HOW DO WE KEEP GUNS OUT OF THE HANDS OF THOSE ON THE TERRORIST WATCH LIST WITHOUT VIOLATING DUE PROCESS

Diane Yandach*

* J.D. May 2017, Rutgers School of Law. I would like to thank the staff and editors of the RJLPP for their guidance and assistance, and my family and friends for their support.

I. INTRODUCTION

On June 12, 2016, Omar Mateen entered a nightclub in Orlando, Florida, carrying an assault rifle and a pistol.[1] Terrified people were trapped inside during a three-hour stand-off with police.[2] During the stand-off, Mateen called 911 in order to pledge allegiance to ISIS.[3] He killed forty-nine people, and wounded fifty-three others before being shot and killed by police.[4] This was the deadliest terrorist attack in the United States since 9/11.[5]

The FBI had investigated Mateen because of suspected ties to terrorism.[6] The FBI interviewed him in 2013 and 2014, but he was not under investigation or on the terrorist watch list at the time of the shooting.[7] Mateen legally purchased the guns used shortly before carrying out the attack.[8]

---

[1] Ralph Ellis et al., *Orlando shooting: 49 killed, shooter pledged ISIS allegiance*, CNN (June 13, 2016), http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/index.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Ellis, *supra* note 1.

[7] Del Quentin Wilber, *Omar Mateen was taken off a terrorist watch list, but keeping him on it wouldn't have stopped him from buying guns*, L.A. TIMES (June 16, 2016), http://www.latimes.com/nation/la-na-orlando-nightclub-shooting-live-omar-mateen-was-taken-off-a-terrorist-1465772737-htmlstory.html.

[8] *Significance of Orlando gunman calling 911 during standoff*, CBS NEWS (June 13, 2016), http://www.cbsnews.com/news/orlando-shooting-investigation-gunman-omar-mateen-911-call/.

After the attack, politicians from both major political parties called for a restriction prohibiting those on the Terrorist Watch List from purchasing guns.[9] Both Hillary Clinton and Donald Trump promoted this idea during the first presidential debate in September 2016.[10] There is a strong public interest in keeping guns out of the hands of terrorists and avoiding future attacks like the one in Orlando. However, American citizens have a constitutional right to bear arms.[11] That right cannot be infringed upon without due process of law, which includes giving the individual the right to be heard.[12]

The Terrorist Watch List is notorious for including innocent people on the list and having very secretive reasons individuals are included.[13] Even Senator Ted Kennedy was delayed several times while travelling because his name appeared on the no-fly list.[14] And many people are unaware that they are even on the list until they attempt to board a flight and are denied the right to travel.[15] The District Court of Oregon held that inclusion on the no-fly list violated the due process rights of certain plaintiffs who were denied the right

---

[9] Barack Obama, U.S. President, Address to the Nation (Dec. 6, 2015), https://www.whitehouse.gov/the-press-office/2015/12/06/address-nation-president (President Obama calling for prohibition on guns sales to those on the no-fly list after the San Bernardino terrorist attack).

[10] Aaron Blake, *The first Trump-Clinton presidential debate transcript, annotated*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/26/the-first-trump-clinton-presidential-debate-transcript-annotated/.

[11] U.S. CONST. amend. II.

[12] U.S. CONST. amend. V.

[13] *U.S. Gov't Watchlisting: Unfair Process and Devastating Consequences*, Am. C. L. Union (March 2014), https://www.aclu.org/sites/default/files/assets/watchlist_briefing_paper_v3.pdf.

[14] Rachel Swarns, *Senator? Terrorist? A Watch List Stops Kennedy at Airport*, N.Y. TIMES (Aug. 20, 2004), http://www.nytimes.com/2004/08/20/us/senator-terrorist-a-watch-list-stops-kennedy-at-airport.html.

[15] U.S. Gov't Watchlisting, *supra*, note 13.

to travel, then not given the reasons for their inclusion on the no-fly list in order to defend themselves.[16] This note argues that the no-fly list could be expanded into a no-buy list prohibiting those on it from purchasing weapons if the procedures are revised in order to comply with due process and stop terrorists from legally purchasing guns. Part I discusses the current case law concerning due process violations involving the no-fly list and the right to travel, along with the current Second Amendment case law. Part II describes in detail the issues with the current procedures of the no-fly list that would violate due process in terms of the Second Amendment right to bear arms. Part III proposes prohibiting gun sales to those on the terrorist watch list and utilizing administrative law judges to remedy the current due process issues.

II. BACKGROUND

A. The Terrorist Watch List and No-Fly List

The Terrorist Screening Center (TSC) is a branch of the FBI responsible for maintaining the Terrorist Screening Database (TSDB), otherwise known as the Terrorist Watch List.[17] A person is placed on the TSDB through nomination by another U.S. government agency and added to the list "when there is a reasonable suspicion that the person is a known or suspected terrorist."[18] The No-Fly List is a subset of the TSDB which prohibits an individual from flying over U.S. airspace.[19] Anyone who experiences travel issues can attempt to resolve those issues through the U.S. Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP).[20]

---

[16] *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

[17] *Frequently Asked Questions*, TERRORIST SCREENING CENTER, (JAN. 1, 2017), https://www.fbi.gov/file-repository/terrorist-screening-center-frequently-asked-questions.pdf/view.

[18] *Id.*

[19] *Id.*

[20] *Id.*

The DHS TRIP process can result in an individual being removed from the no-fly list.[21] Any individual who has been denied or delayed entry into the United States can file an inquiry with DHS TRIP.[22] Individuals can file inquiries either online or through regular mail.[23] The individual must provide identification such as a passport, driver's license or other proof of citizenship.[24] Ninety-nine percent of individuals who file an inquiry with DHS TRIP have experienced problems because they have a name similar to someone else on the Terrorist Watch List.[25] Therefore the government has violated the constitutional right to travel of nearly everyone filing an inquiry with DHS TRIP by erroneously denying their right to travel without notice.

However, there are many issues with the TSDB that infringe on the freedom of American citizens and take a long time to resolve.[26] One example is Avman Latif, a Marine veteran who was restricted from returning to the United States between November 2008 and April 2010 causing him to lose his veteran disability payments.[27]

Latif lives in Georgia with his wife and children.[28] He and his family temporarily lived in Egypt for a time with extended family.[29]

---

[21] Dep't of Homeland Security, *DHS Traveler Redress Inquiry Program,* https://www.dhs.gov/dhs-trip. (last visited Sept. 3, 2017).

[22] *Id.*

[23] Dep't of Homeland Security, *DHS Traveler Redress Inquiry Program, Step 2: How to Use DHS TRIP,* https://www.dhs.gov/step-2-how-use-dhs-trip#. (lasted visited Sept. 3, 2017).

[24] *Id.*

[25] Dep't of Homeland Security, *DHS Traveler Redress Inquiry Program, Step 1: Should I Use DHS TRIP?*, https://www.dhs.gov/step-1-should-i-use-dhs-trip. (last visited Sept. 3, 2017).

