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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,* v. ERIC H. HOLDER, JR., et al., *Defendants*.	Case No. 3:10-cv-00750-BR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF RAYMOND KNAEBLE'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

The revised redress process that Defendants applied to Plaintiff Raymond Knaeble is constitutionally deficient in fundamental ways. It denies Mr. Knaeble what this Court unambiguously required—adequate notice of the reasons for his placement on the No Fly List—along with highly relevant evidence in the government's possession, including his own statements and those of other witnesses, material evidence showing that he should *not* be on the List, and other evidence that must be available to ensure basic fairness. Defendants' revised process also entirely fails to provide Mr. Knaeble with an in-person hearing at which he could cross-examine witnesses and establish his credibility—an especially critical due process protection given the significant deprivation of liberty that resulted when Defendants placed him on the List. The risk of error in Defendants' revised redress process remains unacceptably high. Mr. Knaeble therefore renews his motion for partial summary judgment on his claims for violations of his procedural due process rights and the Administrative Procedure Act.

STATEMENT OF FACTS[1]

Defendants provided Mr. Knaeble with a DHS TRIP notification letter on November 24, 2014. J. Stmt. of Agreed Facts Relevant to Raymond Knaeble ("J. Stmt."), ECF No. 177 ¶ 2; ECF Nos. 177-1, 186, Ex. A. The letter informed Mr. Knaeble that he is on the No Fly List because he had been "identified as an individual who 'may be a threat to civil aviation or national security.'" J. Stmt., ECF No. 177 ¶ 3 (citing 49 U.S.C. § 114(h)(3)(A)). The letter further 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." *Id.* ¶ 4.

The notification letter purported to contain "an unclassified summary that includes reasons supporting" Defendants' placement of Mr. Knaeble on the No Fly List, J. Stmt., *id.* ¶ 5, but the reasons consisted of a single sentence regarding the government's "concerns" about Mr. Knaeble's travel to one country in a particular year. Notification Letter, ECF No. 186, Ex. A. It

[1] Mr. Knaeble incorporates and does not restate facts described in Plaintiffs' Combined Motion for Partial Summary Judgment except where necessary to provide context for his specific facts.

is undisputed that the letter did not disclose all of the reasons or information that Defendants relied upon in determining that Mr. Knaeble should remain on the List. J. Stmt., ECF No. 177 ¶ 6. It is also undisputed that the letter stated Defendants were "unable to provide additional disclosures," *id.* ¶ 7, and neither described the withheld evidence nor disclosed whether Defendants possess exculpatory information or material otherwise "contravening" his placement on the List. *Id.* ¶ 8. It is undisputed that the letter did not provide any prior statements allegedly made by Mr. Knaeble. *Id.* ¶ 9. Defendants did not provide any specific allegations whatsoever, let alone explain how the allegations in the letter satisfied Defendants' substantive criterion for placing Mr. Knaeble on the List. *See* Notification Letter, ECF Nos. 177-1, 186 Ex. A.

By letter dated December 5, 2014, counsel for Mr. Knaeble objected to the notification letters to all Plaintiffs as constitutionally inadequate and requested additional information and procedures, which Defendants refused to provide. Exhibits to J. Status Rep., ECF Nos. 167-1, 167-2.

Mr. Knaeble submitted a response to the notification letter on December 15, 2014. J. Stmt., ECF No. 177 ¶ 14; Response Letter, ECF Nos. 177-2, 186 Ex. B. The response repeated the objections to the adequacy of the disclosures and again requested additional information and procedural protections. *Id.* To the extent possible given the grossly incomplete notice, it also summarized Mr. Knaeble's anticipated testimony responding to the unspecified "concerns" identified in the letter. Response Letter, ECF No. 186, Ex. B at 5-6. It further stated that if called to testify at an evidentiary hearing, Mr. Knaeble would aver that he does not pose a threat of committing any violent criminal act, has no intention of engaging in, or providing support for, violent unlawful activity anywhere in the world, does not knowingly have ties to terrorist organizations or individual terrorists, does not advocate violence, and that his placement on the No Fly List was erroneous. Response Letter, ECF No. 177-2 at 5-7; *see also* Knaeble Decl., ECF No. 91-6 ¶ 23 ("I do not pose a threat to civil aviation or national security. I would be willing to undergo any suitable screening procedures in order to be permitted to board planes.").

