

Indiana Law Review

Volume 59

2025

Number 2

ARTICLES

THE GHOST IN THE MACHINE: THE THREAT SCREENING CENTER AND THE MOOTNESS TOOL

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“ . . . an elusive insubstantial man, a ghost who is everywhere yet nowhere.”
—Gilbert Ryle¹

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INTRODUCTION

In *FBI v. Fikre*, the Supreme Court resolved a circuit split about the voluntary cessation exception to the mootness doctrine in what initially appears

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1. GILBERT RYLE, *THE CONCEPT OF MIND* 18 (1949).

to be a plaintiff-friendly way.² The Court unanimously held that the government's "sparse declaration" was insufficient to moot lawsuits challenging the No Fly List (a list of people banned from aircraft).³ The declaration—five paragraphs in all, of which three were boilerplate—failed to show that the government "cannot reasonably be expected to do again in the future what it is alleged to have done in the past."⁴ It stated only that Fikre "will not be placed on the No Fly List in the future based on the currently available information."⁵

Justice Gorsuch's opinion focused exclusively on this not-good-enough declaration. Fikre's case was not moot, Gorsuch explained, because nothing in that "terse" recital "speaks to whether the government might relist him if he does the same or similar things in the future," whatever those things might be (the government never disclosed them).⁶ Yonas Fikre, who alleges that two FBI agents used the No Fly List to coerce him to be a government informant, and then enabled his detention and torture by agents of a friendly foreign power, fights on.⁷

Fikre is fighting long odds. Litigation against the federal government's Byzantine watchlisting apparatus rarely gets very far, although going nowhere takes a long time. Twenty years after the system's post-9/11 development, only one lawsuit (out of more than forty) has ever reached trial.⁸ That took eight years, a rare exception to the government's use of mootness as a tool to protect its watchlisting system from exposure through discovery or judicially imposed

2. *Fikre v. Fikre*, 601 U.S. 234 (2024); *compare* *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), *with* *Long v. Pekoske*, 38 F.4th 417 (4th Cir. 2022), *and* *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017).

3. *Fikre*, 601 U.S. at 242.

4. *Id.*

5. *Id.* at 240.

6. *Id.* at 242, 244.

7. Following the Supreme Court's judgment, Fikre filed an Eighth Amended Complaint. *See* Eighth Amended Complaint, *Fikre v. Wray*, No. 3:13-cv-00899 (D. Or. Jan. 27, 2025), Dkt. No. 198. The Government filed a Motion to Dismiss, simultaneously submitting classified and privileged materials for *ex parte*, *in camera* review. *See* Defendants' Public-Redacted Motion to Dismiss Plaintiff's Eighth Amended Complaint, *Fikre v. Driscoll*, No. 3:13-cv-00899 (D. Or. Feb. 20, 2025), Dkt. No. 202; Notice of Lodging Classified and Privileged Materials for Ex Parte, *In Camera* Review, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. Feb. 20, 2025), Dkt. No. 204. The publicly available but redacted declaration of the Deputy Director of the TSC asserted that "The TSC never removes an individual [from its watchlists] as a matter of litigation strategy or convenience." *See* Public/Redacted Declaration of Steven L. McQueen ¶ 19, *Fikre v. Driscoll*, No. 3:13-cv-00899 (D. Or. Feb. 20, 2025), Dkt. No. 202-1. The District Court granted the motion only in part. *See* Opinion and Order, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. June 9, 2025), Dkt. No. 222. On July 21, 2025, the Government filed an Answer, its first since the case was filed more than twelve years earlier. *See* Answer, *Fikre v. Patel*, No. 3:13-cv-00899 (D. Or. July 21, 2025), Dkt. No. 231.

8. *See* *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909 (N.D. Cal. 2014). Full disclosure: the author testified as an expert witness for the successful plaintiff.

reforms.⁹ If a complaint remains standing after a salvo of motions to dismiss, then mooted the case by asserting that the plaintiff is off the relevant watchlist has routinely been the government's practice.

What has *not* been routine government practice is any willingness to divulge information about its watchlists, even to acknowledge to those caught in its nets *that* they are on a list or the basis for the decision to put them there. The government's position since the beginning has been that secrecy is important to protect its sources and methods lest the watchlisting system, and the national security interests the government asserts that it protects, be undermined by too much openness. Litigants, however, have alleged a host of constitutional violations cloaked by this secrecy. When those plaintiffs' suits start moving forward, those suits are mooted out. The Solicitor General's petition for a writ of certiorari in Fikre's case sought to protect this useful mootness tool, thus protecting the watchlisting system that it helps shield from scrutiny.¹⁰

Fikre's victory is illusory (and the government's loss not so bad) because the Supreme Court's approach will generate whack-a-mole responses. The government will try out declarations that are incrementally less "sparse" and "terse."¹¹ It may remove him and future plaintiffs from one list while quietly retaining them on others.¹² And, additionally or alternatively, it may simply adjust the timing of its watchlisting revelations as it plays more litigation games. Just as *Fikre* was coming on the horizon, the judge presiding over another watchlisting case bemoaned "what almost seems to be a sick sense of delight the government has taken in withholding from the [plaintiffs] information that is key to the resolution of a jurisdictional question in their case."¹³ Such gamesmanship is the unifying thread that ties all watchlisting cases together. It

9. Ibrahim's complaint was filed in January 2006. *Id.* at 911. Following a bench trial, the district court issued its ruling on the merits in January 2014. *Id.* at 909. It took another five years for the Ninth Circuit, sitting en banc, to order the government to pay Ibrahim's *pro bono* lawyers the fees due under the Equal Access to Justice Act. *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147 (9th Cir. 2019) (en banc).

10. Petition for a Writ of Certiorari at *17, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178) ("Especially in this national-security context, absent some strong showing of bad faith (which respondent has not attempted to make), the court should have presumed that the government removed respondent from the No Fly List for genuine reasons and in good faith, and that it will not place respondent back on the list absent new information that justifies that course of action.").

11. Fikre had already received four versions of such responses. These were interspersed among five government motions to dismiss. *See* Appendix A.

12. This was the problem faced by Rahinah Ibrahim. The trial judge noted that once a person is caught on the main watchlist, "it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away." *See Ibrahim*, 62 F. Supp. 3d at 928.

13. *Jibril v. Mayorkas*, No. 1:19-cv-2457-RCL, 2023 WL 2240271, at *5 (D.D.C. Feb. 27, 2023).

is also just what an important part of the mootness doctrine is supposed to prevent. Rather than strengthen that doctrine, the Court defanged it.¹⁴

This article argues that the Supreme Court's preoccupation with assessing agency declarations in a vacuum ignores an important element in deciding whether the government's voluntary cessation should moot a claim. It isn't just the declaration that should matter, but also the nature of the agency that proffers the declarant. Yet in Justice Gorsuch's retelling of Fikre's story, the relevant agencies are ghosts in this watchlisting machine. Just how two FBI agents from Portland, Oregon, could use the No Fly List as perniciously as Fikre alleges is never explored. The Transportation Security Administration (TSA) also gets no mention in the Court's opinion, although, by strategic design, that agency is charged with enforcing the No Fly List but neither creates nor manages it. The entity that *does* compile and curate the No Fly List (and many other watchlists) was then known as the Terrorist Screening Center (TSC). But its single mention by the Court is only to give the title of the mid-rank official who signed the declaration.¹⁵ The Court doesn't even bother to say what the TSC *is* (an entity with complex relationships to both the FBI and the TSA, among other agencies also unmentioned), let alone that its name has now changed to keep pace with its efforts to expand its authority as the "Threat Screening Center."¹⁶

It is as if the institutional source of the alleged injury does not matter to the Court, *whichever* part of the federal government did this to Fikre (who, understandably uncertain himself, sued the top officials of seven government entities in his initial complaint).¹⁷ The Court's only question was the sufficiency of the declarant's assertion that the complained-of injury had stopped and would not happen again.¹⁸ But the complexity of this watchlisting system is a feature, not a bug. The multi-agency watchlisting apparatus is designed to obscure responsibility for government action and insulate administrative records from judicial review. The Ninth Circuit sitting en banc described it as "the Many-Faced Bureaucratic God."¹⁹ But none of this deliberately complex design figures into the Supreme Court's opinion about whether that god is done playing with Fikre.

It is counterproductive at best to note the injury but ignore the injurer. This is especially so when the whole point of policing the voluntary cessation

14. There is little reason to think the Court will change course on its own. In addition to its unanimity in Fikre's case, the Court cited *Fikre* twice the following term. See *A.A.R.P. v. Trump*, 605 U.S. 91, 98 (2025) (per curiam); *Lackey v. Stinnie*, 604 U.S. 192, 204 (2025).

15. *FBI v. Fikre*, 601 U.S. 234, 239–40 (2024).

16. U.S. DEP'T OF JUST. & FBI, NATIONAL CRIME INFORMATION CENTER (NCIC) TECHNICAL AND OPERATIONAL UPDATE (TOU) 21-3, at 2-1 (June 11, 2021); see also Declaration of Jason V. Herring Regarding Law Enforcement Sensitive Information at 1 n.1; *Jardaneh v. Barr*, No. 18-cv-02415 (D. Md. Apr. 30, 2021), Dkt. No. 128-4.

17. Complaint, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. May 30, 2013), Dkt. No. 1.

18. Such incuriousness is particularly striking given that Justice Gorsuch published a book six months after *Fikre* that criticizes the over-expansion of the administrative state. NEIL GORSUCH & JANIE NITZE, *OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW* (2024).

19. *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147, 1177 (9th Cir. 2019) (en banc).

exception is to prevent gamesmanship by bad actors. This lack of attention renders other exceptions to mootness (such as the existence of collateral consequences) harder to perceive as well. This article argues that an additional factor should be added to a court's evaluation of attempts to moot a case: the agency's institutional design. The history of watchlist litigation presents a revealing pattern that explains why such an inquiry both strengthens Justice Gorsuch's approach in *Fikre* and better accomplishes a core purpose of the mootness doctrine: preventing litigants (especially, but not exclusively, government agencies) from gaming the judicial system.

Gaming the system is more difficult in organizations (1) with structures and rules that are hard to avoid or evade; (2) that follow decision-making procedures that make *ad hoc* deviations more difficult; and (3) that adhere to requirements of public accountability. Conversely, these indicia generate reasons why courts should trust entities that possess them and suspect invocations of mootness by entities lacking such characteristics. An agency with structures so malleable or secretive that their evasion or exception is as easy on the inside as they are undetectable from the outside, is just the sort of place where assertions of mootness are most subject to abuse.

This focus on institutional structures is not a new concept, although the mootness doctrine is a new application. Structural argument as a liberty protecting device is fundamental to our understanding of the Constitution. This is also consistent with the recent shift in the Court's perceptions of the administrative state. The return to prominence of *Skidmore* deference emphasizes that when courts assess agency action, what matters is "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."²⁰

A court presented with evidence of idiosyncratic, litigation-driven, or malleable decision-making acquires valuable evidence about the integrity of an agency's claim to have voluntarily ceased the action causing harm. For what constitutes an agency is the structure that contains and constrains the choices of the officials that populate it and act within its rules, norms, and precedents. With that consideration in mind, the Threat Screening Center defies characterization. It was not created by statute. It promulgates no regulations. It has no accessible public affairs office. Its very location is unpublicized. And yet it is the linchpin to the federal government's interlocking and powerful system of watchlists. As far as Justice Gorsuch's *Fikre* opinion goes, however, it is the ghost in this machine, a haunting presence never mentioned but in complete control.

The article proceeds in three parts. First, I summarize the claims of Yonas Fikre and show how many features of his complaint are replicated in similar lawsuits that the government sought to moot when they, too, approached discovery or a merits determination. Exploring the complex and secretive world

20. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 370 (2024) (quoting with approval *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

of terrorist watchlists, especially the No Fly List, this part reveals how the scope of the problem is obscured by a focus on the declaration alone. Second, I explore the theories and precedents from which the mootness doctrine and its relevant exceptions have emerged and critique Justice Gorsuch's resolution of this circuit split regarding the voluntary cessation exception. Third, I demonstrate how an assessment of TSC's institutional design improves the mootness analysis by exposing the ghost inside the watchlisting machine.

I. CATCH-AND-RELEASE WATCHLISTING

Yonas Fikre's allegations describe a nightmare similar to that of many other watchlisted plaintiffs.²¹ The commonalities that their alleged injuries share are striking, as are the common trajectories of their litigation efforts. They describe a world of "catch-and-release" watchlisting in which the No Fly List is not used as originally designed—to shield aircraft from attacks from known or suspected terrorists—but as an investigative tool.²² The plaintiff is "caught" in a watchlisting web and promised release in exchange for information or service as a government informant. Recourse to administrative remedies invariably proves futile. Only if a lawsuit threatens to advance to the discovery stage is the tool discarded—the plaintiff is "released"—in order to moot the case. Part A describes how Yonas Fikre was ensnared and his long experience litigating against it. After this focus on Yonas Fikre's paradigmatic case, Part B then provides some context by introducing a cohort of similarly situated plaintiffs whose cases reveal a disturbing pattern in the responses of both the government and the courts that hear these cases.

Just who is in charge of these watchlists and how did they come to be used this way? That is the focus of Part C, which briefly describes the consolidation of the government's terrorist watchlist system and its steady expansion. The history of its institutional design reveals the accretion of legal powers and defenses that were not developed with their current uses in mind. This part reveals a system purposely designed to make responsibility hard to locate, authority impossible to access, and decision-making as free from statute, regulation, and judicial interference as possible. In short, a system in which catch-and-release watchlisting could flourish.

21. In all but one No Fly List case, noted below, the government filed motions to dismiss in lieu of answers to the complaints. Thus, like the courts resolving these motions, this article accepts the unproven allegations in these complaints for the limited purpose of describing their grievances and the government's response to them. This is enough, for the point is to show the similarities in these repetitive complaints and the playbook responses of the repeat actors defending government action, almost always a cadre of lawyers in the Federal Programs Branch of the Civil Division of the Department of Justice.

22. Since this watchlisting system was not created by statute, there is no statutory basis to confine its use to any original purpose. Its expansion, however, coincides with allegations of abuse and constitutional injuries. The suspicions raised by these lawsuits are not alleviated by seeking their dismissal as moot.

A. Yonas Fikre's Case

Yonas Fikre, a U.S. citizen, initially sued the FBI, the State Department, four high-ranking government officials and two FBI agents.²³ He alleges that, while trying to set up a small business in Sudan, he was invited to the U.S. Embassy in Khartoum in April 2010 under false pretenses.²⁴ Shortly after he arrived, two FBI agents told him that he was on the No Fly List, but he could be removed from the list if he would become a government informant at his mosque back home in Portland, Oregon.²⁵ The agents interrogated Fikre for several hours, despite his request to contact his attorney, with questions about his attendance at a prominent mosque in Portland, his financial activities, and other topics.²⁶

Fikre refused to become an informant, which made him the unhappy member of a small but growing club.²⁷ Unnerved by the agents' deceptive conduct, their long interrogation, and feeling himself unsafe in Sudan (Fikre believed he was under surveillance), he moved his business to the United Arab Emirates.²⁸ He alleges that, roughly eight months later, he was seized and tortured by secret police whose questions frequently turned to the FBI's topics of interest and demand that he become an informant.²⁹ After more than three months, and a single, spiritless visit by a U.S. consular official, Fikre was released from UAE detention in mid-September 2011, but he was blocked by the No Fly List from return to his home in the United States.³⁰ Instead, he flew to a relative in Sweden.³¹

23. Complaint, *supra* note 17, ¶ 4. By the end of 2019, Fikre's Seventh Amended Complaint had altered the lineup to eight officials respectively heading the FBI, Departments of Justice, State, and Homeland Security, and the TSC, TSA, NSA, and the Director of National Intelligence. *See* Seventh Amended Complaint, Fikre v. FBI, No. 13-cv-00899 (D. Or. Dec. 18, 2019), Dkt. No. 145.

24. Seventh Amended Complaint, *supra* note 23, ¶¶ 52–63. Fikre alleges that David Noordeloos, an FBI agent from the Portland Field Office, falsely implied that he was an embassy official (e-mailing that "I work at the embassy") and invited him to attend a luncheon discussion at the embassy for Americans in Sudan.

25. When Fikre arrived, he was escorted to a small meeting room where Noordeloos and another agent from the FBI's Portland Field Office blocked the door, presented their credentials, and questioned him for hours despite his request to speak with his attorney, announcing that Fikre "had been placed on the No Fly List and thus could not return to the United States to confer with his attorney." *Id.* ¶ 57.