[26] Am. C. L. Union*, supra* note 13.

[27] Latif v. Holder, 28 F. Supp. 3d at 1143 (D. Or. 2014).

[28] *Id.*

[29] *Id.*

When they attempted to return to the United States, Latif was denied access to board the flight and told he was on the no-fly list.[30] Because he was not able to return to the United States, he missed required disability evaluations which resulted in the loss of his veteran's disability payments.[31]

Another example is Raymond Earl Knaeble IV, an Army veteran who was prohibited from returning to the United States in March 2010 causing him to lose his job.[32] Knaeble was working in Kuwait when he traveled to Columbia to get married.[33] When he attempted to return to the United States from Columbia after the wedding, the airline would not allow him to board the flight.[34] Knaeble subsequently missed a medical examination required by a potential employer causing him to lose the job.[35] He eventually made it back to the United States after traveling many different routes and enduring many interrogations along the way.[36]

Senator Ted Kennedy was even delayed several times trying to board flights in 2004 because of the TSDB.[37] A suspected terrorist had used Kennedy's name as an alias, so the Senator was stopped several times before eventually being allowed to board his flight.[38] Even after the Department of Homeland Security had allegedly "cleared the matter up," the Senator was once again delayed boarding a flight.[39]

---

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1144.

[33] *Latif,* 24 F. Supp. 3d at 1144.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Swarns*, *supra* note 14.

[38] *Id.*

[39] *Id.*

B. Due Process Generally

Procedural due process restricts the government from depriving individuals of life, liberty or property according to the Due Process Clause of the Fifth or Fourteenth Amendment.[40] Due process is a flexible rule depending on the facts and circumstances of each particular case.[41] Due process decisions are evaluated using three factors:

1. "the private interest that will be affected by the official action,"

2. "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,"

3. "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[42]

When considering whether governmental action violates due process, the courts weigh the factors above.[43] There is no specific formula or method for weighing the factors.[44] The court must consider all circumstances surrounding a possible due process violation and the impact of each factor.[45] Court decisions therefore are often unpredictable because of the great degree of flexibility in applying the factors to any particular situation.[46]

---

[40] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

[41] *Id.* at 334 (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) and Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[42] *Id.* at 335.

[43] *Id.*

[44] *Id.* at 334.

[45] *Id.*

[46] Christopher L. Mishek, *Recent Minnesota Supreme Court Decisions: Const. Law: Procedural Due Process on "Doggie Death Row": Using Unreviewable Warning Notices as Predicates to Deprive Property – Shaw*

In *Mathews v. Eldridge*, the plaintiff was receiving disability benefits from Social Security.[47] The Social Security Administration (SSA) terminated his benefits based solely on written reports.[48] The plaintiff then filed suit alleging that the SSA procedures violated the Due Process Clause.[49] The Supreme Court weighed the three factors and held that "an evidentiary hearing is not required prior to the termination of disability benefits".[50] The Court reasoned individuals must be "given a meaningful opportunity to present their case," to avoid a due process violation.[51]

First, private constitutional or statutory rights cannot be taken away without due process.[52] Courts should weigh the private interest in terms of both the severity and length of the possible deprivation of the private interest.[53] The longer the possible deprivation of rights, the greater the weight given to the private interest factor.[54] Similarly, the more severe the deprivation, the greater the weight given to the private interest factor.[55] For example, in *Mathews*, the Court weighed the private interest factor heavily because depriving an individual of disability benefits deprives him of his very livelihood in some cases.[56]

---

v. City of Lino Lakes, 40 WM. MITCHELL L. REV. 314, 320 (2013) (citing Richard J. Pierce, Jr. et al., Administrative Law and Process § 6.3.4d, at 275-76 (4th ed. 2004)).

[47] *Mathews*, 424 U.S. at 323.

[48] *Id.* at 324.

[49] *Id.*

[50] *Id.* at 349.

[51] *Id.*

[52] *Id.* at 332.

[53] *Mathews, 424 U.S. at 341.*

[54] *Id.*

[55] *Id.* at 342.

[56] *Id.*

The second factor to weigh is the risk of erroneous deprivation.[57] Courts should consider the probability of innocent people having their constitutional or statutory rights violated.[58] Courts should also consider fairness and reliability of the current procedures in relation to this factor.[59] Finally, courts should consider the possibility of implementing additional procedures to give innocent people more protection.[60] In *Mathews*, the Court found that written medical reports are very reliable and therefore the risk of erroneously terminating disability benefits is low.[61] Further, the Court reasoned that the risk of error was low because the recipient was given full access to all information that the SSA relied on.[62]

The last factor to weigh is the government or public interest protected.[63] The financial and administrative cost of providing additional protection is one element of the government interest protected.[64] In fact, courts should consider any burden or cost to society.[65] In *Mathews*, the Court found that the additional cost of hearings would be substantial.[66] In the end, the *Mathews* Court held that the current SSA procedures were fair and provided sufficient notice to disability recipients of the reasons for the termination of benefits.[67]

---

[57] *Id.* at 335.

[58] *Id.* at 343.

[59] *Mathews*, 424 U.S. at 343.

[60] *Id.*

[61] *Id.* at 344-45.

[62] *Id.* at 345-46.

[63] *Id.* at 335.

[64] *Id.* at 347.

[65] *Mathews*, 424 U.S. at 347.

[66] *Id.* at 437.

[67] *Id.* at 348-49.

Courts have also applied a "Stigma-Plus" test. Under the "Stigma-Plus" test, due process protects the private interest of stigma as long as the government also deprives a more tangible interest.[68] A more tangible interest is one that is created and protected by state law.[69] For example, in *Paul v. Davis*, a man alleged that his due process rights were violated when the police circulated a mugshot of him throughout the community.[70] The Court reasoned that although his reputation was harmed, the government did not deprive any tangible interest protected by state law; therefore there was no due process violation.[71] By contrast, when an individual is denied the possibility of government employment, this may create a stigma but it also deprives the individual of the statutorily created right to government employment, which provides the more tangible right required to meet the "Stigma-Plus" test and likely violates due process.[72]

C. Due Process and the No-Fly List – Latif v. Holder

Analyzing the current no-fly list under the *Mathews* factors above usually leads to a finding of a due process violation. For example, in *Latif v. Holder*, the District Court of Oregon held that there was a due process violation for several plaintiffs who were denied travel because they were on the No-List Fly List.[73] The plaintiffs in *Latif* were individuals who were restricted from travel due to their inclusion on the no-fly list.[74] None of the plaintiffs were given reasons for being on the no-fly list and some were not even told definitively whether they were on the list.[75]

---

[68] Paul v. Davis, 424 U.S. 693, 701 (1976).

[69] *Id.*

[70] *Id.* at 695-96.

[71] *Id.* at 712.

[72] *Id.* at 702 (citing U.S. v. Lovett, 328 U.S. 303 (1946)).

[73] *Latif*, 28 F. Supp. 3d at 1161.

