Court of Appeals Docket No. 10-15873

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAHINAH IBRAHIM, an individual,
Plaintiff-Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants-Appellees.

On Appeal from Judgment in the Northern District of California
No. 3:06-cv-00545-WHA
Honorable William Alsup

BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT IBRAHIM AND IN SUPPORT OF REVERSAL OF DISTRICT COURT'S DISMISSAL OF FEDERAL DEFENDANTS

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS*

All parties have consented to the filing of this Brief Amicus Curiae.

Muslim Advocates is a national legal advocacy and educational organization dedicated to promoting and protecting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of Muslim American legal professionals across the country. Muslim Advocates seeks to protect the founding values of our nation and believes that America can be safe and secure without sacrificing constitutional rights and protections.

Muslim Advocates is concerned about the impact of the government's No-Fly List and Selectee List (hereinafter collectively referred to as the "Watchlist"),[1] and other measures undertaken since September 11, 2001,

[1] The process by which an individual is nominated to these lists, and the administrative procedure by which individuals can attempt to obtain relief from either is nearly identical. *See* DEPT. OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GEN., REPT. NO. OIG-09-64, ROLE OF THE NO-FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION (Redacted) 9-13 (2009). Therefore for the ease of reference, they are collectively referenced herein as the "Watchlist."

particularly at airports, on Muslim and other minority communities. Muslim Advocates is in regular contact with American Muslims who, for reasons unknown to them, either are unable to fly or are subjected to extensive screening each time they fly. The complete absence of any mechanism for relief for a person who is placed on the Watchlist is as disturbing as the original placement on the List. The administrative process established for contesting placement or getting off the Watchlist in fact provides no relief, and the government seeks to foreclose any judicial relief.

No party or party counsel authored any portion of this brief. No one contributed any money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Placement on the Watchlist heavily burdens the right to travel. The government's failure to provide any notice or opportunity to be heard at any time or any meaningful avenue for relief unduly burdens the fundamental right to travel and renders the Watchlist procedures unconstitutional. They are wholly inconsistent with the values and laws of our country, painfully and carefully honed over its nearly 250 year history, not to mention earlier English law and history. They are born of the same excesses and hysteria as so many of the most shameful episodes in American history, beginning with

the Alien and Sedition Acts and continuing with the Palmer Red Raids during World War I, the internment of Japanese-Americans in detention camps during World War II, the excesses of the McCarthy loyalty-security witch hunts, and the Counter Intelligence Program (COINTELPRO) unconstitutionally operated by the FBI during the Vietnam War.

The right to travel has long been recognized as a crucial liberty interest protected by the Constitution of the United States. Like the worst elements of the McCarthy era loyalty-security program, substantive constitutional protection is trampled by the procedures for placing an individual on the Watchlist, *see Peters v. Hobby*, 349 U.S. 331 (1955), and the lack of due process that allows one to extricate herself from the list. Listed persons are provided no prior notice, and no opportunity to be heard at a meaningful time or in a meaningful manner. Indeed, the procedures are so opaque and infirm that an individual cannot even determine whether he is on the list or has been removed from it. Most significantly, removal from the Watchlist is virtually impossible — particularly where misidentification appears to be the reason for an individual's placement on the list, as was the case with Dr. Ibrahim — as the administrative system that the government has developed to handle traveler complaints is wholly deficient.

The complete lack of process in denying the fundamental right to travel cannot be justified by legitimate national security interests. Rather than waiting until the fear fueling these deprivations has subsided and history judges this as yet another episode of repression (*see Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984)), this Court should act to ensure present compliance with the Constitution.

ARGUMENT

I. INNOCENT TRAVELERS ARE SUBJECTED TO THE BURDENS OF INCLUSION ON THE WATCH LIST WITH NO NOTICE, NO OPPORTUNITY TO BE HEARD, AND NO ABILITY TO OBTAIN RELIEF

A. Unknown Thousands of Innocent Individuals Have Been Placed on the Watchlist

The United States has long maintained watchlists for various reasons. DEPT. OF HOMELAND SECURITY, PRIVACY OFFICE, REPORT ON EFFECTS ON PRIVACY & CIVIL LIBERTIES 3 (2006) (hereinafter PRIVACY OFFICE REPORT). After the September 11, 2001 attack, these watchlists expanded in size and number across various federal agencies and were consolidated. *Id*. In 2004, the No-Fly List and Selectee List (herein the Watchlist) became subsets of the consolidated Terrorist Screening Database, maintained by the Terrorist Screening Center, which in turn is managed by the Federal Bureau of Investigation (FBI). *Id.*

