

The Identity Project

www.papersplease.org

**1736 Franklin Street, 9th Floor
Oakland, CA 94612
(510) 208-7744**

James P. Harrison, Executive Director, jph@papersplease.org
Edward Hasbrouck, technical consultant on travel issues, edward@hasbrouck.org

Proposed Agenda on the Right to Travel

Submitted to the House Committee on Homeland Security Roundtable:
“A Path Forward: Constitutional Protections in Homeland Security”
Washington, DC, December 3, 2008

As a civil liberties organization whose central focus is the right to travel, the Identity Project welcomes the opportunity to submit these suggestions (which we have already submitted to the Obama transition team) of what the new Congress and Administration should do to restore our right to travel, and to address the issues of ID requirements and identity-based government surveillance and control of travel and movement.

While parts of this agenda will require actions outside the scope of this Committee, we believe that the Committee’s plans can best be considered in the context of the larger plan of action on these issues by the House, the Senate, and the Executive.

Some of the items detailed below can be accomplished by the new President with the stroke of a pen on Inauguration Day in January, through Presidential proclamations and directives to Executive staff and agencies. Others can be ordered by the President, but will require a slightly longer process to comply with administrative notice and comment requirements for changes to (and, in many cases, withdrawal of) Federal regulations. Others will require legislation, which we urge members of this Committee, in cooperation with the Presidential transition team and organizations with expertise in these areas, to begin drafting so they can take action early in the new Congressional session. If asked, we would be available to advise and participate in this process. Finally, Senators should question nominees for Executive appointments —especially those nominated to be the new Secretary of Homeland Security and the Administrator of the TSA – about how they will address specific, important issues from the day they take office.

Executive Orders:

1. Reaffirm Executive Order 13107 on Implementation of Human Rights Treaties, and instruct heads of agencies to ensure that it is carried out. As part of his agenda, President-Elect Obama has promised to “strengthen civil rights enforcement,” and this should include enforcement of rights guaranteed by international human rights treaties to which the U.S. is a party. In particular, President-Elect Obama should extend Executive Order 13107 to explicitly mandate consideration of international human rights treaties in Federal agency rulemakings that could implicate rights protected under those treaties — such as the freedom of movement guaranteed by Article 12 of the International Covenant on Civil and Political Rights (ICCPR).
2. Forbid Executive agencies from placing names on “watchlists”, blacklists used as a basis for denial or limitation of rights, except as directed by order of competent judicial authorities (e.g. through arrest warrants, injunctions, or restraining orders). In his agenda on homeland security, President-Elect Obama says that, “a comprehensive terrorist watch list ... must be developed and used in a way that safeguards passengers’ privacy while ensuring the safety of air travel.” We urge President-Elect Obama to recognize, as a law-school instructor in Constitutional law and civil liberties, that passengers’ Constitutional and human rights are not limited to privacy, and that the proper protections for those rights are those provided by judicial due process. President-Elect Obama can, and should, thereby put an immediate end to the issuance of “no-fly” orders by secret administrative process, and limit any “watchlists” to those people whose movements and right to travel have been restricted by court order.
3. Order the Secretary of State to revert to the issuance of U.S. passports that don’t contain RFID chips.
4. Order the Secretary of Homeland Security to discontinue the compilation and maintenance of government records of the travels and movements of people who are not subjects of criminal investigation or court orders authorizing such surveillance, and the destruction of existing government travel dossiers as soon as this can be approved by the National Archives and Records Administration. This would include records about the routine travels of innocent people being compiled and maintained in the Automated Targeting System (ATS), Secure Flight, Border Crossing Information System (BCIS), Treasury Enforcement Communications System (TECS), Arrival-Departure Information System (ADIS), and other records systems.

5. Publicly commit the new Administration to respect the conditions placed by Congress on appropriations, notwithstanding the “signing statements” by the previous President that the previous Administration would consider those conditions “advisory” and non-binding. To carry out that commitment, direct the DHS and the TSA not to spend or commit funds (including not to award or extend contracts) for Secure Flight or other or other aviation passenger screening programs, other than expenditures strictly limited to testing, until the Government Accountability Office has reported that the criteria specified in the 2005 through 2008 Homeland Security Appropriations Acts have been met.

Regulations:

By acting promptly to withdraw these ill-conceived and hastily promulgated implementing regulations, or to replace those too far advanced in their implementation process with functionally realistic and privacy conscious alternatives, the President and Congress can head off the waste of billions of dollars more on these schemes. None of these rules would make us safer, and all of them would make us less free.

1. Withdraw the REAL-ID regulations.
2. Withdraw the Secure Flight regulations.
3. Withdraw the Advanced Passenger Information System (APIS) regulations.
4. Withdraw the Transportation Worker Identification Credential (TWIC) regulations.

Legislation:

1. Introduce and make the first legislative priority of the Obama Administration the passage of a “Human Rights Act of 2009” to create a Federal cause of action for violation of the International Covenant on Civil and Political Rights (ICCPR), and to grant the Federal courts jurisdiction over cases arising under this Act.
2. Repeal the REAL-ID Act.
3. Unconditionally defund and prohibit the deployment or implementation of Secure Flight.

Questions for nominees for the DHS and TSA:

“As the nominee for Secretary of Homeland Security or Administrator of the Transportation Security Administration, ...

1. Do you believe that individuals should have a right to travel in the USA? Why or why not?
2. What substantive (e.g. probable cause) and procedural (e.g. due process and judicial review) standards do you believe should apply to actions by or directed by your agency, or other government agencies, that would restrict the right to travel?
3. Should individuals in the USA be required to have or display *government-issued ID* in order to travel by common carrier or on public rights-of-way by plane? By train? By bus? By ship or ferry? By private car? On foot? Why or why not?
4. Should individuals in the USA be required to obtain government *permission* in order to travel by common carrier or on public rights-of-way by plane? By train? By bus? By ship or ferry? By private car? On foot? Why or why not?
5. Should US citizens be required to have a passport and/or obtain government permission in order to *leave* the USA? Why or why not?
6. Should US citizens be required to have a passport and/or obtain government permission in order to *return* to the USA from abroad? Why or why not?
7. Should the government maintain records of the travel or movement of people who are not suspected of a crime or subject to a court order authorizing surveillance and logging of their movements? Why or why not?
8. Should the government mandate the collection or maintenance by travel companies of records of the travel or movement of people who are not suspected of a crime or subject to a court order authorizing surveillance and logging of their movements? Why or why not?
9. Should travel companies or other third parties to whom individuals are required by the government to provide personal information be free to use, sell, or “share” that information, or should it be protected by laws? Why or why not?
10. What do you think should be done with existing government files of travel records about innocent people?