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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

Ayman Latif, et al., Plaintiffs, v. Eric H. Holder, Jr., et al., Defendants.	No. 10-cv-750 (BR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case challenges the constitutionality of the U.S. government's "No Fly List" procedures, by which the government prohibits U.S. citizens from flying without providing them

unconstitutional the government's decision • despite all of these available alternatives to them from flying without providing any after-the-fact notice, statement of reasons, or hearing.

Defendants' refusal to provide the bare rudiments of due process stems from their embrace of an explicit policy known as the "Glomar" policy of refusing to confirm or deny any

To find for Plaintiffs, this Court does not have to decide now what process is specifically due; if the Court rules for Plaintiffs, as they urge, the question of a remedy can be addressed at a later stage after additional briefing from the parties, as it has been in other, similar cases. Instead, based on the indisputable record in this case, Plaintiffs simply ask the Court to hold that Defendants' failure to provide Plaintiffs any notice or a hearing after banning them from flying violates their constitutional and statutory rights.[1]

STATEMENT OF FACTS

I. The No Fly List

The Terrorist Screening Center ("TSC"), which is administered by the Federal Bureau of Investigation ("FBI"), develops and maintains the federal government's consolidated Terrorist Screening Database (TSDB or the "watch list"). Joint Statement of Stipulated Facts ("Stip. Facts"), ECF No. 84, ¶ 1. The watch list is the federal government's master repository for suspected international and domestic terrorist records used for watch list screening.[2] Id. TSC sends watch list records to other agencies, including the Transportation Security Administration ("TSA"), which use those records to identify suspected terrorists. Stip. Facts ¶¶ 1, 3. When individuals make airline reservations and check in at airports, TSA or the airline conducts a name-based search to determine whether the person is on TSC's watch list.[3]

TSC makes the ultimate decision whether a nominated individual meets the minimum requirements for inclusion on the watch list. Stip. Facts ¶ 15. TSC determines whether it has

[1] At this time, Plaintiffs also do not cross-move for summary judgment with respect to their claims challenging their placement on the No Fly List under substantive due process and the Administrative Procedure Act. The case management plan contemplates that the parties will confer on how best to present those claims after the Court rules on the procedural claims presented here. Parties' Joint Case Mgmt. Plan at 4, ECF No. 77.

[2] Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Exh. K at 1.

[3] Choudhury Decl. Ex. K at 3.

¶ 13.[7] They are also denied passage on ships bound for, or departing from, the United States.[8] In addition, they may be prevented from boarding flights that do not cross U.S. airspace because TSC shares the watch list with 22 foreign governments.[9]

II. The Current Redress Process

An individual who is apparently placed on the No Fly List can seek redress only by completing a standard form and submitting it to the Department of Homeland Security Traveler Redress Inquiry Program. Stip. Facts ¶ 4. DHS TRIP determines whether a redress request concerns an exact or near match to the watch list, and if so, forwards the complaint to TSC. Id ¶¶ 8–9. TSC determines whether the individual is on the watch list, consults with any relevant agencies, and makes a final decision as to whether the person should remain on the list. DHS TRIP responds to the individual with a letter that neither confirms nor denies the existence of any terrorist watch list records relating to the individual. Stip. Facts[10] ¶ 11.

III. Denial of Boarding and Plaintiffs' Efforts to Seek Redress

Each of the Plaintiffs flew for years without incident, but was prevented from boarding a flight over U.S. airspace after January 1, 2009.[11] Plaintiffs first found out that they could not fly

[7] Choudhury Decl. Ex. K at 3.

[8] Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 64–67, 72 Fed. Reg. 48,320, 48,322 (Aug. 23, 2007) (passengers on vessels departing the United States are vetted against consolidated terrorism watch list); id at 48,325 (denying passage on ships to "matches" against "the same terrorist watch list used for aircraft passenger vetting").

[9] Choudhury Decl. Ex. E at 21 n.24 (report that TSC shares the watch list with 22 foreign governments)

[10] Sometimes, the letter indicates that the redress seeker can pursue an administrative appeal with TSA or can seek judicial review in the U.S. Courts of Appeals pursuant to 49 U.S.C. § 46110. Stip. Facts ¶ 11.