26. *Id.* ¶ 58.

27. This element of Fikre's complaint in particular is one shared with other plaintiffs. *See, e.g.*, Latif v. Holder, 28 F. Supp. 3d 1134, 1145–46 (D. Or. May 29, 2014) (detailing similar allegations by four plaintiffs); Tanvir v. Tanzin, 894 F.3d 449, 452 (2d Cir. 2018) (summarizing similar allegations by three plaintiffs); Kovac v. Wray, 363 F. Supp. 3d 721, 735 (N.D. Tex. 2019) (same for one plaintiff); El Ali v. Barr, 473 F. Supp. 3d 479, 527 (D. Md. 2020) (same for two plaintiffs); Ghedi v. Mayorkas, 16 F.4th 456, 459 (5th Cir. 2021) (one plaintiff-appellant).

28. Seventh Amended Complaint, *supra* note 23, ¶¶ 67–68.

29. *Id.* ¶¶ 69–72, 75, 82–86, 88–90. Fikre alleges that toward the end of his detention he was told the FBI had been working in coordination with UAE authorities.

30. *Id.* ¶ 89.

31. *Id.* ¶¶ 90, 97.

At this point, a variety of legal processes further complicate this serpentine story. Fikre sought political asylum in Sweden, describing his ordeal at a press conference in April 2012.³² Roughly two weeks later, Fikre, his brother, and the manager of a money transmitting business were indicted in the Southern District of California.³³ Fikre was accused of structuring financial transactions to evade reporting requirements and a related conspiracy charge.³⁴ Arrest warrants were issued, but an assistant U.S. attorney told the court only that Fikre “has not been arrested” without noting his status on the No Fly List or his quite public residence in Stockholm.³⁵ From Fikre’s vantage point, unable to return to the U.S., this looked like retaliation.³⁶ Fikre alleged that the indictment was “based at least in part upon information the United States obtained” from FBI questioning in Khartoum, his interrogation and torture in the United Arab Emirates, and electronic surveillance.³⁷ Without explanation, the government moved to dismiss its case against Fikre eighteen months later.³⁸

Fikre filed his civil action in Portland in May 2013 and frequently amended it to keep up with the government’s varied responses (none of which included filing an answer and many of which were conducted off the court’s docket). A summary timeline of key moments is provided at Appendix A. Like most No Fly List complaints, he alleged violations of his rights to substantive and procedural due process among other statutory and common law claims. According to an amended complaint, an unnamed U.S. government lawyer contacted Fikre’s lawyer in autumn 2013 to suggest that if Fikre “wished to return to the United States he should visit the United States embassy in Stockholm to make necessary arrangements.”³⁹ Why this outreach should occur, and why then, is unclear; the government failed to serve Fikre with its motion

32. *Id.* ¶ 98. See also Associated Press, *US Muslim: I was tortured at FBI’s behest in UAE*, DESERET NEWS (Apr. 18, 2012, at 11:15 MT), <https://www.deseret.com/2012/4/18/20407690/us-muslim-i-was-tortured-at-fbi-s-behest-in-uae/> [<https://perma.cc/B8GK-NJGD>].

33. Indictment, *United States v. Fikre*, No. 12-cr-001689 (S.D. Cal. May 1, 2012), Dkt. No. 1.

34. *Id.*

35. Response in Opposition to Defendants’ Motions For: (1) Discovery (2) Leave to File Further at 2 n.1, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Feb. 11, 2013), Dkt. No. 51.

36. Seventh Amended Complaint, *supra* note 23, ¶ 98.

37. *Id.* The United States responded in the criminal proceedings only as to the latter accusation. See Notice of Intent to Use Foreign Intelligence Surveillance Act Information, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. May 4, 2012), Dkt. No. 10; Supplemental Notice of Intent to Use Foreign Intelligence Surveillance Act Information, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. June 3, 2013), Dkt. No. 65.

38. Judgment of Dismissal, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Oct. 7, 2013), Dkt. No. 88. The court failed to include the conspiracy charge in the dismissal. *Id.* Charges against one of Fikre’s co-defendants were also dismissed, while the other received time served and an order of restitution for slightly more than \$2,300. See Judgment, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Feb. 4, 2014), Dkt. No. 105; Judgment of Dismissal, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Aug. 19, 2014), Dkt. No. 110.

39. Seventh Amended Complaint, *supra* note 23, ¶ 99.

dismissing the criminal indictment at roughly the same time.⁴⁰ Also unexplained is how Fikre could fly if he were on the No Fly List, though it did suggest the fluidity with which Fikre's watchlisting status could change (along with, perhaps, fluid government perceptions of the degree of threat he might pose to an aircraft or national security). Discussions between the lawyers collapsed when "adequate assurances" could not be negotiated that Fikre would be safe from "extra-judicial actions" and that he "could leave the United States once he returned."⁴¹

The government's outreach seems to have sparked some hope in Fikre that his watchlisting status might have changed. In November 2013, he submitted a request through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP), the only administrative process available to individuals seeking to complain about perceived government interference with their travel. Two months later, he received the following status update (the letter is reproduced in full at Appendix B):

In response to your request, we have conducted a review of any applicable records in consultation with other Federal agencies, as appropriate. It has been determined that no changes or corrections are warranted at this time.⁴²

Reader, please try to decipher this carefully crafted response, Fikre's first written notice from the government. What records were "applicable records"? Was a review ever conducted? Why might one be deemed not "appropriate"? Which "other Federal agencies" were consulted, if any? And which "other Federal agencies" were directly involved? What status was determined to need "no changes or corrections"? Who made this determination (the second sentence having been written in the passive voice)? If no changes were needed "at this time," when would the next evaluation occur?

Fikre did get one lucky break, at least initially. Other such non-response responses had pushed No Fly List litigation, after nearly ten futile years, to an inflection point in a case called *Latif v. DHS*. Fikre's letter arrived just as the government was about to be compelled by the federal judge presiding in the *Latif* case to reform a redress process that had never before provided *any* concrete notice of watchlisting status.⁴³ The new procedures, fashioned by the

40. The government did not certify that it had served Fikre with its motion to dismiss the indictment, certifying only as to his co-defendants. Proof of Service, Attachment 1 to Motion to Dismiss Indictment, *Fikre*, No. 3:12-cr-01689 (S.D. Cal. Sep. 26, 2013), Dkt. No. 85-1.

41. Seventh Amended Complaint, *supra* note 23, ¶ 99.

42. DHS Initial Decision, Exhibit 1 to Notice of Supplemental Authority, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. Mar. 4, 2014), Dkt. No. 33-1.

43. *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161–62 (D. Or. 2014).

government under pressure from the court, established broader notice through the DHS TRIP system.⁴⁴

As luck would also have it, both Fikre's case and *Latif* were assigned to the same judge, Anna Brown, who ordered that "substantive reconsideration" of Fikre's inquiry be conducted and Fikre notified of the result.⁴⁵ Fikre was duly notified that as of March 16, 2015, "he is (and, after completion of the renewed DHS TRIP process, remains) on the No Fly List."⁴⁶ This second notice was shorter, and only marginally less empty, than the first one.

As Fikre's lawsuit approached its third anniversary, and after four separate government motions had failed to dismiss it, the government changed its approach. In May 2016, the government filed an unsworn, four-sentence document notifying Judge Brown "that undersigned counsel recently was advised by the Terrorist Screening Center that Plaintiff has been removed from the No Fly List."⁴⁷ The notice (the third now in Fikre's collection) did not say when undersigned counsel learned this fact, what role he might have played in its development, nor any other explanation. But, after noting that plaintiff's counsel had been informed three days earlier, the notice stated that the defendants "are prepared to submit further briefing on the impact of this development" on those parts of plaintiff's lawsuit that stubbornly remained undismissed.⁴⁸

This was enough for Judge Brown to dismiss Fikre's case as moot. She focused on the government's statements, without analysis of the institutional design of the multi-agency watchlisting apparatus that operated behind them. Judge Brown asserted without citation that "the government action is inherently individualized and is not a matter of legislative or executive discretion. If an individual does not meet the substantive criteria to be placed or maintained on the No-Fly List, the government cannot place or keep that individual on the

44. *Traveler Redress Inquiry Program (DHS TRIP)*, DEP'T OF HOMELAND SEC., (June 5, 2025), <https://www.dhs.gov/dhs-trip> [<https://perma.cc/K68Q-RTQD>]. Under the new program, if the applicant made three *seriatim* requests over time, DHS TRIP would (1) reveal the traveler's status on the No Fly List; (2) provide the criteria used to put him or her there with a summary of reasons; and (3) allow the person to request further review. For a summary of this new system and the litigation that led to it, see Jeffrey Kahn, *Terrorist Watchlists*, in *THE CAMBRIDGE HANDBOOK OF SURVEILLANCE LAW* 71, 93–96 (Gray & Henderson, eds., 2017).

45. Order, *Fikre*, No. 3:13-cv-00899 (D. Or. Jan. 14, 2015), Dkt. No. 57.

46. Joint Status Report at 2, *Fikre*, No. 3:13-cv-00899 (D. Or. Mar. 16, 2015), Dkt. No. 58. Inexplicably, however, Fikre was permitted to return to Portland on a private plane on February 14, 2015, although the No Fly List does not distinguish between commercial and private aviation. Seventh Amended Complaint, *supra* note 23, ¶ 105. Judge Brown wrote, without citation to any document in the record: "On February 12, 2015, . . . DHS informed Plaintiff that he remained on the No-Fly List because he had been 'identified as an individual who may be a threat to civil aviation or national security.'" *Fikre v. FBI*, No. 3:13-cv-00899, 2016 WL 5539591, at *4 (D. Or. Sep. 28, 2016).

47. Notice Regarding Plaintiff's Status at 1, *Fikre*, No. 3:13-cv-00899 (D. Or. May 9, 2016), Dkt. No. 98.

48. *Id.* at 1–2.

List.”⁴⁹ “Cannot” was a strong word; as Part C notes, watchlisting is a wholly self-regulating enterprise within the executive branch.

Judge Brown similarly dismissed as “far-fetched” the notion that the government would put national security at risk to game the litigation process and protect its system from judicial oversight.⁵⁰ Judge Brown observed that she herself was handling other No Fly cases, and there were “several other cases around the country.”⁵¹ Thus, she concluded: “To the extent that the government may be concerned about the potential legal and policy implications of those issues, mootng this case would do little to allay those concerns.”⁵²

The Ninth Circuit Court of Appeals disagreed with these *ipse dixit* conclusions, reversing Judge Brown’s judgment and remanding the case.⁵³ The panel expressly acknowledged a presumption of good faith when the government acts and noted that they “did not impute to it a strategic motive to moot Fikre’s suit.”⁵⁴ Nevertheless, just such an imputation is hard not to read into the court’s opinion. A few sentences earlier, the court noted:

The DHS re-evaluated Fikre’s presence on the No Fly List in 2013 and 2015 pursuant to its TRIP procedure and determined that no adjustments to his status were necessary. Indeed, the DHS affirmed as late as March 2015—*after* it had amended TRIP to conform to the decision in *Latif*—that Fikre posed “a threat to civil aviation or national security” and it refused to remove him from the No Fly List. Yet it did just that fourteen months later, without explanation or any announced change in policy. Fikre was taken off the list two months after briefing was completed on the government’s motion to dismiss Fikre’s lawsuit.⁵⁵

At least three times the Ninth Circuit emphasized that no explanation accompanied the government’s decision.⁵⁶ Rather, the record “suggests that Fikre’s removal from the No Fly List was more likely an exercise of discretion than a decision arising from a broad change in agency policy or procedure.”⁵⁷

Back the case went to Judge Brown, who allowed a sixth amended complaint that prompted a fifth motion to dismiss from the government. Judge Brown transferred the case to Judge Michael Mosman, apparently to

49. *Fikre*, 2016 WL 5539591, at *8.

50. *Id.* at *9.

51. *Id.* at *9 n.4.

52. *Id.*

53. *Fikre v. FBI*, 904 F.3d 1033, 1041 (9th Cir. 2018).

54. *Id.* at 1040.

55. *Id.*

56. *Id.* (describing a “determination untethered to any explanation or change in policy,” “without explanation or any announced change in policy,” and “no explanation of the reasons for dropping Fikre from the No Fly List”).

57. *Id.*

accommodate her change to senior status.⁵⁸ Judge Mosman then received from the government exactly what the Ninth Circuit's declaration-focused opinion invited: an incrementally more detailed declaration.⁵⁹ (This declaration, the focus of the Supreme Court's opinion to come, is reproduced in full at Appendix C.) The first two paragraphs of this five-paragraph declaration described the *bona fides* and source of knowledge of the declarant, Christopher Courtright, Associate Deputy Director for Operations at the Terrorist Screening Center.⁶⁰ The third, one-sentence paragraph referred the reader to a two-page summary of TSC policies and procedures released in 2018, without stating that they had been applied in Fikre's case.⁶¹ The fourth, two-sentence paragraph noted the date in 2016 when Fikre had been removed from the No Fly List.⁶² Finally, the fifth paragraph gave the payoff:

Plaintiff was placed on the No Fly List in accordance with applicable policies and procedures. Plaintiff was removed from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly List. He will not be placed on the No Fly List in the future based on the currently available information.⁶³

Notice there is no link between the "applicable policies and procedures" referenced in this paragraph and those referenced in the third one. Everything is in the passive voice: no actor is identified as responsible for removing Fikre from the No Fly List. Was it the TSC, TSA, FBI, DHS? No specific criteria are identified, nor is it clear how Fikre "no longer satisfied" them.

Regardless, the Courtright declaration was enough for Judge Mosman to dismiss Fikre's due process claims.⁶⁴ Back the case went to the Ninth Circuit, now faced with the declaration it had solicited. But a largely different panel hearing this round remained unhappy: "the government has failed to follow the instructions given by this Court the last time Fikre's case was before us."⁶⁵ The

58. See Notice of Case Reassignment, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. July 15, 2019), Dkt. No. 134; see also Order, *Tarhuni v. Barr*, No. 3:13-cv-00001 (D. Or. June 13, 2019), Dkt. No. 174 (noting similar transfer "to accommodate the change to senior status of the undersigned").

59. Declaration of Christopher R. Courtright, Exhibit B to Defendants' Motion to Dismiss Sixth Amended Complaint, *Fikre*, No. 3:13-cv-00899 (D. Or. Aug. 12, 2020), Dkt. No. 130-2.

60. *Id.* ¶¶ 1–2.

61. *Id.* ¶ 3.

62. *Id.* ¶ 4.

63. *Id.* ¶ 5.

64. *Fikre v. Wray*, No. 3:13-cv-00899, 2020 WL 4677516, at *3 n.6 (D. Or. Aug. 12, 2020) ("At oral argument I framed that decision using standing terminology, but key to my holding was that Defendants had met their burden under the voluntary cessation doctrine as laid out by the Ninth Circuit's decision in this case. See Tr. [143] at 40–41 ("I take into account that [Mr. Fikre] has been taken off the [No Fly] List and that a serious barrier has been put in place to putting him back on the list—that is, the declaration that he won't be put back on the list based on anything currently known.")).

65. *Fikre v. FBI*, 35 F.4th 762, 764 (9th Cir. 2022).

Courtright declaration was deemed not good enough because it still provided no explanation either for Fikre's inclusion or removal from the No Fly List.⁶⁶ Its recitation of the existence of policies, procedures, and criteria "neither explains what those criteria are nor identifies any change to the policies, procedures, and criteria under which Fikre was placed on the No Fly List in the first place."⁶⁷ Likewise, the court emphasized that the declaration offered no sign of "procedural safeguards" or evidence that the government had repudiated its earlier decision.⁶⁸

Up the case went, on the Solicitor General's petition, to the Supreme Court.⁶⁹ Justice Gorsuch's opinion for a unanimous Court is discussed at Part II. Judge Brown's confidence that other ongoing cases would discourage use of the mootness tool in Fikre's case turned out to be misplaced. Evidence against that conclusion, and the circuit split that manifested, is the subject of Part B.

B. The Fikre Effect from A to Z

Was the notion that the "government would remove an individual from the No-Fly List whom it believes is a threat to civil aviation or national security, for the mere purpose of concluding this litigation" really as "far-fetched" as Judge Brown thought?⁷⁰ A lot of assumptions are built into the premises on which that conclusion rests. For example, just how low is the bar to label someone a watchlisted threat? Set the criteria low enough and No Fly List status may not always be a flashing signal of danger. Likewise, one might ask how the government balances litigation threats to its watchlisting system with the need to keep a watchlisted individual-turned-plaintiff off a plane and in the dark. Fikre's own return flight home, permitted while he was still on the No Fly List, suggests that whatever concerns might lead to watchlisting a person may be countered in different ways.⁷¹ The frequency with which people on the No Fly List are granted "one-time waivers" to fly home suggests alternative security measures exist. Part C considers these questions.

