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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. 3:10-cv-750-BR

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

No court has ever held that when the government deprives a U.S. citizen of constitutionally-protected rights, due process is satisfied by a secret, ex parte review process in which the citizen is denied official notice of and the reasons for the constitutional deprivation, and a hearing to confront and rebut the government's accusations. To the contrary, courts have found that due process requires the government to provide notice and a hearing to contest a range of deprivations, from denial of welfare benefits to—in the national security context—denial of property rights or personal liberty. Yet Defendants continue to insist that this Court should be the first to carve out new law for Plaintiffs, each of whom is a citizen placed on the No Fly List, and all of whom have been, this Court held, denied constitutionally-protected liberties at great cost to their personal and professional lives. With respect to these Plaintiffs, Defendants ask the Court to create an exception to the procedural due process rights guaranteed by the Fifth Amendment and reinforced by courts over decades. But there is no basis in law or the facts

before the Court for it to create such a drastic new due process exception. That conclusion is confirmed by the facts the Court has requested and which the parties have now provided concerning the scope of judicial review available under 49 U.S.C. § 46110. Those facts make clear that Defendants' administrative redress process cannot satisfy constitutional requirements because it denies Plaintiffs notice and a meaningful opportunity to be heard, and that judicial review under Section 46110 does not cure that deficiency. Plaintiffs respectfully ask this Court to reject Defendants' invitation to make new law, and instead to find that Defendants' failure to provide any notice, reasons, or a hearing to challenge the government's deprivation of Plaintiffs' protected liberties violates procedural due process.

PROCEDURAL AND FACTUAL BACKGROUND

On August 28, 2013, this Court issued an Opinion and Order ruling in part on the parties' cross-motions for partial summary judgment concerning Plaintiffs' procedural due process claims. *See* Opinion, ECF No. 110 ("Op."). It found, based on the undisputed and stipulated facts, that Defendants have deprived Plaintiffs of two constitutionally-protected liberties.[1]

First, this Court held that "Plaintiffs have shown their placement on the No Fly List has in the past and will in the future severely restrict Plaintiffs' ability to travel internationally." Op. at 25. It found that "inclusion on the No Fly List completely bans listed persons from boarding commercial flights to or from the United States or over United States air space," and can even "result in further interference with an individual's ability to travel as evidenced by some Plaintiffs' experiences as they attempted to travel abroad by boat and land and were either turned away or completed their journey only after an extraordinary amount of time, expense, and

[1] Contrary to Defendants' characterization, Plaintiffs have not simply "alleged" the deprivation of protected liberty interests. Because Defendants have "chosen not to refute Plaintiffs' allegations," Op. at 10 n.3, this Court made findings of fact based on Plaintiffs' undisputed declarations.

difficulty." *Id.* at 25. Second, this Court held that Defendants deprived Plaintiffs of their liberty interest in freedom from false governmental stigmatization based on the uncontested fact that No Fly List inclusion smeared Plaintiffs as suspected terrorists and the stipulated fact that inclusion legally banned Plaintiffs from commercial air travel to and from the United States and over U.S. air space. *Id*. at 27.

This Court also made findings of fact concerning the deficiencies in the DHS Traveler Redress Inquiry Program ("DHS TRIP") process. It found that "the DHS TRIP process, at least through the determination-letter step, does not provide Plaintiffs with either post-deprivation notice nor a hearing. Plaintiffs have not been officially provided with any information about why they are not allowed to board commercial flights; they have not been officially informed whether they are on the No Fly List; if they are on the No Fly List, they have not been provided with an opportunity to contest their placement on the list; and they have not been provided with an in-person hearing." *Id*. at 35.

The Court reserved decision, however, on whether "judicial review of the record on which the government acted as to each Plaintiff is sufficient to satisfy the requirements of due process and to avoid the risk of erroneous deprivation." *Id*. at 35. It ordered the parties to supplement the factual record concerning the nature and scope of judicial review of final DHS TRIP determinations, and noted that it lacked information regarding "what specifically would be in the administrative record submitted to the appellate court, what other materials might be submitted, or the nature of the record or materials that deems them sensitive and/or classified so they cannot be revealed to anyone other than the appellate court." *Id*. at 34. In response, the parties conferred and filed a Third Joint Statement of Stipulated Facts on September 26, 2013. *See* ECF No. 114 ("Third Stmt.").