[11] Decl. of Salah Ali Ahmed ("Ahmed Decl.") ¶¶ 3, 6; Decl. of Nagib Ali Ghaleb ("Ghaleb Decl.") ¶¶ 5–6; Decl. of Mohamed Sheikh Abdirahman Kariye ("Kariye Decl.") ¶¶ 4, 6; Decl. of Faisal Nabin Kashem ("Kashem Decl.") ¶¶ 3, 6; Decl. of Raymond Earl Knaeble IV ("Knaeble Decl.") ¶¶ 8–9; Third Am Compl. ¶ 42, ECF No. 83; Decl. of Ibraheim Mashal ("Mashal Decl.")

U.S. and airline officials, however, told each of the Plaintiffs that they are on the No Fly List.[15]

TSC also shares watch list information with thousands of law enforcement officers from federal, state, local, territorial, and tribal agencies, some private sector individuals, and 22 foreign governments.[16] In addition, the government discloses watch list status through CBP's Global Entry program, which identifies "low-risk" travelers permitted to apply for expedited clearance through border inspection when arriving in the United States from abroad.[17] CBP selects participants in the Global Entry program after checking their names against the watch list.[18] According to the government's own description of Global Entry and the No Fly List, people on the No Fly List are categorically ineligible for Global Entry. Accordingly, by approving a traveler for Global Entry, the government discloses that the individual is not on the No Fly List.

ARGUMENT

I) Summary Judgment Standard

Rule 56 permits motions for partial summary judgment such as this one. See FED. R. CIV. P. 56(a). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id.; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

[15] Ahmed Decl. ¶¶ 6, 8; Ghaleb Decl. ¶ 6; Kariye Decl. ¶ 6; Kashem Decl. ¶ 6; Knaeble Decl. ¶ 9; Third Am. Compl. ¶ 43, ECF No. 83; Mashal

II) Defendants' Failure to Provide Plaintiffs Notice or a Hearing Violates the Fifth Amendment Guarantee of Procedural Due Process

Plaintiffs seek partial summary judgment under the procedural component of the Fifth Amendment's Due Process Clause. To prevail, Plaintiffs must first show that Defendants' No Fly List burdens a protected liberty interest. Mathews v. Eldridge, 424 U.S. 319, 332 (1976); Ibrahim v. Dept. of Homeland Security, 669 F.3d 983, 994 (9th Cir. 2012); Nieva v. Reyes, 966 F.2d 480, 485 (9th Cir. 1992). Once Plaintiffs establish that their placement on the No Fly List burdens a protected interest, the Court must determine whether the procedures Defendants afford Plaintiffs satisfy due process under the familiar three-part test set forth in Mathews v. Eldridge, which requires the Court to weigh three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

Defendants have failed to meet even the most basic requirements of due process. It is undisputed that the DHS TRIP system, the only redress mechanism Defendants provide, is premised on their explicit "Glomar" policy of refusing to confirm or deny any information concerning watch list status. As a matter of policy, therefore, Defendants provide no notice. Without notice, a statement of reasons, or knowledge of the evidence against them, Plaintiffs have no opportunity at all to confront or rebut Defendants' allegations even in writing. And there is no dispute that DHS TRIP does not provide Plaintiffs any in-person hearing at which they might present their case or defend themselves. It is hard to imagine a "redress" process that more clearly violates U.S. citizens' most basic due process rights.

The second Mathews factor requires the Court to assess the risk of error from the

government interests. The undisputed facts show that each Plaintiff already knows that she or he is on the No Fly List and that the government routinely discloses watch list status through other means. Any hearing can employ as agencies and courts regularly do a variety of calibrated tools to protect any appropriate assertions of government secrecy.

When weighed against the undisputed facts, the balance of the Mathews factors tips decisively in Plaintiffs' favor. To find for Plaintiffs, this Court does not have to decide now what process is specifically due, however; the question of a remedy can be addressed at a late

United States deprived citizen of liberty interest in travel). This is true even if the challenged action does not foreclose all travel. See, e.g., Nunez, 966 F.2d at 485 (plaintiff "could travel internationally only with great difficulty, if at all") (emphasis added); Hernandez, 913 F.2d at 234 (burden on ability to "travel to and from Mexico," but not other countries); Agee v. Baker, 753 F. Supp. 373, 386 (D.D.C. 1990) (recognizing that one-way restriction on travel from the United States to foreign countries deprived liberty interest in travel); cf. Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972) (due process is required for deprivations of protected interests that "cannot be characterized as de minimis") (internal quotation marks omitted).