But first, this section provides short vignettes of other cases. Fikre is not alone. These cases highlight the similarity both in their factual allegations and in the *modus operandi* (especially the timing) of the watchlist removals that led courts to dismiss them all. This A to Z of U.S. citizens—from Ahmad Chebli to Zijad Bosnic—sketches similar struggles against the "Many-Faced Bureaucratic God," providing at least anecdotal support for the claim that catch-and-release watchlisting is not the far-fetched practice Judge Brown painted it to be.⁷² This section concludes with the case of Saadiq Long, which generated a circuit split

66. *Id.* at 771.

67. *Id.*

68. *Id.* at 771–72.

69. Petition for a Writ of Certiorari, *supra* note 10.

70. *Fikre v. FBI*, No. 3:13-cv-00899, 2016 WL 5539591, at *9 (D. Or. Sep. 28, 2016).

71. *See* Seventh Amended Complaint, *supra* note 23, ¶ 105.

72. *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147, 1177 (9th Cir. 2019) (en banc).

between the Fourth Circuit and the Ninth Circuit (which decided *Fikre*). Only considerations of space inhibit the description of more cases.⁷³

Ahmad Chebli's lawsuit provoked a similarly quick delisting response that contrasted with the indifference with which the government had previously responded (precipitating his lawsuit). Chebli, a U.S. citizen, alleged that the FBI used the No Fly List to coerce him to be a government informant.⁷⁴ Chebli refused and found himself repeatedly subject to enhanced airport screening or simply denied boarding passes. Worried about his wife and children, Chebli and his family moved to Lebanon. When he attempted to return to the United States, he was barred until his attorney negotiated a one-time waiver to fly back home.⁷⁵

Chebli's work, relations with family and friends, and religious life were all harmed.⁷⁶ Resort to the DHS TRIP system failed to result in any information about his watchlisting status.⁷⁷ But ten days after his six-count complaint was filed by the ACLU and publicized by an article in the *New York Times*, there was suddenly a change.⁷⁸ According to his counsel's notice of voluntary dismissal, "the government finally responded to his years-old petition for redress" by informing him that he "no longer satisf[ied] the criteria for placement on the No Fly List [, was] removed from the No Fly List, and will not be placed back on the No Fly List based on currently available information."⁷⁹

Erich Scherfen and *Rubina Tareen*, U.S. citizens, found their case dismissed as moot just two months before *Fikre*'s own troubles began. Scherfen was a commercial pilot with an honorable record of service in the U.S. military; his wife sold books about Islam.⁸⁰ Both complained of enhanced screening at airports and prolonged stops at the border.⁸¹ Scherfen found himself on a

73. See, e.g., *Nur v. Unknown CBP Officers*, No. 1:22-cv-169, 2022 WL 16747284 (E.D. Va. Nov. 7, 2022); *Jibril v. Mayorkas*, 101 F.4th 857 (D.C. Cir. 2024). In a study of forty U.S. persons who sued to remedy watchlisting, the ACLU found that 70% (twenty-eight persons) "received confirmation that they were removed from the [No Fly] List during litigation." Brief for the American Civil Liberties Union and the ACLU Foundation of Oregon as *Amici Curiae* Supporting Respondent at 13–15, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178). And three-quarters of that number received this notice "early on in the process, i.e., before the individual received even a terse summary of reasons for their placement on the List." See *id.*

74. Complaint ¶¶ 7, 24–34, *Chebli v. Kable*, No. 1:21-cv-00937 (D.D.C. Apr. 6, 2021), Dkt. No. 1.

75. *Id.* ¶¶ 35–37, 49–58, 63–69.

76. *Id.* at ¶¶ 23, 35–37, 48, 59, 118–21.

77. *Id.* ¶¶ 72–75.

78. Charlie Savage, *Testing an Opaque Security Power, Michigan Man Challenges 'No-Fly List'*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/politics/no-fly-list-lawsuit.html> [<https://perma.cc/57F5-BNVD>].

79. Notice of Voluntary Dismissal at 3, *Chebli*, No. 1:21-cv-00937 (D.D.C. May 12, 2021), Dkt. No. 4.

80. *Scherfen v. Dep't of Homeland Sec.*, No. 3:08-cv-01554, 2010 WL 456784, at *1 (M.D. Pa. Feb. 2, 2010).

81. *Id.*

terrorist watchlist⁸²—not a good look for a commercial pilot. As it turned out, Scherfen was on the Selectee List, which can lead to hours of extended scrutiny at TSA security checkpoints.⁸³ As a result, Scherfen’s employer took away his pilot identification card, suspended him without pay, and threatened him with termination if he could not get himself off the list, and quickly.⁸⁴ The couple, frustrated by what they alleged was four months spent seeking relief from the government’s non-responsive DHS TRIP system, filed their complaint along with a motion for emergency injunctive relief.⁸⁵

Five days after a federal judge ordered a briefing on the emergency motion, the defendants (eight government entities and their respective top officials) submitted a letter from Scherfen’s own employer that confirmed his return to flight status.⁸⁶ According to Scherfen’s attorney, the government’s lawyer “would not disclose what had changed with regard to Mr. Scherfen’s underlying situation, who instructed [Scherfen’s employer] to issue the letter ‘confirming’ Mr. Scherfen’s return to flight status, or why the letter was addressed to an attorney with Defendant TSA.”⁸⁷ But the letter was enough to moot the need for the motion, for which the plaintiff’s attorney now sensibly sought a voluntary dismissal.⁸⁸

This turned out to be a clever trap. Although Scherfen’s lawsuit finally prompted action that saved his job, this came at the cost of continuing his case against the government. The court proceeded to use this opening melee to hold that the plaintiffs now lacked standing.⁸⁹ This was a nice example of the power of the adage that mootness is just “the doctrine of standing set in a time frame.”⁹⁰

Another husband and wife, *Ashraf Maniar* and *Umaina Shaikh*, experienced the familiar litany of injuries from the No Fly List, on which these U.S. citizens found themselves for approximately three years and two years, respectively.⁹¹ Using the reformed process for seeking administrative remedies, they received notices explaining that they had been put on the No Fly List because of Maniar’s “association and extensive communication with a known

82. *Id.* at *2.

83. *Id.*

84. *Id.* at 1–2.

85. *Id.* at 3.

86. *Id.*

87. Plaintiff’s Motion for Voluntary Withdrawal of Motion for Expedited Preliminary Injunction ¶ 5, *Scherfen*, No. 3:08-cv-1554 (M.D. Pa. Sep. 2, 2008), Dkt. No. 17.

88. *Scherfen v. Dep’t of Homeland Sec.*, No. 3:08-cv-01554, 2010 WL 456784, at *3 (M.D. Pa. Feb. 2, 2010).

89. *Id.* at 8 (“[Plaintiffs] argue that removal from the TSDB would merely amount to the voluntary cessation of actionable conduct that does not render a claim moot. The issue here, however, is not whether a claim has become moot, but whether plaintiffs can satisfy the preconditions for asserting an injunctive claim in a federal forum.”) (internal quotations and citation omitted).

90. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

91. Memorandum Opinion at 18, *Maniar v. Wolf*, No. 1:19-cv-03826 (D.D.C. Mar. 30, 2023), Dkt. No. 33.

extremist located in the United Kingdom who has supported terrorist organizations” and Shaikh’s “support to an individual, made with the knowing purpose of furthering the individual’s desire to join a foreign-based terrorist organization, as well as your association and communication with multiple known extremists.”⁹²

Their redress claims went nowhere until they filed a lawsuit. Contrary to the “far-fetched” assertion that people deemed too dangerous to fly would be delisted to avoid litigation, the government issued letters to each of them a few weeks before the deadline for the government’s motion to dismiss stating they “no longer satisfy the criteria for placement” on the No Fly List and that they would “not be placed back on the No Fly List based on currently available information.”⁹³ Their letters were identical to Fikre’s letter. On the basis of those letters, the government argued that the court should dismiss for lack of standing, since the operative complaint had been amended (to allege, *inter alia*, persistent or related injuries) only after these letters were issued.⁹⁴ However, the brief added, “even if the Court were to view this as a question of mootness, the analysis would remain largely the same.”⁹⁵

It’s a neat trick: timing the letters just right opened up the choice of jurisdictional defenses. Either the claims were moot because no further relief could be ordered by the court, or the plaintiffs never had standing to ask for relief in the first place. The standing option was preferred by the government largely because it avoided the pitfalls of the voluntary cessation exception.

Jamal Tarhuni, U.S. citizen, volunteered with an Oregon-based medical charity in Libya in 2011 and 2012.⁹⁶ After three prior successful trips, he was denied boarding in Tunis onto a flight home to Portland and directed to contact the U.S. Embassy.⁹⁷ An FBI agent at the embassy interviewed him for hours, conditioning his return home on a polygraph test and signed waiver of rights.⁹⁸

92. *Id.* at 14, 17–18.

93. Exhibit Nos. D & G, Second Motion to Dismiss for Lack of Jurisdiction, *Maniar*, No. 1:19-cv-03826 (D.D.C. Sep. 9, 2020), Dkt. Nos. 23-5, 23-8.

94. Second Motion to Dismiss for Lack of Jurisdiction, *Maniar*, No. 1:19-cv-03826 (D.D.C. Sep. 9, 2020), Dkt. No. 23.

95. Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss Plaintiff’s Second Amended Complaint at 14 n.5, *Maniar*, No. 1:19-cv-03826 (D.D.C. Sep. 9, 2020), Dkt. No. 23. Maniar and Shaikh separately filed lawsuits preceding this joint one in which they sought writs of mandamus to compel answers from DHS. Upon receipt of these letters, Maniar voluntarily dismissed his action. Notice of Voluntary Dismissal, *Maniar v. Nielsen*, No. 1:18-cv-01362 (Aug. 19, 2020), Dkt. No. 35. However, the letter was issued four months after Judge Moss had rejected defendants’ first attempt to dismiss the case, inviting the defendants to provide “a more complete showing regarding the regulatory backdrop.” Memorandum Opinion and Order at 10, *Maniar*, No. 1:18-cv-01362 (D.D.C. Apr. 10, 2020), Dkt. No. 29. Shaikh’s action was dismissed by Judge Walton as moot. *See* Order, *Shaikh v. McAleenan*, No. 1:19-cv-01398 (D.D.C. Mar. 31, 2020), Dkt. No. 16.

96. *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1055 (D. Or. Sep. 8, 2015).

97. *Id.* at 1055–56.

98. *Id.* at 1056.

After Tarhuni refused, he was forced to wait until the following month to return on what appears to have been a one-time waiver.⁹⁹

Almost eighteen months later, his DHS TRIP inquiry resulted in a letter: “It has been determined that no changes or conditions are warranted at this time.”¹⁰⁰ More than a year later, under the *Latif* court-ordered reforms, DHS confirmed that Tarhuni remained on the No Fly List because he was “an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.”¹⁰¹ The letter added that “[t]he Government has concerns about the nature and purpose of Jamal Tarhuni’s travel to Libya in 2011 and 2012.”¹⁰² A final letter came in February 2015, stating that he had been removed from the No Fly List “based on the totality of available information, including your submissions to DHS TRIP.”¹⁰³

That might sound like a system of administrative relief that, albeit slow, ultimately worked. But the context of those letters was litigation that was gradually going south for the government.¹⁰⁴ Unexpectedly, the government answered the plaintiff’s amended complaint rather than move to dismiss it.¹⁰⁵ Such a filing is highly unusual in No Fly List cases, for a predictable reason: plaintiff’s counsel proceeded to serve a production request and interrogatories and the court set a tight discovery schedule.¹⁰⁶ As discovery heated up, and defendants sought to stay discovery, invoke the state secrets privilege, and

99. *Id.*

100. *Id.* “Conditions” may be a mistake in the court’s opinion. “Corrections” is the word that usually appears on such letters. The opinion does not cite to a record in the docket that could confirm this word choice.

101. *Id.* at 1057.

102. *Id.*

103. *Id.*

104. Tarhuni’s attorneys filed a preemptive “Motion to Establish Procedural Protocols Re Defendants’ Anticipated Lodging of Ex Parte, In Camera Materials” that led to an order from Judge Brown setting tough ground rules for such filings before the government could even respond. Plaintiff’s Motion to Establish Procedural Protocols Re Defendants’ Anticipated Lodging of Ex Parte, In Camera Materials, Tarhuni v. Barr, No. 3:13-cv-00001 (D. Or. May 7, 2013), Dkt. No. 15; Order, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 7, 2013), Dkt. No. 19. This initial volley seemed to put the government on its back foot, prompting a joint motion to hold further consideration of plaintiff’s motion in abeyance. *See* Joint Motion to Hold Consideration of Plaintiff’s Motion for Protocols in Abeyance, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 23, 2013), Dkt. No. 22. Government counsel represented that they “will not be filing *ex parte* or otherwise nonpublic materials” with their motion to dismiss. *Id.* This was a reversal from a prior representation to plaintiff’s counsel that “we are not able to stipulate to a requirement that the government provide advance notice of an *ex parte* submission.” *See* Plaintiff’s Motion to Establish Procedural Protocols, *supra*, at 2. A year later, defendants’ motion to dismiss produced a court order granting Tarhuni “leave to amend all claims dismissed without prejudice on the condition that Plaintiff can in good faith plead facts sufficient to satisfy the deficiencies discussed and state a plausible claim on the merits.” Opinion & Order at 53, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 23, 2013), Dkt. No. 49.

105. *See* Third Amended Complaint, *Tarhuni*, No. 3:13-cv-00001 (D. Or. Apr. 24, 2014), Dkt. No. 53; Answer to Third Amended Complaint, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 27, 2014), Dkt. No. 56.

106. *See* Minutes of Proceedings, *Tarhuni*, No. 3:13-cv-00001 (D. Or. May 28, 2014), Dkt. No. 57.

remand the case back to the agency for further administrative review, Judge Brown denied the motion to remand and stayed discovery herself, but with her own detailed schedule of notices the government would be required to give to plaintiff regarding his status on the No Fly List and review of his redress inquiries.¹⁰⁷

Tarhuni's last letter, notifying him that he had been removed from the watchlist in four short lines, shared a date with Judge Brown's deadline for the government to complete its substantive review of Tarhuni's status.¹⁰⁸ Judge Brown concluded that this result rendered Tarhuni's case moot and the voluntary cessation exception could not save it. "To the contrary," Judge Brown wrote in language she would duplicate in the *Fikre* case: "the notion that the government would remove from the No-Fly List an individual whom Defendants believe is, in fact, 'an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so' for the mere purpose of concluding this litigation is, to say the least, far-fetched."¹⁰⁹

The Ninth Circuit reversed and remanded the case back to Judge Brown, holding she had erred in dismissing the case with prejudice rather than considering leave to amend.¹¹⁰ Four years later, the government settled the case.¹¹¹

Zijad Bosnic, U.S. citizen, was denied boarding when he sought to fly home to Florida from a family visit to Bosnia in March 2017 and found himself instead interrogated by two FBI agents at the U.S. Embassy in Sarajevo.¹¹² Like Fikre, he responded to a call from "two men who identified themselves as being employed by the United States Embassy" who requested he meet, and then deceitfully suggested they could help him.¹¹³ He filed with DHS TRIP and received formal notice a few months later that he was on the No Fly List.¹¹⁴ A month later, his Transportation Worker Identification Credential (TWIC), essential for his work as a truck driver, was suspended because TSA "has determined that you may pose a security threat" based on a search of terrorist watchlists.¹¹⁵ Nevertheless, he was given a one-time waiver to return to the United States.¹¹⁶ Too dangerous to drive a truck, but not to fly (once).

107. See Minutes of Proceedings, *Tarhuni*, No. 3:13-cv-00001 (D. Or. Oct. 3, 2014), Dkt. No. 79.

108. *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052, 1057 (D. Or. 2015); Order, *Tarhuni v. Barr*, No. 3:13-cv-00001 (D. Or. Jan. 15, 2015), Dkt. No. 88.

109. *Tarhuni*, 129 F. Supp. at 1062.

