No. 19-71

In the Supreme Court of the United States

FNU TANZIN ET AL., PETITIONERS,

v.

MUHAMMAD TANVIR ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF JEFFREY D. KAHN AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Jeffrey D. Kahn has been studying the No Fly List and the Terrorist Screening Center since 2006.[1] He is the author, among other works on these topics, of *Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists* (University of Michigan Press, 2013). In 2013, he testified as an expert witness for the plaintiff in *Ibrahim v. Department of Homeland Security*, No. 06-0545 (N.D. Cal. 2013). He files this brief in support of respondents to clarify a misleading assertion petitioners make with regard to the role FBI agents play in the watchlisting process and to offer the Court relevant historical context regarding the creation and operation of the No Fly List.

SUMMARY OF ARGUMENT

Institutions are composed of people. To say an agency "does" something is to employ a synecdoche, substituting a legal abstraction for the human beings that do the actual work. Such shorthand, while common, obscures the real decisionmakers and true sources of action.

Petitioners inject just such confusion when they assert that "only relevant agencies, and not individual FBI agents, have the authority to determine the composition

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *Amicus* or his counsel made a monetary contribution to its preparation or submission. Respondents filed their blanket consent to the filing of amici curiae briefs on January 28, 2020. Petitioner granted *Amicus*'s timely request for consent to the filing of this brief.

of the No Fly List." Pet. 4.[2] The world of terrorist watchlists, including the No Fly List, is one in which individual FBI agents have enjoyed substantial power but little oversight. That imbalance emerged alongside the creation of the No Fly List and grew with the apparatus developed to operate terrorist watchlists. These origins of the No Fly List inform an understanding of the powerful role that FBI agents play in its composition and sometimes misuse.

ARGUMENT

People, not institutions, act. Agencies are legal constructs, like sovereignty and liability: conceptual rather than tangible things. "[T]he sovereign can act only through agents," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949), because the sovereign in our republic is an idea, not a person. The legal authorities conferred on agencies are exercised by human beings.

That distinction is essential when government agents are haled into court in their personal capacity (not merely as instrumentalities of the state) because "the real party in interest is the individual, not the sovereign." *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017). The Second Circuit recognized the logic behind this distinction: "An individual capacity suit that is confined to injunctive relief has limited value; official capacity suits for injunctive relief already supply injunctive relief against the governmental entity as a whole. … Thus, individual capacity suits tend to be associated with damages remedies, and official capacity suits with injunctive re-

[2] Respondents note that they "have not conceded that individual agents play no role in the composition of the No Fly List or any other watchlist maintained by the TSC." Br. in Opp. 4, n.4; *see also* Resp. Br. 5, n.2.

lief." *Tanvir v. Tanzin*, 894 F.3d 449, 464, n.9 (2nd Cir., 2018).

I. From the Start, FBI Agents Dominated the Process of Building the No Fly List

There was nothing called a No Fly List prior to September 11, 2001. Following the terrorist bombing of Pan Am Flight 103 in 1988, officials at the Federal Aviation Administration (FAA) developed and issued "security directives" to warn airlines not to carry persons believed to present a "specific and credible threat" to civil aviation security. Report of the President's Commission on Aviation Security and Terrorism 78-79, 86-87 (1990); Jeffrey Kahn, *Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists* 133-34 (2013). These security directives were derived from prior authority granted to air carriers "to refuse transportation to a passenger or to refuse to transport property when, … such transportation would or might be inimical to safety of flight." Act of Sept. 5, 1961, Pub. L. No. 87-197, § 4, 75 Stat. 466, 467-68.[3]

Security directives were rare, limited by interagency rivalries, and slow: they were transmitted on thermal fax paper. Jeffrey Kahn, *Terrorist Watchlists*, *in The Cambridge Handbook of Surveillance Law* 75-76 (Gray & Henderson eds., 2017). On Sept. 10, 2001, the FAA had identified twelve such individuals, none of whom were among the terrorists. *9/11 Commission Report* 83 (2004); Kahn (2017), at 76.

