Promoting Accuracy and Fairness in the Use of Government Watch Lists

Statement of the Constitution Project’s Liberty and Security Initiative

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Introduction

United States intelligence and law enforcement agencies have long relied upon “watch lists” to help identify individuals who pose potential threats to national security. In light of widespread press coverage and personal experience, most Americans are now familiar with the watch lists used to screen airline passengers. As we have come to understand, these lists contain names of people who may be subjected to additional screening and review or even prohibited from boarding an airplane. Press reports have also made clear that the use of such lists extends well beyond airport security, and we have recently learned of the existence of an “Automated Targeting System (ATS)” that gathers data on travelers and assigns computer-generated risk scores. Therefore, we, the undersigned members of the Constitution Project’s Liberty and Security Initiative, are issuing this statement to urge policymakers to promptly restrict the use of such watch lists, and adopt important reforms to govern the situations in which they are used.

The Constitution Project is an independent think tank that promotes and defends constitutional safeguards by bringing together liberals and conservatives who share a common concern about preserving civil liberties. By forging consensus positions that bring together “unlikely allies” from both sides of the aisle, the Project broadens support for constitutional protections both within government and in the public at large. The Project launched its Liberty and Security Initiative in the aftermath of September 11th. Guided by an ideologically diverse committee of prominent Americans, the Initiative is committed to developing and advancing proposals to protect civil liberties even as our country works to make Americans safe. We, the committee’s members, are Democrats, Republicans, and independents, conservatives and liberals. We are united in our belief that the use of watch lists must be strictly limited, and in our concern that procedural safeguards and other measures to promote fairness are needed to protect us from the dangers posed by the use of watch lists. Even in situations where watch lists may be appropriate, the use of such lists may harm innocent persons either because they share a name with another individual who is appropriately included, or because such people are placed on lists despite a lack of evidence to warrant such treatment.

Although watch lists may serve as a valuable tool in our government’s efforts to combat terrorism, they also pose serious threats to Americans’ civil liberties. First and foremost, watch lists must not be used as “blacklists,” to prevent certain people even from being considered for various jobs or government benefits. Moreover, watch lists continue to be plagued with errors, and the press has reported numerous accounts of individuals – even children – being mistakenly

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stopped at airports. In order for watch lists to be both effective and fair, it is critically important that they be accurate. Mistaken targeting wastes government resources and harms innocent individuals who are included on lists without justification or who simply share a name with an appropriately listed person. To the extent watch lists impede travel or immigration by non-citizens who present no actual threat to the United States, they can exact substantial cultural, political, and economic costs, in both the short and long term. For individuals wrongly included, costs may range from surveillance or minor inconvenience to serious reputational damage or substantial limitations on privacy and freedom of action.

I. When Watch Lists Are Appropriate

Since September 11, 2001, federal law enforcement and intelligence agencies have vastly expanded the scope of, and their reliance upon, watch lists. In late 2003, the government began consolidating these various lists under the aegis of the Terrorist Screening Center (TSC). The Terrorist Screening Data Base (TSDB), subsequently established by the TSC, now serves as a central repository for records and as a coordinating hub for information that moves between government watch lists.

The history of governmental use of watch lists is a checkered one. In some contexts, watch lists have been used inappropriately to deny people jobs and government contracts on unjustified and discriminatory bases. On the other hand, we recognize that in certain circumstances watch lists may be a useful tool because the opportunity does not exist for more careful real-time investigation.

We recommend that watch lists be used only in situations in which decisions must be made quickly and grave consequences would follow from failure to screen out a listed person. The obvious case occurs when individuals present themselves for immediate access to sensitive sites or facilities, such as airplanes. Thus, it is appropriate to use a watch list to determine who may merit additional screening before boarding an airplane, and for the “no fly” list, subject to the recommendations we make in Section II below. Similarly, under the same conditions, we approve of the use of a watch list to determine which foreigners residing overseas should be denied visas to come to the United States. Such watch lists must only be used, however, for the specific and limited purpose for which the list is authorized.

By contrast, watch lists should not be used in such contexts as employment, where the burdens on individuals are substantial and the government can protect national security effectively through careful contemporaneous investigation. The Constitution Project’s Liberty and Security Initiative disapproves of the practice of compiling watch lists of suspected persons to be used for screening for employment purposes or in connection with applications for contracts or licenses related to employment. We are concerned by current discussions of whether to use the Terrorist Screening Database watch list in such contexts. We note that many members of the Initiative have long fought against the use of criminal history records, particularly arrest records, to deny persons employment, as leading to discrimination and other unlawful practices.
At the same time, we recognize that there are positions that require security clearances or other types of background checks for national security or other legitimate reasons. The security clearance system, for example, has evolved over time to address both the criteria for denying persons clearances and the due process rights of those denied clearances, including how to deal with the classified information in making such determinations. Given the systems in place to assure appropriately qualified applicants obtain clearances for employment and contracts, a watch list of suspected persons is unnecessary and inconsistent with constitutional protections against discrimination and for due process.

