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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

<p>AYMAN LATIF, et al.,</p> <p><i>Plaintiffs,</i></p> <p>v.</p> <p>ERIC H. HOLDER, JR., et al.,</p> <p><i>Defendants.</i></p>	<p>Case No. 3:10-cv-00750-BR</p>
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF STEVEN WASHBURN'S RENEWED MOTION FOR PARTIAL
SUMMARY JUDGMENT**

INTRODUCTION

The revised redress process that Defendants applied to Plaintiff Steven Washburn is constitutionally deficient in fundamental ways. It denies Mr. Washburn 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 No Fly List, and other evidence that must be available to ensure basic fairness. Defendants’ revised process also entirely fails to provide Mr. Washburn with an in-person hearing at which he could cross-examine witnesses and establish his credibility—a critical due process protection given the significant deprivation of liberty that resulted when Defendants placed Mr. Washburn on the No Fly List. The risk of error in Defendants’ revised redress process remains unacceptably high. Mr. Washburn 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 FACTS¹

Defendants provided Mr. Washburn with a DHS TRIP notification letter on November 24, 2014. J. Stmt. of Agreed Facts Relevant to Steven Washburn (“J. Stmt.”), ECF No. 179 ¶ 2; ECF Nos. 179-1, 188 Ex. A. The letter informed Mr. Washburn 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. 179 ¶ 3 (emphasis added). 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 contained “an unclassified summary that includes reasons supporting” Defendants’ placement of Mr. Washburn on the No Fly List. *Id.* ¶ 5. It is undisputed that the letter did not disclose all of the reasons or information that Defendants relied

¹ Mr. Washburn 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.

upon in determining that Mr. Washburn should remain on the List. *Id.* ¶ 6. It is undisputed that the letter stated Defendants were “unable to provide additional disclosures,” *id.* ¶ 7, and that it did not describe the withheld evidence in any manner, nor did it disclose whether Defendants possess exculpatory or material information otherwise “contravening” Mr. Washburn’s placement on the No Fly List. *Id.* ¶ 8. It is undisputed that the letter referred to specific prior statements Mr. Washburn had allegedly made, but it did not provide the full statements. *Id.* ¶ 9. Defendants did not explain how the allegations in the letter satisfied Defendants’ substantive criterion for placing Mr. Washburn on the List. *See* Notification Letter, ECF Nos. 179-1, 188 Ex. A.

By letter dated December 5, 2014, counsel for Mr. Washburn objected to the notification letters to all Plaintiffs as constitutionally inadequate, and requested additional information and procedures, ECF No. 167-1, which Defendants refused to provide. ECF No. 167-2.

Mr. Washburn submitted a response to the DHS TRIP notification letter on December 15, 2014. J. Stmt., ECF No. 179 ¶ 14; Response Letter, ECF Nos. 179-2, 188 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 incomplete notice, the response also summarized Mr. Washburn’s anticipated testimony explaining why the allegations in the letter were incorrect, lacked credibility, or omitted important contextual information. Response Letter, ECF No. 188, Ex. B at 6. It further stated that if called to testify at an evidentiary hearing, Mr. Washburn would aver that he does not pose a threat of committing an act of terrorism, that he has no intention of engaging in, or providing support for, violent unlawful activity, that he does not knowingly have ties to terrorist organizations or individual terrorists, that he does not advocate violence, and that his placement on the No Fly List was erroneous. Response Letter, ECF No. 179-2 at 6-7; *see also* Washburn Decl., ECF No. 91-14 ¶ 24 (“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. Washburn on January

21, 2015. J. Stmt., ECF No. 179 ¶ 15; DHS TRIP Determination Letter, ECF Nos. 179-3, 188 Ex. C. The determination stated that the Administrator had considered Mr. Washburn’s response and “other information available” to him in concluding that Mr. Washburn was “properly placed” on the No Fly List. Determination Letter, ECF Nos. 179-3 at 4, 188 Ex. C. The Administrator stated that his explanations of his decision “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 id.* at 5. The Administrator provided no additional information on the basis for placing Mr. Washburn on the No Fly List, nor did he provide any reasons for rejecting Mr. Washburn’s response. *See id.* At no point during the revised process was Mr. Washburn given any opportunity to present live testimony or cross-examine witnesses at an in-person hearing. J. Stmt., ECF No. 179 ¶ 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. Washburn 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. Washburn’s Fifth Amendment Right to Procedural Due Process.