[74] *Id.* at 1143.

[75] *Id.*

In terms of the first *Mathews* factor of private interest, the plaintiffs in *Latif* had various reasons for traveling.[76] Avman Latif is a Marine Corps veteran who traveled to Egypt to study and was not allowed to return to the United States.[77] He lost his veteran disability benefits because he was unable to attend the evaluations required.[78] After two years, he was finally allowed to travel back to the United States on a "one-time" waiver.[79] However, he is now prohibited from leaving the U.S. in order to continue his studies in Egypt or to fulfill his religious obligations in Saudi Arabia.[80]

Raymond Earl Knaeble IV is an Army veteran who worked in Kuwait.[81] He flew to Columbia to get married, and when he attempted to return to the United States, he was prohibited from traveling.[82] Knaeble lost a job offer because he was unable to return to the United States for a medical exam.[83] He eventually made it back to the United States after traveling through Central America and enduring several hours of interrogation.[84] The other plaintiffs have similar stories.[85]

The court held that plaintiffs have a private interest in traveling internationally and inclusion on the no-fly list significantly deprived this interest.[86] Restricting a person's ability to travel may lead to separation from family, limits on the availability of medical

---

[76] *Id.* at 1143-46.

[77] *Id.* at 1143-44.

[78] *Id.*

[79] Latif, 28 F. Supp. 3d at 1143-44.

[80] *Id.* at 1144.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Latif*, 28 F. Supp. 3d at 1143-46.

[86] *Id.* at 1150.

care, and limits on the availability of education, among other freedoms most Americans take for granted.[87] The court reasoned that "international travel is a necessary aspect of liberties sacred to members of a free society."[88]

In addition, the court held that the no-fly list violated plaintiffs' interest in reputation under the stigma-plus doctrine.[89] Individuals are often publicly denied access to a flight in front of other passengers and sometimes surrounded by security as well.[90] The court reasoned that the right to international travel provides the "plus" of the stigma-plus and that labeling someone as a suspected terrorist, denying them boarding on airline flights, and interrogating them is sufficient to constitute the stigma.[91]

In terms of the second *Mathews* factor of risk of erroneous deprivation, the court found that the "reasonable suspicion" standard used to place individuals on the TSDB has a rather low threshold.[92] "Reasonable suspicion" is more than a hunch, but does not require as much evidence as probable cause and significantly less than preponderance of the evidence.[93] Many people have been put on the no-fly list erroneously and found it very difficult to be removed completely.[94] One example is Rahinah Ibrahim who was mistakenly put on the no-fly list in 2004.[95] Ibrahim continued to have difficulty flying internationally for over nine years until a District Court finally ordered the government to remove all references to Ibrahim in all terrorist watch lists.[96] The government argued that the risk of

---

[87] *Id.* at 1149.

[88] *Id.* at 1149-50.

[89] *Id.* at 1151.

[90] *Id.*

[91] *Latif*, 28 F. Supp. 3d at 1150-51.

[92] *Id.* at 1152.

[93] *Id.* at 1151-52.

[94] *Id.* at 1152.

[95] *Id.* (citing Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 912 (N.D. Cal. 2014)).

[96] *Latif*, 28 F. Supp. 3d at 1152.

erroneous deprivation is decreasing, but it continues to be a problem.[97]

The government also fails to inform individuals if they are on the no-fly list or give reasons for their inclusion on the list.[98] Without being informed of the reasons they are on the list, an individual does not have the ability to defend themselves against those claims.[99] Judicial review does little to alleviate this problem because the plaintiff is still denied access to government records as they are only released to the judge.[100] This leads the court to conclude that the risk of erroneous deprivation is significant.[101]

In terms of the third *Mathews* factor of government interest, the court held that the government interest in national security is a huge one.[102] Much of the information used to put individuals on the TSDB is classified and the government cannot release it to the individual without jeopardizing national security.[103]

We must balance the strong private interest in international travel and stigma, along with the high risk of erroneous deprivation with the large risk to national security.[104] This government interest in protecting national security weighs heavily in favor of the government and is in direct conflict with the plaintiff's interest in providing enough information to the plaintiff to defend themselves.[105] However, the court concludes that current DHS TRIP

---

[97] *Id.* (citing Ibrahim, *supra* note 95).

[98] *Id.* at 1152-53.

[99] *Id.* at 1153 (citing Al Haramain Islamic Found., Inc. v. United States Dep't of Treasury, 686 F.3d 965, 982 (9th Cir. 2012)).

[100] *Id.*

[101] *Id.* at 1153.

[102] *Latif*, 28 F. Supp.3d at 1154.

[103] *Id.*

[104] *Id.* at 1160.

[105] *Id.*

procedures fail to provide individuals with enough information to satisfy due process.[106]

D. Due Process and National Security – Jifry v. FAA

When there is an increased concern about national security, the government interest may outweigh the private interest of the individual.[107] In *Jifry v. FAA*, the D.C. Circuit Court held that the FAA procedure for revoking a pilot's license because of a security threat was not a due process violation.[108] The plaintiffs in *Jifry* were two pilots whose licenses were revoked based on information that they were a security risk.[109] The pilots were notified that their licenses were being revoked for security reasons, and were provided with non-classified information.[110] However, the TSA did not provide the reasons for the determination that the pilots were a security risk because that information was classified.[111] The pilots were given the opportunity to reply in writing.[112]

The court applied the *Mathews* factors to the pilot's claim and found that the government's interest in national security far outweighed the pilots' private interest in keeping their pilot licenses.[113] The court reasoned that the government interest in providing security against terrorist attacks using aircrafts "pales in significance" to the private interest of holding a pilot's license. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[114]

---

[106] *Id.*

[107] Jifry v. FAA, 370 F.3d 1174 (D.C. Cir. 2004).

[108] *Id.* at 1177.

[109] *Id.*

[110] *Id.* at 1178.

[111] *Id.*

[112] *Id.*

[113] *Jifry*, 370 F.3d at 1183.

[114] *Id.* (citing Haig v. Agee, 453 U.S. 280, 307 (1981)).

In the end, the *Jifry* court reasoned that the pilots were provided sufficient due process because they were provided notice and an opportunity to respond to the non-classified information presented.[115] In addition, the judge reviewed the classified information in camera giving the plaintiffs independent judicial review.[116] The court found the procedure provided adequate and the government interest in national security outweighed the pilots' private interest, therefore the revocation of their pilots' licenses was upheld.[117]

E. Second Amendment Right to Bear Arms

The Second Amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[118] The Second Amendment was passed shortly after the Revolutionary War.[119] Americans has just declared their independence in opposition to an oppressive and corrupt British government.[120] The framers of the Constitution wanted to establish a strong federal government in order to protect citizens against attack, but not so strong that the government could grow to oppress the American citizens.[121] With this in mind, the framers chose to allow "the people" to arm themselves for both the purpose of protecting against attacks from foreign countries as well as protecting themselves from a tyrannical American government.[122]

---

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1184.

