What's Wrong With the Government's Rules for Watchlisting

The government's March 2013 Watchlisting Guidance, leaked and published online in July 2014, reveals serious and pervasive flaws in the government's massive watchlisting system. The Guidance shows that uncorroborated and questionably reliable information can lead to watchlisting, that the criteria for watchlisting are vague and exception-ridden, and that the nomination process lacks safeguards to prevent errors.

The watchlists that make up the government's system include the Terrorist Identities Datamart Environment ("TIDE"), a repository of names and information that feeds into the master watchlist; the Terrorist Screening Database ("TSDB"), the government's master list of names of people purportedly involved in terrorism-related activity; the No Fly List, which identifies people who are barred from flying altogether; and the Selectee and Expanded Selectee Lists, which include people who are subjected to additional screening every time they seek to board an airplane. The consequences of placement on these watchlists can be severe and may include an inability to travel by air or sea; repeated, invasive screening at airports; denial of permission to enter to the United States; or repeated detention and questioning in the United States or abroad—to say nothing of shame, fear, uncertainty, and denigration as a terrorism suspect.

The Guidance shows that the standards that the government uses to place people on these various blacklists are vague, overbroad, and riddled with exceptions that can swallow the rules. It reveals that the very low standard for placement on the government's master watchlist can be satisfied with uncorroborated or even questionably reliable information, injecting a significant risk of error into the watchlisting process and making it likely that individuals will be blacklisted based on conduct that is innocent and/or protected under the First Amendment. It makes clear that when government agencies encounter watchlisted individuals—such as through border and police stops, pre-flight inspections, or passport and visa applications—they are directed to gather as much information as possible on those individuals, exacerbating privacy concerns.

The Guidance reinforces our long-held belief that the watchlisting system is bloated, discriminatory, and unfair. The system labels hundreds of thousands of people as suspected terrorists based on secret evidence, without sufficient safeguards to ensure that such evidence is credible and accurate. A vast watchlist system not only increases the likelihood that innocent people will be included, but also diverts law enforcement attention away from those who should genuinely be under investigation. Publically available information and our experience with people who know or credibly suspect that they have been watchlisted also raise serious concerns

that the government applies the watchlisting standard in an arbitrary or discriminatory way, particularly against American Muslim, Arab, and South Asian communities.

To make matters worse, the government's "redress" system for people who have suffered these consequences lacks basic due process safeguards. Under that system, the government does not provide adequate notice of the reasons for individuals' inclusion on the watchlist or a meaningful opportunity to challenge that inclusion and clear their names. Such a redress process is unfair and further increases the likelihood that people will be watchlisted in error.

The Guidance runs to 78 pages (excluding appendices) and can be confusing and contradictory, which is itself cause for concern. We discuss in this briefing paper some of the most significant problems with the Guidance.

1. The level of "suspicion" required for placement on the master watchlist is less than reasonable.

One of the most problematic aspects of the Guidance is that it permits the watchlisting not only of "known" terrorists, but also of "suspected" terrorists. The definition of a "known" terrorist encompasses individuals who have been indicted, arrested, charged, and/or convicted of a terrorism-related crime. The Guidance defines a "suspected terrorist" far more broadly and problematically:

> 3.12.1 A SUSPECTED TERRORIST is an individual who is REASONABLY SUSPECTED to be, or has been, engaged in conduct constituting, in preparation for, in aid of, or related to TERRORISM and/or TERRORIST ACTIVITIES based on an articulable and REASONABLE SUSPICION.

This definition is circular and confusing. It allows an official to nominate a person for placement on the master watchlist if the official has reasonable suspicion to believe that the person is a suspected terrorist—i.e., individuals can be watchlisted if they are *suspected of being suspected terrorists*. This standard provides little guidance and increases the likelihood that officials will place people on the watchlist based on little more than a hunch.

The Guidance makes explicit that to meet the reasonable suspicion standard, "concrete facts are not necessary" (a policy we discuss further below) and that "due weight should be given" to inferences drawn by a nominating official "in light of his/her experience":

> 3.5 **Due Weight.** In determining whether a REASONABLE SUSPICION exists, due weight should be given to the specific reasonable inferences that a NOMINATOR is entitled to draw from the facts in light of his/her experience and not on unfounded suspicions or hunches. Although irrefutable evidence or concrete facts are not necessary, to be reasonable, suspicion should be as clear and as fully developed as circumstances permit. For additional guidance regarding the nomination of U.S. PERSONS, *see* Paragraph 3.15.

