To describe Mrs. Shipley’s career is to restate the legal history in chapter 4 in human terms. It is also to tell the story of a remarkably talented woman who rose to great power in male-dominated corridors of power.

Ruth Bielaski was born in 1885 in Montgomery County, Maryland, the daughter of a Methodist minister, and the granddaughter of a Civil War hero and friend of Abraham Lincoln. She had a high school education and what was then called “business training” before she took a competitive civil service exam at age eighteen to qualify for a position copying assignments of patent rights in the Patent Office. She began there in 1903, where she worked as a clerk until she married in 1909. She spent several years in the Canal Zone, where her husband held a government post. His ill health returned them to Washington, but it was the ill wind blowing through Europe in August 1914 that landed her in the State Department’s Passport Division.

Mrs. Shipley was appointed a clerk on August 25, 1914, just as World War I was beginning in Europe. Thus, her career began just as modern travel controls did. She seems to have quickly become the protégée of then Second Assistant Secretary of State A. A. Adee, whose portfolio at the time covered passports. In time she became Assistant Chief of the Office of Coordination and Review. In 1928, Mrs. Shipley was appointed Chief of the “particularly prickly” Passport Division; a job known in Washington to be “full of responsibility, open to the constant critical attack of an impatient public, it was said to have killed one man who was formerly its chief.” She held that position for twenty-eight years, during which time she made “a record outstanding in the annals of the Department.” In figure 4, Mrs. Shipley is shown receiving an award from Secretary of State John Foster Dulles.

In describing this steep career trajectory, it is worth pausing to remember the special difficulties official Washington presented for women. Women in
high office (considered at that time to be any civil service position salaried at over $5,000) were such a rarity that Mrs. Shipley’s elevation was viewed as precedent-setting. She became part of what was known as the “women’s cabinet”—the small cohort of other women in positions of power. Even after arriving as Chief of the Division, Ruth Shipley had to contend with condescension unimaginable for her male counterparts. The *New York Times* described her as the “slender, dark-haired head” of the Passport Division. In a Sunday feature on “The Women Who Man Our Ship of State,” the *Times* marveled at the rise of career professionals sharing “a common sex which has aroused curiosity ever since Eden’s gates were shut.” Even after five years on the job, at least one congressman congratulated the Secretary of State on “the efficiency shown by the Chief of your Passport Division, Mr. R. B. Shipley.” A woman in such an important position was hard for many to fathom.

Fig. 4. Secretary of State John Foster Dulles presents the Distinguished Service Medal to Ruth B. Shipley, Diplomatic Reception Room, Department of State, April 28, 1955.
Notwithstanding these difficulties, Mrs. Shipley’s career was a glorious success. As this chapter reveals, she laid the groundwork for future government controls on travel that she scarcely could have imagined (but would not have hesitated to use). Mrs. Shipley rose to become the No Fly List of her day.

1. World War I

When Ruth Shipley first joined the State Department, all hell was breaking loose. War trapped many Americans in Europe. Since passports were not required for travel, few possessed them. Now they were desperate for documents that could return them home. It was during the “hysterical days of 1914” that Mrs. Shipley was assigned to help “locate American citizens marooned abroad, whose relatives were frantic to get them back to safety.”

Ironically enough, Mrs. Shipley began her career working to facilitate travel. While many Americans lacked passports, putting great pressure on the State Department to issue them quickly for safe voyages home, a mirror-image problem emerged in the form of passport frauds. The virtually unregulated passports of then neutral America were a tempting target for passport frauds by agents of belligerent nations, particularly Germany. By clothing German reserve officers in the neutral guise of American travelers, their travel across an Atlantic Ocean patrolled by the British fleet was considerably easier. It was in this environment that Mrs. Shipley began to learn her craft. No doubt the difficulties presented in time of war by a largely unregulated travel system made a profound impression on her.

2. Between the Wars

By 1924, Mrs. Shipley had risen to the position of Assistant Chief in the Office of Coordination and Review, working under Miss Margaret M. Hanna. There she worked essentially without supervision, developing a particular expertise enforcing the Immigration Act of 1924, for which she helped write regulations. It seems that she was held in high enough regard that the Acting Secretary of State was willing to fight with the Personnel Classification Board to elevate her position to “a classification commensurate with the duties and responsibilities” she performed. The appeal was granted.

Mrs. Shipley became Chief of the Passport Division in 1928. At this time,
the Passport Division had a staff of more than seventy. Mrs. Shipley quickly realized, however, that she was woefully understaffed and sought permission to employ passport writers on a piecework basis outside of the regular civil service. During the “rush season” of 1928, she complained, “passports were written on an hourly basis” at a rate paid on the expectation of twenty passports an hour. Demand for passports grew and grew between the wars. Mrs. Shipley reported that 1930 was a banner year, with 203,174 passports issued or renewed.

By her fifth year as Chief of the Passport Division, Mrs. Shipley had exceeded the salary of her former boss, Miss Hanna. This reflected, in part, what Mrs. Shipley characterized in an internal memo as public service “exceedingly profitable to the Treasury.” This was not puffery. During the fiscal year that ended in June 1933, passport fees collected at home and abroad totaled over $1.2 million (the equivalent of almost $20 million today). The Passport Division maintained passport agencies in New York, Chicago, Boston, San Francisco, Seattle, and New Orleans; establishment of an agency in Los Angeles was in the works. These operated as intake centers, not autonomous decision-makers, since all cases had to be cleared by Washington. Mrs. Shipley quickly learned that part of overseeing her growing empire of passport agents required mastery of the art of bureaucratic turf fighting with other federal agencies. In this capacity, too, Mrs. Shipley excelled. Nor was any decision too small for Washington (i.e., Mrs. Shipley) to address, right down to the hanging of pictures on the walls of passport agencies.

As she mastered her art, Mrs. Shipley grew ever busier and, perhaps surprisingly in cutthroat Washington, more popular. She even felt sufficiently established in the social scene to feel comfortable inviting Eleanor Roosevelt to address the annual meeting of a service organization of which Mrs. Shipley was the local chapter president. Two examples from Mrs. Shipley’s early years colorfully illustrate influences on her practical education and her deft hand at creative problem-solving.

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EXCURSUS I: THE CASE OF THE KIDNAPPED G-MAN

Did a terrifying event early in the professional life of Mrs. Shipley affect her views of the risks presented by even the savviest of American travelers to U.S. interests abroad?

On June 25, 1922, Mrs. Shipley’s brother was kidnapped in Morelos, a small state south of Mexico City. Her brother had traveled to Mexico with his wife to defend his business interests in a property dispute with a Mexican
This would not necessarily have been newsworthy to those outside the family had her brother not been Alexander Bruce Bielaski, the former director of the FBI. This made the story front-page news. There was initial speculation in the media that the kidnappers were linked to Communist radicals who were “tired of inaction and were planning for this Fall a campaign of terror,” but Bielaski later dismissed the theory as very unlikely. It was enough, however, to lead President Alvaro Obregon of Mexico to order the immediate arrest and deportation of a colony of American and Russian radicals in Cuernavaca, the capital of Morelos. Bielaski orchestrated his own sensational nighttime escape after three days in captivity.

Ordinary tales of kidnapping would end there. But the case took an even more sensational turn a week later, when a judge in Cuernavaca ordered Bielaski’s arrest pending judicial investigation of a charge that Bielaski had arranged his self-abduction to embarrass the Mexican government. President Obregon traveled from Mexico City to personally oversee the investigation. A few weeks later, newspapers reported that the State Department was “losing patience in the Bielaski case” and had delivered a note to the Mexican authorities to wrap up the investigation. By that point, conclusion of the affair Bielaski had turned anticlimactic. It was back-page news when the local court absolved him of all charges and cleared him of any complicity in his own kidnapping. By the time Bielaski reached Brownsville, Texas, in mid-August, the affair was fully behind him.

The press never reported any suspicion that Ruth Shipley used her office to help her brother and, given her low position at the time, it is hardly likely that she could have done so if she had wanted to. But did the episode, hitting so close to home, leave its mark on her? One wonders how the twists and turns of the affair affected her thinking years later, as head of the Passport Division. Clearly, even innocent travelers (not to mention anarchists, Communists, and social undesirables) could find themselves suddenly mired in political scandal with the potential to influence the nation’s foreign policy and international relations. Her brother’s kidnapping, after all, resulted in protests at the highest levels of the American government, the personal involvement of the Mexican President, and then weeks of bizarre claims and counterclaims in the Mexican and American press. Why risk dragging the United States into awkward circumstances that could have been avoided had permission to travel abroad been denied? Or, as an en banc panel of the Court of Appeals for the District of Columbia Circuit put it many years later, “The Secretary [of State] may preclude matches from the international tinderbox.”
EXCURSUS 2: THE CASE OF THE LESS VIRTUOUS BALLERINA

Mrs. Shipley could exercise her power with a delicate touch. This delicacy, however, could not obscure her resolute decision making or its essential paternalism. One example is found in her solution to a problem described with evident frustration by the American Consul General in Valparaiso, Chile. The Consul complained in a cable to Washington that yet another “American ballet and revue company” was planning to descend on his outpost with predictable results:

During the writer’s nine years tour of duty as Consul General in Valparaiso he has been called upon so many times to assist stranded American theatrical companies to obtain return passage to the United States that he is thoroughly convinced that if Mr. Austin goes through with his announced intention of bringing a ballet and revue company to Chile he is merely courting serious financial reverses and the entire venture will end up in the company being stranded in some West Coast port.

As the Department is aware, American theatrical companies stranded in Latin American ports are anything but desirable emisaries [sic] of the United States, and particularly so when the company is largely made up of single girls. It is always a difficult task, as this Consulate General knows from a great deal of experience, to repatriate the female members of such troupes, and oftentimes before this becomes possible some of the less virtuous of them are likely to become public nuisances.48

Although the Consul readily conceded that there was no way to stop the company from touring Chile, “nor are there any reasons why the Department should endeavor to do so,” he suggested that the Department refuse to issue passports to the company unless some sort of bond was posted to cover its predicted need for return passage.49

The Consul was right: passports were not required to visit Chile in 1929. And there was no law or regulation that expressly authorized the refusal of a passport on grounds of predicted penury.50 On the other hand, the economic and social costs of ill-planned ventures seemed to weigh as heavily on the United States as on even the “less virtuous” youthful ballerinas who appeared (at least to the American Consul and Mrs. Shipley) in need of protection.

Mrs. Shipley’s solution was delicate but effective. She directed her passport agent in New York to refer passport applicants in this category to the
Origins: The Extraordinary Mrs. Shipley

Actors Equity Association before processing their applications. Actors Equity was to be relied upon to educate aspiring artists “whether the employer is a reputable person and can be relied upon to keep them employed and provide them with return transportation.”51 Each applicant would then “be advised to ascertain the financial responsibility of her employer and [ ] further advised not to accept such a position unless favorable advice is received from the Actors Equity Association.”52 Her faith in the marketplace notwithstanding, Mrs. Shipley took no chances: she directed a special agent in New York to make informal inquiries about this particular theatrical venture.53 Mr. Austin’s troupe never left port.54

Mrs. Shipley acquired a well-deserved reputation for toughness in response to complaints. A municipal judge in California wrote to complain that clerks of court doubling as passport officials in Los Angeles were “rude, uncivil and so officious that you leave the department division in disgust and shame.” He described the treatment he witnessed of a teacher refused service after driving twenty-five miles to make a passport application. Because she reached the office a few minutes after the four o’clock closing time, a return visit was needed for an application that took just a few minutes to handle. “Why on earth those men feel so secure and independent and discourteous is beyond me,” the judge wrote. “They should realize that it isn’t everyone who can stop work at 4 o’clock in the afternoon, and it certainly would not be going out of the way to help a citizen when that citizen is a public servant and must travel 50 miles in order to have the attention of a Passport clerk for three minutes.”55

In reply, Mrs. Shipley conceded nothing, noting (with less than complete candor) that “your letter is the first one of its kind that we have received.”56 Mrs. Shipley then confronted the judge’s criticism head on: “I do not think that I need to assure you that the hours of official work in the Clerk of Court’s office extend beyond four o’clock.” Asserting that clerical and other work would consume another hour, Mrs. Shipley ignored the details of the unhappy applicant. It was only an incidental suggestion of the judge to improve the efficiency of paying passport fees that attracted her attention. Mrs. Shipley thanked him for it and wrote to the offending clerk the same day, forwarding the judge’s letter. Mrs. Shipley let his primary complaints speak for themselves, choosing only to highlight the opportunity for greater efficiency.57

Mrs. Shipley took no guff on the eastern seaboard either. Responding to a husband’s complaint that a clerk in the New York Passport Agency treated his wife “as a criminal endeavoring to get into the country by unfair means
rather than as an American citizen merely asking a courtesy of her own Government,” Mrs. Shipley riposted that “[t]he Agency at New York transacts an enormous amount of business with some of the most important people in the country and probably some of the most difficult and a complaint of discourtesy in that office is very rare indeed.” In any event, Mrs. Shipley concluded, no harm was done. The New York agency was able and willing to process the application on July 15 “in ample time for your sailing on the 17th.” This was no idle claim. A year later, the passport agent in New York, Ira Hoyt, boasted in a letter seeking to secure a larger budget that “[w]e have a record of having prepared an application for passport, prepared the passport itself, and obtained telephonic authorization from the Department, all in ten minutes time.”

The passport was important, combating fraud was a serious matter, and the books were filling up with statutes and rules for the acquisition and use of these travel documents. But passports were not required by U.S. law for the departure or return of citizens to the country. Nor were they viewed as the unalloyed tools of national security that they would soon become. At least they do not appear to have been viewed that way by the Chief of the Passport Division, who in 1936 willingly provided a visiting counselor from the Chinese Embassy copies of canceled blank passports and the loan of her personal copy of the organization plan of her division. This must have seemed eminently reasonable to Mrs. Shipley, who also invited him to call on the Commissioner of Immigration and Naturalization (then at the Department of Labor) to quench his thirst for knowledge about American practices.

Further evidence of Mrs. Shipley’s capacity for tolerance can be found in the interpretation she gave to the oath requirement for receipt of passports. In a series of naturalization cases (later overruled), the Supreme Court had held that conscientious objectors could be denied citizenship if they refused on religious grounds to swear an oath to defend the Constitution and laws of the United States “against all enemies, foreign and domestic.” The Supreme Court interpreted this phrase to require an oath-bound obligation to take up arms if called to do so. Because the respondents in these cases refused to swear to such a duty, their naturalization petitions were declined. Some feared that these cases would lead to passport denials on the same grounds; after all, the passport had acquired its importance through war. Thus, when the executive secretary of the Women’s International League, Dorothy Detzer, sought a passport to attend her organization’s congress in Prague, she felt compelled to include with her application an admission that “I cannot, without a very distinct mental reservation, swear to support and defend the constitution if by the word ‘defend’ the bearing of arms is implied, or the support of war.”
It was peacetime, however, and Mrs. Shipley appears to have used her discretion to allow modification of the oath. Responding to Miss Detzer, Mrs. Shipley wrote, “The department will consider the matter of issuing a passport to you upon your swearing to the statements contained in your application for a passport and taking the same oath of allegiance as was taken by Roger N. Baldwin in 1926.”66 This was a reference to a founder and then chairman of the ACLU, who was issued a passport after taking a modified oath to “support the Constitution of the United States and will, as far as my conscience will allow, defend it against all enemies, foreign and domestic.”67

Was Mrs. Shipley motivated by her own personal views as the daughter of a Methodist minister? Would she have used her discretion in the same way for adherents to disfavored groups? Those questions were soon to be answered. Already clear, however, was Mrs. Shipley’s mastery of her post. She was an agile, dedicated, and patriotic civil servant.

3. World War II

The winds of war were felt by Mrs. Shipley and her superiors, who prepared for its outbreak. It was not difficult to foresee that, as escape from Europe became more difficult, American passports would become more valuable and subject to more fraud.68 If the Passport Division was too liberal in issuing passports, trust that their holders were truly American citizens might diminish, as would their power to extract Americans from dangerous places. In a memorandum to the Passport Division and the Division of European Affairs just days before the outbreak of war, Assistant Secretary of State George Messersmith warned, “Should hostilities break out, or even should these disturbed conditions continue further without the actual outbreak of hostilities, it is all the more important that the value of the American passport should be safeguarded in every possible way so that it may serve its purpose for bona fide American citizens and that our passport may not be abused.”69 This was, in his words, “no time for this Government in any way to relax its procedure here or in our establishments abroad with respect to the issue of passports.”70

Mrs. Shipley played a pivotal role. As described in a memo to the President recommending her for the Medal for Merit:

Prior to entry of the United States into World War II, Mrs. Shipley directed all outstanding passports be voided and be replaced on a world-wide basis with a new type of passport which was infinitely more difficult to alter or counterfeit. The safeguards surrounding the
issuance of these replacement passports insured their being issued to bona fide American citizens who were the rightful holders of old-type passports.\textsuperscript{71}

Mrs. Shipley’s redesigned passports were quite successful at reducing the rate of counterfeiting, which Mrs. Shipley put at less than 0.5 percent in 1939.\textsuperscript{72} In her words, these passports were “duplicated successfully only about as often as money is, and the rate of convictions for such offenses is gratifyingly high.”\textsuperscript{73} One solution was the distribution to each diplomatic mission and consular office of equipment to take fingerprints. This early adoption of biometrics, however, was not used to take the fingerprints of travelers for verification by the Department, but to place the thumb or fingerprint of a Foreign Service officer on each validated passport!\textsuperscript{74}

The series of proclamations and regulations promulgated in the first few days of September 1939 created what became known at the State Department as the “Emergency Program.” The regulations prohibited travel on vessels flagged to belligerent nations and required passports intended for use in Europe to be validated by the Department. When citizens returned to the United States, their passports were surrendered to immigration authorities for return to the State Department. No exception to these regulations for its own diplomatic and special passports, at least officially, was tolerated by the Department.\textsuperscript{75}

Pressure from business interests led the Department to use a light touch in validating passports for business travelers.\textsuperscript{76} A telegram dated September 14, 1939, above the name of Joseph Kennedy, Ambassador to the United Kingdom, warned of the “considerable uncertainty” of American businessmen in Britain who “complain that their situation is being considered like that of the casual traveller.” Secretary Hull replied the next day: “Department has no desire or intention to hamper legitimate American business with European countries but encourages it. New Regulations merely require commercial travellers to submit documentary evidence showing necessity of traveling in European country for substantial business purpose. Since issue of new regulations passports have been issued promptly for this purpose. Department, of course, does not wish to encourage unnecessary travel on the high seas. Regulations with regard commercial travellers similar those in effect during our neutrality last war. You may assure American businessmen, principally those who are assigned permanently to Great Britain, that statement that their situation is considered by Department like that of the casual traveller is incorrect.”\textsuperscript{77}

Others were not so lucky. The same day that the Department received
the anxious telegram from the American Embassy in London, Mrs. Shipley responded to a telegram received from a representative of parents of about 500 medical students “unable to return to Scotland to finish their studies,” in some cases for their final year of training. The parents complained that their sons had been refused passports “and though educated will be thrown on a country already glutted with unskilled labor.” Mrs. Shipley was unmoved: “The Department has given very careful and sympathetic consideration to this matter but has concluded that the situation is so grave and the hazards involved so great as to render it inadvisable for the students to go abroad at this time.” Entering her second decade in command of the Passport Division, Mrs. Shipley’s views were set. Whether businessman, medical student, or a less virtuous ballerina, Americans traveled only if their government approved. And it was from Mrs. Shipley’s office that approval must come.

When the Department paused to assess its work over the course of the previous two hectic months, Mrs. Shipley expressed overall satisfaction: “I think the Department has handled an extremely difficult situation very well and the pressure from certain individuals for special treatment is just one of those things that is bound to occur as long as Americans are what they are.”

All this work naturally augmented the importance of the Passport Division. By Christmas 1939, the Passport Division had a staff of eighty-two.

This assessment, however, exposed the opposing forces operating on the Passport Division. The Emergency Program was just that—an operation quickly established to deal with a genuine emergency. The State Department had no desire to see American neutrality undone by harm to Americans living and working in Europe. The Lusitania was a fresh memory. But if the Department prohibited travel completely, it would feel the backlash of American business interests in Europe. Assistant Secretary of State George Messersmith noted in a memorandum to Mrs. Shipley the razor’s edge on which the Emergency Program operated. The memo also reveals the paternalism inherent in the Department’s conception of the right to travel and how removed national security or foreign policy concerns could be from its decision making:

It is quite obvious that we must continue to validate, for instance, the passports of American citizens who desire to proceed even to belligerent countries on important business or for residence there in connection with their business. I do not see any reason for changing our present practice of not permitting the wife of such a businessman who is now in this country to proceed with him on a trip which he is making. . . .
On the other hand, there are American businessmen who have been established abroad for a number of years and whose residence abroad is necessary for the firms which they represent or for the business which they conduct on their own account. It seems to me that the wife of such an American businessman should be permitted to leave with him and, if in this country, to proceed there even though it may be in belligerent territory. She would, of course, have to be informed on the validation of the passport that she would be proceeding on her own risk, that we might not be able to accord certain protection under given circumstances, and that we could not assume any responsibility for evacuation, et cetera. I know that such a declaration would not entirely relieve this Government of its obligations, but, on the other hand, I believe that if it were known in this country that such persons had proceeded at their own risk this Department would be absolved of any blame or responsibility should harm come to them.82

The situation was even more dire for American women married to citizens of belligerent countries. Responding to an inquiry from the American Consul in Calcutta, Secretary Hull ordered that the passports of such women not be endorsed for travel into combat areas “except in cases of imperative necessity such as critical illness or other impelling cause,” and that American women who traveled to such areas on foreign passports rendered themselves liable under the Neutrality Act.83

With the passage of the 1941 amendments to the Travel Control Act, Mrs. Shipley’s office acquired more power. Mrs. Shipley played a central role lobbying Congress for the changes.84 The purpose of the amendments was to limit travel to essential persons only, as determined by the State Department. As an internal memorandum makes clear, much of this power remained unshared in the person of Mrs. Shipley herself:

This placed tremendous responsibility on the Chief of the Division. While many applications could be refused immediately on the ground that the purpose of the travel was not urgent or essential, a goodly proportion of the applicants had to be cleared both as to security and as to purpose. . . . The direct contacts with representatives of the agencies, branches of the Armed Services, and foreign missions, which were necessary in order to develop procedures, policy, reconcile differences and exchange confidential information, were made by Mrs. Shipley with consummate skill, tact and diplomacy. She also personally passed upon a great many borderline cases daily. . . . She
handled personally the cases in which great pressure was brought to bear upon the Department by influential persons or organizations on behalf of persons who desired to travel abroad for personal reasons and who had been able to convince their sponsors of the validity of pseudo claims that their travel would be in the interests of the United States or some other country.  

By the end of 1942, Mrs. Shipley not only controlled the issue of passports but was also vested with authority to take action connected with official and private requests for assistance in obtaining visas.  

Administrative records from this period show how closely involved Mrs. Shipley was in the work of her office, from the most extraordinary tasks to the most routine. In March 1944, Mrs. Shipley was dispatched to New York to welcome into port the S.S. *Gripsholm* and repatriate American citizens returning home as part of an intergovernmental exchange of nationals with Nazi Germany. In April, an American Catholic priest, Stanislaus Orlemanски, caused a national scandal by traveling to Moscow for an unprecedented private meeting with Joseph Stalin to plead for a free and democratic post-war Poland. At a press conference, President Roosevelt was forced to defend the decision to issue Orlemanski an American passport. His defense was Mrs. Shipley. President Roosevelt “implied that the action was taken in ordinary course after proper consideration solely by Mrs. Ruth B. Shipley, chief of the Passport Division of the State Department.” According to the *New York Times* coverage of the press conference:

> Mr. Roosevelt made this point by remarking that Mrs. Shipley, veteran chief of the division, has long been known for the care with which she has had applications investigated and for issuing passports only when there were good and sufficient reasons. When anyone has got by Mrs. Shipley, the President emphasized, one can be sure the law has been lived up to. This means, he added, that in this case she must have been satisfied with the reasons that Father Orlemanski gave for requesting a passport.

During the summer and fall of 1944, the Passport Division hovered between 200 and 235 personnel. The workload was relentless. A memo sent to the Acting Chief of the Division of Departmental Personnel, Robert Ward, noted the high level of attrition at the Passport Division: “I went directly to Mrs. Shipley in PD and told her that, in view of the existing shortage of qualified personnel, it would never be possible for us to fill her positions if this separation rate continued as it had in the past three months.” Whether
the workload was oppressive or there were other reasons for resignations, the frustrated official declared the rate “inexcusable.” But Mrs. Shipley led by example, working as hard as anyone on her staff. Records for a one-month period in 1944 tally over $1,000 in long-distance calls between the Passport Division and customs collectors at various ports to verify that seamen were authorized to sail under new security regulations. In 2009 dollars, that was a one-month telephone bill exceeding $13,000. In the vast majority of these calls, the telephone receiver was held to Mrs. Shipley’s ear.

The Emergency Program aimed to protect and return citizens trapped in Europe at the start of the war and to prevent the unnecessary travel of citizens to or through belligerent countries. Acts of Congress during the war augmented and regularized that emergency authority. The end of the war brought little respite from Mrs. Shipley’s iron control. Even the powerful Eleanor Dulles, whose personal accomplishments and family connections made her a force to be reckoned with in diplomatic Washington, was denied passports for her family to join her in postwar Austria to work for the U.S. military delegation there in 1945. Mrs. Shipley felt that postwar Europe was no place for children:

The formidable Mrs. Shipley looked at her as if she was mad and said:

“Nothing doing, Mrs. Dulles. You can’t take the children with you.”

“I’m not going without my children,” Eleanor said.

“Then you’re not going,” said Mrs. Shipley.

Eleanor Dulles did not mince words about her encounter with Mrs. Shipley: “She was a tartar and a despot. It was a harrowing experience.” It took three months of pressure by the powerful Dulles clan, and the personal offers of both the British and Swiss ambassadors to provide visas on their official stationary (Mrs. Shipley had confiscated Mrs. Dulles’s passport), before Mrs. Shipley accepted the inevitable. This was one of few recorded instances of successful opposition to Mrs. Shipley. More often, the hapless traveler found Mrs. Shipley “completely immovable . . . once a decision has been reached . . . [W]hen she has once said ‘no,’ the disappointed applicant might as well save himself further conversation.”

4. The Cold War

Demand for passports began to rise with the end of the war. In 1947, the Passport Division issued 202,424 passports, second only to a prewar peak
in 1930. Still, Mrs. Shipley’s office maintained its control over travel. In an article in the *New York Times* about her office, in which she was the only person quoted or referenced by name, a delicate version of her office’s power was publicized:

> Difficulty is experienced by those who seek to visit the Old World. Some hopefuls tell Mrs. Ruth B. Shipley, chief of the Passport Division, who has controlled American civilian world travel during the war, that they’d like to go to Europe to “see what it looks like.” They are gently discouraged and are warned not to head in that direction unless it is necessary.

About six weeks prior to this article, the *Times* reported a starker statement of travel controls: “the Passport Division is still working under the regularly provided wartime system of controls, with limited travel allowed only in the instances which will contribute to the national interests of the United States or the country visited and under certain conditions for business persons whose presence in the country to which they are going will contribute to the restoration of trade.” Mrs. Shipley determined whose travel and which purposes met these criteria. New standards, catalyzed by new fears, would soon be added.

The fear of Communism that surged through the United States in the 1950s dramatically affected international travel. A population used to wartime restrictions on travel was slow to react to new controls that had the same effect on travel, if based on a very different perception of threat and different legal grounds. A few examples suggest the growing “mission creep” of travel control in the early years of the Cold War.

In June 1950, the State Department issued a “stop notice” at all U.S. ports to prevent the international travel of the entertainer and civil rights activist Paul Robeson. He was denied a new passport on the vague ground that his foreign travel would not be “in the best interests” of the United States. The Department of State later elaborated that “if Robeson spoke abroad against colonialism he would be a meddler in matters within the exclusive jurisdiction of the Secretary of State.” Robeson refused to sign an affidavit that he was not a Communist and challenged the denial of his passport in federal court. Leo Rover, the U.S. Attorney for the District of Columbia, then detailed the government’s grounds for prohibiting Robeson under the Internal Security Act from traveling abroad, including Robeson’s opposition to antisybersive legislation, criticism of racial segregation, and his penchant for singing Communist anthems. In addition, Rover told the court, “in April, 1949—see if this sounds like a loyal American citizen—he delivered a speech
before the Communist-sponsored World Peace Congress in Paris in which
he stated that the American Negroes would never fight against the Soviet
Union. A cruel, criminal libel against the members of his own race.”

In 1952, the eminent chemist Linus Pauling was denied a passport to
attend scientific meetings at the Royal Society of London and receive an
honorary degree in Toulouse. The State Department rejected his applica-
tion, stating only that the “proposed travel would not be in the best interests
of the United States.” Permission to travel was granted only following an
angry speech by Senator Wayne Morse, international media coverage, and
Pauling’s agreement to sign a statement that he was not and never had been
a Communist. This routine continued for two more years, with passports
granted (if at all) at the last minute, validated only for limited travel for lim-
ited time periods and only after Pauling signed repeat affidavits that he was
not a Communist. After dozens of letters, affidavits, and personal visits,
Mrs. Shipley advised Pauling that his applications were denied because the
Department had concluded, based on evidence never shared with Pauling,
that he was “a concealed member of the Communist Party.” Only after
Pauling won the 1954 Nobel Prize for Chemistry did the State Department
grant a normal, unrestricted passport.

In 1954, the playwright Arthur Miller was denied a passport to attend
the Brussels opening of The Crucible because such travel “would not be in
the national interest.” When the Belgian audience exclaimed “Author, au-
thor!” on opening night, it was the American ambassador who appeared
onstage. Another passport application, pending while Miller was called to
testify before the House Un-American Affairs Committee in 1956, was held
up by “derogatory information” leading the State Department to request
“an affidavit concerning past or present membership in the Communist
party.” Miller was later convicted of contempt of Congress during this
hearing, which was ostensibly called to examine “the fraudulent procure-
ment and misuse of American passports by persons in the service of the
Communist conspiracy.”

To these vignettes could be added the travel stories of many other prom-
inent and unknown Americans alike. The well-known Protestant pacifist
J. Henry Carpenter was denied a passport to Japan in 1952 because, accord-
ing to Mrs. Shipley, “his presence in the Far East is considered undesirable at
this time.” The eminent physicist Martin Kamen (libeled as a Communist
spy and subversive, but never prosecuted) fought from 1947 to 1955 for a
passport, at great expense financially and professionally, until it was granted
just half an hour before an oral argument in his lawsuit to obtain one (a case
that, as will be seen below, other litigation increasingly forecast that the State
Department would lose).
Nevertheless, Mrs. Shipley could sometimes surprise. The playwright Lil-lian Hellman devotes several pages of her book, *Scoundrel Time*, to her in-
terview with Mrs. Shipley in 1953, when Hellman sought a passport to work
on a movie script in London. After her own testimony before the House
Un-American Affairs Committee, this seemed “a useless visit” to her, but
one she nevertheless undertook at the suggestion of her lawyer, Joseph Rauh
(a leading civil rights lawyer who would later represent Arthur Miller before
the same body). Hellman describes the arrival of a “fat folder” that Mrs.
Shipley examined during their meeting. After briefly assaying her opinion
of the work of the Committee, and eliciting a promise from Hellman to
write a letter averring not to engage in political activities while abroad, Mrs.
Shipley agreed to issue a limited passport. A stunned Hellman met Rauh
in the hallway. “Why were you so sure I would get it?” she asked. According
to Hellman, a grinning Rauh replied, “Because one Puritan lady in power
recognized another Puritan lady in trouble. Puritan ladies have to believe
that other Puritan ladies don’t lie.”

Rauh couldn’t have been that sure, for Hellman’s interactions with
Mrs. Shipley were a mixed bag. Mrs. Shipley had previously denied Hell-
man passports in April 1943, on the grounds that she was “reported to be
an active Communist,” and in May 1944, despite the prodding of Metro-
Goldwyn-Mayer Studios, “because of the present military situation.” But
by fall 1944, Mrs. Shipley relented, granting her a passport to visit the Soviet
Union despite a two-page memo from the FBI detailing Hellman’s suspected
membership in various pro-Communist organizations and her “pro-Soviet
and pro-Communist point of view.” Mrs. Shipley also approved a visit to
Tito’s Yugoslavia in October 1948. In August 1951, Hellman was allowed
to sail for England after she wrote what one respected biographer called “one
of the most galling letters of her life” to Mrs. Shipley, seeking a passport to
recover from the shock of the arrest and jailing of her longtime companion,
Dashiell Hammett, for contempt of court. Hammett had refused to give
testimony that might lead to the arrest of four men who had jumped bail,
bail that he and others had raised after their convictions under the Smith Act
were upheld by the Supreme Court in *Dennis v. United States* that June.

Based on a thorough examination of Mrs. Shipley’s files, Robert New-
man concludes that, although under pressure not to issue Hellman a pass-
port, Shipley concluded that her office’s investigators were right and the FBI
was wrong: Hellman was not a Communist. Although she was unusually
tardy in fulfilling her promise to send a passport within a week, and (ac-
cording to Newman) she felt “compelled to use an administrative dodge” to
protect her bureaucratic flank in doing so, Mrs. Shipley renewed Hellman’s
passport.
The international Communist conspiracy against the West quickly emerged as the main threat to the United States. Travel controls continued to be seen as an essential weapon in the fight against this conspiracy of subversives and spies. This was not merely an effort to squelch dissenting speech or unpopular opinions. The United States was understood to be fighting a concrete threat to its national security. In fall 1959, Assistant Secretary of State Macomber wrote to Senator McClellan (Chairman of the Committee on Government Operations) that the State Department still believed “that the most critical problem in the passport field is the lack of legislative authority in the Secretary of State to deny passports to dangerous participants in the international Communist conspiracy.”

Mrs. Shipley was perceived to be far ahead of the curve. She did not wait for legislative permission to transform her wartime powers into Cold War controls. An internal memorandum supporting a recommendation that she receive the Medal for Merit summarized her views:

Long before the top Communists in the United States were convicted of conspiracy in the trial before Judge Medina and the enactment of the Internal Security Act of 1950, Mrs. Shipley was alert to the dangers inherent in the travel abroad of Communists and other subversives and steadfastly adhered to the policy of refusing a passport when evidence and information respecting prior actions of the applicant indicated that the proposed travel would be inimical to the best interests of the United States. She has never deviated from this position and after the convictions in the New York trial were sustained by the Court of Appeals, and the Congress set forth its findings concerning the Communist organization in the United States in the Internal Security Act of 1950, she gained acceptance of her view that, in keeping with the spirit of the Act, passports should be refused to Communists as such.

Although Mrs. Shipley figures prominently in these stories, the enormous bureaucracy she managed should not be forgotten. Her ever-expanding office worked like a powerful, well-synchronized machine. The Passport Division was located at this time in the Winder Building, across the street from the Old Executive Office Building and the White House. Mrs. Shipley kept close watch on passport activities abroad, and her office was well staffed to confront all of these issues at home. Autumn 1950 opened with Mrs. Shipley on a seven-nation European tour of fifteen American diplomatic and consular offices “to review and seek advice on citizenship and passport problems.”
1951, her office occupied all six floors of the Winder Building. By 1953, she administered an office in Washington, D.C., that employed approximately 225 people. In addition, satellite offices in the form of passport agencies had been established in New York, San Francisco, Chicago, Boston, and New Orleans, and almost 300 Foreign Service posts worldwide completed a finely wrought web of travel controls at the center of which sat Mrs. Shipley.

Overall, this system impressed Congress. Some members of Congress grumbled that, at the apparent direction of Mrs. Shipley, Passport Division clerks refused to give their names to Capitol Hill staffers who telephoned for passport information for constituents. Much more common than criticism, however, were the letters of praise that flowed into Foggy Bottom from Capitol Hill. Mrs. Shipley had powerful supporters, although one suspects that this may have derived as much from fear as from love. Mrs. Shipley was quite aware of her power, as she ominously suggested in a sharp, public exchange with Senator McCarran: “The bulk of the American traveling public are reputable, law-abiding citizens and are probably above the average in education, intelligence, and stability. The Department does not feel in view of its experience over many years that it is warranted in treating this large group of citizens as potentially subversive by establishing at this time procedures which would delay and hinder bona fide travelers in an effort to detect cases such as those mentioned by the Subcommittee.”

A blanket refusal to issue a passport was not the only arrow in Mrs. Shipley’s quiver. Passport restrictions could also be used in a more nuanced way. As one contemporary State Department official observed, “The passport is an ideal device for the control of the movements of American citizens.” The Passport Act of 1926 delegated the Secretary of State the power to impose travel restrictions in conformity with American foreign policy. The act limited the validity of a passport to two years, with a shorter period possible at the Secretary’s discretion. Alternatively, limits could be placed on the use of the passport in particular places or for particular itineraries. In 1938, President Roosevelt issued an executive order expanding the discretion of the Secretary of State to impose area restrictions and expressly granting the power to cancel or withdraw passports used in defiance of those restrictions. The executive regulations derived from that statutory authorization were broad in scope: “The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.” In 1952, the State Department began stamping all passports as not valid for travel in countries
behind the Iron Curtain, rendering them useless for such a purpose unless specifically endorsed by the Department. ¹⁴⁷ Travel to some countries quite literally required the government’s imprimatur.

This was no small power, particularly as it concerned Americans who wished to live abroad. ¹⁴⁸ Mrs. Shipley did not hesitate to use it. She brooked no opposition when she felt that her office’s resolution of a complaint or issue was satisfactory. For example, a clergyman from Detroit wrote an angry letter to Under Secretary of State Herbert Hoover, Jr., to complain that the Passport Division, “supposedly directed by Mrs. R.B. Shipley,” had ignored his written requests for a copy of an old passport application, in his view “MOST ABOMIBLE [sic] treatment to give any respected American citizen.”¹⁴⁹ Threatening to take the matter up the chain of command to President Eisenhower himself, if necessary, the complainant demanded action.

