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Safeguarding Liberty, Justice and the Rule of Law

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December 19, 2011

Edward Vazquez, Department of State
U.S. Department of State
2201 C Street NW, SA-15 Room 3200
Washington, DC 20520

Re: Notice of Proposed Information Collection: DS-4184, Risk Management and Analysis (RAM), Vol. 76 Fed. Reg. No. 203, page 65317

Dear Mr. Vazquez,

The Constitution Project ("TCP") respectfully submits the following written comments regarding the State Department's (the "Department") proposed information collection. TCP is a national, bipartisan think tank that develops consensus-based solutions to some of the most difficult constitutional challenges of our time. TCP works on criminal justice and rule of law issues by undertaking scholarship, policy reform, and public education initiatives. TCP creates committees of experts and practitioners from across the political spectrum and works with them to promote and safeguard America's founding charter. TCP's Liberty and Security Committee, formed in the aftermath of September 11th, works to ensure that we promote both our national security and Americans' civil liberties. In September 2009, TCP's Liberty and Security Committee released its report *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations,"*[1] which contains a series of recommendations for reform of the material support laws. TCP appreciates the opportunity to comment on the Department's proposed information collection.

The Partner Vetting System ("PVS") will be used "to conduct screening to ensure that State funded activities do not provide support to entities or individuals deemed to be a risk to national security."[2] The Department proposes to collect information from contractors, subcontractors, grantees, and sub-grantees regarding their directors, officers, or key employees. The Department will compare this information to information stored in "commercial, public, and U.S. government databases to determine the risk that the applying organization, entity or individual might use Department funds or programs to benefit terrorist entities."[3]

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[1] The Constitution Project's Liberty and Security Committee, *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations"* (Nov. 17, 2009), http://www.constitutionproject.org/pdf/355.pdf.

[2] 60-Day Notice of Proposed Information Collection: DS-4184, Risk Management and Analysis (RAM), 76 Fed. Reg. 65317 (Oct. 20, 2011).

[3] *Id.*

As we noted in *Reforming the Material Support Laws: Constitutional Concerns Presented by Prohibitions on Material Support to "Terrorist Organizations*, cutting off support of terrorist activity is an important and legitimate part of the United States' counter-terrorism strategy.[4] However, while it may be appropriate for the government to investigate key players receiving government humanitarian aid to prevent the diversion of these resources to terrorist groups, it is critical to incorporate adequate processes and controls to safeguard constitutional rights and values, including due process and privacy. While we recognize that the PVS pilot program will apply to both U.S. persons and non-U.S. persons[5] and that a non-U.S. person would not be entitled to the same protections under the United States' Constitution and laws, we urge that these constitutional standards be applied throughout the PVS process.

Due Process Concerns

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that a person shall not be deprived of life, liberty, or property without due process of law.[6] For the PVS pilot program to provide adequate due process protections, the system must be transparent and curative. In other words, if an applicant is denied access to the Department's funds because of a match to a U.S. government database, the applicant should (1) receive an explanation stating the reason for denial and (2) have a meaningful opportunity to challenge the finding or his or her presence in the database. We note that the Department and USAID have not yet published any details about the PVS pilot program. We urge that robust due process safeguards be afforded to denied applicants.

Due process principles require transparency because the government only remains accountable to its people when the people know that the government follows its own rules and know how the government reaches its decisions. As TCP's Liberty and Security Committee noted in the report *Promoting Accuracy and Fairness in the Use of Government Watch Lists*,[7] many individuals are placed on watch lists due to mistaken identity or inadequate justification for inclusion. Although we recognize that it would defeat the purpose of watch lists to provide individuals notice that they have been placed on such a list, individuals should still have a meaningful opportunity for redress when they are harmed as a result of an erroneous listing.[8] For most watch lists there is currently no effective way to challenge one's inclusion or adverse decisions resulting from such listings.

During the PVS process, grant applicants' personal data will be compared with information contained in commercial, public, and U.S. government databases, including many of the aforementioned inaccurate and unreliable watch lists. Without a system in place to notify applicants of the reason why their grant requests have been denied and to challenge the Department's decision, many organizations will be unfairly denied humanitarian aid. For a system to be fair, it must have some mechanism for redressing errors. The PVS application process should not serve as a means to blacklist certain individuals or organizations from receiving USAID funds just because their names appear on a watch list.

Privacy Concerns

Under the PVS pilot program, the U.S. government will collect personal data – including name, government identification number, date of birth, country of citizenship, home address, email address, employer information, and job title – from applicants who wish to use federal money for humanitarian purposes overseas. Although this data collection may be appropriate to adequately investigate whether people receiving government funds funnel money to terrorist organizations, this data should not be used for any other purpose. The PVS pilot program should (1) impose use restrictions on personal data and (2) properly encrypt and secure this data.

First, use restrictions are essential to protect privacy rights. In TCP's Liberty and Security Committee's report, *Principles for Government Data Mining: Preserving Civil Liberties in the Information Age*, we noted that

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[4] TCP, *Reforming the Material Support Laws:* supra note 1.

[5] The term "U.S. person" refers to both United States citizens and legal residents of the United States.

[6] U.S. Const. amend. V and XIV.

[7] The Constitution Project's Liberty and Security Committee, *Promoting Accuracy and Fairness in the Use of Government Watch Lists* (Mar. 6, 2007), http://www.constitutionproject.org/pdf/53.pdf.

[8] *See id.* at 5.

government access to or use of personal information in databases can violate privacy rights.[9] Any program involving the collection or use of personal data should ensure privacy protection through use restrictions. Data collected during the PVS pilot program should not be used for any other purpose than to verify that USAID recipients are not funneling money to terrorist organizations. Private parties and other government agencies should not receive access to this information. Most importantly, data from approved applicants should not be retained and stored in intelligence databases; investigative files should not be opened on any approved applicant without reasonable suspicion. Humanitarian applicants should not have to worry about how the U.S. government uses their personal and private data.

Second, all data collected under the PVS pilot program should be properly encrypted and secured. As TCP's data mining report recommends, "[a]dministrative and technical measures should be employed together to reduce the potential for abuse or misuse of personal data."[10] The Government Accountability Office and the State Department Office of the Inspector General found that personal information submitted by applicants to the West Bank and Gaza PVS program had been kept in unlocked file cabinets and was otherwise vulnerable to security breaches.[11] Had those data been accessed, applicants' privacy rights would have been violated. The Department should take steps to prevent any future security lapses in the new PVS pilot program.

Conclusion

TCP appreciates the opportunity to offer our view on the PVS pilot program. We share the goal of protecting USAID and Department resources from diversion to terrorist groups. We encourage the Department to create a PVS pilot program that respects applicants' due process rights, provides transparency to the greatest extent possible, and protects applicants' personal and private data.

Sincerely,

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[9] The Constitution Project's Liberty and Security Committee, *Principles for Government Data Mining: Preserving Civil Liberties in the Information Age* (Dec. 12, 2010), http://www.constitutionproject.org/pdf/DataMiningPublication.pdf.
[10] *See id.* at 26.
[11] *See* David Gootnick, United States Government Accountability Office, *Foreign Assistance: Recent Improvements Made, but USAID Should Do More to Help Ensure Aid Is Not Provided for Terrorist Activities in West Bank and Gaza* 17 (Sept. 29, 2006), http://www.gao.gov/new.items/d061062r.pdf.