A review process that does not require "concrete facts" and requires the reviewer to give "due weight" to the nominator's inferences is not sufficiently rigorous and amounts to a presumption in favor of watchlisting. That de facto presumption underscores one of the most problematic aspects of the government's watchlisting system: agencies have a strong incentive to add people to watchlists, but they have far less incentive to maintain the accuracy of watchlist entries or remove names from the lists.

2. Uncorroborated information of questionable reliability can serve as the basis for watchlisting an individual.

Equally troubling is the fact that the Guidance does not require the information supporting a watchlist nomination to be credible or reliable, and it permits officials to nominate people for watchlisting based on uncorroborated information:

> 3.6 NOMINATORS shall not nominate an individual based on source reporting that NOMINATING personnel identify as, or know to be, unreliable or not credible. Single source information, including but not limited to "walk-in", "write-in", or postings on social media sites, however, should not automatically be discounted merely because of the manner in which it was received. Instead, the NOMINATING AGENCY should evaluate the credibility of the source, as well as the nature and specificity of the information, and nominate even if that source is uncorroborated, assuming the information supports a REASONABLE SUSPICION that the individual is a KNOWN or SUSPECTED TERRORIST or there is another basis for watchlisting the individual.

Accordingly, under the Guidance:

- Individuals may be watchlisted based on information of questionable or suspect reliability; only information from sources actually known or determined to be unreliable is rejected (see section 3.7). Thus, the Guidance actually encourages officials to place people on watchlists even if the officials doubt that the information they are relying on is credible.
- A single Facebook post, Tweet, or anonymous letter may provide the "reasonable suspicion" necessary to watchlist an individual. But with perhaps a few exceptions in extreme cases, it seems unlikely that officials could discern without corroboration whether isolated social media posts reflect actual terrorist activity or satire, mockery, or news reporting—or statements that are simply not credible.
- A nominating official "should" nominate an individual based on uncorroborated information, as long as that information supports "reasonable suspicion." The Guidance does not explain how uncorroborated information of doubtful reliability can amount to more than mere suspicion, or, for that matter, rumor and innuendo. Instead, it allows an official to simply decide, in a vacuum, that the suspicion is "reasonable."

Given that nominations need not be based on "concrete facts," this portion of the Guidance sets a very low standard for the reliability of the information the government uses to place people on the master watchlist, opening the door to reliance on rumor, innuendo, or false statements.

Unsurprisingly, the lower the standards are for watchlisting, and the looser the requirements are for the quality of the underlying information, the higher the number of watchlisted individuals. As of December 2013, the TIDE database contained about 1.1 million people. Approximately 680,000 of those were on the master watchlist, including 280,000 people who, according to the government's own documents, had no affiliation with a recognized terrorist group. By June 2016, the number of people in TIDE had grown to 1.5 million, and the master watchlist included approximately one million people.

Such an inflated watchlisting system is neither fair nor effective. The notion that well over a million people could appropriately be suspected of terrorism-related activity strains credulity, and it appears inevitable that the watchlist includes a sizeable number of people who are wholly innocent of wrongdoing. Overly broad watchlists also divert scarce resources away from the few individuals who should genuinely be under investigation. As FBI Director James Comey has said, the FBI is "looking for needles in a nationwide haystack." The larger the haystack, the harder it is to find a needle within it.

3. Actual innocence or acquittal does not guarantee removal from a watchlist.

The government claims the right to continue watchlisting people even after they've been acquitted of terrorism-related crimes, as long as the government believes that those people meet the reasonable suspicion standard:

> 3.13.1 **Individuals Who are Acquitted or for Whom Charges are Dismissed.** An individual who is acquitted or against whom charges are dismissed for a crime related to TERRORISM may nevertheless meet the REASONABLE SUSPICION standard and appropriately remain on, or be nominated to, the Terrorist Watchlist.[49] Each case should be evaluated based on the facts of the underlying activities, the circumstances surrounding the acquittal or dismissal, and all known DEROGATORY INFORMATION to determine if the individual should remain on the Terrorist Watchlist.

This point highlights the unfairness of the watchlisting system. If the government refuses to remove a person from a watchlist after a jury of her peers determines that she's not guilty, or after a judge determines that the charges leveled against her were baseless, what *can* she do to get off the list?

Moreover, the lack of an effective redress mechanism means that people can languish on watchlists indefinitely.[1]

[1] *See, e.g.*, *Latif v. Lynch*, 28 F. Supp. 3d 1134, 1161 (D. Or. 2014) (noting that because of defects in the No Fly List redress process, "an individual could be doomed to indefinite placement on the No-Fly List").

