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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

| | |
|---|---|
| AYMAN LATIF, et al.,<br><br>*Plaintiffs*, | Case 3:10-cv-00750-BR |
| v.<br><br>ERIC H. HOLDER, JR., et al.,<br><br>*Defendants*. | PARTIES' JOINT STATUS REPORT |

## JOINT STATUS REPORT

On June 24, 2014, this Court held that "the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement on the No-Fly List violates Plaintiffs' rights to procedural due process." Order at 60 (Docket #136). On that basis, the Court denied Defendants' Motion for Partial Summary Judgment and granted Plaintiffs' Cross-Motion for Partial Summary judgment as to Plaintiffs' procedural due process claims under the Fifth Amendment and the Administrative Procedures Act. The Court concluded that "Defendants (and not the Court) must fashion new procedures," Order at 61, and directed the parties to confer and file a Joint Status Report with their respective proposals and schedules. The parties have met and conferred telephonically and hereby submit their separate proposals for proceeding in this matter.

## I. DEFENDANTS' PROPOSAL

Defendants submit that the appropriate way forward in this litigation in the absence of an immediate appeal is for the Court to allow Defendants a voluntary remand of Plaintiffs' individual claims for six months. During the next six months, Defendants intend to make

changes to the existing redress process regarding the No Fly List, in coordination with other agencies involved in aviation security screening, informed by the myriad legal and policy concerns that affect the Government's administration of the No Fly List and the redress process, and with full consideration of the Court's opinion.[1] In so doing, the Government will endeavor to increase transparency for certain individuals denied boarding who believe they are on the No Fly List and have submitted DHS TRIP inquiries, consistent with the protection of national security and national security information, as well as transportation security.[2] Once these new procedures have been developed, and also within the six months of the requested voluntary remand, Defendants intend to reopen and reconsider Plaintiffs' redress requests using the new process.[3] Should further litigation be necessary at the conclusion of those administrative proceedings, Defendants could then file a renewed dispositive motion on the basis of the application of these new procedures.

Plaintiffs' proposal for the Court to conduct further remedial proceedings is contrary to well-established law and to this Court's previous decision, committing these issues to the judgment of the Executive Branch. As the Court noted, Defendants are in the best position to consider and evaluate the benefits and costs of alternative or additional procedural safeguards and the interests of the Government in efficient adjudication, while giving due consideration to the national security implications of any new approaches to the administration of the No Fly List,

[1] Defendants have 60 days to decide whether to seek further review of the Court's June 24 order. No decision has been made yet. In the absence of an immediate appeal, a voluntary remand to Defendants is the most appropriate way to proceed.

[2] Among the issues that the agencies will consider is how broadly new procedures should be applied.

[3] Plaintiffs' substantive claims, which have been held thus far while the Court resolved the procedural questions, should also be remanded or continue to be held in abeyance. A remand for additional process could moot those claims with respect to some or all of the Plaintiffs, could affect the substantive basis for any placement decision made with respect to any Plaintiffs who are on the No Fly List, and would likely clarify any issues for review.

as well as any opportunities for Plaintiffs to respond. *See* June 24, 2014 Mem. Op. at 61 ("Although the Court holds Defendants must provide a new process that satisfies the constitutional requirements for due process, the Court concludes Defendants (and not the Court) must fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security.").[4] Neither the Court nor the Plaintiffs possess this perspective, and thus any new procedures should be crafted by Defendants in the first instance and tested administratively prior to any further litigation. Remand is consistent with settled principles of administrative law. *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985). Plaintiffs' ability to challenge the new process in court, should they wish to do so, will not be prejudiced. Plaintiffs' suggestion that the parties brief procedures that Defendants have neither devised nor applied puts the cart before the horse and would result in briefing that has little to no relation to the actual circumstances in this case.

Essentially, Plaintiffs are asking the Court to reconsider its view that the Defendants should fashion procedures in the first instance and decide precisely how the Government would apply these standards and oversee the administrative process as applied to Plaintiffs before the agencies have devised any revised procedures or applied them. Courts have routinely rejected this kind of judicial oversight in administrative process. *See generally Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985); *Dexter v. Colvin*, 731 F.3d 977 (9th Cir. 2013); *National*

[4] *See Rahman v. Chertoff*, 530 F. 3d 622, 627-28 (7th Cir. 2008) ("The problem (from plaintiffs' perspective) may be that Congress and the President worry at least as much about false negatives-that is, people who should be on a watch list but aren't-as about false positives (people who are on the list but shouldn't be, and people who aren't on the list but are mistaken for someone who is). Judges are good at dealing with false positives, because the victims come to court and narrate their grievances, but bad at dealing with false negatives, which are invisible. Any change that reduces the number of false positives on a terrorist watch list may well increase the number of false negatives. Political rather than judicial actors should determine the terms of trade between false positives and false negatives.").

*Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 209 (D.C. Cir. 2001). The Court declined to do this in its June 24 Order, and there is no reason for it to undertake such action now. Such concerns are heightened in the area of national security, where courts lack the expertise to make sensitive judgments about handling of classified information and prediction of future threats.[5]

In order to devise a revised process and to thereafter re-process the Plaintiffs' individual redress requests, Defendants need sufficient time to do so. As explained in Defendants' initial motion to dismiss, as well as in the stipulated facts and in this Court's opinion, the redress process for individuals denied boarding who believe they are on a No Fly List involves a number of different federal agencies, some of which are not defendants in this action. In addition, revising administrative procedures involves important legal and policy questions and requires coordination between Defendants and these other agencies. A minimum of six months would be appropriate to undertake these efforts. This timeframe reflects the need to consult with the affected agencies, to consider the important legal and policy questions presented, and to ensure that the work is done correctly and comprehensively, while also allowing sufficient time to apply any new procedures to Plaintiffs. Plaintiffs' characterization of undue delay is untrue and unfair; Defendants' voluntary remand is a significant undertaking by multiple Government agencies to rework the existing administrative scheme and apply it to Plaintiffs.[6] Defendants also propose to submit a status report to the Court and to Plaintiffs in three months with any information that can be provided at that time.

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[5] Moreover, Plaintiffs' proposal potentially embroils this Court directly in consideration of classified and otherwise sensitive information, raising significant questions of privilege that are unnecessary for the Court to decide. *See, e.g. Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).

[6] Plaintiffs' proposal that Defendants submit briefing on new procedures less than two weeks after the deadline for Defendants' decision on whether to seek further review of the Court's Order is particularly unreasonable and presents a timeframe ill-suited to such a significant task.

## II. PLAINTIFFS' PROPOSAL

To promote judicial economy and the timely resolution of Plaintiffs' constitutional claims, Plaintiffs propose that the parties expeditiously submit briefing to this Court on the new procedures the Court has ordered Defendants to fashion, in order to ensure that those procedures provide Plaintiffs with "the requisite due process." *See* Order at 61.

Still pending before this Court are Plaintiffs' substantive due process claims and their requests for declaratory and injunctive relief.[7] As the Court has recognized, "issues concerning the substance of any declaratory judgment and/or injunction remain for further development." Order at 5. Thus, the adequacy and timing of new procedures through which Plaintiffs may contest their placement on the No Fly List will inevitably come before the Court. Rather than deferring that adjudication (and further delaying the process due to Plaintiffs), the parties should address, and the Court should decide, the adequacy of Defendants' proposed procedures now. Doing so would allow the Court to adjudicate the remaining elements of Plaintiffs' claims and bring this matter to a definitive conclusion.

It bears emphasis that, as this Court has concluded,"[d]ue to the major burden imposed by inclusion on the No-Fly List, Plaintiffs have suffered significantly." Order at 30.[8] Plaintiffs

[7] Plaintiffs disagree with Defendants' assertion that they have 60 days to decide whether to seek further review of the Court's Order. Orders granting partial summary judgment are not, absent special circumstances, appealable final orders under 28 U.S.C. § 1291 because such orders—like this Court's Order—do not dispose of all claims and do not end the litigation on the merits. *Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir.1998). Defendants could have moved promptly to certify the Court's Order for interlocutory review but have not done so. In any event, the standard for interlocutory certification is high and, Plaintiffs submit, is unlikely to be met here. *See* 28 U.S.C. § 1292(b); *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) (Section 1292(b) "must be construed narrowly"); *United States v. Woodbury*, 263 F.2d 784, 788 n.11 (9th Cir. 1959) (statute should be "applied sparingly and only in exceptional cases").

[8] Other courts have made similar findings regarding the harsh consequences of inclusion on the No Fly List. *See, e.g., Gulet Mohamed v. Eric Holder, Jr., et al.*, No. 1:11-cv-50 (AJT/TRJ) (E.D. Va. Jan. 22, 2014) (finding that "[t]he impact on a citizen who cannot use a commercial aircraft is profound," and "placement on the No Fly List is life defining and life restricting across a range of constitutionally protected activities and aspirations; and a No Fly List designation transforms a person into a second class

continue to suffer the severe consequences of their inclusion on the No Fly List, over four years after they initiated this action. Further delay would only compound that injury. Plaintiffs continue to believe that this Court is best equipped to resolve Plaintiffs' claims arising out of their inclusion on the No Fly List.[9] Given the duration and severity of the restrictions on their liberty, Plaintiffs submit that they should be given constitutionally adequate notice and a meaningful opportunity to be heard promptly, and within the context of this litigation. [10]

Briefing on the new procedures—and the remedy now due—follows logically from the Court's Order: once it has been determined that the Due Process Clause applies and has been violated, "the question remains what process is due." *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493 (1985); *see also KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 643 (N.D. Ohio 2010) (following determination that government had violated charity's procedural due process rights, court requested additional briefing from parties on remedy). To that end, the parties should brief now—and the Court should decide—the procedures and standards that would satisfy the general requirements the Court set forth in its Order. Specifically, the parties' briefing should address:

- The constitutionality of the substantive criteria and evidentiary standards that formed the basis for Plaintiffs' inclusion on the No Fly List;

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citizen, or worse"); *Ibrahim v. Department of Homeland Security, et al.*, No. C06-0545-WHA (N.D. Cal. Jan. 14., 2014) (detailing the "litany of troubles" the plaintiff had endured because of her placement on the No Fly List).