The process of selecting and placing people on the Watchlist begins with any one of various federal agencies, state and local law enforcement or the intelligence community submitting a name for possible inclusion in the Terrorist Screening Database. PRIVACY OFFICE REPORT at 3. The Federal Bureau of Investigation, and sometimes the National Counterterrorism Center, review the submissions, and then provide them to the Terrorist Screening Center. *Id.*; *see also* DEPT. OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GEN., REPT. NO. OIG-09-64, ROLE OF THE NO-FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION (Redacted) 54 (2009) (hereinafter OIG REPORT). Analysts at the Terrorist Screening Center then consider whether to include the person in the Terrorist Screening Database and, if so, whether to include the person on the No-Fly or Selectee Lists. *Id.* At no point in this process is the individual informed of the suspicions against her, let alone given an opportunity to explain or rebut the evidence that led to inclusion on the Watchlist.

Persons on the No-Fly List cannot "receive a boarding pass for a flight to, from, over, or within the United States." *Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Part I: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2010) (statement of Janet A. Napolitano [hereinafter

Napolitano Statement] at 12). Persons on the Selectee List are subjected to enhanced screening every time they fly. *Id.*

The Watchlist is intended to identify individuals with "a known or suspected link to terrorism or [who] pose a threat to national security." OIG REPORT at 42; *see also Five Years After the Intelligence Reform and Terrorism Prevention Act (IRTPA): Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2009) (statement of Timothy J. Healy [hereinafter Healy Statement] at 2). ("In order to be placed on the "No-Fly" list, a known or suspected terrorist must present a threat to civil aviation or national security."). There is little evidence that they are so well limited.

Since September 11, 2001, the number of travelers affected by placement on the Watchlist has ballooned, accelerating dramatically in the first quarter of 2010. In the fall of 2001, there were about 125 individuals whom the FBI believed should not be allowed to fly. OIG REPORT at 9. By October 2008, there were 2,500 individuals on the No-Fly List, plus another 16,000 on the Selectee List. *Remarks by Homeland Security Secretary Michael Chertoff and Transportation Security Administration Administrator Kip Hawley at Ronald Reagan Washington National Airport on Secure Flight Final Rule*, Oct. 22, 2008, *available at* http://www.dhs.gov/xnews/

speeches/sp_1224714226228.shtm. By December 2009, the No-Fly List had grown to 3,400 individuals. Healy Statement at 2. In the first months of 2010, the No-Fly List nearly *doubled* in size, jumping to 6,000 people by early March. Eileen Sullivan, *No-Fly List Nearly Doubles Since Christmas Attack*, Huffington Post, March 10, 2010, available at http://www.huffingtonpost.com/2010/03/10/no-fly-list-nearly-double_n_492816.html. Following this dramatic and rapid expansion of the No-Fly List, the government was considering loosening the criteria for inclusion on the list even further. *The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2010) (statement of Timothy J. Healy at 5-6).[2]

B. Additional Tens of Thousands of Additional Individuals Are Treated as Though They Are on the Watchlist Simply Because They Have Names Similar to Someone on the List

The number of people affected by the Watchlist vastly exceeds by multiples the number of people actually on the List. According to the Department of Homeland Security Inspector General: "a large number of air

[2] The number of individuals on the Selectee List has not been made available to the public since October 2008, but it is reasonable to infer that, like the No-Fly List, the Selectee List has grown significantly.

travelers are identified as possible matches to TSA's No Fly or Selectee list. The vast majority of travelers identified as a possible match to these lists are ultimately determined not to be the individuals of interest." DEPT. OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GEN., REPT. NO. OIG-09-103, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM (Redacted) 35-36 (2009) (hereinafter OIG TRIP REPORT). Indeed, the Department of Homeland Security (DHS) acknowledges that most difficulties faced by travelers are "caused merely by a name similarity to another person who is on the watchlist. *Ninety-nine percent of individuals who apply for redress are not on the terrorist watchlist, but are misidentified as people who are*." *See* DHS TRIP website, "How do I know if I am on a Government Watchlist?" http://www.dhs.gov/files/programs/gc_1169699418061.shtm (emphasis added). From August to October 2008, seven major United States airlines reported that 476,094 passengers — more than 5,100 per day — were adversely affected by Watchlist misidentifications or "false positives". OIG TRIP REPORT at 35-36.