This intelligence failure led Congress to establish the Transportation Security Administration (TSA) in November 2001, transfer to it the FAA's responsibility for aviation security, and grant its Administrator "in

[3] In slightly revised form, this provision has been codified at 49 U.S.C. § 44902(b).

consultation with other appropriate Federal agencies and air carriers," authority to "establish policies and procedures requiring 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." 49 U.S.C. § 114(h)(3)(A). (The disjunctive expanded the scope of this power, extending it to threats *not* involving aviation security at all.) That information, gleaned from other government agencies, could then be used to "notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." § 114(h)(3)(B).

The security directive ("SD") was the old FAA legal tool that new TSA officials seized upon to put this power into effect. 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, this once neglected SD authority attracted renewed attention from the White House and intelligence services:

> [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?

Kahn (2013), at 139.[4]

[4] This approach was confirmed by the Deputy Secretary of Transportation at the time of the September 11 attacks, Michael Jackson, who later became Deputy Secretary of Homeland Securi-

Though TSA officials could now issue an SD to prohibit a passenger from boarding a flight, FBI officials—whose investigative tools and intelligence gathering apparatus often provided the information needed to use it—took over the TSA's new legal authority from the start. FBI agents began to use security directives the day after the September 11 attacks. According to an internal TSA memorandum by the Acting Associate Under Secretary at TSA for Transportation Security Intelligence:

> [Early on September 12, 2001, A]t 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."[5]

Kahn (2013), at 140 (quoting 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).

As a result, FBI agents developed a proprietary attitude toward the emerging No Fly List, as e-mails released through FOIA litigation reveal. "We are putting the target on the TSA No Fly List here at FBIHQ" one FBI Supervisory Special Agent wrote on December 17,

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ty. Kahn, 296, n.105 (noting that when TSA promulgated the No Fly List, "it was done through security directives").

[5] *Pentbom* was the code name for the FBI's investigation into the 9/11 attacks.

2002. "I will be getting with TSA tomorrow (12/18) to accomplish this." Kahn (2013), at 140.[6] "We've got a guy we want to no-fly," another FBI e-mail states. "Do you have a copy of the last one we gave you?" *Id.* The attitude at FBI Headquarters was mirrored by agents in the field. "Boston has subject that we would like to add to the TSA 'No Fly List,'" an October 2002 e-mail states. "Do you know who I address the EC [electronic communication] to?" *Id.*

The story behind these internal communications was summarized by Edward Alden: "The process for vetting the names on the terrorist list was far too lax, such that almost any FBI agent could add a name to the list with little scrutiny." Edward Alden, *The Closing of the American Border* 241 (2008).

II. The FBI's Terrorist Screening Center Consolidated the Central Role of the FBI and its Agents in the Watchlisting Process with Low Criteria and Standards for Oversight

As TSA developed its bureaucracy and administrative resources, a turf war threatened to break out over the No Fly List. Randy Beardsworth, a distinguished Coast Guard officer who joined DHS in 2003 as the Chief Operations Officer for Border and Transportation Security observed:

> 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 infor-

[6] These e-mails were released as a result of successful FOIA litigation by the American Civil Liberties Union, *Gordon v. FBI,* 390 F. Supp. 2d 897 (N.D. Cal. 2004).

> mation. 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.

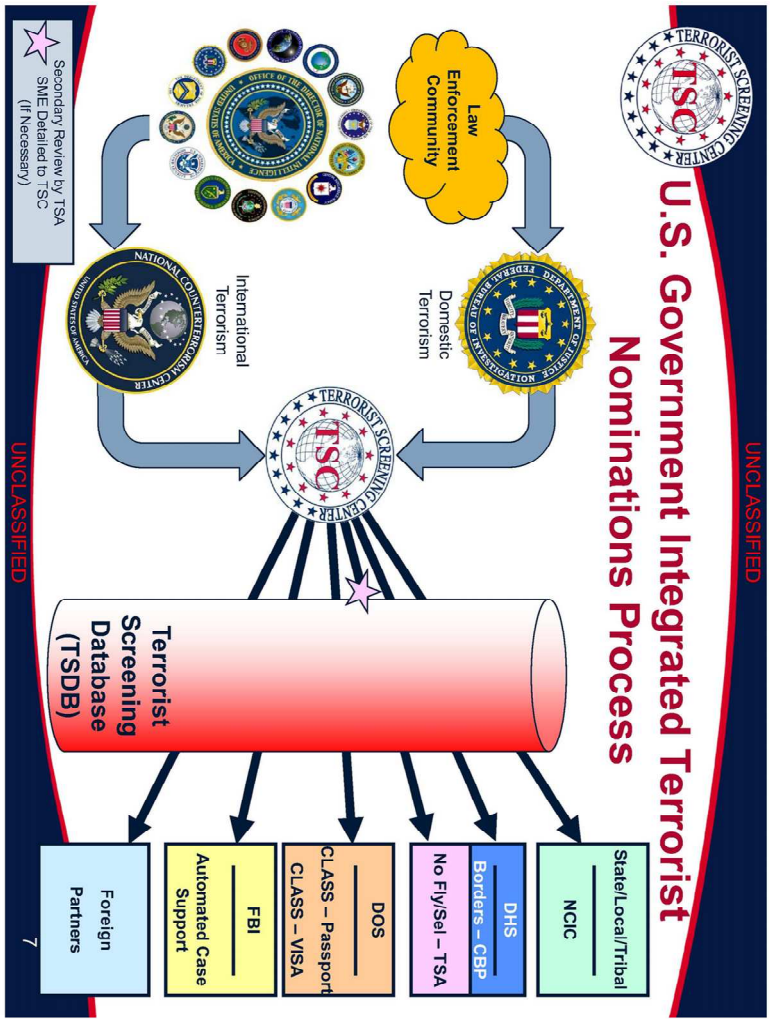
Kahn (2013), at 142.

