

TRAPPED IN A BLACK BOX:

Growing Terrorism Watchlisting in Everyday Policing

Issued by:



Prepared by:

Civil Liberties and National Security Clinic, Yale Law School

April 2016

TABLE OF CONTENTS

Executive Summary	1
Key Findings.....	1
I. Background	3
II. New Data	5
III. Nominations	12
A. Historical Developments	13
B. Current Nomination Procedures and Criteria.....	16
IV. Encounters with Local Law Enforcement	21
A. The Encounter Process	22
B. Description of Handling Codes	24
V. Silent Hits	28
A. Criteria for Silent Hit Nominations.....	28
B. Expanding Use	29
C. Fewer Procedural Protections.....	31
VI. Redress	32
Conclusion	33
Acknowledgments	34

The cover was designed by Alice A. Wang and uses an image modified from a video by allDGoodNamesRtaken (https://www.youtube.com/watch?v=jVV5E5aK_r8), available under a Creative Commons Attribution license.

EXECUTIVE SUMMARY

In the last fifteen years, the U.S. government has drastically expanded a consolidated watchlisting system that includes hundreds of thousands of individuals based on secret evidence. Some parts of that system have drawn significant attention, including the No Fly List—composed of individuals who are barred from flying to, from, or over U.S. airspace—and, to a lesser extent, the Selectee List—composed of individuals who are subjected to additional screening and questioning every time they seek to board an airplane. Yet a key component of the watchlisting system has received far less scrutiny: the Known or Suspected Terrorist (KST) File, which is maintained by the FBI and is accessible to federal, state, and local law enforcement entities nationwide through the National Crime Information Center (NCIC).

The KST File is a successor to what was known until 2009 as the Violent Gangs and Terrorist Organizations File (VGTOF). Whereas VGTOF contained fewer than 10,000 terrorism-related entries in 2003, KST contains hundreds of thousands of entries today. To be sure, law enforcement agencies have a legitimate interest in coordinating efforts to locate people for whom arrest warrants are outstanding. Today, though, KST is part of a vast system of domestic surveillance of people whom law enforcement labels suspect based on vague and loose criteria, with serious constitutional and privacy implications for those who are included in the File. Such individuals may be stigmatized as potential terrorists and are vulnerable to increased law enforcement scrutiny, often without knowing that they are on a secret watchlist, and without a meaningful way to confirm or contest their inclusion.

The ACLU obtained information from the FBI about its VGTOF/KST File through a Freedom of Information Act (FOIA) request and subsequent lawsuit. Although much about the current size and operation of KST remains secret from the public, the more than 13,000 pages we now have, covering a five-year period from December 2003 to December 2008, offer key insights into the workings of this sprawling government database. Further information we analyze in this report came from another FOIA suit brought by the Electronic Privacy Information Center, inspector general reports, and the government's Watchlisting Guidance leaked to the media in August 2014.

This report presents an analysis of the most important findings from these documents and other resources, which raise serious concerns about the fairness, accuracy, and effectiveness of the KST File.

Key Findings

The number of individuals tracked by the VGTOF/KST File has increased exponentially. From just over 13,000 entries in 2003, VGTOF ballooned to 272,198 entries in 2008, and KST is

likely far larger today. Such dramatic growth does not reflect a commensurate increase in terrorist activity inside the United States during that time. In fact, terrorist activity in the United States since 2001 has been historically low and declining. Rather, the watchlist's growth appears to result from a combination of the FBI's decision to loosen the requirements for inclusion in the watchlist and the FBI's shift in focus from federal law enforcement to domestic intelligence gathering.

The documents raise serious questions about the accuracy of many of the records in the VGTOF/KST File. The FOIA documents indicate that the FBI long lacked sufficient safeguards for new entries to the File, increasing the risk that innocent individuals would be placed in it and retained there indefinitely. Although the process has become more centralized over time, the current system lacks adequate substantive oversight for existing entries and utilizes a low "reasonable suspicion" evidentiary standard that is subject to numerous exceptions.

The primary purpose of the VGTOF/KST File is not law enforcement, but the surveillance and tracking of individuals for indefinite periods. It would be legitimate for law enforcement to create a list of individuals for whom arrest warrants have been issued, but such individuals constitute a minuscule percentage of the overall number of records in the File. Police encounters with others in the File almost never result in arrest and are not intended to do so. Rather, the encountering officer is instructed to relay information about the watchlisted individual to the FBI without revealing to the individual that she has been watchlisted or that such information is being gathered or communicated. That information can include anything that the officer might glean during the encounter, such as vehicle information, travel plans and history, and the identities and other details of family members and companions.

The FBI and other government agencies use "silent hits" to track encounters with a watchlisted person without alerting frontline law enforcement officers. During such encounters, the FBI receives an automatic notification of the encounter, while the frontline officer's search of the individual's name and biometric information yields no indication of the individual's watchlisted status. FBI documents from 2009 showed that use of the "silent hit" system became increasingly widespread, and such routine use underscores that the KST File is principally a domestic intelligence-gathering tool, not a means of locating and apprehending criminals.

Redress for individuals who are erroneously placed in the KST File is essentially nonexistent. The FBI's longstanding policy is neither to confirm nor deny that an individual is on a terrorism watchlist. Unlike those on the No Fly List or the Selectee List, whose status on a watchlist becomes clear when they are prevented from boarding a flight or are continually subjected to additional screening, those in the KST File are unlikely to receive such de facto notice. Law enforcement officers who have access to the watchlist may learn that the government considers a person a terrorism suspect during traffic stops or in other contexts, but in

order not to alert individuals to the possibility of a pending investigation, the officers are instructed not to reveal to the individuals that they are on a terrorist watchlist. Even if, as often happens, individuals come to suspect that they have been placed in the KST File, the FBI has not instituted a process through which they can contest that placement and clear their names. The KST File is essentially a black box—an opaque and expanding accumulation of names.

* * *

Disseminating potentially erroneous, inaccurate, or outdated information on an ever-expanding population of watchlisted individuals to hundreds of thousands of law enforcement officers nationwide stigmatizes those individuals as potential terrorists and exposes them to a heightened risk of unwarranted scrutiny or investigation by police. Additionally, leaked documents show that American Muslim communities are disproportionately watchlisted, further eroding those communities' trust in law enforcement. Finally, a sprawling database with a low, exception-ridden standard for inclusion is not an effective one: in attempting to track so many individuals, law enforcement resources are diverted from actual security threats. Congress and the executive branch should institute much-needed reforms to address these concerns.

I. BACKGROUND

The VGTOF/KST File is part of a constellation of federal terrorism watchlists linked to the FBI's Terrorist Screening Database (TSDB). The TSDB contains sensitive but unclassified terrorist identity information such as names, dates of birth, photographs, iris scans, and fingerprints.¹ It was created in September 2003 by presidential directive with the goal of integrating several separate terrorist watchlists maintained by different agencies into one central repository.²

The entity within the FBI that is tasked with managing the TSDB is the Terrorist Screening Center (TSC). TSC is “the U.S. government’s consolidation point for known and suspected terrorist watchlist information, both foreign and domestic.”³ Names are added to the TSDB through the nomination process, which begins with a law enforcement or intelligence agency (see Figure 1). All nominations from these source agencies are sent to and reviewed by either the FBI or the National Counterterrorism Center (NCTC), a part of the Office of the

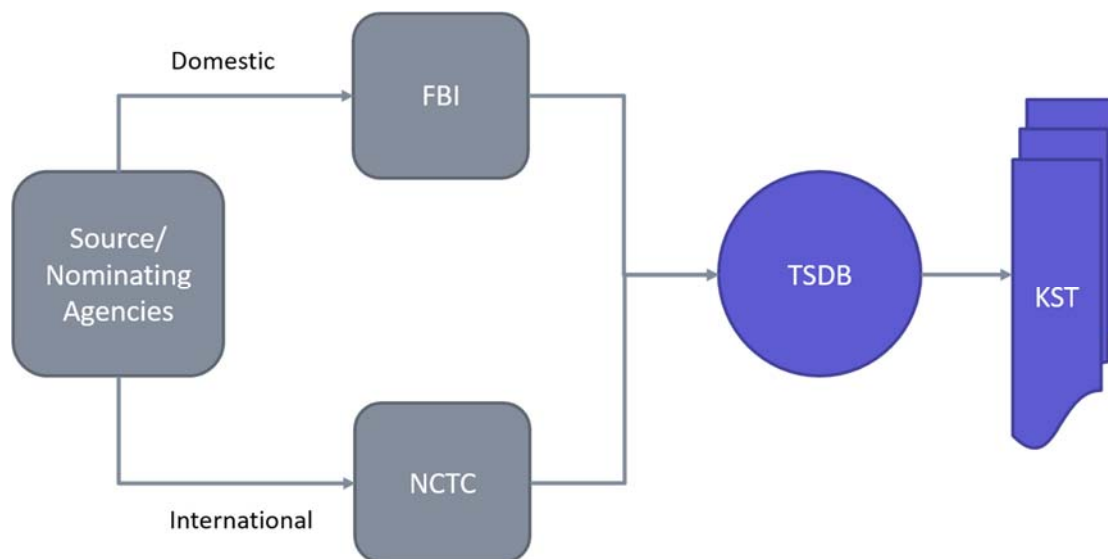
¹ Decl. Christopher M. Piehota at 2-3, *Am. Civil Liberties Union of Washington v. U.S. Dep’t of Justice*, No. C09-0642RSL (W.D. Wash. Mar. 24, 2011), ECF No. 46-1.

² *Id.* at 1-2.

³ Decl. David Hardy—Part 1 of 4, at 10, *ACLU of Washington v. U.S. Dep’t of Justice*, No. C09-0642RSL (W.D. Wash. June 18, 2010), ECF No. 39-2.

Director of National Intelligence, before being forwarded to the TSC for inclusion in the TSDB.⁴ Nominations of individuals suspected of involvement in domestic terrorism are reviewed by the FBI, and nominations of individuals suspected of involvement in international terrorism are reviewed by the NCTC.⁵

Figure 1. Terrorist Watchlist Nomination Process



Although the FBI is the reviewing agency for domestic terrorism nominations, it can also be the source agency for both domestic and international terrorism nominations. Such nominations begin when an FBI field office submits a nomination form to the Terrorist Review and Examination Unit (TREX), the FBI headquarters unit that processes watchlist nominations resulting from open FBI investigations.⁶ TREX reviews these nominations and sends domestic terrorism nominations directly to the TSC, while international terrorism nominations are forwarded to the NCTC.⁷ The NCTC processes these nominations into its own database, the Terrorist Identities Datamart Environment (TIDE), and then feeds the names to the TSC, which enters them into the TSDB as well.⁸

⁴ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT NO. 14-16, AUDIT OF THE FEDERAL BUREAU OF INVESTIGATION'S MANAGEMENT OF TERRORIST WATCHLIST NOMINATIONS (2014), at 1, 3 [hereinafter 2014 OIG REPORT].

⁵ *Id.* Domestic and international terrorism are distinguished primarily by whether the activities take place within the territorial jurisdiction of the United States. See *Definitions of Terrorism in the U.S. Code*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/investigate/terrorism/terrorism-definition> (last visited Jan. 5, 2016).

⁶ 2014 OIG REPORT, *supra* note 4, at 8.

⁷ *Id.* at 9.

⁸ *Id.* The TIDE database is prohibited from containing purely domestic terrorism information. *Id.*

Once a name has been entered into the TSDB, it is fed into other screening databases,⁹ such as the No Fly List (a list of individuals who are prevented from boarding a commercial aircraft for travel into or out of the United States or over U.S. airspace) and Selectee List (a list of individuals who are subjected to heightened screening at airports whenever they seek to board an airplane); the TSA's Secure Flight program (used to conduct pre-flight watchlist screening of passengers); the State Department's Consular Lookout and Support System (CLASS) (used to screen visa and passport applications); Customs and Border Protection's TECS Database, which customs officers use to screen individuals at points of entry;¹⁰ and VGTOF/ KST, which is accessible to law enforcement agencies across the United States through the National Crime Information Center (NCIC).¹¹ Information from the TSDB is also shared with more than a dozen other countries.¹²

As discussed further below, the criteria for nominations to the TSDB and to VGTOF/KST are vague, overbroad, and encompass innocent and First Amendment-protected conduct.

II. NEW DATA

The ACLU's FOIA litigation revealed the following information about VGTOF/KST File from 2003 to 2008:

- The total number of records in VGTOF/KST increased drastically from 2003 to 2008, undergoing a growth of nearly 2,000 percent. The total number of records continuously increased in this period except for one brief decline in late 2006.
- The vast majority of records were related to suspected international terrorism and were processed through the NCTC and the TSC.
- Military detainee entries and entries nominated by FBI legal attachés increased steadily from mid-2003 through the end of 2008.