4. The identifying information required for inclusion on the master watchlist makes misidentifications likely.

The specificity with which people are identified on a watchlist obviously impacts whether others with similar names will be mistaken for watchlisted individuals and inadvertently subjected to the consequences of watchlisting. That means that the "minimum identifying criteria" for inclusion on watchlists carry great significance.

But the minimum biographic criteria for inclusion on the master watchlist leave plenty of room for error. The Guidance only requires a last name, along with:

- a first name or
- one of various identifiers such as a date of birth, a passport number, a telephone number, or an email address, or
- two of a group of other identifiers, such as country of citizenship, partial date or date range of birth, name of an immediate family member, occupation, degrees received, etc. (see section 2.4 of the Guidance).

Based on those requirements, a person could be placed on the master watchlist with, for example, only the following identifying information:

> Last name: Johnson
> Occupation: Businessman
> Date of birth: 1960-1965

With such skeletal biographic information requirements, it's no wonder that innocent people are routinely mistaken for actual, perhaps legitimately watchlisted individuals and suffer the effects of watchlisting themselves.

5. The Expanded Selectee List eclipses the Selectee List and calls into question its relevance.

Since 2002, the government has maintained a "Selectee List" of individuals who are designated for enhanced screening, exhaustive physical searches, and questioning every time they seek to board an aircraft. The government more recently created an additional "Expanded" Selectee List that has received far less attention than the Selectee List. As noted above, however, those on the Expanded Selectee List undergo precisely the same enhanced screening prior to boarding an aircraft as those on the Selectee List (see section 4.13).

That raises the question of what purpose the Selectee List serves. The Guidance shows that placement on the Selectee List requires that a person be a member of a terrorist organization and be "associated" with terrorist activity (see section 4.11). The standard for placement on the Expanded list, however, is far less exacting:

VI. EXPANDED SELECTEE LIST CRITERIA

4.12 The Expanded Selectee List (ESEL) includes records in the TSDB that contain a full name and full date of birth, regardless of the citizenship of the subject, who do not meet the criteria to be placed on either the No Fly or Selectee Lists, excluding exceptions to the REASONABLE SUSPICION standard.

In other words, the Expanded Selectee List includes basically anyone about whom the government has determined that it has "reasonable suspicion"—the same standard used for placement on the massive master watchlist. That far looser standard seems to render the Selectee List pointless, and it also ensures that the Expanded list will be vastly larger than the Selectee List.

6. The Guidance includes exceptions for non-citizens that swallow the rule.

The Guidance includes numerous exceptions to the (already problematic) reasonable suspicion requirement for non-citizens, including lawful permanent residents of the United States. Those exceptions make it significantly easier to watchlist non-citizens, leaving them particularly vulnerable to watchlisting based on inaccurate, incomplete, or questionable information.

The exceptions may seem arcane; read closely, they are expansive:

3.14.7 **Additional Derogatory Information Required (TIDE Category Code 99s and 50s).** NCTC will retain a record in TIDE if it is determined that the information pertains to, or is related to, TERRORISM.[64] However, if a record involving an alien, which includes LPRs, does not contain sufficient DEROGATORY INFORMATION to meet any of the aforementioned exceptions to the TSDB's REASONABLE SUSPICION standard for inclusion, NCTC will generally designate the record as a Category Code 99 (the TIDE category code "applied when DEROGATORY INFORMATION does not meet the REASONABLE SUSPICION standard for watchlisting because it is very limited or of suspected reliability but there is a possible nexus to TERRORISM") or a Category Code 50 (the TIDE category code applied when an individual has a defined relationship with the KNOWN or SUSPECTED TERRORIST, but whose involvement with the KNOWN or SUSPECTED TERRORIST'S activities is unknown)[65], making it available for export to TSDB for use by DOS and DHS for visa adjudication and immigration processing.

This means that a non-citizen can be placed on the master watchlist without reasonable suspicion when:

- there is a *possible* nexus to terrorism even though the "information purportedly showing involvement with terrorist activity is "very limited or of suspected reliability," or
- the individual has a defined relationship—an association—with someone who has already been watchlisted, even where there is no information indicating that the individual is involved in the watchlisted person's suspicious activities.