The Third Joint Statement of Stipulated Facts confirms that an individual seeking the removal of his or her name from the No Fly List may seek judicial review of a DHS TRIP determination in a court of appeals pursuant to 49 U.S.C. § 46110. Third Stmt. ¶¶ 1–2. It also confirms that the judicial review process provides the petitioner with no notice or reasons for their inclusion on the No Fly List. *Id*. ¶¶ 7–8.

ARGUMENT

Judicial Review Under 49 U.S.C. § 46110 Does Not Satisfy Due Process

The question this Court asked the parties to answer in supplemental briefing is a narrow one: whether judicial review under 49 U.S.C. § 46110 of the government's administrative record justifying its denial of each Plaintiff's liberties "is sufficient to satisfy the requirements of due process and to avoid the risk of erroneous deprivation." Op. at 35–36 (deferring ruling on the second and third due process factors under *Mathews v. Eldridge*, 424 U.S. 319 (1976)). The Court asked this question after holding that Plaintiffs have a constitutionally-protected liberty interest in international travel, and, based on undisputed facts, finding that Defendants' official policy is to deny Plaintiffs notice or a hearing, even after the constitutional deprivation.

The answer to the Court's question readily follows from its initial summary judgment ruling and the parties' Third Joint Statement of Stipulated Facts. As those undisputed facts now make clear, *at no stage* of the administrative or judicial review process is a petitioner on the No Fly List given the reasons for the government's decision to include him or her on that list, any information or evidence the government relied upon to make that decision, or a meaningful hearing. In light of those facts, judicial review of a one-sided agency record does not and cannot correct these fundamental deficiencies. Defendants' justifications for their categorical refusal to provide these basics of process to Plaintiffs, including on claimed secrecy grounds, fare no better

now than they did before. The Ninth Circuit and other courts have rejected those arguments and required the government to provide notice and a meaningful process to plaintiffs in analogous cases, including in the national security context. There should be no question that Plaintiffs' procedural due process rights have been violated, and limited Section 46110 judicial review is no cure.[2]

1. Judicial Review of a One-Sided Administrative Record Cannot Correct a High Risk of Erroneous Deprivation

As this Court has recognized, the most basic requirements of due process are (1) notice sufficient to permit the correction of "any errors that may have led to the deprivation," and (2) a "post-deprivation hearing." Op. at 28–29. And as the Ninth Circuit has established, those rudiments of process must be provided to an individual deprived of a constitutional right, so that he or she is not left to "guess" about the government's reasons for the deprivation; otherwise, "the risk of erroneous deprivation [is] high." *Al Haramain Islamic Found., Inc. v. U.S. Dep't. of Treasury*, 686 F.3d 965, 986 (9th Cir. 2011) ("*A.H.I.F.*"); *see also Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997) (lack of notice of reasons and factual bases for deprivation prevents petitioner from "rebut[ting] erroneous inferences"); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 904 (N.D. Ohio 2009) (lack of notice "necessarily enhances, if it does not entirely ensure, the likelihood of erroneous deprivation"); *cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (adversarial process reduces risk of error because "[s]ecrecy is not congenial to truth-seeking"). As a matter of law, therefore,

[2] As Plaintiffs noted in prior briefing, if the Court finds their procedural due process rights have been violated, Plaintiffs respectfully request that the parties be allowed to brief the question of what remedies the Court should order. *See* Reply Mem. in Supp. of Pls.' Cross-Mot. for Part. Summ. J. ("Pls.' Reply") 13; *cf. KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner* 647 F. Supp. 2d. 857, 904, 919 (N.D. Ohio 2009) (holding that Treasury Department violated U.S. charity's procedural due process rights, but postponing remedy until after further briefing).

Defendants' Glomar policy and resulting DHS TRIP process violate due process because Defendants deprive Plaintiffs on the No Fly List of the most basic notice and opportunity to be heard and create a high risk of erroneous deprivation.[3]

The supplemented undisputed facts now before the Court confirm that the due process violation extends to *all stages* of the review process, and is not cured during judicial review of final DHS TRIP determinations under 49 U.S.C. § 46110. Third Stmt. ¶¶ 11, 14 (DHS TRIP); *id.* ¶ 7 (judicial review). Given the Court's holding and the ample due process case law on which it is based, what matters for constitutional purposes is the provision of notice, reasons, and a hearing *to the petitioner*, not how many layers of unilateral and one-sided administrative review the government sets up when it chooses to deny those rights. *Cf.* Defs.' Suppl. Br. 3–7. Even if Plaintiffs were to avail themselves of judicial review under Section 46110, it is so restricted in scope and content that it cannot provide meaningful due process. A description of how Section 46110 review would work shows its incurable deficiencies.