[118] U.S. CONST. amend. II.

[119] Andrea Moates, Note, *Second Amendment Jurisprudence: The Possible Destruction of the Rights of "The People"*, 30 OKLA. CITY U.L. REV. 363, 371 (2005).

[120] *Id.*

[121] *Id.*

[122] *Id.*

The true meaning of the text of the Second Amendment and the rights it grants has been in controversy for the last several years.[123] Some argue that the words "the people" used in the Second Amendment provide an individual right to bear arms.[124] Others contend that the right is only a collective one granted to state-run militias because of the language in the preamble referencing a "well regulated Militia."[125] The Supreme Court may have finally settled that debate in its decision in *District of Columbia v. Heller*.[126]

In *Heller*, the issue was whether a complete ban on the possession of handguns violates the Second Amendment.[127] The Supreme Court held that individuals have a Second Amendment right to possess a firearm unconnected with any militia for the purpose of self-defense.[128] The Court reasoned that the Second Amendment contains both a prefatory clause and an operative clause.[129] The prefatory clause states a purpose for the operative clause, but does not limit it in any way.[130] In this case, the prefatory clause, "a well regulated Militia, being necessary to the security of a free State," gives a purpose to the operative clause, "the right of the people to keep and bear Arms, shall not be infringed," but does not limit it in any way.[131]

The operative clause of the Second Amendment gives the right to bear arms to "the people."[132] "The people" is interpreted everywhere else in the Constitution as conferring an individual right

---

[123] *Id.* at 363.

[124] *Id.* at 363-64.

[125] Moates, *supra* note 118, at 364.

[126] *See* D.C. v. Heller, 554 U.S. 570 (2008).

[127] *Id.* at 573.

[128] *Id.* at 592.

[129] *Id.* at 577.

[130] *Id.* at 577-578.

[131] *Id.* at 577.

[132] *Heller*, 554 U.S. at 579.

rather than a collective right.[133] Further, "the people" generally refers to all members of the community and not just some subset of the community.[134] Therefore, we should interpret "the people" within the Second Amendment as providing an individual right.[135]

Next, the Second Amendment gives the people the right to "keep and bear Arms."[136] "Arms" commonly means weapons.[137] At the time of the writing of the Constitution, "keep arms" commonly meant to possess arms in the home, not necessarily for military use.[138] "Bear arms" commonly meant to carry arms, again not necessarily for military use.[139] Therefore, the operative clause of the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation."[140]

The prefatory clause of the Second Amendment states, "[a] well regulated Militia, being necessary to the security of a free State."[141] "Militia" is not limited to the organized military, but includes "all able-bodied men."[142] "Well regulated" simply means trained in arms.[143] "Security of a free State," means security of the country rather than security of the individual States.[144]

---

[133] *Id.* at 579-580.

[134] *Id.* at 580.

[135] *Id.* at 581.

[136] *Id.*; U.S. CONST. amend. II.

[137] *Id.*

[138] *Heller*, 554 U.S. at 582-583.

[139] *Id.* at 584.

[140] *Id.* at 592.

[141] *Id.* at 595.

[142] *Id.* at 596.

[143] *Id.* at 597.

[144] *Heller*, 554 U.S. at 597.

With all of these definitions in mind, the prefatory clause "fits perfectly" with the individual right to possess and carry weapons.[145] The prefatory clause states the purpose of the individual right to bear arms was to allow the militia to protect itself against political oppression.[146] However, that was not the only purpose of the individual right to bear arms.[147] Self-defense and hunting are additional purposes behind the individual right to bear arms.[148] The purpose of allowing a militia to protect itself against political oppression was listed as an explicit purpose in the Second Amendment because political oppression was exactly what was under attack at the time the Amendment was written, but that gives no less weight to other purposes.[149]

In the end, the Supreme Court struck down the D.C. law prohibiting the possession of handguns completely.[150] The Court held that the D.C. law infringed on the individual's Second Amendment right to possess and carry weapons for the lawful purpose of self-defense.[151] The Court first emphasized the right is an individual one available to all citizens.[152] Secondly the Court emphasized the right extends to bearing arms for any legal purpose.[153]

However, the right to bear arms is not unlimited.[154] The Supreme Court was careful to point out that the individual right to bear arms is not a blanket right to carry any weapon, any time, any

---

[145] *Id.* at 598.

[146] *Id.* at 599.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Heller*, 554 U.S. at 635.

[151] *Id.* at 592.

[152] *Id.* at 581.

[153] *Id.* at 599.

[154] *Id.* at 626.

place for any purpose.[155] The existing restrictions on concealed weapons, types of weapons, carrying weapons within schools or government buildings, and convicted felons or the mentally ill possessing weapons are still valid restricts under the Second Amendment.[156]

The restriction against the ability to carry concealed weapons under the Second Amendment dates back to at least 1850, when the Supreme Court of Louisiana held that a prohibition on carrying concealed weapons was not a violation of the Second Amendment.[157] The court reasoned that the Second Amendment granted individuals the right to bear arms for the purpose of self-defense.[158] The court specifically recognized that the purpose of the Second Amendment was both for individual protection and for the protection of the country.[159]

More recently, in 2012, the Second Circuit upheld a New York law requiring proper cause for the issuance of a full-carry concealed handgun license.[160] The Second Circuit Court reasoned that the Second Amendment applies mainly to the right to possess weapons inside the home.[161] The government has an interest in limiting possession of weapons in public for public safety reasons.[162] "The Second Amendment does not foreclose regulatory measures to a degree that would result in handcuffing lawmakers' ability to prevent armed mayhem in public places."[163]

---

[155] *Id.*

[156] *Heller*, 554 U.S. at 626.

[157] State v. Chandler, 5 La. Ann. 489, 490 (La. 1850).

[158] *Id.*

[159] *Id.*

[160] Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 100 (2d Cir. 2012).

[161] *Id.* at 89.

[162] *Id.* at 94-95.

[163] *Id.* at 96 (quoting United States v. Masciandaro, 638 F.3d 458, 471 (4th Cir. 2011)).

It is also valid under the Second Amendment to restrict the types of weapons an individual can possess.[164] After the Supreme Court invalidated the D.C. law prohibiting the possession of all handguns, the District of Columbia revised the law to restrict assault style weapons and magazines that carry more than ten rounds.[165] The court reasoned that the Second Amendment does not protect "weapons not typically possessed by law-abiding citizens for lawful purposes."[166] The Second Amendment mainly protects the lawful purposes of self-defense and hunting.[167] "[T]he prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves."[168] Furthermore, a restriction on assault weapons and large-capacity magazines supports the government's interest in protecting the public against crime.[169] Therefore, the court concludes that a ban on assault weapons and large-capacity magazines does not violate the Second Amendment.[170]

Restricting the possession of weapons within government buildings and schools is also valid under the Second Amendment.[171] In *Nordyke*, the Ninth Circuit upheld an ordinance prohibiting gun possession on the county fairgrounds.[172] The court held that "although the Second Amendment, applied through the Due Process Clause, protects a right to keep and bear arms for individual self-defense, it does not contain an entitlement to bring guns onto government property."[173] The court reasons that government

---

[164] Heller v. Dist. of Columbia, 670 F.3d 1252 (D.C. Cir. 2011).

