

MRS. SHIPLEY'S GHOST



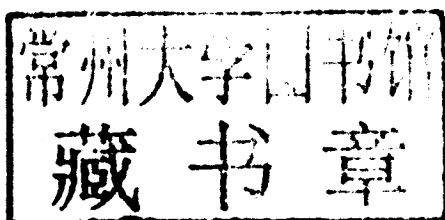
THE RIGHT
TO TRAVEL
and
TERRORIST
WATCHLISTS

Jeffrey Kahn

Mrs. Shipley's Ghost

*The Right to Travel and
Terrorist Watchlists*

Jeffrey Kahn



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Mrs. Shipley's Ghost

♦ *For LaiYee, Sophia, and Nadia* ♦

There is always an easy solution to every human problem—neat, plausible, and wrong.

—H. L. Mencken, *A Mencken Chrestomathy* 443 (1949)

Abbreviations

The Agencies

- DHS Department of Homeland Security
CBP Customs and Border Protection
TSA Transportation Security Administration
(March 2003–present)
- DOJ Department of Justice
FBI Federal Bureau of Investigation
TSC Terrorist Screening Center
- DOS Department of State
- DOT Department of Transportation
FAA Federal Aviation Administration
TSA Transportation Security Administration
(November 2001–March 2003)
- ODNI Office of the Director of National Intelligence
NCTC National Counterterrorism Center (formerly TTIC)

The Watchlists*

- APIS Advanced Passenger Information System (1988; CBP): A system that maintains passenger and crew manifest information from commercial airlines.
- CLASS Consular Lookout and Support Systems (1995; DOS): A system that vets visa and passport applications.

No Fly List (2001; TSA): A list of individuals prohibited access to commercial air travel.

Selectee List (2001; TSA): A list of individuals subject to heightened airport security screening.

TIDE Terrorist Identities Datamart Environment (2002; NCTC): A clearinghouse to centralize collection and analysis of terrorist information.

“TIPOFF” (1987; DOS): A State Department terrorist watchlist that contained approximately 60,000 names on September 11, 2001.

TSDB Terrorist Screening Database (2004; TSC): The consolidated terrorist watchlist from which specialized watchlists, such as the No Fly List, are derived.

VGTOF Violent Gang / Terrorist Organization File (1995; FBI): A component of the National Crime Information Center used by law enforcement. In 2009, this file was divided into two separate files: the Gang File and the Known or Suspected Terrorist File.

*This book references many watchlists. This list may help the reader keep them straight. Each list is identified by its commonly used acronym or initialism. The year of origin for the watchlist and the agency that is frequently associated with it follows. This is *not* a complete list of known U.S. Government watchlists, which is always in flux but would include, at a minimum, the Interagency Border Inspection System (IBIS), Treasury Enforcement Communications System (TECS), National Law Enforcement Telecommunications System (NLETS), National Automated Immigration Lookout System (NAILS), Integrated Automated Fingerprint Identification System (IAFIS), and the Automated Biometrics Identification System (IDENT).

Acknowledgments

This book owes its life to the paper edition of the *New York Times*. In October 2006, I stumbled on a short article by Randal Archibold buried on page A10 of the national edition. I doubt that I would have stopped to click a hyperlink to its title, and it is unlikely that a computer algorithm would have selected it for me based on my past reading history. But the first sentence sank its fangs into me: “Two American citizens of Pakistani descent returned to the United States on Sunday, five months after they were denied permission to fly home to California unless they submitted to an interrogation by F.B.I. terrorism investigators.”¹

I tore the story out of the newspaper and let it gnaw at me as the page yellowed on my desk. Out of the clipping, a law review article emerged.² While researching that article, I stumbled on a reference to Mrs. Shipley. That discovery owes its life to the Internet. Without the free, searchable digital archives of magazines and newspapers, I never would have come to know her well enough to want to seek out her files at the National Archives in College Park, Maryland. Those visits to NARA led to another law review article.³

So, ironically enough, I discovered Mrs. Shipley’s passport-and-rubber-stamp world thanks to massive digital databases of the sort now used to power terrorist watchlists. But I found the inspiration to examine the No Fly List, an invention of the twenty-first century, thanks to the broadsheets of the Gray Lady.

While working on drafts of these articles and this book, I traveled around the country to present their arguments and gather counterarguments. I thank the faculty at the Stanford Law School, University of Minnesota Law School, University of Wisconsin School of Law, Lewis and Clark School of Law, Villanova University School of Law, University of Connecticut School

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The Dahl cartoon in chapter 6 first appeared in the *Boston Herald Traveler's* September 23, 1968, edition and is reprinted with permission of the *Boston Herald*.

Too many holidays, Sundays, dinners, late nights, and early mornings were spent working on this book. Those hours did not belong to me; I took them from LaiYee and Sophia. Sometimes I despair that the debt cannot be repaid, for time is not a fungible commodity. I hope they understand why I did it, and for whom.

J.D.K.