At the outset, the administrative record is woefully incomplete because Plaintiffs cannot even begin to discern what misunderstandings or errors led to their inclusion on the No Fly List—they must guess—and their ability to provide arguments or evidence to inform judicial

[3] Op. at 35 (finding that "the DHS TRIP process, at least through the determination-letter step, does not provide Plaintiffs with either post-deprivation notice nor a hearing"); *see* Pls.' Cross-Mot. 19–30; Pls.' Reply 11–26 (setting forth in detail why this denial violates due process). In their supplemental briefing, Defendants fail to address the Court's factual findings or the national security cases on which Plaintiffs primarily rely. That failure undermines Defendants' critique of Plaintiffs' reliance on *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 14, 16 (1978), and other cases setting forth the baseline requirements of notice and process on the grounds that those cases concern the deprivation of utility subsidies and welfare benefits. *See* Defs.' Suppl. Br. 11. Defendants also miss the point. Courts uniformly require notice and an in-person hearing permitting confrontation and rebuttal both in contexts where the private interests are less weighty than those of Plaintiffs', and in contexts where the private interests are greater and the government asserts significant national security interests. *See* Pls.' Cross-Mot. 19–23, 28–30 (citing cases); Pls.' Reply 15–17, 21–22 (citing cases).

review of the administrative record is crippled. *See* Am. Mem. in Supp. of Pls.' Cross-Mot. for Part. Summ. J. ("Pls.' Cross-Mot.") 24–25; Reply Mem. in Supp. of Pls.' Cross-Mot. for Part. Summ. J. ("Pls.' Reply") 22–23. Indeed, because DHS TRIP determination letters provide no substantive information, Plaintiffs cannot even make an informed decision as to *whether* to petition for judicial review of the administrative record, let alone determine the appropriate *basis* on which to do so.

Nevertheless, if Plaintiffs were to proceed and seek judicial review of the secret determinations represented (but not conveyed) by their DHS TRIP letters, the process they would face is little better than what they have in DHS TRIP. It is now undisputed that "[t]he government does not, at any point during the judicial review process, provide the petitioner with confirmation of whether he or she is on the No Fly List, the government's reasons for including the petitioner's name on the list, or any information or evidence relied upon to maintain the petitioner's name on the list." Third Stmt. ¶ 7.[4] As a result, the judicial review process, like the DHS TRIP process, gives Plaintiffs no meaningful opportunity "to prove or disprove" the facts that are "relevant" to the government's decision to put Plaintiffs on the No Fly List. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003).[5]

[4] Nor does the government provide the petitioner the most basic notice of the rule he or she is accused of violating. *See* Third Stmt. ¶ 8 ("the minimum substantive derogatory criteria for inclusion on the list" is provided to reviewing court, but not the petitioner).

[5] Both in the DHS TRIP process and the Section 46110 review process, Defendants not only fail to "allege[] misconduct with particularity" and provide those allegations to Plaintiffs, but under their Glomar policy they categorically refuse to provide Plaintiffs with any allegation of misconduct at all. *In re Gault*, 387 U.S. 1, 33 (1967); *see* Pls.' Am. Mem. in Opp'n to Defs.' Mot. for Part. Summ. J. ("Pls.' Opp'n") 21 (citing *Hernandez v. Cremer*, 913 F.2d 230, 240 (5th Cir. 1990); *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992)).

From the perspective of a court of appeals reviewing Defendants' administrative record ex parte and in camera, Third Stmt. ¶¶ 3, 7–8, Defendants' refusal to provide *Plaintiffs* any notice, reasons, or in-person hearing also deprives *the court* of potentially dispositive information *not* in the court's possession. Most obviously, the court has no method by which to discern Plaintiffs' explanations as to why the government's information is false or incomplete. *Cf. Weiner v. FBI*, 943 F.2d 972, 977–78 (9th Cir. 1991) (adversarial testing enables "effective judicial review").