⁹ *Id.*

¹⁰ *Id.* at 85-86.

¹¹ In August 2009, VGTOF was separated into the Gang File and the Known or Suspected Terrorist, or KST, file. *Id.* at 85. NCIC is a nationwide information system that provides the law enforcement community with information on various law enforcement data. *Id.* at 85 n.127.

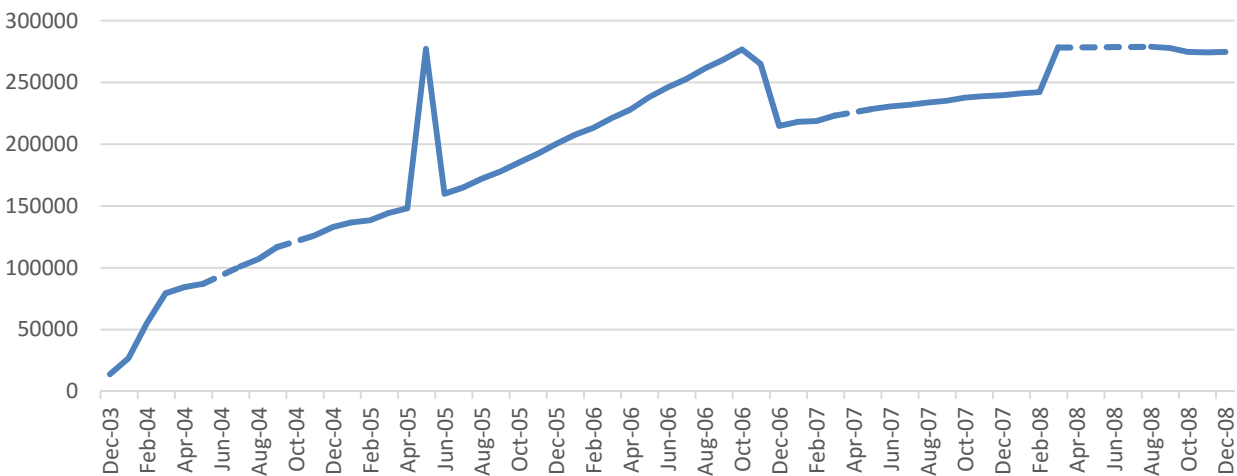
¹² OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SECURITY, NO. OIG-09-64, ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION (2009), at 16.

- Large fluctuations in the data suggest that there were problems with data management and prompt review. Furthermore, there were more than 2,500 faulty records labeled “Unable to Identify” from 2006 to 2007, most of which subsequently became identified as “Unknown”—meaning that the government did not know if the individual was suspected of domestic or international terrorism using its vague and over broad criteria.

Total VGTOF Records

The total number of records in the VGTOF database increased dramatically over the relevant period (see Figure 2). The total increased from under 13,054 records in December 2003 to 272,198 records by December 2008, an approximately 2,000 percent growth over only a five-year period. This number includes both regular and silent hit entries (described in Section V). Even by the most conservative estimate, this means an addition of 259,144 new records to the database in a period of five years—an average of 142 new records per day.

Figure 2. Total VGTOF Entries



In addition to the steady and high rate of increase, the total number of records was also characterized by large fluctuations. In May 2005, the total spiked to more than 270,000, only to decrease again to previous levels in the following month. This was likely the result of “VGTOF Refresh,” a major clean-up initiative which deleted 7,264 records, modified and updated 113,000 records, and added 12,474 records that had been previously rejected from the VGTOF database.¹³ It is unclear, however, how and why the number decreased again precipitously in the next month, June 2005.¹⁴

¹³ FED. BUREAU OF INVESTIGATION, FBI NOMINATIONS & VGTOF TRAINING (2008), No. NCIC-VGTOF-8345 [hereinafter FBI NOMINATIONS & VGTOF TRAINING].

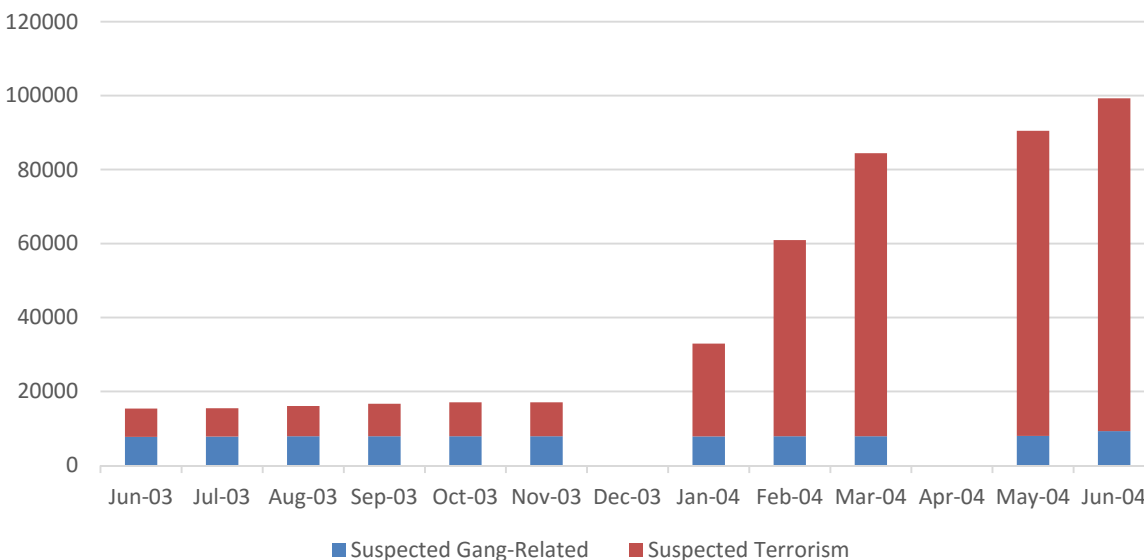
¹⁴ One change that occurred in June 2005 was that the TSDB was connected to the NCIC in near-real time. Prior to this change, the TSC only added, but did not modify or delete, records into the VGTOF database. *Id.* It is possible

These fluctuations in the number of total records in VGTOF suggest flaws in the data management. The addition or deletion of large numbers of records from the database indicates either that records were not inputted promptly and thus dumped into the system in bulk at a later date, or that a large number of records were not properly removed from VGTOF when they should have been, resulting in their wholesale removal later. This indicates the likely presence of false positives—individuals who should have been removed but whose records remained in the system—at any given time over this period.

Suspected Gang-Related versus Suspected Terrorism-Related Entries

From late 2003 to early 2004, the number of suspected terrorism entries underwent a dramatic increase, from over 9,000 to more than 50,000 (see Figure 3). This is especially notable when compared to the number of suspected gang entries, which remained steady over this period. The growth in suspected terrorism entries from December 2003 on is likely because of the establishment of the TSC, which began operating that month.¹⁵ Although VGTOF contained both suspected gang and terrorism information, these data show that the dramatic growth in the size of the database in the last decade is due to the expansion of the suspected terrorism records, which quickly outstripped the suspected gang-related records.

Figure 3. *Suspected Gang-Related versus Suspected Terrorism Entries*



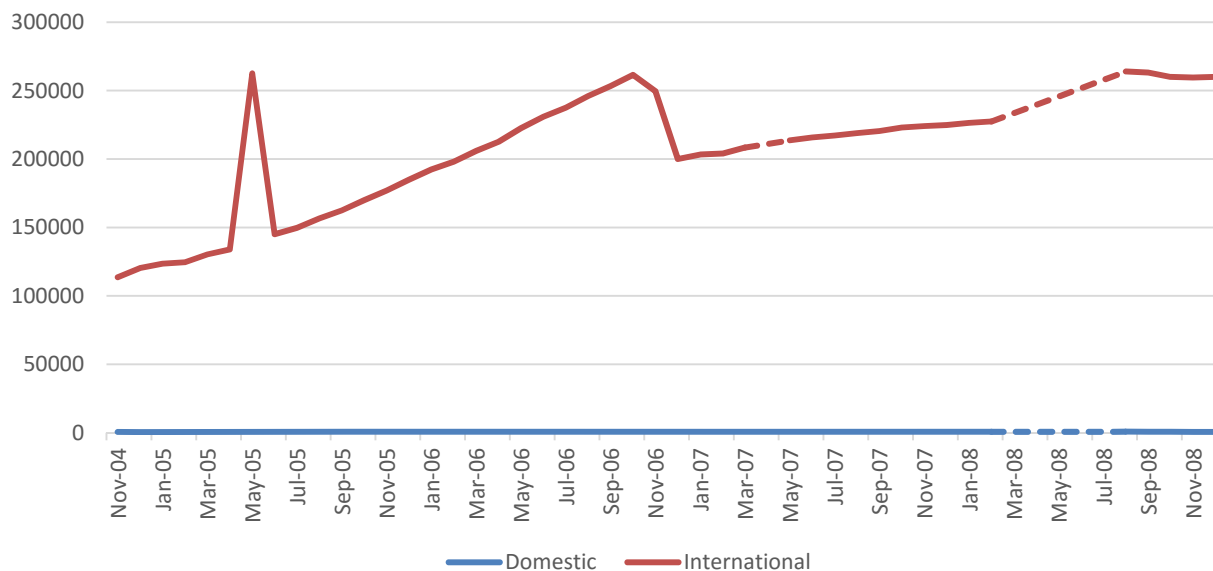
that this real-near-time connectivity allowed for some records to be deleted, but a roughly 130,000 reduction seems too high to be explained by this change.

¹⁵ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT NO. 05-27, REVIEW OF THE TERRORIST SCREENING CENTER (2005), at 39 [hereinafter 2005 OIG REPORT]. The first data point for TSC-entered data in the FOIA documents also appeared in December 2003.

Domestic versus International Entries

The number of international entries vastly outstripped the number of domestic entries. Domestic entries hovered steadily around 500 or 600 entries for the duration of the period from November 2004 to November 2008 (see Figure 4). Fluctuations in the total number of entries in the database seems to be attributable to variations in the number of international entries, as they follow the same pattern.

Figure 4. *Domestic versus International Entries*



Nominating or Processing Entities

The FBI’s records categorize entries as either TSC records or FBI Field Office records. The precise definitions for these categorizations are unclear, but the vast majority of VGTOF’s records were categorized as TSC records, while only a small number were categorized as FBI Field Office records. Thus, the growth of the total number of records in VGTOF closely tracked the growth of records from the TSC (see Figure 5).

The number of records categorized as having come from FBI Field Offices grew from below 2,000 in February 2003 to over 12,000 by August 2006, a six-fold increase (see Figure 6). This number underwent a dramatic change in August 2004, when it plummeted to double digits, where it stayed until it shot back up to approximately the previous levels in February 2006. The drastic reduction in August 2004 is the result of a change which rescinded FBI Field Offices’ ability to effect changes directly in the VGTOF database for suspected terrorism records.¹⁶ After that date, only TREX and TSC, along with limited entities within the FBI’s Criminal Justice

¹⁶ FBI NOMINATIONS & VGTOF TRAINING, No. NCIC-VGTOF-8345, *supra* note 13.

Information Services Division (CJIS), had the ability to add, modify, and delete terrorism records in the VGTOF database.¹⁷ It is unclear what prompted the dramatic increase in February 2006.

