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Air Travel and the No Fly List - The District of Oregon Recognizes a Constitutional Right to Fly

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AIR TRAVEL AND THE NO FLY LIST—THE DISTRICT OF OREGON RECOGNIZES A CONSTITUTIONAL RIGHT TO FLY

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IN *LATIF V. HOLDER*, the U.S. District Court for the District of Oregon held that a group of U.S. citizens and legal permanent residents had a constitutionally protected right to international air travel that was affected by the group's placement on the Terrorist Screening Center's (TSC) "No Fly List."[1] Although many previous courts have affirmed a right to travel, this landmark case marks the first time a federal court has explicitly recognized a constitutional right to *fly*.[2] At a time when traveling internationally by means other than flying is impractical, either because it is too costly or too time-consuming, the court correctly held that Americans have a constitutionally protected right to fly.[3] However, the court incorrectly deferred ruling on whether the judicial review process available to the plaintiffs to challenge their continued inclusion on the No Fly List constituted adequate due process.[4] The court should have found that the government's procedures violated the plaintiffs' Fifth Amendment right to due process because (1) there was sufficient information on the record to find that the judicial review

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[1] Latif v. Holder, No. 3:10-CV-00750-BR, 2013 WL 4592515, at *2–3, *9 (D. Or. Aug. 28, 2013).

[2] *See Id.* at *7, *9. *But see* Gilmore v. Gonzales, 435 F.3d 1125, 1136 (9th Cir. 2006) ("[T]he Constitution does not guarantee the right to travel by any particular form of transportation."); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012) ("The right to travel here and abroad is an important constitutional right. . . . [However,] the Constitution does not ordinarily guarantee the right to travel by any particular form of transportation . . . .").

[3] *See Latif*, 2013 WL 4592515, at *3, *9.

[4] *See id.* at *3, *13–14.

process had a high risk of error, and (2) the government could provide the plaintiffs constitutionally adequate notice without jeopardizing its interest in maintaining national security.[5] Nonetheless, this noteworthy decision, which effectively affords citizens prohibited from flying overseas the right to due process,[6] will likely have a substantial impact on future cases involving challenges to the No Fly List and the Transportation Security Administration's (TSA) screening measures.

The TSC, managed by the Federal Bureau of Investigation (FBI), maintains a Terrorist Screening Database (Database), of which the No Fly List is a subsection.[7] Individuals are nominated to the No Fly List on the basis of a "'reasonable suspicion' that the individuals are known or suspected terrorists."[8] The TSC never releases the criteria or guidelines used for placing individuals on the list.[9] The TSC then furnishes the No Fly List to the TSA for use in its screening of airplane passengers.[10] People seeking redress for any screening issues experienced at an airport must use the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) by submitting an inquiry form detailing their complaints.[11] If the traveler matches an identity in the Database, DHS TRIP forwards the complaint to the TSC to determine whether the traveler should remain in the Database.[12] After the TSC's determination is made, DHS TRIP sends a determination letter to the complainant; however, the letter does not confirm whether the complainant is even on the No Fly List, give any explanation as to why the complainant may be on the list, or provide any assurance that the complainant may fly again in the future.[13] Occasionally, the determination letter directs the complainant to seek administrative appeal with the TSA or judicial review in a federal court of appeals, but the

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[5] *See id.* at *10–13; *see* Amended Memorandum of Points & Authorities in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment at *19, *24–30, *Latif*, 2013 WL 4592515 (No. 3:10-CV-00750-BR) [hereinafter Plaintiffs' Memo]; Brief of Amicus Curiae the Constitution Project in Support of Plaintiffs' Cross-Motion for Partial Summary Judgment at *10–17, *Latif*, 2013 WL 4592515 (No. 3:10-CV-00750-BR) [hereinafter Amicus Brief].

[6] *See Latif*, 2013 WL 4592515.

[7] *Id.* at *2.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at *1, *2.

[12] *Id.* at *2.