The interagency rivalries developing both between FBI and TSA and with other agencies were resolved by Homeland Presidential Security Directive Six (HSPD-6), which President Bush signed in September 2003. That directive ordered that the "Attorney General shall establish an organization to consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." HSPD-6 (Sept. 16, 2003) at ¶ 1. The FBI's consolidation of control over watchlisting began at that point.

On the basis of this directive and an accompanying memorandum of understanding (MOU) signed on the same day as HSPD-6 by the Attorney General, Director of Central Intelligence, and Secretaries of State and Homeland Security, Attorney General Ashcroft established the Terrorist Screening Center (TSC) as a multiagency unit housed within the FBI. William J. Krouse, *Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6*, CRS Report for Congress 2 (Apr. 21, 2004).[7] The TSC would maintain a consolidated Terrorist Screening Database (TSDB) from which other watchlists (such as the No Fly List) would be created for use by customer agencies (such as TSA). The TSC would also establish and administer standardized criteria and formats for information

[7] An addendum to the MOU was signed in 2006 by the original signatories and the Secretaries of the Treasury and Defense, Director of National Intelligence, Director of the National Counterterrorism Center, and Director of the Terrorist Screening Center.

on these lists. Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism ¶¶ 4 & 29 (Sept. 16, 2003). The TSC's keystone role was depicted graphically by TSC Director Timothy Healy in the following slide:



The TSC would be the central authority for the creation and curation of terrorist watchlists used by federal agencies, state and local law enforcement, and even foreign partners. Its staff would gather information from the FBI (for domestic terrorism) and from the National Counterterrorism Center (for international terrorism). That information would be assessed by standardized criteria to add individual identities to the main repository (the TSDB) and, from that source, the TSC staff would also derive downstream lists for customer agencies (such as the No Fly List for the TSA). The TSC called this the "nomination" process.

What is more, the MOU established the FBI's control over the TSC. It required that the TSC Director would report to the Attorney General through the Director of the FBI and be appointed by the Attorney General in consultation with the other signatories and the FBI Director. MOU ¶ 5. This was a substantial acquisition. In its first year of operation (FY 2004), the TSC grew to a $27 million budget and roughly 177-person staff. U.S. Department of Justice Office of the Inspector General, Review of the Terrorist Screening Center 1, 35 (2005). Tellingly, only eight positions were created and filled with representatives of the TSA in 2005; the bulk of all staff came from the FBI. *Id.* at 35 & 109.

The criteria that the TSC established for both the TSDB and the No Fly List that drew from it, as well as the standard of review to determine if such criteria were and continued to be met, were then and are now very low. In its first review of the TSC, the Justice Department's Inspector General determined that "the TSC process for including a name in the TSDB was more of an acceptance than nomination. TSC staff did not review the majority of the records submitted unless an automated error occurred while the records were uploaded to

the database." OIG (2005), at 42. The first TSC Director, Donna Bucella, candidly explained that:

> [T]o err on the side of caution, individuals with any degree of a terrorism nexus were included on the consolidated watch list, as long as minimum criteria was met (*i.e.*, the person's name was partially known plus one other piece of identifying information, such as the date of birth). The Director further explained that one of the benefits of watch listing individuals who pose a lower threat was that their movement could be monitored through the screening process and thereby provide useful intelligence information to counterterrorism investigators.

