



Written Statement of the  
American Civil Liberties Union

Laura W. Murphy  
Director

Christopher Calabrese  
Legislative Counsel

American Civil Liberties Union  
Washington Legislative Office

On

“Terrorists and Guns: The Nature of the Threat and Proposed  
Reforms”

Before the

Senate Committee on Homeland Security and Government  
Affairs

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**WASHINGTON LEGISLATIVE OFFICE**  
915 15th Street, NW Washington, D.C. 20005  
(202) 544-1681 Fax (202) 546-0738

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Chairman Lieberman, Ranking Member Collins, and Members of the Committee.

The American Civil Liberties Union has over half a million members, countless additional supporters and activists, and fifty-three affiliates nationwide. We are one of the nation's oldest and largest organizations advocating in support of individual rights in the courts and before the executive and legislative branches of government. In particular, throughout our history, we have been one of the nation's foremost protectors of individual privacy and due process protections.

We write today about the use of terror watch lists to screen gun purchases. The ACLU believes that the current terror watch list process is deeply flawed. Evidence from numerous government reports document ill-designed and inaccurate lists with serious inadequacies in the process for placing and removing individuals from the list. Even worse, the lists are shrouded in secrecy: who is on the list, the standard for placement on the list, and the requirements for removal from the list are all secret. Given these problems, we do not believe that anyone should be deprived of the right to purchase a gun, or the right to fly, or any other benefit of membership in civil society based solely on placement on a terror watch list.

The ACLU does not oppose the creation of all lists. Law enforcement and intelligence agencies have a difficult job. Faced with masses of sometimes conflicting information, very tight timeframes and difficult decisions, lists can provide clarity and a focus for allocating

resources. Lists like those of the FBI 10 Most Wanted Fugitives and larger databases like the National Criminal Information Center (NCIC) system (a national listing of fugitives) have proved to be valuable law enforcement tools. However these lists are effective because they are based on appropriate legal standards and the processes for placement on the list are transparent. Unfortunately that is not the case for the government's secretive terror watch lists. More than eight years after its inception only one thing is clear: the watch list system is broken.

## Legislation

Two bills pending in the Senate directly address the issue of screening individuals seeking firearm permits against a list of terrorist watch lists: S. 1317, Denying Firearms and Explosive to Dangerous Terrorists Act of 2009, and S. 2820, Preserving Records of Terrorist & Criminal Transactions Act of 2009. Both bills place undue faith on the accuracy and reliability of the inconsistent and inherently unreliable terrorist watch lists.

Section 2(a) of S. 1317 allows the Attorney General to deny the transfer of a firearm or explosive to any individual who

is known (or appropriately suspected) to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism, or providing material support or resources for terrorism; and (2) has a reasonable belief that the prospective transferee may use a firearm in connection with terrorism.

“Appropriately suspected” is not defined in the Act nor is it defined in federal statute or case law. The Act also does not contain any guidance about the legal standard necessary to establish appropriate suspicion. Since it is the policy of the Executive Branch to consolidate all terrorism related information into a central list, it is likely that the phrase “appropriately suspected” will mean that the individual appears on a terrorist watch list, either the master list compiled by the Terrorist Screening Center (TSC) or one of the smaller lists crafted from this master list.<sup>1</sup>

S. 1317 further states that “any information upon which the Attorney General relied for this determination may be withheld from the petitioner, if the Attorney General determines that disclosure of the information would likely compromise national security.” Section 2(g)(1). If an individual challenges the denial, “[w]ith respect to any information withheld from the aggrieved party ... the United States may submit, and the court may rely upon, summaries or redacted versions of documents containing information the disclosure of which the Attorney General has determined would likely compromise national security.” Section 2(g)(2).

S. 2820 mandates that anyone on a terrorist watch list who undergoes a background check pursuant to a firearm purchase shall have his or her information stored for ten years and all

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<sup>1</sup> HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 6: DIRECTIVE ON INTEGRATION AND USE OF SCREENING INFORMATION TO PROTECT AGAINST TERRORISM governs collection and aggregation of terrorism related information. For a detailed discussion of some of the smaller lists created from the TSC master list please see page 69 of THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES, JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, Audit Report 09-25, May 2009, pg 3 available at <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

purchasers shall have their information stored for 180 days. This is contrary to current practices where all personal information relevant to a background check is discarded within 24 hours of the completion of the check.