[13] *Id.* at *3.

traveler is never afforded an opportunity to challenge or correct any criteria upon which the TSC's determination is made.[14]

The plaintiffs, thirteen U.S. citizens and permanent residents, including four veterans, were prohibited from boarding flights to or from the United States or over U.S. air space after January 1, 2009.[15] Some were actually notified of their placement on the TSC's No Fly List while others were not.[16] Each plaintiff, however, unsuccessfully contested his or her placement on the list through the DHS TRIP process.[17] Because of their inclusion on the No Fly List, many of the plaintiffs have been unable to visit family, including wives and children; take religious pilgrimages; attend school; or pursue business opportunities overseas without the risk of being detained and interrogated by authorities.[18]

After failing to remove themselves from the list and receiving no explanation as to why they were prohibited from flying, the plaintiffs brought this action against the Director of the FBI, the Director of the TSC, and the U.S. Attorney General.[19] The plaintiffs alleged that the defendants violated their right to procedural due process by failing to give them post-deprivation notice or any significant opportunity to challenge their placement on the No Fly List.[20] The plaintiffs sought a declaratory judgment that the defendants' practices violate the Fifth Amendment; they also requested

> an injunction requiring [the d]efendants (1) to remedy such violations, including removal of [p]laintiffs' names from any watch list or database that prevents them from flying; (2) to provide [p]laintiffs with notice of the reasons and bases for [their] inclusion on the No Fly List; and (3) to provide [p]laintiffs with the opportunity to contest such inclusion.[21]

The plaintiffs first filed the action in 2010, and, on May 3, 2011, the court "issued an [o]rder granting [the d]efendants' [m]otion to [d]ismiss for failure to join the [TSA] as an indispensable party and for lack of subject-matter jurisdiction" under a federal statute.[22] The Ninth Circuit reversed, holding that the

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[14] *Id.*
[15] *Id.* at *1–6.
[16] *Id.* at *3.
[17] *See id.*
[18] *Id.* at *3–6.
[19] *Id.* at *1–3.
[20] *Id.* at *1.
[21] *Id.*
[22] *Id.* at *2.

TSA could be added as an indispensable party and that the district court had original jurisdiction over the plaintiffs' claims.[23] The case was then remanded back to the district court.[24] The parties subsequently filed cross-motions for partial summary judgment.[25] On remand, the district court granted in part the plaintiffs' motion for summary judgment by holding that the plaintiffs had "constitutionally-protected interests both in international air travel and reputation" that were affected by their inclusion on a list of suspected terrorists, as was required for their procedural due process claim.[26] The court, however, deferred ruling on the remaining parts of the cross-motions because it was unable to resolve: (1) whether the DHS TRIP process creates a risk of erroneous deprivation of the plaintiffs' liberty interests based on the current record; or (2) "whether the judicial-review process is a sufficient, post[-]deprivation process under the United States Constitution."[27]

The court made the correct decision in holding that the plaintiffs had a constitutionally protected right to international air travel, but it incorrectly stopped short when it deferred ruling on the most important issue—whether the defendants actually violated the plaintiffs' Fifth Amendment right to due process.[28] The court should have granted the declaratory judgment and the injunction the plaintiffs so desperately sought because there was, in fact, sufficient information on the record to find that (1) the DHS TRIP created a risk of erroneous deprivation of a personal liberty, and (2) the judicial review recourse was an insufficient post-deprivation process.[29]

To determine whether the government accorded to the plaintiffs adequate due process, the court applied the three-factor balancing test established in *Mathews v. Eldridge* and balanced[30]:

(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]

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at *6–7, *10, *14.
[27] *Id.* at *10–13, *14.
[28] *See id.* at *10–14.
[29] *See id.*
[30] *Id.* at *6–14.

(3) the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[31]

The court found that the first factor of the *Mathews* test was satisfied because the plaintiffs had "constitutionally-protected liberty interests both in international air travel and reputation"; these interests were affected by the TSC's addition of the plaintiffs' names to the No Fly List, which constituted an official action.[32] In finding that the plaintiffs had a constitutional right to fly internationally,[33] the court broadened the fifty-five-year-old precedent established in *Kent v. Dulles*,[34] in which the right to travel was first recognized.[35] The court further found that under the "stigma-plus doctrine," the plaintiffs had a "constitutionally-protected liberty interest" in their "good name, reputation, honor, [and] integrity," which were stigmatized by their inclusion on a list of suspected terrorists.[36] The court recognized, rightfully so, that in the modern world, traveling internationally by way of flight is no longer a "mere convenience" but rather a necessity.[37] This expansion of precedent is especially meaningful considering the realities of our world today—namely the increased popularity of foreign travel and surge in international business—and the evolving views among courts regarding the importance of air travel.[38]

The establishment of a constitutional right to fly was, however, not a sufficient ruling for the plaintiffs. The court deferred ruling on whether the judicial review process of the DHS TRIP provided the plaintiffs with adequate due process and thus failed to provide the plaintiffs relief.[39] The court was wrong to defer ruling on this issue because there was indeed sufficient information to determine that the defendants violated the plain-

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[31] *Id.* at *6–7 (citing Mathews v. Eldrige, 424 U.S. 319, 335 (1976)).