110. See *Tarhuni v. Sessions*, 692 F. App'x 477 (9th Cir. 2017) (mem.).

111. See Joint Stipulation of Dismissal, *Tarhuni*, No. 3:13-cv-00001 (D. Or. Apr. 29, 2021), Dkt. No. 233.

112. Complaint ¶¶ 110–11, 126, *Bosnic v. McCabe*, No. 3:17-cv-00826 (M.D. Fla. July 20, 2017), Dkt. No. 1.

113. *Id.* ¶¶ 121, 124–27.

114. *Id.* ¶ 133.

115. *Id.* ¶¶ 134–36.

116. *Id.* ¶ 141.

Bosnic filed a lawsuit.¹¹⁷ Six months later he received a letter from DHS: “After further review of your inquiry, we have determined that you are no longer on the No Fly List.”¹¹⁸ No further explanation was given, but a month later, the defendants moved to dismiss his complaint as moot.¹¹⁹ A magistrate judge cited approvingly Judge Brown’s conclusion that strategic mooting of these sorts of cases seemed “far-fetched.”¹²⁰ The defendants’ reply brief in support of their motion approvingly quoted the same passage.¹²¹ The magistrate then asserted without citation that “the decision to remove Plaintiff from the No Fly List appears to be the result of substantial deliberation, and not merely an attempt to manipulate jurisdiction.”¹²² And, although the burden falls on the party asserting mootness, he seemed to justify this conclusion by reversing the burden: “There is no evidence to suggest that Plaintiff’s removal from the No Fly List was not a result of a genuine assessment of Plaintiff’s DHS TRIP complaint.”¹²³ The district court judge, adopting the magistrate’s report and recommendation, ordered the case dismissed.¹²⁴

Saadiq Long, U.S. citizen, was an airman in the U.S. Air Force when he unsuccessfully sought conscientious-objector status after his religious conversion.¹²⁵ He was given an Other than Honorable Discharge, after which he eventually settled his family in Qatar.¹²⁶ When he attempted to renew his passport to visit his critically ill mother in Oklahoma, he found himself on the No Fly List, subject to FBI interrogation, and under arrest by Qatari police immediately upon leaving his FBI meeting at the U.S. Embassy.¹²⁷ Six months later, having retained legal counsel and publicized his plight, he was given a one-time waiver to the U.S. to see his mother (whom he alleges was also visited by the FBI).¹²⁸ En route and during his visit, he alleges that he was plagued with

117. See Complaint for Injunctive and Declaratory Relief against Andrew McCabe, Charles H. Cable, IV, Huban A. Gowadia, Kevin K. McAleenan, and Nicholas J. Rasmussen with Jury Demand, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. July 20, 2017), Dkt. No. 1.

118. Letter from DHS to Zijad Bosnic at 1, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. Feb. 15, 2018), Dkt. No. 23-1.

119. Defendants’ Motion to Dismiss for Lack of Jurisdiction, Motion to Dismiss for Failure to State a Claim and Memorandum in Support Thereof, *Bosnic v. Wray*, No. 3:17-cv-00826 (M.D. Fla. Feb. 15, 2018), Dkt. No. 23.

120. *Bosnic v. Wray*, No. 3:17-cv-00826, 2018 WL 3651382, at *4 (M.D. Fla. July 10, 2018).

121. Reply to Response to Motion to Dismiss for Lack of Jurisdiction; Motion to Dismiss for Failure to State a Claim and Memorandum in Support Thereof at 6, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. Apr. 10, 2018), Dkt. No. 27.

122. *Bosnic*, 2018 WL 3651382, at *4.

123. *Id.*

124. Order, *Bosnic*, No. 3:17-cv-00826 (M.D. Fla. Aug. 17, 2018), Dkt. No. 34.

125. *Long v. Barr*, 451 F. Supp. 3d 507, 519 (E.D. Va. Apr. 2, 2020).

126. *Id.*

127. *Id.*

128. *Id.*; see also Amended Complaint ¶ 225, *Long v. Lynch*, No. 1:15-cv-001642 (E.D. Va. Aug. 13, 2019), Dkt. No. 35; Glenn Greenwald, *US Muslim placed on no-fly list is unable to see his ailing mother*, THE GUARDIAN (UK), (Nov. 5, 2012, at 3:19 ET), <https://www.theguardian.com/commentisfree/2012/nov/05/muslim-no-fly-qatar> [<https://perma.cc/SVJ8-T4EU>].

delays, searches, and questioning by DHS and FBI officials.¹²⁹ After his attempt to return to Qatar after this visit failed, despite lengthy questioning by FBI agents, he drove to Mexico and then flew to Qatar.¹³⁰

Long appealed a district court order that substantially limited his claims. Two months after the court of appeals issued its briefing order, the government notified the court that Long had been removed from the No Fly List.¹³¹ The DHS letter, submitted with a declaration from a TSC official, initially confused the appellate court, which asked at oral argument just who was responsible for Long's status determination.¹³² The substantive paragraph of the unsigned DHS letter provided no answer:

Previously, you were informed of the TSA Administrator's determination to uphold your placement on the No Fly List based on the totality of available information. The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) has recently been advised that, based on an assessment of the currently available information, you have been removed from the No Fly List and that you will not be placed back on the No Fly List based on the currently available information. This letter supersedes the letter sent to you on April 23, 2019.¹³³

Who advised *whom* at DHS TRIP? *How* was the matter assessed? *Who* removed him and *what* rules prevented reversal of that choice? The letter answered none of these questions. The declaration, from the Deputy Director for Operations of the Terrorist Screening Center, was also entirely in the passive voice: "Mr. Long will not be placed back on the No Fly List in the future based on the currently available information."¹³⁴ But, again, by *whom*, *how*, and with *what* recourse?

Nevertheless, the Fourth Circuit held that Long's No Fly List challenge was moot and that the voluntary cessation exception didn't apply, creating a circuit split with the Ninth Circuit's just-issued *Fikre* opinion.¹³⁵ The TSC declaration was enough to convince the Fourth Circuit that "the conduct Long challenges

129. Amended Complaint, *supra* note 128, ¶¶ 228–33.

130. *Long*, 451 F. Supp. 3d at 520; *see also* Amended Complaint, *supra* note 128, ¶¶ 234–38. The amended complaint details many other allegations regarding continuing difficulties with air travel, his employment as a truck driver in Oklahoma, and efforts to purchase a firearm that Long attributes to his status on different watchlists.

131. Letter, *Long v. Pekoske*, No. 20-1406 (4th Cir. Sep. 23, 2020), Dkt. No. 27.

132. *Long v. Pekoske*, 38 F.4th 417, 422 n.3 (4th Cir. 2022) ("At first, it was unclear who ordered Long removed from the No Fly List. But at oral argument, the government clarified it was the Screening Center.").

133. Letter, *Long*, No. 20-1406 (4th Cir. Sep. 23, 2020), Dkt. No. 27-1.

134. Declaration of Jason V. Herring, *Long*, No. 20-1406 (4th Cir. Sep. 23, 2020), Dkt. No. 27-3.

135. *Long*, 38 F.4th 417.

won't recur" because the TSC "has removed Long from the No Fly List and has assured us that won't change based on the information it has now."¹³⁶

The Fourth Circuit thought the Ninth Circuit in *Fikre* "demands too much of the government."¹³⁷ Whereas the Ninth Circuit was concerned that no explanation for Fikre's change of status was provided by the government, the Fourth Circuit was quite comfortable with that omission in Long's case: "we assume [the TSC] removed Long from the list because, as he contends, he doesn't belong on it. To say otherwise, would be to suggest the government risked national security simply to moot a lawsuit. This we decline to do."¹³⁸ Not only did the Fourth Circuit decline to do this, but "we think it appropriate—in this unique national-security context where the relevant decision-making is highly sensitive and confidential—to allow the government more leeway on its evidentiary burden than we otherwise might."¹³⁹

* * * * *

What conclusions emerge from this alphabet of watchlist cases? The FBI is involved in nearly every case. Its agents are alleged to use the No Fly List to pressure these travelers but succeed only in turning them into plaintiffs. At the administrative remedies stage, the FBI seems to disappear, replaced by the Department of Homeland Security and its TRIP system. But when courts examine this process more deeply, the FBI reemerges at the center of the action. It never left: although the TSA operates the No Fly List, and the Department of Homeland Security (in which TSA is a component) operates the TRIP system facing the public, the TSC (which the FBI administers) does all the work in the background.

The TSC makes the actual decisions about who is on or off any particular list. It is invariably a declaration from a TSC official that backs the DHS public-facing action. As Part C describes, TSC provides the compositional criteria, the content, and the decisionmakers. But the TSC does this work behind the scenes, without oversight by the public, the courts, or the legislature. The closer one inspects any public aspect of this process—the letters, the declarations, the *bases* for decisions made by these hidden TSC officials—the less substantial, and the more conclusory, the TSA-DHS edifice appears. Like a ghost in the machine,

136. *Id.* at 423–24.

137. *Id.* at 424.

138. *Id.* at 425.

139. *Id.* at 426. As previously noted, the Sixth Circuit Court of Appeals also dismissed a case as moot, holding that the voluntary cessation exception did not apply. *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017). That case is not discussed because its brief analysis does not engage with the reasoning of its sister circuits. The *Mokdad* court concluded that the exception did not apply because the TSC issued a letter to plaintiff regarding his No Fly List status by order of the court and then agreed to the court's request that it supplement that letter with a declaration. Therefore, the court reasoned, these actions "were not voluntary." *Id.* at 171.

the proffered answers are elusive and insubstantial, and the real decision-maker “everywhere yet nowhere.”¹⁴⁰

How watchlisting is actually done, and its decisions protected from review, is the subject of Part C.

C. The Threat Screening Center

The creation of the Threat Screening Center (TSC), formerly the Terrorist Screening Center, was catalyzed by the terrorist attacks on September 11, 2001.¹⁴¹ But the origins of the No Fly List that fell under its control arose much earlier. This sequence is important because the TSC’s institutional design helps insulate this and other watchlists from scrutiny. Behind various screens, the TSC has grown in size and power along with the increasing number of watchlists it controls.

The origins of the No Fly List start in the 1960s with federal responses to an alarming rise in aircraft hijackings. Congress gave commercial airlines an exception to the usual requirement that common carriers serve all ticketed passengers if “in the opinion of the air carrier, such transportation would or might be inimical to safety of flight.”¹⁴² Within a few decades, and after more air tragedies (most notably the bombing of Pan Am Flight 103 in 1988), Congress gave the Federal Aviation Administration (FAA) statutory authority to issue obligatory “security directives” by which the FAA could forbid boarding to someone the FAA identified as a “specific and credible threat” to civil aviation, viz. discovery of an actual threat to a particular aircraft or carrier or route.¹⁴³

These security directives were slow (delivered via fax machine to airline security directors), few (averaging fewer than twenty or thirty per year), and far between (thanks to the decreasing frequency of hijackings due in part to other reforms).¹⁴⁴ On September 10, 2001, only twelve individuals were identified on them, none U.S. citizens and none the terrorists who attacked the next day.¹⁴⁵ But on 9/11, this was the only legal authority the federal government had to deny any particular person a boarding pass.

In the immediate aftermath of the 9/11 attacks, the Bush administration seized on the FAA’s security directive (SD) authority but put the FBI in charge of it. Early on September 12, 2001, according to one official’s memo documenting that initial activity:

140. RYLE, *supra* note 1.

141. A more detailed history of these origins and early operations is provided in JEFFREY KAHN, *MRS. SHIPLEY’S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* (2013).

142. *Id.* at 128 (citing Pub. L. No. 87-197, § 4, 75 Stat. 466 (Sep. 5, 1961)).

143. *Id.* at 133–34.

144. *Id.*

145. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 83 (2004).

At 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* [sic] investigation [PENTTBOM was the codename for the FBI's investigation of the 9/11 attacks] The FBI "controlled," both administratively and operationally, the contents of the list and added or removed names in accordance with the *Pentbom* [sic] 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."¹⁴⁶

Longer-term responses also built on this authority. The Aviation and Transportation Security Act, passed in November 2001, created the Transportation Security Administration (TSA). The Act transferred FAA authority to issue security directives to the TSA, which "in consultation with other appropriate Federal agencies and air carriers," could now require airlines:

to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; 8and . . . if such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual.¹⁴⁷

Notice that this was not merely a transfer of the original legal authority, but a broadening of it. With a well-placed disjunctive—"a threat to civil aviation *or* national security"—the government could now bar someone from flying who was *not* a threat to civil aviation but deemed threatening to national security in some undefined way.

Who constitutes such a threat? It was clear that whichever government entity controlled that definition would have the power to shrink or expand this authority. Congress had conspicuously left that phrase undefined. The FBI quickly took that leading role, though (again) Congress had not granted it any such authority by statute.

The first clues as to who would really be in charge came early, with the FBI's dominance over the TSA's efforts to protect its new No Fly List. E-mails acquired in FOIA litigation not only show how quickly FBI special agents grew accustomed to using this new tool ("We've got a guy we want to no-fly. Do you have a copy of the last one we gave you?") but also how little quality control TSA could exercise over FBI demands; one TSA e-mail in reply to an FBI agent

146. Kahn, *supra* note 44, at 77 (quoting Internal TSA Memorandum "TSA Watchlists" from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence (Oct. 16, 2002)).

147. Pub. L. No. 107-71, § 101(a), 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114(h)(3)(A)-(B)); *see also* *Gilmore v. Gonzales*, 435 F.3d 1125, 1131 n.4 (9th Cir. 2006) (observing that the TSA was authorized "to issue Security Directives without providing notice or an opportunity for comment in order to protect transportation security").

practically begged that “you state in the EC [electronic communication] that the FBI believes that the listed individual is a threat to Civil Aviation Security.”¹⁴⁸ With only a limited number of redacted documents released, one is left to speculate why this basic requirement should be absent.

As the new TSA struggled for control with a powerful and well-established FBI, watchlists were growing in size and number. The No Fly List, for example, soon split off a new list: the “Selectee List,” which allowed boarding only after substantially more intrusive security screening. Similarly, new executive branch entities began to consolidate the country’s intelligence on terrorism. A new Terrorist Threat Integration Center, later transformed by statute into the National Counterterrorism Center, created a massive database to help consolidate the country’s intelligence.¹⁴⁹ That database—called TIDE (Terrorist Identities Datamart Environment)—contained international terrorism intelligence from multiple agencies and departments. Information on purely domestic terrorism remained the province of the FBI. By April 2003, the GAO had identified twelve terrorist-related watchlists across six agencies.¹⁵⁰

With so many different agencies, watchlists, and policy interests involved, the need for coordination and systemization grew in importance. For those twin purposes, the Terrorist Screening Center (TSC) became operational by December 2003.¹⁵¹ Homeland Security Presidential Directive Six (HSPD-6) authorized the Attorney General to create 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.”¹⁵² This short, one-page document provided little else in terms of details.

The details were in an eight-page memorandum of understanding (MOU) signed the same day by the heads of the Departments of Justice, Homeland Security, and State, and the Director of Central Intelligence.¹⁵³ The MOU

148. Kahn, *supra* note 44, at 78 (quoting redacted e-mails released in *Gordon v. FBI*, 390 F. Supp. 2d 897 (N.D. Cal. 2004)).

149. See Intelligence Reform and Terrorism Prevention Act, Pub. L. 108-458, § 1021, 118 Stat. 3638 (2004).

150. U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., REVIEW OF THE TERRORIST SCREENING CENTER (AUDIT REPORT 05-27) iii (2005).

151. *Fact Sheet: The Terrorist Screening Center*, DEP’T OF JUST., https://www.justice.gov/archive/opa/pr/2003/September/03_ag_505factsheet.htm [<https://perma.cc/U87K-RZYT>] (last visited Nov. 4, 2025).

152. Homeland Security Presidential Directive/HSPD-6-Directive on Integration and Use of Screening Information to Protect Against Terrorism, 2 PUB. PAPERS 1174–75, ¶ 1 (Sep. 16, 2003) [hereinafter *Homeland Security Presidential Directive*], available at <https://www.govinfo.gov/content/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1174.pdf> [<https://perma.cc/KN2J-JQ75>].

153. Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism (MOU) (Sep. 16, 2003) [hereinafter *MOU*]. The MOU has not been publicly released. It was leaked as part of the March 2013 Watchlisting Guidance and published by The Intercept and the ACLU, among others. The MOU is at Appendix 3 of the March 2013 Watchlisting Guidance. See *March 2013 Watchlisting Guidance*, THE INTERCEPT (July 23, 2014),

implemented the presidential directive by establishing the TSC, the “organization” that HSPD-6 authorized the Attorney General to create. According to an audit by the Justice Department’s Office of the Inspector General, this MOU “governs the structure and operations of the TSC.”¹⁵⁴ It is worth noting that, unlike the TSA or even the National Counterterrorism Center, the TSC was not a creature of statute.

