

The Public Still Lacks Basic Information About the "No Fly" List

An Analysis of TSA's FOIA Response

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Introduction and Summary

The Transportation Security Administration (TSA) recently released information about its infamous "no fly" list in response to Freedom of Information Act (FOIA) and Privacy Act requests made in December 12, 2002 by the ACLU of Northern California (ACLU-NC) and two activists, Jan Adams and Rebecca Gordon, who were told their names were on the "no fly" list. TSA's response suggests troubling inadequacies with the agency's management of the list, including:

- TSA lacks protocols for ensuring that First Amendment protected activity is not a reason for an individual being placed on the "no fly" list.
- TSA does not track how many times individuals are incorrectly stopped because of the "no fly" list, stating that there is "no pressing need to do so."
- TSA appears to have no instructions for airlines on how to respond to "no fly" list matches.
- TSA appears to provide no guidance to state and local law enforcement about the "no fly" list.

TSA also fails to answer basic questions about the "no fly" list, including:

- Are Rebecca Gordon's and Jan Adams' names on the "no fly" list?
- How can a passenger whose name is incorrectly placed on the "no fly" list get his or her name off the list?
- How many names are on the "no fly" list?
- How does a name get on the "no fly" list?

Background

At San Francisco International Airport and airports around the country, numerous innocent airline passengers are routinely stopped, questioned, and treated like suspects because of a secret "no fly" list maintained by the federal government. The ACLU-NC's efforts to gain information about this mysterious list have focused on the story of Jan Adams and Rebecca Gordon, two longtime peace activists and co-publishers of *War Times*, a newspaper critical of the Bush Administration's policies. When Adams and Gordon went to San Francisco Airport for a flight to Boston last year, they were told that their names appeared on the secret "no fly" list. San Francisco police officers appeared on the scene, questioned the two activists, and only permitted them to fly after checking their names against a "master" list and subjecting them to additional searches.

According to information the ACLU-NC obtained from San Francisco International Airport on April 8, 2003, at least 339 passengers have been subjected to similar treatment because of the "no fly" list at that airport alone. Recently-obtained documents from Oakland International Airport indicate that at least 24 people have been stopped at that airport because of the "no fly" list. The Oakland Airport documents also refer to the "no fly" list as being 88 pages long.

To obtain basic information about the "no fly" list and other government watch lists, the ACLU-NC, Gordon, and Adams sent requests under the FOIA and Privacy Act to the TSA and the FBI last December. The requests ask for basic information about the "no fly" list and other watch lists, including: how does a name get on the list; how can a name be taken off the list; and how does the government communicate with airlines about the list. When neither agency responded with any documents, the ACLU-NC filed a lawsuit on April 22, 2003.

Although the FBI originally stated that it possessed no records responsive to the FOIA/Privacy Act requests, after the lawsuit was filed, the FBI informed the ACLU-NC that it has now located potentially responsive documents. However, the FBI has yet to disclose any documents.

TSA responded to the FOIA/Privacy Act requests in July, 2003. Unfortunately, as explained below, TSA's heavily-redacted response is entirely incomplete and raises troubling questions about the agency's handling of the "no fly" list.

What We Have Learned From TSA's FOIA Response

The documents released by TSA establish that, since November, 2001, TSA has been administering two watch lists: the "no fly" list and the "selectee" list. The "no fly" list contains names of people whom "air carriers may not transport." The selectee list contains names of passengers "subject to additional security screening" prior to boarding aircrafts. Although TSA's documents repeatedly refer to two guidelines used to determine whether individuals are placed on these lists, all information about these two guidelines has been redacted from TSA's response.

TSA relies on private air carriers to implement its "security directives" regarding the "no fly" list and other watch lists. When TSA first began administering the "no fly" and selectee lists, it "required that a law enforcement officer be summoned every time there was a name match from the Watch List to a passenger checking in for a flight." Now, TSA allows airlines to "use established procedures to determine if a name match requires law enforcement notification."

TSA appears to have been aware of the problem of "false positives" – individuals incorrectly flagged as being on the list – since at least December, 2002. At that time, TSA records reveal that the agency was receiving 30 calls per day from airlines about false positives. Despite these calls (and evidence of subsequent meetings at TSA to resolve the "false positive problem"), TSA officials did not feel that there was a "pressing need" to record false positives and the agency has not done so. Further, although TSA's documents refer to a "watch list policy," TSA has redacted all information about the policy from the information it released.

