



Written Statement of the
American Civil Liberties Union

Michael W. Macleod-Ball
Acting Director, Washington Legislative Office

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Legislative Counsel
before the
Senate Committee on Homeland Security
& Governmental Affairs

January 20, 2009
Hearing on Aviation Security and Flight 253



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

The American Civil Liberties Union (ACLU) has more than half a million members, countless additional activists and supporters, 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 pre-eminent advocates in support of privacy and equality. We write today to express our strong concern over the three substantive policy changes that are being considered in the wake of the attempted terror attack on Christmas Day: the wider deployment of whole body imaging (WBI) devices, the expanded use of terror watch lists and increased screening of individuals from fourteen so-called nations of interest. The ACLU believes that each of these technologies greatly infringe on civil liberties and face serious questions regarding its efficacy in protecting airline travelers.

The President has already identified a failure of intelligence as the chief cause of the inability to detect the attempted terror attack on Christmas day. As such, the government's response must be directed to that end. These invasive and unjust airline security techniques represent a dangerous diversion of resources from the real problem. This diversion of resources promises serious harm to American's privacy and civil liberties while failing to deliver significant safety improvements.

I. Introduction

WBI uses millimeter wave or X-ray technology to produce graphic images of passengers' bodies, essentially taking a naked picture of air passengers as they pass through security checkpoints. This technology is currently deployed at 19 airports and the Department of Homeland Security (DHS) recently announced the roll out of 300 more machines by year end.¹ While initially described as a secondary screening mechanism, DHS is now stating that WBI will be used for primary screening of passengers.²

Another way of screening passengers is through terror watch lists. The terror watch lists are a series of lists of names of individuals suspected of planning or executing terrorist attacks. The master list is maintained by the Terrorist Screening Center (TSC) and contains more than one million names.³ Subsets of this list include the No Fly list (barring individuals from air travel) and the Automatic Selectee list (requiring a secondary screening). The names on this list and the criteria for placement on these lists are secret.⁴ There is no process allowing individuals to challenge their placement on a list or seek removal from a list.

Finally, individuals who were born in, are citizens of, or are traveling from fourteen nations will receive additional scrutiny under a policy announced by the US government after the attempted terror attack. As of January 19, 2010 these nations are Afghanistan, Algeria, Cuba, Iran, Lebanon, Libya, Iraq, Nigeria, Pakistan, Saudi Arabia, Somalia, Sudan, Syria and Yemen.

The ACLU believes that Congress should apply the following two principles in evaluating any airline security measure:

- **Efficacy.** New security technologies must be genuinely effective, rather than creating a false sense of security. The wisdom supporting this principle is obvious: funds to increase aviation security are limited, and any technique or technology must work and be substantially better than other alternatives to deserve some of the limited funds available. It therefore follows that before Congress invests in technologies or employs new screening methods, it must

¹ Harriet Baskas, *Air security: Protection at privacy's expense?* Msnbc.com, January 14, 2010. <http://www.msnbc.msn.com/id/34846903/ns/travel-tips/>

² Paul GIBLIN and Eric LIPTON, *New Airport X-Rays Scan Bodies, Not Just Bags*, New York Times, February 24, 2007.

³ *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. <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

⁴ *Id* at 70.

demand evidence and testing from neutral parties that these techniques have a likelihood of success.

- **Impact on Civil Liberties.** The degree to which a proposed measure invades privacy should be weighed in the evaluation of any technology. If there are multiple effective techniques for safeguarding air travel, the least intrusive technology or technique should always trump the more invasive technology.

II. Screening Techniques and Technologies Must Be Effective, or they Should Not be Utilized or Funded

The wider deployment of whole body imaging (WBI) devices, expanded use of terror watch lists and increased screening of individuals from fourteen so-called nations of interest each face significant questions regarding their efficacy in protecting air travelers and combating terrorism.

Whole Body Imaging

There are no magic solutions or technologies for protecting air travelers. Ben Wallace, a current member of the British parliament who advised a research team at *QinetiQ*, a manufacturer of body screening devices, has stated that their testing demonstrated that these screening devices would not have discovered a bomb of the type used on Christmas day, as they failed to detect low density materials like powders, liquids and thin plastics.⁵ A current QinetiQ product manager admitted that even their newest body scan technology probably would not have detected the underwear bomb.⁶ The British press has also reported that the British Department for Transport (DfT) and the British Home Office have already tested the scanners and were not convinced they would work comprehensively against terrorist threats to aviation.⁷

In addition we know that al Qaeda has already discovered a way to work around this technology. In September a suicide bomber stowed a full pound of high explosives and a detonator inside his rectum, and attempted to assassinate a Saudi prince by blowing himself up.⁸ While the attack only slightly wounded the prince, it fully defeated an array of security measures including metal detectors and palace security. The bomber spent 30 hours in the close company of the prince's own secret service agents – all without anyone suspecting a thing. WBI devices – which do not penetrate the body – would not have detected this device.

