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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case No. 3:10-cv-00750-BR

PLAINTIFF RAYMOND KNAEBLE'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF HIS RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Defendants admit that the focus of their No Fly List is on "violent acts of terrorism" and that they are relying on "predictive judgments" to place and keep Mr. Knaeble—who has never been charged with, let alone convicted of, a violent crime—on the List. Defendants support their decision entirely by reference to their prediction about Mr. Knaeble's future behavior, but offer no evidence whatsoever of the accuracy of their prediction model, any scientific basis or methodology that might justify it, or any indication of the extent to which it might result in errors. In their consolidated brief, Plaintiffs have established the high risk of error that results from Defendants' predictive model. That high risk of error makes it imperative that Mr. Knaeble be afforded stringent procedural protections so he can demonstrate to a neutral decision-maker his "innocence" of a crime he will never commit.

Defendants have refused to provide Mr. Knaeble these basic due process safeguards: the full reasons for his placement on the No Fly List, the evidence that is the basis for those reasons—including exculpatory evidence—and a live hearing at which he can testify in his own defense and confront witness hearsay. Defendants' revised redress process violates Mr. Knaeble's Fifth Amendment right to procedural due process and the Administrative Procedure Act. Given that Mr. Knaeble has now been unable to fly anywhere for five years, including for two years since this Court ruled that significant liberty interests were at stake here, he respectfully asks the Court to order Defendants to provide him the procedural protections he seeks in a process overseen by the Court.

ARGUMENT

I. Defendants' Revised Redress Process Guarantees a High Risk of Error.

Defendants have placed and retained Mr. Knaeble on the No Fly List based on their prediction that he poses a threat of committing an act of violent terrorism. Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. ("Defs.' Mem."), ECF No. 251 at 6, 15, 17, 30; Defs.' Unredacted Cross-Mot. for Summ. J.: Knaeble ("Defs.' Knaeble Mem."), ECF No. 246 at 2. But

Defendants' "predictive judgments" are not based on science or any reasoned methodology. *See* Pls.' Opp. to Defs.' Cross-Mot. for Partial Summ. J. ("Pls.' Opp. Mem."), Section I. Ultimately, Defendants are doing little more than guessing at the possibility that Mr. Knaeble might engage in terrorist violence at some point in the future based on nothing more than alleged travel to a particular country in a particular year. No judicial deference is due to such a guess, for at least three reasons.[1]

First, as Plaintiffs' experts have established, no valid profile or model exists that can accurately and reliably predict the likelihood that a given individual will commit an act of terrorism. *See* Pls.' Opp. Mem., Section I.A Thus, as an empirical matter, the "derogatory information" on which Mr. Knaeble's placement on the No Fly List is based—whether revealed to him or not—is not reliably predictive of terrorist violence. There is no dispute that Mr. Knaeble has never been charged with, let alone convicted of, a violent act of terrorism, and he has submitted a sworn declaration stating that he does not pose a threat to aviation or national security.[2] Defendants make no attempt to show that the single cryptic allegation in the DHS TRIP notification letter to Mr. Knaeble—an allegation that on its face is grossly inadequate under the Due Process Clause—could reliably serve as an indicator of future terrorist violence, even if it were accurate. Nor have Defendants used a control group or taken any other steps to provide scientific rigor for their predictive judgments with respect to Mr. Knaeble. Instead, the single piece of "derogatory information" against Mr. Knaeble exemplifies Defendants' failure to utilize even rudimentary science in their predictions.

Second, Defendants' predictive model necessarily lacks specificity; it cannot be used to predict future acts of terrorist violence without incurring numerous false positives—that is,

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[1] Defendants acknowledge that there may be other reasons and evidence that support their listing determination, *see* Knaeble Notification Letter, ECF No. 186, Ex. A at 2, but they have refused to provide any additional information, so Mr. Knaeble has no way of refuting such reasons and evidence.

[2] Declaration of Raymond Knaeble in Support of Cross-Motion for Summary Judgment, ECF No. 91-6 ¶ 23.

without wrongly identifying people like Mr. Knaeble as potential future terrorists. *See* Pls.' Mem., Section I.A.2(c). For example, even if the "derogatory information" in the notification letter to Mr. Knaeble were true (and his response letter demonstrated why even that patently insufficient disclosure is inaccurate and cannot be accepted, *see* Knaeble Response Letter, ECF No. 186, Ex. B), it should be obvious that [redacted] Even if this supposedly "derogatory information" regarding Mr. Knaeble were accurate, it simply cannot be used to predict something as rare as terrorist violence.

