Judicial Scrutiny on US Counter-Terrorism Databases: The *Elhady* Case

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Title: Il controllo giudiziale sui database antiterrorismo statunitensi: il caso *Elhady*

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1. – On September 4, 2019, the US District Court for the Eastern District of Virginia ruled (*Elhady et al. v. Cable et al.*, ED. Va. 1-16-cv-375 (AJT/JFA)) that one of the major tools that the Federal Bureau of Investigation (FBI) and the Department of Homeland Security (DHS) use to monitor terrorism suspects violates the US Constitution as well as provisions contained in a federal piece of legislation. More in details, the Terrorist Screening Database (TSDB) infringes the Due Process Clause – enshrined in the Fifth Amendment and in the Fourteenth Amendment to the US Constitution – and the Administrative Procedure Act (APA), for a number of reasons that will be explained.

This case note comments the *Elhady* decision of the US District Court for the Eastern District of Virginia and is divided as follows. After this short Introduction, Paragraph 2 describes the functioning of the TSDB and its use as a counter-terrorism tool by the US government. Such technical details are essential to get into the core of the case. Paragraph 3 sets the factual background of the decision, describing the facts at issue and the procedural history of the case. Afterwards, Paragraph 4 looks at the Court's judgment and its main rationales. The ruling is then analysed in Paragraph 5, which tries to assess the impact of the District Court's stance as well as foreseeable practical implications on the use of screening databases in counter-terrorism operations. Some brief conclusive remarks follow, dealing with how this decision framed the balance between national security and individual rights, and stressing the convergence of standards established by different courts in terrorism cases.

2. – The TSDB is a consolidated database operated by the Terrorist Screening Center (TSC). The latter is a multiagency center set up by the FBI in cooperation with the DHS. The TSC was established in 2003 to ensure that federal departments and agencies are able to share information that can be useful to counter-terrorism purposes effectively and rapidly. The TSDB is the tool that concretely allows the TSC to do so.

The TSDB contains unclassified but sensitive information on identities of individuals who are involved – or are suspected to be involved – in terrorist activities. In fact, the TSDB distinguishes two categories: the former can be referred to as "known terrorists"; the latter can be mentioned as "suspect terrorists". From a legal perspective,

the main question that may come to anybody's mind is: is there a legal definition of these two categories? Such a definition exists, indeed: to the purpose of the inclusion in the TSDB, a "known terrorist" is someone who has been

> (a) arrested, charged by information, indicted for, or convicted of a crime related to terrorism and/or terrorist activities by U.S. Government or foreign government authorities; or (b) identified as a terrorist or a member of a terrorist organization pursuant to statute, Executive Order, or international legal obligation pursuant to a United Nations Security Council Resolution.

On the other hand, a "suspect terrorist" is an individual who "is reasonably suspected to be engaging in, has engaged in, or intends to engage in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities". Importantly, though, both these definitions are not provided by any federal piece of legislation. Rather, they were adopted by the DHS and the FBI – and, consequently, are accepted by the TSC – on the basis of internal practice of intelligence agencies (Federal Bureau of Investigation, *Terrorist Screening Center: Frequently Asked Questions*, September 25, 2015). Therefore, such bodies play a key role in identifying those who are targeted by these measures.

Going back to how the TSDB works, its main asset is undoubtedly its interoperability, since this database is able to gather information – both biographic and biometric data – from a number of bodies: federal departments, law enforcement authorities, intelligence agencies, some international partners that are selected to contribute to the database. This is the reason why the TSC, which operates the TSDB, was dubbed "a bridge among screening agencies" (R. Kopel, *Statement Before the House of Representatives Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection*, Washington DC, Sept. 9, 2008).

Individuals – or, more precisely, their data – are added to the TSDB pursuant to a procedure that is known as the "watchlist nomination process" and comprises several steps.

First, the precondition for inclusion is that the DHS, intelligence agencies, law enforcement authorities or diplomatic bodies detain sufficient information on an individual according to which they fall into one of the abovementioned categories ("known terrorist" or "suspected terrorist"). These bodies, on the basis of the information available to them, determine potential "nominations" (i.e. data of individuals whom they consider likely to be included in the TSDB).

