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No-Fly List - The Ninth Circuit Misapplies Congressional Intent of 49 U.S.C. Sec. 46110, a Decision that Opens the Doors of District Courts to No-Fly List Challenges: *Ibrahim v. Department of Homeland Security*

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NO-FLY LIST—THE NINTH CIRCUIT MISAPPLIES CONGRESSIONAL INTENT OF 49 U.S.C. § 46110, A DECISION THAT OPENS THE DOORS OF DISTRICT COURTS TO NO-FLY LIST CHALLENGES: *IBRAHIM V. DEPARTMENT OF HOMELAND SECURITY*

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IN *IBRAHIM V. Department of Homeland Security*, the Ninth Circuit held, in part, that an alien passenger's claim seeking removal of her name from the government's No-Fly List was within the jurisdiction of the district court.[1] The court erred, however, because 49 U.S.C. § 46110 gives the U.S. Courts of Appeals exclusive jurisdiction to review orders of the Transportation Security Administration (TSA).[2] The majority was misguided in its

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[1] 538 F.3d 1250, 1255 (9th Cir. 2008).

[2] The relevant subsections of 49 U.S.C. § 46110 (2000) provide in pertinent part:

> (a) **Filing and Venue.**—Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection *(l)* or *(s)* of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.
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> . . . .
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> (c) **Authority of Court.**—When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the

logic that the district court retains jurisdiction simply because the names of individuals are not actually placed on the No-Fly List by the TSA, but by order of an agency not covered under 49 U.S.C. § 46110.[3] At the least, "Ibrahim's claims against the Terrorist Screening Center are 'inescapably intertwined' with an order of the [TSA] and are thus still subject to § 46110(a)."[4]

Rahinah Ibrahim, a foreign student at Stanford University, attempted to fly from San Francisco to her home country of Malaysia in January of 2005.[5] When a United Airlines employee discovered her name on the federal government's No-Fly List, she was refused boarding.[6] The United Airlines employee contacted the San Francisco Police who subsequently detained Ibrahim for several hours before releasing her and allowing her to fly home the following day.[7] Ibrahim, who has yet to return to the United States, brought an action seeking removal of her name from the government's No-Fly List in federal district court for the Northern District of California against a number of parties involved in the incident, including the Department of Homeland Security.[8] The district court dismissed Ibrahim's claims against several defendants holding that 49 U.S.C. § 46110(a) stripped it of the jurisdiction it would otherwise have had pursuant to 28 U.S.C. § 1331.[9]

The Department of Homeland Security was established following the events of September 11, 2001, to protect the United States against acts of terrorism.[10] Congress transferred the TSA and the head of that Administration, the Under Secretary of

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order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings.

[3] *See Ibrahim*, 538 F.3d at 1255.

[4] *Id.* at 1259 (Smith, J., dissenting).

[5] *Id.* at 1253 (majority opinion).

[6] *Id.* Individuals who have been identified by the TSA as posing a risk to air travel are placed on one of two lists. Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1121 (W.D. Wash. 2005). The first, the No-Fly List, is made up of individuals who are prohibited from flying. *Id.* The second, the Selectee List, consists of individuals who must undergo additional screening before boarding an aircraft. *Id.* The two lists may be collectively referred to as the "No-Fly List" in cases within this casenote.

[7] *Ibrahim*, 538 F.3d at 1253.

[8] *Id.* at 1253–54.

[9] *Id.* at 1254. *See* 28 U.S.C. § 1331 (2000) (stating that "district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States").

[10] 6 U.S.C. § 111 (2006); Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135.