The practical obstacles to effective deployment of body scanners are also considerable. In the United States alone, 43,000 TSA officers staff numerous security gates at over 450 airports and over 2 million passengers a day.⁹ To avoid being an ineffective “Maginot line,” these \$170,000 machines will need to be put in place at all gates in all airports; otherwise a

⁵ Jane Merrick, *Are planned airport scanners just a scam?* The Independent, January 3, 2010.

⁶ *Id.*

⁷ *Id.*

⁸ Sheila MacVicar, *Al Qaeda Bombers Learn from Drug Smugglers*, CBSnews.com, September 28, 2009

⁹ http://www.tsa.gov/what_we_do/screening/security_checkpoints.shtm

terrorist could just use an airport gate that does not have them. Scanner operators struggle constantly with boredom and inattention when tasked with the monotonous job of scanning thousands of harmless individuals when day after day, year after year, no terrorists come through their gate. In addition to the expense of buying, installing and maintaining these machines, additional personnel will have to be hired to run them (unless they are shifted from other security functions, which will degrade those functions).

The efficacy of WBI devices must be weighed against not only their impact on civil liberties (discussed further below) but also their impact on the U.S. ability to implement other security measures. Every dollar spent on these technologies is a dollar that is not spent on intelligence analysis or other law enforcement activity. The President has already acknowledged that it was deficiencies in those areas – not aviation screening – that allowed Umar Farouk Abdulmutallab to board an airplane.

Watch Lists

The events leading up to the attempted Christmas attack are a telling indictment of the entire watch list system. In spite of damning information, including the direct plea of Abdulmutallab's father, and other intelligence gathered about terrorist activity in Yemen, Abdulmutallab was not placed into the main Terrorist Screening Database. We believe that fact can be directly attributed to the bloated and overbroad nature of the list – now at more than a million names.¹⁰ The size of the list creates numerous false positives, wastes resources and hides the real threats to aviation security. As we discuss below it also sweeps up many innocent Americans – falsely labeling them terrorists and providing them with no mechanism for removing themselves from the list.

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.¹¹

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.¹² 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.

¹⁰ DOJ OIG Audit Report 09-25, pg 3. <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

¹¹ Virginia Fusion Center, *2009 Virginia Terrorism Threat Assessment*, March 2009, pg 27.

¹² The report does not state that any of these individuals were arrested.

A 2009 report by the Department of Justice Inspector General found similarly troubling results. From the summary:

We 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. Specifically, in 32 of the 216 (15 percent) terrorism investigations we reviewed, 35 subjects of these investigations were not nominated to the consolidated terrorist watchlist, contrary to FBI policy. We also found that 78 percent of the initial watchlist nominations we reviewed were not processed in established FBI timeframes.

Additionally, in 67 percent of the cases that we reviewed in which a watchlist record modification was necessary, we determined that the FBI case agent primarily assigned to the case failed to modify the watchlist record when new identifying information was obtained during the course of the investigation, as required by FBI policy. Further, in 8 percent of the closed cases we reviewed, we found that the FBI failed to remove subjects from the watchlist as required by FBI policy. Finally, in 72 percent of the closed cases reviewed, the FBI failed to remove the subject in a timely manner.¹³

This is only the latest in a long string of government reports describing the failure of the terror watch lists.¹⁴ In order to be an effective tool against terrorism these lists must shrink dramatically with names limited to only those for whom there is credible evidence of terrorist ties or activities.

Aviation Screening on the Basis of Nationality

Numerous security experts have already decried the use of race and national origin as an aviation screening technique.

Noted security expert Bruce Schneier stated recently:

[A]utomatic profiling based on name, nationality, method of ticket purchase, and so on...makes us all less safe. The problem with automatic profiling is that it doesn't work.