In summary, S. 1317 allows the Attorney General to bar anyone who appears on a terrorist watch list from purchasing a firearm or explosive. Anyone who challenges this determination will be unable to discover the evidence against them. Even the judge ruling on the appropriateness of this determination will have to rely on summaries and redacted information. S. 2820 extends the retention period of personal information on all gun buyers with particular attention to those who appear on a terror watch list. Both measures directly tie gun ownership and licensing to use of terror watch lists that have been shown to be inaccurate.

## **Watch Lists Have Been Mismanaged**

It might seem intuitive that known terrorists shouldn't be able to buy guns. The difficulty of this proposition, however, lies in determining exactly which people should be denied permission to purchase a firearm. In the absence of a trial and conviction for a terrorism-related offense, the decision rests solely on the discretion of the Attorney General, with no real opportunity to challenge the basis for the decision. Unfortunately the national security establishment's record in creating and managing watch lists of suspected terrorists has been a disaster that too often implicates innocent persons while allowing true threats to proceed unabated. This regrettable outcome is partly a result of mismanagement and partly due to the deceptive difficulty of creating identity-based systems for providing security. These failures have been documented in a long string of government reports, yet even as the lists continue to grow there is little evidence the problems are being solved.<sup>2</sup>

The reports of a variety of oversight entities are remarkably consistent in their criticisms, with two recurring themes – persistent design flaws and ongoing, unacceptable error rates.

### *Design Flaws*

The reports consistently expose flaws in how the lists are created and maintained:

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<sup>2</sup> GAO REPORT TO CONGRESSIONAL REQUESTERS, GAO-03-322 TERRORIST WATCH LISTS SHOULD BE CONSOLIDATED TO PROMOTE BETTER INTEGRATION AND SHARING (April 2003); DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-04-31 DHS CHALLENGES IN CONSOLIDATING TERRORIST WATCH LIST INFORMATION (August 2004); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 05-27 REVIEW OF THE TERRORIST SCREENING CENTER (REDACTED FOR PUBLIC RELEASE) (June 2005); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 05-34, REVIEW OF THE TERRORIST SCREENING CENTER'S EFFORTS TO SUPPORT THE SECURE FLIGHT PROGRAM (REDACTED FOR PUBLIC RELEASE) (August 2005); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 07-41, FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (REDACTED FOR PUBLIC RELEASE) (September 2007); U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL AUDIT REPORT 08-16, AUDIT OF THE U.S. DEPARTMENT OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESSES (March 2008); JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 09-25, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES (May 2009); DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-00-103, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM, (September 2009).

- An August 2004 report documented a chain of problems that have bedeviled the government's attempts to create a unified watch list. The report criticized the Department of Homeland Security's (DHS) continued failure to assume responsibility for creating the list, with the result that responsibility continued to shift among agencies, creating "an absence of central oversight and a strategic approach to watch list consolidation."<sup>3</sup>
- The Department of Justice Inspector General's (DOJ IG) 2005 review of the Terrorist Screening Center's (TSC) internal controls found "significant deficiencies in the design or operations of the internal control structure that, in our judgment, could adversely affect the TSC's ability to effectively organize a coordinated approach to terrorist screening." The IG identified "weaknesses" in "1) information technology oversight and review, 2) data accuracy and completeness, 3) staffing/hiring of personnel, 4) training provided to call center staff; 5) management of the call center, and 6) strategic planning."<sup>4</sup>
- In 2007 the DOJ IG found that "the TSC was operating two versions of the TSDB [Terrorist Screening Data Base] in tandem and the TSC had not taken adequate steps to ensure that the content of the two databases was identical."<sup>5</sup> The IG discovered significant numbers of duplicate records, 20 percent of which had inconsistent information with regard to "identifying information, handling instructions, or watch list export designation."<sup>6</sup> Further, the IG found the FBI sometimes enters nominations into the TSDB without submitting them to National Counterterrorism Center (NCTC) and the TSC: *"As a result, the TSC is unable to ensure that consistent, accurate, and complete terrorist information is disseminated to frontline screening agents in a timely manner. Moreover, the TSC had determined that the TSDB contained over 2,000 watchlist records that did not belong in the database. This TSC review also identified at least eight records that were missing from the downstream databases and were therefore not available to frontline screening agents."*<sup>7</sup>
- A 2009 report found that "the FBI failed to nominate many subjects in the terrorism investigations that we sampled, did not nominate many others in a timely fashion, and did not update or remove watchlist records as required ... 78 percent of the initial watchlist nominations we reviewed were not processed in established FBI timeframes."<sup>8</sup>