Mrs. Shipley was satisfied that her office had accomplished the task as expeditiously as possible. The search for older records required additional time. In an internal memorandum to which she attached her correspondence with the man of the cloth, Mrs. Shipley summarized her view of the matter: “Dr. Gordon has received excellent service and I think for a clergyman, and I say it as a daughter and granddaughter of clergymen, he shows very little Christian spirit.”¹⁵⁰

Oddly enough, the State Department initially kept “[n]o particular record . . . as to how often, or on how many different grounds, passports have been refused to citizens who met all the usual requirements.”¹⁵¹ But a July 1951 memo responding to a request for information from the State Department’s Deputy Legal Adviser summarized the practice:

It may be stated generally, however, that from time to time passports are refused under the discretionary authority of the Secretary of State to persons in the following categories: persons whose past actions raise doubts as to their loyalty; persons suspected of an intention to commit a crime or otherwise to bring grave discredit upon the United States as, for example, international swindlers and gamblers; persons engaged in the white slave traffic; opium smugglers; confidence men; international spies; and other persons whose habitual practices are such as to bring discredit upon the United States and things American; evaders of justice, including persons “jumping bail” or quitting the country to escape the payment of alimony, or the jurisdiction of a court, or in violation of a writ of ne exeat; and political adventurers, which would include persons desiring to go abroad to take part in the political or military affairs of a foreign country in ways which would
be contrary to the policy or inimical to the welfare, of the United States.\textsuperscript{152}

It is striking that the State Department felt competent to prejudge the future dangerousness and propensity to commit crimes of individuals who were under no restrictions placed on them by the criminal justice system. But all of these categories were consistent with the belief that a citizen's right to travel could be restricted if Mrs. Shipley's office deemed its exercise "not in the interests of the United States."

This memo was written after the Subversive Activities Control Board had been organized, but before it had issued any final orders. The Board became the source of the next major restriction on passports and one of the few that was ultimately prohibited as unconstitutional by the Supreme Court: restriction on the basis of membership in a Communist organization. In 1950, the McCarran Act (the Internal Security Act) made it unlawful for members of organizations ordered to register with the Subversive Activities Control Board to apply for or attempt to use passports.\textsuperscript{153}

Only in the early 1950s, the last years of Mrs. Shipley's reign, did the winds begin to shift against her unreviewable discretion. The issue was cast in its starkest light by Eugene Gressman, the future distinguished Supreme Court scholar and litigator, who asked "whether the 700,000 Americans who travel abroad each year do so by right or by the grace of the Secretary of State."\textsuperscript{154} In late August 1952, the State Department issued new regulations on passports that established a process by which disappointed applicants could seek a more formal review of their cases than supplication before Mrs. Shipley.\textsuperscript{155} This was, at best, a modest procedural reform. Although the new rules required the Passport Division to notify the applicant in writing of the reasons for refusing to issue a passport, these reasons needed only to be stated "as specifically as within the judgement of the Department of State security limitations permit."\textsuperscript{156}

The new regulations also created a Board of Passport Appeals.\textsuperscript{157} This reform gave applicants the right to appeal an adverse decision at a hearing where the applicant could be represented by counsel.\textsuperscript{158} The Board would decide appeals based on the preponderance of the evidence, as in a civil trial.\textsuperscript{159} But the new regulations took away at least as much as they gave. They began with a statement of purpose:

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States
passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to (a) Persons who are members of the Communist Party or who . . . continue to act in furtherance of the interests and under the discipline of the Communist Party; (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement . . . as a result of direction, domination, or control exercised over them by the Communist movement; [and] (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement.\(^{160}\)

The appellant was not permitted access to any part of his passport file or other files on which the Board would make its decision, with the exception of the copy of his initial application and other submissions.\(^{161}\) A finding by the Board of “consistent and prolonged adherence to the Communist Party line” was declared to be prima facie evidence of unfitness to receive a passport.\(^{162}\) If any doubt remained at any stage of its proceedings, the Board could require the applicant to declare under oath or affirmation the state of his affiliation to the Communist Party. “If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.”\(^{163}\) The combination of these provisions effectively denied review by the Board to anyone unwilling to execute a sworn affidavit concerning his or her Party membership.\(^{164}\) These provisions fit Mrs. Shipley’s view of the world: “I intend to stay and fight for what I believe in. One of the things I believe in is refusing passports to Communists.”\(^{165}\) In any event, the Board seemed a dead letter: ten months after it was invented, it still hadn’t met for want of appeals.\(^{166}\)

A catchall regulation was also promulgated to deny passports to individuals on grounds of suspicion of future unlawful activity. The regulation only required a “reason to believe, on the balance of all the evidence,” that future unlawfulness could occur.\(^{167}\) This regulation was amended in 1956 to make its application even broader. The previous standard for refusal of passport facilities was lowered to instances “when it appears to the satisfaction of the Secretary of State” that a person’s activities abroad would “violate the laws of the United States.”\(^{168}\) Two even broader grounds expanded this power further. Passports would also be denied if the Secretary of State was satisfied that the person’s activities abroad would either “be prejudicial to
the orderly conduct of foreign relations” or “otherwise be prejudicial to the interests of the United States.” Neither ground was new, nor was the bar for the determination of those grounds lowered in 1956 from where it had been before. The only change was to formally promulgate the description of what Mrs. Shipley had been doing since 1928 and “infiltrate the passport procedure with all the inanities and unfairness of the federal employee loyalty program.”

Two events explain the sudden promulgation of rules that cosmetically formalized procedures while keeping the substance of Mrs. Shipley’s work well insulated from outside inspection. First was the denial of a passport to Linus Pauling, winner of the Presidential Medal of Merit, to travel to London and France for scientific purposes. As noted above, this decision brought the wrath of Senator Morse to bear on the State Department. Mrs. Shipley’s unvarnished record of implacability suggests that this alone would not have been enough (Pauling, after all, never received his passport). But shortly after the harsh press from the Pauling spectacle, a three-judge panel on the U.S. District Court for the District of Columbia held that a final order denying a passport without a hearing violated due process of law. That was Anne Bauer’s case, described at the beginning of chapter 1.

The Cold War policy was summarized by Louis Jaffe in terms that resonate today: “Nearly every passport denial has been a decision to keep the citizen here within the high walled fortress where he can be isolated, neutralized, kept, let us say, to his accustomed and observable routines of malefaction. It has been simply one facet of our tactic of domestic security, and only incidentally a matter of foreign policy.” At the start of the Cold War, as now in the so-called War on Terror, travel restrictions were deemed necessary in “this age of crisis,” a response by America and its allies “to a world in fear of atomic war and planned insurrection.”

5. Dénouement

Mrs. Shipley retired on April 30, 1955, after forty-seven years of government service. Twenty-eight of those years had been spent as Chief of the Passport Division. To celebrate her retirement, Mrs. Shipley announced that she would take a long European vacation. No one doubted that she would obtain her passport without delay.

In many ways, Mrs. Shipley left government just in time. Her successor, Frances Knight, was plagued with increasing scrutiny of passport policy from Capitol Hill, litigation assaults against the Internal Security Act and
other sources of the Passport Division’s power, the investigations of private bodies (most notably the Association of the Bar of the City of New York),\textsuperscript{178} and the emergence of the Warren Court. Knight presided over a Passport Division of ever-decreasing power. An era had ended with the departure of Ruth Shipley.

The most important case concerning passports up to that time was one that began under Mrs. Shipley but ended—badly for the Department—under Miss Knight. Otto Nathan sought a passport in December 1952 to travel to Switzerland as the sole executor of the estate of Albert Einstein. His application was denied in July 1954, “[a]fter several months of informal interrogation and correspondence.”\textsuperscript{179} Nathan filed suit the following month and won a nearly unprecedented court order to the State Department to hold a hearing that conformed to what “the law contemplates and guarantees.”\textsuperscript{180} In response to the Government’s argument that Nathan failed to exhaust his administrative remedies, to wit, the Board of Passport Appeals, Judge Schweinhaut concluded that this was unnecessary: “I think as a matter of practical fact he had none.”\textsuperscript{181}

Nor did the court believe other parts of the 1952 regulations provided what the law required. The same day that he issued his opinion and order concerning Dr. Nathan’s case, the same judge decided \textit{Clark v. Dulles}, concerning the denial of a passport to federal judge William Clark.\textsuperscript{182} He dismissed the Government’s contention that the law had been satisfied: “It is urged by the government that the plaintiff had a ‘hearing’ in that he personally talked to and corresponded with the then Under Secretary of State. I do not believe that that was a hearing in the sense that the law has in mind. I think, therefore, that the plaintiff should have a hearing in the State Department but I do not suggest or direct the manner in which the hearing should be conducted.”\textsuperscript{183}

The Passport Division delayed its compliance with the judge’s orders in Nathan’s case. On the Ides of March 1955 (forty-five days before Mrs. Shipley’s retirement), the court ordered the Secretary of State to “promptly afford plaintiff an appropriate hearing.”\textsuperscript{184} Two and a half months later, Mrs. Shipley had retired and the hearing still had not occurred. The court then ordered the Secretary of State to issue Dr. Nathan a passport of standard form and duration.\textsuperscript{185} The Department appealed the order to the Court of Appeals for the District of Columbia Circuit the same day. An affidavit from the Assistant Director of the Passport Division averred that “it would be contrary to the best interests of the United States” to issue Dr. Nathan a passport.\textsuperscript{186} In response, the appellate court ordered the Department to comply with the district court’s order and hold a “quasi judicial hearing” within four days,
adding additional reporting requirements to both the court and Nathan.\(^\text{187}\)

The day before that deadline, rather than comply with those unprecedented requirements, the Department issued the passport after a further *ex parte* review by its Passport Board of Appeals.\(^\text{188}\) As the circuit court described this surprise reversal, the Department did not say what the Board reported or recommended, or why. It does not suggest that the Board had new information. It does not say what the Board thought about information referred to in the affidavit of the Assistant Director of the Passport Division. However, since the Department of State has issued the passport, it must be assumed that its issuance was not “contrary to the best interests of the United States.”\(^\text{189}\)

It is likely that the State Department weighed the “best interests of the United States” and determined that issuing a passport to Dr. Nathan was a lesser evil than establishing further precedent for judicial review of State Department passport decisions. Mooting the appeal was therefore a strategic decision.

The very same day that the D.C. Circuit decided the Nathan case, it held that the Department’s stated reason for denying a passport in a different case worked a violation of substantive due process beyond the procedural violations identified in the Nathan case.\(^\text{190}\) The court held that Max Shachtman’s passport application had been denied because he was chairman of an organization that the Attorney General had listed as subversive without giving Shachtman meaningful opportunity to contest that listing despite his repeated attempts to do so. The State Department’s reliance on that conclusion was therefore arbitrary and unconnected to the otherwise nonjusticiable decision making integral to foreign affairs. As in the Nathan case, the court remanded the matter to the district court for further proceedings. In the end, as with Otto Nathan, the Department issued Shachtman a passport rather than risk generating even worse precedent.\(^\text{191}\)

The Nathan and Shachtman cases were followed in short order by a rain of judicial blows to the Passport Division, blows that had not landed in Mrs. Shipley’s day. Five months later, a federal court held that Leonard Boudin (the lawyer who had represented Otto Nathan and was developing a niche practice in passport cases but now found himself the victim of a passport denial) was entitled to an opportunity to refute a written record that included all evidence on which the Department based its decision.\(^\text{192}\) Judge Youngdahl expressed evident frustration with the secret methods of the State De-
partment: “How can an applicant refute charges which arise from sources, or are based upon evidence, which is closed to him? What good does it do him to be apprised that a passport is denied him due to associations or activities disclosed or inferred from State Department files even if he is told of the associations and activities in a general way? What files? What evidence? Who made the inferences? From what materials were those inferences made?” Seven months later, a court of appeals affirmed the lower court’s ruling and ordered the Secretary to “state whether his findings are based on the evidence openly produced, or (in whole or in material part) on secret information not disclosed to the applicant.” If the latter, the court intimated that it would have the power to evaluate that judgment. Rather than reveal information from its confidential files, or risk a precedent firmly establishing the power of the courts to determine whether the Department could rely on secret evidence not included in the record, the Department issued a passport.

These cases emboldened others. Paul Robeson, who had repeatedly been denied passports and had repeatedly refused to sign an affidavit disavowing Communist ties, now sued to compel issuance of a passport without filing such an affidavit. At the oral argument over the motion, the U.S. Attorney painted the government’s picture of an un-American loose cannon whose speeches and appearances abroad were detrimental to U.S. foreign policy. The U.S. Attorney dismissively summarized the other side: “We have listened to an argument here that, in effect, says because of the Nathan case and the Shachtman case, the law of the land is that all you have to do is to walk in the Passport Office, fill out an application and get your passport—go where you want to go, do as you please, the Secretary has no control over you. Now, of course, that is not so.”

Judicial challenges to the Passport Division’s authority, growing in number and severity, began to attract interest in Congress. Only months after Mrs. Shipley’s retirement, the State Department in general and the Passport Division in particular drew the unwanted attention of Senator Thomas Henning, the Chairman of the Senate Judiciary Committee’s Subcommittee on Constitutional Rights. The targets of the Senator’s attack were the security programs of which travel controls were only a small part. The testimony of R. W. Scott McLeod, Assistant Secretary of State for Security and Consular Affairs, in November 1955 before the “Henning Committee” was the subject of particular consternation at the highest levels of the State Department. The fear was that Senator Henning would demand to know who precisely was responsible for various (and increasingly publicized) cases of passport denials. In other words, the senator struck at the very essence of the Passport Division: the unreviewable discretion of one person, such as Mrs. Shipley, or
perhaps a small committee, to decide that the national interest outweighed the individual interest in travel. What the State Department considered an inherently executive prerogative grounded in the conduct of foreign policy, Senator Henning perceived to be an assault on the individual rights of citizens by calloused bureaucrats. Congress presented a danger to the Secretary’s decisional autonomy that the Department had thus far avoided in the courts. Lawsuits could always be mooted by the tactical issuance of passports to successful plaintiffs. Congress, on the other hand, might not be so easily mollified.198

The Supreme Court issued Kent v. Dulles, its first opinion on the right to international travel, on June 16, 1958.199 The Court held that Congress had not delegated the Secretary the authority he claimed to deny passports to the petitioners due to their alleged Communist sympathies and affiliations (Rockwell Kent, an artist and author, and Walter Briehl, a psychiatrist, had separately refused to complete affidavits concerning their membership in the Communist Party).200 The Court found only delegated power to deny passports on the grounds of questions about the particular traveler’s citizenship, allegiance, or unlawful conduct at home or abroad. Justice Douglas therefore concluded that Congress did not intend to give the Secretary of State “unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.”201 Given Mrs. Shipley’s record of having done just that for almost thirty years, Justice Douglas seems to have made a veiled and not entirely accurate reference to her work: “One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern.”202 Finding international travel to be part of the liberty protected by the Fifth Amendment, the Court refused to see the question as a political one for the discretion of the Executive Branch. The passport’s diplomatic function was “subordinate” to another. “Its crucial function today is control over exit. And, as we have seen, the right of exit is a personal right including within the word ‘liberty’ as used in the Fifth Amendment.”203

The Kent case was a shocking blow to the State Department, which considered the use of affidavits sworn under oath that these cases invalidated to be “most effective in administering a passport control program.”204 The Department sought to introduce an oath requirement into draft legislation under consideration in Congress in 1959. This was a targeted effort to respond to the holding in Kent, one that would “strengthen the Government’s defense of the requirement by giving a clear expression of Congressional intent.”205 The Department also sought to add to draft legislation the power
to deny passports when these would “seriously impair the conduct of the foreign relations of the United States; or be inimical to the security of the United States.”\(^{206}\) After *Kent*, and in light of activity on the Hill that it feared could inadvertently cabin power that the Department always assumed that it possessed, the Department was taking no chances.

The same day that *Kent* was decided, the Supreme Court also handed down its decision in *Dayton v. Dulles*. If *Kent* was a death blow to the unreviewable discretion of the Department to decide passport questions, *Dayton* was the first strike on the final nail in the coffin. Weldon Dayton, a physicist, sought permission to travel to India to conduct research. His passport application originated in 1954, during Mrs. Shipley’s reign. She had denied it because “it would be contrary to the best interest of the United States to provide you passport facilities at this time.”\(^{207}\) Dayton, unlike Kent or Briehl, was willing to swear an affidavit that he was not a Communist, but to no avail.\(^{208}\) Justice Douglas described at length the use by the Department of confidential material to deny the application and then remanded the case for consideration in light of his opinion in *Kent*. Since the issue in *Kent* was the breadth of a statutory delegation of power by Congress, not the constitutional question of using confidential evidence to deny a passport, this lengthy digression could only be interpreted as a warning.

In due time, that warning would be partially sustained by the *Aptheker* case (discussed in chapter 3).\(^{209}\) The State Department continued to enjoy considerable deference to set general restrictions on passports for foreign policy reasons. But the passport cases and legislative activity of the late 1950s made clear that the Passport Division was unlikely ever again to enjoy the unlimited, unreviewable discretion that Mrs. Shipley had exercised for almost thirty years.\(^{210}\) This is not to say that open records and judicial-style hearings became the norm. Quite the contrary, the due process protections that emerged from these cases gradually evolved into a balancing test that accepted a heavy thumb on the side of government interests in foreign affairs and national security against individual interests in travel. As chapters 6 and 7 demonstrate, the result has been to replace Mrs. Shipley with automated processes that would satisfy only the most formalistic understanding of due process of law.

There was a certain irony to be found in the Supreme Court opinions in the *Kent* and *Dayton* cases. They were both written by Justice Douglas who, in 1959, was obliged to write to Deputy Undersecretary of State Robert Murphy seeking his “personal consideration and if necessary to discuss . . . with Secretary [of State] Herter and President Eisenhower” the Department’s decision not to validate his passport for travel to China.\(^{211}\)
Chapter Six

Change: Digitizing Mrs. Shipley

The lessons of the past have been wasted; history not only repeats itself, it seems to be laboring under a neurotic compulsion to do so.

—Arthur Koestler

When Mrs. Shipley began her career, barnstorming was the most common use of an airplane in America. The pictures that hung in Mrs. Shipley’s regional passport offices displayed ocean liners, not aircraft. This reflected the most popular mode of travel, which remained ships, not planes, until 1954, the year before Mrs. Shipley retired. And by the time the wide-body Boeing 747 and McDonnell Douglas DC-10 jumbo jets revolutionized international air travel with their first flights in 1970, Mrs. Shipley had been dead for four years.

Only when air travel was in its infancy was Mrs. Shipley there to control it, as she did the international travel of all U.S. citizens. Mrs. Shipley was resolute that her power was based on American interests in foreign affairs and national security. But although passport fraud was a top priority of her office, the national security reasons were espionage and pro-Communist activism, not terrorism. In a world pitched on the brink of nuclear Armageddon, such concerns resonated clearly enough: the travel and activities abroad of those suspected of Communist Party sympathies, even seemingly innocent ones, could set off an international crisis.

Nonetheless, the anxieties of the Red Scare sometimes seem inchoate and shifting compared to the current fear of terrorism. Mrs. Shipley forbade travel for many reasons, but never for the concrete one that originally inspired the No Fly List: to protect aircraft from hijackers and bombers. Paul Robeson, Arthur Miller, and Linus Pauling might have been suspected of undermining American interests abroad, but they were never suspected of
planning to blow anything up. And although she kept meticulous files to prevent the departure of Americans whose international travel was “not in the interest of the United States,” Mrs. Shipley never kept a No Fly List and she never used a computer.

And yet it was Mrs. Shipley’s system that was reconstituted after the attacks of September 11, 2001. To be sure, her name was never mentioned. Indeed, it is doubtful that anyone closely involved in creating new agencies and policies after September 11 had ever heard of her. Nevertheless, the approach to controlling the travel of American citizens that these policymakers crafted was unmistakably hers. It is Mrs. Shipley’s ghost that inhabits the new American counterterrorism machine. This chapter describes that return to Mrs. Shipley’s system of controlling the travel of her fellow citizens. It also begins to explain how the No Fly List shifted from an original mission that focused on the physical safety of the traveling public to one that looks increasingly to stop the travel of individuals who do not present an immediate physical danger to anyone, but whose travel someone has concluded would “not be in the interests of the United States.”

1. After Mrs. Shipley, but before 9/11

*The Invention of Hijacking*

On September 11, 2001, Americans were shocked by the evil demonstration that commercial aircraft could be converted into guided missiles. In retrospect, the lethality of a fuel-filled, wide-bodied passenger aircraft now seems as obvious a means of terrorism as the “old-fashioned” crime of hijacking. But there was a time when hijacking an aircraft was itself a new idea, and its origins are far removed from the political act (whether a crime of civilians or an attack by combatants) that today we recognize as terrorism. In fact, when Congress began studying the problem in the late 1960s, its first report referenced Webster’s Dictionary to explain what the word “hijack” meant in this new context.

Fifty-five years ago, American law had no precise crime to fit the act. After all, hijackers did not typically intend to steal the plane or contraband in its hold in the way that the Prohibition-era origins of that term described the work of smugglers and bootleggers. Nor did “air piracy” really fit, although that was ultimately the term of art used to categorize the crime. Hijackers were not pirates as understood in international law because they typically did not intend to plunder passengers and vessel. Typically, they “only”
wanted to alter the scheduled route for personal or political reasons. The common law might have called the act a combination of the tort of conversion (the intentional wrongful use or possession of another’s property) and the crime of kidnapping (which originally required the element of forcibly taking the person to another country).  

The end of America’s “golden age of flight” might well be said to have coincided with the rise of Fidel Castro’s Communist regime in Cuba. On May 1, 1961 (May Day), National Airlines Convair 440 became the first plane owned by a U.S. airline to be hijacked when Antulio Ramirez Ortiz forced it to fly to Cuba while carrying six passengers and three crew members. Mr. Ramirez bought his ticket under the name “Elpir Cofrisi.” At the last minute, he insisted that the ticket agent add the letter cluster “ata” to his first name. As “El Pirata Cofrisi”—a reference to Roberto Cofresi, a notorious pirate who roamed the Caribbean in the early nineteenth century—Ramirez used a knife and a gun to hijack the Key West–bound plane and divert its passengers and crew to Havana. In the absence of any law criminalizing piracy in the air, however, the United States brought charges against him for theft of an aircraft in foreign commerce, kidnapping, and assault on the high seas.  

A few months later, Leon Bearden, along with his teenage son Cody, tried to hijack Continental Airlines Flight 707, a multistop flight that departed Los Angeles carrying seventy-one passengers. They, too, wanted to go to Cuba. The pistol-wielding father and son were duped into permitting the flight to make a scheduled stop in El Paso to take on fuel. Government agents then chased the plane down the runway, shot out its tires and engine, and captured the hijackers. In the absence of any specific law against hijacking an aircraft, however, the prosecution ran into a series of problems. First, the flight across the high Arizona desert from Los Angeles to El Paso made “piracy on the high seas” a bit of a stretch. Therefore, the government charged Bearden with the federal crimes of obstruction of commerce, kidnapping, and interstate transportation of a stolen airplane. But since the flight hadn’t altered course and the passengers had been delivered to their destination on time, an appellate court ordered a new trial on the first two charges. It was error, the court of appeals said, for the trial court to have failed to instruct the jury on key elements about who was actually in control of the aircraft. After a wild ride, Bearden was finally sentenced to twenty years in prison, but only for obstructing interstate commerce. Clearly a change was needed in the law. In the meantime, armed federal border guards—the precursor to air marshals—were for the first time periodically sent onto commercial aircraft.
These were not freak events; they were the tip of the iceberg. Fifty out of fifty-one U.S. registered aircraft hijacked between May 1961 and September 1969 had their flight plans forcibly rerouted to Cuba, with which government the United States had severed relations. Of the sixty-five perpetrators or accomplices to these hijackings, twenty-four were U.S. citizens (more than from any other country). The general counsel of the Air Transport Association estimated the hijack rate for American-flagged aircraft during January 1969 to be one hijacking every seventy hours. A series of hijackings in Europe in autumn 1970 led President Nixon to respond with a wide range of security and diplomatic measures announced on September 11, 1970.

Although terrifying, these hijackings were generally considered to be nonlethal, nonpolitical phenomena that a passenger could expect to survive. In fact, hijackings to Cuba grew to be so common that they became the punch line in jokes and cartoons, like the one in figure 5.

The gap in the criminal law that these hijackings exposed was no laughing matter. In fact, the first rash of hijackings served as the catalyst for the new federal crime of “aircraft piracy,” which was made punishable by death in 1961. These hijackings also led to amendments and regulations prohibiting various weapons on board aircraft and stimulated interest in the development of magnetometers and other security devices at airports. Of most interest to this study, however, was the grant of a new “Authority to Refuse Transport” (subject to the FAA’s reasonable regulation). Airlines were now expressly granted the power to refuse to transport passengers or cargo when, “in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.”

This was an exception to the usual requirement that common carriers serve all who could purchase a ticket. It was also the legal seed from which authority to devise the No Fly List would ultimately sprout. Although the FAA was authorized to administer this exception from the usual requirements of common carriers, the FBI was given the authority to investigate suspected crimes. This was the beginning of a division of responsibility between agencies that was only partially joined up after September 11, 2001. Their different priorities (aviation safety and law enforcement) could sometimes lead to interagency tensions. The centralization of watchlisting that 9/11 produced was meant to tamp down these tensions (which could sometimes lead one agency to resist sharing information with the other) by managing all databases through a single source agency.

Despite this rash of hijackings, not one American passenger died in a hijacking incident until June 1971. But 189 people were killed on U.S. and Canadian flights by bombs hidden in luggage, under seats, or in lavatories.
between 1949 and 1971. These horrible acts, however, were never found to be instances of terrorism. Invariably, each was determined to be a crime of passion, the planned murder of a relative, or suicides linked with attempts to collect life insurance policies. Aircraft security then was not what we have come to expect. A predeparture search of passengers and their bags was considered “heavy-handed” and pregnant with constitutional implications we do not even think about today. For example, John Gilbert Graham was executed for destroying a United Airlines flight in order to kill his mother for the insurance proceeds. In the aftermath of the midair explosion that caused the deaths of forty-five people, a New York Times journalist asked, “How can a saboteur intent on destroying a plane be intercepted?” The blithe tone of dismissal is hard to understand today:

Security police of one major airline frankly admit there are few useful precautionary measures that can be taken. They hasten to add that saboteurs can just as easily blow up trains, buses or ships. They have some detectives’ tricks for anticipating trouble, but they decline to disclose them.
As for mechanical gadgets, they have rejected several. Customs officials use an inspectroscope to ferret out hidden compartments in luggage or the heels of shoes. But, the airlines assert, only a limited number of people come through customs. It is just not feasible, they say, to inspect the suitcase of every salesman on a short business trip and every wife flying home to see mother. Incidentally, they point out, X-ray devices ruin any film contacted.

Magnetic devices that detect the presence of metal are no better. What suitcase does not contain an electric shaver or a traveling iron? Is each click of the detector to mean a suitcase opened and rifled top to bottom? The rigmarole involved in merely running the detector over every suitcase and hat box going aboard a plane would make present baggage routine, a frequent annoyance, seem like the essence of convenience.30

This thinking was pervasive. For example, the U.S. Postal Service routinely used commercial airlines to transport mail but did not regulate its inspection prior to loading.31 Even as late as the bombing of Pan Am Flight 103 over Lockerbie in December 1988, the Post Office maintained the position that without a search warrant and absent extraordinary circumstances, mail sent “sealed against inspection” could neither be X-rayed nor otherwise subjected to security screening before loading it onto a passenger flight.32 This category of mail, required by law, could include parcels weighing up to seventy pounds.33

Other solutions proposed in the 1960s and 1970s are identical to those proposed today: electronic pass-through detectors, locked cabin doors, armed pilots, judo-trained air marshals, and profiling for the “typical” hijacker.34 This last suggestion was quickly dismissed by one author, who noted that the “preparation of a guide to known subversives” who were considered probable hijackers was a nonstarter “at least in the United States,” because of possible legal problems “attendant to a common carrier’s turning away a harmless passenger on the sole basis of suspected political affiliation.”35 Not every idea proposed in 1969 was worthy enough of reconsideration thirty-two years later. One solution proposed to the FAA was “maneuvering the hijacker over a trap door in the floor of the cabin and pressing a button to open it.”36

New Threats, New Solutions

Hijackings continued. A rash of extortion attempts in late 1971 and early 1972, some including bombs hidden on planes, led the FAA to require air-
lines to create passenger and baggage screening systems and security programs. With the passage of the Air Transportation Security Act of 1974, passengers were required to submit to a personal search of their persons and carry-on luggage if they wished to travel by air. But after a brief lull, hijackings continued into the 1980s, with a new threat emerging that made American nationals hijacking planes to Cuba appear quaint. The new danger came primarily from foreign terrorist organizations. Their modus operandi initially focused on hijacking planes and ransoming the passengers. As the threat changed from ransoming passengers to bombing planes, so did the government response—but it was a terrifying dance in which the American reaction always seemed a beat behind the terrorist’s tune.

The hijacking of TWA Flight 847 on June 14, 1985, was the first major catalyst for aviation security reforms. In Athens, two Lebanese men (widely believed to be Mohammed Ali Hammadi and Hassan Izz-Al-Din, both members of the Shiite terrorist organization Hezbollah) boarded the Rome-bound plane. Their carry-on bags hid a 9 mm pistol and hand grenades wrapped in fiberglass insulation, weapons they used to divert the plane first to Beirut and then back and forth between Beirut and Algiers. Over the course of the next seventeen days, more hijackers boarded the plane and terrorized the passengers with beatings and the murder of a U.S. Navy diver, Robert Dean Stethem. The hijackers gradually released their hostages while making their own demands, including the release of Israeli-held Lebanese prisoners, followed by their own escape.

Congress responded to the hijacking of TWA 847 with the Foreign Airport Security Act. As its name implied, the law focused on threats to U.S. citizens and American-flagged aircraft, but only those threats that occurred at foreign airports. This was hardly surprising given the then fairly accurate, but shortsighted perception that terrorism was a foreign-based threat. Among its provisions were sections calling for an expansion of the air marshal program, evaluations of security at foreign airports, and associated sanctions for inadequate compliance. There was also an authorization to the Executive Branch to immediately suspend, without notice or comment, the right of an air carrier to provide international transportation service or otherwise operate in foreign commerce upon finding that the public interest so demanded, and that “a condition exists that threatens the safety or security of passengers, aircraft, or crew traveling to or from [that] foreign airport.”

TWA 847 also led the FAA to create an Intelligence Division in March 1986. Prior to this reform, the FAA “had no ability to receive, analyze or disseminate intelligence,” all of which came from other agencies of the federal government. Its small cohort was staffed with officials culled from the
DEA, Defense Department, and other agencies.\textsuperscript{45} That unit issued Security Bulletins (known as “SBs”) to the airlines. These contained unclassified information about long- and short-term threats to airline security. After TWA 847, these warnings tended to be directed at specific threats placing specific airlines’ routes at risk because of identified vulnerabilities.\textsuperscript{46} But SBs were recommendations only; that is, they were advisory, not obligatory.\textsuperscript{47} Their dissemination was quickened, but not by much; since 1987, SBs were being sent by fax to the airlines’ security offices.\textsuperscript{48} And what attention these received—even whether they had been received—was impossible to know. Since the airlines themselves were responsible for any action in response, not the government, this was a significant black hole.

Prior to the establishment of the Intelligence Division, the FAA relied entirely on the State Department and FBI for its intelligence. With the creation of this new office, the FAA now established liaisons throughout the Intelligence Community. Although the FAA now had its own in-house analysts, it remained a consumer of the raw intelligence produced by others and, as such, was required to engage in a time-consuming process of permission-seeking to release information in each of the twenty to thirty SBs it sought to distribute to commercial airlines each year.\textsuperscript{49}

The next major catalyst for reform came three and a half years later with the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. This tragedy shifted the focus from preventing hijackers from backing up their demands with the threat of explosives they carried on board to preventing terrorists from using hidden bombs to cause high-altitude death and destruction on planes they never intended to board themselves.\textsuperscript{50} The deaths of 270 people were caused by a bomb hidden in a radio/cassette player.\textsuperscript{51} The bomb was in luggage in the cargo hold, most likely loaded in Frankfurt, where Pan Am’s security was particularly lax, especially with regard to personnel servicing aircraft and bags being transferred for passengers in transit from one airline onto another. Two months before the bombing, an FAA inspector described an overwhelmed system in Frankfurt held together by “a very labor intensive operation and the tenuous threads of luck,” but one nevertheless in compliance with FAA requirements.\textsuperscript{52}

The presidential commission established after the catastrophe described the FAA’s Intelligence Division as “the conduit for intelligence information collected and evaluated by the intelligence community and the FBI for dissemination to the private air carriers and/or airports that must ultimately take defensive action.”\textsuperscript{53} This was a polite way of saying that the FAA remained a mere recipient of whatever information the Intelligence
Community chose to share with it. As a consumer of intelligence produced by others, the FAA needed authority from the source agencies to distribute information to the industry—permission that was often delayed or refused by agencies cautiously guarding their sources, methods, and, sometimes, their political turf. No surprise, then, that the Commission concluded that the FAA was a “reactive agency.”54 Inside the FAA’s intelligence office, there was suspicion that the Intelligence Community did not provide FAA with as much intelligence as it could because it did not take the threat as seriously as it should. As a result, FAA officials felt themselves frequently forced to prove their “need to know.”55 But all they could do was seek a greater flow of information by detailing liaisons to different intelligence agencies.56 Unless they could persuade those agencies (mostly the CIA and FBI) to declassify information for distribution by the FAA to the airline industry, disagreement meant silence.57

The Commission recommended that the FAA provide more direction to the aviation industry than the merely advisory recommendations in its Security Bulletins. Baseline security measures were established as a result. Another result was the creation of “Security Directives” (SDs) and Information Circulars to replace Security Bulletins. SDs were obligatory orders (not advisory notices) to airlines to take specific action. Twenty or thirty SDs might be circulated to airlines each year as gap-fillers to augment standard security plans already in place.58 This was considered a “clear refinement.”59 The standard for issuing an SD was focused narrowly on identifying a “specific and credible threat” to civil aviation.60 This phrase had a particular meaning. It was understood in the Intelligence Community to mean an actual threat to a particular aircraft or carrier or route.61 When an SD was dispatched, the reason was the detection of a serious threat based on specific evidence that a hijacking or terrorist attack on an identified target was imminent. Information circulars were informational in nature, not obligatory, and dealt with matters such as training, travel advisories, and updates on general security measures, explosives, known modi operandi, and the like.62

Security Directives could be cumbersome and slow. As a regulatory vehicle, they were susceptible to the coordination and vetting problems that afflict all administrative systems, although in an emergency one could be prepared within hours. They were faxed to the corporate security directors of the air carriers. These were manually checked lists—there was no automated system pre-9/11.63 Airlines were obliged to acknowledge their receipt within twenty-four hours and report their compliance with specific instructions within seventy-two hours.64 The infrequency of hijackings that led to
loss of life, especially domestically, and the costs associated with heightened security made airlines skeptical of FAA security directives, lowering their compliance.65 Airline executives testified before the 9/11 Commission that they came to rely on SDs, rather than proactively make their own assessments of security, in part out of fear of lawsuits.66 Although the criteria for issuing a person-specific SD were high—a “direct and credible threat” to civil aviation—the FAA’s position as a receiver, not a generator, of intelligence could also slow the process.67 FAA had to seek the approval of the Intelligence Community, which was concerned to protect its sources and methods, before it could watchlist an individual with an SD.68 Perhaps as a result, name-based “do-not-carry” SDs composed only a small fraction of the total library of security directives.69

Nevertheless, the creation of the Security Directive was an important development. For the first time, the federal government could use an SD to order a private airline not to transport a particular individual. That power was derived, in part, from the exemption from the ordinary obligation of common carriers to accept all passengers that Congress enacted in 1961: no airline was obliged to transport a person if “in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.”70 FAA issuance of an SD was prima facie evidence that this standard had been met. Hence the criteria: a direct and specific threat to civil aviation.

Although SDs identifying particular individuals were the precursor to the No Fly List, and therefore their importance for what followed after 9/11 cannot be overstated, other agencies also gathered intelligence on travelers to fulfill their own legal mandates. These systems also influenced the ultimate creation of terrorist watchlists. After the 1993 World Trade Center bombing, Immigration and Naturalization Service Commissioner Doris Meissner worked with Mary Ryan, head of the Consular Affairs Bureau of the State Department, to create an automated terrorist watchlist that could be used by both agencies to achieve the same goal: excluding suspected terrorists from the United States.71 They were building on the work of a State Department official named John Arriza, who in 1987 had designed TIPOFF, a list that collected biographical and derogatory information from State Department and other sources for use in evaluating visa applications.72

The origins of the TIPOFF database were not exactly auspicious. This first watchlist didn’t even take the form of a list: it started off as a shoebox full of three-by-five index cards.73 TIPOFF was only launched in a meaningful way after the Intelligence Community reluctantly agreed to allow the declassification and distribution to consular officials of four biographical
elements: name, date of birth, nationality, and passport number. Although the TIPOFF database had been computerized by 1993, the lists it produced were still distributed on paper when the first World Trade Center bombing occurred that year. In fact, Sheikh Omar Abdel-Rahman, the “blind sheikh” now serving a life term in prison for his role in the bombing, was issued a visa in Khartoum despite his name appearing on the State Department’s watchlist—nobody had checked the microfiche on which the list was stored in the U.S. Embassy in Sudan.

TIPOFF became part of a massive database called CLASS (for Consular Lookout and Support Systems) that the State Department’s Bureau of Consular Affairs used to vet and filter out those deemed suspicious or undesirable. On September 11, 2001, CLASS contained approximately 10 million records that identified individuals who had previously been denied a visa, were wanted by federal law enforcement officials, or who otherwise had attracted undesired attention by the U.S. Government. Aside from the slow speed of technological progress, CLASS and TIPOFF suffered from the same problem that the FAA’s Security Directives faced: agencies reluctant to share information. The contributions of documents to TIPOFF by other agencies in 2001 could best be described as miserly. Nevertheless, it was TIPOFF that served as the kernel from which the Government’s new Terrorist Screening Database (TSDB) would grow.

No federal office or agency seemed to realize the value of watchlists more than the Customs Service, tasked with solving the devilish problem of preventing contraband from flowing into the country without inhibiting the flow of international trade on which our free market depends. The war on drugs was the catalyst for intelligence innovations like the Advanced Passenger Information System (APIS), which gradually began operating in 1988. With the cooperation of the domestic airline industry, this computerized system was fed biographical data from the airlines’ reservations systems. This included not only information that any customs official could eventually obtain from a passport once the traveler had landed, but also information that only the airlines possessed: for example, credit card information gathered at the time of the ticket sale and phone numbers or addresses provided by the passenger to the airline. In 2000, 80 percent of inbound passengers were screened through APIS.