There is no question that the No Fly List severely burdens Plaintiffs' liberty interest in travel. In today's world, the ability to fly by commercial air to and from the United States and over U.S. airspace is integral to Americans' ability to travel abroad, which is increasingly "important[t] . . . particularly in a global economy and an interdependent world." Eunique v. Powell, 302 F.3d 971, 978 (9th Cir. 2002) (McKeown, J., concurring). It is undisputed that the No Fly List bans U.S. citizens from such flights without exception. Coppola Decl. ¶ 13.[21] Placement on the No Fly list also bars citizens from sailing on ships to and from the United States, as confirmed by a CBP regulation and the experience of one Plaintiff. See Advance Electronic Transmission of Passenger and Crew Manifests for Commercial Aircraft and Vessels, 2 Cust. B. & Dec. 07-4, 72 Fed. Reg. 48,320, 48,325 (Aug. 23, 2007) (denying passage on ships to "matches" against "the same terrorist watch list used for aircraft passenger vetting"); Decl. of Nusrat J. Choudhury ("Choudhury Decl.") Ex. L ¶¶ 19–21 (Decl. of Abdullatif Muthanna ("Muthanna Decl.")) (describing denial of passage on a freighter sailing from the United

[21] Choudhury Decl. Ex. K at 3.

States to Europe). Because TSC shares the list with foreign governments, No Fly List placement also threatens to prevent citizens from travelling on flights that do not cross U.S. airspace.

countries other than Mexico and Canada are uncertain, indirect, infrequent, and prohibitively expensive.[26]

"stigma-plus" test. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Humphries v. Cty. of L.A., 554 F.3d 1170, 1185 (9th Cir. 2008) (describing "stigma-plus" test), overruled in part on other grounds, 131 S. Ct. 447 (2010). Under this test, the government must afford procedural due process when a plaintiff suffers stigma from governmental action "plus" an alteration or extinguishment of a right or status recognized by law. See Paul v. Davis, 424 U.S. 693, 711 (1976). To satisfy the "stigma" prong, the government's stigmatizing statement must be publicly disclosed and the plaintiff must contest its accuracy. Ulrich v. City and Cnty. of S.F., 308 F.3d 968, 981 (9th Cir. 2002). To satisfy the "plus" prong, a plaintiff must show that the injury to reputation either was inflicted in connection with the deprivation of a legal right, or caused the denial of a legal right. Id. at 982. This requires only showing that "once listed, [Plaintiffs] legally could not do something that [they] could otherwise do." Miller v. California, 355 F.3d 1172, 1179 (9th Cir. 2004) (discussing Constantineau, 400 U.S. 433); Humphries, 554 F.3d at 1187–88 (describing test as whether plaintiffs are "legally disabled by the listing . . . alone from doing anything they otherwise could do" (internal quotation marks omitted)).

This case presents a quintessential example of stigma and plus. "[T]here can be little doubt that association with a government terrorist watch list might seriously damage [Plaintiffs'] standing and associations in their community.'" Green v. T.S.A., 351 F. Supp. 2d 1119, 1129 (W.D. Wash. 2005) (alteration in original) (quoting Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 777 n.5 (9th Cir. 1982)). Third Am. Compl. ¶¶ 3, 5 (Plaintiffs were branded as suspected terrorists on the No Fly List, a label they vigorously contest). The Supreme Court has found stigma on the basis of far lesser accusations. See Constantineau, 400 U.S. at 435–37 (finding "excessive drinker" label to be stigmatizing); Paul, 424 U.S. at 697 (same for "active shoplifter").

The Ninth Circuit's decision in Humphries, 554 F.3d at 1186–87, 1189, is directly on point. In Humphries, the Court of Appeals found that when a California state agency included the plaintiffs' names on a state list of child abusers that was not publicly available but which other state and law enforcement agencies and private entities consulted, plaintiffs suffered stigma. Id[illegible]

explained below, Defendants fail to satisfy even the most minimal requirements under the Fifth Amendment.

B) The DHS TRIP Process Denies Plaintiffs Notice and an Opportunity to Be Heard

Once it is determined that the No Fly List triggers procedural due process protections, "the question remains what process is due." Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988). The key inquiry is whether Defendants afford the most basic requirements of due process: notice and an opportunity to contest the relevant determination "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The undisputed facts show that DHS TRIP, the only available redress system for U.S. citizens on the No Fly List, utterly fails to provide either constitutionally adequate notice of the reasons for Plaintiffs' inclusion on the No Fly List, or a meaningful opportunity to be heard on why those reasons are improper or inaccurate.

