Before the

PRIVACY OFFICE
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20528

Privacy Act of 1974; Department of Homeland Security / Transportation Security Administration – DHS/TSA-019 Secure Flight Records System of Records (DHS-2013-0020) Privacy Act of 1974; Department of Homeland Security / Transportation Security Administration – DHS/TSA-021 TSA Pre-Check Application Program System of Records (DHS-2013-0040) Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security / Transportation Security Administration, DHS/TSA-021, TSA Pre-Check Application Program System of Records (DHS-2013-0041)	**CONSOLIDATED COMMENTS OF THE IDENTITY PROJECT (IDP) AND JOHN GILMORE**

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

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The Identity Project (IDP) submits these consolidated comments in response to the revised System of Records Notice (SORN) for DHS/TSA-019, Secure Flight Records System of Records (Docket No. DHS-2013-0020, 78 *Federal Register* 55270-55274, September 10, 2013); the new SORN for DHS/TSA-021, TSA Pre-Check Application Program System of Records (Docket No. DHS-2013-0040, 78 *FR* 55274-55278, September 10, 2013); and the Notice of Proposed Rulemaking (NPRM) for Privacy Act Exemptions for DHS/TSA-021, TSA Pre-Check Application Program System of Records (Docket No. DHS-2013-0041, 78 *FR* 55657-55659, September 11, 2013).

Read in combination, this new and revised SORNs and these proposed regulations describe a system in which an essentially unlimited range of personal information collected from an essentially unlimited range of sources, and known to include inaccurate and irrelevant information, would be (or perhaps already is being) compiled into the "TSA Pre-Check Application Program" system of records.

These records would be used – either according to criteria which are illegally being kept secret, or in an entirely arbitrary manner at the "discretion" of the TSA – to determine who is and who is not deemed "eligible" to exercise the right to travel without being subject to unreasonable searches.

The results of that decision-making would be incorporated into the "Secure Flight" system of records, and used as part of the basis (also either pursuant to secret rules or entirely arbitrarily) for deciding to issue or withhold the issuance of individualized "boarding pass printing results", including instructions to TSA staff and contractors as to the degree of intrusiveness of the search to which each would-be traveler is to be subjected as a condition of exercising our right to travel.

Maintenance and use of these systems of records in the manner contemplated by these SORNS and the proposed exemptions would violate the 1st, 4th, and 5th Amendments to the U.S. Constitution, the presumption of innocence, due process, the Freedom Of Information Act (FOIA), the Privacy Act, and Article 12 (Freedom of Movement) of the International Covenant on Civil and Political Rights (ICCPR).

These records should be expunged, and the proposed regulations should be withdrawn.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. TRAVEL BY AIR AND BY COMMON CARRIER IS A RIGHT, AND CONDITIONS ON THE EXERCISE OF THIS RIGHT ARE SUBJECT TO STRICT SCRUTINY.

The right to travel is recognized in the First Amendment to the U.S. Constitution ("The right of the people... peaceably to assemble") and in Article 12 on freedom of movement of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by, and binding on, the U.S. And the TSA, along with all other executive agencies, has been ordered by the President to consider human rights treaties including the ICCPR in performing its functions including rulemaking: Executive Order 13107, “Implementation of Human Rights Treaties,” directs all executive departments and agencies to “maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully.”[1]

1 Among our previous submissions which have raised this issue with respect to TSA rulemakings, but were ignored when final rules were issued, see "Comments of the Identity Project and John Gilmore, Secure Flight Program,” TSA-2007-38572 (October 22, 2007), available at <http://hasbrouck.org/IDP/IDP-SecureFlight-comments.pdf>, and "Complaint of violations of Article 12 (Freedom of Movement) of the International Covenant on Civil and Political Rights (ICCPR) by the Department of Homeland Security" (August 10, 2010), available at <http://papersplease.org/wp/wp-content/uploads/2010/08/tsa-ocrcl-10aug2010-attach.pdf>.

Numerous treaties to which the U.S. is a party require airlines to be licensed by the U.S. government and to operate as common carriers. By definition, a common carrier is obligated to transport all would-be passengers willing to pay the fare in their published tariff. A common carrier cannot "reserve the right to refuse service" to anyone. The U.S. has treaty obligations to mandate that airlines transport all such passengers, and to respect their right to transportation by air.

Express statutory language recognizes the right to travel by air and by common carrier, and specifically requires consideration of that right in rulemaking. 49 U.S. Code § 40103 provides that, "A citizen of the United States has a public right of transit through the navigable airspace." 49 USC § 40101 provides that, "the Administrator of the Federal Aviation Administration shall consider the following matters: … (2) the public right of freedom of transit through the navigable airspace."