Although Customs (and the INS, which also used the system) was legally responsible only for border controls, the data from international flights could not be cordoned off from domestic flights. Nor did the government have an incentive to self-censor its access: the investigative interest in break-
ing up a suspected drug ring did not stop at the border. Inevitably, exigent circumstances would excuse this use. Thus began the creeping expansion of watchlists, in size, scope, and power.

2. September 11, 2001: Regenerating Mrs. Shipley

On September 10, 2001, the latest FAA Security Directives prohibited the boarding on commercial aircraft of twelve named individuals who were deemed to pose a “direct” threat to civil aviation, none of whom were U.S. citizens. The foreign focus was understandable. “[T]he history of the FAA was dramatically more focused on safety than security,” recalled Admiral James Loy, who in November 2002 became the first administrator of the new Transportation Security Administration. Not since 1991 had an airplane been hijacked inside the United States; the last time a U.S. carrier had been hijacked, anywhere, was in 1986. The small size of the list was in large part because standards for inclusion on SDs were evaluated through “aviation glasses.” Only those persons considered a “direct and credible threat to aviation” were identified and prohibited from flying by SDs.

The hijackers were nineteen foreigners whose visas, travels, and activities in the weeks and months prior to September 11 seemed to expose one failing and hole after another in American immigration and law enforcement. Their visas were obtained despite numerous problems. Several were issued speeding tickets by local law enforcement whose access to immigration data was too limited to note their violations.

Not surprisingly, the immediate focus after the attacks was oriented outward. The nation’s borders had to be secured and its net of visa and other immigration controls tightened. Immigration in particular offered a fast way to arrest suspects and hold them much longer than the criminal justice system would have allowed. These efforts did not catch terrorists. Edward Alden’s seminal book on the restructuring of border security after 9/11 reports that not a single one of the 762 people detained for an alleged immigration violation in those first few months “was ever charged with terrorism or a terrorist-related offense.”

9/11 Commissioners John Lehman and Timothy Roemer were particularly infuriated to discover that the FAA seemed to consider only twelve people in the world too dangerous to fly in American airspace. This number seemed small to them compared to the State Department’s TIPOFF database, which had grown out of its shoebox of index cards to identify about 60,000 suspected terrorists who should be denied admission into the United
States. By September 11, 2001, this TIPOFF terrorist watchlist had been incorporated into the larger CLASS database that the State Department’s Bureau of Consular Affairs used to assess all visa applications. It had also been shared with the Justice Department’s Immigration and Naturalization Service, a partnership that was catalyzed by an interest in preventing Iraqi spies from entering the United States prior to the first Gulf War.90 But the FAA had not been included in this partnership. The Commissioners’ wrath grew when Admiral Cathal “Irish” Flynn, the FAA’s Associate Administrator for Civil Aviation Security, admitted under questioning that he was unaware of the existence of the TIPOFF database until the day before his testimony before the Commission, more than two years after September 11.91

The Commission’s investigation led to two sharp criticisms. First, the FAA was not up to the task of ensuring aviation security. The agency was criticized for falling prey to the classic problem of agency capture. Its triple mandate to foster air commerce, advance aviation safety, and protect aviation security established goals that sometimes conflicted. The rarity of domestic hijackings (let alone suicide attacks), combined with the high costs to airlines of more security measures, created pressure to focus on goals more agreeable to the industry the FAA was tasked with regulating.

This criticism combined with a second one directed at the Intelligence Community. Agencies hoarded their information. This resulted in duplicated effort instead of economies of scale. Worse, it meant that agency turf battles kept intelligence from being used intelligently. The FAA was particularly affected by this problem. Its intelligence office relied on the generosity of other agencies to provide it with information. And, when information was provided at all, this intelligence could not be shared with the airlines without the permission of the originating agency, which often preferred to protect its sources and methods rather than risk exposing them to deter a threat held to be of minor significance. Combined with the airlines’ own reluctance to spend money on behind-the-scenes security that inconvenienced their customers and that they considered unnecessary anyway, it is no wonder that the FAA’s Security Directives identified only twelve people worldwide too dangerous to fly in American skies.

First Response: Building the System

President George W. Bush and Congress did not wait for the advice of the 9/11 Commission to begin a major overhaul of American counterterrorism policies, anticipating the Commission’s recommendations concerning both the Intelligence Community and aviation security. Almost immediately, the
White House responded to the weaknesses in civil aviation security exposed by the 9/11 terrorists with the fervor of a recent convert. “We had nothing on 9/11. We had nothing. And then, what we had was pathetic,” recalled Michael Jackson, who on September 11 was deputy to Secretary of Transportation Norman Mineta. “The obvious facts were that what had been done at this juncture was wholly inadequate and totally messed up.”92

On September 20, two days after Congress authorized the use of military force against Al-Qaeda and the Taliban, President Bush announced to a joint session of Congress the creation of an Office of Homeland Security in the White House, to be headed by Tom Ridge, then governor of Pennsylvania.93 The announcement was followed by an executive order creating that office within the Executive Office of the President and a Homeland Security Council modeled after the National Security Council.94 The USA PATRIOT Act was signed October 26, 2001.95

Expansion of the APIS system was one of the first post-9/11 policy steps. It was APIS, after all, that had correctly identified all nineteen terrorists within an hour after the attack on 9/11. Customs successfully pressed for legislation passed in November 2001 that required APIS information from all airlines, domestic and foreign, that routed into the United States.96 Edward Alden notes the pressure placed on foreign airlines to comply with those data sweeps even in advance of the deadline set by Congress. If an airline resisted this demand, it could expect every one of its passengers on every flight to be delayed for hours in secondary screening, every time. A few airlines nevertheless challenged the request to comply; when an example was made of Saudi Airlines, its opposition collapsed within two days after Customs officials demonstrated the long delays passengers outside the APIS system could now expect upon arrival into the United States.97 The threat of lengthy screening upon arrival was an effective pressure point to compel compliance with prescreening.

But, above all, it was Security Directives used by the FAA’s Civil Aviation Security Office—the neglected tool of a neglected office—that now came into their own. Senior officials desperate to prevent another attack seized on the watchlisting power embedded in the concept of “do-not-carry” security directives. As Michael Jackson recalled, “it’s hard to underestimate the personal sense of responsibility that the senior government leaders felt in trying to do everything that was reasonable and yet doable to prevent another attack. And the watchlist was a core tool in that effort. So it would have been irresponsible not to develop and actively manage a watchlist of the sort that we ended up with. And there was no disagreement about that, really, amongst the team.”98
According to Richard Falkenrath, who became the Special Assistant to President Bush and Senior Director for Policy and Plans in the White House’s new Office of Homeland Security,

[I]t was just accidental that the authority originated in their authorizing statute, I assume, and then some pre-9/11 security directive. It was really grabbed a hold of by the White House, which was driving everything back then—FBI, CIA to a certain extent. And it just became, with every single case that came into the White House post-9/11, and there were lots, we got into the habit of just asking, Is he no-flied? Is he no-flied? Is he no-flied? And the bureaucracy at first would respond, “We don’t know,” and they couldn’t keep track of all these lists.99

In November, President Bush signed the Aviation and Transportation Security Act, creating the Transportation Security Administration (TSA) within the Department of Transportation.100 (The Homeland Security Act of 2002 later transferred the TSA to the newly created Department of Homeland Security.)101 As the name implied, the act transferred responsibility for aviation security to TSA, leaving the FAA with responsibility for aviation safety. TSA acquired the authority to issue Security Directives prohibiting airlines from transporting certain individuals deemed too dangerous to fly. In particular, TSA now also acquired the power, “in consultation with other appropriate Federal agencies and air carriers,” to require air carriers “to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security and, if such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual.”102 Deputy Secretary of Transportation Michael Jackson, who believed watchlisting was “a core tool,” was largely responsible for starting up that new agency within the Department of Transportation.103

For Admiral James Loy, one of the TSA’s first administrators, “keeping bad guys off airplanes was at the top of the list” of issues to accomplish when he was tapped to lead the new organization in late 2002.104 Congress had given TSA statutory authority to use SDs, of which the name-based “do-not-carry” variety soon became the operative vehicle for the No Fly List, but left unclear exactly who was ultimately in charge of this emerging watchlist.105 Whatever aspirations Admiral Loy and his TSA policy team had for the No Fly List, e-mail traffic between FBI agents suggests a high degree of confidence within the FBI that TSA was merely the administrative agent
through which the FBI conducted some of its investigations and operations. This confidence appears to have lasted long after the TSA was up and running. On December 17, 2002, one FBI Supervisory Special Agent wrote, “We are putting the target on the TSA No Fly List here at FBIHQ. I will be getting with TSA tomorrow (12/18) to accomplish this.” Another e-mail, dated February 4, 2003, tersely asks: “We’ve got a guy we want to no-fly. Do you have a copy of the last one we gave you?”

Nor was this a matter exclusively for headquarters. The process for adding names was initially so lax that, according to Edward Alden, “almost any FBI agent could add a name to the list with little scrutiny.” The e-mails from the field mirror those from headquarters: “Boston has subject that we would like to add to the TSA ‘No Fly List.’ Do you know who I address the EC [electronic communication] to?” Each of these e-mail requests were answered with language cut-and-pasted from one reply to the next. The process was as easy as it was formulaic: “To place an individual on the No-Fly we ask that you state in the EC that the FBI believes that the listed individual is a threat to Civil Aviation Security. We ask also that any bio data on the No-Fly be at the For Official Use Only (FOUO) [level of classification].”

The FBI’s confidence that the No Fly List was at its disposal was not unfounded. Claudio Manno, who became the Acting Associate Under Secretary at TSA for Transportation Security Intelligence, wrote an internal TSA memorandum that set out the history of FBI involvement. Early on September 12, 2001, he explained in his memo,

[At the request of the FBI, the FAA issued SD-108-01-06/EA 129-01-05, which included a list of individuals developed by the FBI as part of the Pentbom investigation. . . . The FBI “controlled,” both administratively and operationally, the contents of the list and added or removed names in accordance with the Pentbom investigation. The FAA received the list from the FBI and disseminated it to air carriers, without any format or content changes. FAA, in essence, acted as a conduit for the dissemination of their “watchlist.”]

This arrangement continued until November 8, 2001, when, again at the request of the FBI, the FAA “assumed full administrative responsibility for the ‘watchlist’ and issued SD 108-01-19.” Still, the FBI seemed to want the best of both worlds: an FAA that would take responsibility for the list while still compliant enough to follow FBI instructions to add or remove names at its direction. In his memo, Manno refers with ironic quotation marks to the shift from a “FBI watchlist” to the “FAA watchlist,” which by mid-
December had been divided into a No Fly List (which prohibited travel by commercial aircraft) and a Selectee List (which increased security measures but allowed travel). The growth of the watchlists led to increased conflict between rival federal agencies, especially between the well-entrenched FBI bureaucracy and the fledgling TSA. In late October 2002, almost a year after the TSA took over the FAA’s responsibility for aviation security, the FBI was still adamant that “TSA is the agency which actually makes the entries and removals” from the No Fly List, although the FBI was working with TSA “to develop protocols to facilitate entry and/or removal of FBI subjects to/from the No Fly or Selectee Lists.” The FBI wanted the power but not the legal or political headaches associated with the lists: “It should be noted, the air carriers and/or local airport authorities are responsible for preventing a passenger on the No Fly List from boarding an aircraft, not the FBI.”

TSA was careful to protect its bureaucratic interests. In interagency communications, TSA noted that it would not remove any name from its lists without a written request from the agency that originally asked for the name to be listed. Meanwhile, the FBI grew increasingly frustrated with what its agents perceived to be growing TSA imperiousness in administering the watchlists while leaving the FBI to handle the public relations fallout from those bureaucratic decisions. In a May 2002 e-mail to Arthur Cummings, then at FBIHQ’s Counterterrorism Division, the Supervisory Special Agent in charge of the Civil Aviation Security Program there offered “some background, if you have the patience to read it”:

Since 10/2001, when the TSA No Fly and Selectee lists came into being (aftermath of the FBI Watchlist), I have been attempting to make the updated lists available to the field agents [redacted] on a timely basis, i.e., when they are issued, because TSA has made the agents responsible for responding to possible name matches. . . . TSA also fails (except on one occasion) to coordinate with us when they tell [redacted] (the FBI) or when they change the Security Directives concerning responses which affects FBI offices. Despite my best efforts, the TSA just motors along and I and the agents are being whipped around the flagpole trying to do the right thing. . . . Example—today List 51 was issued; Lists 49 and 50 were issued on Friday. I believe I was here, but no mail from TSA, and I check every hour. I have raised this issue with people in TSA and here, and told the agents that getting the lists from me is now a luxury instead of a certainty.
A month later, the same SSA wrote that TSA “maintains that they still act only as a conduit for the FBI and make no decisions about who or what to put on the list, but they refuse to coordinate the procedures with the FBI. The lack of coordination issue has been raised up pretty high now in the FBI due to questions posed to the Director for the hearings.” By July, the SSA was fed up. With the subject line “Info for TSA Legal Request,” the angry FBI agent e-mailed: “[Redacted] seems to believe that he is entitled to an immediate response to his issues, when the FBI has been waiting since Nov 2001 for resolution to our issues asking them for [redacted] and to cooperate on crafting the Security Directives. They ignored [redacted] January letter, and have yet to act, based on discussions held at a meeting in early June to go over these issues again. Therefore, I don’t know that we should be in any rush for him, but you have to keep letting him think you’re working on ‘it’—same tactic they use with us.”

As Randy Beardsworth, a distinguished Coast Guard officer who joined DHS in 2003 as Chief Operations Officer for Border and Transportation Security, observed, part of the problem was a clash of institutional cultures:

And part of the situation was that FBI is feudal. . . . Each SAC [special agent in charge] is completely independent and powerful. So the SAC in one city will look at cases and information a certain way. They don’t want to share information, and put it into a system that everyone has access to: their sources and methods, investigations, and grand jury information. TSA comes in as the new kid, very little knowledge of law enforcement, trying to administer a list. And so there’s this natural tension between the two of them.

According to Beardsworth:

TSA was the kid that had the football on the football field but weighed fifty pounds and had no clue how to play the game. TSA is trying to assert its role and FBI and other agencies are sort of laughing at it. And then abusing it. Because, remember, it’s not a centralized, single FBI. But you would have cases of agents who would say, “I don’t know, I’m not going to be the one that lets somebody in the country. This goes on the No Fly List.” But there was nobody who was adjudicating the No Fly List.

Removing names from the No Fly List could be as frustrating as adding them. “It appears that there is no more [redacted] on either of the two lists
Change: Digitizing Mrs. Shipley

(No Fly 73 or Selectee 44), so Mr. [redacted] should have no more problems for now,” the SSA in charge of the FBI’s Civil Aviation Security Program wrote in a July 2002 e-mail to colleagues at State, FAA, and FBI. “However, if another [redacted] should be put on the list, his name would trigger something. Your advice was the best that could be given under the circumstances. I don’t know if FBI put him on the list or not.” Officials seem to have preferred to err on the side of watchlisting. After all, why take a risk?

The e-mail exchange on the next page, between an FBI SSA in Hawaii and FBIHQ was typical. Given Hawaii’s geography, the resident in figure 6 was essentially stranded after being placed on the No Fly List.

The White House response had been as predictable as the infighting between agencies. It is cliché but true that armies prepare for the last war, a truth the 9/11 Commission extended to describe the early years of the war on terror. America’s responses to attacks on airliners in the 1980s were reactive, not proactive. The hijacking of TWA 847 led to the creation of an intelligence office at the FAA and the tightening of security requirements for foreign airports. But the FAA remained a dependent consumer of the intelligence it was fed by established members of the Intelligence Community. Since the threat of domestic terrorism still seemed remote, the focus was on foreign airports. Likewise, the bombing of Pan Am 103 led to mandatory Security Directives. But FAA’s ability to act speedily to prevent a direct and credible threat to an aircraft remained hampered by its dependence on rival agencies, CIA and FBI, to declassify and permit use of their intelligence.

These interagency rivalries continued and worsened. In August 2001, both agencies were investigating troubling leads about flight training undertaken by Zacharias Moussaoui, often labeled the “twentieth hijacker.” Although the CIA reached out to foreign intelligence services for information about Moussaoui—describing him as a possible suicide hijacker—and the FBI engaged in a spirited internal debate about whether to arrest him, neither agency fully shared its information with the FAA. This was typical. By the time permission to use intelligence to issue a security directive was granted, the individual blocked from flying by the SD was unlikely to be flying anymore. That was the case with Moussaoui, too; by the time the FBI briefed the FAA, Moussaoui had been under arrest for more than two weeks.

In testimony before the Joint Inquiry into Terrorist Attacks against the United States, Director of Central Intelligence George Tenet admitted that this failure had become systemic. Speaking about the CIA’s failure to seek the timely watchlisting of two 9/11 plotters, al-Mihdhar and Nawaf al-Hazmi, whom CIA knew had entered the country as early as January 2000,
From: [Redacted]
To: [Redacted]
Date: 9/1/02 6:01:30 PM
Subject: and No Fly List

Wow, that is the most interesting explanation I've heard yet. I'm not sure it's valid - it just doesn't sound right. However, I will forward this to the airport agents so they know why he is still on the list. Thank you for your efforts.

>>> 9/17/02 1:01:55 PM >>>
I wanted to get back to you concerning our conversation, 9/17/02 and your request to have removed from the no fly list. I have spoken with several individuals concerning this, TSA, and others, to try to get to the bottom of this. No longer a threat. However, unfortunately we are not going to be able to remove name from the list.

Therefore, we do not want to be raced with this risk. If you have any other questions please feel free to get back with me. Thanks!

>>> 9/3/01 1:05 PM >>>

Anyway, can you and the Terrorist Watch List Unit and revisit this matter and see if you can get off the list?

Thanks.

SSA (fax)
Civil Aviation Security Program, Room 11795
Domestic Terrorism Counterterrorism Planning Section
Counterterrorism Division
gpo.gov

9/23/02 1:41:34 PM >>>

Attached is an e-mail documenting concerns of a Hawaii resident by the name of who is being frequently stopped and questioned at various airports based upon the similarity of his name with that of Can you offer any suggestions as to how this Hawaii resident can obtain some relief from this scrutiny. Can a computerized entry be made on the no-fly list that with the particular biographical descriptors is not identical to?

Thanks,

SSA Counterterrorism Squad, Honolulu

CC: [Redacted]

ALL INFORMATION CONTAINED HERIN IS UNCLASSIFIED
DIA 9/6/02 27 LEA0269 NLS/AG/CAL
Gordon/Adams pg-255

Fig. 6. FBI E-mail Exchange Regarding No Fly List
Tenet observed: “The fact that earlier we did not recommend al-Hazmi and al-Mihdhar for watchlisting is not attributable to a single point of failure. There were opportunities, both in the field and at Headquarters, to act on developing information. The fact that this did not happen—aside from questions of CTC workload, particularly around the period of the disrupted Millennium plots—pointed out that a whole new system, rather than a fix at a single point in the system, was needed.”

Richard Falkenrath, who as Deputy Assistant to President Bush and Deputy Homeland Security Advisor claims credit for the creation of the Terrorist Screening Center, attributes his decision to focus on the watchlisting issue to that speech: “It was George Tenet’s admission that the one thing they clearly screwed up was the watchlisting function of the two guys, al-Mihdhar and al-Hamsa. . . . I started every meeting by quoting from Tenet’s testimony. And I’d say, all right, this can’t stand. Does anyone disagree? No, we all agree. Okay. What are we going to do about it?”

It was in response to this breakdown that Falkenrath and his allies at the White House displayed some creative thinking. That coordination problem would be resolved, counterintuitively, by creating two more players in the intelligence sharing game: the National Counterterrorism Center (NCTC) and the Terrorist Screening Center (TSC). Falkenrath did not realize that in the latter office he was reconstituting a more powerful, and less accountable, Mrs. Shipley.

Refining the System: The NCTC and the TSC

The rapid accomplishment of this creative function was not left to the cumbersome process of lawmaking. Speed was at a premium and the delicate task of forcing long-established agency bureaucracies to share the fruits of their intelligence activities would not be easily accomplished in open public forums. The White House therefore did much of the work behind closed doors, issuing policy directives through its Homeland Security Council (which was based on the model of the long-established National Security Council).

As the FBI and TSA fought their turf war over control of the No Fly List, other new agencies were quickly “stood up,” in the lingo of the federal bureaucracy. This turf battle, with another agency—the Department of Homeland Security—about to join it, was ample evidence that the information hoarding that marked the pre-9/11 era had not everywhere been replaced by an era of cooperation.

The first step was centralizing the data stream. During his 2003 State of
the Union Message, President Bush announced that he had ordered the FBI, CIA, Defense Department, and Department of Homeland Security to develop a Terrorist Threat Integration Center “to merge and analyze all threat information in a single location.”

The Terrorist Threat Integration Center (TTIC) was the precursor to what in 2004 became the National Counterterrorism Center (NCTC). On May 1, 2003, the TTIC opened its doors for business at CIA Headquarters at Langley, Virginia, and began centralizing and analyzing information from an alphabet soup of federal databases and watchlists. This multi-agency organization comprised officials from FBI, CIA, Defense, State, and Homeland Security and is funded by these participating agencies, but under the administrative umbrella of the Office of the Director of National Intelligence. It was intended to be the clearinghouse and central repository for the nation's primary terrorist database. The TTIC aimed to integrate all of the U.S. Government's foreign terrorist threat information and analyze it in a single location. TTIC would have access to all intelligence and be given the responsibility for producing the daily reports and other analytical products on which the President and his advisors would rely.

The computer database developed to assist in these tasks became known as the Terrorist Identities Datamart Environment (TIDE). This database was to include “to the extent permitted by law, all information the U.S. government possesses related to the identities of individuals known or appropriately suspected to be or have been involved in activities constituting, in preparation for, in aid of, or related to terrorism, with the exception of Purely Domestic Terrorism Information.” (Purely domestic terrorism information would continue to be gathered and analyzed by the FBI.) The seed for the TIDE database was the State Department’s TIPOFF database, which was transferred to the control of the TTIC (along with a portion of the TIPOFF staff at the State Department) on November 17, 2003. Federal agencies were directed to submit all of their information about known or suspected terrorists to the TTIC for inclusion in the TIDE. TIDE contained both biometric and nominal identifying data (names, aliases, etc.) as well as so-called “derogatory information,” i.e., the collected substantive intelligence deemed to constitute terrorist information. While there was no new data, the value added by the TIDE (and its assembly by the TTIC) was to centralize this data for use by all appropriate parts of the Executive Branch. More colloquially, according to journalist Ronald Kessler, one former director of the NCTC described the TIDE as “the mother of all databases . . . if there’s a piece of derogatory information on a known or suspected terrorist, it goes in that database.”
Once the TTIC began its task of consolidating the nation’s foreign terrorist threat intelligence and analysis, the second step was the reorganization and consolidation of the nation’s watchlists and screening systems, foreign and domestic. The TTIC had no role in setting watchlisting standards or exercising any operational controls over the growing number and size of watchlists being developed at different agencies.\textsuperscript{141} This was again done by the Executive Branch acting through the Homeland Security Council. President Bush signed Homeland Security Presidential Directive 6 (HSPD-6) on September 16, 2003. Its subject was the integration and use of terrorist information for screening and other purposes. Terrorist information was carefully, albeit broadly, defined to be everything in the TIDE plus the FBI’s purely domestic terrorism information.

HSPD-6 ordered that an organization be established “to consolidate the Government’s approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes.”\textsuperscript{142} That organization became the Terrorist Screening Center (TSC). The man who helped set up the TSC and who would later become its director, Timothy J. Healy, succinctly expressed the problem the TSC was to address: “There was no bucket that had them all in there.”\textsuperscript{143} The “bucket” became the Terrorist Screening Database (TSDB), aka the Consolidated Terrorist Watchlist. TSC was tasked with establishing the TSDB and developing a team of expert analysts who would use it to create “downstream” watchlists for customer agencies that drew from this single source and which adopted standardized criteria and formats. The most well-known of its products is the No Fly List. A “call center” at TSC was planned that would facilitate communication between government officials (such as airport personnel or local police) who encountered watchlisted individuals in their daily operations and the agencies that submitted the substantive intelligence used to create the particular watchlist involved.

Although HSPD-6 was issued on September 16, 2003, Healy was not named project leader to set up the TSC until October 27, 2003.\textsuperscript{144} This left only slightly more than one month to organize the Center, which began operations on December 1, 2003.\textsuperscript{145} Healy faced issues that would be familiar to anyone involved at that level in creating a federal entity from scratch. Initially, for example, personnel were largely drawn from the FBI. Gradually, criteria were established for different types of personnel to be drawn from different agencies.

The TSC is housed in the FBI but staffed by officials from agencies throughout the federal government that have a stake in counterterrorism.\textsuperscript{146} In fact, the first director of the TSC, Donna Bucella, had been a TSA official
detailed to the FBI for this purpose. A decision was reached and memoralized in an early memorandum of understanding to reserve the position of principal deputy director for an official from the Department of Homeland Security; similarly, one of the assistant director positions is reserved for an official from the Department of State. Although this multiagency staff is expected to represent the interests of their respective agencies, they report to the TSC Director.

The TSC is entirely a creature of the Executive Branch. It has no organic statute or other Act of Congress that defines its responsibilities, structure, or limits. HSPD-6 (and, to the extent applicable, HSPD-11 and HSPD-24) are the sole legal authority for the TSC. The TSC is a component of the National Security Branch of the FBI. The Director of the TSC reports to the FBI Director through the Executive Assistant Director of the National Security Branch. The TSC does not promulgate regulations; it operates under applicable FBI regulations and is funded through appropriations made for its operation that are administered by the FBI. In its first year of operation (fiscal year 2004), the TSC grew to a $27 million budget and 175 staff; in FY2007, those numbers had grown to $83 million and 408 staff. Among those staff, eight positions were created and filled with representatives from TSA.

The TSC and the TTIC were intended to work closely together. In fact, the startup staff for each came, in part, by dividing up the staff responsible for TIPOFF at the State Department. Both were well funded, well staffed, and well supported by patrons in different parts of the Executive Branch. The vast majority of the information in the database that the TSC used to craft and distribute watchlists to customer agencies came from the TTIC. The TTIC (reconstituted in 2004 as the NCTC) soon outgrew its original space at CIA headquarters at Langley. It is now housed just to the southwest in a state-of-the-art building complex in McLean, Virginia, known as “Liberty Crossing,” a picture of which is provided on the NCTC’s own website. Until recently, the building was identified as NCTC headquarters on Google maps. The TSC, on the other hand, remains more cryptic about its location, somewhere in Crystal City, near Reagan National Airport; its website describes its headquarters only as “housed in a nondescript building in Northern Virginia.”

How the Consolidated Watchlist Works Today

President Bush’s directives required all executive departments and agencies to provide the NCTC with a continuous stream of terrorist information subject only to any legal restrictions concerning information about U.S. per-
sons.\textsuperscript{159} NCTC was to act as the primary pipeline for this terrorist information.\textsuperscript{160} The TSC, on the other hand, was to function as the funnel and the sieve for this information, evaluating its sufficiency for watchlisting purposes and distributing it to different government actors in the form of watchlists created for their specialized functions. A memorandum of understanding signed on June 4, 2002, by CIA, DIA, NSA, State, and the FBI established four unclassified data elements that could be used in the TIPOFF database; this was the starting point for negotiating similar ground rules for information sent from the TTIC/NCTC to the TSC.\textsuperscript{161} (This number was increased by subsequent memoranda of understanding.)

Today, the TSC serves three functions. First, it assembles the names of all known or suspected terrorists into a Consolidated Terrorist Watchlist, aka the Terrorist Screening Database (TSDB), along with a “handling code” that provides information about what should be done if the watchlisted individual is encountered.\textsuperscript{162} The TSDB is an unclassified but law-enforcement-sensitive database that serves as a sort of index to rapidly find all information that the Federal Government possesses about a suspected individual.\textsuperscript{163} Entries into the TSDB can come from many different federal agencies and government offices.\textsuperscript{164} If the information concerns an international terrorist, it is sent to the NCTC for preliminary review; indeed, much information comes from TIDE. If the information concerns a domestic terrorist, it is first routed through the FBI. Both the NCTC and the FBI are then responsible for submitting this information in the proper form to the TSC for final review. This process became known as the nomination process.

Once TSC analysts are satisfied that the information proposed by various agencies for inclusion is sufficiently detailed to be entered into the TSDB, other TSC analysts perform the second function. The entries on the TSDB are then sifted and sorted into discrete “downstream” watchlists tailored to the particular needs of different agencies (called “customers”), such as the TSA’s No Fly List.\textsuperscript{165} The TSC explained this process to Congress with the help of a PowerPoint slide (a rendering without color or graphics is made in figure 7).\textsuperscript{166}

These first two functions take place on an established schedule. Every night and twice on Fridays, the biometric and identifying data from TIDE is sent to the TSC for inclusion in the TSDB.\textsuperscript{167}

The third function occurs round the clock. The TSC coordinates and helps to respond to the inquiries of frontline officials who encounter individuals whom they perceive to be positive hits on these lists. Any federal, state, or local government agent can contact a TSC-staffed “Call Center” twenty-four hours a day, seven days a week, to seek further information after
an encounter is made with someone on one of these lists. The TSC verifies whether the individual is indeed a positive match on the particular watchlist and, if so, advises on how the encounter with the individual should be handled. If necessary, TSC officials can quickly connect the encountering agent with the agency or official (whether an FBI special agent, a customs official, etc.) that originated the record in the TSDB or the downstream watchlist. In its first fourteen months, the TSC recorded a 1,045 percent growth in the volume of calls it handled from Customs and Border Protection, the most frequent caller.¹⁶⁸

The TSDB faced a defining issue from the moment of its conception:

Fig. 7. TSC PowerPoint Slide: U.S. Government Integrated Terrorist Nominations Process
how rigorous should the criteria be to add a name to it? On the one hand, the very name “Terrorist Screening Database” suggested a list with a narrow focus. One could reasonably expect that such a database should only contain the names of individuals whom rigorous screening has determined to be actual terrorists. From a policy perspective, a terrorist screening database that contains the names of nonterrorists is worse than unhelpful—it is a resource-consuming distraction. And the consequences for an individual included on this list are quite serious. Individuals on the TSDB are more likely to be listed on one or more “downstream” watchlists that could restrict their travel, professional licensing, ability to engage in commerce, or receive government benefits. What is more, since the TSC’s “ultimate goal” is a TSDB that is in real-time connection to its customer agencies and that contains more and more biometric data, the power of the watchlist is certain to increase.

On the other hand, the TSDB is a sensitive but unclassified list that is not intended to replace other watchlists and databases maintained in classified form by other agencies. Its purpose is consolidation of enough information to permit interagency coordination, a core recommendation of the 9/11 Commission. Since this consolidated list is the source of many other downstream lists used by different agencies for different purposes, it might seem reasonable to keep criteria for inclusion on it relatively broad. Further evaluation could pare back or refine downstream lists at a later stage. After the information-sharing mistakes revealed by 9/11, there was considerable zeal to err on the side of overinclusion. Even as late as 2005, Justice Department auditors reported that the then-director of the TSC, Donna Bucella, told them that “to err on the side of caution, individuals with any degree of a terrorism nexus were included” on the consolidated watchlist so long as minimum identifying data were available.

As Bucella’s comments suggest, the originators of the TSC chose to resolve the choice in favor of breadth and inclusion at the level of the TSDB, leaving the filtering function to those downstream lists. That puts a lot of pressure on defining what to collect. The foundational definition of what the TSDB was designed to collect—terrorist information—is established by HSPD-6. The presidential directive begins by stating the policy of the United States to be the collection and use of “Terrorist Information,” defined as information about “individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.” In late 2009, the Terrorist Screening Database contained the names of approximately 400,000 people.

In fact, the minimum criteria for inclusion in the TSDB is quite bare indeed: “at least a partial name (e.g., given name, surname, or both) and at least one additional piece of identifying information (e.g., date of birth),”
and some “evidence of a nexus to terrorism.” What that nexus might be is suggested by the executive order that established the NCTC (which is the primary source of information sent to the TSC), which defines “terrorism information” to mean

all information, whether collected, produced, or distributed by intelligence, law enforcement, military, homeland security, or other United States Government activities, relating to (i) the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals, or of domestic groups or individuals involved in transnational terrorism; (ii) threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations; (iii) communications of or by such groups or individuals; or (iv) information relating to groups or individuals reasonably believed to be assisting or associated with such groups or individuals.

The different government agencies that nominate individuals for inclusion on the TSDB have different reasons for doing so. There is no requirement, for example, that the person be the subject of an open FBI investigation; an FBI legal attaché at a U.S. embassy abroad may therefore nominate an individual for inclusion in the TSDB on the basis of information supplied by the foreign country in which the attaché is stationed. As Randy Beardsworth notes, the TSDB “is a database of unadjudicated information that is terrorist related and obtained by any law enforcement agency.” By “unadjudicated,” Beardsworth meant that nobody has evaluated the opinions of the source who sponsors its nomination for inclusion on the TSDB—whether an FBI agent, a customs agent, a city policeman, or someone else. By way of example, Beardsworth observed:

So if you or I go into the restaurant across the street, and I just happen to be unfortunate enough that known terrorists or highly suspect terrorists are meeting there for lunch and I happen to walk in the door behind them and bump into them and talk to them or sit at the table and the FBI guy is out there watching this occur and takes down my license plate number, I might end up in the database. It’s a piece of information, it doesn’t mean anything, but it’s a piece of information that associates me in some way with terrorist activity. And it’s conceivable that information as innocuous as that may be in the FBI file someplace.
Watchlisting is not an action that affects only the individual nominated for inclusion on the TSDB. As the FBI’s Inspector General later concluded: “A subject’s inclusion on the consolidated terrorist watchlist could also have consequences for associates of the subjects [sic], even though they are not themselves the subject of any investigation.”\textsuperscript{180} This was readily admitted by Donna Bucella when she was the TSC Director in 2005. According to the Justice Department’s Inspector General:

> The Director further explained that one of the benefits of watchlisting individuals who pose a lower threat was that their movement could be monitored through the screening process and this could provide useful intelligence information to investigators. In addition, she stated that watch listing lower-threat individuals that have associations with higher-threat level terrorists may lead to uncovering the location of higher watch listed individuals.”\textsuperscript{181}

There can scarcely be an objection to the Government’s interest in seeking to identify terrorists, whether considered a high or low threat. But watchlisting has consequences. In many ways, the TSDB is a sticky list. Once on the list, it is hard to get off the list. What is more, one’s friends and acquaintances are at greater risk of being watchlisted themselves.

The lists are sticky in another way, too. Despite the TSC’s assurances to auditors that its watchlists were routinely checked and purged of names that never did or no longer belonged on them, repeat audits found that such entries had a persistent quality to them. More than a year after the first round of assurances was received, Justice Department auditors identified 2,682 records in the TSDB that appeared to be stuck there—not sent to downstream lists but not deleted from the consolidated watchlist either. Alerted to these records, the TSC investigated and concluded that 2,126 “had not been appropriately watchlisted and needed to be renominated to the TSDB.”\textsuperscript{182} Notice the stickiness: once in the TSDB, the expectation was to renominate the individual and reload the information back into the system.

Listing on the TSDB is only the first function performed by the TSC. The TSC’s second function is to sift these names onto specialized lists for use by different agencies, such as the No Fly List that is used by the TSA. How this process is accomplished is the subject of the next chapter. In short, the process is astonishingly similar to Mrs. Shipley’s methods of deciding to whom she would give a passport. As Yogi Berra once said, “It’s déjà vu all over again.”
In 1925, the State Department’s Division of Passport Control accomplished its work with an index card system. By 1953, Mrs. Shipley’s office maintained 1,250 filing cabinets of data on 12,000,000 people. In light of this mountain of information, the efficiency of her office was amazing. She made state control over who could travel abroad appear to be a public service—few complained because most people received passports quickly and without onerous restrictions. Of course, when Mrs. Shipley decided that a traveler’s itinerary was “not in the interests of the United States,” that was the end of the matter. The traveler stayed put. Nevertheless, many (successful travelers, at least) viewed Mrs. Shipley’s reign as beneficent, if autocratic, and she successfully fended off meaningful judicial review of her discretion until she retired from office.

Mrs. Shipley’s unchecked power to decide which citizens could leave home came to be seen as the gross infringement on liberty that it really was. There is no doubt that the judgments of this capable and experienced civil servant were sincere assessments of national security. But her sincerity could not mask the un-American principle she defended: that the state should have the power to control the movement of its citizens whenever their travel was secretly found to be, not unlawful, but simply not consonant with a government official’s view of foreign policy or national security. Nor could her skill excuse a decision-making process kept behind a wall of unreviewable discretion buttressed by impregnable bureaucratic secrecy. Just as her passport controls reached the peak of their perfection, the courts and
Congress began to restore the individual liberty that had been sacrificed in pursuit of national security. Passport decisions were subjected to judicial review, although the government left its heavy thumb on the judicial scales, to tip them when necessary with claims of grave threats to national security.

Mrs. Shipley’s passports were ultimately abandoned as the primary tool to control a citizen’s travel. But her ghost still lingers in the machine. Just as her empire grew from index cards to rooms full of filing cabinets, today’s watchlisting system has grown from a dozen or so names typed in a security directive that fit on a single piece of thermal fax paper. Today a massive database operates on a budget of tens of millions of dollars, employing hundreds of officials. Travel control is now done remotely, using networked computer systems to sort the good from the bad. In the blink of an eye, it can stop travel into, out of, or through the airspace of the United States. Mrs. Shipley’s spirit has been digitized. It flows through these computers and watchlists with a power greater than the real Mrs. Shipley could possibly have imagined.