OIG (2005), at viii-ix.

At this stage of its development, entry into the TSC's system was a one-way road. Even two years later, a follow-up inspection by the Inspector General's Office found that "[d]espite being responsible for removing outdated or obsolete data from the TSDB, however, the TSC did not have a process for regularly reviewing the contents of the TSDB to ensure that the database does not include records that do not belong on the watchlists." U.S. Department of Justice, Follow-Up Audit of the Terrorist Screening Center 18 (2007).

This virtually non-existent oversight allowed FBI agents virtually unfettered ability to add individuals of interest to their investigations to various watchlists. Mirroring Beardsworth's above-noted view that the FBI was a "feudal" organization with regionally placed agents who were "completely independent and powerful," Edward Alden reached a similar conclusion in watchlisting terms: "The FBI is virtually a franchise operation, with local agents running their own cases, and initially there was no oversight of how these agents added names to the watch lists." Alden, at 241. As a result, both the TSDB and the No Fly List ballooned in size.

Facing both OIG audits and growing litigation pressure, multi-agency working groups and other bodies were routinely organized to develop what became known as "watchlisting guidance": sharper standards, criteria, and processes for evaluating nominations. But the standard that gradually emerged—the "reasonable suspicion" standard—was no real constraint.[8] It was inspired by the test of the same name presented in *Terry v. Ohio*, 392 U.S. 1 (1968), though with no intention by the working group convened to craft it that a neutral magistrate outside the TSC should ever evaluate its application to a watchlisting decision. Kahn (2013), at 170.

The standard has hardly proved to be a constraining one. It is applied to broad definitions of "known" or "suspected" terrorists that satisfied eligibility for inclusion in the TSDB. Thus, according to the most recent publicly available watchlisting guidance, from 2013,[9] an FBI agent nominating an individual to the TSDB must

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[8] Statement of Timothy J. Healy, Director, Terrorist Screening Center, Testimony before the Senate Homeland Security and Governmental Affairs Committee, Dec. 9, 2009, at 2 ("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. Due weight must be given to the reasonable inferences that a person can draw from the facts. Mere guesses or inarticulate 'hunches' are not enough to constitute reasonable suspicion.").

[9] The March 2013 Watchlisting Guidance is an unclassified but "for official use only/sensitive security information" document that was published in 2014 by *The Intercept*, a blog operated by the investigative journalist Glenn Greenwald. Jeremy Scahill & Ryan Devereaux, *Blacklisted: The Secret Government Rulebook for Labeling You a Terrorist*, The Intercept, July 23, 2014, *available at* https://theintercept.com/2014/07/23/blacklisted/ (last visited Feb. 9, 2020).

provide information that a person identified by adequate biometric or biographic information is at least a "suspected terrorist," *i.e.*, "reasonably suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of, or related to Terrorism and or Terrorist Activities." March 2013 Watchlisting Guidance § 1.24 & App. 1(W). Terrorist Activities are defined to include non-violent, facilitative or supporting activities "such as providing a safe house, transportation, communications, funds, transfer of funds or other material benefit, … ." Id. at § 1.15. And the standard that must be met to conclude that these are indeed invidious rather than harmless or unknowing actions is itself only "reasonable suspicion" that such information is correct. *Id.* § 1.24.2 & App. 1(U). In the words of one federal judge assessing this approach, "In other words, an American citizen can find himself labeled a suspected terrorist because of a 'reasonable suspicion' based on a 'reasonable suspicion'." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 531-32 (E.D. Va. 2014).

It turns out that this standard is used to review both the criteria for inclusion in the TSDB as well as for the No Fly List. Kahn (2013), at 168-69; Declaration of G. Clayton Grigg, Deputy Director for Operations, Terrorist Screening Center, May 28, 2015, *Tarhuni v. Lynch*, No. 3:13-cv-1 (D. Or. Sept. 1, 2015) (Docket No. 105-A). The criteria for the No Fly List are similarly expansive. A person may be added to the No Fly List if there is a reasonable suspicion that the person "represents a threat" of committing various definitions of terrorism found in the U.S. Code.[10] March 2013 Watchlisting Guidance § 4.5.