1) Defendants fail to provide Plaintiffs even the most basic notice.

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Fuentes, 407 U.S. at 80 (internal quotation marks omitted). Due process requires notice to "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. At a minimum, notice must "set forth the alleged misconduct with particularity." In re Gault, 387 U.S. 1, 33 (1967) (internal quotation marks omitted). It must "permit adequate preparation for . . . an impending hearing." Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1, 14 (1978) (internal quotation marks omitted). "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice is essential

any decision holding that such fodient notice to U.S. citizens following the deprivation of protected liberties complies with due process.[34]

Plaintiffs do not at this time challenge Defendants' failure to disclose their criteria for placing U.S. citizens on the No Fly List, Coppola Decl. ¶¶ 15–18 (criteria are not disclosed).[35] That is because no matter what the criteria are—and even if they were disclosed to Plaintiffs—is Defendants' basic failure to provide any notice, statement of reasons, or a hearing that violates Plaintiffs' procedural due process rights. In other words, although the secrecy of the criteria compounds the problem because Plaintiffs are in the dark about the legal basis for Defendants' decision to ban them from flying, Stip. Facts. ¶ 17, disclosure of the criteria would not cure the core procedural due process violation.[36]

Defendants' failure to afford Plaintiffs the most "essential" of due process protections—the notice they need to "present [their] side of the story"—violates due process. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 546 (1985).

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[34] Jifry v. F.A.A., 370 F.3d 1174 (D.C. Cir. 2004) is not to the contrary. Although the court in that case upheld an agency's refusal to provide reasons for a decision to revoke airmen certificates, the private interests of the non-resident alien plaintiffs in that case are obviously less weighty than those of Plaintiffs, who are U.S. citizens seeking to protect their liberty interests in travel and reputation. Id. at 1183.

[35] The vague and self-referential standard for inclusion in the consolidated terrorism watch list—"reasonable suspicion" to believe "that [an] individual is a known or suspected terrorist"—does not constitute disclosure. Stip. Facts ¶¶ 15–16. None of the Plaintiffs are "known terrorists"—none of them have been charged, indicted, or convicted of a terrorism crime in a U.S. or foreign court. See Coppola Decl. ¶ 8 & n.3; Ahmed Decl. ¶ 11; Ghaleb Decl. ¶ 15; Kariye Decl. ¶ 10; Kashem Decl. ¶ 14; Knaeble Decl. ¶ 22; Third Am. Compl. ¶¶ 1,3, ECF No. 83; Mashal Decl. ¶ 17; Meshal Decl. ¶ 9; Mohamed Decl. ¶ 14; Choudhury Decl. Ex. L ¶ 25 (Muthanna Decl.); Persaud Decl. ¶ 13; M. Rana Decl. ¶ 18; Washburn Decl. ¶ 23.

[36] Although Plaintiffs do not seek disclosure of the criteria now and do not need the criteria to prevail on this partial motion for summary judgment, at any hearing on the merits, they would need at least some form of disclosure to defend themselves legally and factually.

2) Defendants fail to provide Plaintiffs any opportunity to be heard.

Due process requires the government to provide "some kind of hearing . . . at some time" when it deprives a person of a protected liberty. *See Memphis Light*, 436 U.S. at 16 (emphasis added) (internal quotation marks omitted). The Ninth Circuit has made this requirement clear: "There have been cases in which the Supreme Court has found that a post-deprivation hearing suffices, but under no circumstances has the Supreme Court permitted a state to deprive a person of a life, liberty, or property interest under the Due Process Clause without any hearing whatsoever." *De Nieva*, 966 F.2d at 485 (emphasis supplied) (citation omitted). Essential to the hearing requirement is the provision of at least some opportunity to confront and respond to the government's allegations or evidence. *American-Arab Anti-Discrimination Comm. v. Reno* (*AAADC*), 70 F.3d 1045, 1069 (9th Cir. 1995) (due process hearing requirement has "ancient roots" in the rights to confrontation and cross-examination) (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). The hearing must permit the plaintiff "to prove or disprove" the facts that are "relevant" to the deprivation. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (discussing *Constantineau*, 400 U.S. 433, and *Greene*, 419 U.S. 565).