That shift from corporeal form to digital avatar accomplished a neat trick, even if those who created the new system did not realize just who they had regenerated. There is no single Mrs. Shipley anymore. Her power was certainly not transferred to the singular discretion of the Director of the Terrorist Screening Center. But Mrs. Shipley’s spirit did not entirely disappear. It has been diffused into the databases and computers of scores of analysts working in a systematic, multilevel process. This makes decision making appear scientific, rigorous, and technologically sophisticated. Data points are parsed and assessed at different stages according to set criteria by dedicated professionals in the “watchlisting community.” The involvement of multiple agencies with a stake in the results would seem to prevent any single person from amassing the power that Mrs. Shipley did. What could be more objective and dispassionate? Isn’t the current system the well-designed antidote to the reign of Ruth Shipley, which Dean Acheson called in his memoirs her “Queendom of Passports”?

Though it may seem counterintuitive, diffusing Mrs. Shipley’s power in fact magnified it. The new system makes it much harder to identify just who is responsible for the final decision to ground a citizen. An attempt to reach the decision makers with meaningful controls through our traditional system of checks and balances on government power is a journey down the rabbit hole. No single agency now takes responsibility for the decision to ground a traveler; authority to compose the list is split from the ministerial power to implement it. As a result, the agency action that matters most is hidden from view and, so far, effectively shielded from judicial review. Many analysts at many different decision points in the process have strong incen-
tives to err on the side of including a name in the database. Who wants to be the one to let a terrorist slip onto a plane? When the buck stops with no one, no one has a reason to stop.

Meanwhile, the multiplication of secret criteria and threshold standards obscures the fact that nearly any decision rendered by this hidden process may later be justified by it. “This is not an exact science,” Russell Travers, a deputy director at the NCTC, told journalist Ronald Kessler. That is a meek admission, if it was even intended as such. Terrorist watchlisting is no more a science than Kremlinology was during the Cold War. That is not to disparage Kremlinology, the earnest attempt to identify the secret pathways of power that ran the closed system of the Soviet Union. Specialized Sovietologists analyzed the sequence of leaders lined up on Lenin’s Tomb on May Day, read between the lines of Pravda, and hunted for clues as much in arcana as in the everyday. Then as now, the goal was to piece together an intricate mosaic made of tiny fragments of information.

But that mosaic-restoring task assumes that the pieces fit together, that there is indeed a coherent picture to uncover. That assumption makes the watchlisters poor judges of when their work has gone too far. And behind the facade of analytical rigor, the system has expanded beyond its original purpose. No longer is the No Fly List limited to protecting the physical safety of those who fly on commercial aircraft. The system now permits decisions to target someone for watchlisting as an investigative tool, or as part of a tactical operation to protect interests that may have nothing to do with the plane in the air. What is more, this decision can be hidden in plain sight—just add the name and enough speculative derogatory information into the TSDB and watchlisting may be justified under the lowered criteria for unspecified national security threats. The limit placed on the watchlisting power by the original requirement of a “specific and credible threat to civil aviation” has been rendered meaningless by the addition of a phrase that can sweep all other limits aside. Now the No Fly List prevents the air travel of those the watchlisting community believes “may be a threat to civil aviation or national security.”

Mrs. Shipley’s ghost threatens a freedom of movement that Americans often take for granted. Her ghost is more powerful than the flesh-and-blood Mrs. Shipley ever was. Mrs. Shipley worked—through wars hot and cold—at the Winder Building, a Washington landmark that sits across the street from the White House and the Old Executive Office Building; it now houses the U.S. Trade Representative. The Terrorist Screening Center, on the other hand, elects to remain mysterious about its location; its website describes its headquarters only as “housed in a nondescript building in Northern Vir-
This difference is not without meaning. Authority, responsibility, and accountability are all diffused and dispersed among different agencies, officials, analysts, databases, and systems. Thus, while judicial review is in theory available to those who challenge their inclusion on the No Fly List, in practice, plaintiffs discover that they are playing an expensive and frustrating shell game. To date, no plaintiff has won a judicial remedy.

In a sense, it doesn’t matter where the Terrorist Screening Center is located. Although that is where officials make the ultimate decision to add a name to the No Fly List, there is no one there from whom to seek redress. Reporting on Mrs. Shipley’s operation, a *New York Times* reporter observed:

> Although she has ninety assistants in the passport division, Mrs. Shipley examines each application personally. Despite this extra work she never seems hurried. The door to her office is always open, and any applicant with a grievance can see that she is there and can walk right in, and people of high and low degree do. While I was talking with her the other day a housewifely woman came in about her passport troubles and later Bernard M. Baruch timidly peeped into the doorway.7

Mrs. Shipley’s ghost is locked behind hidden doors at the Terrorist Screening Center. And those doors remain firmly closed to any traveler who wishes to contest the executive decision to deny him both the right to travel like any other American or even a statement of the reason to single him out.

Many policymakers and operational specialists reject this analogy between the War on Terror and the Cold War. They particularly disagree with the analogy between Mrs. Shipley’s passports and the No Fly List. Dismissing this recent past has a profound consequence for today and tomorrow. For in refusing to believe that the past has lessons to teach, the last remaining constraint is removed on a system that strains against artificial and self-imposed limits, as its steady expansion demonstrates. It is a small step now from a list that prohibits travel to one that prohibits other potentially dangerous but routine activities, all in the name of national security.

The Passport Division kept files on individuals whose travel would concern the United States enough to consider denying or restricting a passport. The information in these files came from the FBI, the Foreign Service, the intelligence services, and other agencies.8 Secretary Acheson fended off criticism of the secretive nature of his subordinates’ decision making by describing the legal standard used to determine whether a passport application should be denied:
When an application is received for a passport at the Passport Division, the files of the Department are examined, and if there is nothing in those files to raise any questions regarding the person concerned, the passport is issued immediately, as a matter of routine.

Then we come to the second step. If there is adverse information, this information is reviewed at a higher level in the Passport Division, and if the information is not such as to provide reasonable grounds for belief that the passport should be denied—and the reasons for denial I have already mentioned to you [fugitive status, mental illness, travel adverse to the national interest]—if there are not reasonable grounds from the totality of its evidence to indicate the applicant does not fall within any of the categories mentioned, then the passport is issued.9

The Terrorist Screening Center receives nominations from the NCTC and the FBI to place individuals in its Terrorist Screening Database, the main terrorist watchlist from which subsidiary lists are created for particular uses by different agencies (such as the No Fly List that is used by the TSA). The TSC’s Director, Timothy Healy, described the legal standard his organization uses to add a name to that consolidated watchlist:

[T]he facts and circumstances pertaining to the nomination must meet the “reasonable suspicion” standard of review established by terrorist screening Presidential Directives. Reasonable suspicion requires “articulable” facts which, taken together with rational inferences, reasonably warrant a determination that an individual is known or suspected to be or has been engaged in conduct constituting, in preparation for, in aid of or related to terrorism and terrorist activities, and is based on the totality of the circumstances.10

Note the similarity between the two legal standards. The few differences are largely due to the fact that Mr. Healy’s standard is modeled on the standard set forth by the Supreme Court in a post-Shipley era case, Terry v. Ohio.11 (How this standard also affects No Fly List nominations is discussed below.) Work on the TSC’s standard began in summer 2008 in a working group cochaired by DHS and TSC that produced a policy paper called a “guidance document” for TSDB nominations, informally called the “bible” because it is considered the authoritative source on watchlisting issues.12

Only reasonable grounds from the totality of the evidence were required
to deny a passport. Only a reasonable suspicion based on articulable facts and the totality of the circumstances is required to add a name to a watchlist. Neither standard presents much of a bar to desired action. In any event, the standard to approve a nomination to the TSDB is not policed by any court. When the State Department lost that battle concerning passports (though it fought tooth and nail to avoid judicial review of its determinations), its travel control program became untenable. In 1955, secrecy had the same defense as it does today: “State Department lawyers feel that, if they are compelled to open up security files to the public and reveal confidential sources of information, the whole antisubversive operation will be crippled.”13 The Terrorist Screening Center currently fights just as hard for the same autonomy and seeks the same protection from judicial review. Officials in both eras have emphasized the careful vetting and professional judgment used in their departments. But the answer boils down to the same two words: trust us.

The “us” now includes two separate units of government, the TSC and the Transportation Security Administration (the TSA). This division creates a new difficulty not faced by the travelers who sought out Mrs. Shipley. What can be known from published sources indicates a hierarchical relationship that puts the TSC on top of all significant decision making about composing the No Fly List. This structure is not always easy to pin down. The legal documents that describe it are riddled with delegations of authority, special exceptions, and abstract references. Still, this is a strange and shifting hierarchy. The relationship is often described by the agencies themselves as one in which the TSC delivers a “product” (the No Fly List) to its “customer,” the TSA. Both agencies have good reasons to seek consensus over the crafting of that product, within agreed parameters, to satisfy both producer and consumer. But the recursive effect of this interaction can make it difficult to pin down who is in charge of what.

It is clear that the TSC is in charge of crafting the end product, with an eye toward satisfying its customer. When it comes to responding to external demands for redress, on the other hand, the relationship appears to shift depending on the vantage point of the observer. Observed from within the agencies, the TSC still appears to retain the same dominance in the redress process that it exercises in the process of composing the list. But to outsiders—the private citizens who seek review of a No Fly List decision and the few courts that have heard their complaints—the agencies project a different relationship. TSA is first presented as the sole relevant agency, the only one with a redress office accessible to the public. If pressed further, however, the response shifts to reveal a bit more: TSA is presented as a co-
equal decision maker with the TSC (and sometimes other agencies), or so
inextricably intertwined in the work of the TSC that untangling the two
entities is impossible.

One is forced to speculate that litigation concerns drive efforts to try to
shield the TSC’s work behind a facade of TSA authority. By claiming that
the substantive work at the TSC is “inextricably intertwined” with the legal
authority of the TSA, its “customer,” the TSA takes advantage of a statute
held over from the days of the FAA’s old system of security directives. This
law, found in section 46110 of Title 49 of the United States Code, transfers
jurisdiction to hear a civil action concerning these orders from the federal
trial courts (where discovery may be possible) to the federal courts of ap-
peal (where only an agency’s administrative record normally would be re-
viewed).14 This law made sense when the civil actions were filed by airlines
contesting the routine issuance of licenses and regulations, in which the
only relevant evidence would be contained in a voluminous administrative
record. Of course, the administrative record of the TSC—where the relevant
decision-making is to be found—is not easily obtainable because of the clas-
sified nature of its content and the secret criteria that govern its work. This
jurisdictional argument, routinely made by government lawyers in No Fly
List cases, adds another layer of insulation to TSC decision making.

The TSA argues that the statute applies because the No Fly List acquires
legal force as a security directive. No litigant has yet succeeded in reaching
the point where either a trial court could order discovery of the evidence
behind a decision or an appellate court could evaluate the completeness of
any administrative record that would be produced to support a decision.
As noted later in this chapter, a decision handed down by the United States
Court of Appeals for the Ninth Circuit as this book went to press may
change that litigation strategy by opening access to the TSC in the same
way that courts forced open the black box of Mrs. Shipley’s Passport Office.

1. Compiling the No Fly List

Who Decides?

One of the primary purposes of HSPD-6 and the establishment of the Terror-
list Screening Center was to consolidate control over the nation’s watchlists. In
the memorandum of understanding that provided detail to the broad objec-
tives of that presidential directive, DHS Secretary Tom Ridge agreed that his
agency would “discontinue or transfer to the Terrorist Screening Center, to
the extent permitted by law and with appropriate consultation with the Congress, those operations that are duplicative of the Terrorist Screening Center’s mission to provide continuous operational support to users of the terrorist screening database, including . . . the Transportation Security Agency’s [sic] No-Fly and Selectee list program.” What did all that mean? To what extent was TSA “permitted by law” to transfer the No Fly List to the TSC?

According to Richard Falkenrath, one of President Bush’s advisors closely involved with the drafting of HSPD-6 and its accompanying interagency memorandum of understanding, that language meant that, in the event of conflict over whether to place an individual on the No Fly List, the call belonged with TSC to make, not TSA. Admiral James Loy, who as the TSA’s second Administrator was the first to operate under HSPD-6, agreed that the final decision would belong to TSC. As Falkenrath described the objective: “We weren’t creating TSC to just be an overlay on everything else they were doing. We wanted these other agencies to stop doing their kind of solo, isolated, uncoordinated things.”

That might have been the intent of the drafters of these policy documents, but did the law permit the transfer of authority and control they envisioned? Yes. When Congress created the TSA, Congress made clear that some of the functions being assigned to TSA were not to be delegated to others. For example, TSA “shall be responsible” for the day-to-day “screening operations” (such as hiring and training security personnel) for passengers and cargo at airports, and has broad authority over many aspects of that duty. But when it came to who should control “screening information,” Congress reduced that previous language of authority ("shall") to language of mere managerial support. In a separate subsection of the statute titled “Management of security information,” Congress gave the TSA considerable latitude to decide which of these functions to hold close and which to share or delegate to other agencies. The TSA was directed to “enter into memorandum of understanding” with other Federal agencies concerning the use of screening databases, and establish procedures for submitting information to the database and relevant agencies. Congress also authorized the TSA, “in consultation with other appropriate Federal agencies and air carriers,” to establish policies and procedures “to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security.” If such an individual is identified, the TSA—again in consultation with others—shall establish policies and procedures to “notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual.” Congress told the TSA to establish policies with the assistance
of other Federal agencies, not to seize unilateral control. In other words, this was power that TSA was free to disperse.

And disperse the power TSA did. The Department of Homeland Security conceded the fight over controlling the TSC to the FBI. Now the TSA took the same backseat role that the FAA had occupied when the Intelligence Community was driving the relationship before 9/11. FAA had remained the junior partner with the FBI in creating a No Fly List after 9/11. It then was hardly a surprise that TSA delegated to TSC the final authority over nominations. This delegation occurred in an FOUO (“for official use only”) memorandum of understanding.

A good metaphor to describe this relationship is the commercial one chosen by the TSC and TSA themselves. The TSC provides specialized watchlists to its “customers,” who then put the product to use. Both Kip Hawley and Gale Rossides, in their respective tenures as TSA administrators, referred in favorable terms to the “one-stop shopping” that TSC provided to customers such as TSA. But it is the TSC that crafts the product. As TSC Director Timothy Healy explained the relationship in his testimony to the Senate in the wake of the 2009 “Christmas Day” bomber, Umar Farouk Abdulmutallab:

> When submitting a nomination to NCTC, an originator may, but is under no obligation to submit recommendations regarding specific screening systems the nomination should be exported to (e.g., inclusion on either the no-fly or selectee list). If an originator submits a nomination without a recommendation, NCTC may make an appropriate recommendation based on the totality of associated information. Recommendations made by NCTC will be passed to the TSC for final disposition.

Director Healy muddied the waters a bit as he detailed the process after a TSDB nomination is accepted. Who decides whether the identity should be added to the No Fly List?

If the [TSC] analyst reviewing the no-fly nomination determines that there is insufficient information to warrant inclusion on the no-fly list, the nomination is forwarded to the TSA (Office of Intelligence and/or the Federal Air Marshal Service [FAMS]) subject matter experts at the TSC for further analysis and a final recommendation. The TSA subject matter expert will review the nomination and all accessible derogatory information associated with the individual and
apply the no-fly and selectee list criteria to that information. Based upon that review and analysis, the TSA/FAMS subject matter expert will then decide based upon that criteria whether the individual will be included on either the no-fly or selectee list.27

This makes it sound as if TSA may have the final decision, through “subject matter experts” overseeing the TSC. The impression is misleading. First, the “TSA subject matter experts” are “at the TSC,” not the TSA. The Director does not specify whether they are detailees (temporary employees of the TSC and therefore under its control) or assignees (representing the TSA at TSC and thus still controlled by the TSA).28 But location tends to follow power, and that fact is made clearer by the Director elsewhere in his testimony:

TSC makes the final decision on whether a person meets the minimum requirements for inclusion into the TSDB as a known or suspected terrorist and which screening systems will receive the information about that known or suspected terrorist. In the end, however, TSC works with NCTC and the originators to ensure a nomination is exported to as many screening systems as the nomination information supports.29

TSA is seldom an “originator” of information. And it is the TSC that makes the final decision. “The watchlisting and nomination process,” the Director stated, “can best be described as a watchlisting enterprise because it requires constant collaboration between the originators, NCTC, and the TSC.”30 It is telling that the customer agencies—like TSA—were not included by the Director in his description of that enterprise. Customers are usually not found behind the counter.

Admiral James Loy, Administrator of the TSA from November 2002 to November 2003 and then Deputy Secretary of Homeland Security under Michael Chertoff until March 2005, confirmed this relationship.31 When detailing his people from TSA and DHS to work in the TSC, Loy challenged them “to be thoughtfully representative of quote unquote our position on these issues,” but also warned them that “as soon as you’re perceived to be a spy for TSA in that conference, you will be discounted in a heartbeat.” Loy recalled his typical meeting in his office the day before someone departed for TSC, telling them: “You are being challenged in a collaborative forum to forge the policy necessary to best protect the interests of our country, and I will back you up by telling you in advance that we will, as the operators and the executors, we will execute what you all put together at the TSC.”32
TSA’s supporting role to TSC’s dominion over watchlisting was confirmed by Michael Jackson, who helped organize the TSA as Deputy Secretary of Transportation between May 2001 and August 2003, and then succeeded Loy as Deputy Secretary of Homeland Security from March 2005 through October 2007. While emphasizing that the TSC was part of an “interagency mission that required an unusual degree of coordination and accommodation in how you manage that institution,” Jackson noted that, prior to the creation of the “Secure Flight” program in 2004, “TSC has been delegated legal authorities that exist in both agencies. So when you’re the head of that entity [TSC], you draw upon legal authorities that exist in both agencies. But you’re still acting as the head of that organization.” As detailed below, however, Secure Flight did not in fact change this dynamic.

The same TSC control—and TSA lack of control—is manifest in the auditing and revision of the No Fly List. In July 2006, the Deputies Committee of the White House’s Homeland Security Council provided additional guidance on the criteria that should be used to determine the composition of the No Fly List. The Justice Department’s Inspector General evaluated the implementation of that guidance, noting that the TSC began a review of the No Fly List, which at that time contained over 71,000 records. The review occurred at the TSC, not the TSA. Six months later, the TSC recommended that the No Fly List contain slightly more than 34,000 records and recommended a transfer of slightly more than 22,000 records to the Selectee List. Slightly more than 5,000 records were considered properly included on neither the No Fly nor Selectee list. In other words, 44 percent of the records were shifted or removed.

How involved was the TSA in this reconstitution of the No Fly List? Although the Inspector General’s auditors examined the review process in detail, the acronym “TSA” appears only once in its account: describing TSA’s role disseminating the list to commercial airlines. The reason is clear: it is the TSC, not the TSA, that has expertise evaluating terrorist information against the criteria and guidance set by the Homeland Security Council. It was the TSC’s Nominations and Data Integrity Unit (NDIU) that undertook the review and made the final recommendation.

It is true that this review was assisted by the temporary assignment of ten federal air marshals from DHS to TSC. And it is possible that future TSC reviews could be assisted by officials assigned to TSC from TSA. In 2007, seven members of the thirty-four-member NDIU staff were subject-matter experts, one or more of whom could have been TSA officials who retained roles as agents of their TSA principal. But that is a far cry from consult-
ing, let alone seeking the permission of, the TSA about what records should 
go in, and what records should come out. The process was a TSC one, as 
always, with TSA in the role of the “customer,” perhaps expressing its prefer-
ences at times, but waiting for TSC to deliver the product.

Perhaps the best evidence of TSC’s control is to be found in the state-
ments of other government agencies about the relationship. In 2005, the 
Department of Justice defended the TSA in a lawsuit brought by Robert 
Gray, a commercial pilot who sought permission from TSA to pursue flight 
training for larger aircraft. In a series of e-mails, he was denied permission 
because he was considered to “pose a threat to aviation or national security.”
When Gray’s efforts to determine the basis for this conclusion were unavail-
ing, he filed a lawsuit. About two months later, Gray amended his complaint 
to allege that TSA had added his name to the No Fly List as an act of retaliation. The Justice Department’s argument in opposition to Gray’s motion for 
a preliminary injunction was revealing:

[Gray’s] assertion belies a fundamental misunderstanding of how in-
dividuals are placed on the No Fly List. That list is maintained not by 
TSA, but by the Terrorism Screening Center (“TSC”), which was cre-
ated by the Attorney General in response to the Homeland Security 
Presidential Directive (HSPD-6) . . . [I]t is not within TSA’s province 
to place individuals on the No Fly List; to the contrary, individuals 
who are placed on either list must be nominated for inclusion by 
the FBI or the National Counterterrorism Center, subject to meet-
ing criteria established by TSA. To be sure, after an individual has 
been placed on the No Fly List, TSA will issue a Security Directive 
directing air carriers to implement specific security procedures and 
to take specific security measures with respect to those individuals 
who appear on that list. But TSA does not have authority to designate 
individuals for inclusion on the No Fly List.

Outside the litigation context, the Department of Homeland Security’s 
Inspector General concluded that following the release of the Homeland 
Security Council’s guidance on criteria for the No Fly and Selectee lists, 
“responsibility for maintenance and export of the lists was transferred to the 
TSC. Prior to this time, TSA maintained the No Fly and Selectee lists.”
Responding to a draft of this report, TSA Acting Administrator Gale Ross-
sides acknowledged to the Inspector General that “[n]ominations are pro-
cessed and adjudicated by the TSC with support from TSA.” The Inspector
General’s graphic representation of this understanding visually depicts TSA’s delegation of authority to the TSC (a rendering without color or graphics is made in figure 8). It is clear that ownership of the No Fly List belongs to TSC, which composes the list, periodically revises it, and maintains a base of expertise (not to mention authority delegated from TSA itself) to resolve problems raised by the list.

**What Are the Standards?**

Under what standard, then, does the TSC determine who should be included on the No Fly List? According to Mr. Healy,

> The no-fly and selectee lists are unique among TSDB subsets in that they are the only subsets within the terrorist watchlist that have their own substantive minimum derogatory criteria requirements, which are considerably more stringent than the reasonable suspicion standard required for inclusion in TSDB itself.

This statement must be read carefully. It conflates standards (an evaluative test of evidence) with criteria (the evidence itself). In doing so, it creates the misperception that a higher burden is required to add a name to the No Fly List and Selectee List than is used to evaluate nominations to the TSDB. The statement does not say that the reasonable suspicion standard is not used to evaluate nominations to these lists. In fact, it doesn’t really say anything at all.

The criteria for inclusion in the TSDB are “at least a partial name (e.g., given name, surname, or both) and at least one additional piece of identifying information (e.g., date of birth),” and some “evidence of a nexus to terrorism.” Saying that the “substantive minimum derogatory criteria” for the No Fly List and the Selectee List are “considerably more stringent” than criteria for inclusion on the TSDB is meaningful. But saying that the criteria are more stringent than the reasonable suspicion standard makes no sense. It is saying that the evidence required to make a decision is more stringent than the standard for evaluating evidence, a comparison of two different things.

The derogatory information that must pass that standard for a successful nomination to the TSDB is fairly minimal. In 2007, only some “evidence of a nexus to terrorism” was required. Any substantive minimum derogatory criteria requirements for the No Fly List would likely be higher than that modest requirement for a successful nomination to the TSDB. The specif-
Fig. 8. The DHS View of the No Fly List Nomination Process. (Data from OIG analysis.)
ics are, of course, classified. These criteria were established by the Deputies’ Committee of the Homeland Security Council based on the recommendations of a working group in October 2004, then revised in July 2006, and revised again in 2008.47 In July 2010, the TSC released a new guidance document that made changes to definitions and wording for at least one of the criteria for inclusion on the No Fly List.48

But whatever the substantive minimum criteria might be, derogatory information still needs to be evaluated to determine whether the criteria are in fact met. So the question remains: what standard does a TSC analyst use to conclude that a successful nomination to the TSDB is also sufficient to meet the “more stringent” criteria to include someone on the No Fly List? Should the analyst be certain that the information is true beyond a reasonable doubt? Convinced that the available evidence about this individual is more likely than not to meet these criteria, and thus pose a threat to civil aviation or national security sufficient to justify placement on the No Fly List? Or perhaps the analyst should merely be able to articulate facts adequate to form the basis for a reasonable suspicion that the criteria are met?

The policy implications of such a question may be more important than establishing the particular “substantive minimum derogatory criteria requirements” themselves. Counterterrorism is a piecemeal game of putting together fragmentary information, assessing the shards, and trying to see in the mosaic that they produce a clearer picture of the threat. Suppose that one of the “substantive minimum derogatory criteria” were that there be evidence that a person has the technical ability to threaten an aircraft’s security, for example, that the person is a bomb maker. That requirement is only the first step. What evidence satisfies that criterion? How much should the analyst trust the information that comes across his screen? Is it enough to show the requisite ability? Is the source reliable? Adjusting the standard for evaluating information affects the outcome of the decision. And the shift can be enormous: from the beyond-a-reasonable-doubt level of confidence that a jury must possess to render a guilty verdict to a mere hunch.

Both the hunch and the jury’s standard have been disavowed by the TSC as too extreme.49 It is widely accepted that beyond-a-reasonable-doubt certainty for watchlisting is far too high. And Timothy Healy has made clear that more than a hunch is necessary even to get past the TSDB nomination process. But that still leaves a broad middle ground of options from which to choose a standard. What should the supervisor tell the analyst who asks, “Is this fragment of information enough?”

High-level individuals familiar with the process found it quite difficult to speak about the problem in a way that did not reveal classified information.
One person attempted to explain by saying that the analyst would look at the totality of the circumstances to determine whether the criteria were satisfied. But by what standard would that totality be judged? Was it sufficient merely to be reasonably suspicious that the totality of the circumstances satisfied the criteria, or more certain of it? After much discussion, others suggested that part of the difficulty in answering the question lay in their inability to reveal the criteria being evaluated. It could be said, one person concluded, that the analyst must at least have a reasonable suspicion that the criteria were met, but the process of decision making is hard to reduce to the traditional legal standards familiar to lawyers.

“At least” is a pointless modifier. Setting a floor sets the standard. The answer thus turns out to be the same as before: the low hurdle of the reasonable suspicion standard.

How could this be? The State Department ultimately lost its legal battles to use the reasonable basis standard (i.e., Mrs. Shipley’s judgment) unconstrained by judicial review to control travel. But that loss was because the “reasonable basis” standard, if met, resulted in a concrete injury: denial or loss of a passport. The TSC perhaps recognized that its two-tiered system of watchlisting had the unexpected benefit of shielding the TSDB from that objection.50 No objection could be lodged to the lawful collection of information that the government believes important to decide questions of national security. And when the TSC perceives a reasonable basis to accept a nomination to the TSDB, no immediate injury results from that determination. The decision is simply to add the name to the consolidated pool of “known or suspected terrorists” from which downstream watchlists may be derived and distributed to other government agents. On the other hand, the No Fly List does result in a concrete injury (the denial of the use of commercial air transportation). Therefore, the TSC needed new legal arguments for what was essentially the old legal standard. Where did their legal basis for this standard come from?

The differences between Secretary Acheson’s expression of the reasonable basis standard and Director Healy’s description, above, may be attributable to a Supreme Court decision handed down in the intervening years. The standard the TSC uses is derived from the Supreme Court’s opinion in Terry v. Ohio,51 which upheld the power of police to briefly detain, question, and frisk an individual on grounds less than probable cause: the police officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”52
is derived, the working group was well aware that the *Terry* case concerned the use of the “reasonable suspicion” standard by law enforcement officials in a criminal investigative context. Some concern was expressed about applying this standard in the intelligence context. Participants therefore were careful to use the *Terry* case only as a starting point for discussion. Thus, the working group did not concern itself with the focus in the *Terry* case on officer safety, or the time limits placed on the limited detention permitted by this standard. It was not the intention of the working group to adopt the *Terry* standard as such, but to use the case only as a starting point for guidance in defining the phrase “reasonable suspicion.” This is reflected in the name adopted for the standard ultimately adopted by the working group: the “Reasonable Suspicion Standard,” not the “*Terry* standard” known to specialists in criminal procedure.53

Whatever the label, and however stringent the substantive criteria, the standard is a low one. The result is a five-step decision-making process. A name will be added to the No Fly List if affirmative steps are taken at each point in the following process:

1. A nomination is submitted to the TSC from the NCTC or the FBI for inclusion in the consolidated watchlist (the TSDB);
2. The TSC confirms that the nomination contains the minimum biographical information in the correct formats;
3. If the minimum biographical information criteria are met, the TSC analyst determines whether reasonable suspicion based on articulable facts exists to conclude that the individual is a “known or suspected terrorist,” that is, there is “evidence of a nexus to terrorism,” as those phrases are specially defined;
4. If there is such reasonable suspicion, the nomination is successful. An unclassified but law enforcement sensitive record is entered into the consolidated watchlist (the TSDB);
5. That record is now assessed for inclusion in “downstream” watchlists. To determine whether the nomination should also be included in the No Fly List, the analyst must have at least a reasonable suspicion based on articulable facts that the more stringent substantive minimum derogatory information required to show that the individual is a threat to “civil aviation or national security” exists. Close cases may be assisted by TSA detailees to the TSC, but the final decision is made by the TSC.

Of course, legal standards mean little if they are not applied. As Mrs. Shipley ably demonstrated, departing from standards is especially easy
when the exercise of discretion is unchecked by outsiders. That is why the Supreme Court premised its “Terry stop” standard on “the more detached, neutral scrutiny of a judge” that would follow. Capable officials tend to have little difficulty justifying departures, too. As the TSC started up in 2004, overinclusion was justified as the natural effect of gradually starting up a new office and creating a consolidated list out of disparate sources. When Justice Department auditors criticized continued problems of overinclusion in 2005, then TSC Director Donna Bucella suggested to them that an even lower standard might be the norm: “She informed us that, to err on the side of caution, individuals with any degree of a terrorism nexus were included in the TSDB, as long as minimum [identifying] criteria was [sic] met.”

Not everything is the same as in Mrs. Shipley’s day; some things are worse in the digital age. First is the steady expansion of the No Fly List. As the history of the passport reveals, and Mrs. Shipley’s reign confirmed, there exists constant and omnipresent pressure for expansion of systems of travel control. The No Fly List is no exception. Second, although Mrs. Shipley was a hero to some and a tyrant to others, at least her office was the identifiable source of a traveler’s frustrations. Eventually, courts forced open her closed system of travel controls. As the redress process makes clear, the operative force behind the No Fly List—the TSC—has been carefully shielded from judicial scrutiny by hiding its decision making behind a remnant of the old FAA power to issue security directives. These problems are examined in the following sections.

2. Expanding the Mission

Dean Acheson offered a statistical defense of Mrs. Shipley’s war on Communism. At the peak of her power, the Secretary of State took a sampling of her work: in a universe of 325,000 passports issued between July 1951 and June 1952, only 95 passports were recalled and another 95 requests for passports denied, either because of membership in a subversive organization or because of evidence of some other subversive intent by the passport holder. In other words, criticism of her program was much ado about nothing.

Timothy Healy, the Director of the Terrorist Screening Center, took a similar approach to the defense of his program. In testimony to the Senate Homeland Security and Government Affairs Committee in early December 2009, he emphasized the small number of Americans on the list: “Most of the individuals on the Terrorist Watchlist are not U.S. citizens, but are ter-
rorists living and operating overseas. The Terrorist Watchlist is made up of approximately 400,000 people. ... [T]he ‘No Fly’ list is a very small subset of the Terrorist Watchlist currently containing approximately 3,400 people, of those, approximately 170 are U.S. persons.”

Of course, numbers without context are meaningless. A timeline of the No Fly List’s growth helps one assess a number that will continue to grow. On September 11, 2001, the FAA’s Security Directives identified only about a dozen individuals to be denied transport because they posed a “direct and credible threat to aviation security.” In the aftermath of the attacks, that number changed daily. By November 2001, it had grown to 400 names. By mid-December, the now divided No Fly and Selectee lists contained 594 names and 365 names respectively. Others gave more extreme estimates, not always accurately. According to a former vice president for security at United Airlines, within a week of September 11, the No Fly List had grown to over 1,800 names. In comparison with these other sources, this number appears too high. But this testimony and other statements in the press gave the impression that the No Fly list was out of control, expanding daily and seemingly without limit. It is more accurate to say that in its early days the No Fly List more closely resembled an accordion, expanding and contracting as the FBI pursued its investigation.

By the middle of the decade, audits of the existing list and a tightening of criteria for inclusion on it had pared down the numbers. In July 2006, the No Fly List contained 71,872 records, which an internal review reduced to 34,230 records by February 2007. (Because some of those records could—and likely did—refer to the same individual identified in different entries, the number of discrete persons on the list was still lower, but not publicly disclosed.) As of September 30, 2009, the number of people on the No Fly List was 3,403, of which 171 were U.S. persons.

But just over a year after Umar Farouk Abdulmutallab attempted to explode a bomb on board Northwest Airlines Flight 253 on Christmas Day 2009, TSC Director Timothy Healy told National Public Radio that the No Fly List had grown. In a January 2011 radio interview, Director Healy said that the No Fly List contained the names of about 10,000 people, and that the number of “U.S. citizens on the no-fly list is even much smaller, between 500 and 1,000.” In other words, between September 2009 and January 2011, the number of people on the list had increased almost threefold and the number of American citizens on the list could have increased by as much as a factor of six. In February 2012, an unnamed counterterrorism official told CNN that the No Fly List had doubled in the last year, to 21,000 people. Note, too, that the number has grown even as the categories for measure-
ment have narrowed from the broader “U.S. persons” (which includes permanent resident aliens) to U.S. citizens.

It is unsurprising that the No Fly List should have grown, and grown so rapidly. First, the starting point was zero or near zero—no such list had existed before 9/11, and the FAA’s Security Directives contained just a handful of names. Second, the TSDB from which the No Fly List was created was itself growing at an extraordinary rate of speed. In the four years between April 2004 and April 2007, the number of records in the TSDB quadrupled to over 724,000.66 The influx of more and more records to evaluate naturally led TSC analysts to find more and more cases that fit their changing criteria for inclusion in the No Fly List.

From Aviation Security . . .

It was hard to resist the urge to do more with watchlists then their original purpose required, especially when watchlists were capable of doing so much more. If the post-9/11 goal was to push the border outward—to check people and things long before they ever arrived at the airport—watchlists like APIS or TIPOFF fit that new thinking perfectly. The process could begin even before a ticket was purchased, a visa granted, or a customs checkpoint reached, and the government’s power to act on information it gathered about the traveler could be ratcheted up at any number of decision points.

In the aftermath of September 11, the FAA’s old Security Directives were out of sync with this new thinking and operated quite differently than APIS or TIPOFF. To be effective, the FAA’s directives required the speedy compliance of private airlines; APIS and TIPOFF were entirely government-controlled lists that required no private party cooperation to operate successfully. Security Directives were a last line of defense, responding to specific and credible intelligence of impending threats to security that had evaded regular law enforcement; APIS and TIPOFF had a more passive orientation, accumulating data routinely accessed as a regular response to visa applicants and border crossers.

These nuances were not well received by members of the 9/11 Commission. When the FAA’s Claudio Manno responded to questions about the FAA’s failure to use the State Department’s TIPOFF system, which contained more than 60,000 names, by asserting that the airlines would have been unable to handle such a large list of names, Commissioner John Lehman responded with anger: “But they sure had no trouble handling their frequent flyer lists—I mean that’s ridiculous.”67 That these lists were composed for different purposes, based on different standards, and not computer-searchable
other than by proper name, did not hold the commissioners’ interest. Sure enough, the report that the Commission released in July 2004 contained a recommendation that TSA should not limit itself to the narrow confines of the existing No Fly List, but rather “utilize the larger set of watchlists maintained by the federal government.” Expansion was in the air.

The commissioners had been in no mood to observe government officials blaming each other for hoarding intelligence, or exchanging accusations with airline officials about the proper cost-benefit balance. Information sharing to prevent the next terrorist attack was the singular focus of the Commission’s attention. Commissioner Timothy Roemer was livid:

"Your list, according to what you just said, or what our staff has told me, is 12 people. So there’s a difference of 60,988 names, a difference of 60,988 names between what’s been accumulated at the State Department as dangerous people, shouldn’t be flying, and what you have with your 12 people. Now, I can’t understand why there are not more efforts in liaison activities to reach out to State Department and start to bring some of those names over and prevent those people from flying."

Claudio Manno sought to explain that Security Directives were limited to those individuals about whom there was “specific and credible information that they posed a threat.” Furthermore, Manno emphasized that “it was simply very difficult to get clearance from the [Intelligence] Community in cases where there wasn’t a direct connection to civil aviation for them to get the release information. We had to justify that in each case. Now, did we do it? Did we go in and say we want all 61,000 of these names? No, that was not—we didn’t do that. We focused on the information, again, that was specific to aviation at the time.”

As noted above, that restraint did not last long. The State Department’s TIPOFF list and the FBI’s VGTOF list were among the first to be dumped into the new No Fly List. Nevertheless, although the number of people on what became the No Fly List skyrocketed after September 11, Claudio Manno, the man initially in charge of it, remained adamant about the limited purpose of the No Fly List: “[T]he benchmark for credibility must be set sufficiently high to ensure that only individuals who present a danger to U.S. aircraft or aviation assets are prohibited from travel.”

But that standard was immediately undercut by transferring de facto authority to the FBI to dictate its contents. As Stewart Verdery, former Assistant Secretary for Policy and Planning in the DHS Border and Transpor-
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tation Security Directorate observed: “Essentially the theory after 9/11 was, we are not going to let that happen to us again, . . . any plausible problem [person] is going in. And then, for every name you throw in you’re creating lots of problems for other people who have similar names. And there were all these cases of the FBI throwing in Russian criminals from the fifties and IRA people from the seventies, not to mention you have the current crop of problematic persons.”72 Richard Falkenrath, who as the Deputy Homeland Security Advisor sought to impose coherence and order on the system by creating the TSC, himself admits to the overpowering temptation this new tool presented: “All I know is, at the White House we would routinely just shout out this person has got to be no-flied. And, you know, we expected it to happen.”73

Even if Manno’s exhortation to remain focused on threats “specific to aviation” reflected a strong desire at the FAA, that feeling was not shared by an intelligence community awakened to the potential power of Security Directives transformed into a No Fly List. And even if FBIHQ could have been persuaded to come around to the FAA’s way of thinking, FBI agents in the field enjoyed an extraordinary autonomy. The description of a former assistant INS commissioner about that agency’s decentralization might apply even more to the relationship of FBI field offices to headquarters: “The mountains are high and the emperor is far away.”74 The power of such a list was too great a temptation for agents who had been told that preventing another terrorist attack was their number one priority.