Second, the proposed nominations are submitted to the National Counterterrorism Center (NCTC). At this stage, NCTC analysts have to vet information provided to them in order to determine whether (or not) it is reliable. These operations are often carried out jointly with the FBI.

Third, and only provided that the information was deemed credible by the NCTC, it is transmitted to the TSC, which has to evaluate whether two further criteria are met: on the one side, the "reasonable suspicion watchlist standard"; on the other side, the TSC has to detect the existence of sufficient "identifiers".

The former criterion is quite vague, to the point that it is usually defined in a negative way: in particular, it is necessary that the proposed nomination is not based "solely on activity protected by the First Amendment or race, ethnicity, national origin, and religious affiliation" (J.P. Bjelopera, B. Elias, A. Siskin, *The Terrorist Screening Database and Preventing Terrorist Travel*, Congressional Research Service Report, November 7, 2016). Anyway, FBI members admitted, during congressional hearings, that "limited exceptions" to this rule do exist in the FBI practice (see Testimony of Christopher M. Piehota, Director, Terrorist Screening Center, Federal Bureau of Investigation, in U.S. Congress, House Committee on Homeland Security,

Subcommittee on Transportation Security, *Safeguarding Privacy and Civil Liberties while Keeping Our Skies Safe*, hearing transcript, 113th Cong., 2nd sess., September 18, 2014). Such a statement is quite alarming, since it entails that, even if in an (allegedly) limited number of cases, some individuals were designated as "suspect terrorist" on the sole basis of personal features, which are the object of constitutional protection.

The latter criterion that the TSC has to assess – i.e. the existence of sufficient "identifiers" – means that it must be possible to distinguish the identity of the person at issue from the identities of other persons (see J.P. Bjelopera, B. Elias, A. Sisking, *op. cit.*, also providing recent data on nominations and rejections to the TSDB).

A further point that is essential in order have a proper understanding of the *Elhady* case is what may happen in the aftermath of a "nomination". Once a person has been nominated as a "known terrorist" or "suspect terrorist" to the purposes of the TSDB, a number of special measures can be enacted. They can be subsumed under two categories. On the one hand, there are efforts taken to prevent the international movement of terrorists and suspect terrorists. Hence, *inter alia*, these persons can be denied visas, experience secondary inspections at airports, be denied boarding on international flights (No-Fly Lists) or admission to the US (if they are non-US citizens). On the other hand, TSBD data is useful to enhance law enforcement screening and investigation, so the FBI regularly shares TSDB information with several external bodies, including private entities. Last but not least, this data can also be disclosed to foreign governments that use it according to their domestic laws and practice.

Lastly, it is essential, for the purpose of the present study, to explore how redress mechanisms work in the described framework. In this regard, federal legislation on intelligence requires that all people who are identified as (potential) threats to security always have the possibility to challenge such decisions (Intelligence Reform and Terrorism Prevention Act 2004, P.L. 108-458; on this Act, see T.B. Tatelman, *Intelligence Reform and Terrorism Prevention Act of 2004: National Standards for Driver Licences, Social Security Cards, and Birth Certificates*, in D.D. Pegarkov (ed.), *National Security Issues*, New York, 84 ff.). Accordingly, a redress mechanism was established by the DHS, named Traveler Redress Inquiry Program (TRIP). As originally framed, this program was found in breach of the right to due process, protected by the US Constitution (*Mohamed v. Holder*, 2015 4394958 (E.D. Va. July 16, 2015)) and it was subsequently amended. More specifically, the TRIP originally only allowed a one-step review process; after the *Mohamed* judgment, a second step of review was added, since details of the case can be forwarded to the TSC Redress Office, tasked with reviewing the DHS TRIP determination. However, the procedure to submit a complaint to this body takes place online and merely consists of filling up a form, after which the complainant receives a letter in response. Hence, its effectiveness and transparency could be questioned.