Mr. Washburn 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, Arg. Section II.A. In denying Mr. Washburn full notice of the allegations and evidence against him, a hearing before a neutral decisionmaker, 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. Washburn 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. Washburn fails to meet even these minimal due process requirements, making it virtually impossible for Mr. Washburn to meaningfully respond to the allegations against him.

a. Defendants’ failure to provide full notice of their reasons for placing Mr. Washburn 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, it is undisputed that Defendants did not provide Mr. Washburn with full notice of the reasons for his inclusion on the No Fly List. J. Stmt., ECF No. 179 ¶¶ 6-7. Both the notification letter and the final determination letter acknowledged that Defendants had withheld part of the basis for their decision. *See* ECF Nos. 179-1 at 2, 179-3 at 3. Defendants also failed to provide reasons for rejecting Mr. Washburn’s explanations for why he should be removed from the List, including his clear and unequivocal denials of any intent to harm the United States.

Mr. Washburn cannot meaningfully respond to allegations that Defendants have withheld from him—as he attempted to do in response to the incorrect, misleading, or de-contextualized information in Defendants’ incomplete notification letter. For instance, the notification letter included inflammatory, piecemeal allegations that Mr. Washburn disputed to the extent he could,

such as statements he purportedly made to [REDACTED]

[REDACTED] Notification Letter, ECF No. 188, Ex. A. Mr.

Washburn's response submission stated that, should he be allowed to testify at an evidentiary hearing, he would explain that [REDACTED]

[REDACTED] *Id.* Even though this response was necessarily constrained by the inadequacy of Defendants' notice, it is more than he can 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. Washburn with a complete statement of reasons constitutes a clear violation of his due process rights.

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

When liberty or even mere 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. Washburn did not disclose *any* of Defendants' evidence against him. J. Stmt., ECF No. 179 ¶¶ 6-10. Although the letter made

clear that Defendants relied on statements of FBI agents and reports prepared by those agents describing Mr. Washburn's alleged prior statements, *see* ECF No. 188, Ex. A, Defendants refused to provide that evidence to Mr. Washburn. Nor, obviously, did Defendants provide evidence related to the undisclosed reasons for placing him on the No Fly List. Mr. Washburn therefore has no means to discover or rebut misperception, error, or outright lies in the statements of witnesses, or inquire into their potential biases. Due process requires that Defendants provide the evidence, statements, recordings, and reports on which they rely in placing Mr. Washburn on the List.

c. Defendants' failure to provide Mr. Washburn 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 "contravening" their basis for including Mr. Washburn on the No Fly List, J. Stmt., ECF No. 179 ¶ 8—nor did they even identify material exculpatory information not reflected in the notification letter to Mr. Washburn. Defendants refused to confirm or deny whether they possessed such information, even though the letter purports to quote directly from Mr. Washburn's alleged prior statements. *See id.* ¶¶ 8-9; Notification Letter, ECF No. 188, Ex. A. Defendants' refusal to provide such material statements that they plainly possess, and to confirm whether or not they have information undermining Mr. Washburn's placement on the List, violates elemental due process principles and increases the risk of error in their final determination.

2. Defendants' impermissibly vague criteria do not give Mr. Washburn 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. Washburn fails to provide him with fair notice, for three reasons. First, it lacks any clear nexus to aviation security—which is Defendants’ ostensible purpose for maintaining a No Fly List—and encompass a broad array of other potential harms. As noted above, Defendants applied one of the four “threat”-based No Fly List criteria to Mr. Washburn, *see* J. Comb. Stmt., ECF No. 173 ¶ 5; J. Stmt., ECF No. 179 ¶ 4, but that criterion is not fair notice because it entails a significant penalty—inability to travel by air—that is unrelated to the “threat” that Defendants think Mr. Washburn “poses.”