The Acting TSA Administrator issued a final determination to Mr. Knaeble on January

21, 2015. J. Stmt., ECF No. 177 ¶ 15; DHS TRIP Determination Letter, ECF No. 177-3. The determination stated that the Administrator had considered Mr. Knaeble's response and "other information available" to him in concluding that Mr. Knaeble was "properly placed" on the No Fly List. Determination Letter, ECF Nos. 177-3 at 4. The final determination also changed the criterion applicable to Mr. Knaeble's placement, 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." J. Stmt., ECF No. 177 ¶ 18; Determination Letter, ECF No. 177-3 at 5. The Administrator stated that his explanations "do not constitute the entire basis of my decision, but I am unable to provide additional information" because, according to the Administrator, doing so would risk harm to national security and law enforcement activities. *See* Determination Letter, ECF No. 177-3 at 4-5. The Administrator provided no additional information on the basis for placing Mr. Knaeble on the No Fly List, nor did he provide any reasons for rejecting Mr. Knaeble's response. *See id.* At no point during the revised redress process was Mr. Knaeble given any opportunity to present live testimony or cross-examine witnesses at an in-person hearing. J. Stmt., ECF No. 177 ¶ 16.

ARGUMENT

I. Summary Judgment Standard

Rule 56 permits motions for partial summary judgment such as this one. *See* Fed. R. Civ. P. 56(a). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Mr. Knaeble hereby incorporates all of the arguments made in Plaintiffs' Combined Renewed Cross-Motion for Partial Summary Judgment ("Combined MPSJ"), and moves for summary judgment on the bases set forth therein.

II. Defendants' Revised Redress Process Violates Mr. Knaeble's Fifth Amendment Right to Procedural Due Process.

Mr. Knaeble renews his motion for partial summary judgment under the procedural

component of the Fifth Amendment's Due Process Clause. The hallmarks of due process are notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Defendants' revised redress process falls far short of what courts have required in contexts involving deprivations of comparable significance. *See* Combined MPSJ, Argument Section II.A. In denying Mr. Knaeble full notice of the allegations and evidence against him, a hearing before a neutral decision-maker, and an opportunity to cross-examine individuals with personal knowledge of the adverse evidence, the revised redress system affords less process than *any* system involving a significant liberty or even property interest. *See id.*

1. The revised redress process does not provide Mr. Knaeble adequate notice.

Adequate notice must "set forth the alleged misconduct with particularity," *In re Gault*, 387 U.S. 1, 33 (1967), and "permit adequate preparation for . . . an impending hearing." *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 14 (1978). Defendants' notice to Mr. Knaeble manifestly fails to meet these minimal due process requirements, making it virtually impossible for Mr. Knaeble to meaningfully respond to the allegations against him.

a. Defendants' failure to provide full notice of their reasons for placing Mr. Knaeble on the No Fly List violates due process.

Overwhelming authority, including in the national security context, establishes that constitutionally-sufficient notice must be complete and precise. *See* Combined MPSJ, Arg. Section II.B.1.

Here, Defendants did not provide Mr. Knaeble with *any* meaningful notice of the reasons for his inclusion on the No Fly List, let alone full notice consistent with due process. Defendants' cryptic, one-sentence disclosure regarding unspecified "concerns" is patently insufficient. It says nothing about the nature of those "concerns," why Mr. Knaeble's alleged travel prompted them, or how such concerns could possibly satisfy Defendants' criterion for placing Mr. Knaeble on the List. *See* Notification Letter, ECF No. 186, Ex. A. Both the notification letter and the final determination letter acknowledged that Defendants had withheld

part of the basis for their decision to place and keep him on the List for over five years, *see* ECF Nos. 177-1 at 1, 177-3 at 2, leaving Mr. Knaeble to simply guess at the allegations against him.

Mr. Knaeble cannot meaningfully respond to allegations that Defendants have kept from him—as he attempted to do in response to the entirely ambiguous single sentence provided by Defendants. For instance, Mr. Knaeble's response stated that, should he be allowed to testify at a hearing, he would explain that [redacted] Even though this response was necessarily constrained by the inadequacy of Defendants' notice and based on Mr. Knaeble's guesses as to Defendants' allegations, it is more than he can do provide in response to the other allegations against him—of which he is wholly unaware. Nor can he meaningfully challenge, and the Court adjudicate, assertions of privilege, as Defendants failed to specify grounds for withholding reasons for placing him on the List.

Defendants' refusal to provide Mr. Knaeble with a complete statement of reasons constitutes a clear violation of his due process rights.

b. Defendants' failure to disclose to Mr. Knaeble the evidence used against him violates due process.

When liberty or even property interests are at stake, the Supreme Court and the Ninth Circuit require the government to disclose the evidence that forms the basis for its allegations, including in matters involving national security. *See* Combined MPSJ, Arg. Section II.B.2.