One of the most well publicized instances of such misidentification involved the late Senator Edward "Ted" Kennedy. In 2004, airlines attempted to prevent Senator Kennedy from flying on several occasions

because his name matched a "T. Kennedy" on the No-Fly List. Rachel L. Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. Times, Aug. 20, 2004, *available at* http://www.nytimes.com/2004/08/20/us/senator-terrorist-a-watch-list-stops-kennedy-at-airport.html?scp=1&sq=senator?%20Terrorist?&st=cse; Sara Kehaulani Goo, *Sen. Kennedy Flagged by No-Fly List*, Washington Post, Aug. 20, 2004, at A01. Senator Kennedy's experience highlights the fact that it does not matter if a person actually is on a Watchlist; if a person's name is similar to a name on the Watchlist, he will be subjected to precisely the same harms as the individual whose name is actually on the Watchlist.

C. People on the Watchlist, or Believed to Be on the Watchlist, Suffer a Heavy Burden on Their Right to Travel and on Other Liberty Interests

In this era of the global economy, in which business takes place quickly in far-flung places, and people move and settle far from their families, air travel in the country and abroad is the only feasible mode of transportation for many. Individuals placed on the Watchlist or misidentified as being on the Watchlist "can potentially face consequences ranging from inconvenience and delay to loss of liberty, depending on the law enforcement action taken as a result of the match." PRIVACY OFFICE REPORT at 7. As recognized by Chief Judge Alex Kozinski during an April

2008 hearing in this case, "If your name or my name or anybody's name in this courtroom were put on [the No-Fly] list, we would suffer grievously." *See* Mike McIntire, *Ensnared by Error on Growing U.S. Watch List*, N.Y. Times, Apr. 6, 2010, *available at* http://www.nytimes.com/2010/04/07/us/07watch.html?_r=1&pagewanted=all.

Persons unable to travel by air are hampered in their professional lives, as many jobs require travel and there is no time in most businesses for the traveler to drive or take a train to meetings in distant locations. Americans and persons admitted lawfully into the United States fly for business, for education, to see family, to appointments in faraway places. *See infra*, § II. American society is structured in a way that presumes people will be able to travel and will do so quickly. Taking away or inhibiting people's ability to travel by air imposes a significant burden on individuals incorrectly placed on the Watchlist and on the lawful enterprises for which they travel.

D. People on the Watchlist — Including People Confused with People on the Watchlist — Do Not Receive Notice of the Burden on Their Right to Travel

People frequently first discover that they are on a Watchlist upon arrival at the airport. There is no prior notice, and there is no notice at the airport other than the fact of being prevented from boarding or being

subjected to enhanced screening. PRIVACY OFFICE REPORT at 7; OIG TRIP REPORT 89-93 (discussing policy of non-disclosure); *see also* Shaina N. Elias, Essay, *Challenges to Inclusion on the "No-Fly List" Should Fly in District Court: Considering the Jurisdictional Implications of Administrative Agency Structure*, 77 Geo. Wash. L. Rev. 1015, 1020-21 (2009). Travelers arrive at the airport and are given "no explanation or conflicting explanations about what is going on." PRIVACY OFFICE REPORT at 7.

The failure to inform an individual on a Watchlist of why she is on it makes it impossible meaningfully to challenge the government's basis for placement on the list or rebut the evidence against her. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001) (because an entity was not provided with notice or an opportunity to rebut at least the non-classified evidence against it when it was being designated as a terrorist organization, the court could not presume anything about its ability to do so). *Id*.

The predicament of a traveler arriving at the airport who discovers that the government suspects she poses a "threat to aviation" calls to mind the ordeal of Josef K. in Franz Kafka's dystopic novel *The Trial*. Out of the blue, she, like K., learns she is suspected of some very serious, but

unidentified offense. Like K., she cannot learn the identity of her accuser, the basis for the suspicion, or even what it is that she is believed to have done. Indeed, as with K., even the entity before which she can seek redress remains unclear and there is no process by which she can defend herself. *Cf.* Franz Kafka, *The Trial* (Breon Mitchell, trans., Schocken Books 1998) (1925).

Dr. Ibrahim and many innocent travelers like her have no knowledge of what the federal government believes they have done, they have no criminal record and no ties to terrorism. Like K., they cannot defend themselves because they have not been afforded the protections that are at the core of due process — notice of what they are suspected of and an opportunity to be heard in a meaningful manner at a meaningful time.