Transportation for Security, from the Department of Transportation to the Department of Homeland Security.[11] Under the statutes of 49 U.S.C. §§ 114 and 44903, the legislature tasked the TSA with a number of duties, including the issuance of orders with respect to securing commercial air travel.[12] Congress provided an outlet for challenges to orders issued by the TSA when it drafted 49 U.S.C. § 46110.[13] Section 46110 directs that "a person disclosing a substantial interest in an order issued by [the TSA] . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia or in . . . the circuit in which the person resides . . . ."[14] The majority for the Ninth Circuit noted that "[t]he district court determined, based on undisputed facts," that the No-Fly List is compiled by an agency called the Terrorist Screening Center (TSC), which is actually part of the Federal Bureau of Investigation, not the TSA.[15] Thus, according to the majority, "[b]ecause putting Ibrahim's name on the No-Fly List was an 'order' of an agency *not* named in section 46110, the district court retains jurisdiction . . . ."[16]

Judge N. Randy Smith, in his dissent, disputed the majority's claim that placing Ibrahim's name on the No-Fly List was an order of the TSC and not the TSA.[17] He asserted that "Congress squarely delegated the responsibility for promulgating regulations and directives relating to the No-Fly List to the [TSA] in 49 U.S.C. §§ 114(h)(3) and 44903(j)."[18] Reading these statutes, it is easy to understand Judge Smith's argument. Section 14(h)(3), dealing with the management of security information, requires that the TSA work "in consultation with other appropriate Federal agencies and air carriers."[19] The section further requires the TSA "to use information from government agencies" to identify travelers who may pose a threat to national security, and to "prevent [those] individuals from boarding an aircraft."[20]

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[11] 6 U.S.C. § 203(2) (2006).

[12] *See generally* 49 U.S.C. §§ 114, 44903 (2000).

[13] *See id.* §§ 46110(a), (c) (granting U.S. Courts of Appeals exclusive jurisdiction to hear challenges to orders of the TSA).

[14] *Ibrahim*, 538 F.3d at 1260 (Smith, J., dissenting) (quoting 49 U.S.C. § 46110(a) (2000)).

[15] *Id.* at 1254–55 (majority opinion).

[16] *Id.* at 1255.

[17] *Id.* at 1259 (Smith, J., dissenting).

[18] *Id.*

[19] 49 U.S.C. § 114(h)(3) (2000).

[20] *Id.* §§ 114(h)(3)(A), (B).

Under section 44903(j)(2)(E)(iii) "[t]he Secretary of Homeland Security, in consultation with the [TSC], shall design and review, as necessary . . . the no fly and automatic selectee lists."[21] These statutes show Congress's intent of delegating the authority of implementing the No-Fly List to the TSA and the Department of Homeland Security under which the TSA operates, not the TSC.[22]

The Ninth Circuit, moreover, has held that special review statutes should be interpreted broadly.[23] Under 49 U.S.C. app. § 1486(a), a predecessor to 46110(a),[24] the Ninth Circuit followed the interpretations of the Fourth, Seventh, Eighth, and D.C. Circuits in holding that "[s]ection 1486(a) is not to be given a narrow, technical reading; instead, it is to be interpreted expansively."[25] Further, the Ninth Circuit agreed with the premise of those courts that "the purpose of special review statutes—coherence and economy—are best served if courts of appeal exercise their exclusive jurisdiction over *final agency actions.*"[26] Like the district court in *Ibrahim,* the district court for the Western District of Washington also followed this precedent in *Green v. Transportation Security Administration.*[27] The plaintiffs in *Green* claimed that they were innocent parties with no links to terrorism, but simply had the same names as parties on the No-Fly List.[28] The court explained that "to the extent . . . Security Directives establish a No-Fly List . . . this Court has no subject matter jurisdiction."[29]

Following the court's precedent, Judge Smith strengthened his argument that the creation of the No-Fly List is an "order" of the TSA.[30] In *Gilmore v. Gonzales,* the plaintiff alleged that the government's airline passenger identification policy requiring passengers to present identification before flying was unconsti-

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[21] *Id.* § 44903(j)(2)(E)(iii); *Ibrahim,* 538 F.3d at 1259–60 (Smith, J., dissenting).

[22] *Ibrahim,* 538 F.3d at 1259-60 (Smith, J., dissenting).

[23] *See, e.g.,* San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 968 (9th Cir. 1989); Sima Prods. Corp. v. McLucas, 612 F.2d 309, 313 (7th Cir. 1980); *see also* 49 U.S.C. § 1153(b)(1) (2000) (revising 49 U.S.C. app. § 1486(a)).

[24] City of Los Angeles v. FAA, 239 F.3d 1033, 1036 (9th Cir. 2001).