[165] *Id.* at 1248-1249.

[166] *Id.* at 1252 (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 625 (2008)).

[167] *Id.* at 1260.

[168] *Id.* at 1262.

[169] *Id.* at 1263.

[170] *Heller,* 670 F.3d at 1264.

[171] Nordyke v. King, 563 F.3d 439, 460 (9th Cir. 2009).

[172] *Id.*

[173] *Id.* at 459.

property serves an important public interest and allowing possession of firearms on government property would put a large number of defenseless people at risk.[174]

It is also valid under the Second Amendment to restrict possession of weapons to convicted felons.[175] In *Vongxay*, a convicted felon challenged the constitutionality of the federal statute prohibiting anyone convicted of a crime punishable by more than one-year imprisonment from possessing firearms.[176] The court held that 18 U.S.C. § 922(g)(1) does not violate the Second Amendment.[177] The court reasoned that "felons are categorically different from the individuals who have a fundamental right to bear arms."[178] The court stressed that although *Heller* held that individuals have the right to bear arms, the Supreme Court specified that there are exceptions to that right.[179]

Furthermore, the purpose for the right to bear arm as pronounced in the Second Amendment itself, was "the security of a free State" through a "well regulated Militia."[180] Convicted felons may jeopardize rather than protect "the security of a free State" and are commonly not accepted in the militia.[181] It is generally accepted that the right to bear arms applies only to the righteous, therefore felons do not have a constitutionally protected right to bear arms.[182]

---

[174] *Id.*

[175] United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010).

[176] *Id.* at 1114.

[177] *Id.*; 18 U.S.C. § 922(g)(1).

[178] *Vongxay*, 594 F.3d at 1115.

[179] *Id.* (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 626-27).

[180] U.S. CONST. amend. II.

[181] *Vongxay*, 594 F.3d at 1117 (citing Parker v. Dist. of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007); D.C. CODE § 49-401).

[182] *Vongxay*, 594 F.3d at 1118.

It is also valid under the Second Amendment to restrict possession of weapons to the mentally ill.[183] The Gun Control Act specifically prohibits anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing a firearm.[184] However, it is well established that the government must preserve an individual's due process rights before denying their right to bear arms.[185] In *Tyler*, an individual who was involuntarily committed thirty years past, after an especially emotional divorce, challenged the constitutionality of the Gun Control Act in denying gun possession to the mentally ill.[186] The Sixth Circuit reasoned that the government can restrict an individual's right to bear arms if the individual is given due process and deemed a threat to himself or others.[187] However, the court held that restriction should be temporary and that the government must give the individual the opportunity to restore their right to bear arms.[188]

Lawmakers have also attempted to use waiting periods to limit the availability of guns to convicted felons.[189] Eleven states currently have laws requiring a waiting period of between twenty-four hours and fourteen days.[190] One reason for waiting period laws is to provide a cooling off period for those who may be enraged and desire to quickly buy a gun and commit a crime.[191] Requiring a waiting period may allow time for the person to cool off and decide against

---

[183] Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678 (6th Cir. 2016) (citing 18 U.S.C. § 922(g)).

[184] 18 U.S.C. § 922(g)(4).

[185] *Tyler*, 837 F.3d at 681 (citing Meaning of Terms, 27 C.F.R. § 478.11 (2016)).

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] Brian Burns, *Holding Fire: Why Long Waiting Periods to Buy a Gun Violate the Second Amendment*, 7 CHARLESTON L. REV. 379, 381 (2013).

[190] *Id.*

[191] *Id.* at 400.

committing the crime.[192] Longer waiting periods also provide law enforcement time to perform a background check before actually allowing the person to have access to the gun.[193] There are mixed results on the effectiveness of waiting period laws.[194]

However, a waiting period is fundamentally different than the types of restrictions that *Heller* declared valid under the Second Amendment.[195] *Heller* held that it is within the Constitution to restrict certain types of people from owning guns, restrict guns in certain places, or restrict certain types of guns, but it is unconstitutional to make broad restrictions which apply to a broad group of people.[196] Waiting periods fall under the category of the broad restrictions on all people that *Heller* found unconstitutional.[197]

In the end, individuals have a strong, constitutional right to bear arms. [198] The government can restrict that right for certain people like convicted felons, within certain places like schools, and in certain types of weapons like assault weapons. [199] However, the Second Amendment protects against broad restrictions like lengthy waiting periods. [200] Furthermore, the government must provide due process before restricting any individual's right to bear arms.

III. ISSUE

A. No-Fly, No-Buy under the *Mathews* Factors

---

[192] *Id.*

[193] *Id.*

[194] *Id.* at 401.

[195] Burns, *supra* note 188, at 403-404.

[196] *Id.*

[197] *Id.* at 404.

[198] Dist. of Columbia v. Heller, 554 U.S. 570, 592 (2008).

[199] *Id.* at 626.

[200] Burns, *supra* note 188, at 381.

Simply adding a restriction on buying firearms for those on the no-fly list under the current process would almost certainly violate the Constitution. In terms of the private interest protected, the right to bear arms may be stronger than the right to travel because it is explicitly listed in the Second Amendment. However, case law has determined that the right to bear arms is not without limitations.[201] The risk of erroneous deprivation here would be the same as with the previously discussed right to travel, which has been shown to be quite a large risk under the current system. There is a strong government interest in protecting the public from terrorist attacks and providing national security. However, in balancing these factors, it becomes clear that even considering national security, under the current system, the government mistakenly puts many people on the list and would deny a clear constitutional right if the no-fly list was extended to deny those people on it the right to purchase firearms.

The private interest protected in adding no-buy to the no-fly list is the right to bear arms. *Heller* held that this is an individual right and it is not limited to bearing arms for the purpose of military use.[202] This right is enumerated in the Constitution[203] and has been consistently upheld throughout our nation's history.[204] Therefore we should give the right great weight when balancing the *Mathews* factors.

The right to bear arms is a stronger private interest than the right to travel. The court in *Latif* held that there is a strong private interest in the freedom to travel internationally.[205] However, unlike the right to bear arms, the right to travel must be implied because it is not explicitly stated in the Constitution like the right to bear arms. If the right to travel warrants a strong weight as a private interest in the *Mathews* framework, then certainly an explicit constitutional right warrants an even stronger weight.

---

[201] *Heller*, 554 U.S. at 626.

[202] *Id.* at 581, 599.

[203] U.S. CONST. amend. II.

[204] *Heller*, 554 U.S. at 592.

[205] Latif v. Holder, 28 F. Supp. 3d 1134, 1150 (D. Or. 2014).

