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ACLU Statement for the Record at a Hearing before the House Homeland Security Committee on "The Progress and Pitfalls of the Terrorist Watch List."

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Chairman Thompson, Ranking Member King, distinguished members of the committee:

We are pleased to submit this statement for the record on behalf of the American Civil Liberties Union and its more than 600,000 members, to explain the ACLU's views on the Terrorist Screening Center Watch List.

The ACLU supports the use of a narrowly-tailored watch list of individuals who pose a clear and present danger to national security. This has been our position since 9/11. Unfortunately the Terrorist Screening Center's ("TSC") watch list under discussion today is bloated and ineffective. According to recent news reports, the watch list has grown to an unbelievable 860,000 records, with 20,000 being added every month. At the rate we are going, we will soon have a consolidated watch list of over one million records. Such a massive watch list is unreliable and ineffective as a security measure and is intolerable from the standpoint of basic liberty. We believe the time has come for the TSC to scrap its watch list. In the interim before the watch list is scrapped, we call on Congress to demand a dramatic overhaul of the watchlisting process and the list itself.

I. Watch lists harm innocent travelers

Federal watch lists are bloated with the names of individuals who have absolutely no connection to terror and do not have the capability of threatening aviation or national security. This leads to numerous cases of false positives, *i.e.* mistaken "hits" where the innocent passengers' names are wrongly added to the lists, which distracts government agencies from finding the actual terrorists. False positive stories are ubiquitous. The television program 60 Minutes was able to bring together twelve different

men named Robert Johnson. Each had suffered constant and ongoing trouble traveling in spite of the fact that none of them appear to in any way resemble the Robert Johnson on the watch list.¹ The ACLU has collected complaints from 1,000 such individuals, 740 of which were gathered through our Internet intake process, but we will highlight just four:

- Passenger David XXXXX (Aug. 16, 2005) was surrounded by armed police with guns drawn at the ticket counter when he was mistakenly identified as being on the No Fly List. Moreover, when he arrived at the gate, his checked luggage was brought to him, and he was forced to witness the search of his belongings at the gate, the whole process taking two hours.
- Passenger Gregory XXXXX (May 9, 2005), after having his luggage thoroughly searched, was separated from his five-year-old son who was hysterically crying and escorted into a private room where he was subjected to a cavity search and genital inspection. Gregory has been wrongly delayed overnight on five separate occasions and whoever is accompanying him is also subject to delays and searches.
- Passenger Mary XXXXX (May 16, 2005) was forced by TSA screeners to be screened with a machine (Smiths Detection Ionscan Sentinel II), which she was told checked “to see if I have a bomb inside me.” This machine photographed her and TSA denied her repeated requests to view the picture or be provided a copy.
- Passenger Hussein XXXXX (July 23, 2005) is a Lebanese citizen who has been a legal resident of the U.S. since 1992. During his layover in Minneapolis, Minnesota while flying from Lebanon to Seattle, Washington, he was escorted off the plane by five security officers to a room away from the gate. He was questioned about his family, extended family, how he files taxes, his business, his real estate holdings and so forth. Additionally, the officers demanded he give them access to his computer, which he initially refused because it contained confidential information about his clients. After five hours of interrogation, he was exhausted and delirious so the officers gave him a choice of either being detained overnight and being questioned the following day or having an appeal inspection in Seattle. He was scheduled to appear at the U.S. Customs and Border Protection Office in Seattle on July 25, 2005. In the past, he has had similar experiences. For example, on October 3, 2004, he was stopped in Portland, Oregon on his way to Frankfurt, Germany by U.S. Customs who interrogated him. He was given no medical attention when he fainted, and security officers laughed at him while they waited until he regained consciousness.

As was reported just yesterday, 15,000 individuals have appealed to DHS since last February to have their names removed from the watch list, creating a massive backlog.²

¹ The 60 Minutes episode first aired October 8, 2006. It can be viewed at: <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624.shtml>

² Mimi Hall, “15,000 want off the U.S. terror watch list,” *USA Today*, November 7, 2007.

At least four Members of Congress – Senator Ted Kennedy (D-MA), and Congressmen Darrell Issa (R-CA), John Lewis (D-GA) and Don Young (R-AK) - have names similar to those of individuals on those bloated Lists. Congresswoman Zoe Lofgren (D-CA) reported in congressional hearings last summer that her husband has been repeatedly selected for additional security screening. Nuns and infants have been found on the No Fly List. U.S. Senator Ted Stevens (R-AK) has stated in Congressional hearings that his wife, Catherine “Cat” Stevens, is repeatedly stopped due to the similarity of her name with the singer formerly known as Cat Stevens, Yousuf Islam. To be effective, the lists must be pared down to known terrorists.

