



Legal Challenges to the Terrorist Screening Database

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“On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. . . . Nearly 3,000 civilians were killed,” the Supreme Court [observed](#).

In its report on the terrorist attacks and recommendations for how to prevent future attacks, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) [found](#) that relevant executive agencies failed to effectively and efficiently share relevant counterterrorism information, including information on individuals known to be or reasonably suspected of being involved in terrorist activities. The 9/11 Commission [advised](#) that the prevention of future attacks would be furthered by pooling and disseminating such information across agencies, both in the high-level operational planning phase and during the points at which government agents may interact with individuals in the field—for example, at the border, in an airport, or during a traffic stop. Since the 9/11 attacks, the Terrorist Screening Database (TSDB), a sensitive but unclassified database [consisting](#) of biographical or biometric information on known or suspected terrorists, has become a significant tool for information sharing in this regard. While the federal government has sought to deploy the TSDB in a manner that [protects](#) privacy and civil liberties, a number of individuals have raised legal challenges to the TSDB on various constitutional and statutory grounds.

This Sidebar summarizes the development of the TSDB (which the government has referred to by other names over time, and for simplicity will be discussed here as the “TSDB”), the legal authority for the government’s creation and use of the TSDB, the variety of legal challenges to the TSDB, and how federal courts have adjudicated these claims. The Sidebar concludes with considerations for Congress.

Overview of the Terrorist Screening Database

A Failure in Information Sharing

The 9/11 Commission investigated the terrorist attacks of September 11, 2001, and sought to identify ways to prevent future attacks from occurring. Among other things, the 9/11 Commission [determined](#) that agencies shared counterterrorism information on a limited basis, thus hampering strategic analysis and operational planning. The 9/11 Commission also [found](#) that “the U.S. government did not find a way of

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pooling intelligence and using it to guide the planning and assignment of responsibilities for joint operations involving entities as disparate as the CIA, the FBI, the State Department, the military, and the agencies involved in homeland security.”

A Unified Information Sharing Approach

The 9/11 Commission proposed a unified approach to information sharing that generally would promote the sharing of counterterrorism information, focus preventative efforts on screening in real-time, and safeguard privacy and civil liberties.

Consistent with the recommendations of the 9/11 Commission’s report, the federal government undertook efforts to ensure that counterterrorism information was appropriately gathered and shared. On September 16, 2003, President George W. Bush issued a [directive](#), Homeland Security Presidential Directive 6 (HSPD-6), to executive agencies to maintain “information about individuals known or appropriately suspected to be or [that] have been engaged in” terrorist activities. The directive also required the Attorney General to establish an organization that would “consolidate” the federal government’s terrorist screening approach and provide for the “lawful use” of relevant information in screening processes.

Following the directive, the Attorney General and heads of other executive agencies [announced](#) the creation of the Terrorist Screening Center (TSC)—to be administered by the FBI—that would integrate the multiple existing [watchlists](#) and ensure that agencies and officials would have access to relevant information from these watchlists. The consolidated watchlist [became](#) the TSDB. One subset of the TSDB is the “No-Fly List,” which [contains](#) the “names of individuals who are to be denied transport on commercial flights because they are deemed a threat to civil aviation.”

Another of the 9/11 Commission’s proposals was the [establishment](#) of a National Counterterrorism Center (NCTC). After the publication of the 9/11 Commission’s report, the President [issued](#) an Executive Order creating the NCTC to “maintain[] the authoritative database of known and suspected terrorists, share[] information, and conduct[] strategic operational planning.”

The Terrorist Screening Database Process

Additions. An individual may be [added](#) to the TSDB if there is “[reasonable suspicion](#)” that the individual is a known or suspected terrorist. “Reasonable suspicion” is an individualized, articulable [determination](#) that, based on the totality of the circumstances and with reasonable inferences drawn therefrom, “an individual is known or suspected to be or have been knowingly engaged in conduct constituting, in preparation for, in aid of, or related to terrorism or terrorist activities.” Only government [agencies](#) may nominate an individual for inclusion in the TSDB. An individual’s TSDB record [must](#) include some biographical (e.g., name or date of birth) or biometric (e.g., photographs or fingerprints) information.

Vetting. The NCTC [vets](#) a TSDB nomination and, if satisfied that the criteria have been met, enters the record into its own database, [called](#) the Terrorist Identities Datamart Environment (TIDE), and passes along the nomination to the TSC. The nomination is independently [vetted](#) by the TSC and, if it is satisfied that the criteria have been met, the record is added to (or modified or deleted in) the TSDB. As of February 2016, around 1.6 million individuals, including approximately 16,000 American citizens and lawful permanent residents, were [included](#) in at least TIDE.