Figure 5. Regular¹⁸ Entries from TSC

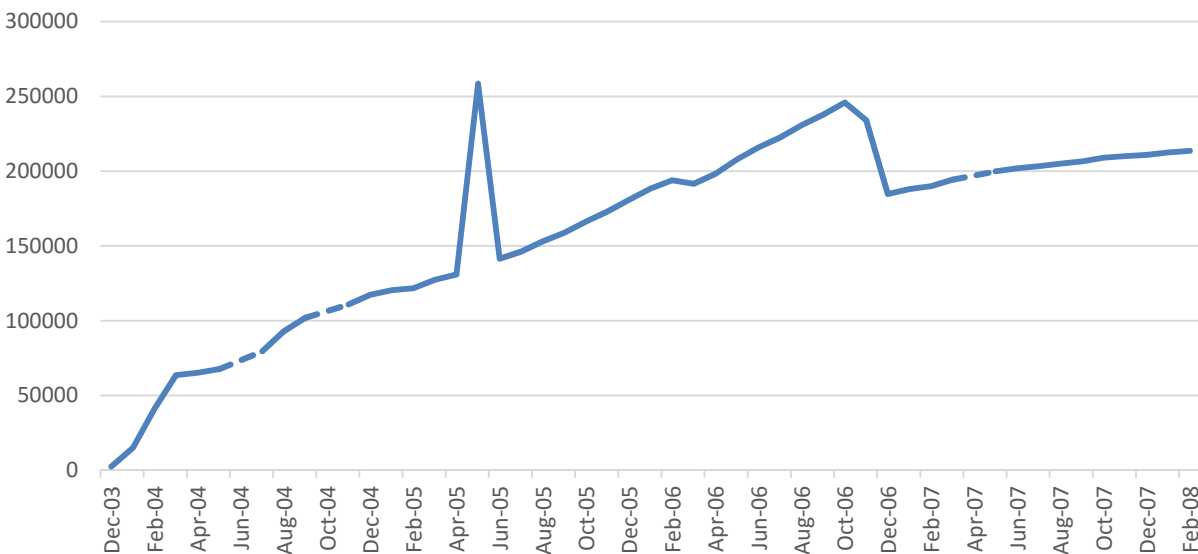
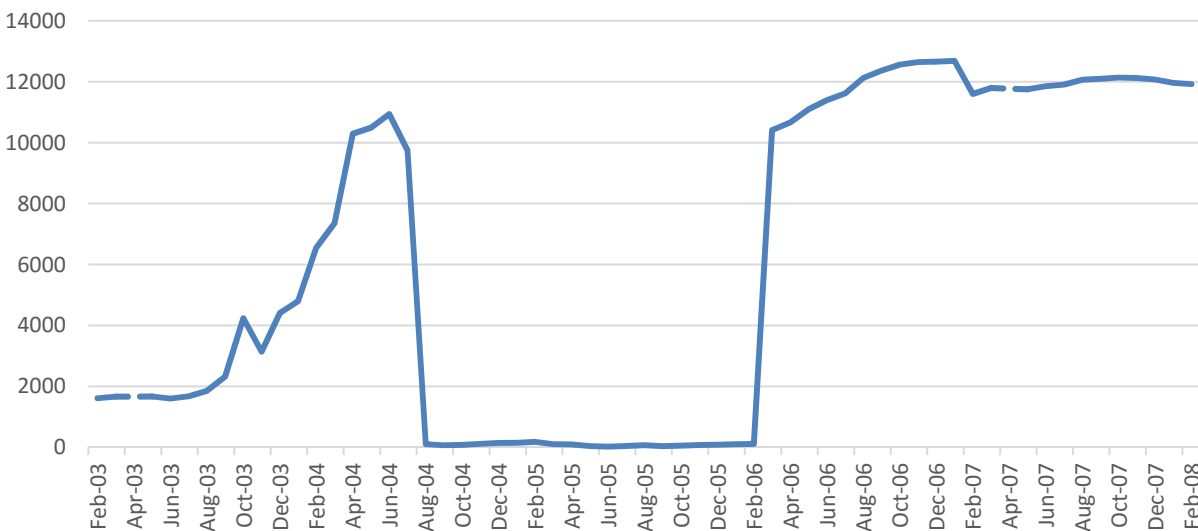


Figure 6. Regular Entries from Field Offices



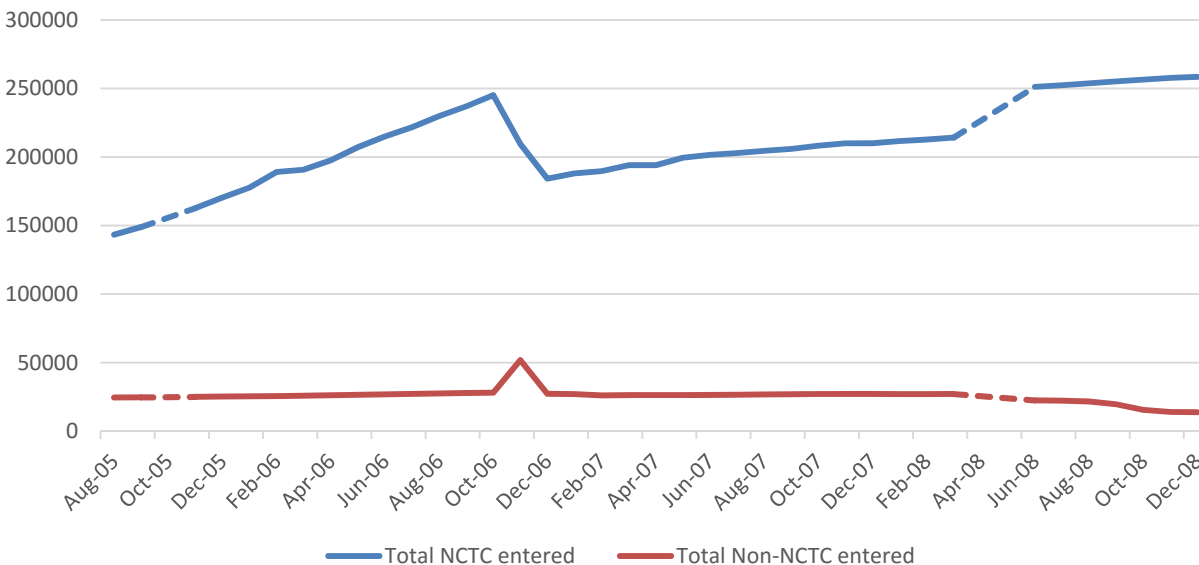
The data obtained through FOIA also reveal the number of records entered by the NCTC compared to other entities (see Figure 7). Throughout the FOIA period, the majority of records in VGTOF were entered by NCTC, and the proportion of NCTC-entered records grew over time.

¹⁷ *Id.*

¹⁸ “Regular” entries do not include silent hit entries, which are discussed below in Section V.

From August 2005 to December 2008, 85 to 95 percent of all international records were entered by NCTC. This percentage increased over time, likely as the result of NCTC consolidating its status as the main unit for processing international entries.¹⁹

Figure 7. NCTC-Entered versus Non-NCTC-Entered Entries



Military Detainees and Legal Attachés

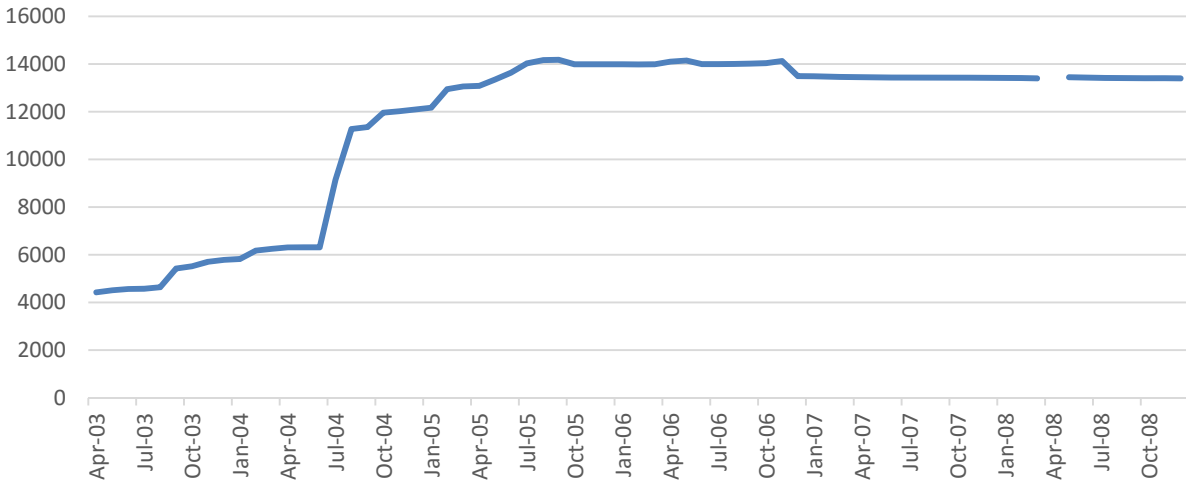
During the period covered by the FOIA request, the VGTOF database also contained entries of U.S. military detainees and individuals nominated by FBI legal attachés. U.S. military detainees included individuals who were detained in Afghanistan, Guantanamo Bay, Pakistan, and Iraq. The FBI began collecting detainees’ fingerprints in Afghanistan in 2002.²⁰ For these military detainee records, the Department of Defense (DOD), rather than the FBI, made the determination that the individuals were suspected terrorists based on its own criteria, and DOD was considered the nominating agency.²¹ After increasing steadily from mid-2003 to mid-2005, the number of military detainee entries stabilized at around 14,000 (see Figure 8).

¹⁹ For example, TREX previously had a practice of directly creating entries for suspected international terrorists in VGTOF but ceased this practice in May 2008, instead sending the entries to the NCTC. Communication from Nat’l Sec. Branch to Counterterrorism, Re: Priority FBI IT Nominations Terrorist Screening Center (May 5, 2008), No. NCIC-VGTOF-10894; see OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT No. 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (2007), at 18-19 [hereinafter 2007 OIG REPORT].

²⁰ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT No. 09-25, THE FEDERAL BUREAU OF INVESTIGATION’S TERRORIST WATCHLIST NOMINATION PRACTICES (2009), at xx [hereinafter 2009 OIG REPORT].

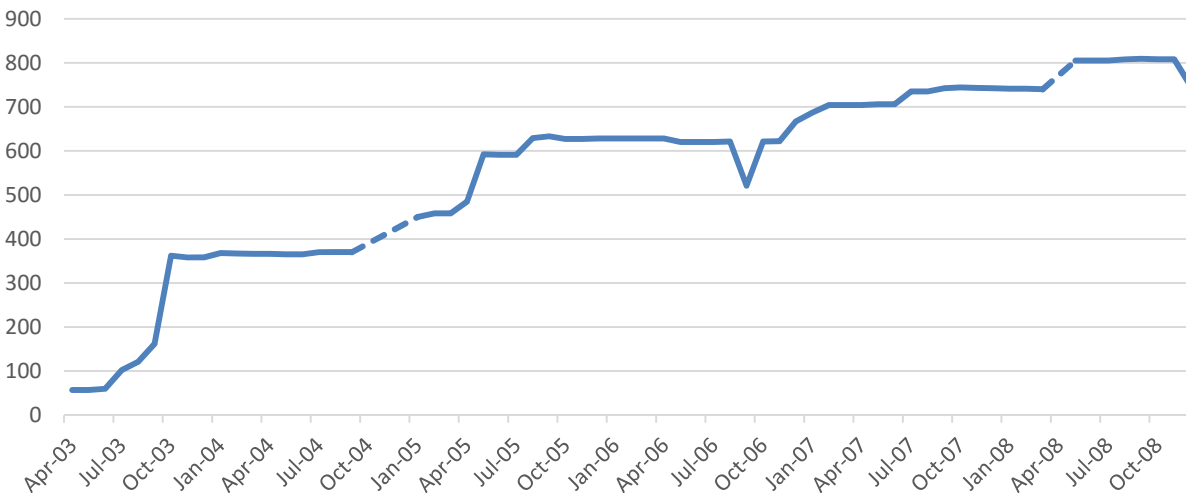
²¹ *Id.* By October 2008, the Department of Defense assumed responsibility for directly nominating detainees to the watchlist via the standard channels, rather than submitting them indirectly through the FBI’s Criminal Justice Information Services (CJIS) Division. *Id.* at xxi.

Figure 8. Military Detainee Entries



Legal attachés are representatives of the FBI in foreign countries whose primary mission is to maintain relationships with the foreign country’s principal law enforcement agencies.²² Entries resulting from nominations by FBI legal attachés increased steadily over the period from mid-2003 through late 2008, from fewer than 60 to over 800 records (see Figure 9). In general, the number of locations from which such entries originated also increased over this time period. In its 2009 review, the Office of the Inspector General raised concerns that many legal attaché entries had limited or no derogatory information supporting them and the FBI often conducted little or no independent analysis of the entries before forwarding them to the NCTC.²³

Figure 9. Legal Attaché Entries



²² *Testimony*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/news/testimony/the-fbi2019s-legal-attache-program> (last visited Jan. 5, 2016).