Finally, we disapprove of the use of watch lists to determine which non-citizens living in the United States should be subjected to arrest or detention, with the exception of a watch list for individuals for whom outstanding arrest warrants have been issued.

II. Recommended Reforms to Watch Lists to Promote Fairness and Accuracy

For situations in which watch lists are appropriate, the Constitution Project’s Liberty and Security Initiative has formulated a set of recommended procedures to promote accuracy as well as fairness in their maintenance and use. Specifically, we propose implementation of “front-end” procedures to enhance the accuracy and uniformity of watch lists, as well as a “back-end” redress system for individuals seeking to clear their names. This combination of measures should not only vastly improve the quality and fairness of watch lists, but also provide clear channels for individuals seeking to remove their names from watch lists. We recommend that Congress enact legislation to implement these procedures.

A. A Front-End Fairness System for Government Watch Lists

Promoting accuracy at the “front-end” will improve the efficiency and effectiveness of watch lists, and provide greater fairness to individuals. This approach will enable the TSC to avoid – and remedy – significantly more cases of potential error than would a system that relied only on a “back-end” redress system.

To achieve these goals, we recommend four kinds of protection in the front-end maintenance of watch lists:

1. **Clear Written Standards:** Agencies maintaining watch lists need clear written standards that specify the general criteria for inclusion, the kinds of information regarded as relevant evidence that the criteria have been met, and the standards of proof appropriate for including individuals when information is received.

2. **Rigorous Nominating Process:** Agencies maintaining watch lists should follow a rigorous nominating process, structured to promote reliability across agents and across agencies in order to make certain that decisions are being made as objectively as possible. The process should be designed so that the decision to include or exclude names is relatively uniform no matter who makes the nomination. Reliability is critical not only to the accuracy of the system, but also as a guarantee of equality in
the treatment of all people.

3. **Internal Monitoring for Accuracy:** Agencies maintaining watch lists should pursue rigorous programs of internal monitoring to insure the completeness, timeliness, and accuracy of all records, including the completeness, timeliness, and accuracy of error correction. This should include regular sampling of records on a random basis. Each agency should appoint a Records Integrity Officer to oversee the implementation of these processes.

4. **Maintaining Accuracy in Interagency Sharing of Records:** Agencies maintaining watch lists should employ a system architecture to protect the accuracy and completeness of records that are shared, with the particular goal of insuring that error correction in any database results in error correction in every other database containing the same foundational record. In addition, watch lists must be maintained under fully secure conditions, to protect against the risks of both inadvertent tampering and computer hacking.

B. A Back-End Redress System for Listed Individuals

To be complete, a fairness system must also include some mechanism for redressing errors in individual cases. At bottom, individuals must be afforded a fundamentally fair opportunity to challenge their inclusion on a watch list, on grounds of either mistaken identity or inadequate justification for inclusion. The specific procedural details that constitute a "fundamentally fair opportunity" will vary with the circumstances, including the nature of the challenge and the degree to which agencies implement protective “front-end” procedures.

In mistaken identity cases, a well-managed front-end process should greatly reduce the number of cases requiring redress, and entitle the government to establish a less exacting “back-end” system at the administrative level. The level of procedural formality might also be expected to vary with the nature of the burden that an individual faces because of challenged watch list inclusion. If, however, the government assembles all or a group of watch lists from a single database serving many functions, it may make sense to have a process tailored to the most burdensome consequence that inclusion in the central database might portend. Acknowledging that variations are inevitable, we offer the following as an example of an appropriate approach.

1. **A Different Approach to Notice**

Most redress systems begin when the government provides an individual with notice of an official action, which the individual may then challenge. In the watch list context, however, providing notice that a person has been added to a list would likely undermine the purposes of the program, and could entail substantial risks to ongoing investigations. Thus, provided that the front-end protections outlined above are implemented, we recommend that the government should be compelled to offer redress only in those cases when an individual suffers a real burden by his or her inclusion on a watch list.
There remain two special types of cases where elimination of the notice requirement becomes more troubling: (1) when individuals are proposed for inclusion on watch lists based solely upon anonymous or uncorroborated tips, and (2) when individuals have been proposed for inclusion on watch lists solely through the operation of pattern recognition techniques. Even with a front-end fairness system in place, the risks of error under either of these scenarios would be substantial.

We therefore recommend that because uncorroborated or anonymous tips are especially unreliable, but giving notice is likely an impracticable solution, government agencies should simply be prohibited from using tip information, without corroboration, as a basis for including any individual on an “operational” watch list that may result in the denial of any right, privilege, or benefit. Thus, such information should not be used as a basis for including a person on the “no fly” list. Uncorroborated tip information might be kept in a separate “pre-operational” list, as individuals potentially subject to watch list inclusion remain subject to investigation. Further, on a time-limited basis, it might be appropriate to rely upon such tips as the basis for further investigation, such as by placing the person on a list requiring additional screening at airports. However, any such use to target individuals for more thorough screening should be strictly limited to a follow-up period of no more than 120 days. After that time, absent corroboration or authentication of the original tip, the individual should be removed from any list of persons to be targeted for more rigorous screening.

