

United States Senate Committee On

HOMELAND SECURITY & GOVERNMENTAL AFFAIRS

Chairman Gary Peters

A stylized eagle with its wings spread, rendered in a dark blue color. Above the eagle's head are seven gold stars, arranged in a slight arc. The eagle is centered on a dark blue background.

MISLABELED AS A THREAT

*How the Terrorist Watchlist &
Government Screening Practices
Impact Americans*

HSGAC Majority Staff Report

December 2023

I. EXECUTIVE SUMMARY

After the September 11, 2001 attacks, Congress swiftly took action to better protect the nation against the threat of terrorist attacks. The federal government subsequently established one comprehensive “terrorist watchlist,” which federal agencies continue to use to identify known and suspected terrorists. In addition to the terrorist watchlist, Congress and the executive branch expanded traveler screening at airports and other ports of entry to combat threats of terrorism and other security risks. A portion of the screening is driven by the terrorist watchlist, but the Transportation Security Administration (TSA) and Customs and Border Protection (CBP) screen travelers for other reasons as well. Today, U.S. travelers may be screened for at least 22 different reasons. While redundancy is a valuable security tool, given the similarity between some of these reasons, there is a likelihood of unnecessary duplication, and repeated and unwarranted screening can have profound impacts on Americans. It can also spread limited national security resources out broadly rather than effectively target changing threats.

For years, individuals and community groups have expressed concern with the reach of the federal government’s terrorist watchlist and frustration with repeated screenings at airports they believed were driven by individuals’ inclusion on the terrorist watchlist. While protecting Americans from the threat of terrorist attacks is paramount, potential abuse and/or lack of meaningful redress for wrongful screening by our government risks eroding Americans’ civil rights and civil liberties. To date, absent a few limited court rulings following lawsuits challenging the constitutionality of government screening practices and several privacy impact assessments, the executive branch has revealed hardly any information about what watchlists it maintains, who is included, and why or how those lists are used. In addition, the executive branch has not revealed what agencies and private sector entities have access to this data and how that information is used. Many Americans are left in the dark as they continue to be repeatedly pulled aside to be interviewed and searched during travel, and in some cases, prevented from flying, resulting in harms ranging from embarrassment, to loss of employment opportunities, or even wrongful arrest.

At the direction of U.S. Senator Gary Peters, Chairman of the Senate Homeland Security and Governmental Affairs Committee, majority committee staff examined existing authorities and current uses for the terrorist watchlist and other reasons individuals may receive additional screening (sometimes referred to as secondary inspection or enhanced screening) while traveling. The report finds that, in some cases, intentionally redundant layers of screenings associated with the terrorist watchlist and other government screening practices may be subjecting U.S. citizens to avoidable and unnecessary harm. Additionally, the report finds that the federal government lacks safeguards necessary to prevent potential discrimination and the redress process established to resolve travelers’ concerns about screening problems and other travel issues does not provide actionable information or assistance. As a result, Americans misidentified or subjected to discrimination do not have meaningful options to resolve concerns.

In a necessary attempt to protect our country from terrorist threats, the federal government has created a system so opaque and complicated it is difficult for U.S. citizens to understand. Certain communities—Muslim, Arab, and South Asian Americans in particular—claim they have been unfairly targeted. Keeping our country safe and our screening systems

targeted and effective, while simultaneously giving innocent people a path out of never-ending screenings requires a clear understanding and holistic review of government screening systems to ensure specific individuals and communities are not unfairly and unnecessarily targeted and a substantive redress process exists. More information about the executive branch's watchlisting and redress processes needs to be shared with the public. And the federal government must create a more effective redress system to sufficiently protect Americans' civil rights and liberties. This will ensure that the government's limited counterterrorism resources are best spent on protecting Americans.

A watchlist that is not properly maintained, coupled with unnecessarily duplicative screening practices that are not frequently assessed for their effectiveness is a risk to our national security. It may not reflect the latest threats, it could overextend limited security resources that should be focused on the best ways to protect Americans, and it breaks the trust with innocent Americans who get caught up in this net with no way out. The goals of this report and its recommended reforms are to strengthen our national security and ensure our screening systems are effectively addressing the serious terror threats we face.

Congress and the executive branch must work together to ensure that processes to protect the United States from future terrorist attacks and other security threats more effectively meet their intended goals without inflicting an undue burden on the traveling public. Federal agencies that use or oversee watchlist data need to improve transparency with the public and Congress. Finally, Congress should ensure sufficient constitutional protections and oversight mechanisms are in place to guide executive branch actions. These steps will strengthen our national security by instilling confidence that government practices that protect Americans eliminate unnecessary redundancies and effectively use limited resources while also balancing Americans' civil liberties.