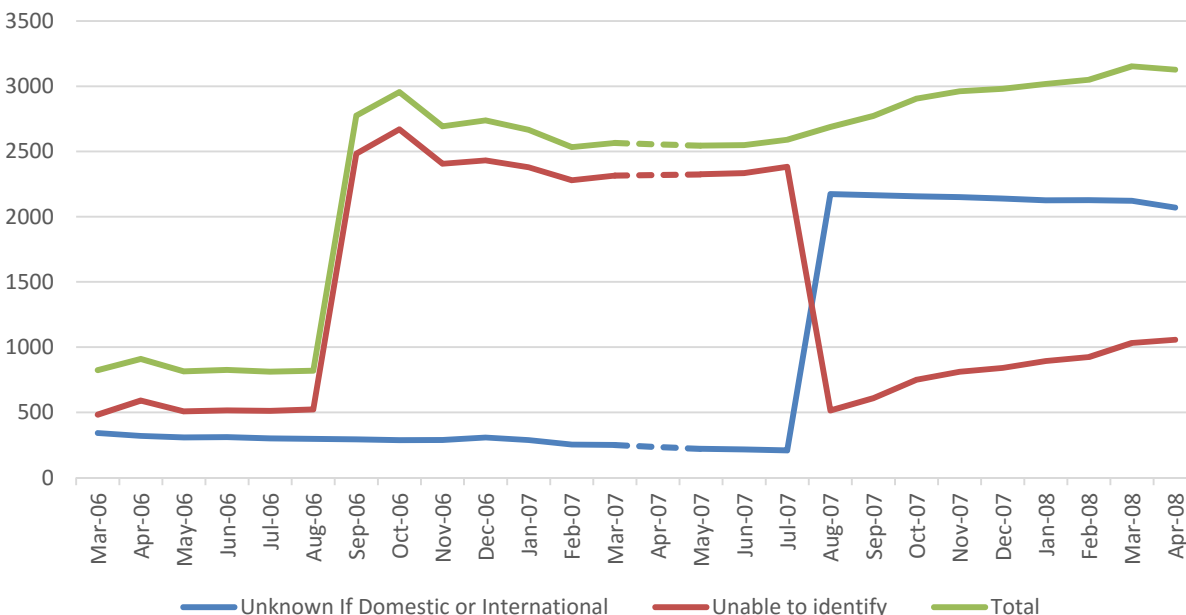
²³ 2009 OIG REPORT, *supra* note 20, at xxii.

Unknown and Unidentifiable Records

Sets of records labeled as “Unknown” and “Unidentifiable” illustrate the extent to which the VGTOF database potentially contains flawed records. “Unknown” non-silent hit records are those that are not coded as domestic or international because that information is unknown. Another classification is “Unable to Identify,” the meaning of which is unclear from the documents.

The number of “Unable to Identify” records, initially in the hundreds in early 2006, increased more than tenfold in August 2006, hitting a peak of more than 2,500 records (see Figure 10). In August 2007, it appears that nearly 2,000 records were moved from the “Unable to Identify” category to the “Unknown” category. It is unclear how and why this change occurred, and whether and how the missing information was recovered for these categories to make them qualify for the “Unknown” category. In any case, these data show that at any time from mid-2006 to mid-2008, between 2,000 and 3,000 records were incomplete and potentially faulty entries.

Figure 10. Unknown VGTOF Records



III. NOMINATIONS

Information obtained from the ACLU’s FOIA litigation, along with publically available documents and reviews from the U.S. Department of Justice’s Office of the Inspector General,

yielded the following conclusions on how the nomination and removal processes have developed over time.

- The procedure for nominating names for VGTOF/KST has become more centralized over time.
- In the meantime, the criteria for inclusion in the watchlist have become less concrete and less specific.
- What has been revealed regarding current practices suggests haphazard applications of vague standards to a variety of entries without regular oversight. During the initial nomination and review process, it is likely that some entries that did not meet the threshold nomination criteria were nevertheless entered into the watchlist.

A. Historical Developments

VGTOF – Early Process (1990s-2004)

The VGTOF database became operational as a file within the NCIC in 1995.²⁴ Prior to the September 11 attacks, the database had never been used for counterterrorism purposes,²⁵ although it contained nomination procedures for both suspected gang members and terrorism suspects alike. Documents governing the use of the file during that period suggest that any originating agency, be it a local law enforcement agency or an FBI office, could make either type of entry.²⁶ Under this system, the originating officer could enter two types of information into VGTOF: group entries (entries of suspected gang or terrorist organizations) and individual member entries (which would be tied to a gang or terrorist organization).²⁷

The NCIC Operating Manual for this period defined terrorist organizations as organizations that use force or violence in patterns of conduct with an aim to “intimidate or coerce a government, civilian population, or segment thereof, in furtherance of political or social objectives.”²⁸ The Manual also specified that terrorist group entries should be “the smallest

²⁴ Communication from Assistant Dir., FBI Criminal Investigative Div., to Special Agents in Charge and Legal Attachés (Mar. 25, 1996), No. NCIC-VGTOF-11653.

²⁵ Statement of Michael Kirkpatrick, Assistant Dir., FBI CJIS Div., CJIS Advisory Policy Board Minutes (June 5-6, 2002), No. NCIC-VGTOF-4269.

²⁶ NCIC 2000 Violent Gang and Terrorist Organization File (VGTOF) (Dec. 1999), at 3, 9. It does not appear there were any restrictions for what kinds of originating agencies can input entries, as long as the entry contains all the mandatory fields (header, message key, ORI identifier, group name, subgroup name, and point of contact). Many additional fields are “free text” and can include miscellaneous information. *Id.* at 4-5.

²⁷ *Id.* at 1.

²⁸ NCIC 2000 Operating Manual: Violent Gang and Terrorist Organization (VGTOF) File (Dec. 1999) ¶ 1.2.

identifiable segment, cell, or division which has been documented to be engaged or preparing to engage in qualifying terrorist activity.”²⁹

For individual member entries, the NCIC Manual provided the same criteria for suspected terrorists and suspected gang members: the individual either must have admitted to membership at the time of arrest or incarceration, or must satisfy two items on a composite list of indicators, including identification by a third party (either proven reliable or corroborated), observation by the originating law enforcement officer that the individual frequents the area near or associates with a group or affects the attire or markings of the group, or admission *after* arrest or incarceration that the individual is a member.³⁰ The individual entries could also contain caution and medical codes such as “Armed and Dangerous,” “Violent Tendencies,” and “Heart Condition.”³¹

Until at least July 2003, it appears that local law enforcement may have been able to enter information into VGTOF; the FOIA production revealed records labeled “Local Law Enforcement” entries, although it appears that they may only have been able to enter gang-related records, not terrorism-related records.³² Even after a policy change requiring all information to be input by the TSC, state and local law enforcement officers could submit names for nomination to local FBI Joint Terrorism Task Force centers, which then transmitted the nominations to FBI Headquarters for review.³³ Because records could remain in the database for years, some of the locally nominated names may have remained in the database long after the FBI phased out local officials’ nominating capabilities.³⁴

Centralization within FBI Headquarters (2004-2008)

The VGTOF nomination procedure became more centralized in August 2004, when the FBI eliminated field offices’ ability to add names to the VGTOF database directly.³⁵ Instead,

²⁹ *Id.* ¶ 1.3.

³⁰ *Id.* ¶ 9.2.

³¹ *Id.* ¶ 10.6. It is not clear if and how these supplemental identifiers are regulated; the manual only lists logistical procedures for entry, not substantive criteria.

³² See VGTOF Totals as of 7/31/2003, No. NCIC-VGTOF-8212. These “Local Law Enforcement Entries” were separate from, and appeared alongside, “FBI Field Office Entries.” However, the data contained disclaimers stating, “Local law enforcement has not entered any Terrorist subject records—CTAs have entered some test records and this count also includes records entered by Legats.” *Id.* In July 2003, 107 terrorism-related records are labeled “Local Law Enforcement Entries,” the only month for which a positive number appears (the number in June 2003 was zero and the category ceased appearing after July 2003). *Id.*

³³ Communication from CJIS Programs Dev. Section/Glob. Initiatives Unit to CJIS and Counterterrorism, Re: National Crime Information Center Technical and Operational Update (Nov. 7, 2005), No. NCIC-VGTOF-6886.

³⁴ For example, at the time of the policy change rescinding FBI local office entry powers, the record owners conducted “no type of qualify [sic] review.” FBI NOMINATIONS & VGTOF TRAINING, No. NCIC-VGTOF-8345, *supra* note 13.

³⁵ *Id.*

only TREX, the TSC, and some entities within the FBI's Criminal Justice Information Services (CJIS) Division could make entries in VGTOF.³⁶ FBI field offices and legal attachés could submit names to the TREX office, but they could not create new records or alter existing records directly. For domestic terrorism entries, TREX sent the nominations it received to the TSC directly for inclusion in the TSDB; for international entries, TREX entered the information into VGTOF directly and then submitted the nomination to the NCTC, which entered it into TIDE, which in turn fed the record into the TSDB.³⁷ Once included in the TSDB, domestic entries were electronically distributed to downstream screening databases, including VGTOF.³⁸ Because international entries were already entered into VGTOF by TREX, the TSC did not export the record it received from TIDE to VGTOF.³⁹

FBI Headquarters' newly centralized control over the nomination process also marked the end of concrete, specific criteria for nominations. In the NCIC 2000 Operating Manual, the government's criteria for nominations included a specific list of behaviors it identified as indicating terrorist association or activity.⁴⁰ By early 2005, the list had expanded to encompass vague, broad criteria such as "Terrorist acting alone" and "Subject is suspected or believed to be associated with terrorism or a terrorist organization."⁴¹ By late 2005, the group entry criteria were deleted entirely from the operating procedures for VGTOF terrorism entries.⁴² By mid-2006, individual entry criteria too appeared to fall away, giving way to a generalized standard: nominees to the TSDB needed only to "demonstrate a nexus to terrorism, or [be the subject of]

³⁶ *Id.*

³⁷ 2007 OIG REPORT, *supra* note 19, at 18.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ NCIC 2000 Operating Manual: Violent Gang and Terrorist Organization (VGTOF) File (Dec. 1999) ¶ 9.2.

⁴¹ Operator's Lesson Plan: Violent Gang and Terrorist Organization File (Feb. 2005), at 209. The new criteria required two of the following:

- a. Admitted membership in a gang or terrorist organization at the time of his/her arrest or incarceration;
- b. Has been identified by an individual of proven reliability as a group member;
- c. Has been identified by an individual of unknown reliability as a group member and that information has been corroborated in significant respects;
- d. Has been observed by members of the entering agency to frequent a known group's area, associate with known group members and/or affect that group's style of dress, tattoos, hand signals, or symbols;
- e. Has been arrested on more than one occasion with known group members for offenses consistent with group activity;
- f. Has admitted membership in the identified group at any time other than arrest or incarceration.
- g. Terrorist acting alone.
- h. Subject is suspected or believed to be associated with terrorism or a terrorist organization.

Id. Note that (g) and (h) were new and expanded the breadth of the criteria.

⁴² Communication from CJIS Programs Dev. Section/Glob. Initiatives Unit to CJIS and Counterterrorism, Re: National Crime Information Center Technical and Operational Update (Nov. 7, 2005), No. NCIC-VGTOF-6886 to NCIC-VGTOF-6890.

an active investigation to ascertain whether a nexus to terrorism exists.”⁴³ Some handling codes required “reasonable, articulable suspicion of criminal domestic or international terrorism activity,” but others did not.⁴⁴ This ambiguity, and the low threshold for nomination, exacerbate concerns that the criteria led to the inclusion of entries that should not have been included.

TSC Control, Dissolution of VGTOF, and Creation of the KST (2008-2009)

The move towards a centralized nominations process with broad entry criteria continued. Although the TSC had been formally designated as the central watchlisting agency in 2003,⁴⁵ some significant gaps remained in the process prior to 2008. For example, TREX had an informal practice of entering international terrorist names directly into VGTOF and then forwarding them to NCTC, thus circumventing NCTC review.⁴⁶ In September 2007, the Office of the Inspector General recommended that TREX stop directly creating VGTOF records for international terrorist nominations before sending them to the NCTC,⁴⁷ TREX ultimately implemented this recommendation in May 2008.⁴⁸

By August 2009, the FBI had split VGTOF into two new, standalone files: the Gang file and the Known or Suspected Terrorist (KST) file, which both remain accessible through NCIC.⁴⁹ The KST file followed the same nomination process as had terrorism-related entries in VGTOF: the TSC is the central body with final decision-making power over whether to include nomination subjects into the TSDB, and the TSDB then populates the KST and other downstream databases.⁵⁰

B. Current Nomination Procedures and Criteria

As outlined in Section I, the current process for source agencies to nominate new entries is as follows:

⁴³ STANDARD OPERATING PROCEDURES: NOMINATION PROCESS, TERRORIST SCREENING CENTER NOMINATIONS AND DATA INTEGRITY UNIT (Aug. 2, 2006), No. NCIC-VGTOF-8373.