Muskegon, Michigan

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Introduction

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

—Justice Louis D. Brandeis (1928)¹

It was a righteous mission back then, and it is a righteous mission today.

—Timothy J. Healy, Director,
Terrorist Screening Center (2009)²

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."

You are stunned. Obviously someone, somewhere, has made a mistake. A simple misspelling, perhaps. You ask to speak to a supervisor, but she shrugs helplessly as you show her your U.S. passport, the ticket stubs from your previous flight, even your driver's license. "There is nothing I can do. It's not our list. But we cannot board anyone who is on it. You will have to contact the Department of Homeland Security." She hands you a slip of paper with a telephone number and a website address on it. As you leave your place in line, you are stung by the nervous glances of travelers who overheard your exchange.

Waiting on hold, a slow sense of dread begins to overwhelm you. This is not going to be resolved with a simple phone call. What is this "watchlist"?

Who put your name on it? How can your name be removed from it? How can an American citizen be kept from returning home? Your thoughts turn to more immediate, practical concerns. You are thousands of miles from home. Your family received their boarding passes; should they travel without you? Can you stay here? Fly to Canada? Take a boat?

Still waiting, you open the website that the gate agent gave you: <https://trip.dhs.gov/>. "Thank you for contacting the DHS Traveler Redress Inquiry Program. Please check ALL the scenarios that describe your travel experience." You start to scroll down, clicking all the categories that apply: "I am unable to print a boarding pass at the airport kiosk or at home"; "I was denied boarding"; "The airline ticket agent stated that I am on a Federal Government Watch List." Some of the categories seem broad, others quite specific: "I feel I have been discriminated against by a government agent based on race, disability, religion, gender, or ethnicity"; "I believe my privacy has been violated because a government agent has exposed or inappropriately shared my personal information." Then there is the ubiquitous "other" category. Should you click that one, too? The next screen asks for personal information. The heading states: "The following information is voluntary; however, it may be needed to complete your request." But when you omit your date of birth, a message pops up to say that this information is required to proceed. This is confusing. What if you make a mistake? Who is going to read this? Will you ever learn what started all this trouble?

Do you need a lawyer?

This hypothetical is drawn from the experience of an American family split in half by the United States Government's "No Fly List." Half the family was allowed to return to their home in California, but father and son were stranded for five months, thousands of miles away, as their attorney fought against a remote and classified government program. Their story is told in chapter 2 as an example of how the No Fly List has expanded from a sharply honed tool for protecting the security of commercial aircraft to a broad and blunt instrument to pursue all kinds of government interests. For example, chapters 1 and 2 describe how it has been used to apply pressure to citizens to agree to FBI interrogations and polygraph tests as a condition of returning home to America. In fact, Richard Falkenrath, who as a senior White House official led the drive to consolidate the nation's watchlists immediately after the terrorist attacks of September 11, 2001, urged the expansive deployment of watchlists in testimony before the U.S. Senate only two weeks before this family was reunited: "The federal government needs to do a much better job of promoting the widespread utilization of watchlist screening."³ Michael Jackson, Deputy Secretary of Transportation on Sep-

tember 11 and Deputy Secretary of Homeland Security from 2005 to 2007, agrees: watchlists “shouldn’t be restricted to air travel.”⁴

The logic behind watchlists makes the urge to expand their use practically irresistible. What should dictate the limits of expansion? For decades before September 11, the FAA maintained a system of issuing what it called “security directives” to airlines that it used to deny boarding to individuals deemed to present a “specific and credible threat” to an aircraft.⁵ These directives identified only a handful of people year to year. Now, according to Director Timothy Healy, whose Terrorist Screening Center is responsible for maintaining the No Fly List, the federal government may prevent the travel of “known or suspected terrorist[s]” who “present a threat to civil aviation or national security.”⁶ With three small words, this disjunctive phrase now justifies adding a person to the No Fly List who does *not* pose a threat to civil aviation. In early 2011, Director Healy said that the No Fly List prohibited over 10,000 people from flying, up to 1,000 of them being U.S. citizens.⁷ A year later, the Associated Press reported in early 2012 that government figures showed the list had nearly doubled in size to 21,000 names, while the number of Americans on it reportedly decreased to around 500 people.⁸

So what? After September 11, who could object to a policy that denied known and suspected terrorists access to anything? But who decides that these people are terrorists, or even suspected terrorists, that they threaten national security, and that their liberty should be restricted? The watchlists are prosecutor, judge, jury, and jailor. Their decisions are made in secret and their rules for decision—like their evidence for deciding—are classified. There is no appeal from the decision of the watchlists, except to the watchlists themselves.

But perhaps that, too, is tolerable in this age. Wouldn’t it be foolish to be too open about the details of this list? Known and suspected terrorists could escape detection. They should not be treated as mere criminals entitled to the rights that police and prosecutors must respect, and courts protect.