3. – Against this background, it is now necessary to address the facts of the *Elhady* case. The plaintiffs were 23 US citizens who brought a legal complaint against the Director of the TSC, Charles H. Kable. They were never formally notified inclusion in the TBSD. Nevertheless, when they flew on commercial airplanes, they regularly faced additional screening searches, seizures, arrests; some of them were denied boarding. One of them, Anas Elhady, while attempting to enter the US, was held in detention twice for periods of 8-10 hours, interrogated about his activities and his family, and subjected to mistreatments that caused him to be hospitalized. All plaintiffs eventually forcibly decided to give up engaging in international travels. In the light of these events, all individuals submitted an inquiry to the DHS TRIP, requesting information about their possible inclusion in the TSBD. In response, they received letters that neither

confirmed nor denied their status as "listed" individuals, but merely informed them that there was no reason why they should be denied boarding.

As a result, the plaintiffs filed complaints alleging that their (possible) inclusion in the TSDB violated a number of constitutional and legislative provisions as well as administrative law principles, namely: the Due Process Clause, both in its procedural and substantive limbs; the Equal Protection Clause; the APA; the non-delegation doctrine (i.e. the principle, inferred from Article 1 of the US Constitution, which prohibits the Congress from delegating its legislative power to other bodies, especially agencies; see, on this matter, K.E. Whittington, J. Iuliano, *The Myth of the Nondelegation Doctrine*, in 165 *University of Pennsylvania Law Review* 379 (2017); I. Wurman, *Constitutional Administration*, in 69 *Stanford Law Review* 359 (2017)).

From a procedural perspective, many materials were excluded from discovery since the government claimed that several pieces of information were shielded by the state secrets privilege. Though, the case was still deemed justiciable on the basis of other pieces of evidence and the US District Court for the Eastern District of Virginia went into its merits (so, in this regard, the Court did not embrace a deferential attitude towards the Executive's secrecy claims, as US courts often did in other cases were the state secrets privilege was resorted to in order to bar litigation on other counter-terrorism operations, for example extraordinary renditions; see A. Vedaschi, *The Dark Side of Counter-Terrorism:* Arcana Imperii *and* Salus Rei Publicae, in 66 *American Journal of Comparative* Law 877 (2018)).

Among the abovementioned allegations, the Court only considered the plaintiffs' procedural due process and APA claims. In fact, it found that they had not alleged sufficient facts on other claims (i.e. substantive due process, equal protection, non-delegation doctrine), which, hence, were not allowed to proceed.

The Court held that both procedural due process and the APA had been violated, according to a very clear and schematic reasoning.

4. – As a first step, the Court had to determine whether or not the plaintiffs had a standing. The defendants (i.e. the representatives of the government) argued that the 23 individuals were not able to demonstrate that their position was likely to bring "future injury to support standing". In other words, the government contended that no causal connection could be identified between the situation the plaintiffs complained about and potential future harm, thereby they had no standing. Such standing doctrine, relying exactly on "potential future harm", was established by the US Supreme Court in the *Lujan* case (*Lujan v. Defenders of Wildlife*, 504 US 555 (1992)). Nonetheless, the District Court, grounding its statement on *Mohamed v. Holder*, held that the plaintiffs' decision, imposed by circumstances, not to engage in international travels "because of the difficulties [they] reasonably expect[ed] upon return to the United States" was sufficient harm to prove standing (on the *Mohamed* decision and other issues associated with No-Fly Lists, see D. Lowe, *The Flap with No Fly - Does the No Fly List Violate Privacy and Due Process Constitutional Protections*, in 92 *University of Detroit Mercy Law Review* 157 (2015)).

As a second step, the Court addressed the merits of the case and focused (only) on procedural due process claims. Indeed, the Court also noted that the plaintiffs' APA claim conflated with their procedural due process claim. Thus, the Court highlighted that the same reasoning was applicable to both claims and the APA argument did not deserve separate examination.

From a US constitutional law perspective, procedural due process means that when US citizens are denied a life, liberty or property interest by the federal government, they must be given prior notice of that decision, they must enjoy the right

to be heard as well as the possibility that such determination is reviewed by a neutral and independent decisionmaker (for more details on procedural due process, see R.H. Fallon, *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, in 93 *Columbia Law Review* 309 (1993)).