⁴⁴ *Id.*, No. NCIC-VGTOF-8374.

⁴⁵ 2014 OIG REPORT, *supra* note 4, at 18 n.44.

⁴⁶ 2007 OIG REPORT, *supra* note 19, at 18-19.

⁴⁷ *Id.*

⁴⁸ Communication from Nat'l Sec. Branch to Counterterrorism, Re: Priority FBI IT Nominations Terrorist Screening Center (May 5, 2008), No. NCIC-VGTOF-10894.

⁴⁹ NCIC 2000 Operating Manual Issued in 1999 with Technical and Operational Updates (TOU) Incorporated – Known or Appropriately Suspected Terrorists (KST) File (Aug. 2, 2009), No. NCIC-VGTOF-707 [hereinafter 2009 NCIC Operating Manual]. KST was fully implemented much later, in June 2011. 2014 OIG REPORT, *supra* note 4, at 36.

⁵⁰ 2014 OIG REPORT, *supra* note 4, at 8.

- 1) The source agency submits names to either the FBI (domestic terrorism) or the NCTC (international terrorism).⁵¹
- 2) The FBI or the NCTC reviews the nominations.⁵²
- 3) The FBI or the NCTC submits approved names to the TSC for inclusion in the TSDB.⁵³
- 4) The TSC exports the TSDB entries to downstream databases, including KST (formerly VGTOF).⁵⁴

For entries that originate with an FBI field office, the nomination process is as follows:

- 1) The FBI field office submits domestic and international nominations to TREX.⁵⁵
- 2) TREX “Technical Information Specialists” review the nominations.⁵⁶
- 3) TREX sends domestic nominations to the TSC and international nominations to the NCTC.⁵⁷
- 4) The NCTC enters the approved names into the TIDE database, which is then exported to the TSC.⁵⁸
- 5) The TSC conducts a final review and imports all approved entries to the TSDB.⁵⁹
- 6) The TSDB entries then flow to downstream databases, including KST (formerly VGTOF).⁶⁰

Nominations for inclusion in the TSDB (and therefore in KST) must meet a “reasonable suspicion” standard based on “articulable intelligence or information which, based on the totality of the facts . . . reasonably warrants a determination that the subject is known or is suspected to be (or has been) knowingly engaged in conduct constituting, in preparation for, in aid of, or related to, terrorism or terrorist activities.”⁶¹ However, nominating agencies are instructed to establish their own processes for ensuring the quality and accuracy of the nominations, and it is not clear how consistent or meaningful those agencies’ quality control is.⁶² No entity ensures that

⁵¹ *Id.* at 1, 3.

⁵² *Id.* at 3.

⁵³ *Id.*

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.*

⁵⁷ *Id.* at 9.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 7. The government’s leaked 2013 Watchlisting Guidance defined terrorism and terrorist activities as “violent acts or acts dangerous to life, property, or infrastructure” in violation of U.S. law and appear to be intended to “intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or, to affect the conduct of a government by mass destruction, assassination, kidnapping, and hostage-taking.” WATCHLISTING GUIDANCE (Mar. 2013) ¶ 1.14 [hereinafter 2013 WATCHLISTING GUIDANCE].

⁶² 2013 WATCHLISTING GUIDANCE ¶¶ 1.43, 1.45. The Guidance states that “[e]ach NOMINATING AGENCY should implement processes designed to ensure that nominations are free from errors, that recalled or revised information is reviewed regularly, and that necessary corrections to nominations based on those revisions/retractions

the “reasonable suspicion” standard is consistently applied by nominating officers or analysts. As explained in greater detail below, the reasonable suspicion standard is deeply problematic for numerous reasons, including that it permits the use of uncorroborated or questionably reliable information, necessarily entails a significant risk of error, and makes it likely that individuals will be nominated for, and included in, the TSDB and KST based on conduct that is innocent or protected under the First Amendment.

It is not clear what, if any, guidelines govern the nominations of source agencies other than the FBI. According to a 2014 OIG report, however, three categories of individuals can be nominated by the FBI for inclusion in the KST File: 1) subjects of full investigations, 2) subjects of preliminary investigations, and 3) non-investigative subjects.⁶³

Full investigations are authorized when there are “specific and articulable facts giving reason to believe that a criminal activity or a threat to national security may exist.”⁶⁴ Subjects of full investigations are presumed to meet the “reasonable suspicion” standard because of the FBI’s internal criteria for expanding a preliminary investigation to a full investigation.⁶⁵

Preliminary investigations are authorized when “there exists any allegation or information indicative of possible criminal activity or threats to the national security.”⁶⁶ Thus, the FBI initiates a preliminary investigation when it does not have enough evidence to meet the standard for a full investigation, and yet it may nevertheless nominate individuals under preliminary investigation for inclusion in the watchlist. Indeed, subjects of preliminary investigations may not meet the reasonable suspicion standard for watchlisting.⁶⁷ As with the watchlisting criteria, the FBI’s guidelines for preliminary investigations are vague and overbroad, permitting intrusive investigations of people for lengthy periods even when the government does not have facts to meet its own low “reasonable indication” standard for showing that anyone has violated the law.

A third type of nomination, the “non-investigative subject nomination,” allows for the nomination of individuals who are not the subjects of an open FBI investigation. Although the specific criteria for who may be nominated as non-investigative subjects are unclear,⁶⁸ these

are made. NOMINATING AGENCIES should, to the extent possible given the nature of the reporting, verify the accuracy and reliability of the information included in nominations.” *Id.* at ¶ 1.43.

⁶³ 2014 OIG REPORT, *supra* note 4, at 33. FBI field offices generally sort terrorism cases into three categories for action: assessments, preliminary investigations, and full investigations. “Assessment” subjects generally are not forwarded for nomination to terrorist watchlists. *Id.* at 7-8.

⁶⁴ *Id.* at 7.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ There are three criteria, but they are redacted in the 2004 OIG Report. *Id.* at 66.

nominations could include names that the FBI receives from foreign governments through legal attachés or from other agencies, such as the Drug Enforcement Administration (DEA).⁶⁹ One document from the FOIA production describes non-investigative subject nominations by FBI Headquarters as “individuals [who] are ‘on the radar’ but are not currently under investigation.”⁷⁰ A 2009 OIG report found that the review process for such nominations is “weak or nonexistent.”⁷¹ Similarly, a 2014 OIG report found that the FBI could not “readily provide an accurate accounting of the actions that were taken regarding the watchlisting of non-investigative subjects.”⁷² As the foregoing analysis makes clear, the FBI’s watchlisting practices for non-investigative subjects are ripe for abuse and permit the inclusion of names submitted by foreign governments (which may have their own reasons for seeking to watchlist dissidents and opponents) under standards that fall short of the FBI’s already low threshold for nomination.

The FBI’s use of the “reasonable suspicion” standard is problematic for numerous reasons:

- First, reasonable suspicion, as used here, is a very low standard that can be met with uncorroborated or even questionably reliable information and, on its face, does not require that it be more probable than not that an individual is involved in terrorism-related activities. Such a low threshold for nomination injects a significant risk of error into the nomination process and makes it likely that individuals will be nominated for, and included in, the TSDB and KST based on conduct that is innocent or protected under the First Amendment. The 2013 Watchlisting Guidance also includes numerous exceptions to the reasonable suspicion requirement that make it significantly easier to watchlist non-citizens, leaving them particularly vulnerable to watchlisting based on inaccurate, incomplete, or spurious information.⁷³
- Second, nominations do not always appear to undergo review to determine whether they actually meet the “reasonable suspicion” standard. This is especially alarming in light of the fact that FBI field agents do not always understand the downstream effects of nominating an individual for entry into the TSDB.⁷⁴
- Third, the nominations of preliminary investigation subjects and non-investigatory subjects raise questions about how individuals who do not meet the criteria for full

⁶⁹ 2014 OIG REPORT, *supra* note 4, at 66.

⁷⁰ FBI NOMINATIONS & VGTOF TRAINING, No. NCIC-VGTOF-8346, *supra* note 13.

⁷¹ 2009 OIG REPORT, *supra* note 20, at v.

⁷² 2014 OIG REPORT, *supra* note 4, at 70.

⁷³ 2013 WATCHLISTING GUIDANCE ¶ 1.47.

⁷⁴ 2009 OIG REPORT, *supra* note 20, at xv (“[M]any agents did not realize that the watchlist feeds several downstream databases used by other segments of the law enforcement community.”).

investigation—that is, “specific articulable facts giving reason to believe” a threat might exist⁷⁵—could nevertheless satisfy the definition of “reasonable suspicion” required for entry into the TSDB, which is “articulable intelligence” and an “objective factual basis.”⁷⁶

- Fourth, the OIG reports suggest that there has been no systematic review for whether the nominating field office correctly determined that the reasonable suspicion standard had been met.⁷⁷ In 2007, the OIG noted that the TSC had been attempting a record-by-record audit review of watchlist entries but that the TSC was unlikely to finish the process before 2012, and it is not clear if the review was ever completed.⁷⁸ In addition, it is not clear how meaningful the review process was. While the TSC’s process in March 2006 included reviewing *incoming* records for a “nexus” to terrorism,⁷⁹ review of *existing* records appeared limited to special targeted reviews of the No Fly List and other specific categories, as well as situations where an external encounter with a subject indicated that information would need to be added or changed.⁸⁰ These are not systematic reviews of historical records for substantive sufficiency to meet the reasonable suspicion standard.
- Fifth, there are few external incentives for officials within the TSC and field offices to exercise caution when entering subjects according to reasonable suspicion standards. Because the information underlying watchlisting entries is secret, and because there is no judicial review of watchlisting decisions,⁸¹ officials do not have the same incentives as police officers (who face the suppression of evidence if their determination of reasonable suspicion or probable cause is incorrect) to adhere carefully to applicable evidentiary standards. In addition, those with decision-making authority over watchlist nominations may not fully understand the ramifications of placement on a watchlist.⁸²

⁷⁵ 2014 OIG REPORT, *supra* note 4, at 7.

⁷⁶ 2013 WATCHLISTING GUIDANCE ¶ 3.4.

⁷⁷ The 2013 Watchlisting Guidance suggests that TSC reviews nominations for whether they meet watchlisting standards. *Id.* ¶ 1.46. However, it also states that a nomination will be accepted if it “contains the minimum substantive derogatory criteria and the minimum identifying information.” *Id.* ¶ 1.56.2.1. It is not clear whether this is systematic review of whether nominations meet the reasonable suspicion standard, or simply a review to make sure the entry is complete.

⁷⁸ 2007 OIG REPORT, *supra* note 19, at xvi.

⁷⁹ *Id.* at xii, 28-29.

⁸⁰ *Id.* at 30.

⁸¹ The operating manual for VGTOF specifically states, “Because VGTOF information is based, in part, on investigative information not previously subject to independent judicial review, strict adherence to policy on the security, use, and dissemination of VGTOF information is necessary.” NCIC 2000 Operating Manual: Violent Gang and Terrorist Organization (VGTOF) File (Dec. 1999), at 1.

⁸² 2009 OIG REPORT, *supra* note 20, at xv (“[M]any agents did not realize that the watchlist feeds several downstream databases used by other segments of the law enforcement community.”).

- Sixth and finally, although the 2013 Watchlisting Guidance states that “First Amendment protected activity alone shall not be the basis for nominating an individual for inclusion on the Terrorist Watchlist,”⁸³ it is clear that First Amendment-protected activity may constitute part of the basis for inclusion in the TSDB. Indeed, under the Guidance, a single Facebook post, Tweet, or anonymous letter may provide the “reasonable suspicion” necessary to watchlist an individual.⁸⁴

Given these deficiencies in the nomination process and standard, it is perhaps unsurprising that even someone who has been exonerated after investigation or even prosecution can nevertheless remain on the watchlist. An FBI document from 2009 explicitly states that individuals who have been acquitted of terrorism-related crimes, and those whose charges have been dismissed, can nevertheless remain on the watchlist provided that reasonable suspicion remains.⁸⁵ Even when an FBI investigation has closed and the field office is theoretically required to submit a request to remove the individual from the watchlist, the FBI case agent can petition to keep that individual on the watchlist by nominating him or her as a non-investigative subject.⁸⁶ In addition, individuals exonerated by an FBI investigation can remain in TIDE based on a nominating agency’s independent determination that the individual is a known or suspected terrorist (again according to vague and overbroad criteria) or under an exception to the reasonable suspicion standard.⁸⁷

IV. ENCOUNTERS WITH LOCAL LAW ENFORCEMENT

The documents obtained through FOIA litigation, along with other publicly available documents, show the following about law enforcement officers’ “encounters”⁸⁸ with watchlisted individuals:

- When local law enforcement encountered an individual on VGTOF/KST, such as during a routine traffic stop, and the officer runs a search of the individual’s name in the NCIC

⁸³ 2013 WATCHLISTING GUIDANCE ¶ 1.19, 3.9. For example, at ¶ 3.13.8.1, the Guidance states: “A sympathizer or supporter of terrorism should be nominated if the support is operational in nature. If support is merely ideological, the individual should not be nominated.”