E. There Is No Mechanism for Actual or Meaningful Relief

The only way that individuals who are placed on the Watchlist can challenge their placement is through DHS's wholly inadequate program, the Traveler Redress Inquiry Program or TRIP.[3] TRIP is "the federal

[3] There have been various processes, but they generally appear to be similar to each other, and the evolution over time has not apparently improved its effectiveness. *See* OIG TRIP REPORT at 3-5. Dr. Ibrahim sought redress through one of the predecessor redress systems, Passenger Identity Verification.

government's one-stop traveler redress process" through which theoretically travelers can address a variety of travel-related concerns. *See* OIG TRIP REPORT at 3. Most of the complaints submitted to TRIP relate to Watchlist misidentification. *Id*. at 34.

1. TRIP Does Not Satisfy Due Process as a Post-Deprivation Process

TRIP falls far short of providing travelers minimum required due process with regard to burdening their right to travel. *See Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) (right to travel is protected liberty interest); *see also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (Brennan, J., plurality opinion) (same); *Crandall v. State of Nevada*, 73 U.S. 35, 39, 48-49 (1868) (same); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (collecting cases recognizing "freedom to travel throughout the United States" as a constitutionally protected right). At the core of procedural due process protections is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). As the Supreme Court explained in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "the central meaning of procedural due process [is] clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be

notified. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id*. at 533[4]; *see also Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d at 205-09 (requiring the State Department to provide notice and an opportunity to be heard when designating an organization as a "foreign terrorist organization").

Placement onto a Watchlist and the redress system fail to provide basic due process protections in just about every way imaginable. First, people are not given any notice of being placed on the list. *See infra* § II; *see also* Elias, 77 Geo. Wash. L. Rev. 1020-21. They may have an inkling only upon arrival at an airport, at which point they may, like Dr. Ibrahim, be arrested. PRIVACY OFFICE REPORT at 7; *see infra* § II. Individuals are not informed of whether they are on a list, what list they are on, or the reason for being on the list. *See* DHS TRIP website "How do I know if I am on a

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[4] Congress has attempted to supersede *Hamdi* by statute. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). As *recognized in Gherebi v. Obama*, 609 F. Supp. 2d 43, 50 (D.D.C. 2009), in *Hamdi*, the Supreme Court decided that courts had been stripped of detainee habeas corpus jurisdiction prospectively only under an earlier statute. In a subsequent decision, *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that Congress had stripped the federal courts of jurisdiction over detainee habeas corpus petitions retroactively as well as prospectively through the Military Commissions Act and struck down the

(continued . . .)

Government Watchlist?" http://www.dhs.gov/files/programs/gc_1169699418061.shtm. Second, there is no opportunity for a person included on a Watchlist to be heard in a meaningful manner. TRIP allows an individual who believes she is incorrectly on the Watchlist to submit identifying information about herself and whatever incident caused her to believe that she is on a list. *See* DHS TRIP website, "How to Use DHS TRIP", http://www.dhs.gov/files/programs/gc_1169826536380.shtm. TRIP includes no two-way exchange of information; it is merely a system in which a person may ask to have information reviewed and submit information in the hope that it sheds light on whatever led to inclusion on a Watchlist. *See generally* DHS TRIP website, "One Stop Travelers' Redress Process" http://www.dhs.gov/files/programs/gc_1169673653081.shtm. This is not an "opportunity to be heard," as the traveler is given no information about whether she is on the list or why. *Mathews*, 424 U.S. at 343. Indeed, Dr. Ibrahim submitted her case for review. Eventually she was informed that her case had been reviewed, but was provided no information at all. She still did not know whether she was, or had ever been, on the Watchlist, or, if so, why. Second Amended Complaint ("Complaint"), ¶ 46.

(. . . continued)
Act for violating due process.

Third, the TRIP process is not completed at a "meaningful time." The TRIP website gives no indication of any timeframe in which the information submitted will be reviewed. *See* DHS TRIP website, "After Your Inquiry" http://www.dhs.gov/files/programs/gc_1169827489374.shtm. Individuals who have sought redress through TRIP have had to wait many months before they are informed that the TRIP review process is complete. *See infra*, § II. Once complaints are processed through intake, which takes months, the actual review process takes additional months. OIG TRIP REPORT at 88. An audit of TRIP by the DHS Inspector General found that in September 2008, there was a five-month backlog in the intake processing for complaints submitted by email.[5] *Id*. at 87.