At best, therefore, judicial review under Section 46110 creates the mere possibility that a reviewing court could correct marginal errors obvious from the face of a one-sided administrative record. This minimal protection is plainly insufficient to obviate the high risk of error inherent in the use of entirely ex parte process under these circumstances. The judicial review Defendants advance also suffers another defect that renders it insufficient to satisfy constitutional demands, wholly apart from its failure to provide notice and a meaningful opportunity to be heard. On the government's view, even if the reviewing court in a Section 46110 action were to find an error in the one-sided administrative record, the court's power to grant a remedy is limited to a "remand [of] the matter to the government for appropriate action." Third Stmt. ¶ 10. Presumably, the government does not interpret the Section 46110 judicial review scheme as permitting the court to remove someone from the No Fly List. Instead, the entire process could thus proceed in an ongoing circle of secrecy from which Plaintiffs would be hard-pressed to emerge—virtually no different from the position they were in without judicial review under Section 46110. Plaintiffs are aware of no court that has held such narrow and restrictive judicial review satisfies due process, and Defendants cite none.

Indeed, Defendants offer no persuasive reason why this Court should carve out the No Fly List as *the only* context in which the government can deprive U.S. citizens and residents of their liberties and categorically refuse to afford even the most basic notice or process. *See infra* pp. 12–15. Defendants point to only one case to support their claim that due process does not require notice and an opportunity to confront and rebut the government's reasons for a deprivation of liberty. *See* Defs.' Suppl. Br. 13 (citing *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004)). But the plaintiffs in *Jifry* asserted only an interest in possessing a certification from the Federal Aviation Administration allowing them "to fly foreign aircraft outside of the United States," *id.* at 1183, and that interest was particularly attenuated because the plaintiffs were non-citizens who had not flown in the United States for years, and appeared to have little if any on-going contact with this country. *Jifry*, 370 F.3d at 1178, 1182–84. The private interests at stake here—those of U.S. citizens deprived of their liberty interests in travel and freedom from false governmental stigmatization as suspected terrorists with devastating impact on their personal and professional lives—are far weightier than the interests of non-citizen pilots with few ties to the United States who seek to pilot aircraft between localities abroad.[6]

Rather than addressing Ninth Circuit precedent and other analogous cases cited by Plaintiffs on what constitutes risk of error in the due process analysis, Defendants instead principally rely on a 2012 government report finding certain improvements to the government's

[6] This Court recognized the seriousness of deprivation of Plaintiffs' liberty interest in international travel when it rejected Defendants' contention "that international air travel is a mere convenience" and observed that "[s]uch an argument ignores the numerous reasons an individual may have for wanting or needing to travel overseas quickly such as for the birth of a child, the death of a loved one, a business opportunity, or a religious obligation." Op. at 22; *see also id.* at 22–23 (citing *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012)).

watch listing process. Defs.' Suppl. Br. 6–7.[7] But these front-end procedures cannot "ensure that the [No Fly List] contains only individuals who are properly placed there," as Defendants argue. Defs.' Mem. in Opp'n to Pls.' Cross-Mot. for Part. Summ. J. ("Defs.' Opp'n") 12. That is because these procedures, no matter how improved, cannot eliminate errors that result from the failure to afford notice: the government's misunderstanding of information about Plaintiffs, or lack of Plaintiffs' explanation or evidence in the administrative record.[8] Similarly, Defendants' contention that recent improvements in watch listing *misidentification* through Secure Flight or other means, Defs.' Suppl. Br. 6, misses the point. Improvements to the process of correcting identity errors do not address Plaintiffs' core concern about a one-sided redress process before Defendants and any reviewing court that deprives those decision-makers of Plaintiffs' information and creates a high risk of error as a matter of law.[9]

2. Defendants' Provision of Notice and a Hearing to Plaintiffs Will Not Harm Government Interests

Defendants' supplemental brief places the greatest weight on the third *Matthews v. Eldridge* factor, and Defendants' claim that administrative and Section 46110 judicial review would protect the government's interest in not providing Plaintiffs *any* notice or reasons for their placement on the No Fly List, including any classified or sensitive information that may be in the

[7] Contrary to Defendants' contention that "[t]errorism screening for air travel presents a factual context that is dramatically different from the cases relied on by Plaintiffs," Defs.' Suppl. Br. 11, the terrorist designation cases Plaintiffs cite are closely analogous and Defendants entirely fail to address them.

[8] Plaintiffs have previously explained that Defendants overstate the impact of any post-2010 improvements to their watch listing procedures on the risk that Plaintiffs were incorrectly placed on the No Fly List. The 2012 report on which they rely does not conclusively rebut a 2009 government audit documenting Defendants' own errors in failing to properly update and remove records in the terrorism watch list of which the No Fly List is a part. *See* Pls.' Reply at 24–25.