[25] *San Diego Air Sports Ctr., Inc.,* 887 F.2d at 968.

[26] *Id.* (quoting *Sima Prods. Corp.,* 612 F.2d at 313).

[27] 351 F. Supp. 2d 1119, 1125 (W.D. Wash. 2005).

[28] *Id.* at 1122.

[29] *Id.* at 1125.

[30] *See* Ibrahim v. Dep't of Homeland Sec., 538 F.3d 1250, 1260 (Smith, J., dissenting).

tutional.[31] The court ruled that a TSA Security Directive is a final order under the meaning of § 46110(a) if it (1) "imposes an obligation," (2) "provides a definitive statement of the [TSA's] position," (3) "has a direct and immediate effect" on a party, and (4) "envisions immediate compliance."[32] The court held that the security directive in question was an order of the TSA because Gilmore had an obligation to present identification, the directive clearly detailed the TSA's position, there was a direct and immediate effect on Gilmore for refusing to comply with the policy, and the directive envisioned immediate compliance.[33] Judge Smith explained that "[i]n light of the [applicable] statutory language" and the court's "decisions construing the term 'order,'" Ibrahim's claims against the TSC "constitute a challenge to an order of the [TSA]" and are thus subject to exclusive appellate review.[34]

Judge Smith further attacked the majority's reasoning by explaining that Ibrahim's claims were also subject to § 46110 because her claims against the TSC were "inescapably intertwined with an order of the [TSA]."[35] Two cases before the Ninth Circuit, *Mace v. Skinner* and *Gilmore*, established the idea that claims against one agency can be "inescapably intertwined" with claims subject to § 46110.[36] In *Mace*, the court held that the district court's dismissal of plaintiff's "broad constitutional challenge to the FAA's power to revoke his mechanic's certificate" was in error.[37] Further, the Ninth Circuit held that "the district court erred by dismissing the claims because they were not 'inescapably intertwined' with an order that was subject to exclusive appellate review under the precursor statute to § 46110(a)."[38] In *Gilmore*, the court held that "Gilmore's due process vagueness challenge [was] 'inescapably intertwined' with a review of the order because it squarely attack[ed] the orders issued by the TSA with respect to airport security."[39]

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[31] 435 F.3d 1125, 1129 (9th Cir. 2006).

[32] *Id.* at 1132 (internal quotations omitted).

[33] *See id.* at 1133.

[34] *Ibrahim*, 538 F.3d at 1260 (Smith, J., dissenting).

[35] *Id.* at 1259.

[36] *Gilmore*, 435 F.3d at 1133 n.9; Mace v. Skinner, 34 F.3d 854, 860 (9th Cir. 1994).

[37] *Ibrahim*, 538 F.3d at 1260 (Smith, J., dissenting) (citing *Mace*, 34 F.3d at 858–60).

[38] *Id.* (citing *Mace*, 34 F.3d at 858).

[39] *Gilmore*, 435 F.3d at 1133 n.9; *see also Ibrahim*, 538 F.3d at 1260 (Smith, J., dissenting).

The majority in *Ibrahim* seemed to collectively ignore its own precedent by dismissing the notion that an order of one agency may be "inescapably intertwined" with the statutory requirements of another agency. The government argued that though the decision to put Ibrahim's name on the No-Fly List was not made by the TSA, it was still subject to § 46110 because it was "inescapably intertwined" with an order issued by the TSA.[40] The majority disregarded its precedent in an almost patronizing response to the government's argument, stating that while "the statute provides jurisdiction to review an 'order'—it says nothing about 'intertwining,' escapable or otherwise."[41] Those remarks would have been better placed in *Mace*, prior to the court's adoption of such a standard.[42] The court made no statement that would give the impression that it was reversing its position on orders being "inescapably intertwined."

