LIBERTY AND SECURITY:
RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

A coalition of more than twenty organizations and over seventy five individuals collaborated to create "Liberty and Security: Recommendations for the Next Administration and Congress." The Constitution Project coordinated the production of the report, which was released in November 2008. "Liberty and Security" indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called "enemy combatants;" and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

CHAPTER 1: Eliminate Unnecessary Barriers To Legitimate Charitable Work
CHAPTER 2: Closing Guantánamo
CHAPTER 3: End Illegal Detention, Torture, and Rendition
CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law
CHAPTER 5: Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.
CHAPTER 6: Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion
CHAPTER 7: Misuse of Immigration Detention Laws in Counterterrorism Efforts
CHAPTER 8: Revising Attorney General Guidelines on FBI Investigations
CHAPTER 9: Updating the Law Governing the Privacy of Electronic Communications
CHAPTER 10: Fusion Centers and the Expansion of Domestic Intelligence
CHAPTER 11: Promoting Government Transparency
CHAPTER 12: National Security Letters and Section 215 of the USA PATRIOT Act
CHAPTER 13: Reform of the National Security Surveillance Laws and Procedures
CHAPTER 14: Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents
CHAPTER 15: Reforming the State Secrets Privilege
CHAPTER 16: Reforming Watch Lists
CHAPTER 17: Assertion of Executive Authority in National Security Matters
CHAPTER 18: Executive Privilege and Congressional Oversight
CHAPTER 19: Signing Statements
CHAPTER 20: War Powers Authority

The full report is available online at http://2009transition.org/liberty-security/, at www.constitutionproject.org, and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

CHAPTER SIXTEEN

Reforming Watch Lists

I. The Problem

Since September 11, 2001, federal law enforcement and intelligence agencies have vastly expanded the scope of, and their reliance upon, watch lists. In late 2003, the government created a consolidated watch list, which is maintained by the Terrorist Screening Center ("TSC"). Watch lists are used in a variety of security-screening related situations including airline passenger screening through the "No fly" and "Selectee" lists of the Transportation Security Administration ("TSA"), visa decisions by consular officers at the Department of State, and even in consumer transactions by private businesses using the Office of Foreign Assets Control's public watch list. In July 2004, the 9/11 Commission published its report making recommendations on the use of watch list and selectee lists by the Transportation Security Administration. According to a TSC representative, as of September 2008, the TSC consolidated watch list contained approximately 1,000,000 records covering approximately 400,000 persons (of approximately 3% whom were believed to be U.S. persons).[1]

Although watch lists can play an important role in identifying threats to national security, they have grown to be inaccurate, unreliable and too widely used. For example, a report of the Inspector General of the Department of Justice described deficiencies in the TSC consolidated watch list, including flawed methodologies used by the FBI to nominate persons to the TSC consolidated watch list and inclusion of records that should not have been included—and equally harmful, the Inspector General noted that the procedures used by the FBI were "unable to ensure that consistent, accurate, and complete terrorist information is disseminated to frontline screening agents in a timely manner."[2] Further, the watch lists also threaten privacy in direct conflict with the strong privacy protections afforded by the Privacy Act's requirements of accuracy, access, and accountability.

The harms caused by the inefficiencies and inaccuracies are extensive. Thousands of innocent people have erroneously been added to watch lists, are unable to clear their records, and are wrongly being detained when attempting to travel or being denied employment and other benefits.[3] Government screeners are so overwhelmed by

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[1] Statement of Rick Kopel, Principal Deputy Director, Terrorist Screening Center, Before the House of Representatives Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, September 9, 2008.

[2] U.S. Department of Justice, Office of the Inspector General, Audit Division, "Follow-up Audit of the Terrorist Screening Center," Audit Report-07-41, September 2007.