Regulations which place conditions on the the exercise of rights protected by the First Amendment or the ICCPR, even if those rights were not (as they are here) expressly recognized by statute, are subject to strict scrutiny including a showing that the proposed rules are the least restrictive available means of accomplishing a permissible government purpose, and would in fact achieve that purpose. “[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

There is no mention of any "rights" in the NPRM or SORNs, nor any consideration of the standards applicable to regulations which seek to impose conditions on the exercise of rights recognized by law. Nor has the right to travel by air and by common carrier been considered in any previous DHS or TSA rulemakings including in the promulgation of previous "Secure Flight" regulations and SORNs.

This rulemaking must start with recognition that travel by air and by common carrier is a right. The DHS must evaluate the proposed records, proposed uses thereof, and proposed exemptions from the Privacy Act against the standard of justification applicable to systems and rules that place conditions on the exercise of rights protected by the First Amendment, treaties, and Federal statutes.

III. THE PRIVACY ACT PROHIBITS THE MAINTENANCE OF RECORDS CONCERNING HOW INDIVIDUALS EXERCISE OUR RIGHT TO TRAVEL.

The Privacy Act of 1974, 5 USC §552a (e)(7), provides that "Each agency that maintains a system of records shall – … maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

As discussed above, the right to travel is guaranteed by the First Amendment. Records of travel itineraries are, *per se*, records of how individuals exercise our First Amendment rights.

None of the statutes cited in the SORNs as authority for the maintenance or use of these records *expressly* authorizes the DHS to maintain any records of how individuals exercise the right to travel or any other rights guaranteed by the First Amendment. Any such authorization is, at most, implicit.

TSA checkpoint and other "screening" staff and contractors are not law enforcement officers, and the overwhelming majority of travelers are not suspected of any violation of the law. The collection, maintenance, and use of these records of how individuals exercise our right to travel are part of a dragnet suspicionless, warrantless surveillance and search activity, not any "law enforcement activity".

The maintenance of these records is thus prohibited by the Privacy Act. It would constitute – and does constitute, since such records are already being maintained – a violation of the Privacy Act on the part of the DHS, each responsible DHS component, and each responsible DHS or component official.

Because the maintenance of these records is prohibited by the Privacy Act, all records of how individuals exercise the right to travel, including records of travel itineraries, must be expunged.

IV. SEARCHES INCLUDED IN "SCREENING" ARE SUBJECT TO CONSTITUTIONAL REQUIREMENTS INCLUDING THOSE OF THE FOURTH AMENDMENT.

No statute or DHS or TSA regulation defines "screening".[2] But when the NPRM and SORNs at issue in this rulemaking use the euphemism, "screening", they include "search" as part of that screening.

And when the DHS says that, "The TSA is reissuing this system of records [notice] to update the categories of records to include whether a passenger will receive expedited, standard, or enhanced screening," what is actually being referred to is the degree of intrusiveness of the search to which the individual will be subjected. The criteria (if any) and procedures by which DHS and TSA make decisions about "eligibility" not to be subjected to more intrusive ("standard" or "enhanced") screening must be evaluated under the standards applicable to decisions to subject individuals to more intrusive searches.

V. THE EXERCISE OF FIRST AMENDMENT RIGHTS CANNOT BE CONDITIONED ON THE WAIVER OF FOURTH OR FIFTH AMENDMENT RIGHTS.

Once we recognize that travel is a First Amendment right, and that the different types of "screening" ("expedited", "standard", or "enhanced") are degrees of progressively more intrusive searches, it becomes clear that the essence of the proposed system is to condition the exercise of First Amendment rights on the waiver of Fourth Amendment rights to be free from unreasonable searches without warrant or probable cause, and/or on the waiver of Fifth Amendment rights to remain silent.

While courts have sometimes upheld requirements for individuals to submit to a uniform degree of warrantless, suspicionless administrative search as a condition of the exercise of other rights, they have

2 This lack of definition makes the requirement to "submit" to "screening" unconstitutionally vague and overbroad, as we have argued in comments currently under consideration by the TSA in another rulemaking. See "Comments of the Identity Project, Passenger Screening Using Advanced Imaging Technology", TSA-2013-0004 (June 18, 2013), available at <http://papersplease.org/wp/wp-content/uploads/2013/06/idp-imaging-comments-18jun2013.pdf>.

never upheld an obligation to respond to "administrative interrogation". On the contrary, they have consistently presumed that individuals are free to remain silent in the face of any questioning that accompanies an administrative search, and that no adverse inference may be drawn from such silence.

Any individual may lawfully use any name of their choice, including John or Jane Doe, as long as they do so without intent to defraud. Anonymity is not a lawful basis for suspicion, detention, or search.

