

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:

Charities, Foundations, and National Security

CHAPTER 1: Eliminate Unnecessary Barriers to Legitimate Charitable Work

Detention, Interrogation, and Trials of Suspected Terrorists

CHAPTER 2: Closing Guantánamo

CHAPTER 3: End Illegal Detention, Torture, and Rendition

CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law

Immigration and National Security

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

Secrecy, Surveillance, and Privacy

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

Separation of Powers and Executive Authority

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.

APPENDIX

Chapter 16: Reforming Watch Lists

I. Jurisdiction

A. Executive Branch

The Executive Branch has jurisdiction over watch lists and terrorist screening activities arising out of its general constitutional power to provide for the national defense. In addition, Congress has delegated to the TSA authority pursuant to 49 U.S.C. § 114(l)(2) to restrict air travel to those persons who “pose a risk to aviation safety.” The foregoing general authority has been supplemented pursuant to the Presidential Directives and agency actions and regulations described below.

On September 16, 2003, the TSC was established pursuant to Homeland Security Presidential Directive 6 (“HSPD-6”).ⁱ Concurrently therewith, the Secretary of State, Attorney General, the Secretary of Homeland Security and the Director of Central Intelligence executed a memorandum of understanding entitled, “MOU on the Integration and Use of Screening Information to Protect Against Terrorism” delineating certain reporting, information provision and other matters related to the TSC. HSPD-6 increased the watch list focus and expanded the use of watch lists to cover data derived from ongoing terrorism-related criminal and national security investigations. It was out of HSPD-6 that the consolidated TSC watch list was born. HSPD-6 states that the consolidated TSC watch list shall contain information about persons “known or appropriately suspected to be or have engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.” HSPD-6 further states that to the extent permitted by law, the consolidated TSC watch list will be made available to (1) state, local, territorial and tribal law enforcement agencies and other appropriate authorities, (2) private sector entities responsible for managing critical infrastructure or organizers of significant events, and (3) foreign governments with immigration agreements with the U.S. or that are engaged as partners with the U.S. in the global war on terror.

Standards for inclusion of names on watch lists are generally set by the nominating agency. As a general matter, except for the “No Fly” and “Selectee” lists, the other watch lists utilize the “known or appropriately selected” standard set forth in HSPD-6 or some derivation thereof (for example, the FBI generally uses a standard of “reasonableness” or a “reasonable indication” of involvement in terrorism).ⁱⁱ Little specific information on the types of information or the standard of proof required to satisfy the foregoing standards has been made public. As a general matter, the relevant agency is also in charge of updating records on individuals that it has previously submitted for inclusion in the appropriate watch list. Each agency is generally responsible for training its personnel with respect to the appropriate watch list, standards for inclusion of information on the appropriate watch list and the process of nominating and updating information on individuals included in the appropriate watch list.

As described above, DHS is continuing to work on guidelines for private sector screening processes related to terrorism. The consolidated TSC watch list would be utilized (including in connection with employment-related decisions) in industries that “have a substantial bearing on homeland security,” including “agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance, chemical industry and hazardous materials, postal and shipping, and national monuments and icons.”ⁱⁱⁱ

In September 2007, the heads of a number of governmental agencies, including the Secretary of State, Attorney General, the Secretary of Homeland Security, the Director of Central Intelligence and the Privacy and Civil Liberties Oversight Board executed a memorandum of understanding entitled, “Memorandum of Understanding on Terrorist Watchlist Redress Procedures.” Redress procedures are currently handed through the agency responsible for submitting the individual’s name to the appropriate watch list. For example, TSA and U.S. Customs and Border Protection have redress offices that work directly with affected individuals. The TSA has established DHS TRIP for persons who “seek resolution regarding difficulties they experienced during their travel screening at transportation hubs.” The TSC does not directly work with affected individuals, but it works with screening agencies to determine whether a person who has initiated a complaint is appropriately included in the consolidated TSC watch list. TSC’s policy in redress proceedings is to neither confirm nor deny whether an individual is listed on the consolidated TSC watch list (on the basis that the underlying information is classified and derived from law enforcement and intelligence information). As a general matter, these redress procedures do not currently permit affected individuals the right to review the information against them or clearly contemplate judicial review of their actions.^{iv}

As part of its remedial steps, TSA has also instituted a process to permit individuals subject to frequent misidentification avoid further misidentification. This process permits frequently misidentified persons to voluntarily provide TSA with additional identifying information, to permit the TSA to decide whether to place the individual on a cleared list. Some affected individuals, however, have complained of continuing problems when traveling. The TSA plan does not appear to contemplate judicial review of decisions by the TSA.

In August 2007, the DHS published a notice entitled, “Privacy Act of 1974; Implementation of Exemptions; Security Flight Record,” (TSA 49 C.F.R. 48397-48400) pursuant to which the DHS stated that it was exempting itself from various disclosure requirements under the Privacy Act of 1974.

Because the foregoing actions and regulations have been taken pursuant to Presidential Directives and agency regulations and actions, the President and/or agency heads under a new administration would have jurisdiction to revise or modify the foregoing Directives, actions and regulations.

B. Legislative Branch

Pursuant to the Aviation and Transportation Security Act, PL 107-71 (codified as 49 U.S.C. 114(h), Congress granted the TSA authority for maintaining the “No Fly” and “Selectee” lists.