[3] The GAO has noted that TSC "data indicate that about half of the tens of thousands of potential matches sent to the center between December 2003 and January 2006 for further research turned out to be misidentifications." U.S. General Accountability Office, "Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public," GAO-06-1031, September 2006.

questioning innocent travelers on the lists that they are unable to devote adequate time and resources to identifying and investigating people who are genuine terrorist threats. Furthermore, if these errors are not addressed, they have the potential to continue to violate our civil liberties and harm innocent civilians.

II. Proposed Solutions

A. Guiding Principles

1. Certain situations, such as those in which a decision must be made quickly and inaction might have potentially dire consequences – for example, in determining whether to admit non-resident aliens into the United States at ports of entry –merit the use of watch lists. However, watch lists should not be used as "blacklists" in any context relating to employment or the application for licenses or contracts. In these cases, the government has sufficient time to protect its interests through a thorough background check.

2. Clearly defined and consistently applied criteria and processes for determining when persons should be added to or removed from watch lists, as well as a consistent oversight process, should be adopted.

3. Reforms should be adopted to improve the accuracy and fairness of watch lists and to establish a system that will allow individuals a meaningful opportunity and due process procedures to challenge their erroneous inclusion on a watch list.

4. Government must be accountable for inaccurate identifications of travelers.

B. Proposed Measures

1. The President should direct the Department of Homeland Security and all other federal agencies that watch lists shall not be used in employment screening or hiring decisions. Instead, the government should protect its interests by conducting a careful investigation through established security clearance systems. The President should also direct the Department of Homeland Security to abandon its developing plans to screen applicants for employment (in both the public and private sector) through watch lists.

2. The President should direct the TSC and all other agencies with jurisdiction to nominate persons to the watch lists to establish a series of measures to promote the accuracy of the lists at the "front end," to improve the efficiency and effectiveness of the lists and provide greater fairness to individuals. These measures should include:

    a. Establishing clear written standards that specify the criteria for including a person on the watch lists, the kinds of information to be considered as relevant evidence that the criteria have been met, and the standards of proof required for including individuals on the watch lists.

b. Establishing a rigorous and reliable nominating process (including an oversight process) to make certain that decisions to include persons on watch lists are made objectively and as consistently as possible across agents and across agencies.

c. Establishing programs of internal monitoring so that agencies nominating persons to the TSC consolidated watch list and other watch lists can ensure the completeness, timeliness, accuracy, and effectiveness of error correction. This should include regular random sampling and analysis of records, annual reporting requirements to Congressional Oversight Committees and to the public.

d. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish systems to ensure that the lists are maintained under fully secure conditions, to protect against the risks of both inadvertent tampering and computer hacking.

e. Ensuring that agencies with access to the TSC consolidated watch list and other watch lists establish policies and procedures to safeguard the personal information of individuals submitted to the government as part of the screening process (including as part of Secure Flight and in connection with the redress proceedings and cleared flight programs).

f. Delaying implementation of Secure Flight until the above –described corrections to the watch lists and the privacy safeguards are fully implemented. Once these corrections and privacy safeguards have been made, new final Secure Flight rules should be promulgated and a 180-day test of the system should be undertaken.

g. Directing agencies nominating persons to the watch lists or otherwise utilizing such watch lists to better coordinate actions to ensure that consistent changes are made across all watch lists on a timely basis (including requiring agencies to make clear the originating source or an appropriate designation for the source of the information to make more transparent the propagation of information among watch list creators).

h. Making transparent and publicizing to travelers the information about them that will be shared with the government by aircraft operators as part of the Secure Flight program.

3. The President should direct the TSC and all other agencies with jurisdiction to nominate names to or maintain watch lists to establish a redress system that will provide a meaningful and fundamentally fair opportunity for individuals to challenge their inclusion on a watch list.

    a. The review process should provide for more extensive review and due process rights than that provided by current agency procedures,

including the current DHS Travelers Redress Inquiry Program ("TRIP"). In appropriate cases, this should include the opportunity for an oral administrative hearing and judicial review.

b. Individuals should be able to challenge their inclusion either on the basis of mistaken identify or on the grounds that the government lacks an adequate justification for including them.

c. For cases alleging inadequate justification, the government should employ government attorneys with security clearances at a level adequate to ensure that they can review classified material to serve as public advocates.