Finally, Defendants' response to Mr. Knaeble's anticipated testimony regarding the allegation in the notification letter illustrate what Plaintiffs' expert, Dr. Sageman, describes as cognitive inertia—the process by which a label once assigned to a person becomes a a default conception that is difficult to dislodge. Sageman Decl. ¶ 42 ("Applied in the No Fly List context, this inertia would only exacerbate the failure to appreciate changing contextual circumstances."). [redacted] Defendants never explain why they do not credit Mr. Knaeble's explanation. *See* Defs.' Knaeble Mem., ECF No. 246, at 1, 3, 9. [3] Nor do they explain why they have ignored his proffer of testimony that he "has no intention of engaging in,

[3] Contrary to Defendants' characterization of it, ECF No. 246 at 4, Mr. Knaeble's objection is not solely to the *outcome* of the redress process, but to the process itself, which does not allow him adequately to challenge the government's predictions of future wrongdoing and present a full defense against them.

or providing support for, violent unlawful activity anywhere in the world." Knaeble Response Letter, ECF No. 186, Ex. B at 5.

II. Defendants' Revised Redress Process Violates Due Process.

In their brief, Defendants assume that their revised redress process is constitutionally sufficient and assert that the only question as to Mr. Knaeble's motion is whether the redress process was fairly applied to him. Defs.' Knaeble Mem., ECF No. 246 at 4. Defendants then contend Mr. Knaeble was afforded adequate process by making selective references to conclusory characterizations built on speculation that they argue Mr. Knaeble did not challenge. *Id.* at 4-5. But Defendants' revised redress process is not constitutionally adequate, and Mr. Knaeble's resulting inability to participate meaningfully in the process cannot be proof that it is fair. Contrary to Defendants' premise, the issue is not whether Defendants' revised redress process was fairly applied, but whether it is constitutionally adequate to allow Defendants to maintain Mr. Knaeble on the No Fly List.

In light of Plaintiffs' arguments and evidence in their main brief and Mr. Knaeble's evidence in his response to Defendants, there can be no doubt that the revised redress process is wholly inadequate, and Mr. Knaeble is constitutionally entitled to the additional safeguards he seeks. For all the reasons set forth in Plaintiffs' main brief, Defendants must provide him with the full reasons for placing and retaining him on the No Fly List, the underlying evidence—including exculpatory evidence—and a live adversarial hearing before a neutral decision-maker in which the government bears the burden of proof under a "clear and convincing evidence" standard. *See* Pls.' Opp. Mem., Section II.

It is undisputed that Defendants' notification and determination letters to Mr. Knaeble did not include all of the *reasons* that Defendants relied upon for placing him on the No Fly List. J. Stmt. Agreed Facts, ECF No. 186 ¶ 6; Knaeble Determination Letter, ECF No. 186, Ex. C at 2, 3. Thus, even if Mr. Knaeble were able to respond meaningfully to the "reasons" in the notification letter—and he cannot do so because Defendants have notified him only of their

ambiguous "concerns" regarding his travel, withheld supporting evidence and exculpatory information, and refused to grant him an in-person hearing—Defendants have relied on undisclosed reasons for keeping him on the No Fly List anyway. In essence, unless Mr. Knaeble happens to *guess* the undisclosed reasons and submit information addressing them, Defendants' reliance on those reasons makes it impossible for him ever to clear his name and get off the List. In *Al Haramain Islamic Foundation, Inc. v. United States Dep't of the Treasury*, the Ninth Circuit explicitly held that the government violated due process when it provided notice of only one of three reasons for designating an organization as a "specially designated global terrorist." 686 F.3d 965, 985-87 (9th Cir. 2012). Although Defendants ignore the Ninth Circuit's holding, this Court should not.

Defendants also err in refusing to disclose evidence to Mr. Knaeble. The single summary sentence that Defendants provided in their notification letter to him manifestly is not *evidence*, see Pls.' Opp. Mem., Section II.C.2., nor does it enable a meaningful response to, or judicial review of, their determinations. Defendants' use of undisclosed evidence against Mr. Knaeble, without granting him any opportunity to review and contest any of it, is neither fundamentally fair nor consistent with due process. *See id.*; Pls.' Summ. J. Mem., ECF No. 207 at 11, 17, 18. It further increases the likelihood of error in Defendants' final determinations.