2. TRIP Fails to Provide Even the Process It Is Designed to Provide

Many TRIP cases are closed without any apparent review at all. The DHS Inspector General found that in October 2008, 8,121 cases were closed due to insufficient paperwork or because they had pending paperwork for

[5] Starting in early 2009, the Transportation Security Administration began instituting "Secure Flight." Secure Flight transfers Watchlist matching responsibilities from airlines to the Transportation Security Administration. OIG REPORT at 4-5. This does not appear to have resolved the issues discussed herein, as the individuals reporting the difficulties faced at airports have continued to experience the same problems. *See infra* § II; *see also* OIG TRIP REPORT at 48-51 (discussing problems with Secure Flight).

more than 6 months.[6] OIG TRIP REPORT at 85. Yet in that same period, TRIP had informed only 1,950 individuals that their paperwork was incomplete or insufficient. *Id*. Thus, *76%* of the individuals whose files were considered inadequate that month had their cases closed without ever learning that they needed to augment their paperwork. *Id*.

Moreover, many files are not provided to the agency that is supposed to review them prior to the cases being closed. OIG TRIP REPORT at 107. Indeed, fewer than half of the complaints to TRIP that should be forwarded to the DHS Office of Privacy or Office of Civil Rights and Civil Liberties are actually forwarded to those offices prior to being closed. OIG TRIP REPORT at 84-85.

3. Remedy Through TRIP Is No Remedy At All

Even when a complaint is appropriately reviewed and the government determines that the individual is not suspected of anything, TRIP usually fails to provide any remedy.

In a confounding twist of logic, the government has acknowledged that there is no redress for the many individuals who are not actually on the

[6] The total number of cases that were closed that month was not publicly available. However, in October 2008, TRIP had received 47,825 complaints since early 2007. OIG TRIP REPORT at 8-9.

Watchlist, but who have names close to individuals who are. According to the Government Accountability Office, "Most redress queries are submitted by misidentified persons, and their names cannot be removed from the watchlist because they are not the persons on the list." U.S. GOV'T ACCOUNTABILITY OFFICE, TERRORIST WATCH LIST SCREENING: EFFORTS TO HELP REDUCE ADVERSE EFFECTS ON THE PUBLIC 5 (2006) (hereinafter GAO, TERRORIST WATCH LIST SCREENING). This reasoning harkens back to Joseph Heller's *Catch-22*, in which Yossarian discovers that Catch-22 means that the authorities enforcing Catch-22 "have a right to do anything we can't stop them from doing" and do not need to show the proof that Catch-22 applies in any given situation. *See* Joseph Heller, *Catch-22* 417-418 (Simon & Schuster 1996). An adversely affected traveler who is not on a Watchlist, and therefore cannot get off it, might well think to herself, like Yossarian: "That's some catch, that Catch-22." *Id*. at 55.

When the government does determine that an individual should not be on the Watchlist, the primary tool for resolving the issue is to deem the individual "cleared" and circulate a list of those who have been cleared to the airlines. OIG TRIP REPORT at 41-43. This, like TRIP itself, is grossly inadequate. The so-called "cleared list" does not include 64% of the individuals who have been cleared. *Id*. at 42. This defect is exacerbated by

the fact the Transportation Security Administration requires airlines to review the Watchlist, and fines them if they do not, but gives no guidance on how to use the cleared list and does not penalize airlines for failing to use it. *Id*. at 41. Not surprisingly, many airlines simply do not bother with the cleared list. *Id*.

The DHS itself acknowledges that the vast majority of people who have been deprived of this fundamental right to travel have lost their right in error. *See* DHS TRIP website, "How do I know if I am on a Government Watchlist?" http://www.dhs.gov/files/programs/gc_1169699418061.shtm. The DHS Inspector General aptly has summed up the inadequacy of TRIP as a mechanism for redress for the ongoing burdens on the right to travel:

> Under present circumstances, however, redress-seekers generally do not benefit from their participation in TRIP. Their cases often languish for extended periods and are handled inconsistently. Sometimes their cases are not brought to the attention of the appropriate agency. In other instances, cases are closed before all indicated agencies have had a chance to review them. Even when cases are properly reviewed, they do not usually produce meaningful results for redress-seekers. *In most cases, government actions in a redress case do not improve redress-seekers' travel experiences.*

OIG TRIP REPORT at 107 (emphasis added). Under our Constitution, rights cannot be tossed away so easily.

II. INNOCENT MUSLIM TRAVELERS HAVE BEEN UNDULY ADVERSELY AFFECTED BY THE WATCHLISTS AND THEIR OPERATIONS

Muslim Advocates regularly receives information from Muslims who have been improperly placed on the Watchlist with no ability to obtain relief. In just the past year, Muslim Advocates has heard from countless individuals — a few of whom are profiled below — who, like Dr. Ibrahim, are unable to fly or are subject to intense scrutiny and screening each time they fly, and find themselves unable to obtain any relief.