II. FINDINGS OF FACT AND RECOMMENDATIONS

FINDINGS OF FACT

1. **There are at least 22 different mechanisms that might lead Americans to receive additional screening at airports and other ports of entry or be denied the ability to travel.** Some of these reasons may be derived from the terrorist watchlist, but they may also be related to agencies' other security measures, including their agriculture, immigration, health, and law enforcement missions, as well as at the discretion of a primary screening officer. In fact, as of 2019, U.S. citizens and lawful permanent residents make up less than 0.5% of the terrorist watchlist, and therefore screening is more likely to be for reasons other than inclusion in the terrorist watchlist. When it comes to TSA, for example, the vast majority of pre-determined screenings are the result of random selection.
2. **The size of the terrorist watchlist has increased dramatically.** As of November 2022, there are approximately 1.8 million records in the terrorist watchlist, up from 150,000 in 2004.
3. **The executive branch watchlists more than just terrorists.** The Terrorist Screening Center (TSC) manages the Threat Screening System (TSS) which maintains records in multiple datasets including terrorist screening, military detainee, transnational-organized crime, and additional datasets. Additionally, the terrorist watchlist includes individuals who are relatives or associates of known or suspected terrorists, and individuals it suspects of being terrorists but does not have enough supporting evidence to list as terrorists.
4. **Non-governmental entities have access to terrorist watchlist data.** Executive branch agencies share terrorist watchlist information with state, local, Tribal, and foreign partners. Additionally, federal agencies have given over 500 entities in the private sector, such as police and security forces of colleges, hospitals, and prisons, access to a subset of the terrorist watchlist for law enforcement purposes.
5. **The executive branch is not holistically assessing whether discrimination is occurring across the full screening enterprise.** TSA and CBP screen travelers under different authorities and for different reasons, yet individuals experience their travel process as a whole. Although each component assesses the privacy and civil liberties impacts of different aspects of their screening systems, neither TSA nor CBP collect data to assess whether there are individuals and groups that face repeated screening because of the agencies' layered approach.
6. **The redress process is not transparent.** The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) does not provide individuals with information about why they are experiencing additional screening or if their application for redress will affect their status on the terrorist watchlist, nor does it provide Congress with information on how many errors, corrections, or revisions are made as a result of

redress efforts. Combined with the multiple reasons people might receive additional screening, travelers who apply for redress are left with little understanding of what they will experience the next time they travel or whether redress worked.

RECOMMENDATIONS

1. **Ensure Full Accountability of the Watchlist Enterprise:** Due to the scope of the terrorist watchlist, its opacity, the lack of oversight, and its impact on the lives of Americans and lawful permanent residents included on the list, Congress should request the relevant Inspectors General conduct a coordinated, full-scope review of the watchlist enterprise, including a quality assurance review of nominations and examination of information sharing practices.
2. **Reform the Redress Process:** Congress should require the Secretary of the Department of Homeland Security (DHS) to provide Congress with a plan to meaningfully reform the redress process. This plan should ensure there is a real path for U.S. citizens and lawful permanent residents to seek redress from the watchlist and other screening processes, improve transparency, and build confidence in the screening and redress processes. Further, to make sure this plan balances national security with civil liberties as well as integrates feedback from the public, the Secretary should develop the new redress process in coordination with representatives of impacted communities.
3. **Establish a Screening and Watchlisting Council:** Congress should create a Screening and Watchlisting Advisory Council at DHS composed of government and non-governmental representatives to advise the Secretary on the development, implementation, modification, and oversight of screening, watchlisting, and redress policies and processes at DHS. This council would create a venue for ongoing dialogue between relevant government representatives and members of communities impacted by DHS policies as well as outside experts.
4. **Holistically Track Screening Activities:** Congress should direct DHS to begin tracking all additional screenings by both TSA and CBP in a systematic manner across the screening enterprise, including the reasons for screenings, and whether they impact specific individuals and communities. DHS should provide annual reports to Congress outlining the full number of screenings each year, broken down by reasons for screening, individuals screened, and whether, in tracking this data, DHS uncovers discrimination or disproportionate impacts on specific individuals or communities. This would allow both DHS and Congress to assess the impact screenings across the enterprise have on groups and individuals and whether the redundancy DHS has built into the system also leads to discrimination.
5. **Terrorist Screening Center Should Annually Report to Congress:** The Terrorist Screening Center (TSC) should provide to all relevant congressional committees the 2023 Watchlisting Guidance and any new version each time it is updated as well as annually report the types of records contained within the Threat Screening System (TSS) and the entities that use information contained therein (e.g. list of executive branch departments

and agencies, law enforcement entities, and private sector entities). Furthermore, Congress should direct the TSC to analyze records in the TSS against the new Watchlisting Guidance and provide an annual report with the number of records added, edited, and removed to all relevant congressional committees.

6. **Evaluate Constitutional Protections:** Congress should consider whether existing watchlist and screening activities have sufficient constitutional protections for individuals who are subjected to them by conducting oversight and exploring legislation. Congress should also authorize the DHS Office for Civil Rights and Civil Liberties and direct it to review all relevant TSA and CBP policies to determine whether sufficient safeguards are in place. Additionally, Congress should direct the Government Accountability Office to evaluate the effectiveness and potential bias in CBP's Tactical Terrorism Response Teams, which is one screening mechanism at airports and other ports of entry.