<sup>3</sup> DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL DHS CHALLENGES IN CONSOLIDATING TERRORIST WATCH LIST INFORMATION (August 2004) available at [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG-04-31\\_Watch\\_List.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG-04-31_Watch_List.pdf)

<sup>4</sup> DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p. 83, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

<sup>5</sup> DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (Sept. 2007), pg 12, available at: <http://www.justice.gov/oig/reports/FBI/a0741/final.pdf>

<sup>6</sup> *Id.* at 22.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES, Audit Report 09-25 (May 2009)

## Error Rates

Unacceptably high error rates are another familiar theme:

- In 2005 the TSC audited a sample of the FBI's Violent Gang and Terrorist Organization File (VGTOF) records, the TSDB's feeder database for domestic terrorism identities, and found a 40% error rate. Yet TSC took no follow-up action to ensure errors would be corrected before VGTOF records were put into the TSDB.<sup>9</sup>
- Late in 2007 an examination of the TSC's quality assurance program found that 38 percent of the records audited "continued to contain errors or inconsistencies that were not identified through the TSC's quality assurance efforts."<sup>10</sup>
- A 2009 audit found that 35% of the nominations to the lists were outdated, many people were not removed in a timely manner, and tens of thousands of names were placed on the list without predicate.<sup>11</sup>

These are just a small sampling of the damning evidence in oversight reports produced over the last several years. They paint a picture of a process that is broken and that – after eight years of operation – shows no sign of improvement.

Worse, even as these problems persist, the watch lists continue to grow. In January 2005 the most updated version of the TSDB had 237,615 active records, representing approximately 170,000 unique individuals.<sup>12</sup> By 2009 that number had grown to 1.1 million identities and approximately 400,000 unique individuals.<sup>13</sup> It is difficult to believe that more than 200,000 new terrorists were identified during that time, or that adding almost 800,000 names to the list actually made us safer. Instead it seems more likely that this rapid expansion stems from poor design and continuing errors that place people on these lists with little evidence they pose real threats.

Meanwhile, actual threats to security remain unobstructed by this system. Indeed, confessed terrorist Najibullah Zazi flew to the U.S. in January 2009 after training in a Pakistani terrorist camp and successfully smuggled a homemade bomb into New York City later that year, before flying back to Colorado where he voluntarily met with FBI agents. Chicagoan David Headley, a confessed conspirator in the 2008 terrorist attacks in Mumbai, India, flew extensively

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<sup>9</sup> DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p 61-62 available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

<sup>10</sup> DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER (Sept. 2007), p 31 available at: <http://www.justice.gov/oig/reports/FBI/a0741/final.pdf>

<sup>11</sup> JUSTICE DEPARTMENT, OFFICE OF THE INSPECTOR GENERAL THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES (May 2009), Audit Report 09-25

<sup>12</sup> DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST SCREENING CENTER (June 2005), p 49, available at <http://www.fas.org/irp/agency/doj/oig/tsc.pdf>.

<sup>13</sup> DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE TERRORIST WATCHLISTS NOMINATION PRACTICES (May 2009), p 115 available at: <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

from 2002 to 2009 to attend Pakistani terrorist camps and scout targets in India and Europe.<sup>14</sup> The secrecy and lack of accountability over our government's watch list programs doesn't aid security, it harms it.