Reviews. TSDB records are periodically [reviewed](#) by nominating agencies and the TSC to ensure that the criteria for inclusion continue to be met.

Access. The TSC [shares](#) information with “agencies and officials authorized or required to conduct terrorist screening, to include diplomatic, military, intelligence, law enforcement, immigration, transportation security, visa, and protective screening processes.” In addition to federal agencies, TSC also [shares](#) information with state, local, tribal, and foreign governments, owners/operators of critical

infrastructure, and private entities with a substantial bearing on homeland security. TSC shares information through [multiple processes](#), such as fusion centers, task forces, or digital platforms.

Removal. The [process](#) to remove a record is similar to the process for an addition: a removal request (prepared by an FBI case agent) is submitted to the NCTC for review and, upon completion of review, is forwarded from the NCTC to the TSC for final processing. A traveler with an issue or complaint that may be TSDB related—such as inclusion on the No-Fly List resulting in additional airport screening, delays, or denial of travel—may [contact](#) the DHS Traveler Redress Inquiry Program (TRIP) for information or potential relief.

Legal Issues Concerning the Terrorist Screening Database

Legal Authorities for the TSDB

The President’s authority to issue the [directive](#) establishing and maintaining the TSDB seems to be grounded in the Constitution and statutes. The directive itself was part of the government’s response to the terrorist attacks of 9/11 and subsequent hostilities. Article II of the Constitution [identifies](#) the President as the Commander-in-Chief of the armed forces. This authority includes the ability to [respond](#) to warlike conditions or a state of war, such as the terrorist attacks by a group that [declared](#) war on the United States. This constitutional authority to respond to warlike situations need not be predicated on a congressional declaration of war. Beyond war-related powers, Article II of the Constitution [assigns](#) to the President the general responsibility to “take care that the laws be faithfully executed.” This duty encompasses the Executive’s authority to [enforce](#) criminal laws, for example, through the prosecution of criminal law violations, and also the [prevention](#) of the violation of criminal laws, including laws related to terrorist activity. Article II also vests the President [with](#) general administrative control over the executive department and [with](#) the power to address common issues with foreign actors. This authority would appear to encompass TSDB information sharing among agencies and with foreign entities, as well as with state and local governments, though the latter may raise unique [federalism](#) considerations.

In addition to constitutional authority, the directive establishing the TSDB is supported by post-9/11 statutes. In 2001, Congress [enacted](#) the Authorization of Use of Military Force, Pub. L. No. 107-40, which mandated that the President respond to the 9/11 terrorist attacks and “prevent any future acts of international terrorism against the United States” by those behind the 9/11 attacks. More specific to the TSDB, Congress [enacted](#) the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, which required the President to “create an information sharing environment for the sharing of terrorism information.”

Primary Legal Challenges to the TSDB

Plaintiffs have brought a variety of constitutional and statutory challenges to the TSDB. As to constitutional claims, three plaintiffs [asserted](#) that they refused to serve as federal government informants that would gather information on the Muslim community and were placed on the No-Fly List in retaliation for their refusal, in violation of their rights under the First Amendment, among other things. Similarly, two other plaintiffs [alleged](#) that they were included on the No-Fly List and precluded from participating in a religious pilgrimage, known as the Hajj, in violation of their religious rights.

Plaintiffs also have asserted that their inclusion in the TSDB resulted in violations of the Fourth Amendment [right](#) to be free from unreasonable searches and seizures. For example, a plaintiff [claimed](#) that he was detained, following a routine traffic stop, for an hour-and-a-half because the officers determined that he was on the No-Fly List. Another plaintiff [asserted](#) that, because he was included in the TSDB, he routinely had his laptop or cell phone seized when traveling back into the United States.

Another constitutional basis for challenges to the TSDB has been the [Fifth Amendment's Due Process Clause](#), which (1) requires the government to provide certain procedural protections when seeking to deprive a person of a constitutionally protected liberty interest; and (2) protects certain fundamental constitutional rights from government interference. In one due process case, plaintiffs [claimed](#) that the reasonable suspicion threshold for inclusion in the TSDB was too low as a constitutional matter; that they were not given notice of, or the reasons for, their inclusion in the TSDB; that they were not afforded an opportunity to contest the basis for their inclusion; that they were erroneously placed in the TSDB; and that the absence of judicial involvement in the inclusion phase impermissibly risked such erroneous inclusion. In another case, a plaintiff [contended](#) that the criteria used for inclusion on the No-Fly List were unconstitutionally vague. Plaintiffs have also alleged that they have been denied various, related liberty interests protected by the Due Process Clause, including the right to [travel](#) by specifically enduring constant [secondary screening](#) in airports, experiencing [delays](#) and inconveniences in travel, and curtailing further travel. On account of being hindered in their travels, Plaintiffs have claimed that they have lost [business](#) or job opportunities and have been unable to visit [family](#). They further alleged that they have suffered stigmatizing and [reputational harm](#) (in the travelers' and others' sense) in being included in the TSDB. Finally, plaintiffs have [claimed](#) that they have been added to the TSDB because of their background or profession in violation of their fundamental rights or of the constitutional guarantees against invidious discrimination among similarly situated individuals.