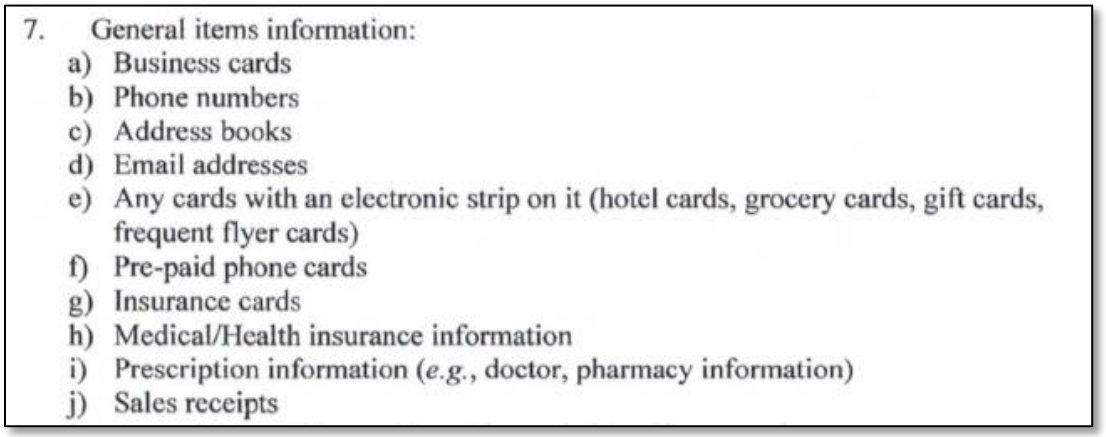
These exceptions do away with the reasonable suspicion requirement entirely. Permitting watchlisting of people purely based on associations—even when those associations are innocuous—not only can be arbitrary and unfair but also can dramatically expand the universe of people who can be watchlisted.

The consequences of this extremely loose standard can be severe. For example, through a secret government program known as the Controlled Application Review and Resolution Program (CARRP), the government indefinitely delays or denies the applications of non-citizens who are seeking to become citizens or lawful permanent residents, and who the government deems "national security concerns." Watchlisted individuals are automatically considered "national security concerns." Therefore, based on the above exceptions to the reasonable suspicion standard, information of "suspected reliability," or an innocent but unfortunate association, may be all it takes to deny someone U.S. citizenship or indefinitely delay a determination regarding citizenship.

7. The government is vacuuming up and storing massive amounts of private data on watchlisted individuals.

The Guidance also tells government officials what to do during "encounters," or interactions with, people on watchlists. The instructions are unequivocal: collect, exploit, and store as much information about these people as possible.

Anything and everything of potential value is fair game—pocket litter, luggage tags, hotel receipts, conference materials, membership cards, bank statements, "anything with an account number," ATM receipts, and all manner of electronic media. This excerpt from the Guidance lists only one portion of the information officers are trained to collect, and it underscores just how invasive these "encounters" can be:



7. General items information:
   a) Business cards
   b) Phone numbers
   c) Address books
   d) Email addresses
   e) Any cards with an electronic strip on it (hotel cards, grocery cards, gift cards, frequent flyer cards)
   f) Pre-paid phone cards
   g) Insurance cards
   h) Medical/Health insurance information
   i) Prescription information (*e.g.*, doctor, pharmacy information)
   j) Sales receipts

And the effort to collect personal and revealing information extends across and beyond the U.S. government. U.S. Citizenship and Immigration Services makes files on non-citizens available to agencies involved in watchlisting on request. The U.S. Agency for International Development shares information about grant applications involving those on the watchlist. Immigration and Customs Enforcement documents interactions with those being held in detention centers and

passes that information on to the watchlisting community. The FBI's Terrorism Screening Center—the hub of the government's watchlisting effort—also obtains photographs, biographic data, and any other available information from foreign governments that encounter watchlisted individuals.

This amounts to an intelligence-gathering blitz, which is all the more troubling given the likelihood that people are watchlisted based on erroneous or unreliable information. To be sure, the Guidance states that agencies should use encounters with watchlisted individuals to collect information that the agencies already have the authority to collect, but that authority is often unclear or easily abused. For instance, U.S. Customs and Border Protection ("CBP") has the authority to conduct searches at borders and ports of entry. However, the scope of CBP's authority to conduct searches of people and their belongings, including electronic devices, is in dispute, and the mere fact that a person is at a border or port of entry does not justify invasive searches absent any indication that the person is engaging in criminal activity. But the Guidance directs CBP officers to do just that—conduct invasive searches absent any indication of criminal activity—to those on watchlists whenever they seek to cross a U.S. border or board an international flight.

Ultimately, the government is using the Guidance—and the low threshold for watchlisting on which the system is predicated—as a justification for collecting and retaining vast amounts of private, sensitive information. In this way, the Guidance makes clear that one of the most serious and likely consequences of being placed on a watchlist is the invasion of personal privacy.

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A bloated and unfair watchlist system does not make us more secure. Rather, it stigmatizes individuals and communities, erodes our privacy, and undermines cherished constitutional rights. The Watchlisting Guidance reinforces the urgent need for reform of the watchlisting system.