And here came the FBI’s next move to exert control. The MOU made clear that the TSC would be closely connected to the FBI. The Director of the FBI would be in charge of establishing it.¹⁵⁵ Once operational, the FBI would administer it.¹⁵⁶ Its director’s line of report goes through the FBI’s leadership.¹⁵⁷ Although staffing would involve many departments of the executive branch, as the multi-agency MOU suggested, the key positions would remain, almost invariably, with the FBI. Since there is no organizational chart or list of the TSC’s leadership published anywhere, evidence for this proposition must be extracted from the declarations its officials occasionally submit in litigation. Consider the position of deputy director for operations, which is routinely described in these court filings as “responsible for the overall operations of the TSC.”¹⁵⁸ Figure 1 is gleaned from successive declarations by three recent holders of this position:

Fig. 1. TSC Deputy Directors for Operations, 2013-2022

Name	Service as Deputy Dir.	Start of FBI Service	TSC Units Supervised	Individuals Supervised
Clayton Grigg ¹⁵⁹	Sep. 2013-Apr. 2016	1997	unstated	unstated
Timothy Groh ¹⁶⁰	May 2016-Feb. 2020	1996	9	≈ 300
Jason Herring ¹⁶¹	April 2020-Feb. 2022	1999	14	≈ 700

<https://theintercept.com/document/march-2013-watchlisting-guidance/> [https://perma.cc/X5HB-GAWE].

154. U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., AUDIT OF THE FBI’S MANAGEMENT OF TERRORIST WATCHLIST NOMINATIONS (AUDIT REPORT 14-16) 1 (2014).

155. MOU, *supra* note 153, ¶ 3.

156. U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (AUDIT REPORT 07-41) 1 (2007).

157. MOU, *supra* note 153, ¶ 5.

158. Declaration of Timothy P. Groh at 1, *Elhady v. Kable*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), Dkt. No. 299-4; Declaration of Jason V. Herring, *Jardaneh v. Garland*, No. 8:18-cv-02415 (D. Md. Apr. 30, 2021), Dkt. No. 128-4.

159. Declaration in Support of Defendants’ Motion to Dismiss, *Tarhuni v. Holder*, No. 3:13-cv-00001 (D. Or. July 6, 2015), Dkt. No. 99; *see also* Gurvais Grigg, LINKEDIN, <https://www.linkedin.com/in/gurvais-grigg-b1027a153/details/experience/>.

160. Declaration of Timothy P. Groh at 1, *Elhady*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), Dkt. No. 299-4; *see also* Timothy Groh, LINKEDIN, <https://www.linkedin.com/in/timothy-groh/>.

161. Declaration of Jason V. Herring at 1, *Jardaneh v. Garland*, No. 8:18-cv-02415 (D. Md. Apr. 30, 2021), Dkt. No. 128-4; *see also* Jason V. Herring, LINKEDIN, <https://www.linkedin.com/in/jason-v-herring-998b79215/>.

Given the origins of the TSC and the close working relationship with the FBI, it is no surprise that the least amount of prior FBI experience for this important position supervising a growing number of units and individuals is over two decades in length. The declaration at the center of Fikre's case was signed by Christopher R. Courtright, the TSC's Acting Deputy Director for Operations. He has been with the FBI since 2001.¹⁶²

But what, exactly, does the TSC do? It is tasked to "maintain a consolidated terrorist screening database" that combines information on international threats from the National Counterterrorism Center's database (TIDE) with the FBI's purely domestic terrorism information.¹⁶³ The TSC also determines which screening processes may access each entry in that database.¹⁶⁴ And the TSC will "provide continual operational support" not only to help identify watchlisted persons, but "facilitate" the action taken by other agencies once that identification occurred and further action may be necessary.¹⁶⁵

The best analogy to translate all of this bureaucratese is to think of an old-fashioned library. Like a master librarian, the TSC was in charge of a massive card catalog (the "consolidated terrorist screening database," or TSDB) that linked to every substantive record about a known or suspected terrorist in the government's possession.¹⁶⁶ Just like a card catalog, the TSDB did not contain every little detail, but rather an unclassified snapshot of the essentials, with which the TSC could locate (and to some extent access) the full record.

In this librarian role, the TSC had an even greater power than managing this TSDB "card catalog." The TSC used the TSDB to create specialized catalogs, subsets of the main one, that became the different watchlists, most notably, the No Fly List.¹⁶⁷ That creative power meant that the TSC was the primary authority that established the criteria by which each watchlist would be compiled and also assessed whether those criteria were met.¹⁶⁸ As the master librarian, only the TSC could add or remove a name to one of these lists. Every agency that sought to use one of those watchlists became a patron in the TSC's library.

This relationship is depicted in Figure 2, which is an unclassified PowerPoint slide given to the author by the then-director of the TSC, Timothy Healy (a long-time FBI official), in 2010. It shows the inputs of intelligence information from the NCTC and FBI on the left, the curation of the TSDB by the TSC in the center, and the TSC's outputs (drawing on the TSDB) on the right in the form of various sublists to patron agencies.

162. See Appendix C ¶ 1.

163. MOU, *supra* note 153, ¶¶ 4(a), 13.

164. *Id.* ¶¶ 4(b), 18.

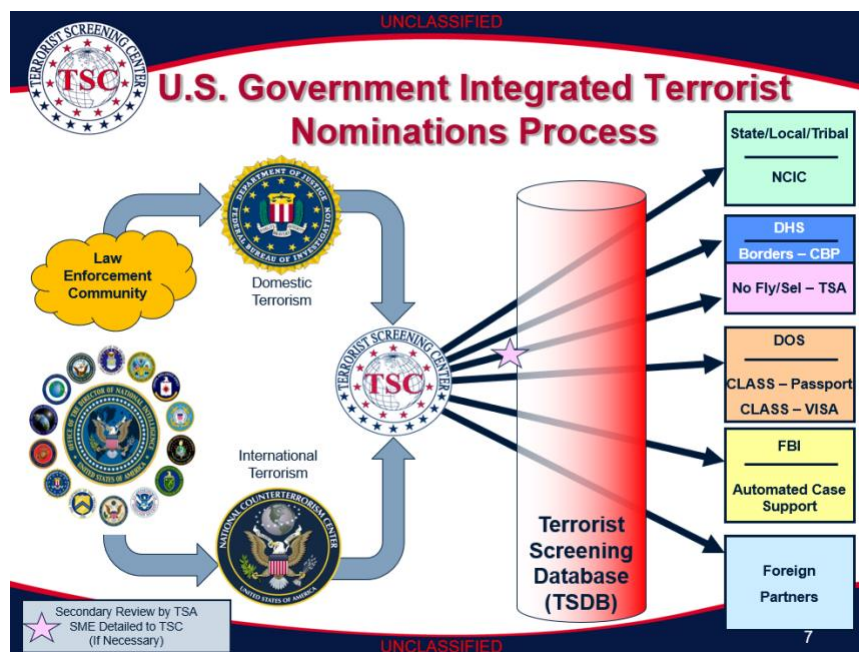
165. *Id.* ¶ 4(e).

166. *Id.* at ¶ 4(a). A nomenclature change has renamed the TSDB to the TSDS (Terrorist Screening Dataset). The original term is used in this article for consistency and ease of understanding.

167. MOU, *supra* note 153, ¶ 29(c).

168. *Id.* ¶¶ 8(a)–(c), 15(a)–(g).

Fig. 2. Flow Chart of the Work of the Terrorist Screening Center¹⁶⁹



Over the past twenty years, the Terrorist Screening Database has grown in size from approximately 150,000 records to 1.8 million records.¹⁷⁰ The database is no longer limited to known or suspected terrorists. For example, under a 2015 order of the Attorney General, “transnational organized crime” actors now fall within the TSC’s watchlisting bailiwick.¹⁷¹ According to the FBI, “in 2018, the Attorney General also granted the TSC authority to maintain additional datasets.”¹⁷² In addition, certain categories known as “exception records” include those of interest to the watchlisting community (such as “relatives, associates, . . . endorsers and inciters of terrorism”) but for whom “precise terrorist support activity is unknown.”¹⁷³ Not only is the absence of such

169. This PowerPoint presentation was provided to the author on April 20, 2010, following an interview with then TSC Director Timothy Healy. This slide has been reproduced in the March 2013 Watchlisting Guidance that was leaked by The Intercept. See *March 2013 Watchlisting Guidance*, *supra* note 153, § 1.32.

170. S. COMM. ON HOMELAND SEC. & GOV’T AFFS., 118TH CONG., MISLABELED AS A THREAT: HOW THE TERRORIST WATCHLIST & GOVERNMENT SCREENING PRACTICES IMPACT AMERICANS 14 (2023) [hereinafter HSGAC MAJORITY STAFF REPORT].

171. FBI, FY 2017 AUTHORIZATION AND BUDGET REQUEST TO CONGRESS 5–8 (2016), available at <https://www.justice.gov/jmd/file/821341/dl> [https://perma.cc/8EZW-NV3U] (“On August 6, 2015, the Attorney General signed Order No. 3548-2015, which granted the TSC the authority to manage, disseminate, perform identity verification, and encounter management functions regarding TOC Actors.”).

172. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 15.

173. *Id.* at 14.

information no impediment to watchlisting, these records “do not meet the same minimum standard for inclusion required for other records in the terrorist watchlist.”¹⁷⁴

The “standard for inclusion” is found in TSC internal documents and whatever excerpts are provided in litigation.¹⁷⁵ These documents are neither limited by statute nor promulgated as regulations. But it is here that the TSC describes the rules, standards, and criteria by which its personnel engage in their work. These procedures occupy over a hundred pages in the leaked “March 2013 Watchlisting Guidance” that is the only such manual to be publicly disclosed.¹⁷⁶ The U.S. Government, however, declines to acknowledge “the alleged leak of this guidance.”¹⁷⁷

So, what is the standard? The TSDB contains information about “known or suspected terrorists.” The breadth of this term’s definition is stunning:

A known or suspected terrorist is a person who is known or reasonably suspected to be engaged in, has been engaged, or intends to engage in conduct constituting, in preparation for, or in aid or in furtherance of terrorism and/or terrorist activities.¹⁷⁸

How does one determine whether a person is “engaged” (let alone intending to be engaged) in conduct, or what is “preparation,” “aid” or “furtherance” of these activities? In other words, if this is the definition, what is the test to evaluate whether it has been satisfied? That test is the “reasonable suspicion” standard, which is also defined:

174. *Id.*

175. In litigation, the FBI has frequently submitted a document titled “Watchlisting Overview.” An updated version of this document appears to have been published on the FBI’s website. *See Overview of the U.S. Government’s Terrorist Watchlisting Process and Procedures as of April 2024*, FBI (May 2, 2024), <https://www.fbi.gov/file-repository/terrorist-watchlisting-transparency-document-april-2024-050224.pdf/view> [<https://perma.cc/V3PK-CEUH>] [hereinafter USG Overview]. The document is not on letterhead, not signed by any official, and provides no indication of its provenance or legal status. Although the document is useful to corroborate more detailed documents that have been leaked, it is of limited legal value, as Judge Moss noted of one of its earlier versions in the *Maniar* case:

Here, the document is not on DHS letterhead, and it lacks any official insignia or markings.

The Department does not indicate who (or which agency) authored the document or who approved it. Nor does the Department even offer a declaration confirming the vague description of the document that appears in the footnote. The Court, accordingly, is left to puzzle over who “authorized” the process, what makes the process “official,” and whether the overview document has binding legal force.

Maniar v. Wolf, No. 1:18-cv-01362, 2020 WL 1821113, at *4 (D.D.C. Apr. 10, 2020) (internal citation omitted). In a footnote, Judge Moss continued, citing 49 C.F.R. § 15601.201, that “The TSA regulations add little clarity and merely declare.” *Id.* at *4 n.3.

176. *See March 2013 Watchlisting Guidance*, *supra* note 153.

177. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 31.

178. USG Overview, *supra* note 175, at 2 n.7. This sentence conforms to the definitions of known or suspected terrorists in the March 2013 Watchlisting Guidance. *See* Homeland Security Presidential Directive, *supra* note 152, §§ 3.10.1, 3.12.1.

The reasonable suspicion standard has been met when, based on the totality of the circumstances, there is reasonable suspicion that the person is engaged, has been engaged, or intends to engage in conduct constituting, in preparation for, or in aid or in furtherance of terrorism and/or terrorist activities.¹⁷⁹

As one federal judge observed, the effect of this double use of “reasonably suspected” in the definition, and “reasonable suspicion” in the standard is that “an American citizen can find himself labeled a suspected terrorist because of a ‘reasonable suspicion’ based on a ‘reasonable suspicion.’”¹⁸⁰

In a preview of the structural argument that is at the heart of this article, it is worth pausing here to consider the origin of this standard. The “reasonable suspicion” standard was derived by TSC lawyers from the test created in *Terry v. Ohio*, which upheld brief detention and questioning by police officers (who lacked probable cause to do so) if this standard was met in what would become known as “Terry stops.”¹⁸¹ But in the watchlisting context, the test was stripped of the inevitable judicial oversight that was the context for these stops. Conducted on public streets by police, such stops could be assessed by a neutral third-party magistrate in a subsequent criminal proceeding.¹⁸² That structural protection has no place in the world of watchlists. Use of the mootness tool is all about preventing such judicial scrutiny.

The low bar established by such a broad definition assessed under such a modest standard predictably engorged the TSDB with successful nominations. In one of the few watchlisting cases to reach discovery, the government revealed that nominations to the TSDB more than doubled between 2008 and 2013, while the rejection rate changed from 0.2% in 2009 to slightly more than 1% in 2013.¹⁸³ But this standard is not even always utilized, as even the public summary acknowledges.¹⁸⁴

179. USG Overview, *supra* note 175, at 3. This sentence conforms to the definition in the March 2013 Watchlisting Guidance. See Homeland Security Presidential Directive, *supra* note 152, § 3.4.

180. *Mohamed v. Holder*, 995 F. Supp. 2d 520, 531–32 (E.D. Va. 2014).

181. See KAHN, MRS. SHIPLEY’S GHOST, *supra* note 141, at 170 (citing the author’s interview with the TSC General Counsel); see also Jeffrey Kahn, *The Unreasonable Rise of Reasonable Suspicion: Terrorist Watchlists and Terry v. Ohio*, 26 WM. & MARY BILL RTS. J. 383, 386–87, 395–97 (2017).

182. See KAHN, MRS. SHIPLEY’S GHOST, *supra* note 141, at 169–70; see also Kahn, *supra* note 44, at 85–86.

183. See Kahn, *supra* note 44, at 85 (referencing statistics provided in Defendants’ Objections and Responses to Plaintiff’s First Set of Interrogatories, *Mohamed v. Holder*, No. 1:11-cv-00050 (E.D. Va. 2014), Dkt. No. 91-3).

184. USG Overview, *supra* note 175, at 2 n.7 (“The TSDB also includes identifying information of some individuals who are connected to or associated with known or suspected terrorists but who may not themselves meet the reasonable suspicion standard. These records are exported to State and DHS for the limited purpose of supporting screening functions, and may only be provided for other purposes, or to other departments and agencies, as approved through established interagency processes.”).

The No Fly List is populated from the TSDB if one or more additional criteria are satisfied.¹⁸⁵ Three such criteria are linked to statutory definitions of terrorism crimes.¹⁸⁶ A sweeping fourth criteria permits placement on the No Fly List of someone who is deemed “a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.”¹⁸⁷ The 2013 Watchlisting Guidance explains that this fourth criteria was “intended to enable flexibility for nominations to the No Fly List [for individuals who] do not pose a threat to civil aviation, a threat to the homeland, or a threat to U.S. facilities and their associated or supporting personnel.”¹⁸⁸

The same reasonable suspicion test is used to determine whether someone presents such a “threat” and is “operationally capable.”¹⁸⁹ But, again, there is a broad collection of exceptions that allow watchlisting without use of either of these self-imposed limits and definition of “operationally capable” is unsurprisingly broad.¹⁹⁰ And oversight on the process is impoverished. In the *Ibrahim* case, for example, an FBI special agent nominated the plaintiff to a variety of watchlists (prior to interviewing her), including the No Fly List. But he “fill[ed] out the form exactly the opposite way from the instructions on the form.”¹⁹¹ This blunder was only detected three months before trial, after eight years of litigation, when the plaintiff finally succeeded in compelling the FBI agent’s deposition.¹⁹² Despite this revelation—what the judge later called the “bureaucratic analogy to a surgeon amputating the wrong digit”—the case continued to trial, where government counsel conceded that the plaintiff “is not a threat to our national security,” that she “does not pose (and has not posed) a threat of committing an act of international or domestic terrorism with respect to an aircraft, a threat to airline passenger or civil aviation security, or a threat of domestic terrorism.”¹⁹³

Concluding this part, it is necessary to discuss the redress process. Although the TSC nominates individuals to the TSDB and selects such watchlisted persons onto the No Fly List, the Traveler Redress Inquiry Program (TRIP) is run by the Department of Homeland Security. This system was established in

185. USG Overview, *supra* note 175, at 4. This conforms to the 2013 Watchlisting Guidance. *March 2013 Watchlisting Guidance*, *supra* note 153, § 4.5.