¹³ DOJ OIG Audit Report 09-25, pg iv-v. <http://www.justice.gov/oig/reports/FBI/a0925/final.pdf>

¹⁴ *Review of the Terrorist Screening Center (Redacted for Public Release)*, Justice Department, Office of the Inspector General, Audit Report 05-27, June 2005; *Review of the Terrorist Screening Center's Efforts to Support the Secure Flight Program (Redacted for Public Release)*, Justice Department, Office of the Inspector General, Audit Report 05-34, August 2005; *Follow-Up Audit of the Terrorist Screening Center (Redacted for Public Release)*, Justice Department, Office of the Inspector General, Audit Report 07-41, September 2007; *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices*, Justice Department, Office of the Inspector General, Audit Report 09-25, May 2009; *DHS Challenges in Consolidating Terrorist Watch List Information*, Department of Homeland Security, Office of Inspector General, OIG-04-31, August 2004; *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO Report to Congressional Requesters, GAO-03-322, April 2003; *Congressional Memo Regarding Technical Flaws in the Terrorist Watch List*, House Committee on Science and Technology, August 2008.

Terrorists can figure out how to beat any profiling system.

Terrorists don't fit a profile and cannot be plucked out of crowds by computers. They're European, Asian, African, Hispanic, and Middle Eastern, male and female, young and old. Umar Farouk Abdul Mutallab was Nigerian. Richard Reid, the shoe bomber, was British with a Jamaican father. Germaine Lindsay, one of the 7/7 London bombers, was Afro-Caribbean. Dirty bomb suspect Jose Padilla was Hispanic-American. The 2002 Bali terrorists were Indonesian. Timothy McVeigh was a white American. So was the Unabomber. The Chechen terrorists who blew up two Russian planes in 2004 were female. Palestinian terrorists routinely recruit "clean" suicide bombers, and have used unsuspecting Westerners as bomb carriers.

Without an accurate profile, the system can be statistically demonstrated to be no more effective than random screening.

And, even worse, profiling creates two paths through security: one with less scrutiny and one with more. And once you do that, you invite the terrorists to take the path with less scrutiny. That is, a terrorist group can safely probe any profiling system and figure out how to beat the profile. And once they do, they're going to get through airport security with the minimum level of screening every time.¹⁵

Schneier is not alone in this assessment. Philip Baum is the managing director of an aviation security company:

Effective profiling is based on the analysis of the appearance and behavior of a passenger and an inspection of the traveler's itinerary and passport; it does not and should not be based on race, religion, nationality or color of skin. ...

Equally, the decision to focus on nationals of certain countries is flawed and backward. Perhaps I, as a British citizen, should be screened more intensely given that Richard Reid (a.k.a "the Shoe bomber") was a U.K. passport holder and my guess is there are plenty more radicalized Muslims carrying similar passports. Has America forgotten the likes of Timothy McVeigh? It only takes one bad egg and they exist in every country of the world.¹⁶

Former Israeli airport security director Rafi Ron:

My experience at Ben Gurion Airport in Tel Aviv has led me to the conclusion that racial profiling is not effective. The major attacks at Ben Gurion Airport were carried out by Japanese terrorists in 1972 and Germans in the 1980s. [They] did not belong to

¹⁵ <http://roomfordebate.blogs.nytimes.com/2010/01/04/will-profiling-make-a-difference/>

¹⁶ *Id.*

any expected ethnic group. Richard Reid [known as the shoe bomber] did not fit a racial profile. Professionally as well as legally, I oppose the idea of racial profiling.¹⁷

This should be the end of the discussions. Policies that don't work have no place in aviation security. When they are actively harmful – wasting resources and making us less safe – they should be stopped as quickly as possible.

III. The Impact on Privacy and Civil Liberties Must be Weighed in Any Assessment of Aviation Security Techniques

Each of the three aviation security provisions discussed in these remarks represents a direct attack on fundamental American values. As such they raise serious civil liberties concerns.

Whole Body Imaging

WBI technology involves a striking and direct invasion of privacy. It produces strikingly graphic images of passengers' bodies, essentially taking a naked picture of air passengers as they pass through security checkpoints. It is a virtual strip search that reveals not only our private body parts, but also intimate medical details like colostomy bags. Many people who wear adult diapers feel they will be humiliated. That degree of examination amounts to a significant assault on the essential dignity of passengers. Some people do not mind being viewed naked but many do and they have a right to have their integrity honored.

This technology should not be used as part of a routine screening procedure, but only when the facts and circumstances suggest that it is the most effective method for a particular individual. And such technology may be used in place of an intrusive search, such as a strip search – when there is reasonable suspicion sufficient to support such a search.