Muslim Advocates heard from a young American — a disabled Marine — stuck in Egypt with his wife and small children. He moved to Egypt in 2008 with his family to study Arabic. When he attempted to return to the United States in early 2010 to visit relatives and attend a Disability Evaluation with the Department of Veterans Affairs, he was informed that he was not allowed to board the plane. He has been trying to leave Egypt since mid-April, and received notice that his disability benefits, which he had been receiving since his honorable discharge from the Marines in 1999, would be cut because he was been unable to go to the Disability Evaluation that he was scheduled to attend during his visit home. He filed a complaint through TRIP when he was told he was unable to fly, but has yet to receive a response.

Other Muslims have contacted Muslim Advocates with reports of apparent targeting at airports for enhanced and intrusive inspections. One man, an American citizen who markets his American hospital overseas, has to travel abroad almost every two months. He estimates he has been stopped 40 times in the last five years. He has repeatedly filed complaints with the DHS, most recently in February 2010, but has received no response and no relief. Another man, also an American citizen, is a director of an organization that works on issues of democracy in the Muslim world. Like the hospital Program Director described above, he travels abroad frequently. He, too, is stopped for questioning regularly when he travels. He estimates this has occurred 50 to 60 times over the last five or six years. He has received no response to any of his complaints, whether through TRIP or through direct letters to DHS.

The reports Muslim Advocates receives are corroborated by findings of DHS Office of Civil Rights and Civil Liberties in its 2006 report on the impact of the Watchlist on privacy and civil rights. DEP'T OF HOMELAND SECURITY, REPORT ASSESSING THE IMPACT OF THE AUTOMATIC SELECTEE AND NO FLY LISTS ON PRIVACY AND CIVIL LIBERTIES (2006) (hereinafter CIVIL RIGHTS OFFICE REPORT). The Civil Rights Office "has received complaints alleging that officers have asked travelers questions about their

religion and national origin, whether one traveler knew anyone at his mosque who hates Americans or disagrees with current policies, targeted a traveler for additional screening because she wore traditional Muslim attire and told another traveler that he and his wife and children were subjected to body searches because he was born in Iraq, is Arab, and Muslim." CIVIL RIGHTS OFFICE REPORT at 18. Indeed, the Civil Rights Office reports that most of the complaints it receives allege, explicitly or impliedly, racial, ethnic, or religious profiling. *Id*.

Plainly, Muslims are at particularly high risk of being singled out at airports and treated as potential terrorists. As discussed above, individuals with names similar to names on the Watchlist suffer many of the same difficulties and indignities as those actually on the Watchlist. *See supra*, § I.B. As recognized by the DHS Privacy Office, the problem of relying on name similarity is exacerbated where names come from different languages or alphabets. PRIVACY OFFICE REPORT at 8, 12. Given that the growth of the Watchlist was prompted by al-Qaeda's attack on September 11, 2001, there are, presumably, numerous Muslims on the Watchlist. However, for the overwhelming majority of Muslims — innocent people with no ties to terrorism — the risk of being identified as a match to the Watchlist is

particularly high as many of their names are transliterations of Arabic names, resulting in a high risk of misidentification.

III. A WATCHLIST THAT INCLUDES INDIVIDUALS WHO ARE INAPPROPRIATELY PLACED ON THE LIST HARMS RATHER THAN PROTECTS PUBLIC SAFETY

The government has a very strong interest in keeping dangerous people off airplanes. And resources to protect the public are limited. The size of the Watchlist and the high rate of false positives exacerbates the problem of resource allocation. Airlines deal with thousands of false positives every day. OIG TRIP REPORT at 37. While many of these misidentifications can be resolved by the airlines, some of these false positives require investigation by the TSA, tying up resources investigating someone who poses no threat whatsoever. *Id*.

The attempted car bombing in Times Square highlights the ineffectiveness of the sprawling Watchlist. In May 2010, Faisal Shahzad, the suspected bomber was added to the Watchlist. Scott Shane, *Government Tightens No-Fly Rules*, N.Y. Times, May 5, 2010, available at http://www.nytimes.com/2010/05/06/nyregion/06plane.html?_r=3. However, whether due to an inability to keep up with the ever-changing list or because of airline employees having grown too accustomed to false

positives, the Watchlist failed in its intended purpose: Shahzad was able to purchase an airline ticket and allowed to board an airplane. *Id*.