186. USG Overview, *supra* note 175, at 4.

187. *Id.*

188. *March 2013 Watchlisting Guidance*, *supra* note 153, § 4.8.1. The document further explains that this now allows inclusion of those who are deemed to present a threat of terrorism “against U.S. nationals abroad (outside of the ‘homeland’) or against a target with no nexus to the United States or its nationals.” *Id.*

189. USG Overview, *supra* note 175, at 4 (referring to the TSDS and its subsets).

190. *March 2013 Watchlisting Guidance*, *supra* note 153, §§ 1.59 (Expedited Nomination Procedures for Temporary, Threat-Based Categories), 4.8.3 (Possible Indicators of Being Operationally Capable), and 4.9 (Operationally Capable Scenarios).

191. *Ibrahim v. Dep’t. of Homeland Sec.*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014).

192. *Id.* (“Agent Kelley did not learn of this error until his deposition in September 2013.”). The complaint was filed in January 2006. *Id.* at 911. The trial occurred in December 2013. *Id.* at 914.

193. *Id.* at 915–16, 928.

response to a statutory directive from Congress in 2004 that was limited to the TSA and its authority over aircraft and, in 2007, shifted to more broadly encompass the Department of Homeland Security.¹⁹⁴ Until compelled to do so by order of the *Latif* court in 2015, “the U.S. government did not confirm or deny for DHS TRIP complainants whether they were on the No Fly List” and it continues to maintain a policy of secrecy about the criteria for the Selectee List and whether individuals are on that list or the TSDB.¹⁹⁵

This design creates a useful double screen. The first screen denies direct access to the TSC; all communication is processed through DHS TRIP. The second screen creates a useful legal shield to protect the TSC against intrusion into its administrative action. As even the government’s summary overview describes the process:

After reviewing the available information, the TSC determines whether the traveler’s record should remain in the TSDS, be modified, or be removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. In such cases, the TSC prepares a recommendation for the decision-making agency and implements the decision-maker’s determination.¹⁹⁶

The key is in the first sentence, a footnote to which notes that “the TSA Administrator makes final determinations concerning placement on the No Fly List pursuant to 49 U.S.C. § 46110.”¹⁹⁷ That provision, a holdover from the FAA’s original administrative authority over security directives and other administrative action (like licensing and other traditional administrative decisions), directs that TSA orders are subject to exclusive review in the courts of appeals. In other words, the operative decision-making process occurs in and by the TSC but is wrapped in a package labelled with an order by the TSA. As the Fourth Circuit concluded, the TSA is only involved if the wrapping paper is

194. See Pub. L. 108-458, § 4012(a), 118 Stat. 3638 (2004) (codified at 49 U.S.C. § 44903(j)(2)(C)(iii)(I) (requiring TSA Assistant Secretary to “establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system”); and § 44903(j)(2)(G)(i) (“The Administrator shall establish a timely and fair process for individuals identified as a threat . . . to appeal to the Transportation Security Administration the determination and correct any erroneous information.”); see also Pub. L. 110-53, § 1606(a), 121 Stat. 266 (2007) (codified at 49 U.S.C. § 44926(a)) (“The Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration, United States Customs and Border Protection, or any other office or component of the Department of Homeland Security.”).

195. Memorandum Opinion at 7, *Maniar v. Wolf*, No. 1:19-cv-03826 (D.D.C. Mar. 30, 2023), Dkt. No. 33.

196. USG Overview, *supra* note 175, at 7–8 (internal footnote omitted).

197. *Id.* at 8.

needed: “If the Screening Center decides someone doesn’t belong on the No Fly List, it will remove them. But if it determines the complainant should stay on the list, it will submit that recommendation to the TSA Administrator, who has the final say.”¹⁹⁸ The result is to shield action actually taken by the TSC from review in district courts. And if the matter is taken to a court of appeal, the shield further prevents discovery or other fact-finding and limits the available evidentiary record to a one-sided presentation by the government.

The TSC is a resource the government strives to protect from legislative or judicial interference. Historically, Congress has not been very interested in constraining an entity about which, almost by definition, only those labelled known or suspected terrorists tend to complain. As the record presented in Part B shows, the judiciary has also not been particularly inclined to interfere. It is to the mootness doctrine at the heart of the *Fikre* case that the next section now turns.

II. *FIKRE* AND THE MOOTNESS DOCTRINE

Practical application of the doctrine of mootness is easier to describe than its theoretical foundations.¹⁹⁹ If the facts that led to filing a lawsuit change—e.g., the plaintiff’s circumstances alter, the relevant law is repealed, the defendant’s action truly abates—there may be nothing further for a court to do. United States courts are averse to offering post-dispute commentary that would render only a constitutionally forbidden advisory opinion.²⁰⁰

Focusing on the existence of live controversies makes mootness seem akin to standing. Indeed, Professor Henry Monaghan famously described mootness as the “doctrine of standing set in a time frame.”²⁰¹ The hazy boundary between the two doctrines clears a bit when the focus shifts to the nature of the remedy sought. Damages claims may remain viable for wrongs long since passed. But if equitable relief is the only remedy, intervening circumstances may render the lawsuit moot when the option of other remedies might have kept it alive.²⁰²

198. *Long v. Pecoske*, 38 F.4th 417, 421 (4th Cir. 2022).

199. See Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 572–74 (2009) (noting the relative recency of current doctrine, the lack of support for its transformation into a constitutional requirement, and the incompatibility of judicially created exceptions to such a requirement).

200. *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

201. *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)); see also *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021) (“The doctrine of standing generally assesses whether that interest exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings.”).

202. Declaratory relief presents a middle case, since it may sometimes be important to establish certain legal facts (e.g., property disputes) even if the injury that precipitated the lawsuit is no more. See *Uzuegbunam*, 592 U.S. at 286 (“For example, a trespass to land or water rights might raise a prospective threat to a property right by creating the foundation for a future claim of adverse

Many judges tend to describe mootness in constitutional terms, resulting from their limited jurisdiction under Article III. All the judges hearing Fikre's case did so, as did the Fourth and Sixth Circuit panels with which the Ninth Circuit split.²⁰³

The Supreme Court has been a little more cagey than the lower courts, referring to the “flexible character of the Art. III mootness doctrine.”²⁰⁴ This flexibility takes the form of exceptions to a finding of mootness. Sometimes, the defendant's claim of mootness will be rejected and the case allowed to proceed. This does not always fit well with the Court's rigid view of its limited jurisdiction only to hear live cases and controversies. But for perfectly reasonable policy reasons, justices have repeatedly recognized that unbending application of mootness would strip from lower court dockets cases they believe ought to remain there. For example, some issues by their very nature arise and then pass with a speed impossible for courts to match—hence they present genuine issues that are “capable of repetition, yet evading review.”²⁰⁵ Likewise, adverse collateral consequences that may linger long after the primary injury has passed (e.g., incarceration) might prevent a case “from ending ignominiously in the limbo of mootness.”²⁰⁶ Or, most relevant for this article, courts should not allow savvy defendants to stop behaving badly just to game the judicial system, ready to start again after the litigation danger has passed.²⁰⁷

This mootness doctrine is applicable to all litigants, public or private. But when the defendant is the federal government, as in *Fikre*, the issue is more acute because the availability of remedies is more limited. Against a private party, a claim for money damages can stave off mootness: defendants cannot unring the bell of their past actions to avoid paying up for a past injury.²⁰⁸ But

possession or prescriptive easement. By obtaining a declaration of trespass, a property owner could ‘vindicate his right by action’ and protect against those future threats.” (internal citations omitted).

203. *Fikre v. FBI*, No. 3:13-cv-00899, 2016 WL 5539591, at *6 (D. Or. Sep. 28, 2016); *Fikre v. Wray*, No. 3:13-cv-00899, 2020 WL 4677516, at *3 (D. Or. Aug. 12, 2020); *Fikre v. FBI*, 35 F.4th 762, 770 (9th Cir. 2022); *Long*, 38 F.4th at 422–23; *Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017).

204. *Geraghty*, 445 U.S. at 400.

205. *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Obvious circumstances in this category are cases concerning elections, reproductive rights, and issues concerning government benefits (e.g., durational educational programs) or pretrial bail or confinement.

206. *See, e.g., Sibron v. New York*, 392 U.S. 40, 55 (1968) (internal quotation marks and citation omitted).

207. All of these exceptions (and others exist) lead some to conclude that mootness has a prudential basis, not a constitutional one. *See, e.g., Hall, supra* note 199; Scott T. MacGuidwin, *Note: Mooting Unilateral Mootness*, 121 MICH. L. REV. 641, 646 n.35 (2023) (“If mootness were truly a constitutional issue, then courts would have no authority to hear moot cases, even if prudential factors weigh in favor of hearing the case.”). This article need not resolve this issue to criticize the use of the voluntary cessation exception in the watchlisting context.

208. *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021) (holding suit for injunctive relief and nominal damages remained justiciable even after defendant changed policies after suit to render injunctive relief moot). *But see Campbell-Weald Co. v. Gomez*, 577 U.S. 153, 166 (2016) (reserving

in many cases in which the government is the defendant, an official may not be subject to a claim for money damages.²⁰⁹ That is the position in which Fikre found himself.²¹⁰ All that is available to the plaintiff is declaratory and injunctive relief. When the government defendant renders that judicial action unnecessary by changing its policies, reversing its decision, or otherwise alters its complained-of actions, the case may be moot.

The government repeatedly opposed application of the voluntary cessation exception in Fikre's case. There is an irony in that argument, because it is the reverse of the government's position advanced when it was the plaintiff in an early, foundational case for the voluntary cessation exception, *United States v. W.T. Grant Co.* In that case, the exception was meant to *promote* law enforcement, not foreclose remedies for the law's alleged violation. That is, the original concern was with *private* defendants engaging in gamesmanship against *public* efforts to enforce the law.

The case concerned a civil action by the United States to enjoin violation of antitrust legislation.²¹¹ Shortly after the United States filed its complaint, the defendants stopped their challenged conduct, filed affidavits that they had done so, and moved to dismiss the complaint as moot.²¹² After all, what was left to enjoin? The Court presented a public policy rationale for rejecting the claim of

question whether suit remains justiciable "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount").

209. *See, e.g., Jacksonbey v. U.S. Dep't of Just.*, No. 2:22-cv-00469, 2024 WL 4216023 (S.D. Ind. Sep. 17, 2024) (barring *Bivens* damages claim and holding claim for injunctive relief moot following government correction of records). Even when money damages are permitted, other doctrines may bar that remedy. *See, e.g., Tanvir v. Tanzin*, 120 F.4th 1049, 1053 (2d Cir. 2024) (affirming lower court judgment that barred on qualified immunity grounds, and therefore dismissed, suit under RFRA for damages remedy against FBI agents alleged to have asked plaintiffs "to serve as government informants within Muslim communities, and that when they refused, the agents pretextually placed or retained them on the federal government's 'No Fly List,' even though none of them posed a threat to aviation safety").

210. Fikre's previous claims for money damages were dismissed with prejudice on sovereign immunity grounds, *see Fikre v. FBI*, 142 F. Supp. 3d 1152, 1168–69 (D. Or. 2015), and for failure to state a claim, No. 3:13-cv-00899, 2016 WL 5539591, at *13–16 (D. Or. Sep. 28, 2016). His proposed eighth amended complaint added a claim for damages under RFRA, presumably based on *Tanzin v. Tanvir*, 592 U.S. 43 (2020), and the notice foreclosing a qualified immunity defense in the future that was provided by *Tanzin v. Tanzin*, 120 F.4th 1049 (2d Cir. 2024). *See Proposed Eighth Amended Complaint, Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. July 29, 2024), Dkt. No. 184-1. However, Judge Mosman denied Fikre's Motion for Leave to File an Eighth Amended Complaint with respect to his proposed RFRA claim. *Fikre v. FBI*, No. 3:13-cv-00899, 2025 WL 88705 (D. Or. Jan. 14, 2025). Judge Mosman held that the proposed claim was both "futile because it is inadequately pleaded under Rule 8 and, therefore, would not survive a Rule 12(b)(6) motion to dismiss," *id.* at *1 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) and substantively deficient because "even if his proposed claim was adequately pleaded, Mr. Fikre cannot sustain a valid RFRA claim" under his theory. *Id.* at *2. Because the motion was granted with respect to certain proposed factual allegations, the case continues. *Id.* at *1; *see also supra* note 8.

211. *United States v. W.T. Grant Co.*, 345 U.S. 629, 630 (1953).

212. *Id.*

mootness and keeping the case alive despite the apparent end of any further injury:

This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.²¹³

Viewed in this way, Fikre's case against mootness is clear. The opportunity to settle the "legality of the practices" that (as he alleges) barred his travel home, sought to coerce his compliance as an informant, and led to his torture is of great importance to him. The government's willingness to drop the case doesn't remove the value to him of a court determining that those actions were unlawful and prohibiting the government from engaging in them again. Not knowing why he was targeted, he considers himself still at risk. Fikre's remaining requests for equitable relief all focus on that remedy.

Justice Gorsuch's short, unanimous opinion does not flow from this perspective, although the end result allows Fikre to fight a little longer. Rather, the operative part of the opinion (which follows a summary of Fikre's allegations and the proceedings below) opens with a general statement of the mootness doctrine rooted in Article III. Justice Gorsuch notes the "limited authority vested in federal courts to decide cases and controversies," with a pinpoint citation that imbeds that rule firmly in Article III.²¹⁴ There is no middle ground apparent in his statement that "a federal court *must* dismiss the case as moot" if litigation would secure no further relief after "events in the world overtake those in the courtroom."²¹⁵

The pinpoint citation to support this seemingly absolute "must-dismiss" rule is to *Already, LLC v. Nike, Inc.* This 2013 case applied the voluntary cessation exception to mootness that is at issue in *Fikre*. But the citation provides a policy basis for voluntary exception that conflicts with, and certainly is not based in, strict adherence to Article III limits:

We have recognized, however, that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued. Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends. Given this concern, our cases have explained that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of

213. *Id.* at 632 (internal citations and footnotes omitted).

214. *FBI v. Fikre*, 601 U.S. 234, 241 (2024) (citing *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)).

215. *Id.* at 240 (emphasis added).

showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.²¹⁶

When Justice Gorsuch moves on to explain voluntary cessation in the next paragraph, again citing to this passage from *Already*, he fares no better.²¹⁷ *Already* relies on another case, *Aladdin's Castle*, to present another assertion hard to square with Article III: that the lower court “was under no duty” to declare moot a lawsuit despite a change in the middle of litigation to the language in an ordinance that was the central issue in the case.²¹⁸ And the next pinpoint cite, from *Friends of the Earth*, said the quiet part out loud: “if mootness were simply ‘standing set in a time frame,’ the exception to mootness that arises when the defendant’s allegedly unlawful activity is “capable of repetition, yet evading review,” could not exist.”²¹⁹

After these broad explanations of mootness in general and voluntary cessation in particular, which occupy the first third of this operative part of the opinion, Justice Gorsuch applies what he terms these “traditional mootness principles” to Fikre’s case.²²⁰ The same inconsistency occurs again. On the one hand, Justice Gorsuch notes that “a federal court’s duty to ensure itself of Article III jurisdiction may begin at the inception of a lawsuit, but it persists throughout the life of the proceedings.”²²¹ Of course, that’s a solid Article III requirement.