[32] *Id.* at *7–10.

[33] *Id.* at *10.

[34] 357 U.S. 116 (1958).

[35] *See id.* at 124–26; *see Latif*, 2013 WL 4592515, at *7.

[36] *Latif*, 2013 WL 4592515, at *9–10.

[37] *See id.* at *8.

[38] *See id.* ("[T]he Court disagrees with Defendants' contention that international air travel is a mere convenience in light of the realities of our modern world."); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012) ("[T]he fact remains that for *international* travel, air transport in these modern times is practically the only form of transporation, travel by ship being prohibitively expensive . . . .").

[39] *Latif*, 2013 WL 4592515, at *6, *13–14.

tiffs' right to due process.[40] First, the DHS TRIP, including the available judicial review recourse, fails to provide the plaintiffs sufficient notice and a "meaningful opportunity to be heard."[41] Second, requiring the government to provide a hearing and constitutionally adequate notice would not endanger national security.[42] Although the court correctly found that the DHS TRIP process—through the determination-letter step—failed to provide the plaintiffs with a hearing or post-deprivation notice, it declined to analyze whether the availability of judicial review was sufficient due process because "the current record in [the] case [was] not sufficiently developed."[43] The court failed to recognize that the record *was* sufficient enough to find that the judicial appeal process, just like the DHS TRIP, fails to provide post-deprivation notice and also fails to avoid the risk of erroneous deprivation of a private interest.[44]

Adequate notice and a hearing are the two key requirements of the Fifth Amendment right to procedural due process.[45] Yet, without first being sufficiently notified, parties cannot enjoy their right to be heard.[46] "Notice is insufficient when an individual does not have adequate information and an opportunity to correct any errors that may have led to the deprivation."[47] A person challenging his placement on the No Fly List via DHS TRIP is *never* informed of the reasons for being included on the list, or if he or she is even on the list at all.[48] Therefore, although a judicial review of the TSC's determination may provide a person with an opportunity to be heard, it does not provide sufficient notice. Moreover, because the government refuses, as a matter of national security, to provide claimants with any explanation

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[40] *See* Plaintiffs' Memo, *supra* note 5, at *8–10.

[41] *Id.* at *19.

[42] *Id.* at *26–30.

[43] *See Latif*, 2013 WL 4592515, at *13.

[44] *See id.* at *12 ("[B]ecause of the lack of information contained in the DHS TRIP determination letters, [plaintiffs] 'do not know what to appeal, whether to appeal, or how best to advocate for themselves on appeal.'" (quoting Plaintiffs' Memo, *supra* note 5, at *21 n.33)).

[45] *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("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.'" (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863))).

[46] *Id.*

[47] *Latif*, 2013 WL 4592515, at *10.

[48] *Id.* at *11.

for their inclusion on the No Fly List,[49] the judicial review process creates a risk that claimants' liberty interest in international flight will be erroneously deprived.[50] Failing to provide adequate notice creates a high risk of "erroneous deprivation" because it "force[s] people to 'guess[ ] what evidence' they should submit in their defense, driving them to 'respond[ ] to every possible argument against denial at the risk of missing the critical one altogether.'"[51] Even during the judicial review process here, the government failed to provide the plaintiffs with any notice concerning the reasons for prohibiting them from flying or whether they were even on the No Fly List to begin with; therefore, there was sufficient information on the record to find that the judicial review process fails to satisfy the requirements of due process.[52]

In addition to creating a high risk of error in the judicial review process, the defendants also failed to provide the plaintiffs with adequate due process because the government can provide claimants with post-deprivation notice of the reasons for their inclusion on the No Fly List without burdening the government's national security interest.[53] The third factor of the *Mathews* test "requires the [c]ourt to weigh the government's interest, 'including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'"[54] Here, the defendants argued that the current redress procedure under DHS TRIP, including the availability of recourse to appellate courts, is constitutionally sufficient in light of the government's interest in "maximiz[ing] the nation's security, without fear that such information will be disclosed whenever anyone cannot travel as he or she might choose."[55] Instead of evaluating the defendants' illogical argument, the court deferred ruling on it because the court allegedly did not have sufficient information to assess the second factor of the *Mathews* test—the risk of erroneous deprivation—and therefore could not "weigh the government's interests against the current review process . . . available to [the p]laintiffs . . . to

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[49] *See id.*

[50] *See id.*; Plaintiffs' Memo, *supra* note 5, at *24–26.