Indeed, as noted above, Congress had subtly expanded the contours of the No Fly List when it created the TSA in November 2001. The TSA now had the power to require air carriers “to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security” and, if so identified, “prevent the individual from boarding an aircraft.”75 A whole new world of opportunity was packed into that new, small disjunctive clause “or national security,” which had never before been part of the FAA’s mission.

The Security Directives—previously so undervalued by an intelligence community that could be stingy with the intelligence it shared—had grown quite popular as mechanisms to distribute the No Fly and Selectee lists.76 In addition to the FBI, the CIA and other agencies sent TSA requests to add names to the lists. In December 2001, when the No Fly and Selectee lists were created under those names, the TSA still tried to emphasize two primary guidelines for use of the lists: (1) “Does the individual present a threat to civil aviation?” and (2) “Is there sufficient unclassified biographical data to ensure proper identification?”77 In other words, use of SDs was still
limited to individuals who “presented a specific known or suspected threat to aviation.”

But the genie was out of the bottle. Increasingly, limiting these lists to a “threat to civil aviation” seemed inconsistent with the broader post-9/11 mandate and therefore subject to question. In a TSA PowerPoint briefing to congressional staff on November 12, 2002, the TSA identified a new issue: “Difficulty in determining who poses a threat to aviation and why.” The preparation of “criteria for placement of individuals on the lists” was identified as a next step. This would be an odd slide to show congressional staff if the No Fly List were still believed to play the same role that Security Directives did before September 11. The fact is, nobody believed that it should anymore.

... to National Security

In his testimony to the Senate Homeland Security Committee in March 2010, TSC Director Healy described the steps in this progressive expansion of the scope of the No Fly List:

Following the creation of the TSC in 2003, the Homeland Security Council Deputies Committee established the initial terrorist screening nomination criteria for the no-fly and selectee lists in October 2004. At that time, the no-fly list consisted of substantive derogatory criteria that focused attention on individuals intending to commit acts of terrorism against civil aviation or the domestic homeland. Over time, that initial criteria proved to be too restrictive. Consequently, in February 2008, the Homeland Security Council Deputies Committee approved additional criteria that served to broaden the scope of terrorists eligible for the no-fly list. In other words, the criteria to place individuals on the no-fly list has broadened to make the no-fly list more inclusive to respond to additional terrorism threats.

Now, the No Fly List prevents the travel of “known or suspected terrorist[s]” who “present a threat to civil aviation or national security.” Both of these elements have expanded far beyond the original objective of ensuring the security of commercial aircraft. It is difficult to give credence to the assertion that the list is “not for use as [a] law enforcement or intelligence-gathering tool[].” Indeed, in an FBI component entirely the creation of the Executive Branch, what save executive discretion establishes this limitation?
Consider the first part of the equation, the determination that a person is a “known or suspected terrorist.” The publicly released definition of this phrase is sufficiently broad to include those who are or have been “engaged in conduct constituting, in preparation for, in aid of, or related to” terrorism. The most recent published references to the watchlisting guidance used by the TSC define a known terrorist as “an individual who has been convicted of, currently charged with, or under indictment for a crime related to terrorism in a U.S. or foreign court of competent jurisdiction.” A suspected terrorist is “an individual who is reasonably suspected to be, or have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on an articulable and reasonable suspicion.”

At first glance, terrorism might seem a word that needs no definition; as U.S. Supreme Court Justice Potter Stewart once wrote (and later regretted writing) of hard-core pornography: “I know it when I see it.” But the term is not consistently defined in federal law: Congress defined the term quite broadly in requiring the State Department to deliver annual reports, but more rigorously in the contexts of terrorism prosecutions, and with even more detail for purposes of regulating immigration and naturalization. Depending on the chosen definition, the associates of a suspected terrorist may be chosen from a series of broad concentric circles.

The choice of definition sets the parameters for exercising powers circumscribed by the term—what is a terrorist and what does it mean to be associated with one? Judge Joyce Hens Green famously illustrated this definitional power by asking a Justice Department lawyer whether a “little old lady from Switzerland” could be detained as an enemy combatant for unwittingly contributing to a faux charity that used her money to finance Al-Qaeda terrorists (the lawyer, Brian Boyle, unhappily conceded that the Government could do so in theory but would refrain in practice). Unlike the self-restraint on its prosecutorial discretion exercised by the Justice Department, the TSA preferred to err in the opposite direction: associates was a broad term that could include spouses, children, relatives, and others with mere acquaintance to the “known or suspected terrorist.” The result, compounded by the limitations of a name-based list, was that little old ladies, as well as infants, the deceased, and other unlikely terrorists and their associates routinely made it on to the early lists. Remember Cat Stevens—both the singer and the former Senator’s wife?

The disjunctive clause separating “civil aviation or national security” is another broad source of expanding power. The No Fly List is not a system limited to protecting the physical security of commercial airlines. A person...
Mrs. Shipley’s Ghost

who presents no known threat to civil aviation, but who is considered a threat to broader national security interests, is a candidate for the No Fly List. In fact, Congress ordered that anyone ever detained at Guantánamo Bay automatically be added to the No Fly List without evaluation under any other criteria. The nature of the No Fly List makes its limitation an exercise in self-policing. And, like the pressures operating on Mrs. Shipley, those who compile and manage the No Fly List operate under constant pressure to expand its coverage.

How far could “or national security” extend? Could the key financier or strategic mastermind of a terrorist organization be considered a sufficient threat to national security (although not necessarily a threat to civil aviation)? High-level officials criticized this hypothetical as an overly broad reading of the phrase “national security.” The phrase, they said, is meant to include only actual physical threats of death or destruction that would be facilitated by travel on board an aircraft. Thus, a terrorist intending to blow up a building in a city to which he seeks to travel by plane would fit this description and therefore be subject to the No Fly List. Financiers and strategic masterminds were not sufficiently immediate threats to national security as that term was understood in this context.

But what legal authority placed such a constraint on the term “national security”? Where did the limitations of immediacy, and actual physical threats come from? There is no legal document requiring this interpretation. It is a limit placed only by implementation guidance found in various policy documents vetted nowhere outside the Executive Branch and susceptible to no outside constraint.

But even these limitations seem breachable. Consider, for example, the September 2004 unscheduled landing in Bangor, Maine, of the London-to-Washington United Airlines flight that carried Yusuf Islam, the folk singer formerly known as Cat Stevens. In a break with protocol, DHS Secretary Tom Ridge confirmed that the musician was on the No Fly List (while distancing his department from any blame for the action by noting its passive receipt of intelligence for use in the No Fly List). “Celebrity or unknown,” he said, “our job is to act on information that others have given us. And in this instance, there was some relationship between the name and the terrorists’ activity with this individual’s name being on that no-fly list, and appropriate action was taken.” According to DHS spokesman Brian Doyle, his boarding had been a mistake because the federal government had information that “further heightens concern” about him.

Was Cat Stevens placed on the No Fly List because he was “a threat to civil aviation”? Not in the FAA’s original meaning of that term. There was
no concern that he was a bomber or a hijacker, or scouting out security and aircraft details for a future attempt by someone else. If he were suspected of such an intent, then the decision to allow him to fly from Boston to Washington, where he then caught a second flight to return to London, would seem to have been particularly improvident. The previous May, he had meetings about his philanthropic interests with President Bush’s White House Office of Faith-Based and Community Initiatives.

How about a threat to “national security”? That was the reason given by DHS spokesman Dennis Murphy for his detention upon arrival in Maine. Another federal official speaking with a promise of anonymity told CBS News that he was suspected of making donations to Hamas and Omar Abdel-Rahman, the “blind sheikh” convicted for his part in the 1993 World Trade Center bombing. If suspicions about his donations were the true cause of his watchlisting, that would fit the working definition of someone whose conduct (giving money) was “in aid of” or “related to” terrorism. Both the “blind sheikh” and Hamas are serious threats to national security.

DHS spokesman Brian Doyle: “Why is he on the watch lists? Because of his activities that could be potentially linked to terrorism.” Financiers and masterminds.

Criteria agreed by a multiagency memorandum of understanding are supposed to limit the inclusion of individuals to only those who fit agreed profiles. But these minimum criteria are not only self-imposed, they are subject to override. According to then TSC Deputy Director for Operations Christopher Piehota, TSC personnel screen nominations to be sure that each nomination “is supported by the minimum substantive derogatory criteria for inclusion in the TSDB, with limited exceptions, as well as the additional derogatory requirements for the No Fly and Selectee lists.” In fact, Deputy Director Piehota acknowledged that even the Terry stop standard for nominations is not an absolute requirement for inclusion: “Generally, nominations to the TSDB are based on whether there is reasonable suspicion to believe that a person is a known or suspected terrorist.” The exceptions that the Deputy Director implied were left unstated, but it is not a stretch to presume that they reserve authority to summarily add names to the list based on the perceived urgency of an operational need.

An example of how easy it was to succumb to pressure to make such exceptions is suggested by a recounting of “Terrorism Tuesdays” in the Bush administration. According to Michael Jackson, the chief operating officer of the Department of Homeland Security from 2005 through 2007, “we used to have what we called Terrorism Tuesday when Chertoff was secretary. So on every Tuesday morning after the President’s foreign intelligence briefing
[composed of the President, the Vice President, the National Security Advisor, the DNI, the President’s CIA briefer, and the Chief of Staff], the session would be expanded and added to that would be the Attorney General, the Secretary of Homeland Security, the FBI Director, Fran Townsend, acting as a national security advisor." Jackson remembers the sessions he attended in Secretary Chertoff’s place:

So I frequently went through this session and you’d read a certain thing and at a certain point the President or somebody in the room would look up and they would look over to the FBI Director and say, or the AG or somebody, and say “And this guy’s on the watchlist, right?” . . . The first time I saw that it was like, well, we’re going to do that but we haven’t done that. Well, that goes along. You know, there’s only so many times you can get beat up by the President of the United States and asked this question, where you know when you come in, when you’ve got a case where there’s a significant concern enough to where you’re briefing the President of the United States, that you say: “and we’ve already got the guy on the watchlist.”

How did it feel to get “beat up” by President Bush? “You know, because he just looks at you like, are you stupid? . . . But then he would rightfully ask, ‘Is he on the watchlist?’ And it was just not acceptable to say no if you thought that he was seriously enough a problem to be in there briefing POTUS about it.”

Could such a feeling trickle down to influence the level of people who weren’t important enough to brief the President, but who were briefing those that were? Did Michael Jackson ever give that same look and ask those same questions? By way of example, Jackson turned the conversation to the case of the Ismail family, the focus of chapter 2:

So when you asked the question is it plausible for an SAC to put somebody on the list, if the SAC was running a major investigation and that investigation looked pretty dicey, it doesn’t seem at all unlikely to me that at some point the SAC says to somebody, you know, put them on the watch list. Does that mean that he sat down at his e-mail and filled out a form and sent it in? No, you know, shit, for all I know maybe he did.

In other words, while legal standards and objective criteria were all well and good, when the right people determined that someone needed to be put
on the watchlist, it happened. And not just for the safety of air travel: “I
did care that if we thought that there was some significant trouble that you
could make sure that you foreclosed the possibility that that could turn into
an airplane bombing. Or that they were just going to willy-nilly come here and
disappear into the country, which goes to the second half of your question about
protecting the airplane or national security.”

This expansion is absolutely natural. Why wouldn’t the men and women
tasked with tracking dangerous terrorists and national security threats, every
day, month after month and year after year, want to expand the use of this
watchlisting tool? To acknowledge this pressure, this intense focus on pre-
venting another terrorist attack, is not to question their professionalism. It
is simply to ask if, given such pressures, those in whose hands this powerful
watchlist has been placed should also be left to police themselves about its
use.

As it turns out, the temptation has proven to be too much.

Secure Flight

The expansion of “mission creep” could take other forms beyond an ever
broadening definition of the criteria for watchlisting. It was perhaps inevi-
table that TSA would eventually displace the airlines in enforcing Security
Directives. Originally, the airlines were expected to implement the No Fly
List themselves, just as they had complied with Security Directives in the
past. This proved disastrous and led to the conclusion that prescreening
against the watchlist should be considered an “inherently governmental
function.” Distributing lists to airlines compromised the security of the
lists and injected too much variability into their use. Airline personnel occa-
sionally informed passengers (rightly or wrongly) that they were watchlisted,
notwithstanding the instruction that all lists should be treated as sensitive
security information (SSI).

To eliminate these problems, and to decrease the number of false-positive
matches with the No Fly List caused by the similarity between watchlisted
names and unsuspected travelers, the TSA created the “Secure Flight” pre-
screening system. Congress gave the green light for this shift to greater
government control in the Intelligence Reform and Terrorism Prevention
Act of 2004. Importantly, however, Congress shifted to TSA only the min-
isterial task to perform “the passenger prescreening function of comparing
passenger information to the automatic selectee and no fly lists and utilize
all appropriate records in the consolidated and integrated terrorist watch-
list maintained by the Federal Government in performing that function.”
Congress did nothing to shift the discretionary power to decide whose names should appear on those lists. That power remained uniquely lodged in the TSC. In fact, in its own final rule implementing the limited power Congress gave it, the TSA explained that “TSA defines ‘watch list’ for purposes of the Secure Flight program as the No Fly List and Selectee List components of the Terrorist Screening Database maintained by the Terrorist Screening Center.”

This is how Secure Flight works today. TSA now obtains an electronic record of the full name, date of birth, and gender of every passenger at the time a ticket is purchased. That data is then compared to the relevant watchlists, including the No Fly List; TSA sends watchlist “hits” to the TSC for final adjudication. Airlines must submit this data at least seventy-two hours before the scheduled departure; last-minute ticket purchases made within that time period must be submitted immediately. TSA presents Secure Flight as a service to the traveling public (like Mrs. Shipley’s passports), providing security while expediting the processing of false positives. Figure 9 shows how TSA presents the system in graphical form (a full-color figure appears on the website).

Having identified prescreening as an “inherently governmental” function, Secure Flight seems the natural next step. But the graphic reveals its power. To use a commercial aircraft to travel within, out of, or into the United States, an individual must now (1) purchase a ticket from an airline, and then (2) seek permission from the U.S. Government to use it.

As this graphic implies, Secure Flight has other advantages beyond decreasing false positives. Secure Flight could provide flight information to TSA well in advance of departure, thus “pushing back” the border, especially on international flights. Naturally, earlier access to data encouraged greater use of it. As the Inspector General for the Department of Homeland Security observed, “with the Secure Flight program, in cases where certain yet-to-be-defined security considerations exist, TSA could screen against the federal government’s entire consolidated terrorist watch list for particular flights or routes.” In other words, Secure Flight worked a trifecta: prescreening earlier, with a bigger watchlist, based on security considerations that were open to redefinition.

Remarkably, if almost certainly unintentionally, this Secure Flight system is little more than a computerized version of Mrs. Shipley’s “red card” system, which she used to flag suspect passport applicants: “Red cards list identifying information, such as the date and place of birth, to keep the innocent from being tagged with a guilty record through similarity of names. Each card carries a code to a full file. The file contains all available information—whether the person concerned is a Communist, a dope addict, a criminal,
Fig. 9. TSA Graphical Representation of the Secure Flight Program
or just has views that might embarrass policy makers if he expressed them in a foreign land.”116 But the result is just the same: as in Mrs. Shipley’s day, a traveler is only allowed to proceed on his itinerary once the state has satisfied itself that he should be allowed to go.

3. Shrinking Responsibility: The Redress Shell Game

In *The Closing of the American Border*, Edward Alden summarized the early policy thinking that went into the creation of a new border agency, Customs and Border Protection: “What it added up to was a faith in the government’s ability to use technology and intelligence to sort the bad from the good.”117 The very same attitude animated thinking about the use of terrorist watchlists under the control of the Terrorist Screening Center and utilized by the TSA. But what happens when a would-be traveler complains that unseen government officials got it wrong? From whom should the thwarted traveler seek a remedy? This section analyzes the failure to adopt a recommendation of the 9/11 Commission that went hand in hand with its encouragement of greater watchlisting: “If the power is granted, there must be adequate guidelines and oversight to properly confine its use.”118

Among the 9/11 Commission’s criticisms was the charge that responsibility and accountability in counterterrorism efforts were too “diffuse.”119 The TSC was one response to that criticism. Ironically, consolidating intelligence sharing and watchlisting in the TSC concentrates information inside the Government, but in a way that thwarts outside attempts to hold accountable the actual officials in charge. Digitizing Mrs. Shipley disperses her ghost throughout the machine. She is omnipresent but untouchable.

Those who created this system view this intangibility as an asset, not a liability. DHS Deputy Secretary Michael Jackson highlighted the need “to execute an interagency mission that required an unusual degree of coordination and accommodation in how you manage that institution.”120 He was not concerned that such a system could confuse the lines of delegated authority to the point that it becomes hard to distinguish TSA orders from TSC recommendations, or vice versa.121 Senior officials present at the creation of DHS, TSA, and TSC praise the synergies, fluidity, and responsiveness that they built into this new interagency system. The checks and balances that traditionally constrain zealous government officials from exceeding their mandates were not part of this picture. Like the redress process itself, this was an afterthought. As Jackson recalled, in the early days “It was chaos. And
so they were happy just to have a No Fly List, . . . so some [innocent] guy turns up on the No Fly List, and it’s a problem. We’ll deal with that problem when it comes up.” Admiral James Loy, the second administrator of the TSA, concurred. The formal and institutional checks on discretion within this new security directive-driven system were “TBD. That’s where it was in those days. To Be Determined.”

This attitude of afterthought for dealing with that problem “when it comes up” illustrates the singular focus of the officials who first created the No Fly List and then began to establish the structures to give it permanence. In light of the unknown dangers and fears of another terrorist attack, Jackson continued, “I think it was considered to be a relatively acceptable trade-off that [for] some people who had duplicate names that triggered them as a selectee, . . . we would work through a process of building a system that you would have a redress capability to give your number in and then get, tell you how to get around it.”

But this attitude, initially justified by the desperate circumstances after 9/11, never went away. Instead, it permeated later thinking. There was no perceived need for an external authority, let alone a judicial authority, to determine when to interfere with a citizen’s travel. Discussing a threat perceived in August 2007, Jackson summarized his view of the relationship between the No Fly List and the redress process:

I think that erring on the side of caution to put people on the list in the heat of the circumstances is what happens and it’s right. And then, over time, . . . maybe that person’s going to end up as, not a no fly, but likely would be, say, a selectee. But depending upon the nature of it, it could be a no fly. And it might be three months or four months before everything got settled out and they go back and they say okay, it’s all right, now let me look at this and we don’t need this person here on the list. It might be six months, I don’t know, I don’t know the answer. But it’s not an unreasonable inconvenience to impose upon certain parties. What would be unreasonable is if there’s not a way to ultimately evaluate one of those cases and obtain redress if it has languished there too long. So that’s what the whole redress process is about. So I think that it’s fair and it’s true to say that nominating agencies are given quite a bit of latitude to put somebody, to err on the side of caution. But that they are instructed to have a culture at the watchlist-operating level to compel routine reexamination of the nominations and to see what happens with those.
In other words, say the creators of the lists, trust us to police ourselves, to develop the proper “culture” among our closed ranks to get the balance right. But don’t interfere with our work by imposing outside scrutiny of our decisions.126

The problem is that the keepers of the watchlists, from the heights of policymaking to the operational trenches, are poorly placed to exercise such self-restraint. The culture that will develop is one that naturally will diminish the importance of individual liberties in the light of perceived threats to the nation. It is easy to understand how the daily onslaught of intelligence briefings that present risks and threats and dangers could produce such an attitude. The binder that Vice Admiral John Redd perused each dawn as director of the NCTC was four inches thick.127 This binder, one of many such binders reviewed each morning by senior government officials responsible for national security, was filled with an ever-changing “threat matrix” of as many as “sixty or seventy potential terrorist threats against the United States.”128 Those who receive it report “a profound impact on one’s thinking—it’s hard to ever see the world in the same way after witnessing the worst that humans can imagine doing to others. It hangs over you all day and each night.”129

There are two problems with the view that the officials in charge of the No Fly List should be left unconstrained by outsiders, that they should be trusted to develop the proper culture within their ranks to make prudent choices about when and how much to infringe the freedom of movement of their fellow citizens. The first problem is bias from within. The second is pressure from without.

To suggest bias is not to suggest malice. It is simply the natural result of the day-to-day experience of a keeper of the watchlist, especially those at the higher levels of government. Michael Jackson’s experience as a senior trusted advisor provides insight into how that worldview is shaped. Jackson described his morning routine during the two years that he was the chief operating officer for the Department of Homeland Security. It was a routine, he said, similar to that experienced by his counterparts at the NCTC, FBI, NSC, Defense Department, and other top positions in the country’s homeland security apparatus:

I was a Secret Service protectee. So every morning, 6:30, the car’s out there, the armored guy and the guy in the front seat with the gun to jump in front of a bad guy for you. That’s a pretty humbling position to be in, to be a Secret Service protectee. But they show up and the first thing you get is the list of the overnight horribles. And
you start tracking them. And you’ve got maybe a 100 names and incidents that you’re trying to make sure that you can remember to say this thing, this thing, how’d this work out, what is this going on? It is a massively sobering responsibility to wake up and to have to deal with the terrorist threats that the country faces every day. And I’m just saying, ask yourself a prudential question. Would you rather those people have the authority to err on the side of caution, or do you want to have the ACLU beat them on the head every time they put somebody’s name on the list? I say err on the side of caution, but combine that with a real and prudent commitment for continuous review of the list, let the things wash out over time and then be dealt with appropriately. And that seems to me where the prudential balance is.130

Naturally enough, therefore, the cases that were of most concern in the beginning were those that could ignite a political firestorm or a public relations debacle that would undermine the independence from judicial oversight upon which the keepers of the watchlists—like Mrs. Shipley—depended. Ironically, therefore, the development of the redress system was not catalyzed by the travails of the innocent but ordinary traveler. Rather, the cases that attracted attention were those that could fall into the category of the “T. Kennedy” problem.131

When, in 2004, Senator Ted Kennedy found himself stopped several times at Logan Airport, the story naturally received nationwide attention. Such attention was hardly desirable as policymakers and operations specialists worked hard to build a system that was both reliable and accurate and perceived by the public to be so, too. As the travel stories of Larry Musarra, Jaber Ismail, and others recounted in chapters 1 and 2 demonstrate, requests by ordinary travelers for help with watchlisting snafus rarely caught the attention of TSA or DHS officials on their own. What did? Michael Jackson described the pressures on his office:

So you get the press on your case, you get a congressman on your case, you get another cabinet member on your case, you get the White House on your case, you get DHS on the case or you get FBI on the case. The punch line is, in this system, there are multiple entry points for people to look at an alleged complaint here, or a complaint or alleged injustice, and to have other people come in, get enough information to say, I’m not going to second-guess that. . . . And sometimes I’d look into it, or have somebody look into it, and I’d call back and
say, you were right and we’ve taken care of that and here’s the number, we’d called them, it’s done. In other cases, I would just call back and say, I can’t do anything about this. It wasn’t because I didn’t look into it. It’s just that I saw enough stuff there that I said I’m not putting my name on the record to give this person a get-out-of-jail-free card in terms of the watchlist.132

This, then, is where the second problem emerged: pressure. This problem affects both high-level political officials and those career officials whose work is on the day-to-day operational level. The “Are-you-stupid?” look that President Bush could give his advisors on “Terrorism Tuesdays” was neither the sole prerogative of the President’s to convey nor limited to the Oval Office or the Situation Room. The officials who briefed the President returned to their departments and agencies and were equally capable of giving such looks to their subordinates.

It should be noted that Jackson strongly objects to this suggestion of defensive groupthink. In our conversation, he repeatedly emphasized the importance of developing an institutional culture that encouraged periodic reviews and empowered participants to second-guess authority or received wisdom. Of course, the secrecy of the process prevents any outside evaluation of it. But it is not hard to see how this trickle-down effect shapes institutional culture, too. Whether the political appointee responding to a congressional inquiry, or the analyst making a tough judgment call, the pressures to reach the same conclusion were equally present: “I’m not putting my name on the record to give this person a get-out-of-jail-free card in terms of the watchlist.”

Down the Rabbit Hole

What if different agencies in the watchlisting process disagreed about whether to add someone to the No Fly List, each agency taking a strong position? Some former officials could not recall a single instance when officials at TSA and TSC were in strong disagreement about whether to watchlist someone, while others thought such conflicts happened routinely.133 Hypothetically, disagreement in those sorts of cases could rise to the higher-deputy levels of authority within the agencies.

How does this translate into an actual response to the ordinary would-be traveler, the average citizen whose government has secretly decided the parameters for his acceptable movement? Return now to the hypothetical that introduced this book and prepare for a journey down the rabbit hole:
Imagine waiting in Hong Kong International Airport for the final leg of a long journey home to the United States. You are traveling with your family. Everyone is tired. When you reach the front of a long line at the ticket counter, the agent looks nervous: “I’m sorry, but I cannot print your boarding pass. Your name appears on a United States terrorism watchlist.”

How do you get back home?

The employee of the commercial airline who denies the traveler a boarding pass at its check-in counter is the first dead end. When the airline’s computer flags a traveler, the ticketing agent will contact the TSA and perhaps the TSC through its 24/7 telephone hotline. As the traveler waits, the TSC will determine the accuracy of the suspected match and likely consult with TSA and the agency or agencies that originally supplied the derogatory information that landed the traveler on the watchlist. Then the TSC and TSA will tell the airline’s agent what to do. Regardless of the outcome, he or she will have no more knowledge than the traveler receives. The airlines’ employees are merely the messengers.

The traveler might reasonably decide to seek redress from the agency in charge of composing the list, the TSC. After all, it is the TSC that accepts nominations to the No Fly List, manages the criteria for approving them (and makes exceptions to them), and coordinates the government’s response to the inquiry from the airline ticketing counter. According to the Inspector General of the Department of Homeland Security, TSA’s parent agency, “TSC quality assurance measures ensure that the correct individuals are on the appropriate watch lists.” As then Deputy Director for TSC Operations explained in late 2010 to a federal judge: “[W]hen a traveler’s inquiry may appear to concern data in the TSDB, the matter is referred to the TSC Redress Unit, which assigns the matter to a TSC redress analyst for research.”

These statements make clear that the TSC is where the action is. The TSC, however, “does not accept redress inquiries directly from the public, nor does it respond directly to redress inquiries.” Nor will the TSC identify the agency or component of the federal government that was the source for the derogatory information that resulted in the nomination in the first place, let alone what the content of that information is. A Freedom of Information Act request either to the TSC or to the TSA would fail because of national security and law enforcement exemptions to the general requirement of disclosure. In fact, the TSC will not even disclose where it is located when it makes its decisions.

If the TSC is hard to access, how about those who implement its deci-
sions? Confusingly enough, the traveler is now confronted by a surfeit of choices. There is both a DHS Office for Civil Rights and Civil Liberties and a TSA Office of Civil Rights and Liberties. Where should a traveler begin?

The former second-in-command at DHS, Michael Jackson, was dismissive of the DHS Office for Civil Rights and Civil Liberties, an advice-giving office that “doesn’t have a line responsibility for anything at DHS.” In fact, in the most sensitive cases, that office would not even be allowed a seat at the table. Jackson chose to recount a particularly terrifying episode during his tenure to illustrate that point and underscore what role he felt should be accorded to institutional checks and balances.139

So the Office of Civil Rights? Pfft [makes a dismissive gesture]. At that point, this is where I’m talking about, when you think about your legal issues, you’ve got [to] ask yourself, what are the people responsible for running the government going to say about stuff like this? They don’t care. I mean, if we have ten names on that list or twenty-five names on that list that ultimately get washed out, but you don’t know if one of them [. . .]? Here are some guys who we know, we’ve seen the pictures, we know what’s going on. They’re about to get on the planes with this. They are looking at flight times, I mean it was a dead-serious no-kidding, no-shit, going-to-blow-up American airplanes plot. And so, in that environment, that’s what I’m saying, you have to understand is, people don’t care if there’s a little bit of temporary addition to the watchlist while you sort it out. And maybe it’s at such a level that routine parts of government aren’t going to be able to have access to the full reason why someone was added on.140

Such an attitude is completely understandable from a former recipient of a daily list of threats to national security. What honorable and competent official (and Michael Jackson is widely regarded in respected circles as both) would not feel enormous pressure to prevent a perceived threat to American national security with every available means possible? Who would choose to err on the side of liberty over security? But the answer is the same as before: Trust us.

How about the TSA Office of Civil Rights and Liberties? The TSA office describes its “compliance mission” to be to “conduct inquiries and respond to complaints of unlawful discriminatory treatment from the traveling public about TSA’s security screening programs and activities,” and its “policy mission” to be to “provide civil rights and liberties guidance in the review of TSA’s existing and proposed policies and programs.”141 A careful read of
its website, however, reveals that it only accepts complaints from travelers alleging mistreatment by a TSA employee based on unconstitutional discrimination. Since the source of the problem is the decision to add the traveler’s name to a watchlist, and that decision making is neither made by TSA employees nor revealed to the traveler, this is a dead end.

Instead, the “single point of contact for all traveler screening issues” is the DHS Traveler Redress Inquiry Program, DHS TRIP. DHS TRIP has no corporeal form to visit (like Mrs. Shipley’s Winder Building). It exists only in the ether of the Internet, through which the traveler may complete an online form at the DHS website. That web page does not indicate who will review the inquiry, by what standards, or even which agency will make the relevant decision.

Although DHS TRIP is the only avenue for redress, neither DHS nor TSA will examine the complaint beyond the need to ascertain that the complaint is based on a positive match to the No Fly List. As TSC Director Timothy Healy told Congress, “the complaint is reviewed by the agency that received it, and referred to the TSC Redress Unit after it has been determined that there is a connection to the Terrorist Watchlist.” In court filings, the Justice Department has argued that the TSC—not the DHS, TSA, or any other agency—is in charge: “The TSC Redress Unit makes a determination as to whether any adjustment in the individual’s status, including modification or removal, is required and informs DHS TRIP accordingly; DHS TRIP, in conjunction with TSA OSTR [Office of Transportation Security Redress], subsequently sends a determination letter to the complainant” as required under law. More concretely, as Director Healy’s deputy informed a federal judge in a declaration submitted in response to litigation:

After reviewing the available information and considering any recommendation from the nominating agency, the TSC Redress Unit will make a determination on whether the record should remain in the TSDB, or have its TSDB status modified or removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. In such cases, TSC will only prepare a recommendation for the decision-making agency and will implement any determination once made. When changes to a record’s status are warranted, the TSC will ensure such corrections are made, since the TSC remains the final arbiter of whether terrorist identifiers are removed from the TSDB. The TSC will also verify that such modifications or removals carry over to the various screening systems that receive TSDB data (e.g., the Selectee and No Fly Lists).
TSC—and no other agency—will “make a determination” about the disputed record. Unless, that is, some other government agency has the “legal authority . . . in whole or in part,” to make that determination. But, even when that is the case, TSC “remains the final arbiter” over removing or changing records in the TSDB and the No Fly List.

But once the traveler’s inquiry has been referred to the TSC (as it must if there is a match with the No Fly List) who actually decides what to do, TSC or TSA, DHS, or some other agency? Director Healy told Congress, “Upon the conclusion of our [TSC] review, we advise DHS TRIP representatives of the outcome so that they can directly respond to the complainant.”147 That TSC review is completed by working “with the nominating or originating agency to determine if the complainant’s watchlisted status should be modified.”148 As if this circular flowchart were not a confusing enough, the Office of Transportation Security Redress in the TSA “acts as DHS’s lead agent managing DHS TRIP.”149

Supposing the long-suffering traveler perseveres, and completes the DHS TRIP complaint online. The end result is a “final agency decision” letter that obscures the various roles of this alphabet soup of agencies just as it evades any clear statement of the decision.150 Read the DHS TRIP letter sent in October 2008 to Erich Scherfen, whose travel story was explored in chapter 1.151 The operative language is identical to that found in the letter reprinted in chapter 2 that Jaber Ismail received in August 2006.

Despite its Orwellian language, the form letter spit out of the TSA system is considered final agency action. This is despite the Government’s description of its content as indicating “either that Plaintiffs are on the No Fly or Selectee List, and thus subject to travel restrictions and/or enhanced screening with consequent travel delays, or not included on the No Fly or Selectee List. In either event, the letters reflect the fact that a final determination has been made that fixes some legal relationship.”152

Some legal relationship, indeed. But with whom? About what? The problem, of course, is that the determination letter is impenetrable. It is impossible to decipher what final agency action has been taken, if any, and by whom. What legal relationship has been fixed? What should the traveler do next? DHS TRIP is the impermeable shield that protects the TSC in its glorious isolation. The traveler will discover this fact if, frustrated and having exhausted this administrative remedy, he decides to file a civil action for injunctive relief against the agency.

Whom should the traveler name as the defendant in that suit? The logical choice is the TSC. If the traveler has been placed on the No Fly List, it was the TSC that made the decision and only it has the power to remove a name
October 15, 2008

Mr. Erich Michael Scherfen

Control Number: [Redacted]

Dear Mr. Scherfen:

Thank you for submitting your Traveler Inquiry Form and identity documentation to the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP).

In response to your inquiry concerning travel delays at the airline ticket counter or airport security checkpoint, we conducted a review of any applicable records in consultation with other Federal agencies, as appropriate. Where it was determined that a correction to records was warranted, these records were modified to address any delay or denial of boarding that you may have experienced as a result of the Transportation Security Administration’s watch list screening process. This determination constitutes our final agency decision, which is reviewable by the United States Court of Appeals under 49 U.S.C. § 46110.

DHS cannot ensure your travel will always be delay-free as this redress process does not affect other standard screening procedures in place at the security checkpoint. For example, an individual may be selected for additional screening in order to resolve a walk-through metal detector alarm, because of random selection, or based on certain non-identity factors reflected in reservation information. Additionally, this process may not eliminate the need to go to the ticket counter in order to obtain a boarding pass. For instance, an airline might still require a brief period of time to comply with identity verification requirements prior to issuing a boarding pass.

Based on our analysis of those persons who have applied for redress through DHS TRIP, more than 99 percent are not on a Federal watch list. DHS and the airlines have developed solutions to reduce inconvenience and facilitate remote check-in. Before your next flight, contact the designated office of the airline in advance to inquire about its procedures for collecting your full name and date of birth. The airline will likely be able to store your information or enroll you in its frequent flyer program, which may enable you to print your boarding pass at a kiosk or online.

Concerning the difficulties you have experienced clearing inspection at a U.S. port of entry, we have completed our review of this matter.

We assure you that it is not the intent of DHS to subject the traveling public to unwarranted scrutiny. The traveling public is entitled to, and is accorded, the utmost courtesy and facilitation we can offer.

www.dhs.gov/trip

Fig. 10. DHS Letter to Erich Scherfen
within the limits of our law enforcement responsibilities. Regrettably, the results of our efforts cannot always be as you might hope.

Please understand that in order to detect those international travelers involved in illicit activities, we must, at times, unfortunately inconvenience law-abiding travelers. We are especially aware of how those selected for inspection may perceive the inspection process as upsetting, uncomfortable, inconvenient, and stressful. That is why we try to emphasize to our officers on a nation-wide basis the need to perform their duties with the highest levels of courtesy and professionalism.

While DHS cannot guarantee complete freedom from intensive inspections, whether the inspections are random or specific, we can strive for a better understanding of our mutual needs. DHS must rely upon the professional judgment of individual inspections officers to determine the extent of examination necessary and to do their best to differentiate between travelers who are of interest to DHS, and those who are not.

Although we can neither confirm nor deny that DHS has records or information that prompted this inspection, if DHS has determined based on your correspondence that there is a need to make changes or corrections to any such record or information, should it exist, I can assure you such changes or corrections have been made.

We regret any inconvenience or unpleasantness you may have experienced during your airline check-in or recent travel into a U.S. port of entry. We hope that your future encounters with DHS will be of a more pleasant nature. To contact DHS TRIP, send an e-mail to TRIP@dhs.gov, or write to the following address:

DHS Traveler Redress Inquiry Program (TRIP)
601 South 12th Street, TSA-901
Arlington, VA 22202-4230

Sincerely,

Jim Kennedy
Traveler Redress Inquiry Program

Control Number: [Redacted]
from the watchlist. But if the TSC is named as the defendant, the Justice Department attorneys tasked to respond to the lawsuit will argue that the TSC is the wrong party. The TSA must be named because it retains final authority to determine redress appeals, even though as a practical matter those determinations, too, are made by the TSC. This is because the TSA adopts the TSC’s No Fly List in the form of a Security Directive, the old power it acquired from the FAA to deny boarding to dangerous, but ticketed, passengers. This is further reflected in a memorandum of understanding on redress procedures signed by the TSC, TSA, and other agencies in 2007. The relevant sections of that memorandum indicate that TSC “will make a determination . . . unless the legal authority to make such a determination resides, in whole or in part, with another agency.” If that is the case, TSC “will only prepare a recommendation” to that agency. On this basis rests the argument that the decision making of the TSC and TSA is “inextricably intertwined” concerning redress appeals.

That entwinement argument is a crucial step because it is the hook for an argument about which court may hear these legal claims, and even what information that court may be entitled to review. The Justice Department has argued that federal law requires that jurisdiction to hear any lawsuit filed concerning the No Fly List rest not in the ordinary federal trial courts but only in a federal court of appeal. That shift means that the routine processes of discovery, through which evidence is obtained by each side to present their respective cases, do not apply. Instead, the decision-making record of the relevant agency is the basis for any appellate review under principles of administrative law. On at least one occasion, the Justice Department has even argued not only that jurisdiction may only be had in an appellate court, but that an administrative record is not even required for the jurisdiction-shifting statute to apply.

The origin of the jurisdiction-shifting provision of law, found in section 46110 of Title 49 of the United States Code, goes back to the 1958 statute that created the Federal Aviation Administration, long before the No Fly List or even its security-directive predecessors were even conceived. In the standard rule-making context for which this departure from the norm was conceived, it made sense to allocate judicial review in the first instance to an appellate court for cases that were largely disputes filed by airlines and pilots about regulations concerning industry safety standards, licenses, certificates, and other matters. In the typical case complaining about an FAA rule or decision, the facts that trial courts ordinarily evaluate would not come from live witnesses and outside exhibits. Logically, the case should be heard by an appellate court because the “facts” on which the decision was based had already been gathered in the form of the administrative record of the agency’s
challenged decision making. It was the evaluation of the agency’s decision based on the compiled record that a court was tasked to evaluate—in a way, a sort of appellate review.