But in explaining that neither the contents of the government’s “sparse declaration” nor the passage of time since Fikre’s removal from the watchlist satisfies the “formidable burden” that voluntary cessation principles place on the government, Justice Gorsuch concludes that “[i]t is on that consideration alone—the potential for a defendant’s future conduct—that we rest our judgment.”²²² Potential future conduct sounds an awful lot like conjectural or hypothetical conduct, quintessentially insufficient to support a case or

216. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal citations omitted).

217. *Fikre*, 601 U.S. at 241.

218. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 (1982). In fact, applying the voluntary cessation exception “is a matter relating to the exercise rather than the existence of judicial power.” *Id.* at 289.

219. *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 190 (2000). The *Friends of the Earth* Court explained the very practical basis for its view in a way that resonates with the delays and frustrations of lengthy No Fly List suits: “Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years.” *Id.* at 191.

220. It is interesting to note that Justice Gorsuch never uses the word “exception” in his opinion, although it is how “voluntary cessation” and other exceptions to mootness are regularly described. Reference is instead made to “traditional mootness principles” and “precedents” to introduce them. *FBI v. Fikre*, 601 U.S. 234, 241, 244 (2024). This would seem to be a way to elide the fact that these principles, found in those precedents, are grounded in policy concerns, and thus hard to reconcile with the logic of Article III.

221. *Id.* at 244.

222. *Id.*

controversy under Article III.²²³ And the long-standing test—that the defendant bears a “formidable burden” to show that it is “absolutely clear” that the subject of the complaint “could not reasonably be expected to recur”—is not a formula that is supportable by considerations other than policy.²²⁴

All this dancing around takes up a lot of space in this short opinion. What is more, it obscures an essential point. The issue in the voluntary cessation analysis is not whether Fikre has maintained the Article III standing that brought him to this point after a decade of litigation. There was no doubt now that Yonas Fikre is not on the No Fly List. He sought no damages and, as the Solicitor General emphasized in her petition for certiorari, Fikre and the Justice Department agreed that “there is no longer a live controversy with respect to Plaintiff’s request for an injunction requiring the Government to remove him from the No Fly List.”²²⁵ All that remained in Fikre’s complaint was a request for declaratory relief about the illegality of what was done to him and various requests for injunctive relief based on his suspicion that he may be subjected to similar watchlisting in the future.²²⁶ Of course, that’s potential (one might say conjectural, speculative, or even hypothetical) future conduct, too.

This emphasis on Article III is a *non sequitur*. Fikre’s injury was there at the start. Had it not been, the proper motion to dismiss would be for want of standing, not mootness. Justice Gorsuch alludes to (if he doesn’t invite) just such a future motion on remand, when “the complaint’s allegations will be tested rather than taken as true, and different facts may emerge . . . for a federal court’s duty to ensure itself of Article III jurisdiction may begin at the inception of a lawsuit, but it persists throughout the life of the proceedings.”²²⁷

The real issue before the court is whether the defendant’s assertion that the controversy is now moot should be believed. Only then would Fikre have managed “to secure outside of litigation all the relief he might have won in it.”²²⁸ Testing whether the defendant’s voluntary cessation renders the case moot shifts to the defendant the “formidable burden” of proving that the injurious action has

223. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”) (internal quotations and citations omitted).

224. Hall, *supra* note 199, at 582.

225. See Joint Stipulation, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. May 27, 2016), Dkt. No. 102; see also Petition for a Writ of Certiorari at 6, *Fikre*, 601 U.S. 234 (No. 22-1178).

226. As Fikre summarized his complaint in his brief to the Supreme Court, “Fikre continues to seek declaratory and injunctive relief, including a declaratory judgment that his due process rights were violated by his addition to the No Fly List; an order restricting the government from subjecting him to anything other than standard security precautions at airports; an order to remove and expunge his watchlist and No Fly List records; an order requiring the government to provide him with written notice if his name is again added to the No Fly List; and an order requiring the government to disclose the specific reasons he was listed and to repudiate that decision.” Brief for Respondent at 12, *FBI v. Fikre*, 601 U.S. 234 (2024) (No. 22-1178).

227. *Id.* at 244.

228. *Id.* at 240.

ceased and cannot reasonably be expected to recur. Perhaps the best formulation of this understanding was by Justice Scalia: “The ‘voluntary cessation’ doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist.”²²⁹

Justice Gorsuch’s approach can be seen to respond to this “evidentiary presumption” with a singular focus on only one piece of evidence: the Courtright declaration. Nothing in the government’s representation, he writes, “speaks to whether the government might relist him if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant.”²³⁰ This focus allows the opinion to conclude on a high note for the government, emphasizing the national security context in which the case occurs. “Careful attention must be paid to the handling of classified or privileged information.”²³¹ A future declaration, it would be reasonable to infer, need not say too much more even if “so far” the government has not satisfied its burden.²³²

“So far” was an invitation to try again. Justice Alito, joined by Justice Kavanaugh, concurred solely to drive this point home. “I join the Court’s opinion, but write to clarify my understanding that our decision does not suggest that the Government must disclose classified information to Mr. Fikre, his attorney, or a court to show that this case is moot.”²³³ In fact, Justice Alito emphasizes the possibility that “non-classified information or information obtained in discovery from the plaintiff in this and other cases may be sufficient

229. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 213 (2000) (Scalia, J., dissenting) Justice Scalia presented this view in *support* of the idea that mootness, as well as its exceptions, are grounded in the federal courts’ limited jurisdiction under Article III. *Id.* at 212 (Scalia, J., dissenting) (“We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III.”). By Justice Scalia’s lights: “Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist.” *Id.* at 213–14 (Scalia, J., dissenting) (quoting *Honig v. Doe*, 484 U.S. 305, 341 (1988) (Scalia, J., dissenting)). This “probability” is hard to square with his seminal statements about standing doctrine in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992) (“Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘*certainly* impending.’”) (citation omitted), let alone subsequent precedents heightening that hurdle. *See, e.g.*, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (“Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.”) (internal quotation marks omitted).

230. *Fikre*, 601 U.S. at 242. The government also sought support from the duration of time that had passed since Fikre’s removal from the watchlist. But this was quickly dismissed as an attempt at burden shifting. *Id.* at 243 (“In all cases, it is the defendant’s ‘burden to establish’ that it cannot reasonably be expected to resume *its* challenged conduct—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment.”).

231. *Id.* at 244.

232. *Id.* at 245.

233. *Id.* (Alito, J., concurring).

to show that the allegedly unlawful listing is unlikely to recur, thereby proving mootness,” without a word about the possibility of useful discovery coming from the government defendants.²³⁴

In a national security environment in which so much information is, or can be, kept from the public and plaintiffs alike, this is not an approach that promises much more than slightly less “sparse” or “terse” declarations from officials and entities that already do their best to say as little as possible while shielding their involvement in watchlisting decisions. The D.C. Circuit expressed disgust for this sort of logic:

At oral argument, Government counsel suggested that if the Jibrils would like to determine whether they remain on a terrorist watchlist, some or all members of the family can book another trip to see whether they endure the same problems that they faced in 2018. Whether this suggestion was meant to be a tongue-in-cheek quip or simply a heartless argument, it makes no sense.²³⁵

Part III presents an alternative approach to assessing Justice Scalia’s “evidentiary presumption” that makes more sense.

III. THE GHOST IN THE MACHINE

What would application of the voluntary cessation rule look like if the *Fikre* Court had focused on the nature of the agency that proffers the declarant and not just the declaration alone? This concluding section of the article asks how an examination of the structure of the TSC, largely hidden but nevertheless at the heart of this case, could inform the “evidentiary presumption” at the base of the voluntary cessation exception. What structural or institutional details might lead a court to conclude that “the controversy reflected by the violation of alleged rights continues to exist”?²³⁶ What could reassure, or alarm, a court trying to discern whether *Fikre* was removed from the No Fly List because he had begun to see success in litigating against it (leaving the government “free to return to [its] old ways”), or was removed for reasons and in ways that make “absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur”?²³⁷

The Threat Screening Center is the ghost in the government’s watchlisting machine. The autonomy and secrecy that the TSC prizes for the free range of action it provides becomes a liability when the credibility of its assurances about mootness are assessed. Although courts routinely afford government agencies

234. *Id.*

235. *Jibril v. Mayorkas*, 20 F.4th 804, 817 (D.C. Cir. 2021).

236. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 213 (2000) (Scalia, J., dissenting).

237. *Fikre v. FBI*, 904 F.3d 1033, 1039 (9th Cir. 2018).

the presumption that they act in good faith, the “formidable burden” to demonstrate mootness is one carried by the defendant, whether public or private. One need not question the integrity of hard-working government officials to recognize that they operate within a secret and unaccountable system.²³⁸

In asking what prevents a recurrence of such action by the TSC, a natural first stop is to consider any restrictions the legislature placed on it. But there are none. Nothing in the United States Code authorized its establishment.²³⁹ The Aviation and Transportation Security Act does not provide it with any authority to compile watchlists, let alone establish criteria for their composition or requirements for how compliance with those criteria should be controlled. That statute authorizes a *different* agency, the TSA, to consult with other agencies before taking action to protect “civil aviation or national security” but says nothing about what *those* agencies may do in support of that mission.

Similarly, reassurance might be given that agency action could not reasonably be expected to recur if it were bound by publicly promulgated regulations, rules that create a check on mere exercises of executive discretion. But nothing of the kind is to be found in regulations promulgated by the FBI, Department of Justice, or *any* agency stakeholder in this system. In fact, both the FBI and DHS have exempted the TSC from various provisions of the Privacy Act.²⁴⁰ That law requires, *inter alia*, that each agency that maintains a system of records shall “maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.”²⁴¹

Rather than follow this regulatory regime, the FBI opted the TSC out of it, with only unenforceable assurances of self-regulation:

[M]any of the records in this system are derived from other domestic and foreign agency record systems and therefore it is not possible for the FBI and the TSC to vouch for their compliance with this provision;

238. KAHN, MRS. SHIPLEY’S GHOST, *supra* note 141, at 15.

239. At times, the government has argued that the Intelligence Reform and Terrorism Prevention Act is a source of authority. See Privacy Act of 1974; System of Records, 76 Fed. Reg. 77846, 77848 (Dec. 14, 2011) (citing, *inter alia*, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, as a source of authority for maintenance of its Terrorist Screening Records System); see also Declaration of Timothy P. Groh ¶ 4 n.1, *Elhady v. Kable*, No. 1:16-cv-00375 (E.D. Va. Mar. 11, 2019), Dkt. No. 299-4 (asserting that Congress “mandated greater sharing of terrorist information among federal departments and agencies,” citing IRTPA § 1016). IRTPA neither references the TSDB or TSC, nor does it impose any limits on them. As I noted in an *amicus* brief filed in the Fourth Circuit in the *Elhady* case, other than a 2005 requirement of some reports and guidelines that lack any indication of obligation, this law provides only hortatory instructions to the Director of National Intelligence to protect privacy and civil liberties. See Brief of Professor Jeffrey D. Kahn as Amicus Curiae in Support of Plaintiffs-Appellees at 5 n.8, *Elhady v. Kable*, Nos. 20-1119 & 20-1311 (4th Cir. June 2, 2020), Dkt. No. 43-1.

240. See, e.g., 28 C.F.R. § 16.96(s)(4), (6)–(8) (FBI); see also 6 C.F.R. Pt. 5, App. C (DHS).

241. 5 U.S.C. § 552a(e)(5).

however, *the TSC has implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible . . .* In the collection of information for law enforcement, counterterrorism, and intelligence purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. The restrictions imposed by (e)(5) would limit the ability of those agencies' trained investigators and intelligence analysts to exercise their judgment in conducting investigations and impede the development of intelligence necessary for effective law enforcement and counterterrorism efforts. *The TSC has, however, implemented internal quality assurance procedures to ensure that TSC terrorist screening data is as thorough, accurate, and current as possible.*²⁴²

Notice that this exemption limits its assurances only to internal quality controls over the thoroughness, accuracy, and currency of TSC's information. No assurances are given about any procedures regulating the decisions made by its officials in reliance upon that data.

Any standards, rules, or criteria that do exist (and numerous exceptions to them) are all based solely on internal guidance manuals that are self-imposed and largely inaccessible. When leaked, the government declines to confirm their existence.²⁴³ And, historically, when courts have inquired about these criteria, or even acknowledgment that someone has been placed on the No Fly List, the TSC has claimed that national security would be compromised by such revelations. In the end, after ten years of litigation, the *Latif* case extracted reforms that make that information more accessible.²⁴⁴ However, the TSC continues to refuse acknowledgment of TSDB or Selectee List status.²⁴⁵

Neither HSPD-6 nor its MOU was published in the Federal Register nor refers to any regulatory authority. Indeed, HSPD-6 makes clear that it was only intended to improve "the internal management of the executive branch" and expressly did "not alter existing authorities or responsibilities of department and agency heads to carry out operational activities or provide or receive information."²⁴⁶ The MOU is hardly better, since its authority is even further removed from law and itself represents nothing more than the "consensus view"

242. 28 C.F.R. § 16.96(s)(7) (emphasis added).

243. See HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 31.

244. See *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

245. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 34–35. The report expresses concern that "[t]he lack of acknowledgement of a change of status and repeated additional screenings for different reasons creates the possibility of a breakdown in trust and communication between the government and those who experience this cycle." *Id.*

246. Homeland Security Presidential Directive, *supra* note 152, after ¶ 5.

of four members of the Cabinet.²⁴⁷ In any event, it has never been publicly released.

Further, the precise content of what this presidential authorization requires is contested. The GAO reported that “[c]onsistent with Homeland Security Presidential Directive 6, to ensure that watchlist information is current, accurate, and complete, nominating agencies generally are to provide information to remove an individual from the watchlist when it is determined that no nexus to terrorism exists.”²⁴⁸ But the FBI told Senate staff that “this requirement does not appear in HSPD-6.”²⁴⁹

This isolation from established statutory and regulatory review and control is not by accident, but by design, to accomplish the TSC’s mission through what the FBI called “a unique, interagency business model.”²⁵⁰ By comparison, other contemporaneously created entities involved with national security watchlists within the Executive Branch have been established by statute. For example, the National Counterterrorism Center (the successor to the Terrorist Threat Integration Center that curated the first massive terrorism database, the Terrorist Identities Datamart Environment (TIDE)), was established by the Intelligence Reform and Terrorism Prevention Act of 2004.²⁵¹ So was its director, that office’s lines of direct report, their duties and responsibilities, and their limitations.²⁵²

Searching for limits on otherwise unbridled discretion is a search for structural reassurances that the agency declarant’s assurances are not easily discarded after the litigation threat has passed. Indeed, after *Fikre* was handed down, one federal judge sought to reconcile that case with an earlier Ninth Circuit opinion that seemed to diverge from Justice Gorsuch’s admonition that the formidable burden to successfully asserting mootness “holds for governmental defendants no less than for private ones.”²⁵³ Sitting en banc, the Ninth Circuit had previously held that “legislative actions should not be treated the same as voluntary cessation of challenged acts by a private party.”²⁵⁴ The legislature was given an easier time, with the burden shifted by a presumption that “repeal, amendment, or expiration of legislation will render an action

247. MOU, *supra* note 153, ¶ 1.

248. GOV’T ACCOUNTABILITY OFF., GOA-12-476, TERRORIST WATCHLIST: ROUTINELY ASSESSING IMPACTS OF AGENCY ACTIONS SINCE THE DECEMBER 25, 2009, ATTEMPTED ATTACK COULD HELP INFORM FUTURE EFFORTS 39 (2012).

249. HSGAC MAJORITY STAFF REPORT, *supra* note 170, at 13 (noting FBI response to Senate Homeland Security and Governmental Affairs Committee majority staff, October 13, 2023).

250. FBI, *supra* note 171, at 4-4.

251. See Intelligence Reform and Terrorism Prevention Act, Pub. L. 108-458, § 1021, 118 Stat. 3638 (2004).

252. *Id.*

253. *FBI v. Fikre*, 601 U.S. 234, 241 (2024).

254. *Ger Chong Ze Chang v. Cnty. of Siskiyou*, 746 F. Supp. 3d 808, 821 (E.D. Cal. Aug. 21, 2024) (quoting *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc)).

challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it.”²⁵⁵

The district court concluded that the Ninth Circuit’s burden-shifting scheme survived *Fikre*. The court’s reasoning is grounded in the structural differences between legislative action and executive action. In support, the district court actually referenced the Ninth Circuit’s logic in their first *Fikre* opinion prior to the one that Justice Gorsuch had affirmed:

[T]he form the governmental action takes is critical and, sometimes, dispositive. A statutory change is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. The rigors of the legislative process bespeak finality and not for-the-moment, opportunistic tentativeness. On the other hand, an executive action that is not governed by any clear or codified procedures cannot moot a claim.²⁵⁶

What are those rigors? Procedural regularity, public accountability, codified rules, and accessible work product. Not all of those characteristics may be easily transferred to an entity in the intelligence community acting to protect national security. But neither are they inherently always in conflict with that role. That is especially true when the work of the government entity directly translates into concrete action that can affect the rights of U.S. persons. Intelligence gathering is different than taking action based on that intelligence.