[9] This is true *whether or not* this Court finds, as a matter of fact, that Defendants' watch listing procedures have resulted in a bloated terrorism watch list riddled with error or whether the watch listing process includes, as Defendants contend, "safeguards and protections" on the front-end to lessen the risk of erroneous inclusion decisions. Defs.' Suppl. Br. 8.

administrative record. *See* Defs.' Suppl. Br. 8; *see also* Third Stmt. ¶¶ 6–8. But that sweeping claim, which Defendants have repeatedly made, cannot support the weight Defendants give it.

As Plaintiffs described at length—and Defendants do not address—the Ninth Circuit has squarely rejected virtually the same categorical secrecy-based arguments against due process in an analogous case involving the designation of a suspected terrorist organization. In *Al-Haramain*, the circuit court required the government to *mitigate* harm that would result from the kind of ex parte and in camera judicial review of classified information that Defendants seek to justify in the Section 46110 process. *A.H.I.F.*, 686 F.3d at 983–88. The Ninth Circuit further required the government to provide the organization with adequate notice and a meaningful opportunity to respond through means such as an unclassified summary of classified information. *See id.* at 986–88; *see also KindHearts*, 647 F. Supp. 2d at 901–08 (same); Pls.' Am. Mem. in Opp'n to Defs.' Mot. for Part. Summ. J. ("Pls.' Opp'n") 20–23; Pls.' Reply 17.

Defendants fail to address *Al-Haramain*. For that reason, although Defendants are correct that "[t]he nature of the information at issue in challenges to inclusion on the No Fly List is critical to the due process analysis," Defs.' Suppl. Br. 10, they draw the wrong conclusion from this premise. Precisely because No Fly List inclusion may be supported by "information obtained from human sources, foreign governments, and signals intelligence," Defs.' Suppl. Br. 9, it constitutes information that can be subjected to differing interpretations, some of which may be erroneous in ways that only Plaintiffs could correct. Defendants also fail to address the numerous other national security and criminal cases demonstrating that any harm that might result from the disclosure of specific legitimately-secret evidence is appropriately and routinely handled in individual instances through calibrated means, rather than categorical prohibitions. *See* Pls.' Opp'n 22–23 (discussing terrorist designation cases); *id.* at 23 n.37 (discussing habeas,

enemy combatant status, and criminal contexts); Pls.' Cross-Mot. 29–30 (same).[10] Put another way, Defendants' asserted interests in protecting classified or otherwise sensitive information are routinely and amply protected by reviewing courts in numerous contexts in which the government is required to provide sufficient notice and process to parties deprived of protected liberties.

Moreover, Defendants overstate the harm that might result from their provision of post-deprivation notice to Plaintiffs, particularly because *every single one* of the Plaintiffs was told by a government official that he or she is on the No Fly List. *See* Pls.' Reply 14; Pls.' Cross-Mot. 27 & nn.42–43. Defendants' supplemental briefing ignores that these and other facts squarely rebut the Coppola Declaration's assertions of harm. *See* Pls.' Reply 15 (describing government's own disclosure of watch list status through the Global Entry program).

Finally, Plaintiffs have shown—and Defendants do not rebut—that even if the administrative record supporting a DHS TRIP determination includes *some* discrete information over which Defendants assert the qualified law enforcement privilege, or information designated Sensitive Security Information by TSA, Plaintiffs may be able to follow applicable rules to gain access to that information in the course of their challenge to No Fly List inclusion. *See* Pls.' Reply 17–18.

In sum, although Defendants argue that permitting individuals on the No Fly List to seek judicial review of DHS TRIP determinations through the Section 46110 process adequately

[10] Thus, contrary to Defendants' extreme arguments, Defs.' Suppl. Br. 9, disclosing *some* watch-listing information would not undermine the entire watch listing regime any more than disclosing information under the Classified Information Protection Act prevents law enforcement from catching actual criminals. Notably, the government's arguments fail to account for individuals in Plaintiffs' situation—people who pose no threat to airline security and were wrongly placed on the No Fly List. It does not make our country safer for Defendants to maintain Plaintiffs on the list on the basis of whatever error or innuendo caused the initial placement—which Plaintiffs cannot meaningfully rebut.

"balance[s] the need for meaningful review with the need to protect such information from individuals who are on the No Fly List," Defs.' Suppl. Br. 9, their Glomar policy in fact forecloses any meaningful review either in the DHS TRIP process or in a court of appeals.

* * *

For the foregoing reasons, judicial review under Section 46110 cannot cure the risk of erroneous deprivation or satisfy the procedural due process to which Plaintiffs are entitled.

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