Here, it is undisputed that the notification letter to Mr. Knaeble did not disclose *any* of Defendants' evidence against him. J. Stmt., ECF No. 177 ¶¶ 6-10. Indeed, the letter fails even to *refer* to evidence that would to support the government's "concerns" regarding Mr. Knaeble's travel or Defendants' placement of him on the No Fly List. Notification Letter, ECF Nos. 177-1,

186, Ex. A. Nor, obviously, did Defendants provide evidence related to the undisclosed reasons for placing him on the List. Mr. Knaeble therefore has no means to discern the sources of the allegations against him; discover or rebut misperception, error, or outright lies in the statements of any witnesses; inquire into their potential biases; or raise other evidentiary concerns. [redacted] Due process requires that Defendants provide the evidence, statements, recordings, and reports on which they rely in placing Mr. Knaeble on the No Fly List.

c. Defendants' failure to provide Mr. Knaeble with material and exculpatory evidence violates due process.

Due process has long required the government to disclose (1) evidence in its possession that undermines the government's case and is favorable to an accused, and (2) prior witness statements, so that the accused can explore inconsistencies or omissions in those statements. *See* Combined MPSJ, Arg. Section II.B.3.

It is undisputed that Defendants did not provide information in their possession that is exculpatory and "contravened" their basis for including Mr. Knaeble on the No Fly List, J. Stmt., ECF No. 177 ¶ 8—nor did they even identify material exculpatory information not reflected in the notification letter to Mr. Knaeble. Defendants refused to confirm or deny whether they possessed such information. *Id.* ¶ 10. Further, the absence of any reference to evidence in the letter makes it impossible for Mr. Knaeble to tell what material information they *might* possess. *See id.* ¶¶ 8-9; Notification Letter, ECF No. 186, Ex. A. Defendants' refusals violate elemental due process principles and increase the risk of error in their final determination as to Mr. Knaeble.

2. Defendants' impermissibly vague criteria do not give Mr. Knaeble fair notice of conduct that could lead to placement on the No Fly List.

The Due Process Clause requires that a statute or regulation give "fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, --- U.S. ---, 132 S. Ct. 2307, 2317 (2012). The No Fly List criterion Defendants applied to Mr. Knaeble fails to provide him with fair notice, for three reasons. First, it lacks a necessary nexus to aviation security—Defendants' ostensible purpose in maintaining the List. The notification letter identified one criterion for blacklisting Mr. Knaeble—"pos[ing] a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland"—but Defendants then applied the catchall criterion to Mr. Knaeble, determining that 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 so." *See* J. Comb. Stmt., ECF No. 173 ¶ 5; J. Stmt., ECF No. 177 ¶ 4, 18. Mr. Knaeble does not know why Defendants changed the criteria. In any event, notice of these criteria is not fair notice because both entail a significant penalty—inability to travel by air—that is unrelated to the "threat" Defendants think Mr. Knaeble "represents."

Second, the criterion ultimately applied to Mr. Knaeble is unconstitutionally vague on its face. *See* Combined MPSJ, Arg. Section II.C. Terms such as "represents" and "threat" are entirely ambiguous and encompass conduct that Mr. Knaeble could not have known would lead to placement on the List. Similarly, the vague, multi-pronged explanation in the government's Watchlisting Guidance of the phrase "operationally capable" appears to penalize individuals for their First Amendment-protected associations and incorporate innocent conduct such as travel. *See id.*; *cf.* Notification Letter, ECF No. 186, Ex. A (reasons for placing Mr. Knaeble on the List include alleged travel). In addition, the fact that the ill-defined conduct and unspecified "concerns" alleged in the notification letter were deemed to satisfy first one criterion and then another underscores the ambiguity and subjectivity inherent in those criteria.

The criterion is also unconstitutional as applied to Mr. Knaeble. The notification letter states that Mr. Knaeble was placed on the List because of alleged travel—conduct which itself is

innocent. *See* Notification Letter, ECF No. 186, Ex. A. [redacted] An elevated standard of clarity must apply because the criterion impinges on Mr. Knaeble's protected conduct. *See Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). The criterion plainly fails to provide that clarity, and Defendants have impermissibly sanctioned him for engaging in constitutionally-protected conduct.