[10] Although for many years Government counsel represented in No Fly List litigation that publication of these criteria would

A person may also be added if the person is reasonably suspected of being "operationally capable" of "engaging in or conducting a violent act of terrorism" without any particular target of terrorism. March 2013 Watchlisting Guidance, at § 4.5. "Operationally capable" is also a specially defined term. The Watchlisting Guidance indicates that the reasonable suspicion standard could be met "depending on the circumstances, and in combination with other facts," by evidence of "traveling for no legitimate purpose to places that have terrorist training grounds, regardless of whether the person is presently capable" of using a dangerous weapon. *Id.* § 4.8.2. Guidance on what is the relevant geographic scope of "places" and what constitutes a basis for discerning what is a "legitimate" purpose for travel is not provided.

Notwithstanding these broad criteria and low standards, the Watchlisting Guidance includes exceptions to the standard procedures. Thus, for example, a nominator may use an "expedited" procedure for individual nominations in "exigent circumstances" (an undefined term) by calling a toll free telephone number after normal duty hours to "telephonically complete a Terrorist Screening Center Expedited Nomination Request Form" and follow up within 72 hours with documentation providing the basis for watchlisting. *See* March 2013 Watchlisting Guidance §§ 1.58.3-1.58.4.

It should be unsurprising, therefore, that most nominations are successful. Thus, for example, the table below shows nominations and rejected nominations to the Terrorist Screening Database between fiscal years 2009 and 2013. It was produced by Government counsel in litigation alleging that unknown TSC agents had placed

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threaten national security, they are now publicly acknowledged. *See Tarhuni v. Lynch,* 129 F. Supp. 3d 1052, 1055 (D. Or. 2015).

the plaintiff on the No Fly List following his interrogation abroad by FBI agents seeking to pressure him to become an informant.[11]

FY	NOMINATIONS	REJECTED
2009	227,932	508
2010	250,847	1628
2011	274,470	2776
2012	336,712	4356
2013	468,749	4915

As the Government's table reveals, nominations to the TSDB more than doubled in this five-year period, while the percentage of rejected nominations rose from slightly more than 0.2 percent in 2009 to only slightly more than one percent in 2013.

III. The Combination of Substantial Control and Low Oversight Invites Error and Misuse

Neither the TSC in generating the Terrorist Screening Database and No Fly List, nor the TSA in operationalizing the latter, are responsible for verifying the information supplied by the FBI agent or other nominating

[11] Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories, *Mohamed v. Holder*, No. 1:11-cv-00050-AJT-TRJ (E.D. Va. March 28, 2014) (Docket No. 91-3). *See also id.*, Fourth Am. Compl. ¶ 2 ("Defendants placed Mr. Mohamed on its No Fly List while he was abroad in order to pressure him to forgo his right to counsel, submit to invasive questioning, and become an informant for the FBI upon returning to the United States."), *id.* ¶¶ 49-54 (alleging conduct by unnamed FBI agents) (Docket No. 85). Tellingly, the Government's Answer to this allegation was careful to disavow responsibility for watchlisting by DHS officials, answering in part: "DHS Defendants deny that they make final decisions regarding the placement of individuals, including Mr. Mohamed, on the No Fly List." *See id.*, Answer ¶ 2 (Docket No. 88).

official that supplies it. The March 2013 Watchlisting Guidance puts that responsibility squarely on the shoulders of the originator of the nomination itself:

> Nominating Agencies should implement processes designed to ensure that nominations are free from errors, that recalled or revised information is reviewed regularly, and that necessary corrections to nominations based on those revisions/retractions are made. Nominating Agencies should, to the extent possible given the nature of the reporting, verify the accuracy and reliability of the information included in nominations.

March 2013 Watchlisting Guidance § 1.24.2. Thus, if an FBI agent submits a nomination form to the TSC to request that an individual be placed on the TSDB and the No Fly List, the information on the form is assessed *as is*.