[9]As the Ninth Circuit made clear in its jurisdictional ruling in this case, this Court has the authority to adjudicate the validity of Plaintiffs' placement on the No Fly List. *See Latif v. Holder*, 686 F.3d 1122, 1129–30 (9th Cir. 2012).

[10] On several occasions during the course of this litigation, Plaintiffs have urged that the due process inquiry should be bifurcated, and that the parties should have an opportunity to brief the issue of remedy if the Court finds a procedural due process violation. *See* Reply Mem. in Supp. of Pls.' Cross-Mot. for Part. Summ. J. (Docket #104) at 13; Pls.' Suppl. Mem. in Supp. of Cross-Mot. for Part. Summ. J. (Docket #121) at 7 n.2; Pls.' Suppl. Reply Mem. in Supp. of Cross-Mot. for Part. Summ. J. (Docket #124) at 8. Now that the first part of the inquiry is complete, and the Court has found a procedural due process violation, the inquiry should proceed to briefing on remedy.

- What information constitutes the constitutionally-sufficient notice that Defendants must provide to Plaintiffs to contest their placement on the No Fly List; and
- The standard and procedures for this Court's review of Plaintiffs' inclusion on the No Fly List.

Plaintiffs propose that the parties submit briefs to Court on the following schedule:

- Defendants' brief, describing their proposed procedures, to be submitted on or before September 5, 2014;
- Plaintiffs' Response to be submitted on or before September 19, 2014;
- any reply by Defendants to be submitted on or before September 26, 2014.

Thus, Plaintiffs' proposal takes into account the Court's ruling and gives it effect: Defendants would propose new procedures (including procedures related to the handling of sensitive or classified information, Order at 61-62); Plaintiffs would respond to those procedures; and, the court would adjudicate any disputes. Proceeding in this manner would serve Plaintiffs' interests in just and expeditious resolution of their claims without compromising the government's interest in protecting national security.

By contrast, Defendants' proposal would not promote prompt and efficient resolution of the claims before *this* Court. As a threshold matter, the Court has directed Defendants to fashion a process to remedy the harm Plaintiffs have suffered, but Defendants *still* have not done so and propose several more months' delay. The continued delay results in a continuing violation of Plaintiffs' rights to due process.

Although Defendants' proposal to fashion a new set of administrative procedures generally applicable to others on the No Fly List is both necessary and welcome, Defendants' plan for drawing up that procedure should not hinder the resolution of Plaintiffs' claims now. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2492 (2001) (holding that individual alien plaintiffs could bring habeas challenges to indefinite detention despite the government's

assertion that the Court should defer to executive branch rulemaking); *Ibrahim*, No. C06-0545-WHA (Jan. 14., 2014) (concluding that DHS TRIP is inadequate and setting forth the specific process due to the plaintiff). And for the reasons set forth above—the need for and ability of the Court to adjudicate Plaintiffs' claims that are before it—there is no need for Plaintiffs to go through another round of administrative review.

Moreover, Defendants' invocation of "settled principles of administrative law" is inapposite and unsupported by their case citations. Each of those cases involved review of adverse agency *action*. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (disapproval by Securities and Exchange Commission of regulated utility's reorganization plan); *Fla. Power & Light v. Lorion*, 470 U.S. 729 (1985) (denial by Nuclear Regulatory Commission of petition to suspend operating license); *Dexter v. Colvin*, 731 F.3d 977 (9th Cir. 2013) (denial by Social Security Administration of request for hearing on application for benefits); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) (designation of organizations by State Department as "foreign terrorist organizations"). This case is very different: it is a constitutional challenge to a set of agency *procedures*, which the Court has now concluded are "wholly ineffective." Order at 60. Defendants' theory may have been valid if they had won the jurisdictional arguments they made to the Ninth Circuit—but they did not. *See Latif*, 686 F.3d at 1130 (remanding Plaintiffs' constitutional procedural challenge "for such further proceedings as may be required to make an adequate record to support consideration of their claims"). There is no record of agency action before the Court, and thus no basis for the Court to remand this case for "additional investigation or explanation." *See Fla. Power & Light*, 470 U.S. at 744.

Finally and relatedly, Plaintiffs fear that leaving the adequacy of the procedures to Defendants will only result in additional delays and a continuation of the limbo in which

Plaintiffs have languished for years. Defendants' proposal that they be permitted to amend their constitutionally-deficient process in a manner that is as unilateral, one-sided, and non-participatory as the original process increases the likelihood that the new process will itself be subject to challenge, whether by Plaintiffs or others. Given the history of this litigation to date, it is critical that Defendants' proposed process with respect to Plaintiffs include input from Plaintiffs and direction from the Court, so as to satisfy the requirements set forth in the Order. Otherwise, it is virtually certain that six months from now, Plaintiffs will be in exactly the same position they are in today—before this Court, litigating the adequacy of the procedures Defendants devise.

Plaintiffs therefore respectfully request that the Court order the parties to submit briefing on the procedures Defendants propose—the logical and necessary next step in adjudicating Plaintiffs' claims.

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