But in the case of the No Fly List, whose administrative record would be lodged with the court? The whole point of watchlisting is to do it secretly. As Chief Judge Alex Kozinski of the U.S. Court of Appeal for the Ninth Circuit asked in *Ibrahim v. DHS* (the first of two important cases on this issue in which the Ninth Circuit would rule), “Just how would an appellate court review the agency’s decision to put a particular name on the list? There was no hearing before an administrative law judge; there was no notice-and-comment procedure. 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 [a] name on the No-Fly List, it makes sense that it be a court with the ability to take evidence.”

The Government’s argument has persuaded several federal trial courts that they lack jurisdiction to hear claims about the No Fly List. But Chief Judge Kozinski, writing for the Ninth Circuit in the *Ibrahim* case, rejected the assertion that any relevant decision-making was “inextricably intertwined.” TSC compiled the list and resolved interagency disputes about its composition. Once that task was done, its customer, TSA, was sent the product for use on the front lines. A complaint about composition, the court said, was distinct from one about applying the list via a TSA Security Directive:

> The district court determined, based on undisputed facts, that an agency called the Terrorist Screening Center “actually compiles the list of names ultimately placed on the No-Fly List.” And the Terrorist Screening Center isn’t part of the Transportation Security Administration or any other agency named in section 46110; it is part of the Federal Bureau of Investigation, as the government concedes. Because putting Ibrahim’s name on the No-Fly List was an “order” of an agency not named in section 46110, the district court retains jurisdiction to review that agency’s order under the APA.

Nevertheless, the Justice Department has routinely argued that the TSA and DHS are indispensable parties to any lawsuit. The determination letters, after all, are mailed from TSA and DHS. For example, the Justice Department argued in a November 2010 filing:

> As explained above, TSA is responsible for identifying travelers who pose a threat to national security, preventing those individuals from
boarding an aircraft, and for redress. See 49 U.S.C. §§ 114(h)(3), 114(f) (1)–(4), 44903. TSA and DHS are responsible for providing redress to travelers who complain that they have been delayed or denied boarding due to wrongful placement on a government watchlist.164

This is a partially true statement, but not responsive to the issue. TSA is not responsible for “identifying” threatening travelers; it is responsible for instructing the airlines to prevent the boarding of passengers that the TSC No Fly List has identified for them. The cited sections of § 114(f) grant TSA powers to “receive, assess, and distribute intelligence information related to transportation security; assess threats to transportation; develop policies, strategies, and plans for dealing with threats to transportation security; make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government.”165 Congress described these powers to receive intelligence from other agencies and make policies based on it quite differently than it defined the core functions identified in the previous subsection, to “be responsible for day-to-day Federal security screening operations,” like airport security checkpoints.166 Indeed, the strongest powers referenced by the Justice Department—“identifying” and “preventing” the boarding of individuals who threaten airline or passenger safety—are actually statutory powers to establish policies and procedures to accomplish those ends “in consultation with appropriate Federal agencies and air carriers,” not grants of exclusive, decision-making authority.167 In fact, Congress specifically required the Secretary of the Department of Homeland Security (not the Assistant Secretary for TSA) to collaborate with the TSC on No Fly List issues.168 When Congress sought to give the TSA exclusive power, it knew how to do that, and markedly did not do so with regard to the No Fly List.169 In this case, Congress instructed the TSA to utilize records controlled by another agency.170

Congress ordered the TSA to establish “a timely and fair process for individuals identified as a threat . . . to appeal to the Transportation Security Administration the determination and correct any erroneous information.”171 The process created in response to that mandate—DHS TRIP—is administered through the TSA: it is from TSA’s Office of Transportation Security Redress (TSA OTSR) that the traveler will receive the letter announcing the final determination. But the decision making itself—as distinguished from the letter-drafting to report that result—is done by the TSC. As Deputy Director Piehota explained, “After the TSC Redress Unit completes its review of the matter, DHS TRIP is notified of the recommendation so DHS
TRIP may send a determination letter to the traveler.” The word “recommendation” is a euphemism; as Piehota notes in the previous paragraph of his declaration, this “recommendation” comes from the “final arbiter” over these lists, the TSC. Figure 11 shows the TSC’s perception of the process, in a flowchart it supplied to the Justice Department’s Inspector General (a full-color version appears in the IG’s report).

As the flowchart indicates, the TSC Redress Office “reviews related watchlist record(s) and resolves complaint.” The TSC then revises the watchlist and instructs the screening agency—the TSA in the case of the No Fly List—to respond to the complainant. Based on its audit and review of the governing documents, the Justice Department’s Inspector General expressed no doubt as to the chain of command:

If, as a result of a redress review, the TSC recommends a change to the watchlist record or status (for either a positive match or misidentification referral), the Redress MOU and the TSC Redress SOP both require that the TSC discuss its findings with the nominating agencies. While the nominating agencies may provide input, the TSC has the ultimate authority to resolve all terrorist watchlist redress matters. Finally, the TSC Redress Office ensures that the necessary changes are made to watchlist records before closing its review and alerting the frontline screening agency of its resolution. The TSC does not respond to the complainant. Rather, the TSC coordinates with the frontline screening agency, which should submit a formal reply to the complainant.

As the DOJ Inspector General noted, the TSC is completely insulated from the complainant. It is not possible for an individual to file a redress complaint directly with the TSC, and the TSC will not respond to such complaints.

While it is true that the vehicle for distributing the No Fly List is a Security Directive that only the TSA has legal authority to issue, control over the real substantive matter at issue—the content of the No Fly List—belongs to the TSC analysts and officials who assess the TSDB entries and decide whether the criteria for inclusion in the No Fly List are met. And with enough agencies represented in the process—the agency that originated the derogatory information, the TSC that organized it, and the TSA that used it—decision making can begin to look like a dissenter’s veto. As Richard Falkenrath described the issue: “[T]hese sorts of decisions, one dissenter can usually block it. Affirmative action by government is done on the ba-
sis of consensus, which is bad if you are [seeking] redress. Any one agency rep[resentative] can just show up and say, ‘Yeah, we don’t think so.’”

Just as this book was going to press, the U.S. Court of Appeals for the Ninth Circuit issued its second groundbreaking opinion rejecting the Government’s entwinement theory. Some of the plaintiffs’ allegations in the case for which the opinion was rendered, \textit{Latif v. Holder}, were described in chapter 1. Judge Richard Tallman, writing for himself and his colleagues, Chief Judge Alex Kozinski and Judge A. Wallace Tashima, refused to allow the Government to use the division of labors it had created between the TSC and the TSA to evade the jurisdiction of the district courts. The court found

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**Fig. 11. TSC Flowchart of Terrorist Watchlist Redress Process. (Courtesy the Terrorist Screening Center.)**
that Ayman Latif and his fellow plaintiffs had alleged both a substantive challenge to the composition of the No Fly List and a procedural challenge to the redress process. As to the substantive challenge, the TSC was the proper defendant and the district court was the proper court: “Because TSC actually compiles the list of names ultimately placed on the list, § 46110 does not strip the district court of federal question jurisdiction over substantive challenges to the inclusion of one’s name on the List.”

As to the procedural component, Judge Tallman wrote, the district court had correctly determined that the TSA was a necessary party (and therefore did not abuse its discretion) but erred in concluding that § 46110 made TSA’s joinder as a defendant infeasible. The key, again, was in rejecting the Government’s division of authority between the TSC and TSA as a means of evading review. In that way, the opinion has an elegant irony to it: the very jurisdictional move that the Government had used to skip up to the court of appeals landed the Government right back in the trial-level district court on the grounds that the appellate court lacked jurisdiction under the same statute to render an appropriate remedy. Concluding the opinion, Judge Tallman observed:

At oral argument, the government was stymied by what we considered a relatively straightforward question: what should United States citizens and legal permanent residents do if they believe they have been wrongly included on the No Fly List? In Ibrahim I, we held that district courts have original jurisdiction over travelers’ substantive challenges to inclusion on the List. Today, we take another step toward providing an answer. We hold that the district court also has original jurisdiction over Plaintiffs’ claim that the government failed to afford them an adequate opportunity to contest their apparent inclusion on the List. We leave it to the district court to determine whether to require joinder of TSA on remand.

This ambiguity about the source of a traveler’s woes did not afflict the traveler in Mrs. Shipley’s day. Because the passport was a tangible document in the possession of the traveler, it was immediately clear whether travel was permitted. Even when the Passport Division occasionally dragged its heels in acting on an application, the traveler knew that no travel was permitted without a passport. You either possessed one or you did not.

Today that certainty is gone. No amount of unimpeded travel in the past is an assurance that a trip will be permitted in the future. No notice is
given until the moment a boarding pass is sought for imminent travel. Even then, the denial of a boarding pass is not certain evidence that the traveler has been watchlisted. This means that judicial review of the determination is much more difficult to obtain.

If the traveler sues the TSC for compiling the No Fly List, the Department of Justice will argue that the list has no effect unless a different agency, the TSA, uses it to deny boarding. But if the traveler sues the TSA for using the No Fly List, the Department of Justice will argue that the source of the injury is not in the application of the list by TSA, but in the compilation of the list itself, by TSC. Sue both, but prepare oneself for a battle over the proper judicial forum to hear the case. If the Government wins that argument, the evidence offered for the court to consider, if any, will be provided by the Government in the form of an administrative record, part or all of which the plaintiff may not even be permitted to see. The rationale for this secret evidence is the same one that was offered, and rejected, in Mrs. Shipley’s day.

Just as in Mrs. Shipley’s day, these procedures are designed to shield the real decision maker from outside oversight and control. Promises to respect civil liberties mean little if the guardian against their infringement is the same set of unsupervised officials against whom the complaint of infringement is lodged. As Congressman John Dingell long ago explained, before anyone had ever heard of a No Fly List, “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.” DHS and TSA officials like to boast that DHS TRIP provides travelers “one-stop shopping” for redress. In fact, for citizens whose right to travel has been infringed by the No Fly List, the TSA is one shop stopping access to the real decision makers.
103. *Id.*, § 6. The statute required knowledge of the registration or final order to register.

104. *Id.*, § 15(c).

105. *Id.*, § 2(8).

106. *Id.*, § 2(9).


108. *Id.*

109. “Except as otherwise provided by the President and subject to such limitations and exceptions as the President may authorize and prescribe, it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.” Act of Oct. 7, 1978, Pub. L. 95–426, § 707(b), 92 Stat. 992, 993, codified at 8 U.S.C. § 1185(b). Congress also struck out all penalties for violating the control. *Id.* at § 707(d).

110. Farber, supra note 10, at 263.

111. Aptheker v. Sec’y of State, 378 U.S. 500, 507 (1964) (“[t]he denial of a passport . . . is a severe restriction upon, and in effect a prohibition against, world-wide foreign travel.”).

Chapter 5


3. Passport Chief to End Career, supra note 1. The *Times* reported that “[t]he custom then required that women quit work when they were married.”

4. Citation to Accompany the Award of the Medal for Merit to Mrs. Ruth Bielaski Shipley, for Exceptionally Meritorious Conduct in the Performance of Outstanding Services to the United States During the War Emergency, attached to Memorandum to the President from John Foster Dulles, dated Dec. 11, 1953; File 110.4-PD/12-953 CS/MC; CDF 1950–54; RG 59; NACP.

5. Hathaway, supra note 2. It may be that Mrs. Shipley focused on a State Department career as a result of her husband’s death in 1919, the same year she became Adee’s special assistant. Andre Visson, Ruth Shipley—The State Department’s Watchdog,
59 Reader's Digest 73, 74 (Oct. 1951) (condensed and reprinted from Independent Woman (Aug. 1951)).


8. Stuart, supra note 7, at 288.

9. Ruth B. Shipley and John Foster Dulles, by Herbert J. Meyle, 59-SO-288, # 7331, NARA.

10. Adams, supra note 7.

11. Hathaway, supra note 2; Adams, supra note 7.

12. Id. Even gray-eyed Athena would have raised an eyebrow at the muse who inspired this Homeric description. As it turned out, she had more in common with white-armed Hera, though at times she appeared more powerful than both goddesses combined.

13. Letter from Congressman D. Lane Powers to Secretary of State Cordell Hull, Sept. 7, 1933; File 112/1166; CDF 1930–39; RG 59; NACP. Secretary Hull thanked the Congressman without correcting his error identifying Mrs. Shipley. Copy of Letter from Secretary of State Cordell Hull to Congressman D. Lane Powers, Sept. 12, 1933; File 112/1166; CDF 1930–39; RG 59; NACP. The mistake was common. See, e.g., Stanley I. Stuber, Can Christians Obtain Passports? 49 Christian Century 1102 (1932) (referring to the Chief of the passport division, “Mr. R.B. Shipley”).

14. Mrs. Shipley’s professional achievements were not confined to the Passport Division. In early 1930, Acting Secretary of State Cotton named her as a delegate to the International Conference for the Codification of International Law held at The Hague that spring. Copy of Letter from Acting Secretary of State Cotton to R. B. Shipley, Feb. 27, 1930; File 504.418 A 2/173; CDF 1930–39; RG 59; NACP. Mrs. Shipley was the only female delegate from the United States. Final Act, Conference for the Codification of International Law Held at The Hague in March–April, 1930, 24 Amer. J. Int’l L. No. 3, Supplement: Official Documents (Jul. 1930), p. 170. Although her work to resolve conflicts in nationality laws did not result in substantial reform or codification (like much of the rest of the products of the conference), her efforts were hailed within the Department and in academic circles. Secretary of State Henry L. Stimson singled out her work at the conference in a letter of appreciation he sent her on his last full day in office. Copy of letter from Secretary of State Stimson to R. B. Shipley, Mar. 3, 1933; File 111.28/232A; CDF 1930–39; RG 59; NACP. The distinguished American lawyer and scholar James Brown Scott singled Mrs. Shipley out for praise in an editorial comment on the work on nationality done at the conference. James Brown Scott, Editorial Comment, 24 Amer. J. Int’l L. 556, 557 (Jul. 1930).

In spring 1953, Mrs. Shipley was designated to serve as “Chairman [sic] of the Department of State Loyalty Security Appeals Board.” Letter to Mrs. Shipley from Acting Secretary Walter B. Smith, May 13, 1953; File 110.4-LSB/5-1533; CDF 1950–54; RG 59; NACP. The Board was the penultimate step (before the Secretary himself) to termination of a State Department employee found to constitute a security risk.


18. Letter from Acting Secretary of State Joseph C. Grew to F. J. Bailey, Chairman of the Personnel Classification Board, Aug. 12, 1924; File 112/720a; CDF 1910–29; RG 59; NACP.

19. Id.

20. Letter from Acting Secretary of State Joseph C. Grew to F. J. Bailey, supra note 18.

21. Note from “ECW” stating “This appeal was granted” attached to letter from Acting Secretary of State Joseph C. Grew to F. J. Bailey, supra note 18.


23. Memorandum from R. B. Shipley to the Solicitor’s Office, Department of State, Aug. 16, 1930; File 111.28/214; CDF 1930–39; RG 59; NACP.


25. Enclosure to copy of letter from Division of Research and Publication Assistant Chief E. Wilder Spaulding to Fletcher Cooper, Dec. 11, 1933; File 112/1171½; CDF 1930–39; RG 59; NACP. Miss Hanna, who remained Chief of the Office of Coordination and Review, earned $600 less than Mrs. Shipley’s $5,600 base salary. This meant that by the end of 1933, Mrs. Shipley was the highest paid woman in the State Department.

26. Memorandum by R. B. Shipley, Dec. 1, 1933; File 111.28/233½; CDF 1930–39; RG 59; NACP.

27. Id. This was accomplished, Mrs. Shipley complained, despite a 12 percent reduction in her staff from an average personnel of 78.8 in fiscal year 1932 to 66 in fiscal year 1933. For inflation adjustment, see http://www.dollartimes.com/calculators/inflation.htm.

28. Copy of memorandum from R. B. Shipley to Assistant Secretary of State Wilber J. Carr, Jan. 22, 1932; File 111.28 Los Angeles/5; CDF 1930–39; RG 59; NACP. In locations lacking a passport agency, applications could be executed by clerks of federal or state courts that had naturalization authority. Letter to James A. Davis from R. B. Shipley, Sept. 28, 1937; File 111.28/255; CDF 1930–39; RG 59; NACP.

29. Copy of memorandum from R. B. Shipley to Assistant Secretary of State Wilber J. Carr, Jan. 22, 1932; File 111.28 Los Angeles/5; CDF 1930–39; RG 59; NACP; see also Attachment to internal memorandum to W. J. Carr from R. B. Shipley, Feb. 23, 1937; File 111.28 Los Angeles/37; CDF 1930–39; RG 59; NACP.

30. Consider a battle she won against an assistant secretary at the Labor Department. The overmatched assistant secretary used concern about passport fraud as an excuse to write to Secretary of State Henry Stimson requesting that passport agents be obliged to seek certificates of naturalization (for a fee payable to the Labor Department) in connection with passport applications, rather than rely on clerks of court (who often doubled as passport agents and therefore were under the influence of Mrs. Shipley) who could check court records regarding naturalization themselves. Letter from Assistant Secretary of Labor Robe Carl White to Secretary of State Henry L. Stimson, Nov. 9, 1931; File 111.28/221; CDF 1930–39; RG 59; NACP. Mrs. Shipley saw “no possibility of fraud” and deftly parried the bureaucratic move. “I should like not to tie our hands in this matter and yet have no wish to antagonize Labor,” she wrote to her lieutenant, John Scanlan. She proposed answering Labor “that passport agents will
be requested to communicate with the commissioners of naturalization in the cities where they are stationed when they wish information contained in the local records regarding naturalization. We can then continue as we have done with the clerks of courts who are acting as our agents in passport matters and who are, as well, the custodian of court records regarding naturalization.” Memorandum to John Scanlan from R. B. Shipley, Dec. 13, 1931, attached to Letter from Assistant Secretary of Labor Robe Carl White to Secretary of State Henry L. Stimson, Nov. 9, 1931; File 111.28/221; CDF 1930–39; RG 59; NACP.

31. Internal note exchange between R. B. Shipley and Herbert C. Hengstler, Aug. 11, 1931, attached to letter from R. A. Proctor, Passport Agent, Chicago, to R. B. Shipley, Aug. 6, 1931; File 111.28 Chicago/29; CDF 1930–39; RG 59; NACP. Mr. Proctor wrote in response to a letter from Mrs. Shipley earlier that month to describe the pictures of foreign cruise ships that had hung in the reception room at the Chicago Passport Agency and inform her that they had been taken down.

32. See, e.g., Letter to Secretary of State Cordell Hull from D. P. Aub, Washington, D.C. District Manager, American Express Co., Aug. 8, 1934; File 111.28/235; CDF 1930–39; RG 59; NACP (commending Mrs. Shipley and her office and, no doubt, hoping to stay in her good graces). See also Memorandum from the Assistant Secretary, Dec. 8, 1937; File 113/777; CDF 1930–39; RG 59; NACP (reporting testimony of Assistant Secretary George Messersmith before a subcommittee of the House Appropriations Committee, praising Mrs. Shipley for her work preparing new codes concerning passport and citizenship laws).

33. Letter to Captain George T. Summerlin, Chief of Protocol, U.S. Department of State, from Ruth B. Shipley, Dec. 10, 1937; File 811.0011 Roosevelt Family/170; CDF 1930–39; RG 59; NACP. Mrs. Roosevelt was unable to attend. Letter to Captain George T. Summerlin from Mrs. J. M. Helm, Secretary to Mrs. Roosevelt, Dec. 31, 1937; File 811.001 Roosevelt Family/172 H/HG; CDF 1930–39; RG 59; NACP.

34. Bielaski is Held, Companion Freed, N.Y. TIMES, June 27, 1922, at 1.


36. Bielaski is Held, Companion Freed; supra note 34; A. Bruce Bielaski Kidnapped in Mexico and Held for $10,000, N.Y. TIMES, June 26, 1922, at 1.


38. Obregon to Deport a Group of Radicals; Acts to Clear the Region Where Bielaski Was Captured of Foreign Reds, N.Y. TIMES, June 28, 1922, at 22. President Obregon was reported to have traveled to Cuernavaca to personally oversee the investigation.


40. Bielaski’s Arrest Reported Ordered, N.Y. TIMES, July 6, 1922 at 1. As arrests go, this one was fairly comfortable; Mr. and Mrs. Bielaski lived in a local hotel or as guests of the American chargé d’affaires and it may be that Mexican legal procedures were misrepresented by the American press. Bielaski to See It Out, N.Y. TIMES, July 29, 1922, at 12; Bielaski is Cleared by Mexican Court, N.Y. TIMES, Aug. 13, 1922, at 21. The chauffeur, on the other hand, remained lodged in a Mexican provincial jail. Bielaski Is Under Guard, N.Y. TIMES, Aug. 3, 1922, at 20. Bielaski himself later made light of the situation and disputed some newspaper accounts of his detention. Bielaski Explains Charges, N.Y. TIMES, Aug. 22, 1922, at 23.
41. Obregon in Morelos, Sifts Bielaski Case, N.Y. Times, July 15, 1922, at 3.
42. Intervenes for Bielaski, N.Y. Times, Aug. 12, 1922, at 6.
43. Bielaski is Cleared by Mexican Court, supra note 40.
45. There seems to have been some friendship between Ruth Shipley’s mentor, Alvey Adee, and her brother. Years earlier, Adee had given Bielaski “a small, pearl-handled revolver . . . insisting that Bielaski carry it” for safety’s sake given his livelihood. Bielaski a Fighter, but Quiet about It, N.Y. Times, June 30, 1922, at 3.
46. It also may have triggered other kidnappings. While Bielaski was still in captivity, a rebel Mexican General Gorozave seized an oil company and forty Americans near Tampico. Secretary of State Charles Evans Hughes called the seizure an “outrage” and demanded “vigorous” measures in a telegram to the American vice consul at Tampico. 40 Americans held by Tampico Rebels; Bielaski not Freed, N.Y. Times, June 28, 1922, at 1.
48. Despatch No. 1569 from American Consul General C. F. Deichman to the Secretary of State, Aug. 9, 1929; File 032 Austin, C.J./1; CDF 1910–29; RG 59; NACP.
49. Id.
51. File copy of dispatch from R. B. Shipley to the American Consul General, Valparaiso, Chile, Sept. 13, 1929; File 032 Austin, C.J./4; CDF 1910–29; RG 59; NACP. A handwritten note from “R.S.” dated September 11 and appended to the file copy of this dispatch states: “I think this is as far as we should go in the matter and it should safeguard any unsuspecting victims.”
52. Letter from Ira F. Hoyt, Passport Agent, New York City, to R. B. Shipley, Sept. 16, 1929; File 032 Austin, C.J./8; CDF 1910–29; RG 59; NACP.
53. File Copy of Letter to R. C. Bannerman, Chief Special Agent, Department of State, New York City, from R. B. Shipley, Sept. 11, 1929; File 032 Austin, C.J./2; CDF 1910–29; RG 59; NACP. File Copy of Letter to Ira Hoyt, Passport Agent, New York City, from R. B. Shipley, Sept. 11, 1929; File 032 Austin, C.J./3; CDF 1910–29; RG 59; NACP.
54. Letter to R. C. Bannerman, Chief Special Agent, Department of State, New York City, from R. Burr, Special Agent in Charge, Sept. 18, 1929; File 032 Austin, C.J./6; CDF 1910–29; RG 59; NACP. This letter reported a reply from Austin himself, which gave assurances that “no tour with a ballet company or any other group will take place for the time being” due to unspecified unsatisfactory conditions in Latin America, and that any future venture would only be considered if producers in those countries were willing to “furnish a bond and deposit the money” in an American bank. In other words, exactly what the Consul General had suggested.
55. Letter to Secretary of State Hull from Judge Martin DeVries, July 14, 1938; File 111.28 Los Angeles/39; CDF 1930–39; RG 59; NACP.

56. Copy of Letter to Judge DeVries from R. B. Shipley, July 22, 1938; File 111.28 Los Angeles/40; CDF 1930–39; RG 59; NACP. This was not entirely true. Mrs. Shipley had known for years that the Los Angeles office drew “many complaints from our best people . . . [The deputy clerk] does not have the time to be as courteous as he would like to be.” Letter to R. B. Shipley from W. A. Newcome, Passport Agent, San Francisco, Feb. 18, 1931; File 111.28 Los Angeles/24; CDF 1930–39; RG 59; NACP. In another letter to Mrs. Shipley, Newcome confessed that “Los Angeles has always had exceedingly unsatisfactory facilities for making applications for passports. I refer to the inadequate office space and inadequate staff to properly handle applications in a business-like, courteous and efficient manner. From the complaints which have reached me from transportation people and applicants, the situation in this regard has been most unsatisfactory. Such people would relish being served by trained and courteous passport workers and in offices adapted to their needs.” Letter to R. B. Shipley from W. A. Newcome, Feb. 16, 1931; File 111.28 Los Angeles/23; CDF 1930–39; RG 59; NACP.

57. Copy of letter to R. S. Zimmerman, Clerk, U.S. District Court, Los Angeles, from R. B. Shipley, July 22, 1938; File 111.28 Los Angeles/41; CDF 1930–1939; RG 59; NACP.

58. Letter to Secretary of State Stimson from S. Stanwood Menken, July 23, 1930; File 111.28 New York/63; CDF 1930–39; RG 59; NACP.

59. Letter to S. Stanwood Menken from R. B. Shipley, August 2, 1930; File 111.28 New York/63; CDF 1930–39; RG 59; NACP.

60. Id.

61. Letter to J. H. Mackey, Bureau of the Budget, from Ira F. Hoyt, July 1, 1931; File 111.28 New York/71; CDF 1930–39; RG 59; NACP.

62. That is not to say that these regulations could not be put to such purpose, as demonstrated by the conviction of Earl Browder, head of the Communist Party of the United States (CPUSA) from 1934 to 1945 and, by some scholarly accounts, a spymaster without equal for the Soviet Union. James G. Ryan, Socialist Triumph as a Family Value: Earl Browder and Soviet Espionage, 1 American Communist History 125, 126 (2002). Browder had obtained passports in the past under various aliases but a charge of fraudulent procurement was time-barred. Browder was therefore tried and convicted of using the fraudulently obtained passport. Browder unsuccessfully challenged the statutory interpretation of “use” since his conviction was for using his passport to prove his citizenship upon reentry to the United States, a use that was permitted but not required under the passport law at that time and therefore not the kind of use the statute was intended to reach. Browder v. United States, 312 U.S. 335 (1941). This was seen by some as the equivalent of convicting Al Capone for tax evasion. Purge by Passport, 150 The Nation 117 (Feb. 3, 1940).

63. Memorandum to File by R. B. Shipley, July 13, 1936; File 111.28/247; CDF 1930–39; RG 59; NACP.


65. Stuber, supra note 13.
66. *Id.* at 1102. It may be that Mrs. Shipley was not going out on much of a limb in this case. According to this periodical, her decision was defended by Assistant Secretary of State Wilbur Carr against an attack by H. Ralph Burton, a rising star in official Washington. Carr is reported to have responded to Burton by noting that the oath for a passport is not fixed by law, as was the case for the oath required for naturalization. *Id.*

67. *Id.* at 1101.

68. As in World War I, American passports were subject to fraud. See, e.g., Herbert Solow, Stalin’s American Passport Mill, 47 *Amer. Mercury* 302, 303 (July 1939) (“In spy lingo passports are ‘boots,’ and American boots are especially valuable. The fact that we have a polyglot population makes it possible for spies of almost any nationality to pass as Americans throughout the world without exciting suspicion. The United States, with mild competition from Canada, is therefore bootmaker to international spym.”).

69. Memorandum to J. P. Moffat and J. J. Scanlan from G. S. Messersmith, Aug. 28, 1939; File 138 Emergency Program/9; CDF 1930–39; RG 59; NACP. Messersmith warned in particular of “many thousands of persons in Europe, particularly in Poland and in the states of Southeastern Europe, who have a tenuous claim to American citizenship. . . . It is, I believe, not going too far to say that the great majority of those who will be applying for passports are persons who have not been carrying out any of the responsibilities of citizenship in this country, have had no intention of doing so and who would only be endeavoring to come to this country for purely selfish reasons.” *Id.* Expecting that the “presumption of expatriation” would ultimately be raised against these desperate people, Messersmith expressed his view that the United States “would not be particularly concerned in making available transportation facilities for them.” *Id.*

70. Memorandum to J. P. Moffat and J. J. Scanlan from G. S. Messersmith, Aug. 28, 1939; File 138 Emergency Program/9; CDF 1930–39; RG 59; NACP.

71. Memorandum—Ruth B. Shipley: Background and Performance, enclosed in Memorandum to the President from Secretary of State John Foster Dulles, Dec. 11, 1953; File 110.4 PD/12-953; CDF 1950–54; RG 59; NACP.


73. *Id.*

74. Memorandum to American Diplomatic and Consular Officers in Europe from Assistant Secretary of State G. S. Messersmith, Oct. 6, 1939; File 138/4085 A; CDF 1930–39; RG 59; NACP. Memorandum to American Diplomatic and Consular Officers except in Europe from Assistant Secretary of State G. S. Messersmith, Nov. 30, 1939; File 120.3/523B; CDF 1930–39; RG 59; NACP.

75. In a telegram reply to inquiries from the U.S. Embassy in Sweden (which appears to have been signed by Secretary Hull and initialed by Ruth Shipley), the American Consul in Stockholm was told, “Diplomatic and special passports must be limited and may be validated for travel in European countries where reasonably required for official purposes. They should, however, conform in this latter respect to general practice with respect to other passports.” Telegram from Department of State to American Consul in Stockholm, Dec. 8, 1939; File 138 Emergency Program/404 MM; Passport Office Decimal File 1910–1949; RG 59; NACP. Mrs. Shipley sent a similar reply to inquiries from the American Consul in Mexico concerning border crossings by government officials. Instruction to American Consular Officer in Charge, Mexico,
D.F., Mexico, from Ruth B. Shipley, Oct. 11, 1939 (“[Y]ou should advise all officers and employees who have diplomatic or special passports that they should surrender such documents to the immigration authorities upon their arrival in this country and that, when communicating with this Department regarding the return of such documents, they should furnish complete information regarding their proposed travel. The Department assumes that officers and employees of the Consulates along the border, who reside in the United States and cross the border daily to their offices, do not need to exhibit their passports as evidence of citizenship and identification.”); File 138 Emergency Program/223; Passport Office Decimal File 1910–1949; RG 59; NACP.

76. Telegram to Secretary of State Hull from Ambassador Kennedy, Sept. 14, 1939; File 138 Emergency Program/98; Passport Office Decimal File 1910–1949; RG 59; NACP.

77. Telegram to American Embassy London from Secretary of State Hull, Sept. 15, 1939; File 138 Emergency Program/98; Passport Office Decimal File 1910–1949; RG 59; NACP.

78. Telegram to Secretary Hull from Dr. Harry Gilbert, Sept. 13, 1939; File 138 Emergency Program/77 MM; Passport Office Decimal File 1910–1949; RG 59; NACP.

79. Letter to Dr. Harry Gilbert from Ruth Shipley, Sept. 14, 1939; File 138 Emergency Program/77 MM; Passport Office Decimal File 1910–1949; RG 59; NACP.

80. Memorandum to George Messersmith from Ruth Shipley, Nov. 22, 1939; File 138 E.P./364; Passport Office Decimal File 1910–1949; RG 59; NACP.

81. McLaughlin, supra note 1.

82. Memorandum to Ruth Shipley from George S. Messersmith, Assistant Secretary of State, Nov. 21, 1939; File 138 E.P./364 LS; Passport Office Decimal File 1910–1949; RG 59; NACP.

83. Confidential Cable to American Consul in Calcutta from Secretary of State Hull, Nov. 27, 1939; File 138 Emergency Program/368 MM; CDF 1930–39; RG 59; NACP.

84. Representative Sol Bloom (D-NY), Chairman of the House Foreign Affairs Committee, could think of no better way to introduce the bill to amend the Travel Control Act of 1918 than by reading into the record a letter from Mrs. Shipley encouraging the enactment of legislation “providing for the centralization of control over the entry into and departure from the United States of persons of all classes [of citizenship and alienage].” 87 Cong. Rec. 5048 (June 11, 1941).

85. Memorandum—Ruth B. Shipley: Background and Performance, supra note 71.

86. State Department Order # 1118 from Secretary of State Hull, Dec. 17, 1942; File 111.28/279 (cross-reference file note); CDF 1940–44; RG 59; NACP. A State Department reorganization at the end of 1943 created the Office of Controls, which was composed of Mrs. Shipley’s Passport Division as well as the Visa Division, Special War Problems Division, and Division of Foreign Activity Correlation. This appeared to reflect recognition for what these units did, rather than to shift any power away from Mrs. Shipley. State Department Order # 1218: Organization of the Department of State, Jan. 15, 1944; File 111.017/711; CDF 1940–44; RG 59; NACP.

87. Travel Order No. 4-2575 to Mrs. Ruth B. Shipley from Assistant Secretary G. Howland Shaw, Mar. 10, 1944; File 111.661/IC; CDF 1940–44; RG 59; NACP.


89. President Clarifies Priest’s Passport, N.Y. Times, May 10, 1944, at 7. Newsweek
later reported that the President had been less than candid: “Last month Premier Stalin sent a personal letter to President Roosevelt requesting that passports for a visit to Russia be issued to Father Orlemanski and Prof. Oscar Lange of the University of Chicago. . . . After lengthy discussions within the State Department and with the White House, it was finally agreed to grant Stalin’s request but to inform him at the same time that should any publicity be given to the visit by the Russians, the American Government would be forced to declare that the men involved were acting in a private capacity and were in no way connected with the government.” Father Orlemanski: The Inside Story, Newsweek 30 (May 22, 1944).

90. Id.

91. Office Memorandum from Mr. Nidiffer, Division of Departmental Personnel, to Robert Ward, Acting Chief, Division of Departmental Personnel, dated Dec. 22, 1944; File FW 111.661/11-2344 CS/V; CDF 1940–44; RG 59; NACP.

92. Office Memorandum from Mr. Nidiffer, Division of Departmental Personnel, to Robert Ward, Acting Chief, Division of Departmental Personnel, dated Dec. 22, 1944; File FW 111.661/11-2344 CS/V; CDF 1940–44; RG 59; NACP.

93. Office Memorandum from Passport Division to Division of Administrative Management re: “Increase in Long Distance Telephone Calls,” dated Nov. 23, 1944; File 111.661/11-2344; CDF 1940–44; RG 59; NACP.

94. This figure is calculated using the Consumer Price Index and an average annual inflation rate. See http://dollartimes.com/calculators/inflation.htm.

95. Department of State Record and Certification of Long Distance Calls Made, Passport Division, Aug. 11–Sept. 10, 1944, attached to Office Memorandum from Passport Division to Division of Administrative Management re: “Increase in Long Distance Telephone Calls,” dated Nov. 23, 1944; File 111.661/11-2344; CDF 1940–44; RG 59; NACP.


97. Id.

98. Id.


100. In the Field of Travel, N.Y. TIMES, Feb. 1, 1948, at X15.


102. Passport Curbs Will Stay a While, N.Y. TIMES, Aug. 25, 1945, at 11. The article reported some exceptions for hardship cases.

103. MARTIN BAUML DUBERMAN, PAUL ROBESON 388 (1989).


War, 47 The Historian 497, 499 (Aug. 1985) (“Shipley told Robeson that when he spoke against colonialism, he was ‘meddling in matters within the exclusive jurisdiction of the secretary of state’”).


107. Dr. Pauling described his efforts to obtain a passport on this and subsequent occasions in a 1977 interview for the PBS television program NOVA. See Audio tape: Passport problems, Dep’t of Special Collections, The Valley Library, Oregon State University (available at Linus Pauling and the Race for DNA: A Documentary History website, http://osulibrary.orst.edu/specialcollections/coll/pauling/dna/audio/nova4.html).


109. Id. at 254, 256.


111. Id. at 13.

112. Id.


115. Allen Drury, Arthur Miller Admits Helping Communist-Front Groups in ’40’s, N.Y. Times, June 22, 1956, at 1. The link between application and testimony may have been quite direct. Martin Gottfried argues that Miller’s application “provided HUAC with an excuse to summon him to hearings. These were designed just for him and a few select others on ‘The Unauthorized Use of United States Passports.’” Gottfried, supra note 113, at 286.


118. His efforts are recounted in detail in his memoir, MARTIN D. KAMEN, RADIANT SCIENCE, DARK POLITICS: A MEMOIR OF THE NUCLEAR AGE (1985).

119. Scoundrel Time must be treated with caution as a historical source, if not some suspicion. Joseph Rauh, her lawyer when she was subpoenaed to appear before the HUAC, noted, at least with regard to her testimony, that “her account in Scoundrel Times [sic] is not the way it happened.” William Wright, Lillian Hellman: The Image, the Woman 248 (1986). On the other hand, Carl Rollyson and Robert P. Newman, two respected Hellman scholars, use this source in recounting her meeting
with Shipley. CARL ROLLYSON, LILLIAN HELLMAN: HER LEGEND AND HER LEGACY 342–44 (1988); ROBERT P. NEWMAN, THE COLD WAR ROMANCE OF LILLIAN HELLMAN AND JOHN MELBY 236 (1989). Both of them nevertheless are quite aware of the problem that, as William Wright observed, even where the truth of the matter has been verified elsewhere, her retelling should be suspected for “the hand of a dramatist at work.” Wright, supra, at 253.

120. Lillian Hellman, Scoundrel Time 79 (1976).

121. Id. at 80–82. The letter was written, and notarized, and expressed her continued willingness to barter her rights to freely speak and associate in exchange for a passport. Newman, supra note 119, at 237–39.

122. Id. at 82. Though colorfully descriptive, this is hardly explanatory. It may simply be that Mrs. Shipley discounted the FBI’s derogatory information. Rollyson, supra note 119, at 343. It probably did not hurt that among Hellman’s close friends were a number of Mrs. Shipley’s colleagues and superiors at the State Department, including Loy Henderson, Christian Herter, and Averell Harriman. Newman, supra note 119, at 16 (cited approvingly by Rollyson, supra, at 220).