III. Allies*

American Library Association
Lynne E. Bradley, Director
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202-682-8410
The ALA Policy Manual: The Rights of Library Users and the USA Patriot Act (52.4.5) *available at* http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf

Bill of Rights Defense Committee (BORDC)
Chip Pitts, President
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Center for Democracy & Technology
Gregory T. Nojeim
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202-637-9800 (ext 113)
The Internet in Transition, *available at* http://www.cdt.org/election2008/

Council on American-Islamic Relations (CAIR)
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The Constitution Project
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Defending Dissent Foundation
Sue Udry, Director

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202-549-4225
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Electronic Frontier Foundation (EFF)

Lee Tien
lee(at)eff.org
415-436-9333 (ext. 102)
A Privacy Agenda for the New Administration, *available at* http://www.eff.org/deeplinks/2008/11/privacy-agenda

Essential Information

John Richard or Robert Weissman
202-387-8034

Government Accountability Project

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202-408-0034 (ext. 107)

Liberty Coalition

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Muslim Advocates

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OpenTheGovernment.org

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South Asian Americans Leading Together

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Stanford Law School - Mills International Human Rights Clinic

Barbara J. Olshansky, Leah Kaplan Visiting Professor and Clinic Director
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U.S. Bill of Rights Foundation
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* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information.

IV. Counter-Arguments and Rebuttal

Supporters of the use of watch lists in employment screening contend that government agencies and private employers should have all possible tools available in their efforts to keep Americans safe. They assert that watch lists can be valuable tools, and we should not disadvantage our security efforts by denying people the use of these tools. However, it is important to remember that watch lists are simply a shortcut to be used in situations when decisions must be made quickly – such as in decisions regarding access to airline flights or sensitive security sites. In the employment context, by contrast, there is ample time to rely upon the more thorough, accurate, and traditional tool of conducting a security clearance investigation, and there is no urgency to outweigh the substantial risks to individual rights posed by the use of watch lists in this context.

Supporters of the use of watch lists can point to progress cited by DOJ and DHS inspector generals in connection with the nominating process for individuals for inclusion on watch lists, updating and review of information on watch lists and formation of an oversight process. The inspector general reports, however, point to uneven progress in this regard, as well as a lack of communication between agencies with respect to watch lists. Moreover, there is no indication that all governmental agencies with the right to nominate individuals to or maintain the watch lists are, however, using the same processes as described in the DOJ/DHS reports.

Regarding the proposed reforms to improve the accuracy of watch lists and to create a more comprehensive and meaningful redress process, some would argue that these reforms are too costly and unnecessary. First, they would contend that it would take too many hours of employee time to further scrub and improve existing watch lists, and that government agents need flexibility to perform their jobs properly in deciding whom to nominate. For the redress process, they would assert that they have already established the TRIP program, and that any additional procedures would be too costly and time consuming. However, these arguments fail to recognize the substantial costs and diversion of resources required now by inaccurate lists. Improving the accuracy of lists at the front end and creating meaningful redress procedures at the back end will not only improve fairness to individuals, but will also improve government efficiency and permit screeners to focus on actual terrorist suspects.