[51] Plaintiffs' Memo, *supra* note 5, at *24 (quoting Barnes v. Healy, 980 F.2d 572, 579 (9th Cir. 1992)).

[52] *See Latif*, 2013 WL 4592515, at *11.

[53] *See* Plaintiffs' Memo, *supra* note 5, at *26–30; Amicus Brief, *supra* note 5, at *13–17.

[54] *Latif*, 2013 WL 4592515, at *13 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[55] *Id.*

determine whether additional or alternative procedural requirements [were] necessary or possible."[56]

However, the court had sufficient information on the record to assess both the second and third *Mathews* factors and find that the government can safely provide the plaintiffs with post-deprivation notice and a hearing without jeopardizing national security.[57] The Constitution Project, acting as amicus curiae for the plaintiffs, refuted the defendants' national security concerns with well-founded arguments.[58] For instance, providing the plaintiffs with the reasons underlying their placement on the No Fly List would not help possible terrorists avoid detection because these plaintiffs have been alerted to the fact that they were already under government watch when they were stopped by airport security, prohibited from boarding, and possibly interrogated by FBI agents.[59] Additionally, in *Rahman v. Chertoff*,[60] the court rejected a similar argument made by the TSC that telling a claimant he or she is *not* on the list would encourage the claimant to engage in terrorist activity.[61] The court found that, in reality, just the opposite would be encouraged because when claimants are surrounded by TSA agents at the airport and prevented from boarding their flights, they are made aware that they are under the watchful eye of law enforcement.[62] Finally, the nation's courts frequently adjudicate matters involving sensitive information without endangering national security, including Guantanamo Bay habeas cases and cases involving the Freedom of Information Act.[63] The government can safely accord to the plaintiffs and all citizens the necessary notice needed to contest their placement on the No Fly List, and federal courts can confidently provide a hearing to rule on issues involving sensitive information without endangering our country's security by using techniques to safeguard the information, including protective orders and in camera proceedings.[64]

The U.S. District Court for the District of Oregon correctly held that the plaintiffs had a liberty interest in flying, which was

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[56] *Id.* at *6–7, *13.

[57] Amicus Brief, *supra* note 5, at *13–27.

[58] *See id.* at *12–27.

[59] *Id.* at *13–14; *see Latif*, 2013 WL 4592515, at *3–6.

[60] No. 05 C 3761, 2008 WL 4534407 (N.D. Ill. Apr. 16, 2008), *rev'd on other grounds*, 530 F.3d 622 (7th Cir. 2008).

[61] *Id.* at *6; Amicus Brief, *supra* note 5, at *14–16.

[62] *See Rahman*, 2008 WL 4534407, at *6; Amicus Brief, *supra* note 5, at *15–16.

[63] Amicus Brief, *supra* note 5, at *18.

[64] *See id.* at *19–20.

affected by official action, but the court incorrectly declined to rule on whether the defendants violated the plaintiffs' due process rights. By failing to hold the government accountable for depriving the plaintiffs of their constitutional right to due process, the court not only increased the risk that innocent people will suffer reputational harm and be prohibited from flying, but also condoned the government's wrongful infringement of its citizens' liberties—a behavior the Founding Fathers strived to eliminate in drafting the Due Process Clause of the Fifth Amendment.[65] Nonetheless, the court's recognition of a constitutional right to fly will undoubtedly impact future cases. The court's establishment of a liberty interest in air travel represents a shifting attitude regarding the importance of the freedom to travel abroad. Despite the court's failure to provide the plaintiffs relief, this shifting attitude will certainly have an effect on the No Fly List, airport screening procedures, and other governmental measures that infringe upon citizens' right to travel internationally in the future.

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[65] *See* U.S. CONST. amend. V.


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