123. Rollyson, supra note 119, at 216; Newman, supra note 114, at 1 & 14.

124. Rollyson, supra note 119, at 217.

125. Id. at 271–72; Newman, supra note 119, at 127.

126. Rollyson, supra note 119, at 312–13. Newman, supra note 119, 160–62, reprints the letter in which Hellman pleadingly offers “proof of my loyalty” and begs for a passport because “I need to earn the money.”


129. Id., at 236, 255–56. Much of the problem was due to the investigation of Hellman’s onetime lover and longtime confidante, John Melby, by a State Department loyalty board that ultimately led him to be fired for his affair with Hellman. The passport Mrs. Shipley promised within days took almost a month. Mrs. Shipley wrote a carefully worded “memorandum for file” to justify her action, just in case: “The time given Miss Hellman for the consideration of this work was very limited and the file was out of our hands too long for me to consult SY [Security] before granting the extension if she was not to lose her contract.” Id. at 256.

130. Letter to Sen. John L. McClellan from Assistant Sec’y of State Wm. B. Macomber, Jr. dated August 21, 1959; File 110.4-PPT/6-859; CDF 1955–59; RG 59; NACP.

131. Memorandum—Ruth B. Shipley: Background and Performance, supra note 71. The memo refers to a case brought against American Communists under the Smith Act, which made it unlawful to knowingly teach the duty of violently overthrowing the U.S. government. The case was tried by Judge Harold Medina and the defendants were convicted of engaging in a conspiracy to advocate such views. The convictions were ultimately affirmed by the Supreme Court in Dennis v. United States, 341 U.S. 494 (1951).


133. Outgoing Airgram to Certain American Diplomatic and Consular Officers from Sec’y of State Acheson, Aug. 16, 1950; File 110.4-PD/8-1650; CDF 1950–54; RG 59; NACP.

134. Visson, supra note 5.

135. Memorandum—Ruth B. Shipley: Background and Performance, supra note 71.
136. *Id.*

137. Memorandum to Undersecretary of State for Administration Donald B. Lourie from Assistant Secretary for Congressional Relations Thruston B. Morton dated April 9, 1953; File 110.4 PD/4-953; CDF 1950–54; RG 59; NACP.

138. Personal Letter to Sec’y of State Dulles from Congressman John McCormack dated Dec. 28, 1954; File 110.4-PD/12-2854 CS/S; CDF 1955–59; RG 59; NACP. (original letter at File 110.4-PD/12-2854 CS/S; CDF 1955–59; RG 59; NACP.). Rep. McCormack, the Democratic Whip, wrote: “All I can say, Mr. Secretary, is that during my many years in Washington I have contacted Mrs. Shipley on many occasions. She is one of the most courteous ladies I have ever talked to, and she is one of the most cooperative Government officials I have ever contacted during my service in the Congress.”

139. Congressman McCormack’s personal letter was sent to forward a copy of a letter that Secretary Dulles had already received, from a friend of the congressman, Lawrence Valenstein, the President of Grey Advertising in New York City. That letter seems truly to have been penned out of love, not fear. It begins by asking the Secretary to “[p]ermit me to tell you a beautiful Thanksgiving Day story” in which Mrs. Shipley played the starring role in clearing bureaucratic hurdles to issue travel documents for a doctor to reach a sick relative in the Philippines. “One day, I hope to be able to say hello to Mrs. Shipley. I just want to say, ‘Thank you.’ She probably is not even interested in the mildest form of appreciation. She was commanded by her inner fine instincts.” Copy of Letter to Sec’y Dulles from Lawrence Valenstein, dated Dec. 1, 1954; File 110.4-PD/12-154; CDF 1950–54; RG 59; NACP.

140. Answer to Attack on Passport Operations, 26 DEP’T OF STATE BULL. 110, 111 (1952) (emphasis added).


142. Memorandum to Jack B. Tate, Deputy Legal Advisor, from Mr. Yingling, July 24, 1951; File 110.4 PD/7-2451; CDF 1950–54; RG 59; NACP. See also Zemel v. Rusk, 381 U.S. 1, 8 (1965).

143. § 2, Act of July 3, 1926, 69 Cong. Ch. 772, 44 Stat. 887. See also Stuart, supra note 141, at 1069. Short time limits were a further control “to channelize the travel of persons proceedings abroad and to review their cases at regular intervals.” *Id.*

144. Stuart, supra note 141, at 1069 (describing wartime restrictions on passports “for use to specific countries through which the bearer would travel en route to his ultimate destination.”).


146. Part XIV of Exec. Order 7856, 3 FED. REG. 681, 687 (Mar. 31, 1938) codified in 22 C.F.R. § 51.75 (1949) cited by Yingling in memorandum to Jack B Tate, Deputy Legal Advisor, July 24, 1951; File 110.4 PD/7-2451; CDF 1950–54; RG 59; NACP.


148. Visson, supra note 5 (“In addition to issuing or renewing passports—a record of 299,665 in 1950—she has under her jurisdiction some 430,000 Americans residing abroad”).

149. Letter to Under Sec’y Herbert Hoover, Jr., from Dr. H. Truman Gordon, dated Oct. 20, 1954; File 110.4-PD/10-2054 CS/W; CDF 1950–54; RG 59; NACP (emphasis in original).
Office Memorandum to Director Walter K. Scott, Executive Secretariat, from Mrs. Shipley, dated Oct. 26, 1954; File 110.4-PD/10-2054 CS/W; CDF 1950–54; RG 59; NACP.

Memorandum to Jack B. Tate from Mr. Yingling, July 24, 1951, supra note 142. Id.

Sec. 6, 64 Stat. 987, 50 U.S.C. § 285 (1950). The act required knowledge of registration or a final order to register as an element of the offense.

Eugene Gressman, Have You the Right to Travel Abroad? 127 NEW REPUBLIC 14 (Sept. 15, 1952).


Id. at § 51.139.

Id. at § 51.141(a).

Id. at § 51.135.

19 FED. REG. 162 (Jan. 9, 1954) (codified at 22 C.F.R. § 51.163 (1957)). The Board “shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.” 22 C.F.R. § 51.170 (1957).

Id. at § 51.142.


H. W. Erksine, You Don’t Go If She Says No, 132 COLLIER’S 62, 63 (July 11, 1953).

Id. (nine-month mark); Boudin, supra note 164 (reporting personal communication from Mrs. Shipley averring to no appeals at the ten-month mark). Roughly eighteen months later, a total of twenty-two appeals had been filed (out of twenty-eight passport refusals since Jan. 19, 1954). Paul J. C. Friedlander, ‘Due Process’ for Passports, N.Y. TIMES, July 3, 1955, at X13. By mid-1957, twenty cases had been accepted and heard by the Board, including Otto Nathan’s case (see infra), which was handled ex parte at the request of the Secretary. Memorandum to John M. Raymond, Deputy Legal Advisor, from John W. Sipes, June 19, 1957; File 110.4-PPT/6-1957; CDF 1955–59; RG 59; NACP.

17 Fed. Reg. 8013 (Sept. 4, 1952) (codified at 22 C.F.R. § 51.136 (1957)). (“[N]o passport . . . shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States.”).


14. Id. at 14.

Bauer v. Acheson, 106 F.Supp. 445 (D.D.C. 1952). Since the court was otherwise quite deferential to the executive’s asserted power to withhold passports from those “whose activities abroad might be in conflict with its foreign policy”, id. at 452, it
may be that the State Department preferred to accommodate the relatively modest procedural concerns of the court (which the court felt could be addressed “under the existing statute and regulations”), since the Department did not appeal the court’s judgment.


175. Passport Chief to End Career, N.Y. TIMES, Feb. 25, 1955, at 15. It appears that Mrs. Shipley may have stepped down because she reached the mandatory retirement age. Obituary, Ruth B. Shipley, Ex-Passport Head, N.Y. TIMES, Nov. 5, 1966, at 29. On the other hand, an article published weeks before her retirement stated that “Secretary of State Dulles in a letter dated March 14 urged her to stay on.” Passport Head Named, N.Y. TIMES, Apr. 1, 1955, at 8. Characteristically, “Mrs. Shipley refused to change her mind.” Id.

176. Passport Chief to End Career, N.Y. TIMES, Feb. 25, 1955, at 15. Characteristically, Mrs. Shipley intended to pick her heir: “Yes, my successor has been chosen—by me. We have a good ship. Don’t you think that after twenty-eight years I should know what’s needed?” Id. As it turned out, however, her successor came from outside the Passport Division: Frances G. Knight of the Bureau of Inspection, Security and Consular Affairs. Id. A few weeks after her departure, Mrs. Shipley claimed that she had chosen Miss Knight. Mrs. Shipley Cited by Anti-Red Group, N.Y. TIMES, May 11, 1955, at 22.


178. Letter to John Foster Dulles, Sec’y of State, from Fifield Workum, Chairman, Special Committee to Study Passport Procedures of the Association of the Bar of the City of New York, May 17, 1957; File 110.4 PPT/5-1757; CDF 1955–59; RG 59; NACP. The findings and recommendations of this distinguished committee (the membership of which included Adrian S. Fisher, former legal advisor to the Secretary of State) presented a damning indictment of the principles and practices that characterized Mrs. Shipley’s era. FREEDOM TO TRAVEL: REPORT OF THE SPECIAL COMMITTEE TO STUDY PASSPORT PROCEDURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1958).


180. Id.

181. Id.


183. Id. at 951; see also Reginald Parker, The Right to Go Abroad: To Have and to Hold a Passport, 40 VA. L. REV. 853, 859 (1954).


185. Id.

186. Id.

187. Id. at 30–31.

188. Id. at 31.

189. Id.

190. Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955). For an analysis of the effect of this ruling on the Attorney General’s Subversives List, see Robert Justin Goldstein,

191. Letter to Senator Theodore Green, Chairman, Senate Foreign Relations Committee, from Assistant Secretary of State Robert Murphy, May 22, 1957; File 110.4 PPT/5-2257; CDF 1955–59; RG 59; NACP. Although this file copy was cleared for release by the initials of five relevant office heads, it is unclear whether it was ultimately sent to Senator Green.


193. Id. at 221.

194. Boudin v. Dulles, 235 F.2d 532, 536 (D.C. Cir. 1956). The same conclusion was reached, citing Boudin, a few months later: Dayton v. Dulles, 237 F.2d 43 (D.C. Cir. 1956).

195. Letter to Senator Theodore Green, Chairman, Senate Foreign Relations Committee, from Assistant Secretary of State Robert Murphy, May 22, 1957, supra note 191.


198. Loy Henderson, Deputy Under Secretary for Administration, described the danger in a memorandum to the Acting Secretary: “It is quite possible that when a name is given the Committee will call the person named before it in order to request that he explain why he took the decision. This person will then have the difficulty of disclosing the records or of refusing to answer questions put to him. . . . The precedent which would be established in naming the persons responsible for making decisions could have far-reaching consequences. . . . This is so important that I hope we can take a new look at the matter before Mr. McLeod commits himself too far today,” Confidential Memo for the Acting Sec’y from Loy Henderson, Nov. 16, 1955; File 110.4 PPT/11-1655 CS/HHH; CDF 1955–59; RG 59; NACP. A note dated the same day and pinned to the memo carried the scent of relief about it: “Mr. McLeod’s office reports the hearings are over on the Hill; that Mr. McLeod was not asked any pertinent questions, and the hearing went very smoothly.” Id.


200. Id. at 119. Although, as the Court noted, the Subversive Activity Control Board created by the Internal Security Act of 1950 had the power to prohibit members of registered organizations from applying for passports, the Board had not issued any such final orders to organizations requiring registration at the relevant time in the Kent case. See Comments on S. 2095, p. 6, attached to letter to Senator John L. McClellan from Assistant Sec’y of State William B. Macomber, Jr. dated August 21, 1959; File 110.4-PPT/6-859; CDF 1955–59; RG 59; NACP (noting “no organization is registered or has been finally ordered to register by the Subversive Activities Control Board.”).

201. 357 U.S. at 128.

202. Id.

203. Id. at 129.

204. Comments on S. 2095, p. 3, attached to letter to Senator John L. McClellan from Assistant Sec’y of State William B. Macomber, Jr. dated Aug. 21, 1959; File 110.4-PPT/6-859; CDF 1955–59; RG 59; NACP.
205. Id.

206. Comments on S. 2095, p. 5, supra note 200. These comments noted with favor the (then) recent D.C. Circuit opinion Worthy v. Herter that upheld this power.


208. Although Mrs. Shipley would not provide specifics, she informed Dayton’s lawyer that “the determining factor in the case was Mr. Dayton’s association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government” five years prior to his application. Id. at 146–47.


210. Indeed, President Eisenhower sent an urgent message to Congress in the aftermath of Kent v. Dulles conceding, “Any limitations on the right to travel can only be tolerated in terms of overriding requirements of our national security, and must be subject to substantive and procedural guarantees.” Dwight D. Eisenhower, Special Message to the Congress on the Need for Additional Passport Control Legislation (July 7, 1958), available at http://www.presidency.ucsb.edu/ws/index.php?pid=11120 &st=passport&st1=control.


Chapter 6


3. That is not to say that the idea was necessarily a surprise. The FAA’s Civil Aviation Security intelligence office, NORAD, and even a self-actualized Justice Department trial attorney, analyzed the operational and legal implications of a suicide hijacking, although unsystematically, episodically, and incompletely. Final Report of the National Commission on Terrorist Attacks upon the United States 345–47 (2004) [hereafter “9/11 Commission Report”]. Generally, the leadership of the FAA’s security and intelligence offices did not consider suicide hijacking to be a credible threat before September 11. Memorandum for the Record, 9/11 Commission interview with Rear Admiral Cathal “Irish” Flynn USN (ret), Sept. 9, 2003, at 5.

4. Staff of H.R. Subcomm. on Inter-American Affairs, Comm. on Foreign Affairs, 90th Cong., Report pursuant to H. Res. 179 on Air Piracy in the Caribbean Area 1 n.a (Comm. Print 1968) [hereafter “H. Rep. on Air Piracy”].

6. 49 U.S.C. § 46502(a)(1)(A) (defining aircraft piracy to mean “seizing or exercising control of an aircraft in the special aircraft jurisdiction of the United States by force, violence, threat of force or violence, or any form of intimidation, and with wrongful intent”).


8. BLACK’S LAW DICTIONARY supra note 5, at 948.


10. Statement of Elmer E. Jones, Jr., Vice President of Public Affairs, National Airlines, Inc., Before the Subcommittee on Inter-American Affairs, of the House Committee on Foreign Affairs, Oct. 1, 1968, reprinted in H. Rep. on Air Piracy, supra note 4, at 19. There is a discrepancy between the seven passengers that Jones states to have been victims, the number (6) provided by the State Department in an appendix to the report, and the number (8) given by Horlick, supra note 7.

11. Id.


14. Id. at 103 (“The jury could have found that appellant himself was transported, rather than doing the transporting himself. The jury should have been instructed that in order for appellant to have ‘transported’ the plane and passengers he must have been in actual control or command of the aircraft and that the acts of the crew were not of their own volition but done at his direction”) (footnote omitted).


17. Evans, supra note 5, at 697. The fifty-first hijacking was to Syria. Id. More than half of these were in 1969. Id. at 698. At this time, the United States had no air traffic to Cuba and permitted only limited air travel from Cuba, so-called “Freedom Flights” twice daily to Miami for Cuban refugees. H. Rep. on Air Piracy, supra note 4, at 3; Cuba: End of the Freedom Flights, TIME 36 (Sept. 13, 1971).

18. H. Rep. on Air Piracy, supra note 4, at 13. The second most frequent citizenship was Cuban, with sixteen individuals. See also Evans, supra note 5, at 700.


20. Richard Witkin, Armed U.S. Guards Reported Ordered on Flights Abroad, N.Y. TIMES, Sept. 11, 1970, at 1. See also Kraus, supra note 9, at 41–42.
21. Evans, supra note 5, at 701–2; Horlick, supra note 7, at 39–42.


23. Pub. L. No. 87–197, § 1, 75 Stat. 466 (Sept. 5, 1961) (amending Federal Aviation Act of 1958). This amendment also made it a crime, for the first time, to carry a concealed weapon on board a commercial aircraft. Id. Aircraft piracy was defined as “any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.” Note that scienter required no political or other motive. In fact, the State Department expressed its preference against labeling air hijacking a political offense out of concern for the difficulties this would create for international extradition, which tended to exempt individuals seeking political asylum:

In our extradition treaties—and this is true for treaties of other countries as well—we traditionally have not accepted an obligation to return fugitives accused of common crimes whom we determined to be fleeing from political persecution. We have taken a hard look at this traditional policy in the light of the increasing danger to innocent persons from hijacking of commercial aircraft, and of the importance of an effective deterrent; and we have concluded that the hijacker of a commercial aircraft carrying passengers for hire should be returned regardless of any claim that he was fleeing political persecution. Our [proposed] protocol would provide, however, that he could be tried and punished only for the aircraft hijacking, not for any other offense. Under United States law, a hijacker faces a minimum penalty of 20 years; but obviously the penalty alone is no deterrent if the hijacker thinks he can avoid return for trial by persuading a foreign government to refuse to return him on the ground that he is really fleeing from political oppression. We do not propose to change in any way our general policy on political asylum; but we think the risks involved in the hijacking of commercial aircraft are great enough so that neither we nor others should treat hijackers—whatever their motivation—as simple political offenders.

Testimony of Frank E. Loy, Dep’y Asst. Sec’y for Transportation and Telecommunications, before the House Committee on Interstate and Foreign Commerce, Feb. 5, 1969, reprinted in 60 Dep’t of State Bull. 212, 213 (1969); see also Horlick, supra note 7, at 45–51.


26. On March 17, 1970, an Eastern airlines copilot became the first American killed in a domestic hijacking, dying from gunshot wounds, but not before wounding the hijacker with the hijacker’s own gun. Kraus, supra note 9, at 40. The passenger, Howard L. Franks, died during a hijacking on a TWA flight about to depart from Chicago to New York. Hijacker Is Seized at Kennedy After Man Is Killed in Chicago, N.Y. Times, June 12, 1971, at 1; Darien Consultant Shot on Plane Is First to Die in U.S. Hijacking, N.Y. Times, June 13, 1971; Kraus, supra note 9, at 42.

27. On September 9, 1949, J. Albert Guay secreted a bomb in the luggage of his wife, killing her (his purpose) and twenty-two others aboard a Quebec Airways flight.


On July 25, 1957, a passenger was ejected from a Western Airlines flight over California when he apparently detonated dynamite in the lavatory, but the plane landed safely. Civil Aeronautics Board, Aircraft Accident Report No. 1-065: Western Air Lines, Inc., Convair 240–1, N 8406H, Near Daggett, California, July 25, 1957 (Jan. 9, 1958); Passenger Insured for $125,000 Mysteriously Blasted from Airliner, N.Y. TIMES, July 26, 1957, at 1.

On November 16, 1959, forty-two people were killed aboard a National Airlines flight over the Gulf of Mexico that some investigators believed was lost due to a bomb placed as part of an insurance-collection scheme. Civil Aeronautics Board, Aircraft Accident Report No. 1-071: National Airlines, Inc., Douglas DC-7B, N 4891C, in the Gulf of Mexico, November 16, 1959 (June 14, 1962); Theory on Wreck in Gulf Suggests a Substituted Passenger and Bomb, N.Y. TIMES, Jan. 17, 1960, at 1.

On January 6, 1960, a National Airlines flight was destroyed over North Carolina by dynamite under a passenger seat, with the loss of thirty-four lives. The investigation was inconclusive, but suspicion rested on a lawyer believed to have committed suicide. Civil Aeronautics Board, Aircraft Accident Report No. 1-002: National Airlines, Inc., Douglas DC-6B, N 8225H, Near Bolivia, North Carolina, January 6, 1960 (July 29, 1960); C. P. Trussell, Senator Says Bomb Caused Airliner Crash Fatal to 34, N.Y. TIMES, Jan. 15, 1960 at 1.


28. Horlick, supra note 7, at 51–52 (“The most heavy-handed system is to check passengers and luggage for weapons. If such an examination is thorough enough to be effective, however, airlines fear that it might prove annoying to customers, and further complicate and delay the boarding process as well. Moreover, personal search raises the specter of constitutional problems.”) (citations omitted); see also Evans, supra note 5, at 703 (“Given the congestion which obtains at take-off of most flights, routine search of passengers and baggage would produce an intolerable situation unless it could be managed speedily and with a minimum of inconvenience to all concerned.”).

31. President's Commission, supra note 27, at 50.
32. Id., at 50–51.
33. Id., at 52. The report incorrectly cites the provision as 39 U.S.C. § 3263. The correct provision was 39 U.S.C. § 3623(d), promulgated as part of the Postal Reorganization Act, Pub. L. 91-375, Aug. 12, 1970, 84 Stat. 719, 761: “The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.” This section was repealed in 2006, § 201(b), Pub. L. 109-435, Dec. 20, 2006, 120 Stat. 3205.
34. Evans, supra note 5, at 703–4; Horlick, supra note 7, at 52.
35. Horlick, supra note 7, at 52 n. 103.
36. Evans, supra note 5, at 703–4.
37. Kraus, supra note 9, at 43.
38. See §§ 315(a) & 1111, Pub. L. 93-366, Aug. 5, 1974, 88 Stat. 415. The requirement had previously been enforced by an emergency FAA rule issued in December 1972. Kraus, supra note 9, at 44.
39. According to the President's Commission on Aviation Security and Terrorism, convened in the wake of the Pan Am 103 tragedy, other catalysts included the hijacking of Egyptair 648 in November 1985, and the terrorist attack that December on the Rome and Vienna airports. President's Commission, supra note 27, at 74.
42. Sec. 551(g)(1)-(2), Foreign Airport Security Act, supra note 41 (as codified at 49 U.S.C. App. 1515(g), as currently amended and found at 49 U.S.C. 44907(c)(1)-(2)). The determination is made by the Secretary of Transportation with the approval of the Secretary of State.
45. Manno, author interview, Oct. 20, 2009, supra note 43. Manno was one of a group of five that started this office. He came from Air Force OSI (counterintelligence).
46. Manno, author interview, Oct. 20, 2009, supra note 43; President's Commission, supra note 27, at 78 (“In the FAA model, threat exists only when a person or entity has both the capability to carry out a particular type of attack and the intention
to do so. Either of these factors, standing alone, does not constitute a credible threat. The model used by FAA is widely accepted and used by the majority of U.S. intelligence and law enforcement community agencies”).


48. Author’s interview with Claudio Manno, Mar. 14, 2011, Washington, D.C. (hereafter “Manno, author interview, Mar. 14, 2011”). Prior to 1986, it appears that SBs were sent by mail, although this finding by the President’s Commission on Aviation Security and Terrorism does not comport with Manno’s recollection. President’s Commission, supra note 27, at 78.


50. President’s Commission, supra note 27, at 14–40 (“The FAA’s view of the nature of the threat to domestic flights has not changed for almost two decades. . . . FAA makes clear that it views the terrorism problem as restricted to the international arena. FAA has said that at domestic airports, efforts will continue to focus on the hijacking threat, while research and development will emphasize improved passenger and baggage screening equipment”). This was disputed by Claudio Manno, who cited a number of information circulars issued by the FAA prior to the Pan Am 103 disaster referencing domestic threats. Manno, author interview, Mar. 14, 2011, supra note 48.

51. President’s Commission, supra note 27, at 14–15.

52. Id., at 6.

53. Id., at 69.

54. Id., at i. In fact, the head of the FAA’s Office of Civil Aviation Security himself described the FAA as a “reactive agency.” Id., at 53.


59. President’s Commission, supra note 27, at 78–79.

60. Memorandum for the Record, Manno, 9/11 Commission interview, supra note 44, at 6 & 8; Manno, author interview, Oct. 20, 2009, supra note 43; Memorandum for the Record, 9/11 Commission interview with Lee Longmire, Oct. 28, 2003, at 5 & 6. Longmire had held operational and policy posts at FAA since 1980. At the time of the interview, he was Assistant Administrator for Operations Policy at TSA.


62. Id.

63. Id.

64. President’s Commission, supra note 27, at 78–79.

65. Memorandum for the Record, 9/11 Commission interview with Rear Admiral Cathal “Irish” Flynn USN (ret), Sept. 9, 2003, at 5. Admiral Flynn was Associate Administrator of Civil Aviation Security (ACS 1) at FAA from 1993 to 2000. Memorandum for the Record, 9/11 Commission interview with John Steven Hawley, Oct. 8, 2003, at 5. Hawley served as a liaison to the State Department for both the FAA and TSA. Memorandum for the Record, 9/11 Commission interview with Lynne Osmus,

66. Testimony of Gerard Arpey, CEO of American Airlines, Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 80 (placing responsibility for threat assessment on federal officials and limiting airline responsibility to “implementing the security procedures that are given to us by the federal government”) and 88 (describing post-9/11 lawsuits brought by the Department of Transportation against American Airlines for crew member decisions to refuse transport to passengers they deemed suspicious). Testimony of Edmond Soliday, Former Vice President, United Airlines, Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 82 (“[M]ost recently after 9/11, 38 of our captains denied boarding to people they thought were a threat. Those people filed complaints with the DOT, we were sued, and we were asked not to do it again. . . . We were reminded quite frequently that unless they posed an immediate threat we were disobeying the common carrier rules.”).


68. 9/11 COMMISSION REPORT , supra note 3, at 476 n. 54.

69. Manno, author interview, Mar. 14, 2011, supra note 48. A more common use of SDs is illustrated by a terrifying precursor to the 9/11 attacks. The “Bojinka” plot, conceived in the mid-1990s by Ramzi Yousef and Khalid Sheikh Mohammed, aimed to destroy twelve U.S. air carriers in a span of forty-eight hours as they flew over the Pacific Ocean. 9/11 COMMISSION REPORT, supra note 3, at 147 & 489 n. 8 (2004). Among the responses once the plot was uncovered was the issuance of SDs requiring a variety of new security measures not already required by the overseas security plans of commercial airlines, all of which responded to the new modus operandi that the Bojinka plot uncovered. Manno, author interview, Mar. 14, 2011, supra note 48; Kraus, supra note 9, at 102.


73. WILLIAM J. KROUSE, TERRORIST IDENTIFICATION, SCREENING, AND TRACKING UNDER HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 6, CRS REPORT FOR CONGRESS (RL32366) 26 (Apr. 21, 2004).

74. EDWARD ALDEN, THE CLOSING OF THE AMERICAN BORDER 163 (2008). The Intelligence Community was concerned about the risk that its sources and methods could be revealed.


76. ALDEN, supra note 74, at 161.

77. ELDRIDGE, supra note 72, at 78.

78. Id. at 80 (“In 2001, the CIA provided 1,527 source documents to TIPOFF; the State Department, 2,013; the INS, 173. The FBI, during this same year, provided 63 documents to TIPOFF—fewer than were obtained from the public media, and about the same number as were provided by the Australian Intelligence Agency (52).”).

79. BART ELIAS, WILLIAM KROUSE, AND ED RAPPAPORT, HOMELAND SECURITY: AIR PASSENGER PRESCREENING AND COUNTERTERRORISM, CRS REPORT FOR CONGRESS (RL 32802) 5 (Mar. 4, 2005).

80. ALDEN, supra note 74, at 28–30.

81. Written Statement of Doris Meissner to the National Commission on Terrorist Attacks upon the United States, January 26, 2004, Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States.

82. ALDEN, supra note 74, at 30–31.

83. 9/11 COMMISSION REPORT, supra note 3, at 83. In a memorandum dated October 16, 2002, Claudio Manno wrote that “On September 11, 2001, only three of these SDs were in effect, with a total of 16 names of individuals that air carriers were prohibited from transporting.” Internal TSA Memorandum on “TSA Watchlists” dated Oct. 16, 2002, from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy (ACLU FOIA Release, AT–010). See infra at note 106 for a description of the ACLU Freedom of Information Act litigation that produced this document. Claudio Manno was not aware of any individual listed on an SD who had contested denial to board, or even showed up for a flight for which an SD had been issued—by that point, such individuals weren’t flying. Manno, author interview, Mar. 14, 2011, supra note 48.


85. 9/11 COMMISSION REPORT, supra note 3, at 85 & 457 n.91. This statistic depends on the definition of the word hijack. On December 7, 1987, a disgruntled former employee, David Burke, used his unrelinquished employee credentials to board Pacific Southwest Airlines Flight 1771 bound from Los Angeles to San Francisco. Armed with a .44 caliber pistol, he caused the plane to crash into a California hillside, killing
all forty-three persons on board. NTSB Brief of Accident File No. 1750 (NTSB ID: DCA88MA008) Adopted 01/04/1989; Richard Witkin, Threatening Note is Found at Site of Fatal Jet Crash, N.Y. Times, Dec. 11, 1987. This sort of suicide-hijacking, however, was typically not classified as hijacking by security officials. This one was classified by the NTSB as “sabotage . . . intentional . . . passenger.”

87. Id., at 8.
88. Alden, supra note 74, at 98.
89. Commissioner Bob Kerrey also exhibited flashes of anger that day: “The FAA can’t just say as they’ve done, they’ve given us five or six pages of rebuttal to the Joint Committee saying we didn’t know, we didn’t know, we didn’t know, we didn’t know, we didn’t know. It’s like you know how many times can you say we didn’t know before somebody says, Jesus, you should have?” Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 84.
90. Eldridge, supra note 72, at 78.
91. Testimony of Rear Admiral Cathal “Irish” Flynn USN (ret), Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 29.
96. Alden, supra note 74, at 127.
103. Author’s interview with Michael P. Jackson, Mar. 14, 2011, Arlington, Virginia (“I was one of two negotiators that the administration sent to negotiate the ATSA bill that created TSA”); author’s interview with Richard Falkenrath, June 8, 2010, New York City (“And you know TSA was stood up by Michael Jackson. . . . He was the key guy for standing up TSA. Norm Mineta was secretary but Jackson really drove it.”); Steven Brill, After: How America Confronted the September 12 Era 235 (2003).
104. Author’s interview with Admiral James M. Loy, Mar. 16, 2011, Washington, D.C.
105. Author’s interview with Michael P. Jackson, Mar. 14, 2011, Washington, D.C. (“So when TSA promulgated the Selectee and the No Fly List, it was done through security directives, in essence in that authority, and, so at the end of the day, implementing the No Fly List is a TSA, in my understanding of it is, that it relies upon TSA legal authorities.”).

106. Redacted e-mail chain (ACLU FOIA Release B2-128). This document is part of a Freedom of Information Act release obtained by the American Civil Liberties Union as a result of civil litigation, Gordon v. FBI, 390 F.Supp.2d 897 (N.D. Cal. 2004). Most of the documents are available at http://www.aclu.org/national-security/unprecedented-release-government-documents-reveal-confusion-and-absence-policy-imp. The remaining documents were obtained from one of the plaintiff’s attorneys, Thomas R. Burke, a partner at Davis Wright Tremaine LLP. The documents were released as separate attachments: attachment A has two parts and attachment B has four parts. All documents are identified by their original titles and dates and also by the attachment, part, and Bates number.

107. Redacted e-mail chain (ACLU FOIA Release B2-130).

108. Alden, supra note 74, at 241.


110. Redacted e-mail dated Oct. 11, 2002 (ACLU FOIA Release B2-137); redacted e-mail dated Feb. 5, 2003 (“Here is what I need from you and your UC to place an individual that is believed to be a threat to Civil Aviation Security on the TSA No-Fly list. An EC is probably the best vehicle to do this. . . . All the bio info you can put together on this person. This will need to be at the FOUO (for official use only) level, it goes to the airlines. . . . Once we get this, I will forward this person’s name to the TSA for placement on the No Fly list. Once this person is on the list, he will not fly within the US, nor will he be able to fly out of the US or from any airport [redacted]”) (ACLU FOIA Release B2-130); redacted e-mail dated Dec. 18, 2002 (same) (ACLU FOIA Release B2-128).

111. Internal TSA Memorandum on “TSA Watchlists” dated Oct. 16, 2002, from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy (ACLU FOIA Release, A1-010). Kip Hawley, a former administrator of the TSA, asserts without citation that, shortly after September 11, a Security Directive containing approximately twenty-five names taken from an unspecified database became “the first iteration of the now-iconic no-fly list” at the suggestion of a former U.S. Marine Captain Joe Salvator, who had been loaned to the FAA from the Department of Defense and later worked as a TSA intelligence deputy. Kip Hawley and Nathan Means, Permanent Emergency: Inside the TSA and the Fight for the Future of American Security 36 (2012). However, this book contains virtually no references to corroborating sources and is self-admittedly unreliable: “I have simplified certain processes or omitted details, or presented as a single scene a composite of events that occurred over time.” Although the author states that he has occasionally “lightly fictionalized an event, detail, or process” in the book, the author does not indicate whether this is an instance of that sort of imaginative recreation. Id. at vi. I have not located evidence elsewhere to corroborate this version of events in place of those presented in this chapter.

112. Id.

114. Id.

115. E-mail from SSA [redacted] to Arthur M. Cummings, May 28, 2002, 1:43PM (ACLU FOIA release B1-29). My efforts to identify the particular SSA who authored this e-mail were unsuccessful. E-mail correspondence with Susan T. McKee, Public Affairs Specialist, FBI Public Affairs Office, May 24–June 12, 2010 (on file with author).

116. E-mail from SSA [redacted] to [redacted], June 18, 2002, 6:35PM (ACLU FOIA release B5-271).

117. E-mail from SSA [redacted], Civil Aviation Security Program, Domestic Terrorism Counterterrorism Planning Section, Counterterrorism Division, to [redacted], July 22, 2002, 1:48PM (ACLU FOIA release B1-43).

118. Author’s interview with Randy Beardsworth, Mar. 11, 2010, Washington, D.C.

119. Id.

120. E-mail from SSA [redacted], Civil Aviation Security Program, Special Events Management Unit, Domestic Terrorism Counterterrorism Planning Section, Counterterrorism Division FBI, to [redacted], July 5, 2002, 5:50 PM (ACLU FOIA release B3-168).

121. Id.

122. E-mail between SSA [redacted], Counterterrorism Squad, Honolulu, and SSA [redacted] Civil Aviation Security Program, Counterterrorism Division, FBI, Sept. 17, 2002 (ACLU FOIA release B4-255).

123. 9/11 Commission Report, supra note 3, at 391 (“Over 90 percent of the nation’s $5.3 billion annual investment in the TSA goes to aviation—to fight the last war.”).

124. Id., at 273–76.


126. 9/11 Commission Report, supra note 3, at 274–75.

127. Director of Central Intelligence George J. Tenet, Testimony Before the Joint Inquiry into Terrorist Attacks Against the United States (Unclassified Version), June 18, 2002.


129. Falkenrath was Special Assistant to the President and Senior Director for Policy and Plans in the Office of Homeland Security from October 2001 to January 2003, after which he became Deputy Assistant to the President and Deputy Homeland Security Advisor until spring 2004. Falkenrath explained that both HSPD-6 and its accompanying Memorandum of Understanding were his idea. “Yeah so this was my clever little thing. It was a package deal where you got HSPD-6 and the MOU and you did them simultaneously,” Falkenrath recalled. Such policymaking was only possible, he continued, “because everyone agreed we screwed up and we needed to do something.” Author interview with Richard Falkenrath, June 8, 2010, New York City.

130. Indeed, according to Edward Alden, “Congress had envisioned that [DHS] would become an information clearinghouse for protecting the country against terrorist attack.” Alden quotes Tom Ridge, the first Secretary of DHS, regarding the decision to place the TTIC within the CIA structure: “The president made it pretty clear where he wanted it. He didn’t want it in DHS. End of story.” Alden, supra note 74, at 230. Similarly, Richard Falkenrath describes his role in locating the TSC within the FBI:
The one squirrely bit was who was going to own TSC. And that for all the drafts until the final principals’ meeting or deputies’ meeting we just bracketed it. We didn’t decide it and, cause it could have gone to either DHS or FBI. But DHS, you got at this point, is nine months old. . . . DHS comes in and says, Well, we think we should have this. And the FBI says, Well, we think we should have this. But they were very polite and we weren’t like cramming it down. We didn’t decide it because I actually think, my point here was look, the statutory construction for both agencies would permit it to go either place, but not really anywhere else. And there was no way it could go to State cause we were talking about law enforcement, screening, I mean this was a lot of different kinds of lists and I said, okay, let’s not resolve this here, this first meeting.

Well, the two of you agencies go back and lay out your step-by-step proposal about how you’d stand up this entity, time frame, budget costs, whatever, staffing whatever.”

Two weeks later, Falkenrath says, FBI came back with a detailed plan, while DHS conceded that the state of their internal development as a new agency was such that they couldn’t put together a proposal in time.

[It] was a huge concession but the momentum of the process was such that they couldn’t just say everyone in the government wait for us to get our act together then we’ll take it over. There was no room to be turfy because I’d created this kind of environment where we had this huge vulnerability hanging out there, we gotta like have a solution, this could happen again today. . . . FBI came forward with their proposal. No one else had any other proposal. DHS has no choice but to assent to letting it go to FBI. And then at some point I remember in the MOU, it may be in there, there was a provision like in a year we would reevaluate whether it should go to DHS, and that was fine with me. So that was it. And then that was the only open issue. Then the President signed this, it was totally, they sent it in and it came back the next day executed and they signed their MOU.

Interview with Richard Falkenrath, New York City, June 8, 2010.

131. E.O. 13228 (Oct. 8, 2001), 66 Fed. Reg. 51812 (Oct. 10, 2001). As the 9/11 Commission described the process within the NSC (on which it was based), the National Security Advisor, through the NSC Staff, “developed recommendations for presidential directives, differently labeled by each president. For President Clinton, they were to be Presidential Decision Directives; for President George W. Bush, National Security Policy Directives. These documents and many others requiring approval by the president worked their way through interagency committees usually composed of departmental representatives at the assistant secretary level or just below it. The NSC staff had senior directors who would sit on these interagency committees, often as chair, to facilitate agreement and to represent the wider interests of the national security advisor.” 9/11 COMMISSION REPORT, supra note 3, at 99–100.


133. Following its announcement in President Bush’s 2003 State of the Union Message, the TTIC’s mission was outlined by Director of Central Intelligence Directive (DCID) 2/4. TERRORIST THREAT INTEGRATION CENTER (TTIC) AND ITS RELATIONSHIP WITH THE DEPARTMENTS OF JUSTICE AND HOMELAND SECURITY: JOINT HEARING BE-


137. The Intelligence Authorization Act for Fiscal Year 2003, Pub. L. 107-306, § 343, 116 Stat. 2383, 2399 (Nov. 27, 2002), mandated the creation of a Terrorist Identification Classification System, a list to be shared with appropriate government agencies of “individuals who are known or suspected international terrorists, and of organizations that are known or suspected international terrorist organizations.”