An individual is entitled to buy a ticket as John or Jane Doe, and as a common carrier an airline is required to sell a ticket to such an individual. John or Jane Doe is entitled to stand mute at a TSA checkpoint, and is entitled to proceed to his or her flight without hindrance unless, in the course of a brief and minimal administrative search, a law enforcement officer (not a member of the typical TSA or contractor non-LEO checkpoint staff) develops a lawful basis for passenger Doe's detention or arrest, or unless a member of the non-LEO checkpoint staff or another individual affects a lawful citizen's arrest.

Checkpoint staff (or anyone else) are entitled to ask passenger Doe questions, but all case law to date on administrative searches presumes – correctly, we believe – that individuals subjected to administrative searches are entitled not to respond to accompanying questions. Moreover, the exercise of the right to remain silent in the face of such questions is not, and cannot be, deemed suspicious in itself or a lawful basis for further detention or more intrusive search than the minimal default for the checkpoint.

Moreover, courts have consistently held that the degree of required search must be minimal, and that any more intrusive search must be justified by probable cause to suspect the individual of a crime.

The DHS and TSA, however, have turned these principles upside down. They propose to make the default search a more intrusive search, and to "allow" travelers to exercise their First Amendment right to travel with the minimal "expedited" search only if they wave their Fifth Amendment rights by "voluntarily" providing additional information for the sweeping uses contemplated in these SORNs.

Such a conditioning of the exercise of one constitutional right on the waiver of others is clearly prohibited. We are entitled to travel without waiving our right to be free of any more than minimal administrative search in the absence of probable cause, and without waiving our right to remain silent.

VI. THE PROPOSED USES OF RECORDS TO DECIDE THE INTRUSIVENESS OF REQUIRED SEARCHES WOULD BE ARBITRARY AND VIOLATE DUE PROCESS.

As discussed above, the criteria and procedures for determining the intrusiveness of the searches to which individuals are subjected as a condition of the exercise of our right to travel are subject to strict scrutiny as well as to the general requirements of due process.

According to the "TSA Pre-Check Application Program" SORN, "Eligibility for the TSA Pre-Check Application Program is within the sole discretion of TSA." But the TSA has no Constitutional "discretion" to impose a requirement to submit to a search of arbitrarily individualized intrusiveness. Administrative searches must be uniformly minimized, and any search more intrusive than the minimal default must be justified in accordance with both substantive and procedural due process requirements.

The "TSA Pre-Check Application Program" SORN refers to "disqualifying" records, which would suggest the existence of some qualifications or criteria for eligibility decisions. However, no statute or regulation provides any substantive or procedural rules for these "eligibility" decisions.

The Freedom Of Information Act, 5 USC §552(a)(1), requires that, "Each agency shall ... publish in the Federal Register for the guidance of the public - … (C) Rules of procedure...; (D) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

If the DHS or TSA had adopted policies, procedures, or substantive rules applicable to decisions with regard to eligibility for the "TSA Pre-Check Application Program" or for the issuance of "boarding

pass printing results" including instructions regarding types of "screening" (intrusiveness of search), those would have been required to be published in the Federal Register. But no such policies, procedures, or rules have been published. Either such rules have been adopted secretly, without publication, in violation of FOIA, or there are no such rules, and decisions are being made arbitrarily and illegally.

In either case, one or another statutory or Constitutional requirement is being violated.

VII. THE PROPOSED REQUIREMENT FOR INDIVIDUALS TO REBUT INFORMATIOIN CONTAINED IN FBI RECORDS VIOLATES THE PRESUMPTION OF INNOCENCE.

According to the "TSA Pre-Check Application Program" SORN, the TSA will place the burden of proof on the applicant (would-be traveler) in any case where "the FBI criminal record discloses information that would disqualify him or her from the TSA Pre-Check Application Program.... The applicant must provide a certified revised record, or the appropriate court must forward a certified true copy of the information, prior to TSA approving eligibility of the applicant for the TSA Pre-Check Application Program.... If neither notification nor a corrected record is received by TSA, TSA may make a final determination to deny eligibility."

There is no statute or regulation that requires individuals with criminal records to submit to more intrusive search as a condition of exercising their right to travel. Individuals who have completed criminal sentences have not forfeited their First or Fourth Amendment rights. Individuals who have been convicted of crimes are not specially subject to search unless they are serving a sentence or subject to ongoing court supervision (probation or parole) as a condition of which a competent court has imposed such a condition.

