

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 watchlisters 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 watchlisters, except to the watchlisters 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 watchlisters. 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

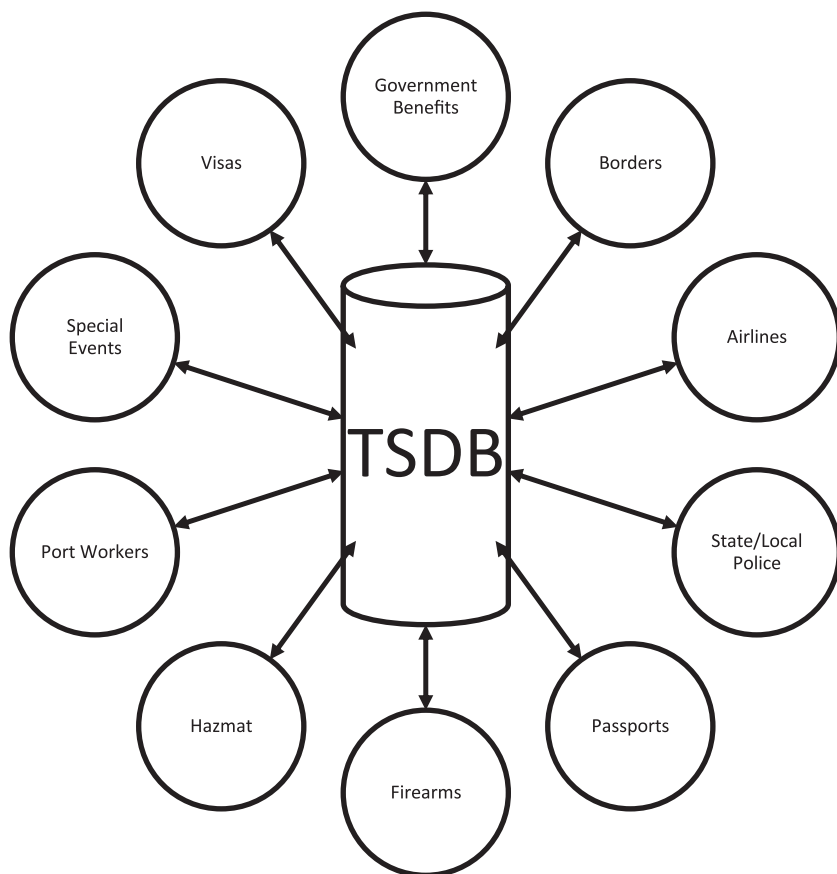


Fig. 1. A (Simplified) TSC PowerPoint Slide: The Many Uses of a Watchlist

dangerous, but also essential to modern life. And if a watchlist is to have any utility at all, it can't be widely shared. Terrorists could easily circumvent the list if they knew they were on it by inventing an alias or tapping coconspirators who are not on the list. It would be easier for terrorists to commit their horrible crimes, or escape justice, if they knew that the government was on their trail. Some predict that name-based lists will someday give way to biometric-based systems that will be much harder to trick or evade. But whether names or fingerprints or retina patterns are collected, the original concept will remain the same: a list kept by the state identifying who among its citizens may come and go freely.

Some would say the risks inherent in using terrorist watchlists to po-

lice America's borders and transportation networks (if not access to guns or dangerous materials) are worth taking. Citizens of the United States enjoy a freedom of movement at home and abroad that others have long envied. But that freedom, like so many freedoms, is not absolute. In a world in which airplanes have been transformed into guided missiles, some say that travelers should accept new limitations on their right to travel. Among those new rules: every time a citizen wishes to fly somewhere, the state must approve the itinerary.

This argument is not new. In fact, it was made, and ultimately rejected, the last time the nation's intelligence community perceived that the country faced an existential threat. The No Fly List has a historical analogue in the methods the United States used to control travel through the control of passports. Sixty years ago, communists were feared just as terrorists are feared today: they were international, ideologically driven enemies, sometimes hidden in plain sight, intent on destroying the American way of life. Restricting their travel was not just about dampening the ardor with which they spread their pro-communist sympathies. Back then, the fear was not that terrorists in league with religious extremists would kill thousands by flying jets into skyscrapers. The fear was that this international conspiracy in league with the Soviet Union would overthrow the U.S. Government, even if it meant vaporizing American cities in a nuclear Armageddon that could extinguish all life on earth.