It is undisputed that Defendants fail to provide Plaintiffs any type of hearing—written or in-person, pre- or post-deprivation—where they can confront or rebut the allegations or evidence supporting their inclusion in the No Fly List. *See* Defs.' Br. 27. The Defendants' application of secret criteria to include U.S. citizens in the No Fly List shows that factual findings necessarily underlie these decisions. Stip. Facts ¶ 17; Coppola Decl. ¶¶ 15–18, 21. Defendants concede as much, but refuse to disclose any of this evidentiary information. Stip. Facts ¶¶ 11, 14. The DHS TRIP process itself, based on these secret criteria and secret evidence, deprives Plaintiffs of the

There can be no dispute that Defendants' Glomar policy creates an unacceptably high risk of error. Defendants deprive Plaintiffs of any reason or bases for their inclusion on the list, withhold even the rule they accuse Plaintiffs of violating, and force Plaintiffs to guess why they are suddenly banned from flying. *See Gete*, 121 F.3d at 1297; *Barnes*, 930 F.2d at 579. This absolute lack of notice maximizes error by crippling Plaintiffs' ability "to determine whether the agency based its decision on erroneous facts, to discover whether there is evidence not previously considered that might be submitted," and to clear up any error. *Gete*, 121 F.3d at 1298; *see Kindhearts*, 647 F. Supp. 2d at 904. Defendants' failure to afford Plaintiffs a hearing further compounds this error because they are prevented from presenting exculpatory information and their own good character to an impartial decisionmaker. *See De Nieva*, 1989 WL 158912, at *7; *Califano*, 442 U.S. at 697 (in-person hearing necessary to assess character, credibility, and good faith).[37]

Defendants' redress policy not only fails to provide safeguards against the erroneous deprivations of U.S. citizens' liberties, it also exacerbates error. Numerous government reports

fiction: that it is even possible to keep a person's No Fly List status a secret after that person has been prevented from flying.[40] It is undisputed that Plaintiffs already know, albeit without official confirmation, they are on the No Fly List; each was denied boarding on at least one flight, and U.S. or airline officials subsequently told each Plaintiff that she or he is on the list.[41] Some Plaintiffs were very publicly denied boarding in a manner that made clear that the denial was for national security reasons.[42]

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communities in exchange for assistance with removal from the list.[44] CBP confirms that people are not on the watch list every time it approves members for its Global Entry program by conducting a check that "ensure[s] that applicants are not on any watch list" before permitting members to join and obtain expedited clearance at U.S. borders.[45] Providing U.S. citizens on the No Fly List the post-deprivation notice and hearing that due process requires will not harm national security when the government itself routinely disregards its Glomar policy. See Coppola Decl. ¶ 37.[46]

Moreover, courts require due process even when serious national security interests are at stake because, as the Supreme Court has made clear, the government's interest in protecting national security is not a "blank check . . . when it comes to the rights of the Nation's citizens." Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion)(requiring notice to alleged enemy co

Plaintiffs do not argue here that Defendants cannot take appropriate steps to protect certain classified evidence in the hearings they seek. But such hearings may not be foreclosed categorically simply because Defendants may attempt to rely on secret information in particular instances. As far more complex cases in the national security context show, the decisionmaker in any process can utilize calibrated tools, including evidentiary privileges and protective orders, to balance U.S. citizens' due process rights and any legitimate government secrecy interests that may arise. See, e.g., Al Odah, 559 F.3d at 547-48; In re Guantanamo Bay Detainee Litig., No. 08-0442 (TFH), 2009 WL 50155, at *6, *9 (D.D.C. Jan. 9, 2009).

The undisputed facts thus show that the balance of the Mathews factors tips decisively in Plaintiffs' favor. Defendants' placement of these U.S. citizens on the No Fly List has deprived them of their liberties without affording them the most basic notice and opportunity to be heard that the Constitution requires.

III) Defendants' Failure to Provide Plaintiffs Notice or a Hearing Violates the Administrative Procedure Act

Plaintiffs seek partial summary judgment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and have established a violation on two separate theories. First, for the reasons stated above, Defendants' failure to afford U.S. citizens on the No Fly List meaningful notice and a hearing following the deprivation of protected liberties violates due process and is "contrary to constitutional right, power, privilege, or immunit

and unverified." Wash. Toxics Coal. v. U.S. Dep't

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