But even if criminal history could be a lawful basis for later searches, the FBI has exempted all of its systems of criminal history records from the requirements of the Privacy Act for accuracy or

completeness. ("Final Rule, Privacy Act of 1974; Implementation", 68 *Federal Register* 14140-14141, March 24, 2003, amending 28 CFR 16.96)

Whatever the reasons for, or legality of, the maintenance by or use of these inaccurate and incomplete records by and within the FBI, they cannot be afforded any presumption of accuracy or completeness by the DHS or any other agency. Presuming them to be accurate or complete, or relying on them as the basis for decision-making, when the agency maintaining those records has given public notice that it knows that they cannot be relied on to be accurate or complete, would be a deprivation of due process. In the absence of independent evidence of the accuracy and completeness of these records, DHS is bound to accept the FBI's own official determination as to their inaccuracy and incompleteness.

Individuals dealing with the TSA or other DHS components are entitled to the presumption that we are not criminals. The burden of proof is on the TSA, DHS or any other agency to establish that an individual has a criminal record. FBI records deliberately maintained in spite of their known inaccuracy cannot be considered sufficient to overcome that presumption of innocence and burden of proof.

VIII. THE PROPOSED PRIVACY ACT EXEMPTIONS ARE UNJUSTIFIED.

The NPRM proposes regulations to exempt the "TSA Pre-Check Application Program" system of records from the requirement of the Privacy Act that records be maintained "with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination related to the … rights … of … the individual that may be made on the basis of such record."

But the purpose of this system of records as described in the SORN (assuming that the purported purpose is not a pretext to justify general surveillance) is to make decisions, on the basis of these records, regarding individuals' rights to travel and to be free from unreasonable searches and seizures.

As discussed above, such decisions are subject to strict scrutiny and due process requirements which would certainly include that they be based on information sufficiently accurate to assure fairness.

The maintenance of inaccurate records, as the NPRM proposes to authorize, would defeat the ostensible purpose of the system of records since such inaccurate records would not serve as a lawful basis for the making of the contemplated decisions regarding individuals' exercise of our rights.

IX. THE "TSA PRE-CHECK APPLICATION PROGRAM" SORN MISSTATES THE STATUS OF THE PRIVACY ACT EXEMPTION RULEMAKING.

According to the "TSA Pre-Check Application Program" SORN published on September 10, 2013, "The Secretary of Homeland Security has exempted certain records from this system from the notification, access, and amendment procedures of the Privacy Act because it may contain records or information related to law enforcement or national security purposes."

This claim was, and is, false. As of the date of the SORN, no such exemption had even been proposed: the NPRM proposing such an exemption, and requesting public comments (such as this one) concerning that proposed exemption for consideration by the DHS, was not published until a day later, on September 11, 2013. Even now, the Secretary has promulgated no final rule for such an exemption. Nor could he or she promulgate any such final rule, consistent with the Administrative Procedure Act, unless and until the current period for public comment on the proposed exemption rule has concluded and the comments submitted (including these comments) have been considered by the DHS.

The false claim that "The Secretary of Homeland Security has exempted certain records from this system from the notification, access, and amendment procedures of the Privacy Act", when in fact the Secretary has not done so, appears to be intended to mislead individuals about what rights we have, and to dissuade us from attempting to exercise our rights. In addition, by stating the outcome of the current

exemption rulemaking as a *fait accompli*, it constitutes *prima facie* evidence of bad faith in the consideration of public comments. It is not enough for an agency to accept submissions of comments from the public to the circular file, after making a decision. An agency must give genuine consideration to public comments *before* deciding whether to finalize, modify, or withdraw a proposed rule.

In any case, the SORN is clearly inaccurate. An accurate SORN would state that no final rule exempting the "TSA Pre-Check Application Program" system of records from any of the requirements of the Privacy Act has been promulgated. Individuals currently have all the rights provided by the Privacy Act, including rights of access and correction of records and to an accounting of disclosures of records pertaining to themselves. It is currently a violation of the Privacy Act on the part of any agency official to maintain inaccurate, irrelevant, or incomplete records in this system.

In addition, it is a criminal violation of the Privacy Act, 5 USC §552a (i)(2), for any agency officer or employee to maintain this system of records without meeting the requirement for a valid SORN. A copy of these comments is being sent to the Public Integrity Section of the Department of Justice for investigation of possible criminal violations of the Privacy Act by agency officers or employees responsible for the maintenance of this system of records without a valid SORN.

X. CONCLUSIONS AND RECOMMENDATIONS

Decisions to subject individuals to any search more intrusive than the minimal default, as a condition of the exercise of our right to travel, should be based on probable cause. The exercise of our right to remain silent should not be deemed a valid basis for suspicion or probable cause. The SORNs and the proposed rules should be withdrawn, and these systems of records should be expunged.

Respectfully submitted,

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