Limiting the names on the list is the only way that federal agencies with a national security mission can focus on their core task: preventing another terrorist attack on an airplane. Senator Kennedy (D-MA) revealed at a Senate hearing that due to the fact an “E. Kennedy” was on the No Fly List, Senator Kennedy repeatedly was selected for additional screening. Every minute spent treating Senator Kennedy like a potential terrorist is one less minute that could be spent catching the next Mohammed Atta.

II. Redress procedures are inadequate

The harm caused by watch lists is exacerbated by the difficulty in removing an individual from the list. TSA has indicated that it has instituted a mechanism, DHS TRIP, to allow travelers who have been confused with entrants on the watch list to gain a clearance so they are not subject to repeated security screening when they travel. Unfortunately this claim has to be met with skepticism because DHS has repeatedly made this claim in the past without producing a viable redress procedure.³

³ A sampling of such claims from the past include:

- “CAPPS II will include a comprehensive redress process for those passengers who have questions concerning their experience. TSA will appoint an Ombudsman to handle any inquiries. These capabilities will result in improved resource scheduling and other operational efficiencies.” (March 7, 2003) Congressional briefing by Ben H. Bell, III, Dir. Office of National Risk Assessment (“ONRA”) TSA, available at http://www.acte.org/initiatives/CAPPS_II_CongressBriefing.pdf.
- “The redress system is based on having an ombudsman and a passenger advocate designated and a process in place so that when an individual finds that they are being repeatedly selected as a secondary screenee during their transit through the airport that they will have an opportunity then to contact TSA, the ombudsman, and the passenger advocate and then we will have the capability to have a decision made at the TSA level concerning going in on that individual and then adjusting the criteria for that individual after we verify their name, date of birth, address to [sic] for into that and make these decisions, we think, in a rapid matter so that it is not a bureaucratic system of waiting forever to get a response. Our goal is to have a redress system that has flexibility in it and speed and scratches the itch for the traveling public regarding frustrations over being selected repeatedly.” (March 17, 2004) David M. Stone before House of Representatives Transportation Committee, Subcommittee on Aviation, available at <http://www.house.gov/transportation/aviation/03-17-04/stone.pdf>.
- “In addition, the new program [Secure Flight] will also include a redress mechanism through which people can resolve questions if they believe they have been unfairly or

More importantly even if TSA can implement the mechanism it describes in the proposed regulations, it will still be inadequate for meeting constitutional due process concerns. Specifically DHS TRIP only applies if TSA determines that additional screening or a prohibition on flying results from “a misidentification of the individual.” 72 C.R.F. 48375. However, TSA will “neither confirm nor deny whether an individual is on the watch list.” *Id.* In spite of the fact that an 860,000 person list is almost certain to have hundreds of thousands of erroneous entries, there is no way to find out if one is on the list or to remove oneself.

This process not only creates serious constitutional issues as innocent Americans are denied due process even as they are subjected to the numerous indignities described above but it also causes major security flaws. For example, when the TSC list is used to wrongly deny a would-be government employee a job or a promotion, or block them from receiving a security clearance, that individual suffers tangible harm to his or her professional and personal reputation and financial situation. Every time an innocent U.S. person is wrongly denied entry to a government building or access to government services, benefits or entitlements, there is a denial of due process. Every innocent traveler who is stopped for extra screening is a false positive, one that distracts screeners from finding the few truly dangerous individuals who may be on the list.

Because of the number of innocent persons whose names are similar to names on the list and because the number of names on the list grows seemingly without limitation, these deprivations will become more common, not less. Further, because the sheer number of innocent individuals who are wrongly deprived of a right or privilege – the false positives – so greatly outweighs the numbers of those who are dangerous, the false positives quickly swamp the system. In time, even those who are using the watchlist on the front lines are likely to quit using it as it is demonstrated time and time again that the list leads to a massive number of innocent people who have no connection to terror. In short,

incorrectly selected for additional screening.” (August 26, 2004) TSA Press Release, available at

<http://www.tsa.gov/public/display?theme=44&content=09000519800c6c77>.