⁸⁴ *Id.* ¶ 3.6 (“Single source information, including but not limited to ‘walk-in’, ‘write-in’, or postings on social media sites, however, should not automatically be discounted merely because of the manner in which it was received.”).

⁸⁵ Communications from Counterterrorism to All Field Offices and All Legats, Re: Counterterrorism Program Guidance/Watchlisting/Administrative and Operational Guidance (Dec. 7, 2009), http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance2.pdf, ¶ 1.7.

⁸⁶ *Id.* ¶ 1.8.

⁸⁷ 2013 WATCHLISTING GUIDANCE 28 n.34.

⁸⁸ “Encounter” means “local, state, tribal, or federal law enforcement and homeland security screeners have come across a known or suspected terrorist during normal job duties (e.g., traffic stops, checking of airplane manifests, or evaluating an application for a U.S. passport or visa).” 2009 OIG REPORT, *supra* note 20, at 2 n.42.

database, the officer ordinarily received an NCIC “hit” showing that individual had been watchlisted as a terrorism suspect.⁸⁹

- In the overwhelming majority of cases, an officer who encountered a watchlisted individual was not encountering a person with an outstanding arrest warrant. Instead, the individual was on the list for tracking and information-gathering purposes only.⁹⁰
- Although the TSC issued some standard advisory messages to law enforcement officers on how to conduct these encounters, the disclosure of individuals’ watchlisting status to local law enforcement officers made the individuals vulnerable to intensified monitoring and investigative interest.
- Between December 2003 and May 2007, individuals in over 40 percent of all encounters that were referred to the TSC Call Center were a false match and were not actually on the watchlist.⁹¹

A. The Encounter Process

When a local officer queries the NCIC about an individual who is the subject of an entry in VGTOF/KST, the officer generally receives a message through NCIC about the individual. Entries in VGTOF/KST are categorized by the type of message—or “handling code”—that NCIC returns to the querying officer. As of 2009, KST utilized three separate handling codes (described in detail below): Handling Code 1 for subjects with arrest warrants, Handling Code 2 for subjects who are slated to receive DHS detainers, and Handling Code 3 for the rest.⁹²

The vast majority of VGTOF/KST entries appear to have been Handling Code 3, the catch-all category. As of March 2007, 96.8 percent of the VGTOF entries were Handling Code 3, 0.5 percent were Handling Code 2 (detainers), and 2.1 percent were Handling Code 1 (arrest warrants).⁹³ The remaining 0.6 percent of entries were “Other,” presumably meaning silent hit entries (discussed in Section V).⁹⁴ Thus, it appears that VGOTF/KST in practice has primarily

⁸⁹ This is not true for silent hit entries, which are discussed in Section V.

⁹⁰ In other words, the individual would be free to go after the officer records the encounter.

⁹¹ A 2007 OIG audit indicated that only 53.4 percent of encounters called into the TSC by local officials were matches, while in 43.4 percent of these calls, the encountered individual did not match the watchlisted identity. The other 3.2 percent of encounters were indeterminate and referred to the FBI by the TSC Call Center staff. 2007 OIG REPORT, *supra* note 19, at vi.

⁹² Communications from Counterterrorism to All Field Offices and All Legats, Re: Counterterrorism Program Guidance/Watchlisting/Administrative and Operational Guidance (Dec. 7, 2009), http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance2.pdf.

⁹³ 2007 OIG REPORT, *supra* note 19, at 9.

⁹⁴ *Id.*

identified and tracked the whereabouts of its subjects, and very rarely has resulted in arrests or detention.

For the vast majority of subjects, which fall under Handling Code 3, VGTOF/KST has acted as an information-collecting tool for the TSC. In a 2006 meeting of the NCIC Advisory Policy Board, the director of the TSC stated that VGTOF's purpose is to ensure that "for the very first time, state and local officers had some ability to know that someone they pulled over could be on the watch list,"⁹⁵ prompting the local officer who encountered someone on the watchlist to call the TSC and provide the TSC with additional information about the subject. The TSC's practice has been to record such information using a tool called the "Encounter Management Application," which was implemented in July 2004 and contains records of all encounters since the TSC became operational.⁹⁶ Information gathered from the encounter is analyzed and "used to enhance existing watchlist records," which the intelligence community uses to assess threats and conduct investigations.⁹⁷

When the TSC receives a call from an encountering official based on a VGTOF/KST hit,⁹⁸ it can look into the nominating agency's system to determine if the individual apprehended is indeed the watchlisted suspect, and if so, if action should be taken. For domestic encounters, the FBI "must be consulted prior to taking any action based on ENCOUNTERS with a person who is a POSITIVE MATCH with KNOWN or SUSPECTED TERRORIST."⁹⁹ The 2013 Watchlist Guidance adds that "[e]specially sensitive ENCOUNTERS often require coordination and situational updates with the White House, Northern Command (NORTHCOM), and FBI's Counterterrorism-Watch."¹⁰⁰ In the vast majority of instances, the authorities have taken no action and have released the individual without telling him that he is on a watchlist.¹⁰¹

For local officers, the discovery that a traffic violator is on a terrorist watchlist has sometimes led to actions that are not prescribed by the handling code messages. For example, the TSC acknowledged that in the early days of the implementation, some encountering officers had

⁹⁵ Statement of Donna Bucella, Dir., Terrorist Screening Ctr., CJIS Advisory Policy Board Minutes (June 22-23, 2006), No. NCIC-VGTOF-5411. As discussed in Section V, this is not the case for silent hit entries, for which VGTOF/KST information is hidden from the view of state and local officers.

⁹⁶ 2007 OIG REPORT, *supra* note 19, at 6.

⁹⁷ 2014 OIG REPORT, *supra* note 4, at 5; 2013 WATCHLISTING GUIDANCE ¶ 5.14.

⁹⁸ It is likely that, when NCIC is queried and there is a VGTOF/KST hit, that the TSC first received an electronic notification that there has been a hit, and then (if the encountering official follows the Handling Code instructions) a phone call from the encountering officer. The 2013 Watchlist Guidance states that "[n]ame-based transaction queries by law enforcement personnel (*e.g.*, traffic stops) made to the FBI's National Crime Information Center . . . that match a name in the KSTF . . . are routed electronically to TSC for confirmation and subsequent processing as an ENCOUNTER." 2013 WATCHLISTING GUIDANCE ¶ 5.8.1.

⁹⁹ 2013 WATCHLISTING GUIDANCE ¶ 5.18.

¹⁰⁰ *Id.* ¶ 5.13.1.

¹⁰¹ 2007 OIG REPORT, *supra* note 19, at 9.

been “a little aggressive and . . . pulled the person out of the car” when they saw the NCIC hit telling them to contact the TSC.¹⁰²

B. Description of Handling Codes

Handling Code 1 applies to individuals with outstanding arrest warrants in the NCIC Wanted Persons File.¹⁰³ As of 2009, Handling Code 1 read as follows:

LAW ENFORCEMENT SENSITIVE INFORMATION

WARNING – APPROACH WITH CAUTION.

THIS INDIVIDUAL IS ASSOCIATED WITH TERRORISM AND IS THE SUBJECT OF AN ARREST WARRANT, ALTHOUGH THE WARRANT MAY NOT BE RETRIEVABLE VIA THE SEARCHED IDENTIFIERS. IF AN ARREST WARRANT FOR THE INDIVIDUAL IS RETURNED IN YOUR SEARCH OF NCIC, DETAIN THE INDIVIDUAL PURSUANT TO YOUR DEPARTMENT’S PROCEDURES FOR HANDLING AN OUTSTANDING WARRANT, AND IMMEDIATELY CONTACT THE TERRORIST SCREENING CENTER AT (866) XXX-XXXX FOR ADDITIONAL DIRECTION.

IF AN ARREST WARRANT FOR THE INDIVIDUAL IS NOT RETURNED, USE CAUTION AND IMMEDIATELY CONTACT THE TSC AT (866) XXX-XXXX FOR ADDITIONAL DIRECTION WITHOUT OTHERWISE EXTENDING THE SCOPE OR DURATION OF THE ENCOUNTER. IF YOU ARE A BORDER PATROL OFFICER IMMEDIATELY CALL THE NTC.

UNAUTHORIZED DISCLOSURE OF TERRORIST WATCHLIST INFORMATION IS PROHIBITED. DO NOT ADVISE THIS INDIVIDUAL THAT THEY MAY BE ON A TERRORIST WATCHLIST. INFORMATION THAT THIS INDIVIDUAL MAY BE ON A TERRORIST WATCHLIST IS PROPERTY OF THE TSC AND IS A FEDERAL RECORD PROVIDED TO YOUR AGENCY THAT MAY NOT BE DISSEMINATED OR USED IN ANY PROCEEDING WITHOUT THE ADVANCE AUTHORIZATION OF THE TSC.

LAW ENFORCEMENT SENSITIVE INFORMATION¹⁰⁴

Handling Code 2 appears to pertain mainly to watchlisted individuals who are subject to current or future DHS detainees. The future detainees apply to those who would be given

¹⁰² Statement of Donna Bucella, Dir., Terrorist Screening Ctr., CJIS Advisory Policy Board Minutes (June 22-23, 2006), No. NCIC-VGTOF-5411.

¹⁰³ Communications from Counterterrorism to All Field Offices and All Legats, Re: Counterterrorism Program Guidance/Watchlisting/Administrative and Operational Guidance (Dec. 7, 2009), http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance2.pdf, ¶ 1.2.1.1.

¹⁰⁴ 2009 NCIC Operating Manual, *supra* note 49, No. NCIC-VGTOF-708.

detainers if they encounter law enforcement.¹⁰⁵ People with sealed federal indictments can also be subject to Handling Code 2.¹⁰⁶ In addition, documents from 2008 indicate that Handling Code 2 could be used for entries made under “exigent circumstances which require immediate entry of the record.”¹⁰⁷ The full text of Handling Code 2 is as follows:

LAW ENFORCEMENT SENSITIVE INFORMATION

WARNING – APPROACH WITH CAUTION.

THIS INDIVIDUAL IS OF INVESTIGATIVE INTEREST TO LAW ENFORCEMENT REGARDING ASSOCIATION WITH TERRORISM AND THERE MAY BE A DETAINER AVAILABLE FROM THE DEPARTMENT OF HOMELAND SECURITY FOR THIS INDIVIDUAL.

IMMEDIATELY CONTACT THE TERRORIST SCREENING CENTER (TSC) AT (866) XXX-XXXX OR, IF YOU ARE A BORDER PATROL OFFICER, IMMEDIATELY CALL THE NTC TO ASCERTAIN IF A DETAINER IS AVAILABLE FOR THE INDIVIDUAL AND TO OBTAIN ADDITIONAL DIRECTION. PLEASE QUESTION THIS INDIVIDUAL TO ASSIST THE TSC IN DETERMINING WHETHER THE INDIVIDUAL ENCOUNTERED IS THE SUBJECT OF A DETAINER WITHOUT OTHERWISE EXTENDING THE SCOPE OR DURATION OF THE ENCOUNTER.

UNAUTHORIZED DISCLOSURE OF TERRORIST WATCHLIST INFORMATION IS PROHIBITED. DO NOT ADVISE THIS INDIVIDUAL THAT THEY MAY BE ON A TERRORIST WATCHLIST. INFORMATION THAT THIS INDIVIDUAL MAY BE ON A TERRORIST WATCHLIST IS PROPERTY OF THE TSC AND IS A FEDERAL RECORD PROVIDED TO YOUR AGENCY THAT MAY NOT BE DISSEMINATED OR USED IN ANY PROCEEDING WITHOUT THE ADVANCE AUTHORIZATION OF THE TSC.