What is troubling about TSA's response is not only the very limited information it has provided, but also, the confirmation that the agency fails to maintain crucial policies and protocols. Examples include:

- *TSA lacks protocols for ensuring that First Amendment protected activity is not a reason for an individual being placed on the "no fly" or selectee lists.* TSA states that it possesses no policy directives, procedures, or guidances regarding whether political beliefs, membership in groups, or any other First Amendment activity is a factor in placing individuals on the "no fly" or selectee lists. This means the TSA has *not* instructed its agents not to place individuals on the list because of First Amendment protected activity. Are activists like Gordon and Adams placed on the list because of their political beliefs? TSA's failure to create and enforce policies regarding First Amendment protected activity has the effect of chilling the exercise of free speech in this country: people legitimately could abstain from activism or dissent for fear that their names would be placed on the "no fly" or selectee lists.
- *TSA does not track how many times individuals are incorrectly stopped because of the "no fly" list, stating that there is "no pressing need to do so."* TSA does not track the number of times that air travelers have been stopped and questioned across the country because of the "no fly" list. TSA also does not track the number of times that individuals were *incorrectly* stopped because of the "no fly" list or any watch list. How can TSA correct the mistake of people being incorrectly stopped because of the "no fly" list if it does not even track the problem? How does TSA know whether the "no fly" list enhances security if it does not track "no fly" list matches?
- *TSA appears to have no instructions for airlines on how to respond to "no fly" list matches.* TSA's records indicate that it has delegated to private air carriers the day-to-day responsibility for determining whether a passenger is on the "no fly" list and taking subsequent action. However, TSA appears to have no guidelines for airlines on *how* airlines should react to "no fly" list

matches. In fact, TSA's documents reveal that TSA had to ask Alaska Airlines basic questions, such as "how does Alaska Airlines' system work[] in terms of handling Selectee/No Fly list passengers?" Shouldn't TSA be telling Alaska Airlines and other airlines how they should handle watch list matches, and not the other way around? TSA should ensure that airlines across the country are responding in a uniform fashion to "no fly" and selectee list matches.

- *TSA appears to provide no guidance to state and local law enforcement about the "no fly" or selectee lists.* TSA documents reveal that "TSA does not have an official watch list data sharing agreement with any agencies," instead relying on general memoranda of understanding that TSA refuses to release to the public. Without specific agreements with law enforcement agencies regarding the "no fly" and selectee lists, how can TSA ensure that all law enforcement agencies across the country are responding in a uniform manner to watch list matches? Given that TSA is well aware of the problem of "false positives," why has TSA not instructed local law enforcement about that problem and other issues related to the "no fly" and selectee lists?

What We Still Don't Know About the "No Fly" List

TSA's response is both incomplete and heavily redacted. By the agency's own admission, it has decided to withhold 99 pages of relevant documents from its response. The documents TSA has provided are often so heavily redacted as to be entirely incomprehensible.

TSA's response fails to provide the public with basic answers about the "no fly" list, including:

- *Are Gordon's and Adams' names on the "no fly" list?* TSA states it can "neither confirm or deny" whether Adams and Gordon are on the "no fly" list. If Adams and Gordon are *not* on the list, why can't the TSA tell them so? If TSA has incorrectly placed Gordon and Adams on the "no fly" list,

or placed them on the list based on inaccurate information, why not give them the opportunity to correct the mistake? How is safety advanced by such secrecy?

- *How can a passenger whose name is incorrectly placed on the "no fly" list get his or her name off the list?* TSA appears to have no protocols telling air travelers how they can get their names off of the "no fly" list if they believe they are incorrectly on the list. TSA's recently-announced ombudsman process for passengers routinely stopped because of the "no fly" list does not solve this problem because it does not provide any way for such passengers to get their names off the list. This means that individuals like Gordon and Adams effectively have no way of getting their names off of the "no fly" list. The problem is compounded by the fact that the TSA does not appear to have internal protocols for correcting "no fly" or selectee list errors.
- *How many names are on the "no fly" list?* TSA's response fails to disclose how many names are on the "no fly" list.
- *How does a name get on the "no fly" list?* TSA appears to have final control of whether a particular name is placed on the "no fly" list. However, "individuals placed on the No-Fly list are added or removed based on the request of and/or information provided by a U.S. federal intelligence or law enforcement agency." TSA does not clarify which agencies it interacts with or what kind of information would result in an individual's name being placed on the list.

Conclusion

TSA's management of the "no fly" and selectee lists – including its failure to provide airlines or local law enforcement with guidelines – has resulted in numerous innocent air travelers being treated like terrorist suspects. Worse yet, much of this intrusive law enforcement activity is happening in secret: the TSA

has failed to give the public even basic information about the "no fly" or selectee lists. What little information the TSA has released suggests that these lists have done nothing to make ordinary Americans any safer.

The public deserves to hold TSA accountable on its management of the "no fly" and selectee lists. When thousands of innocent travelers are likely being subjected to unwarranted searches and detentions because of these lists, the public should be able to understand and deliberate on whether the lists improve security, or are just a waste of government resources. No public debate or government accountability is possible so long as the federal government continues to keep the public in the dark.

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