The technology of that day was cruder, but its purpose and effect were the same. Americans whose loyalties were questioned or who were perceived as threats to the state's interests were denied passports and kept at home. Their names were put on secret lists and in files kept by the FBI, the Justice Department, and the Department of State. Others were allowed to travel, but on restricted itineraries that were monitored by requiring their passports to be renewed at embassies and consulates spread throughout the world, as if the citizen were a prisoner on parole from America for good behavior, but still under suspicion. The courts initially upheld these actions because a passport holder should not "exploit the sponsorship of his travels by the United States."¹⁷ The Court of Appeals for the District of Columbia Circuit (the nation's second most important court) put the point more bluntly: "The Secretary [of State] may preclude potential matches from the international tinderbox."¹⁸ The evolution of this case law is examined in chapter 3 and the transformation of the passport is explored in chapter 4. The system of travel controls that resulted is examined in chapter 5.

I reject the premise that puts a citizen's right to travel into conflict with national security. The premise is that the state has a right to restrict

any citizen's travel when it frustrates the state's foreign policy or national security objectives. This premise naturally suggests a balancing test: when national security outweighs a citizen's interest in travel (and, so characterized, it nearly always can be made to seem to do so), the state should prohibit this travel. But citizens are a special type of civic creature. Citizens of a republic, unlike the subjects of a monarch or dictator, should be no more obliged to abridge their travel to serve the state's interests than they are obliged to curtail their speech when it conflicts with the state's preferences. A citizen's travel is not "sponsored" by the state. The metaphor of the traveling citizen as a "match" set to ignite an "international tinderbox" ignores the difference between a citizen and a subject. It is rarely constitutionally appropriate to weigh a citizen's travel interest against how that itinerary will affect foreign policy. Travel restriction in the service of the state is the hallmark of authoritarian regimes, not democratic republics. Citizens are not pawns on an international chessboard or proxies for their nation's foreign policies.

Of course, few rights are truly absolute. The Constitution, many like to warn, "is not a suicide pact."¹⁹ *Some* national security reasons *should* result in curtailment of a citizen's right to travel. But these cases are rare birds. This is easy to see when the deceptively labeled balancing test is replaced by the proper constitutional test for a fundamental right such as the right to travel. The right to travel should be curtailed only to the extent that strict judicial scrutiny determines it necessary to achieve a compelling government interest. A secret, summary, executive decision to curtail all air travel for an indeterminate time and without meaningful procedures to contest that decision would not pass such review. The No Fly List must be adapted to our liberty-rich society, not the other way around.

The mistakes of the mid-twentieth century are being remade at the start of the twenty-first. Although the technology to control travel has changed tremendously, the logic behind the controls has not changed at all. To invite historical reflection, therefore, is not to minimize today's threats or to suggest that victory over them is inevitable. It is simply to ask how we got here and to pause to consider whether "here" is a good place to be.

THIS BOOK TRACES THE HISTORY of the right to travel, the dangers it faces today, and proposes a new approach to reconciling the state's security with the citizen's liberty under the U.S. Constitution. Chapters 1 and 2 present a series of travel stories, from our time and the era of the Red Scare. Chapters 3 and 4 analyze the legal history of regulating the right to travel, a freedom that every American (rightly) assumes he possesses, but no one

seems able to locate precisely in the Constitution. Chapters 5, 6, and 7 uncover how this ambiguity has been exploited to restrict travel in the name of national security, first when the country felt threatened by communism in the 1950s and today when the threat is terrorism. Chapter 8 proposes an end to this ambiguity by fixing the source of the right to travel in the essence of citizenship in a democratic republic.

In short, this book is about the development of a powerful idea, first by a powerful woman in the middle of the last century, and again by a powerful federal agency at the start of our own. Here in a nutshell is that idea, that woman, and that agency, linked by a shared conceptual history.

The Powerful Idea

The idea is to make a list of people who are thought too dangerous to be allowed to move freely in society. Infringing their free movement in this way may be considered necessary because their prosecution is not yet possible (perhaps for want of evidence) or simply not desirable (perhaps out of fear of exposing sources of intelligence). What distinguishes this idea from the much older ideas of internal exile, house arrest, or preventive detention (aside from their more frequent association with authoritarian regimes than with republican democracies) is the complete absence of judicial oversight. Restraint is an exercise left to the self-control of executive officials.