According to Defendants, the fact that Mr. Knaeble's response included "general denials and explanations that in fact go to the reasons for the No Fly List determination" demonstrates the adequacy of Defendants' disclosures. Defs.' Knaeble Mem., ECF No. 246 at 5. But again, even if Mr. Knaeble is correct about his *guesses* as to some of the government's reasons and evidence, the very fact that Mr. Knaeble has to *guess* means Defendants' process is fundamentally inadequate. And just as the government is relying on reasons not disclosed to Mr. Knaeble, it presumably is relying on evidence not referred to in the single sentence provided to him. Thus, Mr. Knaeble is not "conceiv[ing] of additional disclosures," Defs.' Knaeble Mem., ECF No. 246 at 7, but rather seeking access to the information, government reports, or accounts of his various

interactions with government agents on which Defendants plainly rely in making predictive judgments about his future conduct—predictive judgments that Mr. Knaeble disputes. Mr. Knaeble can no more meaningfully contest secret evidence than he can contest undisclosed reasons. *See* Pls.' Mem., Section II.C.1-2; Pls.' Summ. J. Mem., ECF No. 207 at 15-19.

As Plaintiffs explain in their main brief, to the extent that Defendants seek to invoke any applicable privilege against disclosure of information to Mr. Knaeble, they must do so by reference to specific information and according to the procedures courts have devised for the adjudication of such privileges. Pls.' Opp. Mem., Sections II.B, II.C.2. Given the availability of strong protective measures, *id.*; *Latif v. Holder*, 686 F.3d 1122, 1130 9th Cir. 2012 (suggesting use of Classified Information Procedures Act on remand), the Court must not deny Mr. Knaeble additional process on the ground that the government's interest in secrecy forecloses it.

Due process also requires that Mr. Knaeble receive a live hearing before a neutral decision-maker. The fundamental dispute in Mr. Knaeble's case turns at least in part on his credibility, which cannot be assessed solely on paper. *See* Pls.' Opp. Mem., Section II.D. The TSA Administrator plainly made an adverse credibility finding when he stated that he considered Mr. Knaeble's responses but concluded that the "information available" nonetheless supported Mr. Knaeble's placement on the No Fly List. *See* Knaeble Determination Letter, ECF Nos. 186, Ex. C at 2. Similarly, Defendants' conclusory statement that the government's "concerns" [redacted] betray their refusal to credit Mr. Knaeble's responses to those allegations. These determinations—assessments of Mr. Knaeble's credibilty—cannot validly be made absent a live hearing, nor can the hearsay testimony of government witnesses be accepted wholesale without the opportunity for confrontation and cross-examination. *See* Pls.' Summ. J. Mem., ECF No. 207 at 28-31.

Nor can Defendants realistically assert that the revised redress process provides Mr. Knaeble with a neutral decision-maker. Indeed, Defendants state that "there is no reason to believe that [Mr. Knaeble's] testimony would alter the Government's reasonable suspicion that he poses a threat"—a statement that reflects the bias and futility that is built into the revised redress process. *See* Defs.' Knaeble Mem., ECF No. 246 at 11. Mr. Knaeble's ability to submit statements through the DHS TRIP process is not an adequate substitute for a hearing at which his credibility, and that of the government's evidence and witnesses, can be assessed by a neutral decision-maker.

Defendants' refusal to provide these necessary procedural safeguards to Mr. Knaeble violates his due process rights.

III. Defendants Overstate the Government's Interests.

Defendants emphasize the weight of their aviation and national security interests without accounting for the additional, rigorous protocols for heightened screening and other security options that the Court has recognized are at Defendants' disposal, and that would mitigate Defendants' concerns with respect to Mr. Knaeble. *See* Pls.' Opp. Mem., Section IV. When faced with litigation at an earlier stage in this case concerning Plaintiffs trapped overseas as a result of placement on the No Fly List, Defendants put these procedures in place to permit Plaintiffs to fly home. *See* J. Status Rep. dated Sept. 23, 2010, ECF No. 28. Mr. Knaeble has stated that he is willing to undergo these additional measures, Knaeble Decl., ECF No. 91-6 ¶ 23, and Defendants do not explain why they are unwilling to provide these measures to him rather than imposing a complete flight ban.