The approach of US courts to procedural due process claims is governed by the *Mathews* precedent, a case decided by the US Supreme Court in the mid-70s (*Mathews v. Eldridge*, 424 US 319 (1976)). The *Mathews* court ruled that judges have to engage in a balancing test to assess the violation of procedural due process rules. They have to take into account the private interest to life, liberty or property implied in the case, as well as the risk of an erroneous deprivation of such private interest through the procedures used by the government; they have to consider the government's interest that may justify a limitation of due process; lastly, they have to evaluate whether additional procedural safeguards would concretely reduce such risk (see J.L. Mashaw, *The Supreme Court's Due Process Clause for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, in 44 *The University of Chicago Law Review* 28 (1976)).

The District Court's reasoning in *Elhady* applied the *Mathews* test and took the following steps. Firstly, it was undisputed that the plaintiffs had a liberty interest depending on their inclusion in the TSDB, and that the "nomination" process did involve the risk of erroneous deprivation of such interest. Secondly, the government had an opposite (and legitimate) interest, i.e. its duty to ensure public safety to US citizens and to protect national security. Thirdly, the abovementioned risk (i.e. the erroneous deprivation of the plaintiffs' liberty interest) would be reduced by additional procedural safeguards. The latter would also be able to ensure a fair balance with the government's interest. It is now necessary to explain how the Court justified these steps in its reasoning.

The first private interest at stake was, according to the Court, a "movement-related liberty interest", which also covers the "right to travel internationally" (*Kent v. Dulles*, 357 US 116, 125 (1958)) and "the right to interstate travel" (*Mohamed*, cit.). On this point, the government's argument was rejected, according to which plaintiffs were conflating the right to travel with the right to travel "without screening or delay", which is not protected by the Constitution at all. In the defendants' view, measures taken against the plaintiffs were nothing but reasonable checks necessary to ensure security in airports. The Court's approach was pretty different: such actions were far from being legitimate and reasonable restrictions, since they had wide ranging effects that substantively equated them to a travel ban (the plaintiffs gave up engaging in international travels). Moreover, they were carried out in a way that amounted to ill-treatment of targeted people: the Court recalled that some of the plaintiffs had to be rushed to the hospital due to the harm they were inflicted during detention and interrogation, and that others had suffered from psychological trauma.

The right to travel was not the only individual interest that the plaintiffs had, according to the *Elhady* decision. As a matter of fact, the 23 individuals' reputational interest was involved as well. Their inclusion in the TSBD entailed stigmatization and adverse effects on those persons' standing in their respective communities. Moreover, the Court noted, TSBD data is often shared with private parties, included employers, causing many troubles, for people included therein, to be hired or keep their job.

Hence, these two private interests did exist and, even though their limitation is possible, it could not depend on erroneous evaluations.

Accordingly, the Court then moved to the risk of erroneous deprivation of the private interests at stake (in the present case, the plaintiffs' right to travel and reputational interest) in the light of existing procedures. This assessment is still part of the first step of the *Mathews* test (i.e. the existence of a private interest and of the

risk of its erroneous deprivation). In the case of *Elhady*, the Court determined that there was "a grave risk of erroneous deprivation", due to several factors that can be synthesised as follows.

Since there was no evidence that any of the plaintiffs fell within the definition of "known terrorist", their inclusion in the TSDB could only be based on their categorization as "suspected terrorist". However, the Court highlighted, the standard for inclusion in this category is very vague and unclear. Requiring that a person "is reasonably suspected to be engaging in, has engaged in, or intends to engage in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities" (see *supra*, para. 2) means that innocent behaviour may trigger a series of inferences resulting in the inclusion. The Court also noted that even if nominations cannot be based "solely on activity protected by the First Amendment or race, ethnicity, national origin, and religious affiliation" (see *supra*, para. 2), it is undeniable that such elements may contribute – and to what extent? – to the nomination itself. Moreover, despite both the nominating agency and the TSC are tasked with reviewing elements on which nominations themselves are based – a point that the government promptly remarked in its defence – no neutral decisionmaker is involved in the process, so violating procedural constitutional requirements. And the DHS TRIP itself was deemed inadequate to satisfy procedural due process standards: has happened in the case of the plaintiffs, even after filing a complaint, individuals are not told about whether or not they are in the watchlist and why they were included.