Judge Smith argued in his dissent that the majority's attempts to distinguish its precedent case of *Gilmore*, were merely "distinctions without difference."[43] He noted that the majority argues *Gilmore* "(1) involved a claim against the [TSA] instead of the [TSC], as is the case here; and (2) did not decide whether the No-Fly List constitutes an order."[44] The Congressional directive set forth in § 46110(a), Judge Smith argued, is what matters, not whether *Gilmore* decided if the No-Fly list was an order of the TSA.[45] Judge Smith underscored the premise that "the [TSA] is charged with developing—in consultation with the [TSC]—the 'necessary, [sic] guidelines, policies, and operating procedures for . . . the no fly and automatic selectee lists."[46] Judge Smith was far more sound in his reasoning than the majority in recognizing that because of the holdings of the Ninth Circuit in *Mace* and *Gilmore*, "district courts lack jurisdiction to consider claims that are 'inescapably intertwined' with orders of the [TSA] . . . ."[47]

It is difficult to decipher where the tipping point lies in the eyes of the Ninth Circuit. If the district courts follow the reasoning in *Gilmore*, a plaintiff who claims he should not have to pre-

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[40] *Ibrahim*, 538 F.3d at 1255 (majority opinion).

[41] *Id.*

[42] *See Mace*, 34 F.3d at 858.

[43] *Ibrahim*, 538 F.3d at 1261 (Smith, J., dissenting).

[44] *Id.*

[45] *Id.*

[46] *Id.* (quoting 49 U.S.C § 44903(j)(2)(E)(iii) (2000)).

[47] *Id.*

sent identification prior to boarding a commercial aircraft is directly challenging an order of the TSA.[48] However, if the district courts are presented with a scenario as in *Ibrahim*, where a plaintiff did present identification and that identification was subsequently compared to names on the government's No-Fly List, the plaintiff need simply challenge the fact that his name is on the No-Fly List to be within the district court's jurisdiction.[49] This, the Ninth Circuit claims, is not a challenge of a TSA order.[50] Yes, the TSA is required by statute to take measures to secure commercial air travel against the threat of terrorism including establishing, maintaining, and updating the No-Fly List.[51] And yes, the TSA works in consultation with other federal agencies to produce the No-Fly List as they are further required by statute to do.[52] But because another federal agency (the TSC) maintains the database from which the No-Fly List is created, the Ninth Circuit feels that the congressional intent of § 46110, giving the federal appellate courts exclusive jurisdiction to hear challenges to orders of the TSA, does not apply.[53] Moreover, the majority fails to address here the precedent set in *Gilmore*, that a challenge may be "inescapably intertwined" with an order of the TSA if "it squarely attacks the orders issued by the TSA with respect to airport security."[54]

Moving forward, the Ninth Circuit's decision in *Ibrahim* will have undesired effects on the implementation and use of the No-Fly List, as well as judicial challenges of the list. There are several roads that may develop as a result of the Ninth Circuit's decision. First, and probably the foremost undesired effect will be the increase of challenges to the No-Fly List within the district courts. Following this decision, anyone who resides or has his principal place of business within the jurisdiction of the Ninth Circuit may challenge the placement of his name on the government's No-Fly List by bringing a claim in U.S. District Court. Second, the TSA will likely seek to more plainly assert that names are placed on the No-Fly List as a result of an order of its agency. It is safe to assume that the statutory requirement that the TSA work in consultation with other agencies, including

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[48] *See* Gilmore v. Gonzales, 435 F.3d 1125, 1133 (9th Cir. 2006).

[49] *See Ibrahim*, 538 F.3d at 1256.

[50] *Id.*

[51] *See* 49 U.S.C. §§ 114(h)(3), 44903(j)(2)(E)(iii) (2000).

[52] *See id.* § 114(h)(3).

[53] *See Ibrahim*, 538 F.3d at 1256 n.8.

[54] Gilmore v. Gonzales, 435 F.3d 1125, 1133 n.9 (9th Cir. 2006).

the TSC, to develop and maintain the No-Fly List, was enacted to promote the sharing of intelligence in addition to efficiency within the federal government. If the TSA moves to establish a separate No-Fly List within its agency in the hopes of avoiding challenges at the district court level, these legislative intentions will be lost. Finally, this decision invites further legislation to clarify the congressional intent of § 46110. Perhaps only with additional legislative clarity can mix-ups like those displayed in the decisions of the Ninth Circuit be avoided.