Ibrahim v. Dep't of Homeland Security, No. 3:06-cv-0545 (N.D. Cal. 2013), the only No Fly List case to receive a trial in federal court, provides concrete evidence of the effect of such low oversight and review, and the vigorous efforts made to shield agents from accountability outside of the FBI, of which the TSC is a part.[12]

Dr. Rahinah Ibrahim, a Malaysian citizen, Muslim, and prominent professor of architecture, was a graduate student at Stanford University when she was unexpectedly approached by FBI Special Agent Kevin Michael Kelley. The Government conceded at trial that Dr. Ibrahim did not at that time, nor at any other time, present any threat of domestic terrorism or any other threat to civil aviation security or national security. *Ibrahim v. Dep't of Homeland Security,* 62 F. Supp. 3d 909, 915-916

[12] Prof. Kahn testified as an expert witness on these topics on behalf of the plaintiff in *Ibrahim.*

(N.D. Cal. 2014). In December 2004, Agent Kelley and a colleague interviewed Dr. Ibrahim at length, including about her involvement in the Muslim community. *Ibrahim*, 62 F. Supp. 3d at 916-917.

A month *prior* to meeting her, in November 2004, Agent Kelley, then in San Jose, California, nominated Dr. Ibrahim to several terrorist watchlists including the No Fly List. He did this through a written form. Agent Kelly admitted at trial that he misunderstood the instructions on the form and nominated Dr. Ibrahim to the No Fly List and other watchlists completely by mistake. According to the district court, Agent Kelley "checked the wrong boxes, filling out the form exactly the opposite way from the instructions on the form." The district court copied an excerpt from this form to its opinion, finding it to be the "bureaucratic analogy to a surgeon amputating the wrong digit." *Ibrahim*, 62 F. Supp. 3d at 928.

As a result of this error, when Dr. Ibrahim attempted to fly to an academic conference from San Francisco International Airport, she was placed in handcuffs, escorted to a jail cell (though Dr. Ibrahim needed a wheelchair at the time) and humiliated in front of her fourteen-year-old daughter, after which her student visa was revoked and she was forbidden to return to the United States. *Ibrahim*, 62 F. Supp. 3d at 917. The district court found that due to Agent Kelley's mistake in submitting information to the TSDB, "it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away." *Ibrahim*, 62 F. Supp. 3d at 928.

It is telling that Agent Kelley did not realize his mistake for eight years—so much for oversight. The error was not caught by either the FBI agent himself, TSC officials mechanically inputting his information, or TSA officials when the form was submitted in November 2004.

One can only wonder what vetting process could confirm Dr. Ibrahim on multiple watchlists that were not only negligently requested by this FBI agent but also when (as the court found and the Government conceded) Dr. Ibrahim was at no time a threat of any kind. Neither routine nor *ad hoc* oversight procedures caught the error. Only at Agent Kelley's September 2013 deposition, which was permitted to proceed only after vigorous objections by government counsel, did Agent Kelley realize his monumental blunder. *See Ibrahim v. Dep't of Homeland Security*, 912 F.3d 1147, 1162-63 (9th Cir. 2019) (en banc).

And yet, the Government (knowing this blunder and knowing Ibrahim's innocence) forced the case to trial. The District Court, considering a request under the Equal Access to Justice Act, concluded that both the Government's pre-litigation conduct ("The original sin—Agent Kelley's mistake and that he did not learn about his error until his deposition eight years later—was not reasonable.") and the Government's litigation conduct ("[T]he government's attempt to defend its no-fly error for years was not reasonable.") defending such inadequate due process "was not substantially justified." *Ibrahim v. Dep't of Homeland Security*, 2014 WL 1493561 at *8 (N.D. Cal. Apr. 16, 2014). Indeed, the Court of Appeals, sitting *en banc*, observed:

> In sum, the government failed to reveal that Dr. Ibrahim's placement on the No Fly list was a mistake until two months before trial, and eight years after Dr. Ibrahim filed suit. And at all times, as the government vigorously contested Dr. Ibrahim's discovery requests, and lodged over two hundred objections and instructions not to answer questions in depositions, the government was aware that she was not responsible for terrorism or any threats against the United States.

Ibrahim v. Dep't of Homeland Security, 912 F.3d at 1162-63 (internal footnotes omitted).

The nature of the form Agent Kelley blundered is also indicative of the nature of the watchlisting enterprise itself. A blank copy of this form appears below.[13]

It is recommended that the subject NOT be entered into the following selected terrorist screening databases:

- ❒ **Consular Lookout and Support System (CLASS)**
- ❒ **Interagency Border Information System (IBIS)**
- ❒ **TSA No Fly List**
- ❒ **TSA Selectee List**
- ❒ **TUSCAN**
- ❒ **TACTICS**

...