After stating that existing procedural guarantees were not enough to prevent the risk of erroneously depriving people of their travel and reputational interests, the Court focused on opposite government's interests. In this regard, the analysis was quite brief and straightforward, since no doubt existed that interests at issue stemmed from the government's duty to protect public safety and national security and that these are legitimate goals to be pursued by public bodies.

Having determined both the private interests (and high the risk of erroneous deprivation entailed in current procedures) and the governmental interest, the Court focused on whether and how additional procedural requirements could concretely improve the situation. Plaintiffs sought additional procedural guarantees in two main forms: notice of TSDB nomination and a meaningful opportunity to challenge the inclusion. The Court ruled that notifying those included in the TSDB *before* the enactment of restrictive measures (e.g. boarding denial) would not be feasible. In the light of the necessary balance with the opposite government interest to safeguard security, such a provision would unacceptably compromise ongoing investigations. Yet, after the restrictive measures are applied, notification of inclusion in the database and the possibility to challenge the decision are necessary to comply with procedural due process standards and they would not jeopardise investigation nor any other measures aimed at protecting security. The current DHS TRIP does not allow such a remedy, thus it does not provide adequate procedural guarantees under the Due Process Clause.

5. – Hence, in this decision, the Court rejected the government's arguments both on the standing and on the merits of the case, engaging in a careful assessment of the plaintiffs' position, at least with regard to some of the allegations.

Such an approach was seen as a quite unexpected outcome by some commentators (S. Sinnar, *Q&A on Court Decision Invalidating Administration's Terrorist Watchlist*, in *Lawfare*, 5 September 2019, https://www.justsecurity.org/66068/shirin-sinnar-on-court-decision-invalidating-administrations-terrorism-watchlist/). They noted that the judge delivering the opinion in the *Elhady* case – Judge Anthony J. Trenga – was appointed by President George W. Bush and did not often rule in favour

of plaintiffs in other cases dealing with national security. For instance, in a travel ban case (*Sarsour v. Trump* (1:17cv00120 (AJT/IDD), 24 March 2017), he sided with the Trump Administration, rejecting arguments that the ban was discriminatory against Muslims (for a comment on this decision, see P. Margulies, *Upholding the Revised Refugee Executive Order: A Virginia District Court Clarifies the Establishment Clause Issues*, in *Lawfare*, 26 March 2017, https://www.lawfareblog.com/upholding-revised-refugee-executive-order-virginia-district-court-clarifies-establishment-clause).

This paragraph reads the decision following this scheme: firstly, it explains why this judgment is relevant (para. 5.1.); secondly, it highlights whether the Court could have reviewed some additional issues in order to ensure a more accurate scrutiny of the case (para. 5.2.); thirdly, it focuses on how the *Elhady* case's practical impact (para. 5.3).

5.1. – The *Elhady* judgment should be regarded as a landmark case for at least two main reasons.

The first one is that the Court ruled on the TSBD, which is the larger terrorist watchlist in the US and all other databases used by US authorities depend on it. Consequently, declaring that the TSDB does not meet standards required by the US Constitution implies that all other databases deriving from it present the same flaws (as noted also by J. Kahn, *Why a Judge's Terrorism Watchlist Ruling is a Game Changer: What Happens Next*, in *Just Security*, 9 September 2019, https://www.justsecurity.org/66105/elhady-kable-what-happens-next-why-a-judges-terrorism-watchlist-ruling-is-a-game-changer/).

The other reason that makes the *Elhady* a key case is that Judge Trenga set some standards that closely resemble those adopted by other courts outside the US, when they examine the relationship between security needs and individual rights in cases involving surveillance through technology tools. As a matter of fact, the European Court of Justice (ECJ) decided a number of cases on these topics. The latest stance of the Luxembourg judges is represented by Opinion 1/15 on the exchange of PNR (Passenger Name Record) data between Europe and Canada to preventive purposes. This opinion was issued by the Grand Chamber on 26 July 2017 (on this decision, see A. Vedaschi, *The European Court of Justice on the EU-Canada Passenger Name Record Agreement*, in 14 *European Constitutional Law Review* 410 (2018)). In other words, without prejudice to the obvious and clear differences between the European Union (EU) and the US system, a convergence of certain standards begins to stand out.