### **Focused Watch Lists: Good For Security And Liberty**

To be effective, terrorist watch lists must be exactly that: lists focused on true terrorists who pose a genuine threat of taking over or taking down an aircraft. Bloated watch lists are bad not only because they cast many innocent travelers as suspected terrorists, but also because they dissipate the focus that those screeners should be keeping on true terrorists. A terrorist watch list that is discrete and focused has a greater chance of being productive, and a lesser chance of being unfair; not only is it better for civil liberties, but more likely to provide a security benefit. False accusations hassle and humiliate individuals; false positives divert security resources. This is truly a case where good security and civil liberties are aligned.

In 2004, then-TSA chief David M. Stone actually boasted to Congress about the rapidity with which the no-fly list was being expanded, as if that were automatically something good:

Prior to 9/11, there were fewer than 100 names on the "no-fly" list. Today, TSA provides carriers with "no-fly" and "selectee" lists that have been dramatically expanded. New names are being added every day as intelligence and law enforcement agencies submit new names for consideration. . . . Continued expansion will be possible as integration and consolidation of various watchlists by the Terrorist Screening enter (TSC) progresses. . .<sup>15</sup>

Six years later, despite the massive expansion of the TSC watch lists, the NCTC failed to properly identify would-be Christmas bomber Umar Farouk Abdulmutallab as a potential threat to aviation. Yet NCTC Deputy Director Russell Travers told this Committee that the watch list architecture "is fundamentally sound," and suggested that the lists would soon be getting bigger: "The entire federal government is leaning very far forward on putting people on lists."<sup>16</sup> The "continued expansion" of watch lists is not itself helpful, however, and unless the names being added to the list are of high quality, the expansion is likely to be counterproductive. Watch lists have a natural tendency to become bloated simply because security workers have every incentive to add names, and no incentives to clear them. Swamping the names of truly dangerous terrorists in a sea of other names is not good for security, as we learned last Christmas.

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<sup>14</sup> See Jane Perlez, *American Terror Suspect Traveled Unimpeded*, New York Times, (Mar. 25, 2010) at: <http://www.nytimes.com/2010/03/26/world/asia/26pstan.html>; and Sean Gardiner, *Police Let Terrorist Slip Through*, Wall Street Journal, (Apr. 26, 2010) at: [http://online.wsj.com/article/SB10001424052748703441404575205954118455716.html?mod=WSJ\\_hps\\_MIDDLE\\_TopStories](http://online.wsj.com/article/SB10001424052748703441404575205954118455716.html?mod=WSJ_hps_MIDDLE_TopStories)

<sup>15</sup> *9/11 Commission Recommendations on Civil Aviation Security Before the Subcommittee on Aviation of the House Committee on Transportation and Infrastructure*, 108th Cong. (August 25, 2004) (Testimony of David M. Stone), available at <http://www.house.gov/transportation/aviation/08-25-04/stone.pdf>.

<sup>16</sup> See *The Lessons and Implications of the Christmas Day Attack: Watchlisting and Pre-Screening*, Hearing of the S. Comm. On Homeland Security and Governmental Affairs, 111<sup>th</sup> Cong. (2010)(Statement of Russell Travers, Deputy Director National Counterterrorism Center); and Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, (Apr. 6, 2010) at: <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>



These problems are not hypothetical. They have real consequences for law enforcement and safety. An April 2009 report from the Virginia Fusion Center states

According to 2008 Terrorism Screening Center ground encounter data, al-Qa'ida was one of the three most frequently encountered groups in Virginia. In 2007, at least 414 encounters between suspected al-Qa'ida members and law enforcement or government officials were documented in the Commonwealth. Although the vast majority of encounters involved automatic database checks for air travel, a number of subjects were encountered by law enforcement officers.<sup>17</sup>

Every time a law enforcement officer encounters someone on the terrorist watch list (as determined by a check of the National Crime Information Center (NCIC) database) they contact the TSC. So in essence Virginia law enforcement is reporting that there are more than 400 al Qaeda terrorists in Virginia in a given year. This is difficult to believe.<sup>18</sup> In reality most, if not all, of these stops are false positives, mistakes regarding individuals who should not be on the list. These false positives can only distract law enforcement from real dangers.

### **Due Process and Redress: Still No Fairness after Eight Years**

The ability of individuals to receive fair treatment when caught up in this system is still lacking after eight years. Due to the secrecy obscuring the watch listing process, innocent victims cannot discover if they are victims of inaccuracies that riddle government and private databases, if they were falsely accused of wrongdoing, or if they are being discriminated against because of their religion, race, ethnic origin, or political beliefs.