The case agent will also nominate any terrorist screening database into which the subject should not be entered. If no databases are selected, then the subject will be added by the TSC to all appropriate databases.

The form presented a list of watchlists with the presumption that a nomination would be made to *all* of them. The form instructed the FBI agent to positively opt out of those watchlists that the FBI agent did not recommend his subject be added to. Such a construction is entirely to be expected given the culture that prevailed at the FBI and the TSC. As the former Chief Operations Officer for Border and Transportation Security at the Department of Homeland Security observed, "[R]emember, 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

[13] Both the District Court, *Ibrahim*, 62 F. Supp. 3d at 916, and the Court of Appeals, *Ibrahim*, 912 F.3d at 1158, reproduced copies of Agent Kelley's erroneously completed version of it. The Court of Appeals also reproduced a blank copy, *Ibrahim*, 912 F.3d 1157, which is the source for this image.

who was adjudicating the No Fly List." Kahn (2013), at 142.

IV. The Working Environment of the Terrorist Screening Center Reinforces Deference to the Real Decisionmakers

The Terrorist Screening Center does not accept redress inquiries directly from the public.[14] The FBI has not disclosed the physical location of the TSC, which was only revealed by accident to be in Vienna, Virginia. Tom Jackman, *Vienna Tormented by FBI Building's Non-Stop Buzz*, Wash. Post, June 21, 2012. Although the building lacks any visible signs, newspaper accounts can now be confirmed using Google Maps because its former Director dramatically revealed during an interview on CNN that its employee entrance is ornamented with a three-story tall sculpture taken from the rubble of the World Trade Center's North Tower. *Exclusive Interview with Terrorist Screening Center Director Christopher Piehota*, CNN (Apr. 6, 2016).[15] The interview began by highlighting the sculpture.

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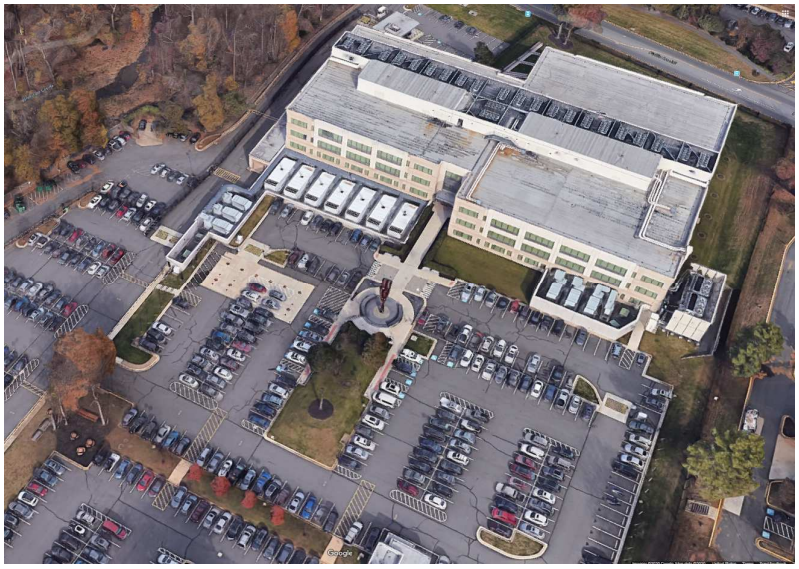
[14] *Available at* https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc (last visited Feb. 9, 2020).

[15] *Available at* http://www.cnn.com/videos/politics/2016/04/06/exclusive-interview-with-terrorist-screening-center-director-christopher-piehota-origwx-allee.cnn (last visited Feb. 9, 2020).

But as this image from Google Maps better illustrates, the sculpture is placed so that employees must file past it each morning on their way from the secure parking lot to the building entrance.