More in detail, the *Mathews* precedent, which governs those situations involving procedural due process claims, is applied, in this specific case, very similarly to a "European style" proportionality test. The proportionality test is typical of the ECJ when it rules on the limitations of rights in the name of public security, but also the European Court of Human Rights (ECtHR) relies on such test (on proportionality in a comparative perspective, see A. Stone Sweet, J. Mathews, *Proportionality Balancing and Constitutional Governance*, Oxford University Press, 2019). The *Mathews* precedent resembles a proportionality test due to the following reasons.

First, according to the *Mathews* rule, it is necessary to scrutinize the existence of a "liberty interest" of the applicant. The "European" proportionality test – Article 52 of the Charter of Fundamental Rights of the European Union (CFREU) can be seen as the main normative reference – imposes the assessment of an "interference" with a fundamental right.

Second, the *Mathews* precedent asks judges to check whether the government had an evident "opposite interest" to limit the fundamental right at stake. This step is quite similar to the requirement, embodied in the proportionality analysis, to evaluate whether or not the interference was justified in the light of a legitimate aim.

Third, in *Mathews* the US Supreme Court explained that the impact of "additional procedural safeguards" must be taken into account. In other words, it is necessary to understand if such additional safeguards would be applicable without impairing the "opposite" governmental interest to be protected and, at the same time, would reduce the risk that the individual right at issue is excessively limited. On the "European side", the proportionality test requires a "strict scrutiny" on whether the goal, which the limitation of rights aims at attaining, is pursued through appropriate (and not excessive) means.

These similarities show that the *Mathews* balancing test is quite alike to the proportionality test adopted by the ECJ, for example when it held that surveillance by the collection, retention and analysis of PNR data pursues a legitimate aim, but the lack of appropriate guarantees makes it disproportionate.

However, if one looks at the proportionality paradigm as applied in Europe, there is something that is missing in the US approach. According to Article 52 CFREU, but also pursuant to other provisions on the limitation of rights for the sake of public security – for example Article 8, para 2 of the European Convention on Human Rights (ECHR) dealing with the right to private and family life and its limitations –, restriction to rights must be "provided by law". This *caveat* does not emerge in the *Elhady* case, since the Court does not pay any attention to the fact that the definition of "known terrorist" and "suspect terrorist" is not embodied in any federal piece of legislation.

Besides the use of proportionality, another similarity with the European attitude (once again, the main reference is the ECJ in both Opinion 1/15 and *Digital Rights Ireland*, C-293/12 and C-594/12, 8 April 2014) is the rejection of vagueness of standards for inclusion in the database. The ECJ, in the mentioned judgments, repeatedly held that when an interference with rights is provided due to security needs, the legislation governing it must be precise and accurate, both under a formalistic perspective (drafting of legal provisions) and from a substantive point of view (i.e. it must be clear who and in which circumstances can be targeted).

5.2. – After depicting the main reason why this decision, whereas not being final, is relevant, it is also useful to address "what is missing" in it and which points could have been reviewed more in-depth by the Court.

First, the Court did not focus so much on the automatization of the analysis of biometric and biographic data. The TSDB works on the basis of automatic matches, at least at a very first stage. Clearly, this feature could imply some problems of accuracy, as long as it is not demonstrated that the database is regularly updated and checked (as required by the ECJ in its Opinion 1/15) and that its mechanisms do not make mistakes. Such a lack of attention on this point is indeed coherent with the traditional US approach to data, typically being privacy and data protection guarantees easily overstepped by other interests. Nor did the Court remark the importance of human review on automated processes, which in the European scenario is instead quite a consolidated principle, both in general data protection legislation (see Article 22 of Regulation (EU) 2016/679) and in tools specifically dealing with the use of data in law enforcement activities (for example, Article 7 of Directive (EU) 2016/681).