TSA is also touting privacy safeguards including blurring of faces, the non-retention of images, and the viewing of images only by screeners in a separate room. Scanners with such protections are certainly better than those without; however, we are still skeptical of their suggested safeguards such as obscuring faces and not retaining images.

Obscuring faces is just a software fix that can be undone as easily as it is applied. And obscuring faces does not hide the fact that rest of the body will be vividly displayed. A policy of not retaining images is a protection that would certainly be a vital step for such a potentially invasive system, but it is hard to see how this would be achieved in practice. TSA would almost certainly have to create exceptions – for collecting evidence of a crime or for evaluation of the system (such as in the event of another attack) for example – and it is a short step from there to these images appearing on the Internet.

¹⁷ Katherine Walsh, *Behavior Pattern Recognition and Why Racial Profiling Doesn't Work*, CSO Online, (Feb. 1, 2006), at: http://www.csoonline.com/article/220787/Behavior_Pattern_Recognition_and_Why_Racial_Profiling_Doesn_t_Work

Intrusive technologies are often introduced very gingerly with all manner of safeguards and protections, but once the technology is accepted the protections are stripped away. There are substantial reasons for skepticism regarding TSA promised protections for WBI devices. In order for these protections to be credible Congress must enshrine them in law.

Finally, the TSA should invest in developing other detection systems that are less invasive, less costly and less damaging to privacy. For example, “trace portal detection” particle detectors hold the promise of detecting explosives while posing little challenge to flyers’ privacy. A 2002 Homeland Security report urged the “immediate deployment” of relatively inexpensive explosive trace detectors in European airports, as did a 2005 report to Congress, yet according to a 2006 Associated Press article, these efforts “were frustrated inside Homeland Security by ‘bureaucratic games, a lack of strategic goals and months-long delays in distributing money Congress had already approved.’”¹⁸ Bureaucratic delay and mismanagement should not be allowed to thwart the development of more effective explosive detection technologies that do not have the negative privacy impact of WBI devices.

Watch Lists

The creation of terrorist watch lists – literally labeling individuals as a terrorist – has enormous civil liberties impact. It means ongoing and repetitive harassment at all airports – foreign and domestic, constant extra screening, searches and invasive questions. For the many innocent individuals on the lists this is humiliating and infuriating.

For some it is worse. Individuals on the no fly list are denied a fundamental right, the right to travel and move about the country freely. Others are threatened with the loss of their job. Erich Sherfen, commercial airline pilot and Gulf War veteran, has been threatened with termination from his job as a pilot because his name appears on a government watch list, which prevents him from entering the cockpit.¹⁹ Sherfen is not the only innocent person placed on a terror watch list. Others individual who are either on a list or mistaken for those on the list include a former Assistant Attorney General, many individuals with the name Robert Johnson, the late Senator Edward Kennedy and even Nelson Mandela.²⁰

The most recent case – revealed just last week – 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 that began when Mikey was an infant. When he was 2 years old, the kid was patted down at airport security. He's now, by all accounts, an unassuming bespectacled Boy Scout who has been stopped every time he flies with his family.²¹

¹⁸ John Solomon, *Bureaucracy Impedes Bomb Detection Work*, Washington Post, Aug. 12, 2006, at: <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/12/AR2006081200269.html>

¹⁹ 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>

²⁰ For details on these individuals and many other please see: <http://www.aclu.org/technology-and-liberty/unlikely-suspects>

²¹ Lizette Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, New York Times, January 13, 2010.

In addition, to stops at the airport watch list information is also placed in the National Criminal Information Center database. That means law enforcement routinely run names against the watch lists for matters as mundane as traffic stops. It's clear that innocent individuals may be harassed even if they don't attempt to fly.

Nor is there any due process for removing individuals from the list – there is simply no process for challenging the government's contention that you are a terrorist. Even people who are mistaken for those on the list face challenges. A September 2009 report by the Inspector General of the Department of Homeland Security found that the process for clearing innocent travelers from the list is a complete mess.²²

In light of the significant and ongoing harm to innocent Americans as well as the harm to our national security caused by the diversion of security resources these watch lists must be substantially reduced in size and fundamental due process protections imposed. Innocent travelers must be able to remove themselves from the list both for their sake and the sake of national security.