The image of the plotting terrorist resonates most strongly today, but dangerous subversives have taken many forms in the past. In the twentieth century alone, we have cycled through periods when we as a nation have felt threatened by anarchists, enemy aliens, Communists, and now religious extremists. Fighting these threats, a young J. Edgar Hoover conducted the Palmer Raids in the 1920s, Japanese-Americans were interned in the 1940s, and subversives were stripped of their passports (not to mention their livelihoods and reputations) in the 1950s.²⁰

In each historical instance, the threat was first seen to come from foreigners or recent immigrants organized as fifth columnists in secret cells. This perception was politically useful, for foreigners and recent arrivals are not constituencies typically possessed with politically powerful defenders. Inevitably, however, the perception of each threat turned inward, to be viewed as a domestic threat rather than only a foreign one, and the distinction between citizen and foreigner became less meaningful. Lists that may have prevented the visit, employment, or naturalization of dangerous foreigners never remain limited to policing the nation's borders. These borderlines dissolve, or

move inward, to capture dangerous citizens, too. After all, the logic always goes, the threat is not the lesser for originating with an American than with a foreigner. In fact, the threat may be worse for hiding in plain sight, making more difficult the process of distinguishing good from bad.

Who could object to the most basic first step: know your enemies. In fact, a terrorism watchlist seems so obviously valuable that it seems strange to think that it didn't always exist. The federal government's first watchlist devoted to identifying suspected terrorists and keeping them out of the country was the creation of one State Department employee, John Arriza. In 1987, Arriza compiled a list of foreigners suspected of terrorism who should not receive visas to enter the United States. He kept his list—later called TIPOFF—in a shoebox of three-by-five index cards.²¹

Like past government lists, TIPOFF started with a narrow purpose: evaluating visa applications. Roughly twenty years later, TIPOFF had become the seed for a sophisticated system of records containing information about approximately 400,000 unique individuals that is now known as the Terrorist Screening Database (TSDB).²² The TSDB, in turn, is used to spin off “downstream” watchlists for a variety of purposes: to assess visa applications, patrol our nation's borders, disrupt terrorist financing networks, investigate and prosecute terrorists themselves, and keep Americans safe when they are at home, when they travel, and when they participate in the civic life of the nation at work and at play. The No Fly List is just one of these watchlists, but it, too, has expanded beyond its original purpose. The No Fly List originated in FAA security directives intended to prevent hijackings and bombings of commercial aircraft. Now the No Fly List is tasked with protecting us against threats to civil aviation or national security, a much broader function that permits its use not just to prevent imminent threats, but to investigate or disrupt more dimly perceived future ones that may have nothing to do with civil aviation.

Like past government lists, Arriza's TIPOFF list started with a focus on foreigners outside the United States. Its successor, the TSDB, includes U.S. citizens and foreigners alike. Why shouldn't it, when one considers the American citizenship of Timothy McVeigh (executed for the 1995 Oklahoma City bombing), Ted Kaczynski (serving a life sentence for years of terror bombings as the “Unabomber”), Nidal Malik Hasan (charged with the Fort Hood massacre), and Faisal Shahzad (sentenced to life in prison for the attempted bombing of Times Square). Federal officials tasked with managing the No Fly List routinely testify to Congress that only a tiny percentage of the people on the No Fly List are American citizens—that is, the people who vote for members of Congress. That diminishes an important political



Fig. 2. The Extraordinary Mrs. Ruth B. Shipley

restraint in a democracy. And in its absence the pressure to use the list for more and more purposes grows without substantial impediment.

The Powerful Woman

The first person to fully exploit the power to control travel in pursuit of national security was one of the most powerful women in government in her day. Surprisingly, her name has been all but lost to history. Ruth B. Shipley was the chief of the State Department's Passport Office from 1928 to 1955. Figure 2 shows her at work on a passport.²³

Ruth Shipley was not a politician or even a political appointee. She was a civil servant who rose from the ranks of World War I era file clerks to be-

come a force in Washington whom presidents praised and to whom senators paid obeisance. Franklin Delano Roosevelt called her “a wonderful ogre,” which he intended as a great compliment.