There lies the problem. Who “they” are is left to the watchlists. Not only do the new standards make that discretion broader than ever before, the pressure to watchlist someone is great. In its September 2010 report on the FBI’s investigations of various domestic advocacy groups, the FBI’s Inspector General criticized the practice of overclassifying matters as domestic terrorism cases.⁹ It is only human nature that those who are daily confronted by a thick and terrifying threat matrix should inevitably prefer to err on the side of watchlisting.

Of course, that is the rationale for requiring that the judgment of even the most experienced police and prosecutors be evaluated by a neutral and

dispassionate magistrate. But there is no such person involved in the watchlisting process—the decision is returned to the original deciders. There is an appeals *process*, of course, but the burden is on the individual to prove that he or she is not a terrorist or some other security threat. And this must be done without access to the information that led to the watchlisting in the first place. What if someone made a mistake? Or the judgment is based on evidence that is of unknown provenance or weak credibility or susceptible to multiple interpretations? In the absence of legal standards that are routinely enforced by neutral third parties (as courts routinely enforce the legal standards that govern searches, arrests, and other invasions of an individual's liberty), what institutional incentives exist that would lead an anonymous analyst to resolve ambiguous evidence in any way other than in favor of watchlisting? Who wants to be the official who erred in favor of a terrorist? As David Addington, Chief of Staff to Vice President Cheney, once angrily responded to Jack Goldsmith, a senior Justice Department official, "If you rule that way, the blood of the hundred thousand people who die in the next attack will be on *your* hands." Imagine the pressure on lower-level government officials expected to carry out orders. As Goldsmith notes, "It is hard to overstate the impact that the incessant waves of threat reports have on the judgment of people inside the executive branch who are responsible for protecting American lives."¹⁰ Or, as TSC Director Timothy Healy put it, "The problem I've got is if I allow that person to get on a plane and something happens, what do I say to those victims that go on the plane?"¹¹

The technology that facilitates these watchlists develops even faster than the changes in air travel that catalyzed their creation. When the FAA began its system of security directives in the early 1990s, the fax machine was the fastest means of distributing its short, paper list of persons considered too dangerous to fly. (The FAA should not be singled out. The State Department's list of people considered too dangerous to receive a visa was kept in a shoebox.) Today, massive government-run computer databases transmit information at lightning speed. Indeed, the state no longer need wait until the moments before departure for an airline's gate agent to determine that a person should be denied boarding. All travelers now require the federal government's express prior permission to board any aircraft (or maritime vessel) that will enter, leave, or travel within the United States.¹²

Of course, no one realizes that permission is required—or has even been sought—until it has been refused. In late January 2009, the Transportation Security Administration (a component of the Department of Homeland Security) began the phased implementation of a program called Secure Flight.¹³ This program requires every person who wishes to

buy an airplane ticket to submit his full name, date of birth, and gender to the airline at the time of purchase. Although the government permits the airline to sell the ticket right away, that reservation cannot be redeemed for a boarding pass without the government's assent. This Secure Flight data is sent to the TSA (and sometimes to a support office run through the FBI called the Terrorist Screening Center), where analysts determine whether the information matches entries on any of their watchlists. Long before the traveler arrives at the airport, TSA analysts can now arrive at the decision that the traveler will not receive a boarding pass. In June 2010, the TSA achieved its goal of 100 percent watchlist prescreening.¹⁴ In other words, each time you travel by airplane in American airspace, it is by the grace of the U.S. Government.

The speed of technological change will not slow down. And that means that the pressure to expand watchlisting and screening will only grow as more and more becomes possible. Why stop at the hazards of air travel? If a person is too dangerous to fly, isn't he too dangerous to drive a truck laden with dangerous chemicals? If a No Fly List, and a No Hazmat List, why not a No Gun List? Who would want to give a terrorist easy access to a gun or a truck full of dangerous materials?¹⁵ Certainly, this is the opinion of the controllers of these watchlists. In a PowerPoint slide shown to the author (in unclassified form) and to congressional staff (with the inclusion of sensitive security information, or "SSI"), the Director of the Terrorist Screening Center, Timothy Healy, made abundantly clear how versatile a terrorist watchlist can be.¹⁶ A simplified version of this display appears in figure 1, but the colorful graphics on the original slide included a reproduction of 9/11 terrorist Mohamed Atta's U.S. visa and images of an American Airlines aircraft, an automatic handgun, and John Riggins's famous touchdown run in Super Bowl XVII. What do all of these things have in common?

The message was clear: this Terrorist Screening Database (the TSDB) could be used for any number of security purposes. And yet this protection comes with a price. The secrecy that shrouds watchlists—indeed, the secrecy necessary to make them useful in the first place—conflicts with our most basic instincts for an open government accountable to its citizens and checked in its inevitable excesses by a watchful, neutral judiciary.

The logic of a No Gun List or a No Hazmat List is identical to that of the list that started them all: the No Fly List, the subject of this book. Terrorists rarely self-identify; at least, they tend to prefer anonymity before it is too late to stop them. Therefore, the government must deploy its intelligence resources to find them. Once identified, those on the list should not have easy access to a wide variety of activities and things that are essentially