Third, neither the notification letter to Mr. Knaeble nor the final determination explains how the stated reason satisfies either of the substantive criteria they cite. Rather, the notification letter merely recites the criterion followed by a single vague sentence that alleges nothing more than travel to a particular country in a particular year. *See* Notification Letter, ECF No. 186, Ex. A. The final determination letter likewise provided no explanation of how the scant reason provided therein could satisfy the new criterion it applied. *See* Determination Letter, ECF No. 186, Ex. C. Merely making the conclusory statement that his alleged travel caused the government to have "concerns," *id.*, does not explain *how*, even if true, such conduct would render him "operationally capable" or a "threat" worthy of inclusion on the List.

These defects in the No Fly List criterion applied to Mr. Knaeble increase the already substantial risk of error in Defendants' determination and render the criterion unconstitutional.

3. Defendants' failure to provide Mr. Knaeble with a meaningful hearing violates due process.

No court has *ever* upheld the deprivation of a citizen's liberty without a hearing. *See* Combined MPSJ, Arg. Section II.D. Due process requires Defendants to provide Mr. Knaeble a hearing before a neutral decision-maker at which he can cross-examine witnesses and receive a decision that applies a fixed burden of proof to the evidence presented. *See id.* Defendants failed to provide any of these basic protections to Mr. Knaeble.

a. Defendants' failure to provide Mr. Knaeble a live hearing before a neutral decision-maker violates due process.

The opportunity to be heard is an indispensable minimum of due process, *see Mathews*, 424 U.S. at 333, and the Supreme Court has repeatedly required hearings for far less weighty interests than those at stake here. *See* Combined MPSJ, Arg. Section II.D.1. A live hearing would give Mr. Knaeble a critical opportunity to present his defenses and explain his reasons for needing to be able to fly, *see* Knaeble Decl., ECF No. 91-6 ¶¶ 19-21, and would enable decision-makers to effectively assess his credibility and that of any other witnesses.

Here, Defendants' revised redress process provides *no hearing at all* at which Mr. Knaeble could contest his inclusion on the No Fly List. J. Stmt., ECF No. 177 ¶ 16. It is clear, moreover, that the TSA Administrator made an adverse credibility finding when he stated that he had "considered" Mr. Knaeble's response but concluded that the "information available" to the Administrator—which included all the information Defendants failed to disclose to Mr. Knaeble—supported Mr. Knaeble's placement on the No Fly List. *See* Determination Letter, ECF No. 177-3. Given the gravity of the restriction on Mr. Knaeble's liberty, Defendants' failure to provide a hearing is a serious due process violation.

b. Defendants' refusal to allow Mr. Knaeble the opportunity to confront and cross-examine adverse witnesses violates due process.

Defendants' refusal to hold an in-person hearing also necessarily denies Mr. Knaeble any opportunity to confront and cross-examine adverse witnesses and to call his own witnesses—rights long recognized as essential to due process. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); Combined MPSJ, Arg. Section II.D.2.

Defendants' revised redress process ignores these basic due process principles and instead permits the entirely unconstrained use of hearsay. Although the notification letter does not identify any evidence on which it relied, presumably the government's decision is based on *someone's* statements, and those statements would presumably be hearsay. Mr. Knaeble was provided no opportunity to test the memory and potential biases of any witnesses against him.

Similarly, the final determination that Mr. Knaeble should remain on the No Fly List may well have turned on disputed questions of fact, including the nature and purpose of his alleged travel. *See* Determination Letter, ECF No. 177-3 at 2. In making his final determination, the TSA Administrator assessed not only Mr. Knaeble's credibility but also that of any adverse witnesses (unknown to Mr. Knaeble). The determination letter lacked any mention of whether the Administrator based his conclusions on evidence from individuals with personal knowledge who were available to make their own statements, or whether those witnesses had any self-interested motivation to provide that information. If Defendants relied to any extent on witness statements, such use of hearsay simply does not comport with basic notions of fairness or due process.

c. Defendants' failure to apply an appropriate burden of proof violated due process.

Defendants' failure to employ the "clear and convincing evidence" standard of proof (or *any* standard), is a further due process violation because Mr. Knaeble does not know what standard must be met, and who has the burden of meeting it. *See* Combined MPSJ, Arg. Section II.D.3.

4. Defendants can provide additional procedural protections without harming government interests.

The robust procedural protections courts use to ensure due process in analogous contexts, including in criminal and immigration cases, demonstrate that such protections can be applied here without harming government interests. *See* Combined MPSJ, Arg. Section II.E. Defendants may not use secret evidence against Mr. Knaeble without allowing him to confront it.

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

Mr. Knaeble also renews his motion for partial summary judgment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* Combined MPSJ, Arg. Section III.

CONCLUSION

For the reasons stated above, Mr. Knaeble respectfully requests that the Court grant this renewed motion for partial summary judgment.

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Respectfully Submitted,

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