Federal court says secret US terrorism watchlist is unconstitutional

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In a significant decision, a federal court ruled on September 4 that the US government's secret list of "known or suspected terrorists" of more than a million people violates the constitutional rights of American citizens who are on it. In his 32-page decision, Judge Anthony J. Trenga of the US Eastern District of Virginia ruled that the legal standard for inclusion in the so-called terrorism watchlist "fails to provide constitutionally sufficient procedural due process."

Since its creation in the aftermath of the September 11, 2001 terrorist attacks, the Terrorist Screening Database (TSDB) has grown to include the personal biographic and biometric data of as many as 2 million individuals. Since the list is not public, most individuals have no idea that they are on it. It has been reported that approximately 1,600 new names are secretly submitted each day for inclusion on the watchlist by various US military, intelligence and law enforcement agencies as well as foreign governments.

Importantly, Judge Trenga's decision challenges the primary justification behind the undemocratic and police state measures implemented by the US government over the past two decades, as well as the launching of multiple wars of aggression in the Middle East and elsewhere.

The ruling specifically rejects the legal argument advanced by the TSDB that "the Government's interest in combating terrorism" justifies the abrogation of democratic rights of US citizens and the these are national security matters that fall exclusively within the domain of the executive branch of government not the courts.

Judge Trenga's decision concludes a case that was originally filed by 23 Americans on April 15, 2016. The plaintiffs argued—despite not being told they were on the terrorism watchlist—that their presumed inclusion in the database was a violation of their constitutionally guaranteed due process and equal protection rights.

The plaintiffs further claimed they were entitled to an injunction against the government agency responsible for the TSDB and that a legal mechanism must be provided for being notified "of the reasons and bases for their placement on the [Watchlist] and a meaningful opportunity to contest their continued inclusion." Although the ruling agrees with this in principle, it does not address the specifics of how such a process must be implemented.

In granting summary judgment to the plaintiffs, Judge Trenga ruled on several key aspects of their complaint. First, he ruled that the free movement rights of people on the watchlist were violated since inclusion in the TSDB "imposes a substantial burden on plaintiff's exercise of their right to international travel and domestic air travel."

He also ruled that inclusion on the watchlist causes "reputational harms" to individuals because it stigmatizes them in the eyes of law enforcement and any of the other 18,000 government agencies and approximately 533 private entities that have access to the database and use it for employment and other reviews.

Finally, Judge Trenga's ruling says that "the risk of erroneous deprivation of Plaintiff's travel-related and reputational liberty interests is high" and the current procedures against such deprivation are insufficient. The judge said that the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP) process—that allows individuals to file objections to their presumed inclusion on the watchlist—"does not satisfy the Due Process Clause."

In finding for the plaintiffs, the judge also denied the summary judgment motion by the defendant, Director

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of the TSDB Charles H. Kable. The ruling rejected the claim by Kable's legal team that the plaintiffs "cannot establish with sufficient certainty an impending future injury" and that the TRIP system is adequate for protecting the liberty rights of citizens who are on the watchlist.

In his ruling, Judge Trenga says that as of June 2017 there were 1.2 million people listed in the TSDB and that 4,600 of them are either US citizens or lawful permanent residents. The ruling says, "The information contained in the TSDB, which is unclassified, is 'updated continuously and disseminated around the country and world in real-time.'"

Significantly, the ruling contains a review of the process by which an individual is identified, evaluated and placed on the TSDB as well as a detailed description of the brutal treatment faced by several of the plaintiffs.

Individuals are initially "nominated" for placement on the list by a federal government agency or foreign government. All nominations are reviewed by the FBI's Terrorism Screening Center (TSC) to determine whether the US government has a "reasonable suspicion that the individual is a known or suspected terrorist."

Inclusion in the watchlist "does not require any evidence that the person engaged in criminal activity, committed a crime, or will commit a crime in the future," and those "who have been acquitted of a terrorism-related crime may still be listed in the TSDB."

The ruling then describes how the plaintiffs—none of whom have ever been convicted, charged or indicted for a criminal offense related to terrorism—are routinely "subjected to additional screening when they fly on a commercial airplane and when they enter the United States at a land border or port."

It says that the plaintiffs "have been forcibly arrested (often at gunpoint) and detained for long hours in front of their family," that they "have had their electronics and those of family members searched, seized, and copied" and "have regularly and repeatedly had their travel disrupted by long and invasive secondary inspections, causing them to, on some occasions, miss connecting flights, and sometimes to avoid travel altogether."

In one instance, on a trip to Canada in April 2015, Anas Elhady "was surrounded by CBP officers, handcuffed, and then escorted to a room where he was held for more than ten hours and repeatedly interrogated about his family members and other associates." Mr. Elhady ended up needing emergency medical attention and was transported to and from the hospital in handcuffs.

When the plaintiffs attempted to submit inquiries with the DHS TRIP system as to their status on the watchlist, they either received letters informing them that they should have no problems traveling without saying they were no longer in the TSDB or received letters neither confirming nor denying that they were on the list.

Previously, Judge Trenga struck down the specific use of the No Fly List to bar Goulet Mohamed, a US citizen, from boarding a flight home from Kuwait in 2011 when he had not been charged or convicted of any terrorism-related crimes. However, the judge also upheld the No-Fly List as being constitutional.

While the latest ruling has been hailed by the Council on American-Islamic Relations as a "complete victory" and an end to the secretive watchlist that is "effectively a Muslim registry created in the wake of the widespread Islamophobia of the early 2000s," it must be seen within the context of the shift in US foreign policy under the Trump administration.

As announced in January 2018 by then-US Defense Secretary James Mattis, "great power competition, not terrorism, is now the primary focus of US national security." Under conditions of intensified preparation for military confrontation and war against its rivals in Europe and Asia, the suppression of democratic rights at home will continue.

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