The Second Circuit has similarly distinguished *Fikre* in a case that makes this last point even clearer. After the New York Police Department denied Joseph Srour a gun permit, he sued for injunctive, declaratory, and monetary relief, challenging the city’s permitting rules.²⁵⁷ The court partially ruled for the plaintiff, but before it could fully rule on the merits, the city-defendant defined a previously undefined term (a vague “good moral character” requirement) that was central to its permitting process and, when the plaintiff reapplied, granted the gun permit²⁵⁸. The city filed an interlocutory appeal and moved to dismiss the case as moot and vacate the lower court’s initial judgment after its definitional reform.²⁵⁹

The Second Circuit distinguished *Fikre*, focusing on a description of the watchlisting system (“it appears no statute or publicly promulgated regulation describes the standards” for adding or removing individuals from the watchlist) that—the main criticism of this article—subsequently played no role in the

255. *Id.*

256. *Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018) (internal quotation marks, ellipses, and citations omitted).

257. *Srour v. New York City*, 117 F.4th 72, 76 (2d Cir. 2024).

258. *Id.* at 76–77.

259. *Id.* at 76.

reasoning behind Justice Gorsuch's opinion.²⁶⁰ But to the Second Circuit, this was the central, *structural*, point:

The fact that the defendant ceased and declared it would not restart its challenged behavior are where the similarities between *Fikre* and this case begin and end. In *Fikre*, the government unilaterally took Fikre off the No Fly List. Here, Srour actively applied for a rifle and shotgun permit again. Once Srour re-applied for a permit, the City had legal obligations to him beyond his role as a litigant in this suit. It was required to process his application. And it was required to do so under the new regulations defining "good moral character" promulgated by the NYPD.²⁶¹

None of these requirements exist to constrain the TSC, which decides its rules in secret as well as when they will not apply. Nothing in the TSC's organization, structure, or supervision provides anything similar to the public, transparent regulations that govern New York's permit system. Indeed, to the extent that any such system exists, the DHS TRIP system's design shields the TSC (the actual decision-maker) from the public it affects.

The Second Circuit also noted a sequencing detail that distinguished *Srour* from *Fikre* in a key factual way: "Srour, not the City, initiated review of his new application, which was eventually granted in March of 2024."²⁶² In a footnote, the Court observed, "If the City, after being faced with this lawsuit and decision from the district court, unilaterally reversed its denial of Srour's original 2018 application and issued him a rifle and shotgun permit, his case might more closely resemble *Fikre*."²⁶³

This, too, connects with structural considerations. Fikre's efforts to reach TSC decision-makers through the screen of the DHS TRIP system met with failure for six years. Twice, opaque statements through the TRIP system revealed no change in his status, and no explanation for the conclusion that he was a "threat."²⁶⁴ As the Ninth Circuit noted, the government "refused to remove him from the No Fly List [in 2015]. Yet it did just that fourteen months later, without explanation or any announced change in policy. Fikre was taken off the list two months after briefing was completed on the government's motion to dismiss Fikre's lawsuit."²⁶⁵

The Second Circuit then turned to directly distinguish *Fikre*'s logic from its own conclusion that Srour's case was moot:

260. *Id.* at 84.

261. *Id.* (internal citations omitted).

262. *Id.*

263. *Id.* at 84 n.7.

264. *Fikre v. FBI*, 904 F.3d 1033, 1036 (9th Cir. 2018).

265. *Id.* at 1040.

Additionally, in *Fikre*, when faced with a policy governed by no public rules or regulations, the Supreme Court could not rely on the government's "sparse declaration" that Fikre would not be subject to impermissible placement on the No Fly List in the future. Here, we have a robust set of rules and regulations governing the granting and renewal of licenses. We know quite a bit, including the exact standards that changed between the denial of Srour's first application and the granting of his second, the fact that his renewal will generally be automatic, and the criteria under which his renewal would not be automatic. Moreover, unlike in *Fikre*, if Srour's renewal were to be denied in the future, he would be provided with the exact reasons as to the denial.²⁶⁶

The Second Circuit is a little too generous to the Supreme Court. Critique of the sparse declaration was not made contingent on the absence of public rules or regulations. The Court made no such connection. That it should have done so is the essential argument of this article.

The TSC's isolation from oversight is not limited to the lawbooks. There is no public relations office at the TSC, which "does not receive or respond to individual complaints directly."²⁶⁷ In fact, even its physical location is undisclosed by the government. The only reason it is known to operate in Vienna, Virginia, is because the constant droning of HVAC systems needed to cool its computers led to a spat with angry neighbors for violating local zoning ordinances.²⁶⁸

Although the building lacks any visible signs, newspaper accounts can now be confirmed using Google Maps because the Center's 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.²⁶⁹ 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 workday is hardly 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."²⁷⁰

266. *Srour v. New York City*, 117 F.4th 72, 84 (2d Cir. 2024) (internal citations omitted).

267. Privacy Act of 1974; System of Records, 76 Fed. Reg. 77846, 77850 (Dec. 14, 2011).

268. Tom Jackman, *Vienna Tormented by FBI Building's Non-Stop Buzz*, WASH. POST, June 21, 2012.

269. *An exclusive look inside the Terrorist Screening Center*, CNN POL. (Apr. 6, 2016), <https://www.cnn.com/videos/politics/2016/04/06/exclusive-interview-with-terrorist-screening-center-director-christopher-piehota-origwx-allee.cnn> [<https://perma.cc/459K-X82L>]. This paragraph and the following one, with minor changes, is taken from the author's Brief in Support of Plaintiffs-Appellees, at 23–27, *Elhady v. Kable*, Nos. 20-1119 & 20-1311 (4th Cir. June 2, 2020), Dkt. No. 43-1.

270. CNN POL., *supra* note 269, at 00:10.

Nor is the sculpture the only reminder. Once inside the building, these reminders continue. Director Piehota escorted his interviewer inside the building and showed CNN's audience the images his staff see each morning: a macabre museum of artifacts from past terrorist attacks. Again, his message was very clear. As he somberly observed standing in front of another piece of the wreckage from the World Trade Center, "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."²⁷¹ 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. The message to the employees passing these artifacts of intelligence failures seems clear: Do not err on the side of caution; do not interrogate too rigorously the judgments of those who send you names of people to be watchlisted. There will be no reward (and there is too much at risk) to question the reasons for adding someone who has been placed on the watchlist. The reasonable suspicion standard is meant to accord deference to the reasonable suspicion of FBI agents, not to provide an independent, neutral adjudication of their claims.

CONCLUSION

Courts whose role in the separation of powers is to decide cases and controversies declare themselves unable to proceed in watchlisting cases because unseen actors, ghosts in the government's watchlisting machine, assert that the claim that is the subject of judicial scrutiny has been rendered moot. This assertion is provided by yet another occult action: the TSC's secret conclusion, but neither its grounds nor anything else, is reported in a brief declaration that tends to be filed when the government has been unsuccessful in getting the case dismissed with other arguments. This can happen weeks after the complaint is filed, or months or years after the plaintiff has been stonewalled by government silence or conclusory responses.

This gamesmanship is just what the voluntary cessation exception to the mootness doctrine is supposed to prevent. Rendered by the Supreme Court in *FBI v. Fikre* as a referendum on the wording of the declaration alone, that exception is substantially weakened. A better approach is one that does not view the declaration in isolation, but considers its assurances alongside its silences about the nature of the decision-making process, the structure of the institution in which the real decision is made, and the impact—or absence—of statutory and regulatory regimes that can hold the decision-maker to its promises.

The TSC, from its creation to today, is an entity that is fundamentally premised on playing the central, decision-making role behind the screen of government agencies that shield it from scrutiny. It is the ghost in the government's watchlisting machine. Fortunately, such institutions are very rare in the federal government. But they are not unicorns.

271. *Id.* at 00:22.

Failure to establish a more substantial evaluation of the TSC's assurances, with a full understanding of the institutional context in which those assurances are being made, is dangerous. As its name change from Terrorist Screening Center to Threat Screening Center implies, watchlisting is a growth industry and the No Fly List merely an initial example of its power. According to a congressional inquiry to the agency heads that the TSC's watchlists support, portions of its work product are "distributed to other federal agencies, over 18,000 law enforcement agencies, over 500 private entities, and around 60 foreign governments."²⁷² Depending on the particular watchlist in question, the TSC may have a hand in restricting individuals' "air, land, and sea travel, as well as access to immigration benefits, financial services, employment, licenses, security clearances, and more."²⁷³

Even as far back as 2010, when the TSC PowerPoint slide that appears below (Figure 3) was created, that entity was dreaming big. The TSC leadership realized even before it changed its name that there was no logical reason why screening and watchlisting should stop at terrorism directed at civil aviation, or even limited to terrorism as a national security threat. The limits were, and are, only one's imagination.

Fig. 3. The Future According to the Terrorist Screening Center



272. Letter from Senator Elizabeth Warren, Senator Bernie Sanders, Congressman André Carson and Congresswoman Katie Porter to Att'y Gen. Merrick Garland, Dir. [sic] Alejandro Mayorkas, Dir. Christopher Wray, Under Sec'y Ken Wainstein, Comm'r Troy Miller, Adm'r David Pekoske, Dir. Avril Haines, and Dir. Christine Abizaid 2 (Dec. 20, 2023), <https://www.warren.senate.gov/imo/media/doc/2023.12.20%20Terrorism%20Watchlist%20Letter.pdf> [<https://perma.cc/KLW9-78KQ>].

273. *Id.* at 2–3.

Following after *FBI v. Fikre*, but not following its approach, both the Second Circuit Court of Appeals and the District Court for the Eastern District of California have shown that inquiry into the structural details of the relevant government actor is both possible and useful in assessing claims of mootness. In examining the declaration that seeks to assure the court that the challenged action cannot “reasonably be expected to recur,” it is entirely reasonable to examine the institutional context from which the declarant comes.

For plaintiffs like Yonas Fikre and the A to Z of litigants who have made similar allegations only to be denied the opportunity to prove them in court, such scrutiny makes all the difference. For agencies like the FBI, rendering the mootness tool harder to wield will, if Fikre and others are to be believed, bring greater accountability. And for entities like the TSC, such a change need not spell the end of their watchlisting world. The core of its mission—consolidating, systematizing, and sharing intelligence about national security threats across the federal government—will not be affected by a requirement that when its lists turn into action against U.S. persons who then challenge that decision, the ghost comes out of its machine.

Appendix A. Abbreviated Timeline of Fikre District Court Litigation

May 30, 2013	Initial Complaint FBI agents in Sudan notify Fikre he is on the No Fly List in 2010	
Nov. 4, 2013		Motion to Dismiss
Jan. 23, 2014	DHS TRIP Letter “No changes or corrections are warranted”	
June 27, 2014		2d Amended Complaint²⁷⁴
Aug. 8, 2014		Motion to Dismiss
Jan. 14, 2015		Order re New DHS TRIP Procedures²⁷⁵
Mar. 16, 2015	Joint Status Report “He is (and, after completion of the renewed DHS TRIP process, remains) on the No Fly List.”	
Apr. 6, 2015		4th Amended Complaint
May 22, 2015		Motion to Dismiss
Nov. 29, 2015		5th Amended Complaint²⁷⁶
Jan. 21, 2016		Motion to Dismiss
May 9, 2016	Gov’t Notice Regarding Pl.’s Status “Plaintiff has been removed from the No Fly List.”	
Oct. 24, 2016		Dist. Ct. dismisses case
Jan. 10, 2019		Ninth Circuit remands

274. This amended complaint resulted from Judge Brown’s opinion and order dismissing one claim with prejudice for failing to meet pleading requirements and dismissed several others without prejudice and with leave to amend. Opinion and Order, *Fikre v. FBI*, No. 3:13-cv-00899 (D. Or. May 29, 2014), Dkt. No. 36.

275. Judge Brown, noting “this case is now over 18 months old and has not yet proceeded beyond the pleading stage,” extended time to allow for substantive reconsideration of Fikre’s DHS TRIP inquiry consistent with new procedures emerging from her oversight in *Latif v. Holder*. She ordered a joint status report on the results due March 16, 2015. Order, *Fikre*, No. 3:13-cv-00899 (D. Or. Jan. 14, 2015), Dkt. No. 57.

276. This amended complaint resulted from Judge Brown’s opinion and order dismissing some, but not all, of Fikre’s claims and granting leave to amend others. Opinion and Order, *Fikre*, No. 3:13-cv-00899 (D. Or. Nov. 4, 2015), Dkt. No. 81.

June 19, 2019	Courtright Declaration “He will not be placed on the No Fly List in the future based on the currently available information.”	Motion to Dismiss
Jan. 22, 2020		Sealed Motion to Dismiss
Aug. 12, 2020		Dist. Ct. dismisses case
May 31, 2022		Ninth Circuit remands

Appendix B. Letter to Yonas Fikre from DHS TRIP, January 23, 2014

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U.S. Department of Homeland Security
Traveler Redress Inquiry Program (TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901



**Homeland
Security**

January 23, 2014

Mr. Yonas Fikre
Co Advokat Hans Bredberg
Norlandsgaten 12, Third Floor
Stockholm
Sweden

Redress Control Number: 2184463

Dear Mr. Yonas Fikre:

Thank you for submitting your Traveler Inquiry Form and identity documentation to the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP). DHS's mission is to lead the unified national effort to secure the country, including U.S. border and transportation security. We take requests for redress seriously, and we understand the inconveniences that additional inspections may cause. DHS strives to process travelers in the most efficient and professional manner possible without compromising our mission to safeguard the United States, its people, and its visitors.

In response to your request, we have conducted a review of any applicable records in consultation with other Federal agencies, as appropriate. It has been determined that no changes or corrections are warranted at this time.

If you feel that this decision is in error, you may file a request for administrative appeal with the Transportation Security Administration (TSA) by following the instructions in the enclosure, "How to Request an Appeal of an Initial Agency Decision." The information you submit should be as complete as possible and include accurate dates, complete addresses, names, and telephone numbers where appropriate.

This determination will become final 30 calendar days after you receive this letter unless you file a timely administrative appeal. Final determinations are reviewable by the United States Court of Appeals pursuant to 49 U.S.C. § 46110.

If you have any further questions, please contact DHS TRIP via e-mail at TRIP@dhs.gov, or write to the address found in the letterhead.

Sincerely,

Deborah O. Moore
Director
DHS Traveler Redress Inquiry Program
cc w/encl: Atty. Thomas Howard Nelson

Appendix C. Declaration of Christopher R. Courtright, June 19, 2019UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

YONAS FIKRE,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, *et al.*

Defendants.

Case No. 3:13-cv-00899-BR

DECLARATION OF CHRISTOPHER R. COURTRIGHT

I, Christopher R. Courtright, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am a Supervisory Special Agent with the Federal Bureau of Investigation (FBI) and the Associate Deputy Director for Operations of the Terrorist Screening Center (TSC). I became Associate Deputy Director for Operations at TSC in December 2015. I have been Acting Deputy Director for Operations of the TSC since June 10, 2019. I have been with the FBI since 2001 and have served in a variety of criminal investigative, counterterrorism, and management positions.

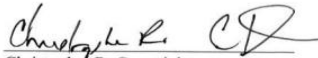
2. The matters stated herein are based on my personal knowledge and review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, FBI Special Agents, and other Government agency employees or contract employees acting in the course of their official duties.

3. The current policies and procedures regarding inclusion on the No Fly List are described in the Watchlisting Overview document, released by the U.S. Government in January 2018.

4. On May 6, 2016, TSC advised counsel for Defendants that Plaintiff had been removed from the No Fly List. Counsel for Defendants notified counsel for Plaintiff of this change on Friday, May 6, 2016.

5. Plaintiff was placed on the No Fly List in accordance with applicable policies and procedures. Plaintiff was removed from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly List. He will not be placed on the No Fly List in the future based on the currently available information.

Executed this 19th day of June 2019.


Christopher R. Courtright
Deputy Director for Operations, Acting
Terrorist Screening Center