The task facing security agencies is challenging indeed, and we do not object to the goal of trying to identify genuine terrorists. But in actual practice, the government's list appears to be so large and bloated that it inevitably sweeps in many innocent people. Adequate protections must be built in to deal with the problems that will result and to protect the rights and the reputations of those who have done nothing wrong.

Dr. Rahinah Ibrahim, a Malaysian mother of four with no previous criminal record, has been suing for the right to challenge her placement on the no-fly list ever since she was arrested at the San Francisco airport in 2005 while she was a student at Stanford University. She was quickly released and allowed to fly home to Malaysia, but has been prohibited from flying since. U.S. District Court Judge William Alsup suggested that Dr. Ibrahim's inclusion on the list may have been the result of "a monumental mistake," and he dismissed the government's continuing claims that the five-year old information that put her on the list must remain secret for national security reasons as "baloney," yet the U.S. continues to deny her a visa and won't tell her why she remains prohibited from flying.<sup>19</sup>

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<sup>17</sup> VIRGINIA FUSION CENTER, 2009 VIRGINIA TERRORISM THREAT ASSESSMENT, March 2009, pg 27.

<sup>18</sup> The report does not state that any of these individuals were arrested.

<sup>19</sup> Mike McIntire, *Ensnared by Error on Growing U.S. Watchlist*, New York Times, (Apr. 6, 2010) at: <http://www.nytimes.com/2010/04/07/us/07watch.html?pagewanted=all>; see also, Order for Production of Items



In a democratic society, the act of maintaining a secret list of people who are considered suspect and therefore denied freedoms others enjoy must be scrutinized closely. The power to impose denial of access to common-carrier services such as airlines (which are integral to the free and normal conduct of life for many in today's society) or deny them a firearm when they are otherwise eligible to possess one must not be wielded in an arbitrary manner. Reliance on unreliable tools like the watch lists results in inherently arbitrary decisions and makes it imperative that checks and balances be instituted to limit the use of such lists.

Erich Scherfen, a commercial airline pilot and Gulf War veteran, was threatened with termination from his job as a pilot because his name appeared on a government watch list, which prevented him from entering the cockpit.<sup>20</sup> Scherfen is not the only innocent person placed on a terror watch list. Others individuals who are either on a list or mistaken for those on the list include former Assistant Attorney General Jim Robinson, many individuals with the name Robert Johnson, the late Senator Edward Kennedy and even Nelson Mandela.<sup>21</sup>

One recent case is that of Mikey Hicks, an 8 year old boy who has been on the selectee list seemingly since birth. According to Hicks' family, their travel tribulations began when Mikey was an infant and could not get a seat assignment at an airport kiosk. When he was 2 years old, the child started being patted down by airport security. He's now, by all accounts, an unassuming bespectacled Boy Scout, yet he is stopped and scrutinized by security officials every time he flies with his family.<sup>22</sup>

Internal processes for addressing these problems are woefully inadequate or completely non-existent. In some cases – like that of Mikey Hicks – the problem seems to be one of mistaken identification. However after more than 5 years – the first law aimed at remedying misidentifications was passed in 2004 – the problems persist.<sup>23</sup>

A 2009 report by the Inspector General of DHS detailed extensive problems with the appeal process.<sup>24</sup> Specifically the report reveals that DHS is promising travelers that their watch list problems are solved, while privately admitting that airlines don't use the so-called 'clear' lists that would allow innocent travelers onto their flights. DHS officials frequently write to tell travelers their underlying data problems have been solved without being able to ensure that is true. Further because of outmoded information technology systems, the method for clearing the

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Despite the Assertion of Various Privileges, United States District Court for the Northern District of California, Case No. C 06-99545 WHA, (Dec. 17, 2009) *available at*: <http://www.courthousenews.com/2009/12/21/Ibrahim.pdf>

<sup>20</sup> Jeanne Meserve, *Name on government watch list threatens pilot's career*, CNN.com, August 22, 2008,

<http://www.cnn.com/2008/US/08/22/pilot.watch.list/index.html?iref=newssearch>

<sup>21</sup> For details on these individuals and many other please see: <http://www.aclu.org/technology-and-liberty/unlikely-suspects>

<sup>22</sup> Lizette Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, New York Times, January 13, 2010.