LAW ENFORCEMENT SENSITIVE INFORMATION¹⁰⁸

As the above language indicates, the querying officer is instructed to “question this individual” in order to help the NTC to determine whether this person is subject to a detainer, but the message provides no guidance on the questioning or the kind of information that would assist in such a determination. It also appears doubtful that officers could question an individual “without otherwise extending the scope or duration of the encounter,” since presumably an encounter with an individual not listed in VGTOF/KST would not involve additional questioning or awaiting a reply from the TSC or the NTC. Thus, encounters with individuals subject to Handling Code 2 will likely be longer and more

¹⁰⁵ Communications from Counterterrorism to All Field Offices and All Legats, Re: Counterterrorism Program Guidance/Watchlisting/Administrative and Operational Guidance (Dec. 7, 2009), http://epic.org/privacy/airtravel/EPIC_DOJ_FOIA_NoFlyList_09_13_11_CT_Guidance2.pdf, ¶ 1.2.1.1.

¹⁰⁶ *Id.* ¶ 1.6.

¹⁰⁷ STANDARD OPERATING PROCEDURES: NOMINATION PROCESS, TERRORIST SCREENING CENTER NOMINATIONS AND DATA INTEGRITY UNIT (Aug. 2, 2006), No. NCIC-VGTOF-8403.

¹⁰⁸ 2009 NCIC Operating Manual, *supra* note 49, No. NCIC-VGTOF-709.

intrusive than they otherwise would because of the ambiguity of the instructions and the directive to officers to question the individuals further.

Finally, Handling Code 3 applies to all entries that are not categorized as Handling Code 1, Handling Code 2, or silent hits.¹⁰⁹ The text of the message for Handling Code 3 states:

LAW ENFORCEMENT SENSITIVE INFORMATION

DO NOT ADVISE THIS INDIVIDUAL THAT THEY MAY BE ON A TERRORIST WATCHLIST. CONTACT THE TERRORIST SCREENING CENTER (TSC) AT (866) XXX-XXXX DURING THIS ENCOUNTER. IF THIS WOULD EXTEND THE SCOPE OR DURATION OF THE ENCOUNTER CONTACT THE TSC IMMEDIATELY THEREAFTER. IF YOU ARE A BORDER PATROL OFFICER IMMEDIATELY CALL THE NTC.

ATTEMPT TO OBTAIN SUFFICIENT IDENTIFYING INFORMATION DURING THE ENCOUNTER, WITHOUT OTHERWISE EXTENDING THE SCOPE OR DURATION OF THE ENCOUNTER, TO ASSIST THE TSC IN DETERMINING WHETHER OR NOT THE NAME OR IDENTIFIER(S) YOU QUERIED BELONGS TO AN INDIVIDUAL IDENTIFIED AS HAVING POSSIBLE TIES WITH TERRORISM.

DO NOT DETAIN OR ARREST THIS INDIVIDUAL UNLESS THERE IS EVIDENCE OF A VIOLATION OF FEDERAL, STATE OR LOCAL STATUTES.

UNAUTHORIZED DISCLOSURE IS PROHIBITED.

INFORMATION THAT THIS INDIVIDUAL MAY BE ON A TERRORIST WATCHLIST IS PROPERTY OF THE TSC AND IS A FEDERAL RECORD PROVIDED TO YOUR AGENCY THAT MAY NOT BE DISSEMINATED OR USED IN ANY PROCEEDING WITHOUT THE ADVANCE AUTHORIZATION OF THE TSC.

WARNING – APPROACH WITH CAUTION.

LAW ENFORCEMENT SENSITIVE INFORMATION¹¹⁰

¹⁰⁹ STANDARD OPERATING PROCEDURES: NOMINATION PROCESS, TERRORIST SCREENING CENTER NOMINATIONS AND DATA INTEGRITY UNIT (Aug. 2, 2006), No. NCIC-VGTOF-8374. In the past, there was an additional Handling Code 4 containing less biographical information than Handling Code 3, requiring only a name and an “incomplete” date of birth. *Id.*; see Communications from Counterterrorism to CJIS, Re: Terrorist Screening Database; Violent Gang and Terrorist Organization File (VGTOF) – Handling Code 4 to 3 Conversion (June 14, 2004), No. NCIC-VGTOF-10908; FBI Email, Subject: HC 4 to 3 Conversion (June 16, 2005), No. NCIC-VGTOF-10912 to NCIC-VGTOF-10913. As of early 2004, Handling Code 3 was also the default code for the subjects of preliminary investigation. Communications from Counterterrorism to All Field Offices, Re: Violent Gang and Terrorist Organization File (VGTOF), No. NCIC-VGTOF-10871.

¹¹⁰ 2009 NCIC Operating Manual, *supra* note 49, No. NCIC-VGTOF-709.

This message makes clear that the querying officer should attempt to identify, but not to arrest or detain, the individual; it also states that the officer may contact the TSC after letting the individual go to avoid extending the length of the encounter.

The three handling codes above were in operation as of 2009, but it is not clear if they continue to contain the language and format as listed above. In the past, some handling code messages contained a stronger warning against using the VGTOF hit as grounds for search and seizure:

WARNING – STANDING ALONE, NCIC VIOLENT GANG AND TERRORIST ORGANIZATION FILE INFORMATION DOES NOT FURNISH GROUNDS FOR THE SEARCH AND SEIZURE OF ANY INDIVIDUAL, VEHICLE, OR DWELLING¹¹¹

This warning appears to have been omitted from the most recent handling codes; the 2009 handling codes lack such specific instructions for law enforcement to ensure that they do not use KST hits improperly to extend the scope of detentions.

The documents related to encounters with watchlisted people underscore that KST functions primarily as a means of tracking and monitoring individuals about whom the FBI is suspicious. It is not aimed only at a legitimate and targeted need to apprehend actual, known terrorists, and it carries the significant risk that innocent people will be subjected to intense scrutiny or lengthy, intrusive stops by law enforcement officers.

¹¹¹ NCIC 2000 Operating Manual: Violent Gang and Terrorist Organization (VGTOF) File (Dec. 1999) ¶ 13.1. In addition, for some time after September 11, 2001, another handling code that specifically identified individuals as a potential suspects in the September 11 attacks:

WARNING - INDIVIDUAL MAY BE SOUGHT BY FBI FOR QUESTIONING RELATED TO ATTACKS AGAINST WORLD TRADE CENTER AND PENTAGON. APPROACH WITH CAUTION. HOWEVER, MAKE NO EFFORT TO ARREST INDIVIDUAL UNLESS THERE IS EVIDENCE OF A VIOLATION OF FEDERAL, STATE, OR LOCAL STATUTE(S). RATHER, LAW ENFORCEMENT OFFICERS ARE REQUESTED TO STOP AND PROACTIVELY QUESTION THESE INDIVIDUALS AND TO CONTACT THE NEAREST FBI OFFICE IMMEDIATELY FOR FURTHER GUIDANCE. THESE INDIVIDUALS MAY BE HELPFUL IN PROVIDING INFORMATION AND POSSIBLY EVIDENCE IN SUPPORT OF AN ONGOING INVESTIGATION. SEE CURRENT FBI NLETS MESSAGE BOLO FOR MORE INFORMATION.

No. NCIC-VGTOF-11586.

V. SILENT HITS

The ACLU's FOIA litigation revealed for the first time the widespread and growing use of "silent hits," a mechanism through which the FBI can keep tabs on individuals suspected of terrorism without notifying either those individuals or the local law enforcement officers who encounter them:

- Silent hit entries allow the FBI and other executive departments and agencies to track watchlisted individuals while withholding this information from state and local law enforcement officials who encounter the individuals. Whenever local law enforcement encounters an individual with a silent hit entry, the FBI (and sometimes other designated agencies) will be automatically notified, but the local law enforcement officer will not.
- The use of silent hits has grown over time, and more agencies have gained the ability to "nominate" individuals for silent hits as well as receive notifications of encounters.
- Because of their highly secret nature, silent hit nominations are subject to less procedural protection, and it is extremely difficult for individuals wrongly placed on the list to seek redress.

A. Criteria for Silent Hit Nominations

The VGTOF/KST watchlist allows some individuals to be tracked without even the awareness of local law enforcement. When a local law enforcement officer encounters an individual with a silent hit entry and sends a query through the NCIC, the officer receives no hit in response, as if no record existed. Simultaneously, however, a notification is sent to the FBI or another nominating agency, informing them that the individual has been encountered.

A directive from the Counterterrorism Division to all FBI field offices in July 2006 stated that the subjects may be nominated as a silent hit entry in circumstances where the nominating official can articulate "a specific, narrowly-defined and legitimate operational justification" for requesting the silent hit.¹¹² Such justifications include the following:

- 1) "Subject of investigation is the target of 24/7 physical surveillance, undercover activities and operations, and undisclosed participation in organizations, in conformity with FBI policy";

¹¹² Communications from Counterterrorism Division to All Field Offices (July 25, 2006), No. NCIC-VGTOF-10889.

- 2) “Subject is an employee, member, or is affiliated with a military, federal, state, local, or other law enforcement agency, or any group that may have access to NCIC terminals”; or
- 3) “Other unique operational circumstances in which a nominating official can articulate a reasonable and detailed justification why the subject should be included in NCIC/VGTOF as a silent hit.”¹¹³

A proviso in the same directive recognized that because the fact that encountering officers are not alerted to silent hit entries “raises officer safety issues, subjects who have a violent nature or are known to be armed and dangerous should not be marked as silent hits.”¹¹⁴

In order to ensure that those considered “armed and dangerous” are not listed as silent hits, internal guidelines from May 2008 stated that the “Officer Safety Information Field” of an individual’s VGTOF entry must “be null/blank for records with a HC [handling code] of R or S.”¹¹⁵ The “Officer Safety Information Field” includes any information “that would serve to protect or support an encountering law enforcement officer,” including that the subject “professes to kill or harm law enforcement,” “is known to impersonate a law enforcement officer,” “has been issued a concealed weapons permit,” or “is known to carry weapons on his person.”¹¹⁶ Correspondingly, the guidelines stated that “it is imperative that individuals that pose any degree of threat to the safety of an encountering law enforcement officer not be issued a Silent Hit Handling Code.”

B. Expanding Use

The records the ACLU obtained through FOIA indicate that the capability to utilize silent hits was originally intended to be temporary.¹¹⁷ Only CJIS could enter silent hit entries, and a local law enforcement officer’s query of a silent hit record prompted a notification only to FBI Headquarters.¹¹⁸ Around February 2002, silent hits became a permanent fixture of the system, and the “Office of Origin” for a particular case gained the ability to receive notifications regarding that silent hit record.¹¹⁹

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ New FBI Nomination Processing Protocol (May 5, 2008), No. NCIC-VGTOF-10558. “R” stands for “routine” and “S” stands for “sensitive” silent hits. FBI NOMINATIONS & VGTOF TRAINING, No. NCIC-VGTOF-8345, *supra* note 13. Although the criteria for these is not clear, there is “no operational difference” between the two handling codes. *Id.*

¹¹⁶ New FBI Nomination Processing Protocol (May 5, 2008), No. NCIC-VGTOF-10559.

¹¹⁷ Communications from Counterterrorism Division to All Field Offices (Feb. 22, 2002), No. NCIC-VGTOF-11121.

¹¹⁸ *Id.*

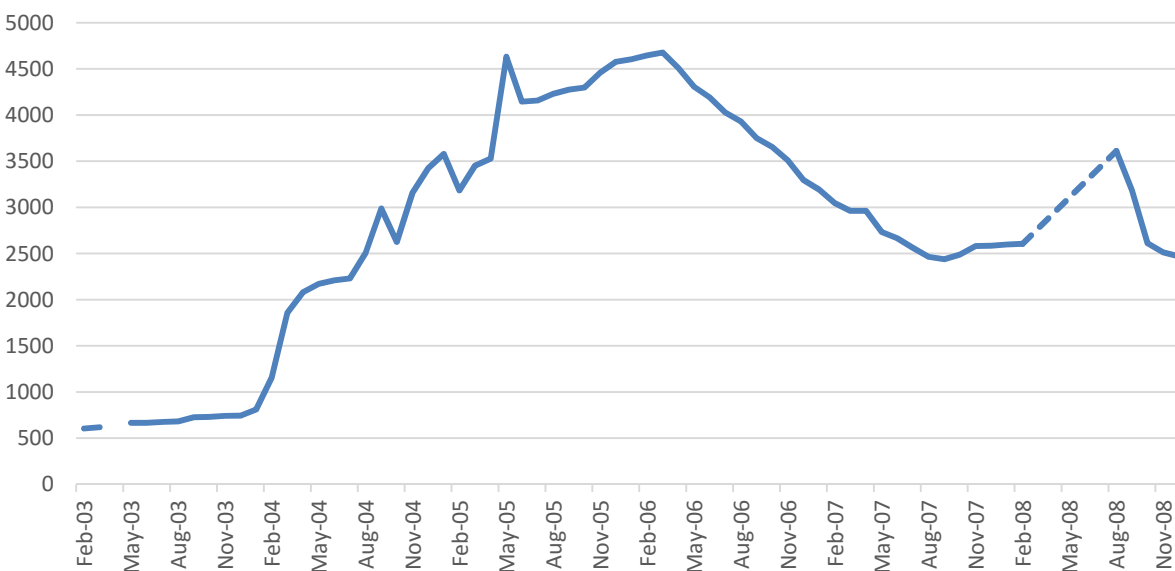
¹¹⁹ *Id.*

As of 2008, the FBI and “OGAs” (likely “other government agencies”) could nominate individuals to be included as silent hit entries and receive notifications from encounters with those individuals.¹²⁰ In some circumstances, “sole OGA identities” with “no FBI nexus/interest” could also be included as silent hit entries.¹²¹ It is unclear whether and to what extent the FBI reviewed silent hit nominations from outside agencies before approving them.