IV. The No Fly List Criteria Are Unconstitutionally Vague.

The criterion that Defendants identified in their determination letter to Mr. Knaeble is unconstitutionally vague.[4] Because the criterion implicates all manner of First Amendment-

[4] The notification letter to Mr. Knaeble stated that "it has been determined that you pose a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland." J. Stmt., ECF No. 186 ¶ 4. The determination letter he received, however,

protected conduct, it must meet a heightened standard of clarity. *See* Pls.' Opp. Mem., Section V. The criterion cannot meet that standard. Defendants deemed Mr. Knaeble's alleged [redacted] [redacted]—conduct that, again, reflects no wrongdoing whatsoever—as sufficient of itself to meet first one, then another ill-defined criterion for placement on the No Fly List. Neither criterion provides any notice whatsoever of required or proscribed conduct, so Mr. Knaeble's alleged travel does not clearly fall within either criterion. Aside from the violent acts of terrorism that the criteria do not require—acts which, of course, Mr. Knaeble has never committed—the criteria lack any meaningful limitation. Moreover, the fact that Defendants used Mr. Knaeble's alleged conduct as the basis for making a "predictive judgment" about him only renders their application of the criteria more indeterminate and ambiguous. Neither of the criteria, and neither of the letters to Mr. Knaeble, explains how Defendants measured the "threat" that Mr. Knaeble allegedly poses, how much of a "threat" Mr. Knaeble had to "pose" in order to satisfy the criteria, or how his alleged travel demonstrates that he meets that threshold. Nor did the determination letter attempt to explain how or why Defendants determined that Mr. Knaeble is "operationally capable." *See* Knaeble Determination Letter, ECF No. 186, Ex. C at 2-3. The criterion is utterly and irretrievably vague.[5]

V. Defendants' Constitutional Violations Cannot Be Deemed Harmless.

Defendants' argument that the numerous deficiencies permeating their revised redress process are harmless is not properly before the Court at this stage in Mr. Knaeble's case, and even if it were, the prejudice to Mr. Knaeble from Defendants' constitutional violations is clear

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altered the criterion Defendants applied to him without explanation, stating that he "is properly placed on the No Fly List because he is an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing do." *Id.* ¶ 18; Knaeble Determination Letter, ECF No. 186, Ex. C at 3.

[5] It is telling that, while Defendants argue as to other Plaintiffs that "[a] reasonable person in [the Plaintiff's] position would know that the conduct described both satisfies the applicable criterion and is conduct that the Government would inherently consider in making No Fly determinations" *see, e.g.*, Defs.' Kashem Mem., ECF No. 242 at 11, they do not even attempt this dubious argument as to Mr. Knaeble, whose entire "notice" consists of a single line of hopelessly ambiguous text. *See* Defs.' Knaeble Mem., ECF No. 246 at 9-10.

and substantial. *See* Pls.' Opp. Mem., Section VI. Defendants' use of an unconstitutionally vague criterion and an unacceptably low evidentiary standard taints the entire redress process and places it beyond harmlessness analysis. Moreover, Defendants' refusal to provide Mr. Knaeble with adequate notice, evidence, and a live hearing deprives the Court of the very record material on which a determination of harmlessness could be made. *Id*. No basis exists for determining that adequate notice would not have altered the outcome. Likewise, the Court cannot conclude that Defendants' adverse credibility finding regarding Mr. Knaeble was harmless where Defendants have refused to permit live testimony, and it cannot conclude that sufficient evidence supports Defendants' listing determination when it does not know the strength of any exculpatory evidence that may be in Defendants' possession. *See id.*

In any event, Defendants' failure to provide constitutionally required process to Mr. Knaeble plainly harmed him. Defendants not only denied Mr. Knaeble the ability or opportunity to rebut reasons on which they relied in placing him on the No Fly List, but they also placed their own witnesses, evidence, and exculpatory information beyond his reach and rejected his proffered explanations summarily, without taking any testimony from him or other witnesses. Deficiencies as profound as these cannot be labeled harmless.

VI. Defendants' Revised Redress Process Violates the Administrative Procedure Act.

Mr. Knaeble should also prevail on both grounds of his APA claims, for the reasons set forth in Plaintiffs' consolidated memorandum. *See* Pls.' Opp. Mem., Section VII.

CONCLUSION

For the reasons set forth above and in Plaintiffs' consolidated briefing, Plaintiff Raymond Knaeble respectfully requests that the Court grant his motion for partial summary judgment, and deny Defendants' cross-motion for summary judgment.

Dated: August 7, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing response memorandum was delivered to all counsel of record via the Court's ECF notification system.

s/Hina Shamsi
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