Aviation Screening on the Basis of Nationality

This history of the civil rights movement in the 20th and 21st Century is a long, compelling rejection of the idea that individuals should be treated differently on the basis of their race or nation of origin. Because of that, the administration's decision to subject the citizens of fourteen nations flying to the United States to intensified screening is deeply troubling. Longstanding constitutional principles require that no administrative searches, either by technique or technology, be applied in a discriminatory matter. The ACLU opposes the categorical use of profiles based on race, religion, ethnicity, or country of origin. This practice is nothing less than racial profiling. Such profiling is ineffective and counter to American values.

But the harm that profiling on the basis of national origin does to civil liberties is not an abstraction – it also has direct impact on American security interests. These harmful policies have a direct impact on the Muslim and Arab communities. The Senate Homeland Security and Government Affairs committee has heard testimony from several witnesses who cited the growth of Islamophobia and the polarization of the Muslim community as risk factors that could raise the potential for extremist violence.²³ Unfairly focusing suspicion on a vulnerable community tends to create the very alienation and danger that we need to avoid.

Indeed a recent United Kingdom analysis based on hundreds of case studies of individuals involved in terrorism reportedly identified “facing marginalization and racism” as a

²² *Effectiveness of the Department of Homeland Security Traveler Redress Inquiry Program*, Department of Homeland Security, Office of the Inspector General OIG 09-10, September 2009.
http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG-09-103r_Sep09.pdf

²³ See for example, Hearing of the Senate Homeland Security and Governmental Affairs Committee, *Violent Islamist Extremism: The European Experience*, (June 27, 2007), particularly the testimony of Lidewijde Ongering and Marc Sageman, available at:
http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=9c8ef805-75c8-48c2-810d-d778af31cca6.

key vulnerability that could tend to make an individual receptive to extremist ideology.²⁴ The conclusion supporting tolerance of diversity and protection of civil liberties was echoed in a National Counterterrorism Center (NCTC) paper published in August 2008. In exploring why there was less violent homegrown extremism in the U.S. than the U.K., the authors cited the diversity of American communities and the greater protection of civil rights as key factors.

At the January 7, 2009 White House briefing regarding the security failures surrounding the Christmas attack, DHS Secretary Janet Napolitano raised a question about “counter-radicalization.”²⁵ She asked, “How do we communicate better American values and so forth, in this country but also around the globe?” Of course the Secretary should know American values are communicated through U.S. government policies, which is why adopting openly discriminatory policies can be so damaging and counterproductive to our national interests.

IV. Conclusion

Ultimately security is never absolute and never will be. It is not wise security policy to spend heavily to protect against one particular type of plot, when the number of terrorist ideas that can be hatched – not only against airlines, but also against other targets – is limitless. The President has identified a failure “connect the dots” by intelligence analysts as the main reason that Umar Farouk Abdulmutallab was able to board a flight to the U.S.²⁶ We must not lose sight of that reality. Limited security dollars should be invested where they will do the most good and have the best chance of thwarting attacks. That means investing them in developing competent intelligence and law enforcement agencies that will identify specific individuals who represent a danger to air travel and arrest them or deny them a visa.

Invasive screening mechanisms, enlarging already bloated watch lists, targeting on the basis of national origin – none of these approaches go to the heart of what went wrong on Christmas day. Instead they are a dangerous sideshow – one that harms our civil liberties and ultimately makes us less safe.

²⁴ Alan Travis, “*MI5 Report Challenges Views on Terrorism in Britain*,” The Guardian, (August 20, 2008) at: <http://www.guardian.co.uk/uk/2008/aug/20/uksecurity.terrorism1> and; Alan Travis, “*The Making of an Extremist*,” The Guardian (Aug. 20, 2008) at: <http://www.guardian.co.uk/uk/2008/aug/20/uksecurity.terrorism>

²⁴ National Counterterrorism Center Conference Report, Towards a Domestic Counterradicalization Strategy, (August 2008)

²⁵ Briefing by Homeland Security Secretary Napolitano, Assistant to the President for Counterterrorism and Homeland Security Brennan, and Press Secretary Gibbs, 1/7/10, at: <http://www.whitehouse.gov/the-press-office/briefing-homeland-security-secretary-napolitano-assistant-president-counterterroris>

²⁶ Jake Tapper and Sunlen Miller, *Obama: Intelligence Community Failed to “Connect the Dots” in a “Potentially Disastrous Way”*, ABCNews.com, January 05, 2010. <http://blogs.abcnews.com/politicalpunch/2010/01/obama-intelligence-community-failed-to-connect-the-dots-in-a-potentially-disastrous-way.html>