- “Before implementing a final program, however, TSA will create a robust redress mechanism to resolve disputes concerning the Secure Flight program.” (June 17, 2005) Lisa S. Dean, TSA Privacy Officer, Secure Flight Test Phase Privacy Impact Assessment, available at http://www.tsa.gov/interweb/assetlibrary/Secure_Flight_SORN_PIA.pdf.
- “In conjunction with the Secure Flight program, TSA has charged a separate Office of Transportation Security Redress to further refine the redress process under the Secure Flight program. The redress process will be coordinated with other DHS redress processes as appropriate. Utilizing current fiscal year funding, resources have been committed to this Office to enable it to increase staffing and to move forward on this important work. TSA recognizes that additional work remains to ensure that there is a fair and accessible redress process for persons who are mistakenly correlated with persons on the watch lists, as well as for persons who do not in actuality pose a security threat but are included on a watch list.” (June 29, 2005) Statement of Secure Flight Assistant Administrator Justin Oberman to House of Representatives Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity, available at <http://homeland.house.gov/files/TestimonyOberman.pdf>.

the very size of the list and the lack of rigid criteria regarding who should be on the list render it virtually useless as a security tool.

Further, the rationale for not describing the names on the list is to “protect the counterterrorism and intelligence collection objectives of the Federal Government.” 72 C.F.R. 48375. While this secrecy has some superficial appeal, close scrutiny reveals it to be completely illogical. The entire point of the watch list is to find the individuals on the list. Having a redress process where an individual presents him- or herself to the federal government of course perfectly meets this objective. It is hard to imagine a true terrorist willingly going to the federal government and subjecting him or herself to the scrutiny that might be necessary to be removed from a watch list. For innocent people, however, it is the perfect (and constitutionally necessary) opportunity to clear their name and no longer be subject to the false accusation that they are a terrorist. A comprehensive redress process provides security and protects individual rights.

III. Watch lists are inaccurate and lack consistent standards

A redress procedure is particularly important because independent review has consistently demonstrated that watch lists are a standardless mess, which lack coherent criteria and are riddled with inaccuracies.

Part of the problem with watch lists is bureaucratic. After 9/11 a variety of federal agencies began dumping thousands of names into the list. Each of these agencies had enormous incentive to demonstrate that they were responding to terrorism and making sure that they were covered if anyone in their files committed a future act of terrorism (no matter how unlikely that might be). As a former FBI agent explains “I know in our particular case they basically did a massive data dump and said 'Ok anybody that's got a nexus to terrorism, let's make sure they get on the list.'”⁴ Of course no one had any incentive to take names off the list. The result is a “‘cover your rear end’ document designed to protect bureaucrats and make the public feel more secure.”⁵ The Terrorist Screening Center appears to still have no regular process for reviewing watch list records and removing those that are outdated or obsolete.⁶

Design flaws with the lists exacerbate these problems. The DOJ Inspector General revealed recently that TSC is actually running two databases in tandem without assuring that they are identical.⁷ Updates in one database are not always entered into a second. Worse the list contains a significant number of duplicates so that changing one record may not in fact change all the information about an individual in the system. The IG also found that 38% of records contained errors or inconsistencies. Finally, information is not entered into the system in a consistent manner, with the FBI entering information directly into the system in

⁴ 60 Minutes episode.

⁵ *Id.*

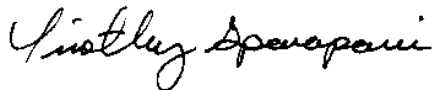
⁶ *Follow-up Audit of the Terrorist Screening Center*, U.S. Department of Justice Office of the Inspector General Audit Division, Audit Report 07-41, September 2007.

⁷ *Id.*

some cases – resulting in duplicative and incomplete records. All of these facts make it impossible for the TSC to present a watch list that is coherent or accurate.

IV. Conclusion

The federal government already has a model for a watch list that works: the FBI's 10 Most Wanted List, which is narrowly tailored, relevant, and up-to-date, and contains individuals who represent a real threat to public safety. A watch list containing approximately one million records will not be exponentially more useful than this, but, rather, its utility as a counterterrorism tool will decrease as it continues to grow. We will be stuck with a massive blacklist of mostly innocent persons that is hopelessly unreliable. TSC's attempts to streamline procedures for the watch list and establish redress processes have largely failed. We urge the committee to use its authority to dump the current watch list and encourage TSC to start from scratch to develop a watch list that actually serves its intended purpose and does not harm privacy and civil liberties.



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