<sup>23</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Section 4017.

<sup>24</sup> DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, EFFECTIVENESS OF THE DEPARTMENT OF HOMELAND SECURITY TRAVELER REDRESS INQUIRY PROGRAM OIG-00-103 (September 2009)

names of people who pose no threat to national security from watch lists is plagued by delays, and DHS can't even monitor how many cases it resolves.

Perhaps worse than the inadequacies of the process for resolving mistaken identifications is that fact that there is no administrative process for an individual to actually be removed from the list. No statute or regulation creates a process whereby any of the more than 400,000 individuals currently on the terror watch list can be removed. Individuals are left to rely on the arbitrary discretion of the federal agencies and airlines involved in the process, none of whom are motivated to ensure the removal of names from the lists.

The TSC, which does not accept redress requests directly from the public, processed only about 500 redress requests from government agencies between February 2007 and March 2010, removing people from the list in only 25 percent of the cases, according to the New York Times (citing Congressional Research Service data).<sup>25</sup> Meanwhile, the TSC adds more than 350 people to the watch list every day.<sup>26</sup>

It is inconceivable that a democratic nation can allow the creation of a vast infrastructure for denying individuals their full freedoms, without tight checks and balances on that machinery. Those checks and balances are well established in other areas where individuals are subject to what amounts to punishment, such as the criminal justice system:

- **Meaningful due process.** Individuals must have the opportunity for a meaningful, participatory process by which they can challenge their inclusion on a watch list in an adversarial proceeding before a neutral arbiter.
- **Access to and a right to challenge the data on which inclusion on a list is based.** Before any individuals lose the rights and privileges that other members of society enjoy (for example, to travel by air or to own a gun), then they must have the same rights to confront their accusers and be told of the charges being leveled against them that other individuals are entitled to in criminal proceedings. In some limited circumstances - genuinely justified by true national security imperatives - some data may be reviewed in camera by a neutral arbiter, but such circumstances must be narrowly drawn.
- **Tight criteria for adding identities to watch lists.** Security officials must be tightly constrained in their ability to add names to watch lists, and the natural incentive to add a name to a list ("better safe than sorry") must be institutionally counterbalanced.
- **Rigorous procedures for removing names from watch lists.** When the government begins keeping lists of individuals for the purposes of lessening their freedom, it assumes the responsibility to keep that list up to date by regularly reviewing and reassessing each person's inclusion on that list.

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<sup>25</sup> *How Names Enter the Terrorist Watch List*, New York Times, (Apr. 7, 2010) at: <http://www.nytimes.com/imagepages/2010/04/07/us/07watch-graphic.html?ref=us>; see also, *Federal Bureau of Investigation Terrorist Screening Center Redress Procedures*, at: <http://www.fbi.gov/terrorinfo/counterterrorism/redress.htm>

<sup>26</sup> *Flight 253: Learning Lessons from an Averted Tragedy*, Hearing of the S. Comm. On Homeland Security and Governmental Affairs, 111<sup>th</sup> Cong. (2010) Statement of Michael Leiter, Director National Counterterrorism Center available at: [http://www.dni.gov/testimonies/20100127\\_testimony.pdf](http://www.dni.gov/testimonies/20100127_testimony.pdf)

Without such controls, the inevitable result will be a capricious and unpredictable security bureaucracy that will trample on the rights and freedoms individuals, leaving them no recourse and offering no accountability.

## **Conclusion**

No American should be denied a firearm – or any other benefit or right – based on their placement on a terror watch list in their current form. Years of government and media reports and countless examples of harm to ordinary Americans demonstrate that these lists, and the processes for creating and maintaining them, are fatally flawed. Before bills such as S. 1317 and S. 2820, as well-intentioned as they may be, or any similar measures go forward, the watch lists must be scrapped and replaced with a narrow, tightly circumscribed process focused on identifying those who are real threats to security, with effective due process measures to ensure the minimization of errors and abuses leading to inclusion of innocent persons.