This sobering opportunity for reflection at the start of the work day was not accidental. In his interview, TSC Director Christopher Piehota explained the purpose of this sculpture to his CNN interviewer: "It reminds us

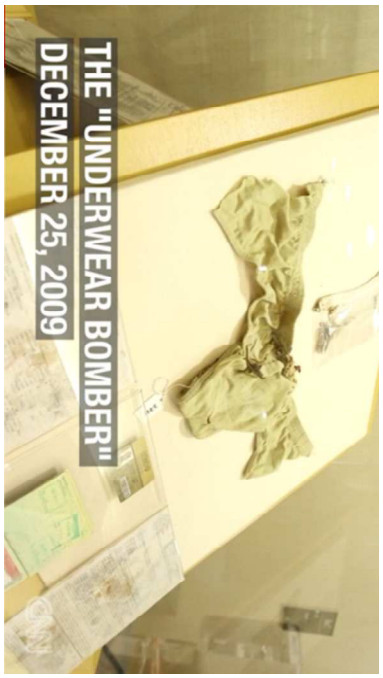
daily of the importance of what we do. The threat is ever present." *Id.* at 00:11-00:21.

Nor was the sculpture the only reminder. Once inside the building, these reminders continue. CBS News reported that "Throughout the Terrorist Screening Center are placed artifacts from various terrorist attacks including Oklahoma City federal building, the USS Cole bombing, and the World Trade Centers. All sober reminders of how important their work is." Bob Orr, *Inside a Secret U.S. Terrorist Screening Center*, CBS Evening News, Oct. 1, 2012, 9:03 PM, *available at* https://www.cbsnews.com/news/inside-a-secret-us-terrorist-screening-center/.

Four years later in his 2016 interview, Director Piehota escorted his CNN interviewer through this macabre museum and allowed the images his staff sees each morning to be shown on CNN. Again, his message was very clear, as he somberly observed standing in front of another piece of the wreckage from the World Trade Center: "And the remnants were put here to remind our staff of our mission, which is to prevent acts of terrorism. Keeps us mindful of the threat that is still out there. Each remnant or each artifact shows you the evolution of terrorism." *Id.* at 00:20-00:41.


FROM THE USS COLE BOMBING
OCTOBER 12, 2000
USS COLE
DDG 67
CNN


FROM THE OKLAHOMA CITY BOMBING
APRIL 19, 1995
CNN


THE "UNDERWEAR BOMBER"
DECEMBER 25, 2009
CNN

Since this building is not accessible to the public, this museum's purpose is not to educate anyone who does not work at the TSC. Tellingly, none of the exhibits shown in this interview concerned the *successful* use of the No Fly List or other terrorist watchlists to *prevent* acts of terrorism. Some exhibits predated the existence of the TSC.[16] Others, like the "Underwear Bomber" on Northwest Airlines Flight 253 on Christmas Day 2009, were demonstrations of the *failure* of the TSC to use its watchlisting tools effectively.

The message to the employees passing these artifacts of intelligence failures therefore seems clear: Do not err on the side of caution; Do not interrogate too rigorously the judgments of the FBI agents who send you names of people to be watchlisted. There will be no reward (and there is too much at risk) to question their reasons for adding (let alone for deciding to remove) someone who has been placed on the watchlist. The rea-

[16] In addition to these exhibits, the FBI has posted a time-lapse video that shows individuals (who most likely are TSC employees, given the guarded nature of the facility) at prayer or somber reflection as shadows cast by three flagpoles that once stood in front of the World Trade Center pass over a 9/11 memorial placed at one of the security gates to the TSC building. The memorial is designed so that these shadows cross the memorial once each year at the precise times of the crashes of the four hijacked planes. *See* FBI, *Video: 9/11 Memorial at Terrorist Screening Center*, https://www.fbi.gov/video-repository/160906-terrorist-screening-center-sept11-memorial.mp4/view. There is no doubt that those paying their respects are sincere. And no doubt that the sculpture and artifacts are vivid reminders of threats to our national security that TSC and other government officials diligently and dutifully seek to prevent. But these monuments to vigilance in no way create the presence of mind needed for dispassionate evaluation of evidence that could be compared to that found in a courthouse whose employees pass by a statue of blindfolded Lady Justice. Each institution seeks to sculpt the attitude it wishes to instill in those that enter its buildings.

sonable suspicion standard is meant to accord deference to FBI agents, not to provide an independent, neutral assessment of their claims.

CONCLUSION

In deciding this case, the Court should recognize the actual role that FBI agents play in the watchlisting process. Referring to an agency's legal authority, as if this abstraction were in fact capable of acting on its own, obscures the reality that an agency is composed of the people who work there.

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