



July 2, 2010

U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Room 3138
Washington, DC 20024

Attention: Mr. Joseph M. Gerhart, Chief, Records Management Branch

**RE: OMB Control No. 1653-0036
Comment Request: Extension of an Existing
Information Collection; National Security
Entry-Exit System (NSEERS)**

Dear Mr. Gerhart,

The Constitution Project submits these comments in response to the Notice published in the Federal Register (Vol. 75, No. 86) on May 5, 2010 by the Department of Homeland Security (DHS) and United States Immigration and Customs Enforcement (USICE) regarding the collection of information on the National Security Entry-Exit System (NSEERS).

The Constitution Project is a nonprofit organization in Washington, DC that promotes and defends constitutional safeguards by bringing together liberals and conservatives who share a common concern about preserving civil liberties. The Constitution Project's bipartisan Liberty and Security Committee, launched in the aftermath of September 11th, brings together members of the law enforcement community, legal academics, former government officials, and advocates from across the political spectrum who develop and advance proposals to protect civil liberties as well as our nation's security. As part of this work, the Constitution Project has released two reports relevant to the requested collection of information by USICE with respect to NSEERS, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations*¹ and *Promoting Accuracy and Fairness in the Use of Government Watch Lists*.² Both reports urge policy reforms to ensure that we protect both law enforcement needs and the constitutional rights of residents, and propose specific recommendations for appropriate security measures that minimize intrusions on individual rights.

As the Constitution Project's Liberty and Security Committee has found, NSEERS and similar programs which single-out individuals based solely on their citizenship or nationality are inherently both overly-broad and under-inclusive. Therefore, not only do they unnecessarily infringe on the civil liberties of innocent people, but they are also ineffective counter-terrorism

¹ An electronic copy of *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations* can be found on the Constitution Project's website, at <http://www.constitutionproject.org/manage/file/48.pdf>.

² An electronic copy of *Promoting Accuracy and Fairness in the Use of Government Watch Lists* can be found on the Constitution Project's website, at <http://www.constitutionproject.org/manage/file/53.pdf>.

tools. In response to the first specific question raised in the May 5, 2010 Notice, NSEERS is not necessary for the proper performance of the functions of USICE and the information ascertained through NSEERS has had little practical utility.³ As recent events have shown, there is no single “model terrorist.” Such persons may be male or female⁴, U.S. citizens or foreign nationals from anywhere in the world.⁵ Therefore, using racial profiling to single-out suspected terrorists based on their nationality provides no guarantee that USICE will be effective at honing in on its desired targets; however, in the process, NSEERS does and will continue to offend our principles of equal protection and to trample the rights of innocent individuals.

As the Constitution Project’s Liberty and Security Committee explained in its 2008 report *The Use and Abuse of Immigration Authority as a Counterterrorism Tool*:

As of 2008, under NSEERS, more than 80,000 noncitizens living in the United States were subject to special registration. Of these, 2,783 were detained for some period, and 13,400 were placed in deportation proceedings because of alleged visa violations. Many of those removed were individuals awaiting priority dates for family reunifications. At the end of the interview process, the administration claimed to have identified eleven terrorism ‘suspects.’ To this day, however, none of those registered has been convicted of a terrorist crime.⁶

The Committee specifically recommended that DHS should not be permitted to “selectively target foreign nationals for deportation or other immigration enforcement on the basis of race, ethnicity, religion, or political association or ideology.”

Moreover, not only is NSEERS an ineffective counter-terrorism tool, but it and similar programs are actually detrimental to our counter-terrorism efforts and further strain the United States’ relationships with the targeted countries and their respective citizens. NSEERS is based on the questionable notion that individuals from select countries are more likely than others to commit acts of terrorism. As the Constitution Project’s Liberty and Security Committee explained in the context of the use of watch lists, targeting people “who present no actual threat to the United States” is a practice that “can exact substantial cultural, political, and economic costs, in both the short and long term.”⁷ Moreover, whenever the Government has previously profiled

³ As the bipartisan 9/11 Commission’s staff found, there is no evidence that the post-September 11 immigration initiatives targeted at Arabs and Muslims succeeded in identifying any actual terrorists. Nat’l Comm. On Terrorist Attacks, Threats and Responses in 2001: Staff Statement No. 10, April 15, 2004, http://www.9-11commission.gov/staff_statements/staff_statement_10.pdf. See also Footnote #6 below.

⁴ See “Jihad Jane, American who lived on Main Street”, <http://www.cnn.com/2010/CRIME/03/10/jihad.jane.profile/index.html>.

⁵ See “Indonesian police think they’ve captured wanted terror suspect”, <http://www.cnn.com/2010/WORLD/asiapcf/06/23/indonesia.arrest/index.html>. See also “Prosecutors say terrorism suspect waived right to counsel”, <http://www.cnn.com/2010/CRIME/01/23/new.york.terror.case/index.html> (A Bosnian-American terrorist suspect).

⁶ See *The Use and Abuse of Immigration Authority*, pg. 9.

⁷ See *Promoting Accuracy and Fairness in the Use of Government Watch Lists*, p. 2.

suspected terrorists, this has simply caused the terrorist organizations to adapt and choose people outside the targeted profiles to carry out future acts of terrorism.⁸

The key to effective counter-terrorism is information, and these communities will be more likely to share information about suspicious behaviors or newcomers by having stronger relationships built on trust with the Government. The Government cannot indiscriminately target, profile and harass particular populations and then expect those same people to cooperate and help in the fight against terror. If the Government continues to discriminate against particular communities through programs such as NSEERS, the trust of these communities will be replaced by fear, which will in turn sever communication, ultimately leading to less public safety.⁹

The Government has recently recognized the counter-productive nature of programs targeting individuals from particular Muslim countries in connection with the screening policy adopted by the Transportation Security Administration (TSA) in the aftermath of the December 25, 2009 bombing attempt on Northwest Flight 253. This hastily-adopted policy required passport holders and passengers from fourteen “terror-prone” countries to undergo full-body pat-downs and manual baggage searches as part of extra screening.¹⁰ Within months after the adoption of this enhanced screening program, the TSA terminated the program in favor of a more individualistic approach which focused on the behaviors of individual travelers from all countries (including the U.S.).¹¹

In light of the concerns and comments detailed above, the Constitution Project calls for DHS and USICE to follow the TSA’s lead and terminate NSEERS so as to avoid selectively targeting foreign nationals on the basis of race, ethnicity, religion or political association in favor of a more intelligent, personalized approach which analyzes an individual’s behavior in order for DHS and USICE to effectively locate and neutralize the true threats and risks.

Thank you for your consideration. The Constitution Project respectfully requests to be informed about the next steps to be taken by DHS and/or USICE, once the comments have been considered.

Respectfully submitted,



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⁸ See Footnotes 4 and 5 above.

⁹ See generally *The Use and Abuse of Immigration Authority*.

¹⁰ See “U.S. Intensifies Air Screening for Fliers From 14 Nations”, *New York Times*. January 4, 2010, <http://www.nytimes.com/2010/01/04/us/04webtsa.html>.

¹¹ See “US to drop extra security against ‘terror-prone’ Muslim air travelers”, *The Times*, April 3, 2010, http://www.timesonline.co.uk/tol/news/world/us_and_america/article7085860.ece.