Due to the overbreadth of the Watchlist and the matching process, there are fewer national security personnel available to act on information that has a better grounding than a name similarity. The dangers of squandering those resources is evident. Even though Umar Farouk Abdulmutallab's father had warned the American embassy in Nigeria about his son before the son's attempt to blow up an airplane on December 25, 2009, the information did not make it to people who could have prevented him from boarding the plane in time for them to do so. John Burns, *Britain Rejected Visa Renewal for Suspect*, N.Y. Times, Dec. 28, 2009, *available at* http://www.nytimes.com/2009/12/29/world/europe/29london.html?scp=1&sq=Britain%20Rejected%20Visa%20Renewal%20for%20Suspect&st=cse.

The government has sought to enlist the Muslim community to assist law enforcement in identifying dangerous extremists. However, when Muslims are targeted, as they appear to have been on the Watchlist, we risk alienating Muslims who may become less willing to assist because of the

fear that federal law enforcement may treat them as suspect.[7] In other words, a Watchlist that disproportionally targets the Muslim community erodes trust between federal law enforcement and those communities, which are the target of hate crimes and which can assist law enforcement to help combat terrorism.

IV. FEAR OF TERRORISM DOES NOT JUSTIFY THE DEPRIVATION OF FUNDAMENTAL RIGHTS

Fear, particularly during wartime, is a powerful motivator for stripping individuals indiscriminately of basic liberties—particularly those individuals who seem similar to those we fear. Our nation has experienced such fear-driven deprivations of civil liberties throughout its history — and each time history has judged it harshly.

Shortly after the birth of the United States, Congress passed the Alien and Sedition Acts — laws aimed primarily at an unpopular immigrant community "to criminalize unpopular and unpatriotic actions," William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 Am. U.L. Rev. 1, 16 and nn. 99-104 (Oct. 2000). These

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[7] For a general discussion of profiling of Muslims since 2001, *see* Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 Vt. L. Rev. 407 (2005).

laws expired in 1801, and Thomas Jefferson pardoned the dozens of individuals who had been imprisoned for sedition — but the Acts are widely recognized as having unconstitutionally deprived people of their rights under the First Amendment. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (discussing the "broad consensus" that the Sedition Act was unconstitutional).

Unfortunately there have been far too many such episodes since 1801, where fear has resulted in the deprivation of basic rights in violation of the Constitution. The 19th Century experienced the Know Nothing Movement and the Chinese Exclusion Acts. The early 20th Century suffered the Palmer Raids in which thousands of foreigners were rounded up for potential ties to terrorism.

During World War II, the government excluded some 120,000 Japanese-Americans from areas of the West Coast, detaining them in internment camps, and imposed a curfew on all German and Italian aliens and individuals of Japanese descent, citizens and aliens alike, within certain regions. *See Hirabayashi v. United States*, 320 U.S. 81, 88 (1943). Decades later in *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984), a federal court revisited the Supreme Court's decision sustaining the exclusion and detention of individuals of Japanese descent:

> As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Id. at 1420; *see also* Anne-Marie Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 Harv. J.L. & Pub. Pol'y 965, 975 (Summer 2002) (noting that the *Korematsu* decision by the Supreme Court "brought shame rather than honor to our legal system")

In the 1950s, fear of communism erupted in the requirement of loyalty oaths, grossly infirm loyalty-security proceedings and witch-hunting hearings before the House Un-American Activities Committee. People (many wholly innocent) lost their livelihoods and their reputations, being impugned by the government without any due process protections. *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.L. L. Rev. 1, 20-22 (Winter 2003); *Peters v. Hobby*, 349 U.S. 331 (1955). Over time, many of the statutes that formed the basis of the loyalty-security programs of the 1950's either were repealed, declared unconstitutional by the Supreme Court or rendered unenforceable by Supreme Court decisions. *See, e.g., Watkins v. United States*, 354 U.S.

178 (1957); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956). But of course this all was too late for the many victims of McCarthyism.

In the late 1960s, the Federal Bureau of Investigation initiated its Counter Intelligence Program (COINTELPRO), targeting vaguely defined groups opposing the Vietnam War or promoting civil rights of African Americans. *Hobson v. Wilson*, 737 F.2d 1, 11 (D.C. Cir. 1984). With little regard for whether the target groups' activities were legal and protected by the First Amendment, the FBI infiltrated the groups, and attempted to discredit them and create animosity toward and among them, sometimes setting the stage for violent physical attacks. *Id.*; *see also* SELECT COMM. TO STUDY GOV'TAL OPERATIONS WITH RESPECT TO INTELL. ACTIVITIES, FINAL REPT., S. REP. No. 94-755, BOOK II, 8-10 (INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS) (1976) [hereinafter SENATE REPORT] (detailing the scope of the COINTELPRO activities). According to the Senate Report, the FBI was aware of the illegality of the program, but was concerned "only for 'flap Potential.'" *Id*. at 13. One witness explained: "It was my assumption that what we were doing was justified by what we had to do … the greater good, the national security." *Id*. at 14. The Senate found that "the legal questions involved in intelligence programs were often not

considered [or] were intentionally disregarded in the belief that because the programs served the 'national security' the law did not apply." *Id*. at 137.