Moreover, we can make the same stigma-plus argument that was made in *Latif* in terms of adding no-buy to the no-fly list. Here, the right to bear arms provides the "plus" of the stigma-plus doctrine. The same logic as in *Latif* applies for the stigma attached to being labeled a terrorist when you are denied the ability to purchase a gun. There may be less immediate public attention associated with a denial of the ability to purchase a gun than there is with a denial of the ability to board a plane. The public is likely to take more notice of someone being pulled out of line or off the plane when boarding, then they are to notice someone being rejected when trying to purchase a gun. However, in communities where hunting and target shooting are the norm, the long-lasting effect of not being able to participate in hunting or target shooting events with family and friends is just as stigmatizing as not being able to travel to see family and friends. Therefore there is also a strong weight given to the private interest factor for the stigma associated with being denied the right to purchase a gun.

Indeed, a no-buy list would be similar to the complete ban on guns that the Supreme Court rejected in *Heller*.[206] Just as the D.C. law banned residents of the District of Columbia from possessing any firearm for any purpose,[207] a no-buy list would ban anyone on the list from possessing any firearm for any purpose. Individuals have the right to bear arms for any legal purpose,[208] and a no-buy list would take away that right without providing due process of law.

Moreover, the restrictions on gun bans on concealed weapons, types of weapons, restrictions near schools and government buildings are categorically different than a restriction for those on the no-fly list. The no-fly, no-buy list could be a total restriction in all aspects of individual's life and all types of guns. By contrast, the restriction on concealed weapons only controls the way which an individual may carry a weapon, but does not completely ban an individual from owning a gun.[209] The restriction on the types of weapons, such as assault weapons or high-capacity weapons, also only controls the kind of weapon an individual may carry and again,

---

[206] *Heller*, 554 U.S. at 592.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 626.

does not completely ban an individual from owning a gun.[210] Similarly, restrictions on carrying weapons in or near schools and government buildings apply only a partial restriction on where an individual may carry a weapon, as opposed to a complete ban on carrying weapons.[211] A no-buy list would restrict an individual from carrying any type of weapon, in any manner and any place, therefore making it the type of complete ban that the Supreme Court ruled unconstitutional in *Heller*.[212]

The restriction on convicted felons and the mentally ill from possessing weapons is more comparable to a restriction of those on the no-fly, no-buy list from possessing weapons. The Sixth Circuit held that restricting convicted felons and the mentally ill from purchasing guns is within constitutional bounds because of the danger it would present to the public.[213] The same argument can and has been made about restricting those on the no-fly list from purchasing guns. In fact, that is the whole point of this article. However, those facing a restriction for whatever reason are still entitled to due process before their right is taken away.[214] Convicted felons have been convicted and given ample opportunity to be heard and to present evidence of their innocence. Similarly, the government cannot deny the mentally ill the right to bear arms unless and until they give them the opportunity to present evidence of their ability to function safely in society.[215] By contrast, those on the no-fly are given no opportunity to be heard and in fact, are sometimes not even told they are on the list before their rights are taken away.[216] This is the fundamental problem with the current no-fly list.

The undetermined amount of time that an individual could be on a no-buy list, and therefore denied the right to bear arms, also

---

[210] *Id.*

[211] *Id.*

[212] *Heller*, 554 U.S. at 592.

[213] Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 681 (6th Cir. 2016).

[214] *Id.*

[215] *Id.*

[216] Latif v. Holder, 28 F. Supp. 3d 1134, 1143 (D. Or. 2014).

should increase the weight given to the private interest factor. Just as a lengthy waiting period is arguable unconstitutional because of the long amount of time that an individual is deprived of his rights,[217] a no-buy list would also violate the Constitution due to the long time that rights are deprived. This is especially concerning due to lack of practical procedure for being removed from the current no-fly list.[218] The government could indefinitely deprive an individual's private interest in the right to bear arms while they attempt to follow the inadequate procedure to be removed from the list.

For the second *Mathews* factor considering the risk of erroneous deprivation, many people have erroneously been put on the no-fly list under the current system.[219] If we simply add a no-buy restriction to the current no-fly list and keep the same procedures, the same problems will remain. Namely, the government puts individuals on the list without even being told they are on list and once they find out they are on list the government gives them little to no information about why they are on the list.[220] The government can place individuals on the list with nothing more than a reasonable suspicion. Then when they request information as to why they are on the list, the government fails to provide them with the information that was used to form that reasonable suspicion.[221] This makes it very difficult for someone on the list to defend themselves and dispute the information used to restrict their rights.

However, we also need to consider the third *Mathews* factor of the government interest. Again, if we simply add a no-buy restriction to the current no-fly list the same deprivation of rights will occur. The government has an immense interest in protecting American citizens from terrorist attacks like the one in Orlando.[222] The Supreme Court has declared that there is no greater public

---

[217] Burns, *supra* note 188, at 401.

[218] *Latif*, 28 F. Supp. 3d at 1152.

[219] *U.S. Government Watchlisting*, *supra* note 13.

[220] *Latif*, 28 F. Supp. 3d at 1143.

[221] *Id.* at 1162.

[222] *Id.* at 1154.

interest than national security.[223] Maintaining a terrorist watch list is in the best interest of the general public in order to prevent future attacks. The government interest in keeping guns out of the hands of terrorist is greater than the government interest of stopping terrorists from flying because the danger of arming a terrorist with a gun is usually greater than the danger of allowing a terrorist to fly. However, allowing terrorists to fly can present a huge risk to innocent lives as was proven on September 11, 2001.

Avoiding giving terrorists confidential information in the name of due process is also an important consideration, as terrorists could later use that information against us in an attack on innocent American citizens. We need to walk the fine line between providing enough information to give proper due process and supplying too much information that we should keep confidential. Providing terrorists with information in the name of due process may compromise national security.

There is also the very real problem of suspected terrorists using the discovery process to gain confidential information. In *Ibrahim*, the parties went back and forth with discovery disputes.[224] The government claimed the information requested was sensitive and it could not safely release it to the plaintiffs.[225] The district court judge needed to resolve these disputes using in camera and ex parte review due to the confidential nature of the information.[226] The court eventually cleared plaintiff's counsel to receive "sensitive security information" ("SSI"), but not classified information.[227] The plaintiff himself was never cleared to view either type of information.[228] All of these discovery disputes not only potentially put sensitive information in the hands of terrorists, but can burden the courts.

---

[223] Jifry v. FAA, 370 F.3d 1174, 1183 (D.C. Cir. 2004).

[224] Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 912 (N.D. Cal. 2014).

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.*

In the end, we need to balance all of the *Mathews* factors in determining whether or not there is a due process violation in simply adding a no-buy provision to the current no-fly list. We must balance the strong private interest in the individual right to bear arms, along with the high risk of erroneous deprivation with the large risk to national security.