VI. Recommended Documents for Further Information

a. U.S. Department of Homeland Security, "Report Assessing the Impact of the Automatic Selectee and No Fly Lists on Privacy and Civil Liberties as Required Under Section 4012(b) of the Intelligence Reform and Terrorism Prevent Act of 2004, Public Law 108-458," April 27, 2006, *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_rpt_nofly.pdf

b. U.S. Government Accountability Office, "Aviation Security: TSA is Enhancing Its Oversight of Air Carrier Efforts to Identify Passengers on the No Fly and Selectee Lists, but Expects Ultimate Solution to Be Implementation of Secure Flight," GAO-08-992, September 2008.

c. U.S. Department of Homeland Security, Office of the Inspector General, "The DHS Process for Nominating Individuals to the Consolidated Terrorist Watchlist," OIG-08-29, February 2008, a*vailable at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-29_Feb08.pdf.

d. U.S. Government Accountability Office, "Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public," GAO-06-1031, September 2006, *available at* http://www.gao.gov/new.items/d061031.pdf.

e. William J. Krouse, "Terrorist Identification, Screening, and Tracking Under Homeland Security Presidential Directive 6," CRS Report for Congress, April 21, 2004, *available at*: http://www.fas.org/irp/crs/RL32366.pdf.

f. Statement of Rick Kopel, Principal Deputy Director, Terrorist Screening Center, Before the House of Representatives Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, September 9, 2008, *available at* http://homeland.house.gov/SiteDocuments/20080909154423-03376.pdf

g. Prepared Testimony and Statement for the Record of Lillie Coney, Associate Director, Electronic Privacy Information Center, "Ensuring America's Security: Cleaning Up the Nation's Watchlists," Before the Subcommittee on Transportation Security and Infrastructure Protection, Committee on Homeland Security, U.S. House of Representatives, September 9, 2008, *available at* http://homeland.house.gov/SiteDocuments/20080909154244-52260.pdf.

h. Statement of Glenn A. Fine, Inspector General, U.S. Department of Justice, before the Committee on Homeland Security, House of Representatives, concerning The Terrorist Screening System and the Watchlist Process, November 8, 2007, *available at* http://homeland.house.gov/SiteDocuments/20071108115238-59003.pdf.

i. U.S. Government Accountability Office, Statement of Eileen R. Larence, Director Homeland Security and Justice Issues, "Terrorist Watch List Screening:

Recommendations to Promote a Comprehensive and Coordinated Approach to Terrorist-Related Screening," as Testimony before the Committee on Homeland Security, House of Representatives, GAO-08-253T, November 8, 2007, *available at* http://homeland.house.gov/SiteDocuments/20071108115229-56813.pdf

j. The Constitution Project, "Promoting Accuracy and Fairness in the Use of Government Watch Lists," December 2006, *available at* http://www.constitutionproject.org/pdf/Promoting_Accuracy_and_Fairness_in_the_Use_of_Government_Watch_Lists.pdf

k. The OFAC List, "How a Treasury Department Terrorist Watchlist Ensnares Everyday Consumers," March 2007, *available at* http://www.lccr.com/03%202007%20OFAC%20Report.pdf**.**

l. EPIC Comments on Docket Nos. DHS-2005-0053: Notice of Revision and Expansion of Privacy Act System of Records, May 22, 2006

m. EPIC Comments on Docket Nos. TSA-2007-28972, TSA-2007-2872

n. Paul Rosenzweig and Jeff Jonas, "Correcting False Positives: Redress and the Watch List Conundrum," Legal Memorandum #17, June 17, 2005, *available at* http://www.heritage.org/Research/HomelandSecurity/lm17.cfm

o. *No-Fly List Should Not Be Used As a Political Weapon*, Op-Ed, THE BUFFALO News, Aug. 8, 2008, *available at* http://www.buffalonews.com/149/story/407399.html

p. *A Blacklist's Real Face*, NAT'L LAW J., Feb. 19, 2007, *available in part at* http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=389x266591

q. Sikh Coalition Letter to TSA Urging Implementation of Mechanism to Prevent Discrimination in Screenings, available at: TSA Auditing Coalition Letter; For further information, contact: Neha Singh, Western Region Director, The Sikh Coalition, Ph: 510.659.0900 (ext. 90); Email: neha@sikhcoalition.org