At first glance, Mrs. Shipley may seem an unlikely person to link to the difficult national security issues of our time. Ruth Shipley never heard the phrase “No Fly List,” which did not exist when she was a government official. Computers did not exist either. Al-Qaeda had not been organized in her lifetime, nor had the U.S. Army's elite counterterrorism unit, Delta Force. Ruth Shipley never saw the Twin Towers of the World Trade Center in New York City, nor had ground been broken for the FBI's Hoover Building in Washington, D.C.

But this extraordinary civil servant is the intellectual ancestor of the No Fly List and of the anonymous government officials who use it to decide who flies and who is grounded. She invented the first government system to identify people whose travel was—in the idiom of her day—“not in the interests of the United States.” These people were not criminals or even clearly identified enemies of the state. In fact, their seeming or even professed innocence was sometimes considered further evidence of their dangerousness. Mrs. Shipley controlled travel by issuing, or not, what became a license for their travel: a passport. It was her job to decide who could go where, for how long, and under what conditions. On the day she retired, Mrs. Shipley's office had amassed files on twelve million people.

The No Fly List, of course, embodies a power much broader than Mrs. Shipley's passport power. The No Fly List makes no distinction between domestic travel and international travel. But Mrs. Shipley's control of passports was, at the time, the only means the federal government had of monitoring and controlling the travel of its citizens. Then, as now, no national identity card or internal passport was in use. Indeed, such things were identified in her day with only the most authoritarian and undemocratic of regimes—the Soviet Union. Mrs. Shipley lacked any means other than a gumshoe to track the movement of subversives. And that job was the responsibility of J. Edgar Hoover, the head of the FBI.

The Powerful Agency

Mrs. Shipley's Passport Office was a large and powerful bureaucracy. But Mrs. Shipley's large staff rummaged through thousands of filing cabinets stuffed with paper files. Today, Mrs. Shipley's office has been digitized in a

new and powerful government entity: the Terrorist Screening Center (TSC), a multiagency body administered through the Federal Bureau of Investigation. The motivation for such a center was forged in the aftermath of September 11, when it became apparent that the failure to prevent the attacks had a lot to do with the failure of federal agencies to share information. Although housed in the FBI, it is staffed by officials and analysts detailed from the FBI, State Department, Department of Homeland Security, and the Intelligence Community. Congress did not create the TSC—it is entirely a creature of executive power.

The TSC was conceived to be both a funnel and a sieve for all of the federal government's terrorist watchlists. First, the TSC is a funnel: it is the central repository for the federal government's most comprehensive, consolidated watchlist, the Terrorist Screening Database (TSDB). Information gathered by FBI agents, State Department diplomats, the armed forces, CIA operatives, signals intelligence analysts, and many others is evaluated by members of the intelligence community. Those analysts then "nominate" that information for inclusion in the Terrorist Screening Database at the TSC, where it is evaluated for compliance with generally agreed criteria that are intended to make the information capable of immediate dissemination and use to all components of the federal government.

Second, the TSC is a sieve: its specialists, many of whom are detailed or assigned from other parts of the federal government, determine to which of numerous "downstream" watchlists the information should be added. Among these downstream lists is the No Fly List. As nominations to the TSDB are accepted, the information is evaluated against additional criteria for potential inclusion in the No Fly List. That list is then sent to the Transportation Security Administration (TSA) for immediate use to screen incoming and outgoing commercial flights. If TSA identifies a "hit" on the list, the TSC serves as a liaison to the government official or agency that made the original nomination.

Today's No Fly List is no better, and in many ways much worse, than Mrs. Shipley's passport regime, a system of travel controls long since discredited and disassembled by order of the Supreme Court. It is Mrs. Shipley's ghost that inhabits today's computer systems and watchlisting databases. The idea that a citizen travels only with the government's permission is an idea that she perfected. The asserted needs for secrecy, urgency, and absolute discretion that infuse today's No Fly List decisions are echoes of her own insistence on the unabridged power of her office. And today's legal arguments, claims, and defenses of executive authority to exercise this power, especially

in a time of war or national emergency, all can be traced to the arguments, claims, and defenses raised by Mrs. Shipley and her cadre of capable defenders in the courts and on Capitol Hill.

