

The Bigger No Fly List Problem

By Marqo Schlanger

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Yesterday, Judge Anna Brown issued her much-anticipated opinion in *Latif v. Holder*, in the U.S. District Court for the District of Oregon. As Jennifer Daskal explained in her excellent post from earlier today, *Latif* is a case brought by thirteen U.S. citizens and lawful permanent residents, each denied boarding on an international flight because they are (it seems) on the federal government's No Fly List. Judge Brown held that the redress procedures available to the plaintiffs violate the Due Process Clause. Inclusion on the No Fly List, the opinion explains, is a stigmatizing constraint on the plaintiffs' liberty interest in international travel. And the procedures—the DHS Travelers Redress Inquiry Program—failed to provide the plaintiffs a fair opportunity to contest the government's derogatory information against them.

There's no injunction—yet. The Court instructed the government to “fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security.” The opinion does offer some guidance: the government must provide information

“reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List. In addition, Defendants must include any responsive evidence that Plaintiffs submit in the record to be considered at both the administrative and judicial stages of review. . . . Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel.”

What about the possibility that disclosure undermines security? The Court allowed “the possibility that in some cases such disclosures may be limited or withheld altogether.” But only after “a determination on a case-by-case basis including consideration of, at a minimum . . . (1) the nature and extent of the classified information, (2) the nature and extent of the threat to national security, and (3) the possible avenues available to allow the Plaintiff to respond more effectively to the charges.” And any such decision “must be reviewable by the relevant court.”

As both Steve Vladeck and Jennifer noted, it's a really important decision. It will be challenging to implement: Presumably many of the hundreds of Americans on the No Fly List are there for good reasons. Telling them what those reasons are could disclose intelligence sources and methods. And letting them know what the government *doesn't* know might be even more damaging. On the other hand, Judge Brown is clearly correct that erroneous inclusion on the No Fly List is a really consequential deprivation.

But even carefully implemented (assuming the holding survives appeal), I think the opinion doesn't address the crucial injustice caused by the No Fly List. To my mind, the most important No Fly List problem is not procedural, it's substantive. That problem is that Americans—including those who meet the criteria for the No Fly List—should not be stranded abroad, rendered unable to come home by their government.

Start with Trop v. Dulles, the case best known for the Supreme Court's explanation that the Eighth Amendment's Cruel and Unusual Punishment Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." The *Trop* Court struck down a statute that stripped convicted deserters of their citizenship. Expatriation, the Court said, was unconstitutional; "[c]itizenship is not a license that expires upon misbehavior," Chief Justice Warren wrote in *Trop's* lead opinion.

"The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. . . . He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies."

The clear implication is that a citizen, unlike a non-citizen, is not susceptible to banishment—and that no matter how extensive the process afforded, it is unlawful to render a U.S. citizen thus susceptible, much less to actually carry through the

threat. To state the same point more doctrinally, if a particular consequence is disallowed under the Eighth Amendment's Cruel and Unusual Punishments Clause after criminal conviction, it follows *a fortiori* that the same consequence is constitutionally forbidden, as a matter of substantive due process, *without* the criminal conviction. That's why jail conditions are governed by much the same constitutional standards as prison conditions. (The Supreme Court has also noted citizens' "absolute right to enter [United States] borders.")

This issue was briefed in another No-Fly case, Mohamed v. Holder. The government there offered a wized interpretation of the citizen's right to re-enter the United States. "While United States citizens have a right to re-enter the country, citizens do not have a constitutional right to rearrive at a port of entry via a specific mode of transportation," the government argued:

"Denial of boarding on airplane does not constitute a denial of entry into the United States. Lawful entry of U.S. citizens into the United States does not occur until the individual citizen has presented himself or herself at a U.S. port of entry and been permitted to enter by U.S. Customs and Border Protection. *See* 8 C.F.R. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section.").

In a subsequent brief in the same case, the government recognized that that the regulation it cited was not the ultimate source of law in this area: "a citizen's ability to enter and reside in the United States has a constitutional dimension, [although] such a right is not explicitly delineated in the Constitution." Still, it persisted in arguing that the No Fly List does not implicate this right.

U.S. District Judge Anthony Trenga, of the Eastern District of Virginia, disagreed on the general point (though agreeing that Mohamed, the plaintiff, had not suffered a constitutional injury, because he'd been able to get home after a delay of just a few days):

“The Court concludes that a U.S. citizen’s right to reenter the United States entails more than simply the right to step over the border after having arrived there. . . . At some point, governmental actions taken to prevent or impede a citizen from reaching the boarder[sic] infringe upon the citizen’s right to reenter the United States.”

This, I think, is the vital point. And a process-based change to watchlisting procedures can’t meet the need. After all, there will be times when the federal government has a “reasonable articulable suspicion” that a U.S. citizen seeking to fly internationally into the U.S. is “known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism or terrorist activities.” Such suspects are appropriately included in the Terrorist Screening Database. If the would-be traveler also satisfies the criteria for inclusion in the No Fly List (whatever those secret criteria are), the federal government should take steps to protect aviation security—do a particularly thorough search, seat the traveler next to a Federal Air Marshal, whatever it takes. If those travelers are American citizens, they are entitled to come home.

Tags: [Guest Post](#), [Latif v. Holder](#), [No-Fly List](#)

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