We similarly recommend that agencies be precluded from relying solely upon pattern recognition techniques to include persons on operational watch lists. Such techniques involve the compilation of several characteristics or behaviors, each of which may itself be innocuous, but the combination of which is considered suspicious. Although pattern recognition may be a valuable tool, this kind of statistical profiling is subject to high rates of error, and could lead to inclusion of individuals on watch lists despite the lack of any direct evidence of a suspicious act or behavior. Therefore, individuals identified solely through pattern recognition techniques should not be included on any operational watch lists, but only on pre-operational lists or time-limited lists for additional screening, as described above for uncorroborated or anonymous tips. To the extent that the recently disclosed “Automated Targeting System (ATS)” is such a pattern recognition system, that system should only be operated in compliance with these recommendations.

As an alternative for pattern recognition cases, the government could create a process that would provide independent review of proposed pattern recognition algorithms. Specifically, the government might provide for an independent arbiter to determine whether a particular statistical profile creates a justifiable belief that persons identified are reasonably suspected of involvement in terrorism. The agency proposing use of the particular algorithm would make a confidential ex parte showing to the independent arbiter that (a) the government was justified in associating the behavioral pattern with suspected terrorism and (b) the algorithm was accurately deployed in identifying the subjects involved. The required showing should include a demonstration that the targeted behavioral pattern characterizes a substantial number of terrorist suspects.
identified through other means. Only after such an independent arbiter approves the profile analysis could the government rely upon it to nominate individuals for inclusion on an operational watch list.

2. *A Proposed System of Redress*

For situations in which watch lists are appropriate, as outlined in Section I above, the government must also design improved “back-end” redress procedures. Although adoption of the recommended “front-end” procedures outlined in Section II.A. above will reduce the number of cases in which redress may be needed, there will still be situations in which individuals seek to clear their names from watch lists.

We recommend that the government develop two different back-end procedures, one informal and one formal. The choice of which procedure to apply in any specific case should depend on whether the government actually implements the recommended front-end protections, and on whether the individual is alleging mistaken identity – that he or she simply shares a name with someone on the list but is not that person – or is alleging that there is not sufficient evidence to warrant his or her inclusion on the list.

*a. Informal:* The informal process should consist solely of written procedures without an oral hearing. Individuals would have a right to appeal in court, but the decision would be reviewed only for arbitrariness. If the government implements the recommended front-end fairness protections, the informal process should be applicable for all mistaken identity cases in which the decision maker determines that the front-end standards and processes were followed.

*b. Formal:* The formal system would involve an oral administrative hearing and judicial review under a *de novo* evidentiary standard with the government bearing the burden of proof. If the government declines to adopt the recommended front-end fairness protections, then the formal procedure should be available whenever an individual challenges his or her inclusion on a watch list. Otherwise, the formal process would be available only for cases alleging insufficient evidence to warrant inclusion on a watch list and for those mistaken identity cases in which the agency failed to follow the required front-end safeguards.

In addition to these two tracks, another category is needed for individuals who are non-United States persons* outside the borders of America. These individuals should be entitled to submit a written complaint for review by the agency maintaining the watch list, but the government should not be compelled to grant hearings outside of the United States for those dissatisfied with the results of the written review process.

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* The term “United States person” refers to both United States citizens and legal residents of the United States. A “non-United States person” would not be entitled to the same protections under the United States’ constitution and laws.
For purposes of hearings under the formal system and appeals under the informal system, the government should employ government attorneys to serve as public advocates, who will have security clearances at a level adequate to insure that they can review classified material.

3. **Audits and Recordkeeping**

Whatever redress procedures the government follows, it should preserve the records from any complaints. Information regarding the nature of the complaint and its resolution should be promptly recorded in the Terrorist Screening Data Base (TSDB) and circulated to all agencies using watch lists.

In addition, the TSC should conduct regular routine audits of how the TSDB has been used. The TSDB purports to contain names of people with known or suspected links to terrorism. Those with “suspected links” are included in this database because government officials want to watch them further, to assess whether they are in fact participating in any terrorist plot. The audit process should document each occasion on which use of a watch list has resulted in a match, and describe what occurred during the encounter with the listed individual. This should include whether or not the individual was arrested, and the nature and extent of any follow-up investigation that was conducted to assess whether the watch-listed individual is in fact participating in any terrorist plot. Audit reports should then be reviewed to assess the efficacy of the watch list, and to determine whether any particular individuals should be purged from the list.

**C. Reports to Congress**

Despite procedures to ensure fairness and proper redress, the lack of transparency built into the watch list program may undermine the public’s support. In order to improve accountability and monitoring of watch lists, Congress should further require regular reporting by the agencies employing watch lists, including submission of the audit reports recommended above.
Members of the Liberty and Security Initiative
Endorsing the Constitution Project’s Promoting Accuracy and Fairness in the Use of Government Watch Lists*

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