138. U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE TERRORIST SCREENING CENTER 127 (App. IV) (June 2005) (hereafter OIG 2005 REPORT). This statement was made by the TSC, quoting the language of paragraph 10 of the Memorandum of Understanding that accompanied HSPD-6, in its written response to the OIG draft audit; see also Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism, § 10, Sept. 16, 2003 (hereafter TSC 2003 MOU).

139. Written Statement of Russell E. Travers, Jan. 26, 2004, Seventh Public Hearing of the National Commission on Terrorist Attacks upon the United States; Krouse, supra note 73, at 14; TSC 2003 MOU, supra note 138, at § 28. At the time of his testimony, Mr. Travers was a deputy director at TTIC.


141. TERRORIST THREAT INTEGRATION CENTER (TTIC) AND ITS RELATIONSHIP WITH THE DEPARTMENTS OF JUSTICE AND HOMELAND SECURITY, supra note 133, at 123 (Responses to Questions for the Record by John O. Brennan, Dec. 4, 2003).

142. HSPD-6, § 1 (Sept. 16, 2003). See notes 129 and 130 for background on the development of HSPD-6.

143. Author interview with Timothy J. Healy, Director, Terrorist Screening Center, December 4, 2009, Washington, D.C.

144. Id.

145. OIG 2005 REPORT, supra note 138, at iv.

146. These include Defense, Homeland Security (CIS, Coast Guard, CBP, ICE, Secret Service, and TSA), Justice (FBI, ATF, and DEA), State, Treasury, and private con-
tractors. Unclassified PowerPoint presentation supplied by Trent Duffy, TSC Public
Affairs, e-mail to author, April 20, 2010.

147. Krouse, supra note 73, at 15.

148. Healy interview, supra note 143; see also TSC 2003 MOU, supra note 138, at § 5.

149. OIG 2005 REPORT, supra note 138, at iv.

Screening Center (TSC), which was established and is administered by the Attorney
General pursuant to HSPD-6, enables Government officials to check individuals
against a consolidated Terrorist Screening Center Database.”).

151. Healy interview, supra note 143.

152. Id.


155. HSPD-6, a short and general document, was accompanied by a memorandum
of understanding signed by Attorney General John Ashcroft, DHS Secretary Tom
Ridge, Secretary of State Colin Powell, and CIA Director George Tenet that provided
operational details. See TSC 2003 MOU, supra note 138; see also Travers, supra note 139.

156. Krouse, supra note 73, at 14.

157. Kessler, supra note 140, at 3–4; http://www.nctc.gov/about_us/about_nctc

news/stories/2007/august/tsc083107 (accessed on TSC homepage, last visited June 15,
2012).

159. The only exception, carved out by the language concerning U.S. persons, con-
cerned “purely domestic terrorism information,” i.e., information concerning U.S.
persons that lacked any connection to foreign or international terrorism. Such informa-
tion remains the purview of the FBI, which independently provides it to the TSC.
Travers, supra note 139.

160. TSC 2003 MOU, supra note 138, at § 13 (“The TTIC identities database will
serve, with the exception described in paragraph (10) [concerning purely domestic
terrorism information to be supplied by the FBI], as the single source for the Terrorist
Screening Center terrorist screening database.”).

161. Travers, supra note 139. Access to classified information held by the Intelli-
genue Community for entry into TIPOFF by State, and the INS’s subsequent access
to TIPOFF, was governed by at least one MOU on sharing four unclassified elements:
name, date of birth, country of birth, and passport number. Eldridge, supra note 72,
at 79.

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163. TSC 2003 MOU, supra note 138, at § 13. The TSC does not “own” derogatory
information in this sense: derogatory information is not included in the TSDB. De-
rogatory information is typically classified; it is “owned” by the source agency. There-
fore, although TSC analysts may (and often do) view derogatory information associ-
ated with a TSDB record, only unclassified data elements of an identifying nature are
included in the TSDB. This distinction could be described in a metaphorical (but not
technical) sense as the difference between accessing derogatory information as if on
the Internet and possessing unclassified biographical information as if on a hard drive. TSC analysts are able to use both derogatory and biographical information, but only the latter is kept within the confines of the TSDB. In this sense, the TSC had merely a usufructuary’s right to this information.

164. Id., at 8; OIG 2005 REPORT, supra note 138, at 24.
165. OIG 2009 REPORT, supra note 162, at vii & 13.
166. Unclassified PowerPoint presentation supplied by Trent Duffy, TSC Public Affairs, e-mail to author, April 20, 2010. The slide shown to congressional staff was SSI, Sensitive Security Information.
167. OIG 2009 REPORT, supra note 162, at 5.
170. Id., at 12.
171. Id., at viii.
173. OIG 2009 REPORT, supra note 162, at 1 n. 40; Timothy J. Healy, Statement before the Senate Homeland Security and Governmental Affairs Committee, Dec. 9, 2009.
174. OIG 2007 REPORT, supra note 135, at 3 n.23.
176. OIG 2009 REPORT, supra note 162, at 8; OIG 2005 REPORT, supra note 138, at 24.
177. OIG 2009 REPORT, supra note 162, at 8.
178. Author’s interview with Randy Beadsworth, Mar. 11, 2010, Washington, D.C.
179. Id.
180. U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 27 (Sept. 2010). The OIG quoted from the TSC’s response to a 2005 audit: “The Associates Project was developed to identify possible associates of known or suspected terrorists. During their normal course of duties, law enforcement officers, DOS officials and Border Agents encounter known or suspected terrorists in the TSDB from querying their case management systems during an encounter. These encounters provide valuable information which includes who the known or suspected terrorist is with at the time of the encounter. These encounters with possible associates will be documented and provided to the office of origin for appropriate action.” OIG 2005 REPORT, supra note 138, at 100.

Chapter 7

2. Letter from Secretary of State Charles Evans Hughes to H. M. Lord, Director, Bureau of the Budget, Jan. 20, 1925; File 112/721a; CDF 1910–29; RG 59; NACP.
3. H. W. Erksine, You Don’t Go If She Says No, 132 Colliers 62, 64 (July 11, 1953).
4. Letter to Secretary Acheson from Charles Maylon, former legislative assistant to President Truman, June 20, 1952; File 110.4 PD/6-2052; CDF 1950–54; RG 59; NACP (“Due to extenuating circumstances it was necessary to procure the passport without delay. Mrs. Shipley issued her passport in less than twenty-four hours. That is indeed service to the people”).
6. See chapter 6, note 158.
10. Statement of Timothy J. Healy, Director, Terrorist Screening Center, Testimony before the Senate Homeland Security and Governmental Affairs Committee, Dec. 9, 2009 (hereafter “Healy 2009 Testimony”); see also author interview with Timothy J. Healy, Director, and Jacqueline F. Brown, General Counsel, Terrorist Screening Center, FBI Headquarters, Washington, D.C., Dec. 4, 2009. A December 2010 FBI memo on watchlisting guidance provides a little more detail on the “reasonable suspicion” standard, but not much:

In order to nominate a subject for entry into the TSDB and all eligible supported systems, the FBI must have a reasonable suspicion to believe that the subject is a known or suspected terrorist (KST). To meet this standard, the FBI must have “articulable” intelligence or information which, based on the totality of the facts and taken together with rational inferences from those facts, reasonably warrants a determination that the subject is known or suspected to be (or has been) knowingly engaged in conduct constituting, in preparation for, in aid of, or related to terrorism or terrorist activities. There must be an objective factual basis for the nominator to believe that the individual is a KST. Mere guesses or “hunches” are not enough to constitute a reasonable suspicion that an individual is a KST.

The Domestic Investigations and Operations Guide (DIOG) authorizes the initiation of a Preliminary Investigation based on any “allegation or information” indicative of criminal activity or threats to national security. Subjects of terrorism Preliminary Investigations must meet the reasonable suspicion standard for watchlisting. In order for such subjects to be watchlisted, the allegation or information used to predicate the investigation must have at least one source of corroboration that ties these subjects to terrorism or terrorist activities. The DIOG authorizes initiation of a Full Investigation based on “articulable factual basis” of possible criminal and national threat activity. The articulable factual basis used to open a terrorism Full Investigation will always meet the reasonable suspicion standard for watchlisting.

Subjects of Guardian leads and assessments should not be submitted to TREX for watchlisting. In addition, the FBI will not nominate an individual based on single source information from unsolicited tips such as walk-ins,
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write-ins, or call-ins, unless the subject meets the reasonable suspicion standard. Nominations should not be based on source reporting that is unreliable or not credible. Suspicious activity alone, that does not rise to the level of a reasonable suspicion, is not a sufficient basis to watchlist an individual.

Section 1.1. Watchlisting Standard – Reasonable Suspicion. FBI Memorandum to all field offices from Counterterrorism Front Office titled “Counterterrorism Program Guidance Watchlisting Administrative and Operational Guidance,” Case ID # 3190-HQ-A1487636-CTD, Dec. 21, 2010 (hereafter “FBI Memo on Watchlisting Guidance”). This 29-page document was obtained through a Freedom of Information Act (FOIA) request dated June 7, 2011, that was submitted to the FBI by the Electronic Privacy Information Center (EPIC). The memorandum, part of a 92-page release made by the FBI dated Sept. 13, 2011, was subsequently posted on EPIC’s website, http://epic.org/foia/fbi_watchlist.html (last visited June 15, 2012).

11. Healy and Brown interview, Dec. 4, 2009, supra note 10. Director Healy credited his general counsel, Jacqueline “Lyn” Brown, as having been instrumental in the drafting of this common standard for watchlist nominations.

12. The working group was composed of subject matter experts from the intelligence and screening communities (CIA, NSA, DOD, DOS, DHS, FBI, TSC, NCTC, and the Office of the Director of National Intelligence). The guidance document is classified as sensitive security information for official use only. It was approved in January 2009 by the Deputies Committee of the Homeland Security Council. It was then issued by the TSC and the White House Executive Secretariat. It was approximately twenty pages long and appeared in an appendix (Appendix 5 in March 2009) of the Watchlisting Protocol. The Watchlisting Protocol is a lengthy and detailed reference book used by TSC managers and analysts on a daily basis.

The working group’s objective was to improve the definitional clarity of key terms in the relevant Homeland Security Presidential Directives. As noted above, terms such as “terrorism” and “terrorist activities,” which are found in the HSPDs, are not always consistently defined in the U.S. Code. Likewise, successive HSPDs contain subtle differences in language. HSPD-6 refers to individuals “known or appropriately suspected” of various connections to “terrorism.” HSPD-11 refers to individuals “known or reasonably suspected” of such connections and added the phrase “terrorist activities.” HSPD-24, which concerns the use of biometrics in screening, refers to an “articulable and reasonable basis for suspicion” that an individual posed “a threat to national security.”

This working group itself emerged out of one of the twice-yearly meetings of the TSC Policy Board, which is composed of the signatories to the TSC memorandum of understanding. The relationship of the working group to the Policy Board is roughly analogous to the relationship of the Deputies’ Committee to its Policy Coordinating Committees (PCCs, which are now known as Inter-Agency Policy Committees, or IPCs). Since the Homeland Security Council no longer exists, these reevaluations are now conducted in the National Security Council. Author interview with Jacqueline “Lyn” Brown, General Counsel, Terrorist Screening Center, Mar. 8, 2010, Washington, D.C.; see also Department of Homeland Security Office of the Inspector General, Role of the No Fly and Selectee Lists in Securing Commercial Aviation 9 (July 2009) [hereafter “DHS 2009 OIG Report”]. The TSC issued new watchlisting guidance in July 2010. See FBI Memo on Watchlisting Guidance, supra note 10.


16. Author interview with Richard Falkenrath, June 8, 2010, New York City (Kahn: “Now I understand it’s a very consultative process with lots of detailees from the interested agencies at TSC. But do I understand that language to mean if and when there is ever a conflict where TSA says we want him on, and TSC doesn’t agree, the deciding group is TSC, not TSA?” Falkenrath: “That was certainly our idea.”).


18. Falkenrath interview, June 8, 2010, supra note 16.


23. See Ch. 6, n. 130, for Falkenrath’s description of this “squirrelly bit [about] who was going to own TSC.”


25. Kip Hawley, Assistant Secretary, Transportation Security Administration, Statement Before the House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, Washington, D.C., Sept. 9, 2008 (“the TSC now provides ‘one-stop shopping’ so that every government agency is using the same TSDB”); Ms. Rossides’ identical use of the phrase is found in the DHS 2009 OIG Report, supra note 12, at 41 (Memorandum from Gale D. Rossides, Acting Administrator, to Richard Skinner, DHS Inspector General, Mar. 17, 2009).

26. Timothy J. Healy, Statement before the Senate Committee on Homeland Security and Governmental Affairs, Washington, D.C., Mar. 10, 2010 (hereafter “Healy 2010 Testimony”). According to the Government Accountability Office, “[i]n general, a nominator is a department or agency that has determined that an individual is a known or suspected terrorist and nominates that individual to TIDE and the TSDB based on information that originated with that agency or another agency. An originator is a department or agency that has appropriate subject matter interest and classification authority, and collects terrorism information and disseminates it to other U.S. government entities.” U.S. GOVERNMENT ACCOUNTABILITY OFFICE, TERRORIST WATCHLIST: ROUTINELY ASSESSING IMPACTS OF AGENCY ACTIONS SINCE THE DECEMBER 25, 2009, ATTEMPTED ATTACK COULD HELP INFORM FUTURE EFFORTS (GAO-12–476) 6 n.15 (May 2012).

27. Id.

28. A July 2009 report by the DHS Inspector General states that these “TSA subject matter experts . . . are detailed to the TSC from TSA’s Office of Intelligence and Federal Air Marshal Service (FAMS).” DHS 2009 OIG REPORT, supra note 12, at 12; see also Brown interview, Mar. 8, 2010, supra note 12. This lends further support for the conclusion that TSC, not TSA, is truly in charge. “There was a core of people who were formally detailees,” recalled Michael Jackson, Deputy Secretary of the Depart-
ment of Homeland Security from March 2005 through October 2007. “And it was not fair game for you to try to use that person to inflict your own policy views on the agency where they were working. They brought a general sense of what DHS was about or TSA was about over to that and to some degree represented the type of thinking and equities that were presumably resident at TSA. But they worked for this assignment and they took their daily operating orders from the head of the, well, if it was the FBI guy, for the agency.” Author’s interview with Michael Jackson, Mar. 14, 2011, Arlington, Virginia. Jackson also remembers sending “a bunch of loaners over and I suspect they weren’t formally detailed. I just think they were the right type of people, some may be a lawyer, some may be intel office people, some may be FAMS who had intel training and field training, et cetera. But we essentially loaned them smart and capable generalists to go through the list.” Id. Jackson is probably remembering the fallout of a July 2006 review when, with the help of ten federal air marshals assigned from DHS to TSC, the No Fly List was culled from 71,872 records down to 34,230 records by January 31, 2007. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER 31–32 (Audit Report 07-41, Sept. 2007).


30. Id.

31. Loy interview, Mar. 16, 2011, supra note 17 (Author: “So do I understand correctly that there was quite a lot of back and forth and conflict—for lack of a better word—but positive conflict. But in the end, at the end of the day, whether it’s a decision in the first instance to watchlist or it’s a decision to go back and take a look and see if redress is warranted, the final decision maker is TSC?” Loy: “Absolutely.”).

32. Id.


35. Id., at 32.

36. Id.

37. Id., at 33.

38. Id., at 31 (“To assist the TSC in its review of the No Fly List, the DHS temporarily assigned 10 federal air marshals to the TSC”). This conflicts with the DHS Inspector General’s report, which refers to subject matter experts “detailed” from TSA to TSC. Compare supra note 28. This may simply be a case of less than precise use of language. Regardless, the air marshals were there “[t]o assist the TSC in its review,” which seems to capture a hierarchical relationship. OIG 2007 REPORT, supra note 34, at 31.

39. OIG 2007 REPORT, supra note 34, at 28, n. 41.


41. Id., at *14–15 (internal citations omitted; emphasis in original).

42. DHS 2009 OIG REPORT, supra note 12, at 9.

43. Id., at 42 (Memorandum from Rossides to DHS IG Richard Skinner, Mar. 17, 2009).
44. Id., at 54.
46. OIG 2007 REPORT, supra note 34, at 3 n.23.
49. Id.
50. Some history provided support for this conclusion. When the State Department controlled its own TIPOFF database back in the late 1980s and early 1990s, its criteria to start a file on an individual “included reasonable suspicion that the alien engaged in or might engage in terrorism, otherwise known as ‘derogatory information’ and sufficient biographical information for positive identification.” THOMAS R. ELDRIDGE, ET AL. 9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 89 (2004). The 9/11 Commission staff traced that “reasonable suspicion” standard back to the early 1980s, when it appeared in (and appeared to them to have been taken from) a confidential task force report that “suggested a border watchlist be created to improve national security. The task force suggested that the watchlist database hold names of those who may seek admission for criminal purposes. The reasoning was that since the database only compiled names of those who may seek admission, the higher standard of excludability need not be met.” Id. at 110 n. 169.
52. 392 U.S. 1, 21 (1968).
54. 392 U.S. at 21 (“The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”).
56. Press Conference Remarks by Secretary Acheson, supra note 9, at 41. A few years later, the head of the Bureau of Security and Consular Affairs began a public defense of passport procedures with the same argument: “Out of more than half a million passport applications made to the State Department last year, only about 450 were denied on substantive grounds. Only thirteen final denials were turn-downs on the ground of Communist activities.” Roderic L. O’Connor, The State Department Defends, 41 Saturday Review 11 (Jan. 11, 1958).
58. Although the 9/11 Commission seized on the number twelve, the FAA and the TSA put the number of SDs in effect on September 11, 2001, at three and the number of names of individuals prohibited from air travel at sixteen. Internal TSA Memorandum on “TSA Watchlists” dated Oct. 16, 2002, from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy (ACLU FOIA Release, A1-009).
59. Internal TSA Memorandum on “TSA Watchlists” dated Oct. 16, 2002, from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy (ACLU FOIA Release, A1-010); Transportation Security Intelligence Service, TSA Watchlists, Unclas-
sified PowerPoint Slides dated December 2002 (ACLU FOIA Release, A1-002). This
document is part of a Freedom of Information Act release obtained by the American
Civil Liberties Union as a result of civil litigation, Gordon v. FBI, 390 F. Supp. 2d 897
(N.D. Cal. 2004). See chapter 6, n. 106, for an explanation of document coding.

60. Transportation Security Intelligence Service, TSA Watchlists, Unclassified Pow-
erPoint Slides dated Dec. 2002 (ACLU FOIA Release, A1-003); Internal TSA Memo-
randum on “TSA Watchlists” dated Oct. 16, 2002, from Claudio Manno, Acting As-
sociate Under Secretary for Transportation Security Intelligence to Associate Under

61. Testimony of Edmond Soliday, Seventh Public Hearing of the National Com-
mission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 82.


at that time were 13,903 people, of which 1,158 were U.S. persons. Id.

64. Jamie Tarabay, The No- Fly List: FBI Says It’s Smaller Than You Think, National
list-fbi-says-its-smaller-than-you-think. See also GAO 2012 Report, supra note 26 at
14 (reporting number of U.S. Persons on No Fly List “more than doubled” after post-
Abdulmutallab initiative).

65. Carol Cratty, 21,000 people now on U.S. no fly list, official says, CNN, Feb. 2,
2012. The article interchangeable refers to “people” and “names” on the list but seems
to mean discrete individuals, saying the list “doubled over the past year.”


67. Seventh Public Hearing of the National Commission on Terrorist Attacks upon

68. Final Report of the National Commission on Terrorist Attacks upon
The United States 393 (2004).

69. Seventh Public Hearing, supra note 67, at 37.

70. Testimony of Claudio Manno, Seventh Public Hearing of the National Com-
mission on Terrorist Attacks upon the United States, Jan. 27, 2004, at 37.

71. Internal TSA Memorandum on “TSA Watchlists” dated October 16, 2002,
from Claudio Manno, Acting Associate Under Secretary for Transportation Security
Intelligence, to Associate Under Secretary for Security Regulation and Policy (ACLU


73. Author interview with Richard Falkenrath, June 8, 2010, New York City.

74. Memorandum for the Record, 9/11 Commission informal phone conversation
with George Regan, Oct. 21, 2003 (quoted in Eldridge, supra note 50, at 86).


76. As noted in chapter 6, the Intelligence Community was not particularly en-
thusiastic about the FAA’s security directives, or even the State Department’s TIPOFF
watchlist. As the staff of the 9/11 Commission observed, watchlisting was not seen as
an “integral” tool for the work of the Intelligence Community, but rather “a chore off
to the side” that “busy intelligence officials just have to remember to do.” National
Commission on Terrorist Attacks upon the United States Staff Statement No. 2, Three

77. Internal TSA Memorandum on “TSA Watchlists” dated October 16, 2002,
from Claudio Manno, Acting Associate Under Secretary for Transportation Security


85. *Id.* (citing *Watchlisting Guidance*, July 2010, Appendix 1, Page 3); see also *supra* note 10, at 4.


87. Compare the definition used by the State Department to compile annual country reports on terrorism, 22 U.S.C. § 2656f(d)(2) (“the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”) with the Federal Criminal Code, 18 U.S.C. § 2331 (5) (“the term ‘domestic terrorism’ means activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.”) (internal outline omitted) and with federal immigration law, 8 U.S.C. § 1182(a)(3)(B)(iii) (“the term ‘terrorist activity’ means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person; An assassination; The use of any biological agent, chemical agent, or nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; A threat,
attempt, or conspiracy to do any of the foregoing.”) (internal outline omitted). All three definitions are referenced in the GAO’s latest report on the TSC’s involvement in terrorist watchlisting. See supra note 26 at 6–8.


89. 49 U.S.C. § 44903(j)(2)(C)(v) (“The Assistant Secretary, in coordination with the Terrorist Screening Center, shall include on the No Fly List any individual who was a detainee held at the Naval Station, Guantanamo Bay, Cuba, unless the President certifies in writing to Congress that the detainee poses no threat to the United States, its citizens, or its allies. For purposes of this clause, the term ‘detainee’ means an individual in the custody or under the physical control of the United States as a result of armed conflict.”).


91. ABC News, Cat Stevens “In the Dark” Over No-Fly List, Oct. 1, 2004. This claim has been disputed by many, among them Randy Beardsworth, who joined the DHS transition team in December 2002 to help organize operational aspects of border and transportation security: “Remember Cat Stevens was on the No Fly List. We make light of that now. Everybody in my office brought in Morning has Broken. Cat Stevens songs were popular, they were playing all over the place. So it was funny. But when we went back and said ‘why was he on the No Fly List?’ there were reasons that he would have been in the Terrorist Screening Database, but there were no reasons why he should have been on the No Fly List. That was one of the cases that drove us to say we need to make sure that we’re adjudicating these lists.” Author interview with Randy Beardsworth, Mar. 11, 2010, Washington D.C.


94. Sara Kehaulani Goo, Cat Stevens Held After D.C. Flight Diverted, Sept. 22, 2004, at A10 (DHS Spokesman Dennis Murphy said that Stevens “is being detained on national security grounds.”).


97. Docket # 44, Declaration of Christopher M. Piehota, supra note 84, at ¶ 20 (italics added).

98. Id., at ¶ 21 (italics added).

99. Jackson interview, Mar. 14, 2011, supra note 28. Use of this nickname has been difficult to corroborate, although Tuesday briefings of this sort certainly occurred. Kessler, supra note 5, at 224. Kessler also reports an interview with Fran Townsend, who emphasized how the President “oftentimes . . . will ask operational questions: Are agencies doing particular things to follow up?” Id. at 227. The nickname appears to be in use in the Obama Administration. See Jo Becker and Scott Shane, Secret “Kill List” Proves a Test of Obama’s Principles and Will, N.Y. times, May 29, 2012, at A1 (describing “Terror Tuesday” meetings).


101. Id.

102. Id.

103. Id. (emphasis added).
106. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, AVIATION SECURITY: TSA HAS COMPLETED KEY ACTIVITIES ASSOCIATED WITH IMPLEMENTING SECURE FLIGHT, BUT ADDITIONAL ACTIONS ARE NEEDED TO MITIGATE RISKS 5 (May 2009).
109. 73 FED. REG. 64019 (Oct. 28, 2008).
110. 49 C.F.R. § 1540.107.
114. 49 C.F.R. § 1560.105(b)(1) (“Denial of boarding pass. If TSA sends a covered aircraft operator a boarding pass printing result that says the passenger or non-traveling individual must be placed in inhibited status, the covered aircraft operator must not issue a boarding pass or other authorization to enter a sterile area to that individual and must not allow that individual to board an aircraft or enter a sterile area.”).
116. Leaving America is Easy—for Most, supra note 8.
119. Id., at 400.
120. Jackson interview, supra note 28.
121. I put the question to Michael Jackson, describing how the MOU between these agencies indicates that TSC will make the final decision in all cases except where legal authority lies with TSA, for whom TSC makes a recommendation. Didn’t recommendation in this context take on a euphemistic quality since, in practice, those recommendations are hard to distinguish from final decisions? “Right,” Mr. Jackson responded, “So what’s wrong with that?” Jackson interview, supra note 28.
122. Id.
123. Loy interview, supra note 17.
125. Id.
126. Both Michael Jackson, former DHS Deputy Secretary, and Admiral James Loy, former TSA Administrator, agree with this description. Jackson interview, supra note 28 (Author: “The idea is that we are an expert administrative agency. We’ve got checks and balances within, we’ve got fail-safes and switches, and when we say at the end of the day that all that has been done, that decision has to be given tremendous deference.” Jackson: “I think that’s true.”); Loy interview, supra note 17 (Author: “But do I understand you correctly that other than those [informal, noninstitutional] con-
straints, what you felt was constraining you in the use of this security directive authority was your discretion?” Loy: “I think so.”

This is not to diminish efforts by these men and others to hear the critical opinions of their policy opponents outside of government. Both Jackson and Loy recounted a series of meetings at a retreat and conference facility at Wye River, Maryland, with representatives of the ACLU and various other civil liberties and privacy-rights advocates and groups. Both men described constructive exchanges of views about the appropriate limits to government use of databases. *Id.*


131. “So the whole redress office was intended to be an intake valve, for complaints like T. Kennedy, you know, the famous Ted Kennedy thing, and to be able to then go back into that process and say, okay, so we have a T. Kennedy problem and what can we do about this thing? And this got, the redress office got progressively strengthened over time.” Jackson interview, *supra* note 28.

132. *Id.*

133. “So, that is a totally hypothetical, and I’m going to say incredible, example because I have never known a case that was like that.” Jackson interview, *supra* note 28.

“Oh, I think those things, I think those conflicts happened. I won’t say all the time but I’ll say routinely.” Loy interview, *supra* note 17. This disagreement may be more apparent than real. In a follow-up conversation, Admiral Loy stressed that the relevant officials in these two agencies “finally agreed all the time as to whether the name should go on or stay off the list (that was the job!). But it should also be recognized that such eventual agreement came only after thorough discussion where different initial opinions were often offered.” E-mail correspondence with Admiral Loy, June 27, 2012.


137. *Id.*, at ¶ 33, n.11.

138. 5 U.S.C. § 552(b) & (c), 552a(j). The same is true of a FOIA request for watchlist information sent to TSA. 49 C.F.R. §§ 1520.5 & 1520.15(a). The TSA has successfully argued that it is statutorily exempt from disclosing information from watchlists, even those originating with other agencies, that it uses in security screening. See Barnard v. Dep’t of Homeland Sec., 531 F. Supp. 2d 131 (D.D.C. 2008) (upholding TSA withholding of TECS watchlist information); Tooley v. Bush, No. 06-306-CKK, 2006 WL 378342, at *20 (D.D.C. Dec. 21, 2006); Gordon v. FBI, 388 F. Supp. 2d 1028 (N.D. Cal. 2005).

139. Based on a number of similar details, it is likely that the episode Jackson referenced is described in more detail by former TSA administrator Kip Hawley. Hawley and Means, *supra* chapter 6 note 111, at 140–46. However, Hawley’s account should be treated cautiously for the reasons previously stated. *Id.*

140. Jackson interview, *supra* note 28. Several requests to meet with the then current Officer for Civil Rights and Civil Liberties, Margo Schlanger, between March 2010
and March 2011 were unsuccessful. Two scheduled meetings were canceled by her office. A third meeting was canceled with the explanation that Ms. Schlanger lacked approval to meet with me. Efforts to meet with Francine Kerner, TSA General Counsel, were even less successful.

142. Piehota Declaration, supra note 84, at ¶ 30. See also http://www.fbi.gov/terror info/counterrorism/redress.htm ("The TSC does not accept redress inquiries directly from the public."); see also DOJ 2005 OIG REPORT, supra note 111, at 23 ("According to TSA, the TSC will play a supporting role in the redress process and will not have direct contact with the public about these issues."). Although TSA operates a "blog" on which "Blogger Bob" and other anonymous TSA employees seek to give a human face to the agency, see http://blog.tsa.gov/, questions concerning the No Fly List are either redirected to the DHS TRIP website or to another web portal at which the individual may submit an electronic message to an unspecified unit of TSA. See http://www.tsa.gov/contact/index.shtm.
146. Piehota Declaration, supra note 84, at ¶ 35.
147. Id. In fact, the DHS specifically states: "The U.S. government does not reveal whether a particular person is on the terrorist watch list, which is administered by the Terrorist Screening Center." http://www.dhs.gov/files/programs/gc_1169699418061.shtm (under "More About Screening and Watchlists").
150. If the complainant appeals one of its decisions (as communicated to the complainant by the TSC), the process is slightly different in the case of the No Fly List: the TSC Legal Department performs another analysis and a decision is made by the TSC Redress Appeals Board, which is comprised of TSC deputy directors. OIG 2007 REPORT, supra note 34, at 57. This time, however, the TSC makes only a recommendation to the TSA, which has the authority to make the final decision. Id.
153. See, e.g., Named Defendants’ Motion to Dismiss Petition for Review, Docket #18, Mohamed v. Holder, 11-1924 (4th Cir. Nov. 16, 2011), at 2 ("This Court should dismiss [because] despite repeated chances in both the district court and this Court, Mohamed has never named DHS or TSA as defendants, and has never identified a TSA order that he purports to challenge.").
154. Docket # 6, Declaration of Catrina M. Pavlik, Tooley v. Bush, 1:06-cv-00306-CKK, (D.D.C. May 1, 2006), at ¶ 21 ("The watch lists are incorpo-
rated into Security Directives and Emergency Amendments issued to air carriers and constitute SSI under governing regulations at 49 C.F.R. § 1520.5.”; see also Defendant’s Opposition to Plaintiff’s Motion for a Preliminary Injunction, Gray v. TSA, 05-11445-DPW, 2005 WL 3803814, at *11 (1st Cir. Sept. 20, 2005); Gilmore v. Gonzales, 435 F.3d 1125, 1131 n. 4 (9th Cir. 2006) (“The No-Fly and Selectee lists are Security Directives.”). The Security Directives that implement the No Fly List are exempt from standard notice-and-comment rulemaking. 49 U.S.C. § 114(l)(2)(A) exempts “a regulation or security directive [that] must be issued immediately in order to protect transportation security” from notice-and-comment rulemaking.


156. 49 U.S.C. § 46110 (“[A] person disclosing a substantial interest in an order issued . . . in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.”).

157. Even when TSA has not escaped the jurisdiction of the federal district courts, it has argued that its Security Directives—since they contain “sensitive security information”—are privileged from civil discovery. At least one court has held that the Homeland Security Act of 2002, Pub. L. 107-296, § 1601(b), 116 Stat. 2135, 2312 (codified at 49 U.S.C. § 114(s)), created a privilege against civil discovery. Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608, 615 (N.D. Cal. 2004).

158. Gilmore, 435 F.3d at 1133 n. 7.


160. Ibrahim v. Department of Homeland Security, 538 F.3d 1250, 1256 (9th Cir. 2008) (footnote and citations omitted). Judge Koziński’s reference to notice-and-comment rulemaking reveals another reason why the TSA prefers this mixing of its Security Directives with TSC’s No Fly List. See 49 U.S.C. § 114(l)(2)(A) (“Notwithstanding any other provision of law or executive order (including an executive order requiring a cost-benefit analysis), if the Under Secretary determines that a regulation or security directive must be issued immediately in order to protect transportation security, the Under Secretary shall issue the regulation or security directive without providing notice or an opportunity for comment and without prior approval of the Secretary.”). Rahinah Ibrahim is a Malaysian citizen who, while on a student visa for graduate study at Stanford University, found herself on the No Fly List when she sought to return to her home country to attend a conference. As of this writing, she has not been permitted to return to the United States while her lawsuits against the DHS, TSC, and other agencies continue. See Ibrahim v. Department of Homeland Security, 669 F.3d 983 (9th Cir. 2012).


162. Ibrahim, 538 F.3d at 1254–55 (footnote and citations omitted).

164. Id., at 16.

165. 49 U.S.C. § 114(f)(1)–(4). This hardly amounts to exclusive responsibility to identify and prevent threats to civil aviation or national security. Eleven other responsibilities in this section, uncited by the brief, suggest even greater collaboration.

166. 49 U.S.C. § 114(e)(1).


168. 49 U.S.C. § 44903(j)(2)(E)(iii) (“The Secretary of Homeland Security, in consultation with the Terrorist Screening Center, shall design and review, as necessary, guidelines, policies, and operating procedures for the collection, removal, and updating of data maintained, or to be maintained, in the no fly and automatic selectee lists.”).

169. See, e.g., 49 U.S.C. § 44903(e) (“The Under Secretary has the exclusive responsibility to direct law enforcement activity related to the safety of passengers on an aircraft involved in an offense under section 46502 of this title from the moment all external doors of the aircraft are closed following boarding until those doors are opened to allow passengers to leave the aircraft. When requested by the Under Secretary, other departments, agencies, and instrumentalities of the Government shall provide assistance necessary to carry out this subsection”). Section 46502 is the offense of aircraft piracy.

170. 49 U.S.C. § 44903(j)(2)(C)(i) & (ii). None of the requirements listed in 49 U.S.C. § 44903(j)(2)(c)(iii) delegate authority over the watchlists compiled by the TSC to the TSA.

171. 49 U.S.C. §§ 44903(j)(2)(G)(i) and 44909(c)(6) (same for international passengers).

172. Piehota Declaration, supra note 84, at ¶ 36.

173. Id., at ¶ 35; see also supra text accompanying note 146.

174. OIG 2007 Report, supra note 34, at 48 (“Exhibit 4-1”).

175. Id., at 51 (emphasis added).

176. Falkenrath interview, supra note 16.

177. Latif v. Holder, 686 F.3d 1122, 1127 (9th Cir. 2012) (quoting Ibrahim v. Dep’t of Homeland Security, 538 F.3d 1250, 1255 (9th Cir. 2008)) (internal quotation marks omitted).

178. Id. at 1128–29 (“TSA simply passes grievances along to TSC and informs travelers when TSC has made a final determination. TSC—not TSA—actually reviews the classified intelligence information about travelers and decides whether to remove them from the List. And it is TSC—not TSA—that established the policies governing that stage of the redress process. . . . Thus, because we would not be able to provide relief by simply amending, modifying, or setting aside TSA’s orders or by directing TSA to conduct further proceedings [i.e., the only jurisdiction granted to the appellate court under § 46110], we lack jurisdiction under § 46110 to address Plaintiffs’ procedural challenge.”) (emphasis in original).

179. Id., at 1130.

180. Two petitions for review have been filed in the U.S. Courts of Appeals so far. See Kadirov v. TSA, et al., No. 10-1185 (D.C. Cir. filed July 12, 2010), and Mohamed v.
Holder, No. 11-1924 (4th Cir. filed Sept. 1, 2011). An index to the administrative record produced by the Government has been filed in both cases. In Kadirov’s case, the index indicates that the record is composed of documents (mostly e-mails and electronic communications) from two agencies: TSC and TSA. See Document # 1286331 (filed January 5, 2011), Kadirov v. TSA. The Kadirov docket reports settlement discussions ongoing since July 2011. In Mohamed’s case, the Justice Department filed the index under seal, preventing even a bare description of its contents. See Docket Entry # 32 (Dec. 23, 2011), Mohamed v. Holder.


Chapter 8


2. This phrase appears in a travel case, Haig v. Agee, 453 U.S. at 309–10, which cited to its use in a citizenship case, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). Justice Jackson coined it in dissent in Terminello v. Chicago, 337 U.S. 1, 37 (1949) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact”).

3. Bruce Ackerman, 2 We the People: Transformations 198 (1998) (observing that the Federalists of the Revolutionary Era “avoided any effort to define national citizenship, let alone to give it priority [over state citizenship]. Americans of their generation were profoundly uncertain whether the claims of national identity should trump more local commitments.”).

4. U.S. Const., Art. I, § 2, cl. 2 (House of Representatives), Art. I, § 3, cl. 3 (Senate), Art. II, § 1, cl. 5 (President), XII Amend. (Vice-President).

5. Id., Art. I, § 8, cl. 4.

6. Id., Art. I, § 2, cl. 3. Until the passage of the Fourteenth Amendment, this decennial enumeration was marred by the fractional counting of African-American slaves. XIV Amend., § 2. “Indians not taxed” remained excluded in apportioning representatives.

7. Id., XV Amend., XIX Amend., and XVI Amend., respectively.

8. Id., XXIV Amend.

9. The text can also impede. The Privileges and Immunities Clause, for example, applies to citizens and noncitizen residents alike. See Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978); Zobel v. Williams, 457 U.S. 55, 73 n. 3 (O’Connor, J., concurring). I admit that such instances cloud my reliance on the canon of constitutional interpretation, infra at text accompanying note 25.


11. See Madison’s notes for May 29, June 15, and June 18, 1787 concerning the Randolph Resolutions (the Virginia Plan). 1 The Records of the Federal Convention of 1787, at 22, 244, 292 (Max Farrand, ed., 1937). The first reference to “subjects or citizens of other countries” is in notes of the Committee of Detail from late July. 2 The Records of the Federal Convention of 1787, at 147 & 173.