

Notes for ICLMG submission to Public Safety Committee on U.S. SECURE FLIGHT

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First I would like to mention that ICLMG shares all of the concerns expressed by BCCLA with regards to Passenger Protect, especially that it was introduced by the back door without adequate legislative basis, without any discussion in Parliament, and very likely in violation of article 7 of the Charter.

However, I would like to focus my presentation today on the new U.S. Secure Flight program.

While the Canadian Passenger Protect and the U.S. no-fly list have made life miserable for many airline passengers – and unbearable for others – the incremental introduction of the U.S. Secure Flight program over the last few months raises even more dramatic concerns and could literally ground many Canadians and visitors to Canada who have no intention to ever travel to the U.S.

The avowed aim of Secure Flight is to shift pre-departure watch list responsibilities from airline operators to the U.S. Transportation Security Administration and to remove the secret watch lists from the hands of airline companies.

Under the “Final Rule”¹ of the international component of Secure Flight, published in late October 2008, airlines are required to transmit all passenger information to Homeland Security and U.S. Customs and Border Protection 72 hours before departure, for all flight to and from the U.S. as well as for all flights that overfly U.S. territory. This includes not only basic API information (name, gender, date of birth), but all information contained in reservations systems known as PNR (Passenger Name Record). After running a risk assessment for each passenger using data mining technology, Homeland Security in turn issues a “boarding pass result” back to the airline. The “result” instructs the airline to issue a boarding pass, deny permission to travel, or issue an enhanced screening requirement (SSSS). These regulations give access to the U.S. to a whole subset of information on air passengers who are not entering the U.S. but merely overflying its airspace.

The program gives the government of a foreign country a *de facto* right to decide who gets to travel to and from Canada, since the vast majority of Canadian flights to and from Europe, the Caribbean and South America overfly American airspace. According to an internal document of Public Safety obtained by the Canadian Press, the U.S. has provided Canada an exemption only for domestic flights that “transit the airspace of the continental United States between two Canadian airports or locations.

Let me quote from that document dated January 26, 2009:

“Canada will be subject to the Secure Flight Program by late 2009, although officials at Homeland Security have confirmed that they would consider granting an extension if there were assurances that Canada is pursuing a comparable program. There are a number of concerns that the Secure Flight Program poses for Canada.

Secure Flight affects both passengers and airlines. Airlines will be compelled to share personal data with the U.S. government – an act that is currently prohibited by the Personal Information and Electronic Documents Act. It is possible that Canadians overflying the United States could be denied boarding based on U.S. No-Fly lists that were developed based on lower U.S. risk tolerance. There are also no guarantees how the U.S. will use the information it obtains from carriers overflying its territory. It is important to note that the National Airlines Council of Canada has written to the Minister of Public Safety expressing its concern about the application of the Secure Flight Program.” END OF QUOTE

The document goes on to recommend that to address these concerns, Canada should develop a more robust program, know as Air Passenger Assessment System (APAS), that would meet the “comparability test of Secure Flight”. This raises numerous concerns and questions with regards to the amount of information that will be collected on travellers, the standards and criteria to be applied to put a person of the list and the number of people who will be added to the list to satisfy U.S. requirements. The document makes no reference to the legislative basis to implement such a program.

The Secure Flight program became active on Jan. 27, 2009. When fully established, it will encompass more than 70 US airlines and roughly 150 foreign airlines.

As of March 31, the program has grown to include 74 US airlines and 19 foreign airlines in some way. Of those, Secure Flight assumed watchlist matching for five foreign airlines. Air Canada is most likely one of those five airlines. In an e-mail sent to the Montreal Gazette last February, a spokesperson from the airline admitted for the first time that “ For flights to and from the U.S., as well as flights overflying the U.S., we are obligated by law to enforce the U.S. No Fly List”. So it would seem that Air Canada is already violating PIPEDA, Canada’s privacy regime.

There are grave consequences for Canada’s sovereignty here. It creates the very real possibility that the Charter rights of Canadians, and their rights to privacy, are being violated by the legislation of a foreign country, without Canada being able to defend those rights. Several cases have already been reported where Canadians have been denied boarding by the U.S., even for domestic flights in Canada. That includes the case of Abdullah Almaki who, after having his name cleared in Canada by the Iacobucci inquiry, was denied a boarding on an Air Canada flight between Toronto and Windsor

last December. He was told he was on the U.S. No-Fly List. In this case, not only did Air Canada violate PIPEDA, it did not even take into account that there is an exemption in Secure Flight for purely domestic flights that overfly U.S. air space.

There are other concerns related to Canada's sovereignty. For example, half the Cabinet of Evo Morales in Bolivia are *personae non gratae* in the U.S. So if Canada were to invite one of those ministers for a diplomatic meeting in Canada, the U.S. could bar this minister from boarding a plane to Canada. The same could apply to refugee claimants from Colombia who, even if admitted by Canada, could be denied the possibility of leaving their country by the U.S.

Disclosure of personal information to the Department of Homeland Security (DHS) on passengers travelling to certain destinations – particularly Cuba – could lead to unpleasant consequences. For example, this information could be used to identify Canadian companies who do business with Cuba or penalize travellers who have visited Cuba by subsequently refusing them entry in the U.S. How will Canada ensure that the U.S. not use the Secure Flight program to apply its *Helms-Burton Act*, which imposes penalties on foreign companies that do business with Cuba?

And what about the precedent created by Secure Flight? How would Canada, or the U.S. for that matter, react if the same measures were imposed by North Korea or other less friendly countries?

There are also serious concerns related to the huge number of passengers who are intercepted as false positives, and have no redress mechanism other than being told to change their name. ICLMG has received testimonies from several Canadians who have been intercepted as false positives on the U.S. list in Canadian airports and have been told by Homeland Security that the Secure Flight redress mechanism could not apply to them because the incident did not occur on U.S. territory.

Finally, the published regulations are extremely worrisome both for what they state as well as for what they fail to address. There is nothing outlining the applicable standards or how decisions will be made to issue these new travel credentials nor are there any mechanisms for travellers to find out why they are denied permission to fly. And, none of these decisions are subject to any due process or judicial review.

As you can see, the U.S. Secure Flight program will have a very harmful impact on Canadian travellers and visitors to Canada. The ICLMG calls on you to strongly and quickly oppose these measures. Canadians expect their government to protect the sovereignty of their country and uphold their rights.