We can also distinguish *Jifry* from adding a no-buy provision to the current no-fly list. In *Jifry*, the procedure provided to the pilots was different in that they were given information about why their pilot's license was being revoked before the license was actually revoked.[229] All non-confidential information was released to the pilots.[230] Therefore, the pilots had the opportunity to dispute the evidence against them and defend themselves.[231] By contrast, if we simply add a no-buy provision to the current no-fly list and keep the same procedures where individuals are given little to no information about why they are on the list, this will clearly violate due process.

The court in *Latif* balanced the *Mathews* factors in considering the current no-fly list and found that there was a due process violation.[232] By adding a no-buy provision, we are simply increasing the weight given to the private interest because there is a stronger interest in protecting an explicit right specified in the Constitution than there is in protecting a right to travel. We may also be increasing the government interest in protecting national security since it is more dangerous to give a terrorist a gun than to allow them to travel on a plane. However, the unreasonably large risk of erroneously being put on the list becomes the deciding factor. As the court in *Latif* explained, there are simple steps that we can take to decrease the risk of erroneous deprivation without increasing the risk to national security.[233] Therefore, adding a no-buy provision to the current no-fly list without also changing the procedures followed is a violation of due process.

---

[229] *Jifry*, 370 F.3d at 1178.

[230] *Id.*

[231] *Id.* at 1177.

[232] Latif v. Holder, 28 F. Supp. 3d 1134, 1160 (D. Or. 2014).

[233] *Id.*

IV. ANALYSIS

Ultimately, we need to weigh two competing objectives in setting due process procedures for a no-buy list. One, we need to provide enough information to those put on the list to allow them to defend themselves and request removal from the list. Two, we need to prevent providing too much information to actual terrorists as they could exploit the procedure to gain intelligence to use against us.

On one hand, we need to provide real protection against erroneously being put on the watch list, the second *Mathews* factor.[234] American citizens have a constitutional right to bear arms.[235] We cannot take away that right without due process of law.[236] Therefore we need to give those on the list a real opportunity to tell their side of the story and be taken off the list, restoring their constitutional rights. However, in order to explain why they were unfairly placed on the list, the government needs to provide them with the reason they were placed on the list.

On the other hand, the government does not want to provide confidential information to suspected terrorists. This leads to the third *Mathews* factor of protecting the government interest in national security.[237] The Supreme Court has declared that national security is a huge government interest.[238] Just informing a suspect that they are indeed on the terrorist watch list could be more information than the government wishes to reveal. If the government is forced to reveal too much information to those on the watch list, then terrorists will start to use the people on the list to gain information. Terrorists could simply file a complaint claiming a constitutional rights violation in order to gain access to confidential information that they could use against innocent people in a terrorist attack. There is a fine line between protecting national security and protecting the constitutional rights of individuals.

---

[234] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[235] U.S. CONST. amend. II.

[236] *Mathews*, 424 U.S. at 332.

[237] *Id.* at 335.

[238] Jifry v. FAA, 370 F.3d 1174, 1183 (D.C. Cir. 2004).

A. Proposed No-Buy List Procedures

In *Latif*, the court concludes that current DHS TRIP procedures can be modified without threatening national security.[239] Plaintiffs could be given notice of their inclusion on the no-fly list after being denied travel, any relevant unclassified information, and a summary of classified information.[240] However, providing all unclassified information and a summary of classified information would likely go too far in jeopardizing national security. A terrorist network could easily use information about what the government knows and doesn't know to infiltrate the United States. The terrorists would know who can enter the United States and legally purchase weapons. The terrorists could then distribute those legally purchased weapons throughout the terrorist network.

The current war on terrorism is more about information, intelligence, and secrecy than it is about weapons.[241] U.S. government agencies have become experts in intelligence gathering since September 11, 2001.[242] Although the United States has endured attacks such as those in San Bernardino and Orlando, we have not seen another massive terrorist attack on the scale of 9/11, and we may attribute that to the government's ability to gather information on terrorism.[243] However, as the war on terrorism advances, it has become more and more difficult to gather information.[244] We need to continually strengthen our intelligence gathering in order to remain one step ahead of the terrorists.[245]

On the other hand, some have voiced concerns that the so-called "war on terrorism" will give government an excuse to invade

---

[239] Latif v. Holder, 28 F. Supp. 3d 1134, 1160 (D. Or. 2014).

[240] *Id.*

[241] John R. Schindler, *We're Losing the War Against Terrorism*, OBSERVER (Sept. 13, 2016), http://observer.com/2016/09/were-losing-the-war-against-terrorism/.

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

the privacy of law abiding citizens.[246] The fear is that individual's civil liberties would be violated in the name of war on terrorism.[247] Furthermore, those individuals working toward peace may be subject to increased scrutiny and civil rights violations because of their connections with the war on terrorism.[248] We need to find the balance between getting the necessary information from actual terrorists and violating the constitutional rights of honest citizens.

To avoid the dissemination of information, we could establish an independent administration office tasked with adjudicating claims arising from the various terrorist watch lists including the current no-fly list and a new no-buy list. When an individual feels they have been wrongly placed on a terrorist watch list and their constitutional rights have been violated, that individual would first go through the current DHS TRIP process already in place to resolve these issues. If an individual is not satisfied with the results of the DHS TRIP process, they would then file a complaint through the new administrative agency and an administrative law judge that specializes in national security would hear their case. Just as the Social Security Administration and the Department of Labor have their own independent administrative law judges to hear cases particular to those departments, the Department of Homeland Security could establish a set of independent administrative law judges for the purpose of adjudicating claims associated with national security.

Generally, administrative law judges are utilized when there is a need for special expertise.[249] Administrative law judges are also used to relieve some of the pressure on federal court dockets. Administrative courts can often resolve issues more quickly due the fact that the administrative law judges already have the background knowledge and expertise necessary to jump right into the factual dispute of a case while federal judges would need to research the background information before even beginning a case. Furthermore, allowing administrative judges to handle specialized cases frees up federal judges for other more general matters.

---

[246] Anup Shah, *War on Terror*, GLOBAL ISSUES (Oct. 7, 2013), http://www.globalissues.org/issue/245/war-on-terror.

[247] *Id.*

[248] *Id.*

[249] PAUL R. VERKUIL ET AL., THE FED. ADMIN. JUDICIARY, 773 (1992).

National security and terrorist watch list cases are the perfect situation for administrative law judges. When walking the fine line between national security and due process, the judge should have a specialized level of expertise to determine what information we can safely distribute to individuals. An administrative judge who handles these types of cases on a daily basis would quickly gain that needed expertise.

Furthermore, time may be of the essence in many of these cases, and administrative law judges would potentially resolve cases more quickly. An intruder may shoot and kill an individual who is denied the right to purchase a gun for self-defense during a home invasion while his case is pending. Or an individual who is denied the right to travel may miss out on employment or education opportunities, miss a family wedding, or fail to perform a religious ceremony while a case is pending. Resolving cases quickly in an administrative court would limit plaintiff's exposure to these unfortunate situations.

However, creating administrative law judges within the Department of Homeland Security does not itself provide due process protection. We still need to provide individuals with enough information in order to defend themselves in court, without providing too much information and risking national security.