Second, the Court did not attach importance to the "quality" of data contained in the TSDB. In other words, it did not examine whether or not this data could be based on discriminatory patterns, e.g. focusing more on Muslims than on other categories of people, although this is generally regarded as a troublesome topic related to the use of the TSBD (see Testimony of Christopher M. Piehota, Director, Terrorist Screening Center, Federal Bureau of Investigation, *cit.*).

Third, the Court did not mention the fact that not only biographic, but also biometric data is included in the TSBS, meaning that additional guarantees could be required in the light of this data's particularly sensitive nature. This aspect, instead, would probably have been a key point if the decision had been taken in the European scenario, due to the relevance that biometric data has recently assumed in the EU data protection legislation (see Article 9 of Regulation (EU) 2016/679).

Albeit the lack of any reference to these three points can be explained by the fact that they were not included in the claims of the plaintiffs (except for the discrimination issue, which instead was among the main allegations), the Court could have anyway referred to them indirectly. If the Court had done so, it would have stressed the impact of the TSBD on other constitutional rights and values, namely the Fourth Amendment, other than those allegedly breached, and would have strengthen the reasons behind the unconstitutionality of this tool.

5.3. – In order to assess the practical impact of the *Elhady* decision, one has to bear in mind that the TSBD is a "motherlode" watchlist, on which other US databases aimed at screening the terrorist risk depend. As a consequence, it is quite likely that not only the TSBD, but also all other databases associated with it will have to face reform. Until this moment, no steps were taken in order to change any feature of the TSBD and, in general, of other databases designed to prevent terrorism in the US. Forthcoming reforms (if any) should take into account the Court's *caveats* and, in particular, provide for more appropriate remedy and more precise criteria for inclusion in the database.

Also in this regard, it is possible to compare the need for reforms of the TSBD with the European scenario. As a consequence of Opinion 1/15 of the ECJ, the draft agreement between the European Union (EU) and Canada regulating the exchange of PNR data to prevention of terrorism purposes was inhibited from entering into force and needed to be amended. Thereby, the deal was renegotiated, but the new text has not been published yet.

In both cases, it will be interesting to see whether the Courts' remarks will be taken into account by political bodies tasked with redrafting or amending the acts at issue.

Indeed, an important difference is that, in the case of EU-Canada PNR Agreement, the EU is legally obliged to renegotiate the agreement with Canada (otherwise they have to definitively drop any cooperation on PNR with such third country), since the draft version, submitted to the ECJ, is prevented from taking effect. The US TSBD, instead, is not immediately due to be amended from a legal point of view, meaning that Congress is not directly bound to change legislation dealing with it, even if the District Court's decision implicitly calls for reform.

6. – In conclusion, three main aspects need to be pointed out.

First, if the TSBD is reformed after this Court's ruling – mainly on the side of procedural requirements –not only US citizens, but also non-US nationals will benefit from amendments, since foreigners are often the ones who are most impacted by measures deriving from the inclusion of such databases. Therefore, the TSBD is a tool with extra-territorial and extra-jurisdictional effects.

Second, the convergence, which has been highlighted throughout this analysis, between the approach of the *Elhady* decision and the stance taken by the ECJ emphasizes that threats to national security are triggering a "globalization" of responses, aimed at trying to establish some common legal tools and standards to better deal with such a multifaceted and dangerous menace as international terrorism is.

Third – and this is the most important point – the *Elhady* decision touches upon the complex balance between security and rights, which has been a real conundrum at least since 11 September 2001, when international terrorism showed up as one of the most serious threats of the 21st century. Although much has been written on this tricky relationship, no solution seems to have been found yet about how to fairly balance these two factors, i.e. the need to ensure security and the necessity not to give up rights so as not to relinquish democracy.

In most courts' decisions, among which *Elhady* might be included, rights-security is a relationship to be framed on a case-by-case basis. In other words, according to this attitude, security and rights are not incapsulated in a fixed and pre-established hierarchy, but they are two elements whose proportion changes according to the specific situation at issue.

Even if such an "empiric" view might seem, at least for the moment, the only viable solution, and perhaps the fairest one, some concerns do arise. For instance, one could wonder whether, in a long-term perspective, the lack of a well-established hierarchy will lead to uncertainty as to the very essence of individual rights and, as a result, to the impairment of core values of the rule of law.