The TSC retains the most troubling aspects of Mrs. Shipley's era. But it also has injected disturbing features that even Mrs. Shipley could not have foreseen. Mrs. Shipley could be found most days on the top floors of the Winder Building at the corner of Seventeenth and F Streets, just a block from the White House. The TSC operates in an undisclosed location in northern Virginia. None of its analysts are ever identified by name. Their decision making is conducted in absolute secrecy.

In Mrs. Shipley's day, her large and well-staffed Passport Office in the State Department was the easily identifiable agency responsible. From whom should the frustrated traveler now seek redress when she is denied a boarding pass and told by the airline's ticketing agent that "the government" is to blame? The TSC creates the list, but with intelligence that originates with other agencies. It purports to have no operational role to play in the use of the lists it manages other than to serve as a liaison and clearinghouse. The TSA uses the list, but asserts that it has no authority over the listing of a name in the TSC's Terrorist Screening Database from which the No Fly List is crafted. Nor can it reveal the originating agency's information about the traveler without the permission of that source. The Department of Homeland Security operates the redress system mandated by Congress, as well as an Office for Civil Rights and Civil Liberties. But those resources have no power over the TSC or the intelligence agencies whose data the TSC funnels and sifts into watchlists. In any event, interviews with senior officials suggest how easy it is for political pressure and groupthink to circumvent these structures. Once a person is caught in this web of agencies and watchlists, the way out is pitted with administrative dead-ends, depersonalized switchbacks, and legal traps.

READER, YOU SHOULD KNOW before turning another page that every current and former government official whom I interviewed to write this book strongly disagrees with the analogy that I make between Mrs. Shipley's past and the computerized, but faceless system at work today.

Stewart Baker, former General Counsel for the National Security Agency and the first Assistant Secretary for Policy at the Department for Homeland Security, rejects this analogy:

The Communist threat is like the Confederate threat. It's historical and easy to see as inherently improbable [and] it tends to trivialize

the threat. . . . The wars that you've won always look like you were bound to win them.²⁴

Randy Beardsworth, a distinguished Coast Guard officer and civil servant who helped set up the operational components of the Department of Homeland Security, rejects this analogy:

The idea of making a comparison between denying passports to U.S. citizens for political reasons and denying people the ability to get on an airplane because they pose a threat is just—it's apples and oranges.²⁵

McGregor Scott, the former U.S. Attorney in whose district the events described in chapter 2 occurred, rejects this analogy:

That was a simpler time. There is no way today that someone like Mrs. Shipley could exist.²⁶

Needless to say, the current director of the Terrorist Screening Center, Timothy Healy, who generously consented to an interview, also was not favorably inclined toward my critique.²⁷ Michael Jackson, Deputy Secretary at the Department of Transportation on September 11, 2001, and then Deputy Secretary at the Department of Homeland Security from 2005 to 2007, also disagrees with my approach. The truth, he notes, is "not easy to pitch in a book where you're looking for people who are right and people who are wrong. The truth is that if you have the responsibility to manage these types of things you have to do what you think is the most prudent thing and you have to err on the side of caution in today's world."²⁸

These current and former officials, like so many other men and women in the federal government, dedicated themselves to public service to protect our nation from terrorists. My conversations with them convinced me that their efforts to create, use, or defend terrorist watchlists like the No Fly List are based on firmly held convictions that such lists are essential to protect the national security of the United States. These are men and women of zeal, and they are well-meaning. We need such professionals in the halls of our government.

And yet Mrs. Shipley was a civil servant, too, one of equally unimpeachable integrity and deeply held principles. Her credentials were second to none, her judgment was respected at the highest levels of government, and the system of passport controls that she perfected was zealously defended for more than a decade as essential to national security. But Mrs. Shipley's

system was the wrong one, administered without understanding of the relationship between liberty and security that the Constitution demands.

I did not write this book to find heroes or villains. I wrote this book to examine a particular policy choice that was made in the aftermath of September 11, 2001. I hope to persuade you that the No Fly List, as currently conceived, is as indefensible in our democratic republic as Mrs. Shipley's system of travel controls that came before it.