Total Silent Hit Records

The use of silent hits grew dramatically after their inception, from several hundred records in early 2003 to over 4,600 records by mid-2006 (see Figure 11). In the period from 2004 to 2008, silent hit records consistently made up between 1 to 3 percent of all records in the VGTOF database.

Figure 11. *Total Silent Hit Records*¹²²



¹²⁰ *Id.* Silent hit entries may also be accessible through the National Instant Criminal Background system (NICS), the database used by federal firearms licensees to determine whether individuals are eligible to buy firearms or explosives. From April to May 2004, NICS received routine silent hit records within an inquiry hit response. After May 2004, sensitive silent hits were restricted in response to NICS queries, but routine silent hit records may still be received through NICS. Terrorist Screening Center Initiative Summaries and associated [sic] Specification Documentation Change Requests (SDCR’s) and Program Tracking Reports (PTR’s) (May 26, 2004), No. NCIC-VGTOF-11207.

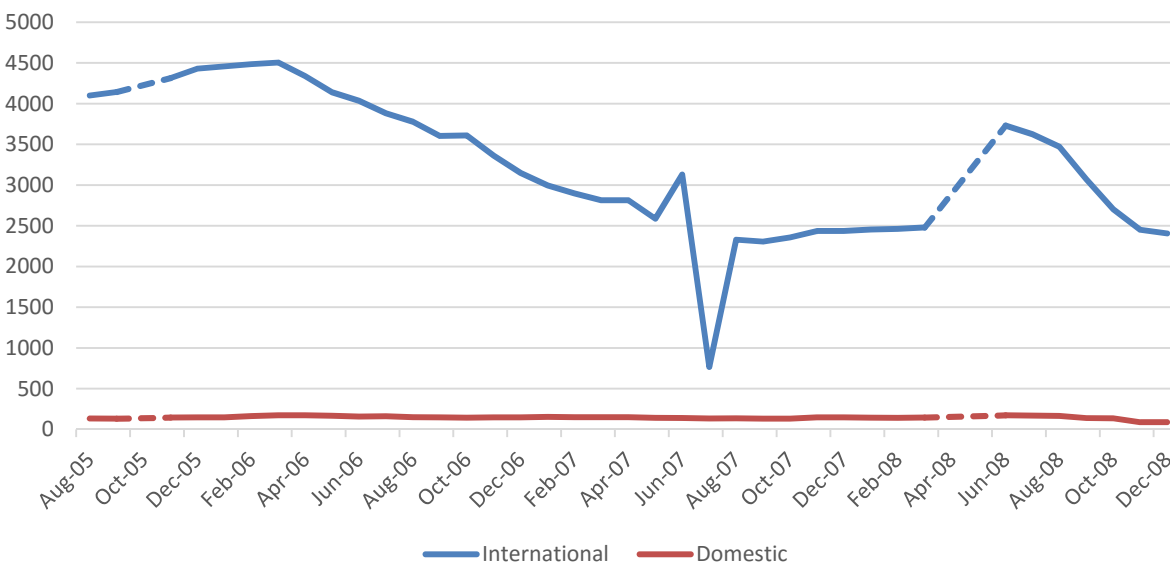
¹²¹ New FBI Nomination Processing Protocol (May 5, 2008), No. NCIC-VGTOF-10556.

¹²² The increase in February 2004 appears to be the result of a database change that relocated all “Terrorist Member/Silent Hit records from the Undercover database to the VGTOF database.” Terrorist Screening Center Initiative Summaries and associated [sic] Specification Documentation Change Requests (SDCR’s) and Program Tracking Reports (PTR’s) (May 26, 2004), No. NCIC-VGTOF-11207.

International versus Domestic Silent Hits

In terms of total numbers, the vast majority of silent hit records are international (see Figure 12). However, silent hit entries account for a much larger proportion of domestic entries than of international entries. In the period from 2005 to 2008, between 21.0 and 25.4 percent of domestic entries were silent hit entries, compared to between 1.0 and 2.4 percent of international entries.

Figure 12. International versus Domestic Silent Hit Records



C. Fewer Procedural Protections

Because silent hits are kept secret even from local law enforcement, they present an additional layer of due process concerns. First, silent hits undergo less review internally. Regular, non-silent hit subjects are required to be referred to the Office of the General Counsel and the Inspection Division of the FBI as a potential matter for Intelligence Oversight Board (IOB) review when the subject remains in the VGTOF/KST database after the FBI investigation is closed and is nominated solely by the FBI. Silent hits, on the other hand, “are not considered potential IOBs” and are not referred for such review.¹²³

Second, it is nearly impossible for an individual to challenge or seek redress for erroneous placement on the silent hit list. Generally, the government does not disclose whether an individual is on a terrorist watchlist. Nevertheless, in some instances, individuals who are

¹²³ Communications from Counterterrorism to All Field Offices (July 14, 2008), No. NCIC-VGTOF-10880.

designated as regular (i.e., non-silent) hits in VGTOF/KST have become aware of their likely inclusion on the watchlist through encounters with law enforcement, allowing them to at least file complaints for redress.¹²⁴ By contrast, individuals who are the subjects of silent hit entries have no way of knowing that they are watchlisted, making any challenge to their watchlist status highly unlikely.

VI. REDRESS

Obtaining redress for erroneous inclusion on VGTOF/KST is extremely difficult:

- The government does not confirm whether individuals who suspect that they have been adversely affected by placement on a watchlist are, in fact, watchlisted.¹²⁵
- The procedure for challenging erroneous inclusion on the terrorist watchlist is opaque, one-sided, and non-participatory.
 - Individuals can submit complaints only if they come to suspect, through encounters with law enforcement officers or other government officials, that they are included on the watchlist.
 - Individuals cannot review or refute any information underlying their placement on the watchlist.
 - Individuals are not granted a hearing at which they could establish their credibility before a neutral decision maker.
 - Individuals never receive a confirmation that erroneous information has been removed from watchlist-related files.

Until 2005, the government had no redress process in place for individuals who were erroneously placed on the watchlist.¹²⁶ In January 2005, the TSC established a formal redress procedure through which screening agencies could refer individual complaints to the TSC.¹²⁷ In

¹²⁴ See the discussion in Section VI on obtaining redress.

¹²⁵ The only exception to this policy resulted from litigation challenging the No Fly List redress procedure, which a federal court found unconstitutional in June 2014. *See* *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014). Under the government's revised policy, instituted in April 2015, a U.S. person who purchases a ticket, is denied boarding at the airport, subsequently applies for redress through the Department of Homeland Security's Traveler Redress Inquiry Program, and is on the No Fly List after a redress review, will receive a letter disclosing that status on the No Fly List. If the individual opts to receive and/or submit further information, the government will provide a second response that includes an unclassified summary of reasons (of varying specificity and length) for the individual's inclusion on the No Fly List. *See* Notice Regarding Revisions to DHS TRIP Procedures, *Latif v. Holder*, No. 10-750-BR, ECF No. 197 (D. Or. Apr. 13, 2015). The plaintiffs in *Latif* have also challenged the revised redress process as inadequate under the Due Process Clause.

¹²⁶ 2007 OIG REPORT, *supra* note 19, at 45.

¹²⁷ 2013 WATCHLISTING GUIDANCE ¶ 1.67.

September 2007, agencies involved in the watchlist process executed a “Redress Memorandum of Understanding” to coordinate a redress process.¹²⁸

When an individual files a redress complaint, the screening agency—the agency that conducted the terrorist screening, for example airport security—forwards the complaint to the TSC.¹²⁹ TSC’s Redress Office then determines whether the complaint is related to a TSDB record, including whether the complainant is a watchlisted individual or “merely a near-match to a watchlist record.”¹³⁰ If the complainant is the watchlisted individual, TSC’s Redress Office coordinates with the nominating agency in determining whether the individual continues to meet the standards for remaining on the watchlist, and it can remove or modify the watchlist entry accordingly. The TSC has the final say on redress disposition.¹³¹ The screening agency sends a formal response to the complainant.¹³² An individual could try to file an administrative appeal through the screening agency where the agency makes such appeals available.¹³³ The TSC may then release or update the watchlist information. It is unclear if anyone has appealed a redress disposition successfully.¹³⁴

As of February 2007, it took the TSC an average of over two months to review a redress inquiry, and 28 percent of reviews lasted more than 90 days.¹³⁵ The TSC did not have explicit guidelines for timeliness in redress procedures as of that date.¹³⁶

The Department of Homeland Security’s Traveler Redress Inquiry Program (DHS TRIP) addresses redress complaints related to watchlist issues that arise during travel screening, including airport screening by the Transportation Security Administration and border screening conducted by Customs and Border Protection.¹³⁷

CONCLUSION

This White Paper pieces together previously unknown details about the federal government’s VGTOF/KST watchlist by synthesizing public materials and FOIA documents obtained from the FBI. However, because the FOIA documents are not comprehensive and only provide information until 2009, a number of informational gaps remain. For example, the

¹²⁸ *Id.* ¶ 1.68.

¹²⁹ *Id.* ¶ 1.67.

¹³⁰ *Id.* ¶ 1.69.

¹³¹ 2007 OIG REPORT, *supra* note 19, at 51.

¹³² *Id.*

¹³³ *Id.* at 57.

¹³⁴ *Id.*

¹³⁵ *Id.* at 54.

¹³⁶ *Id.* at 55-56.

¹³⁷ 2013 WATCHLISTING GUIDANCE ¶ 1.71.

documents do not reveal the extent to which VGTOF/KST information can be accessed by non-law enforcement agencies at the state level or even certain private entities, which could impact everything from bail determinations and sentencing to employment prospects and access to the financial system. It is also unclear what criteria and procedures other agencies follow in nominating subjects, and how rigorously those agencies review nominations or redress complaints. Similarly, we do not know which agencies can nominate individuals for silent hit entries and what standard of review is used to vet them.

Despite these knowledge gaps, the available information on the VGTOF/KST watchlist system leads to troubling conclusions. The system poses a serious threat to constitutional rights and civil liberties, as watchlisted individuals may be subject to unwarranted monitoring and surveillance, prolonged detention and questioning, and the stigmatization that comes with such law enforcement scrutiny. In addition, watchlisted individuals face the risk of mistaken dissemination of terrorist watchlist information to private third parties like employers and insurance companies.¹³⁸ They may also face discrimination in immigration and naturalization proceedings.¹³⁹ Despite the threat to these individuals' due process and privacy rights, they have little recourse to challenge the watchlisting procedures.

ACKNOWLEDGMENTS

The Civil Liberties and National Security Clinic at Yale Law School prepared this report on behalf of the American Civil Liberties Union.¹⁴⁰ Alice A. Wang and Angela Cai authored this report and Zachary Blau provided editorial assistance under the supervision of Michael J. Wishnie, William O. Douglas Clinical Professor of Law. The report was reviewed and edited by Lee Gelernt, Dror Ladin, Hugh Handeyside, and Hina Shamsi of the ACLU and by Kate Desormeau, formerly of the ACLU.

¹³⁸ The FOIA documents revealed numerous instances of unauthorized dissemination, often by mistake, including to insurance companies and private citizens. *See* No. NCIC-VGTOF-11494 to NCIC-VGTOF-11543.

¹³⁹ The Controlled Application Review and Resolution Program (CARRP) implemented by the United States Citizenship and Immigration Services (USCIS), for example, blacklists applicants who are in the KST database as “national security concerns” and denies them immigration benefits. MUSLIMS NEED NOT APPLY: HOW USCIS SECRETLY MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS, AM. CIVIL LIBERTIES UNION OF S. CAL. 17-18, <https://www.aclusocal.org/CARRP>.

¹⁴⁰ This paper reflects the views of its authors and the organizations that are publishing it. It does not represent the views of Yale Law School.