Due to their expertise, the new administrative law judges will have a better idea of what information they can safely give to individuals without jeopardizing national security. The government will have to give judges security clearance in order to read the information in camera and then disseminate the safe and proper information to the plaintiff. Instead of simply disseminating all unclassified information and a summary of classified information as the court in *Latif* suggested,[250] an expert administrative law judge would have the ability to determine what information they can safely release to an individual on a case by case basis. This will allow us to find the proper balance of the *Mathews* factors for an individual's right to bear arms, to travel, and the government interest in national security, while cutting back on the risk of erroneously depriving individuals of their constitutional rights.

[250] Latif v. Holder, 28 F. Supp. 3d 1134, 1160 (D. Or. 2014).

B. Proposal under *Mathews*

The proposal of creating a no-buy list and having administrative law judges housed under the Department of Homeland Security handle all terrorist watch list claims would provide sufficient due process to avoid a constitutional violation. In terms of private interest protections, the right to bear arms is a strong one as it is explicitly listed in the Second Amendment.[251] However, there are limitations on the right to bear arms.[252] The risk of erroneous deprivation is decreasing even under the current system.[253] That risk should continue to decrease over time as the Department of Homeland Security, including the new administrative law judges, gain the necessary expertise and make appropriate recommendations for changes to the procedures. There remains a strong government interest in protecting the public from terrorist attacks and providing national security.[254] In balancing all of these factors, administrative law judges will be able to provide plaintiffs with enough information to satisfy due process without providing so much that national security is put at risk.

The private interest protected in a no-buy list is the right to bear arms. This right is enumerated in the Constitution[255] and has been consistently upheld throughout our nation's history.[256] Therefore we should give great weight to the right when balancing the *Mathews* factors.

Heller held that this is an individual right and it is not limited to bearing arms for the purpose of military use.[257] Self-defense and hunting are additional purposes behind the individual constitutional right to bear arms.[258] The right to bear arms for any lawful purpose

---

[251] U.S. CONST. amend. II.

[252] Dist. of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[253] *Latif*, 28 F. Supp. 3d at 1152.

[254] *Id.* at 1154.

[255] U.S. CONST. amend. II.

[256] *Heller*, 554 U.S. at 592.

[257] *Id.* at 581, 599.

[258] *Id.* at 599.

is constitutionally protected and cannot be taken away with due process of law.[259] Without due process, a no-buy list would be similar to the complete ban on guns that the Supreme Court rejected in *Heller*.[260] However, as long as the government provides the appropriate level of due process, a no-buy list restricting only those posing a threat to national security from purchasing weapons is more akin to the current laws restricting gun purchases by convicted felons and the mentally ill, which have been deemed constitutional.[261]

A no-buy list may also meet the stigma-plus test. The right to bear arms provides the "plus" of the stigma-plus doctrine. The same logic as in *Latif* applies for the stigma attached to being labeled a terrorist when you are denied the ability to purchase a gun. Therefore, we also strongly weight the private interest factor for the stigma associated with being denied the right to purchase a gun.

For the second *Mathews* factor, considering the risk of erroneous deprivation, many people have erroneously been put on the no-fly list under the current system.[262] However, reports have shown that things are getting better with time.[263] By creating an administrative adjudicative process for individuals who are erroneously put on list, the problem areas will come to light more quickly and we can find ways to resolve those problems. Administrative law judges who are involved in terrorist watch list cases on a daily basis will quickly develop expertise. This will help to set procedures and rules for determining what types of information must be given to an individual in order to satisfy due process. In addition, administrative law judges will be able to resolve individual complaints more quickly than federal judges enabling individuals to regain their constitutional rights quickly when they are temporarily erroneously deprived.

---

[259] *Id.* at 592.

[260] *Id.*

[261] Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 681 (6th Cir. 2016).

[262] *U.S. Government Watchlisting: Unfair Process and Devastating Consequences, supra* note 13.

[263] Latif v. Holder, 28 F. Supp. 3d 1134, 1152 (D. Or. 2014).

Last but not least, we need to consider the third *Mathews* factor of government's interest. Government has a huge interest in protecting American citizens from terrorist attacks.[264] There have been many terrorist attacks on U.S. soil recently such as the ones in Orlando and San Bernardino.[265] Maintaining a terrorist watch list is necessary to protect the general public from future attacks.

We also want to avoid giving suspected terrorists confidential information in the name of due process that they could later use against us to perpetrate an attack on innocent American citizens. We need to walk the fine line between providing enough information to give proper due process and supplying too much information that we should keep confidential. Once a terrorist files a complaint in federal court, they are entitled to discovery. The discovery rules in administrative law are different than those in federal court. In administrative court, discovery is often much more limited than the federal courts and this is not considered a due process violation.[266]

In the end, we need to balance all of the *Mathews* factors in determining whether creating a no-buy list and handling all terrorist watch list claims by administrative law judges is a due process violation. We must balance appropriately the strong private interest in an individual's right to bear arms, the diminishing risk of erroneous deprivation, and the large risk to national security.

The court in *Latif*, found that the main problem was the total lack of any information provided to the plaintiff was in violation of due process.[267] Creating an administrative court where administrative law judges with special expertise in terrorist watch lists can determine the proper amount of information to release alleviate this problem. Improving the process over time through the recommendations of the administrative law judges, may also reduce the risk of erroneously putting individuals on the list. The risk to national security remains high, and thus we must not compromise our national security. Therefore, with the increased information

---

[264] *Id.* at 1154.

[265] Schindler, *supra* note 241.

[266] *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that welfare recipients must be given an oral hearing before benefits are terminated, but discovery is not necessary in order to satisfy due process).

[267] *Latif*, 28 F. Supp. 3d at 1160.

given to plaintiffs and the reduced risk of erroneous error, the huge government interest in national security makes utilizing administrative law judges within the Department of Homeland Security the perfect solution to the problem of due process violations within a no-buy terrorist watch list.

V. CONCLUSION

In today's society, there are more and more terrorists going on shooting sprees and killing innocent American citizens. It makes perfect sense to prohibit terrorists from purchasing guns. Politicians on both sides have promoted the idea of banning those on the Terrorist Watch List from purchasing guns legally. However, American citizens have a constitutional right to bear arms. We cannot infringe that right without due process of law which includes first giving the individual the right to be heard. The problem is that the Terrorist Watch List is notorious for including innocent people on the list and not even informing individuals when they are on the list.

However, the no-fly list can be expanded into a no-buy list prohibiting those on it from purchasing weapons as long as the procedures are revised in order to comply with due process and stop terrorists from legally purchasing guns. Setting up an administrative agency tasked with adjudicating claims arising from terrorist watch lists would provide individuals with enough information to satisfy due process without jeopardizing national security. Administrative law judges would have the expertise needed to determine what information we can safely distribute to individuals. Innocent individuals would be able to defend themselves and be removed from the list in a timely matter. However, real terrorists would not be given sensitive information thereby protecting national security.