Toward the end of the COINTELPRO era, the Supreme Court decided that the Executive Branch had violated individuals' rights by engaging in warrantless wiretapping to collect information that it "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." *United States v. United States Dist. Court*, 407 U.S. 297, 300 (1972). In a concurring opinion, Justice Douglas recognized that "we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era." *Id.* at 329 (1972). Each of these fear-driven decisions to strip people of their rights has been roundly criticized once the "national seizure of paranoia" subsides.

Unfortunately, fear returns, and the cycle begins anew. It is up to the courts to protect basic constitutional rights in the face of these baser instincts. As explained by the Supreme Court in a case about the due process rights of a United States citizen who allegedly fought on the side of the Taliban against the United States:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our

> commitment at home to the principles for which we fight abroad.

Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).

The Watchlist is yet another example of the willingness on the part of the government to toss away due process rights in the face of fear. Standing the presumption innocence on its head, the Director of National Intelligence, Dennis Blair, testified during a January 20, 2010 hearing before the Senate Homeland Security Committee that "[w]hat is prudent is to put names on just in case and take them off when it's justified." *See* Susan Crabtree, *Intelligence chief says it was mistake to reduce No-Fly List*, THE HILL, Jan. 20, 2010, *available at* http://thehill.com/homenews/administration/77053-intelligence-chief-says-it-was-mistake-to-reduce-passenger-No-Fly-list.

But, alas, as we have shown, there is no process for getting off the list, or even for knowing if one is off the list. Once someone has made a determination — based on secret unchallengeable information — that places a person on the Watchlist, all the person who is listed can do is request that the government review the information. Persons on the List do not know why they are on it. They cannot submit information or evidence that explains the circumstances that resulted in their placement on the List. They cannot go before a hearing officer or fact finder to present evidence or

answer questions to get themselves cleared. They have no opportunity to be heard.[8] The courts are the last recourse for these individuals, but the government has attempted to keep them from pursuing redress in the courts.

In the years since the September 11, 2001 terrorist attack, the Supreme Court has resisted pressure from the government to take away the rights of individuals believed to be terrorist or sympathetic to their cause. It has repeatedly refused to deny due process to individuals accused of

[8] Even the immigrants rounded up in the Palmer Raids had more process. They were questioned and, if they did not confess to being communists, they were released. *See* Cole, *The New McCarthyism*, *supra*, at 16. Similarly, during the era of McCarthyism, individuals accused of disloyalty had the right to present evidence at a hearing, and they could in fact be cleared during that process. *See Peters*, 349 U.S. 331.

supporting al-Qaeda or the Taliban. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). This Court should also ensure that the basic rights to travel and to due process of law of all people in the United States are protected as required by the Constitution.

An individual's placement on a Watchlist, with no mechanism or opportunity for justifying her removal from it, cannot be accepted in a society founded on due process and the rule of law. To find otherwise would be to accept that, as in Kafka's *The Trial*, the best to be hoped for is to be neither acquitted nor convicted, but to merely continue on in a state of qualified freedom. *The Trial* at 161.

CONCLUSION

The United States government is severely burdening many thousands of individuals' right to travel. It is doing so without giving the affected individuals any notice or any opportunity to be heard. Further it is doing so knowing that most of the people subjected to these burdens are entirely free of any suspicion of wrongdoing — yet it refuses to provide any meaningful redress. Thousands of people every day are required to convince someone that they are not terrorists — and to risk arrest if they cannot — just to exercise their fundamental right to travel, and they must do so without any

knowledge of why they are suspected. This burden, placed disproportionately on Muslims, is unconstitutional. This Court must reverse the District Court's Order of July 27, 2009 denying Plaintiff Ibrahim the opportunity to challenge her placement on the list and the inadequate procedures for removal from it.

Dated: October 1, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE TO
FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 10-15873

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6,993 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: October 1, 2010

/s/ Maria V. Morris
Maria V. Morris