Congress has also enacted the Homeland Security Act of 2002, 6 U.S.C. 451 et seq., which provides jurisdiction for the Executive Branch to undertake the actions and regulations described above.

II. Status of Actions in Legislative, Executive and Judicial Branches

A. Executive Branch

See Section I.A of this Appendix.

B. Legislative Branch

Congress has passed a series of bills over the years requiring the Executive Branch to provide additional information regarding watch lists. For example, pursuant to Section 360 of the Intelligence Authorization Act for Fiscal Year 2004, P.L. 108-177, Congress required the President to report, among other things, on the operations of the TSC.

Congress has held hearings on the TSC consolidated watch list. For example, the Committee on Homeland Security of the House of Representatives held a televised hearing entitled “The Progress and Pitfalls of the Terrorist Watch List” on November 8, 2007. On September 9, 2008, the Subcommittee on Transportation Security and Infrastructure Protection, Committee on Homeland Security of the House of Representatives held a hearing entitled “Ensuring America’s Security: Cleaning Up the Nation’s Watchlists.”

Bills have been introduced in Congress to modify watch list redress procedures. Senate Bill 3392, introduced July 31, 2008 by Senators Klobuchar, Thune, Leahy, McCaskill and Voinovich to the Committee on Commerce, Science and Transportation, would, among other things, (1) require DHS to establish an Office of Appeals and Redress to hear appeals from persons included on the consolidated TSC watch list, (2) require DHS to establish, maintain and distribute to appropriate agencies within the government a comprehensive cleared list, and (3) require the Secretary of Homeland Security to undertake various protective steps with respect to personally identifying information of individuals. A similar bill, H.R. 4179 was introduced in the House of Representatives on June 19, 2008 to the Committee on Commerce, Science and Transportation.

C. Judicial Branch

To date, courts have generally deferred to Executive Branch assertions regarding the need for privacy with respect to watch lists. For example, in *Gordon v. FBI*, 388 F.Supp.2d 1028 (N.D. Cal. 2005), the plaintiff sought to compel disclosure of information regarding the consolidated TSC watch list and the criteria for adding individuals to the List under the Freedom of Information Act (“FOIA”). Although the

court reviewed certain portions of the consolidated TSC watch list in camera, the court declined to order such publication on the basis of an affidavit from the FBI that disclosure of watch list selection criteria and related information would enable potential terrorists to devise a plan to circumvent the watch lists. See also *Gilmore v. Gonzales*, No. CV-02-03444-SI (Jan. 26, 2006 9th Cir.) (rejecting the plaintiff’s claims with respect to the consolidated TSC watch list on lack of standing grounds).

In August 2008, the U.S. Court of Appeals for the Ninth Circuit held that an airline passenger who was detained and prevented from boarding a flight in a U.S. airport can sue the Department of Homeland Security to challenge her inclusion on the “No fly” list maintained by the government’s Terrorist Screening Center. *Ibrahim v. Department of Homeland Security*, 538 F.3rd 125 (9th Cir. 2008). The government has moved for rehearing *en banc* in the case.

In *Rahman v. Chertoff*, No. 05 C 376, 2008 US Dist LEXIS 32356 (N.D. Ill. 2008), the Magistrate Judge, in a discovery dispute, rejected the government’s assertion that information tending to confirm or deny whether plaintiffs were listed on the TSC consolidated watch list was protected by the state secrets privilege.

ⁱ In August 2004, the President signed Homeland Security Presidential Directive 11, designed to strengthen HSPD-6. This directive requires the Secretary of Homeland Security (together with other agency heads) to submit reports to the President on the government’s approach to terrorist screening.

ⁱⁱ A report by the Inspector General of the Department of Justice has noted that “to err on the side of caution, individuals with any degree of a terrorism nexus were included on the consolidated watch list, as long as minimum criteria was [sic] met (i.e., the person’s name was partially known plus one other piece of identifying information, such as the date of birth).” In addition, the Inspector General “determined that the TSC could not ensure that the information in the database was complete and accurate. We found instances where the consolidated database did not contain names that should have been included on the watch list. In addition, we found inaccurate information related to persons included in the database.” U.S. General Accountability Office, “Secure Flight Development and Testing Under Way, but Risks Should Be Managed as System is Further Developed,” GAO-05-356, March 2005. Agency oversight reports have also declined to focus on the substantive underlying standards for inclusion on names on the watch lists. See 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 (“the Privacy Office believes that the current TSC standards for No-fly and Selectee lists are appropriately tailored to current uses . . . In reaching this conclusion, the Privacy Office primarily examined the standards from a privacy and fair information principles perspective: evaluating whether the information collected and used is relevant to the screening inquiry at hand, rather than evaluating the validity of the law enforcement risk determination”).

ⁱⁱⁱ Statement of Glenn A. Fine, Inspector General, U.S. Department of Justice, before the Committee on Homeland Security, U.S. House of Representatives, concerning “The Terrorist Screening System and the Watchlist Process,” November 8, 2007.

^{iv} Agency actions have tended to focus on their own administrative procedures, rather than permitting judicial redress, to respond to complaints regarding watch lists. For example, a GAO report describing methods of redress failed to address the relation between agency redress and other possible remedies, such as judicial review. U.S. Government Accountability Office, “Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public,” GAO-06-1031, September 2006.