Beyond constitutional claims, plaintiffs also have brought TSDB-related suits based on federal statutes. For example, plaintiffs have alleged that the TSDB inclusion process is [arbitrary and capricious](#) in violation of the Administrative Procedure Act (APA). One plaintiff sought relevant watchlist [records](#) under the Freedom of Information Act (FOIA) and the Privacy Act. Plaintiffs included in the TSDB have also claimed that they are entitled to relief under the [Religious Freedom Restoration Act](#), which establishes religious rights beyond those protections afforded by the Constitution by creating a heightened standard of review for government actions that substantially burden a person's exercise of religion.

Limited Success of Legal Challenges to the TSDB

With limited exceptions, described below, courts have rejected constitutional and statutory challenges to the TSDB. For example, several federal appeals courts, including the [Fourth](#), [Fifth](#), [Sixth](#), [Ninth](#), and [Tenth](#) Circuits, have concluded that various plaintiffs—who asserted violations of their rights under the Fourth Amendment, the Fifth Amendment, and the APA—were not entitled to relief. In addition, the Ninth Circuit [determined](#) that, for national security reasons, Twitter did not have a First Amendment right to disclose certain information regarding the government's requests for information on Twitter users that ostensibly would be used for terrorist screening purposes. Beyond circuit court rulings, federal district courts also have recently dismissed constitutional and statutory claims pertaining to the TSDB (see, for example, [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#)).

Despite the above decisions, some plaintiffs have had a limited amount of success in TSDB-related legal challenges. In 2014, for instance, one district court [determined](#) that the TRIP process for redressing the erroneous placements of individuals on the No-Fly List deprived the plaintiffs—several citizens and lawful permanent residents of the United States—of their constitutional right to procedural due process under the Fifth Amendment. The court determined that the TRIP process contained a high risk of erroneously depriving the plaintiffs of their constitutionally protected interests in their reputations and in air travel because of the low evidentiary threshold for inclusion in TSDB coupled with the government's failure to disclose inclusion on the No-Fly List and the reasons for inclusion. Overall, the court [viewed](#) the TRIP procedures as fundamentally deficient for these reasons, holding that they left the plaintiffs without “proper notice and an opportunity to be heard.” In light of the district court's decision, the government [revised](#) TRIP procedures such that, among other things, complainants on the No-Fly List

would be explicitly advised of their inclusion on the list and, upon request, provided with information regarding “the specific criterion under which the complainant has been included on the list.”

A different federal district court [ruled](#) in 2014 that the government violated the plaintiff’s right to procedural due process when an FBI Special Agent mistakenly added her to the No-Fly List after misreading the instructions on the relevant form. As a remedy, the court [ordered](#) that all references to the mistaken designation be stricken from all databases, among other things. Additionally, in 2022, a federal district court [held](#) that U.S. Customs and Border Protection did not adequately respond to the plaintiffs’ FOIA request regarding the policies and practices of agents at ports of entry and an assessment of the efficacy of these counterterrorism efforts. The court ordered the agency to produce all non-exempt and segregable information pertinent to the request.

Several TSDB-related cases are also pending as of this writing. For example, the Ninth Circuit [ruled](#) in 2022 that an FBI agent’s declaration that the plaintiff had been removed from the No-Fly List was insufficient to moot a case filed by a plaintiff who claimed that his inclusion on that list violated his constitutional rights. A federal district court also [ruled in late 2022](#) that a plaintiff’s Fourth Amendment claim could proceed where, as indicated previously, the plaintiff alleged that he was detained for well over an hour after a routine traffic stop. The government’s appeal remains pending. In May 2023, another federal district court transferred a plaintiff’s No-Fly List claims to the federal appeals court, which under [federal law](#) has exclusive jurisdiction over such claims.

Congressional Considerations

Congress may wish to consider whether current TSDB standards and practices are adequate or should be revised. For example, Congress might view the “reasonable suspicion” standard for additions to the TSDB as sufficient or might determine that additions should be subject to a higher evidentiary standard, such as probable cause. Congress may also consider internal procedural safeguards to avoid erroneous inclusion in the TSDB and other lists, as well as the frequency of reviews and processes for redress.

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