Second, the criterion is unconstitutionally vague on its face. *See* Combined MPSJ, Arg. Section II.C. Terms such as “pose” and “threat” are entirely ambiguous and encompass conduct that Mr. Washburn (or anyone else) could not have known would lead to placement on the No Fly List. The vagueness of the criterion leaves Mr. Washburn vulnerable to subjective, arbitrary, and discriminatory interpretation and renders it unconstitutional.

The criterion is also unconstitutional as applied to Mr. Washburn. The notification letter states that Mr. Washburn was placed on the No Fly List in part because of alleged conduct that, if accurately described in the letter, is plainly protected under the First Amendment, including his alleged [REDACTED]

[REDACTED]. *See* Notification Letter, ECF No. 188, Ex. A. Thus, an elevated standard of clarity must apply because the criterion impinges on Mr. Washburn’s protected speech or conduct. *See Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). The criterion plainly fails to provide that clarity, and Defendants have impermissibly sanctioned Mr. Washburn for conduct that is constitutionally protected.

Third, the notification letter to Mr. Washburn fails to explain how the stated reasons satisfy the substantive criterion. Rather, the letter merely recites the criterion followed by various allegations, including his protected beliefs and opinions, despite his disavowal of any intention to engage in violence. *See* Notification Letter, ECF Nos. 179-1, 188 Ex. A. Simply

making such allegations does not explain *how*, even if the allegations were true (which Mr. Washburn does not concede), such conduct would render Mr. Washburn or a “threat” worthy of inclusion on the List.

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

3. Defendants’ failure to provide Mr. Washburn 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. Washburn a hearing before a neutral decisionmaker 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. Washburn.

a. Defendants’ failure to provide Mr. Washburn a live hearing before a neutral decisionmaker 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. Washburn a critical opportunity to present his defenses and explain his reasons for needing to be able to fly, *see* Washburn Decl., ECF No. 91-14 ¶¶ 20-22, and would enable decision-makers to effectively assess his credibility and that of other witnesses.

Defendants’ revised redress process provides *no hearing at all* at which Mr. Washburn could contest his inclusion on the No Fly List. J. Stmt., ECF No. 179 ¶ 16. It is clear, moreover, that the TSA Administrator made an adverse credibility finding when he stated that he had “considered” Mr. Washburn’s response but concluded that the “information available”—which included the information Defendants failed to disclose to Mr. Washburn—supported Mr. Washburn’s placement on the No Fly List. *See* Determination Letter, ECF Nos. 179-3 at 4, 188 Ex. C. Given the gravity of the restriction on Mr. Washburn’s liberty, Defendants’ failure to

allow him to testify violates the Due Process Clause.

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

Defendants' refusal to hold an in-person hearing also necessarily denies Mr. Washburn 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 permits the entirely unconstrained use of hearsay. The notification letter to Mr. Washburn relied almost exclusively on the hearsay testimony of unnamed government witnesses whose memory and potential biases Mr. Washburn could not test, regarding Mr. Washburn's own alleged statements—none of which he had access to. *See* Notification Letter, ECF No. 188, Ex. A. Similarly, the final determination that Mr. Washburn should remain on the No Fly List plainly turned on disputed questions of fact, [REDACTED]

[REDACTED] Determination Letter, ECF No. 188, Ex. C at 2.

In making a final determination against Mr. Washburn, the TSA Administrator assessed not only Mr. Washburn's credibility—without directly hearing from him—but also that of adverse witnesses from the FBI to whom Mr. Washburn had no access or ability to confront and cross-examine. The determination letter did not mention whether the TSA Administrator based his conclusions on evidence from government officers with personal knowledge who were available to make their own statements, or whether those officers had any self-interested motivation to provide that information. Such pervasive, unconstrained use of hearsay simply does not comport with basic fairness.

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. Washburn 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. Either way, Defendants may not use secret evidence against Mr. Washburn without allowing him to confront it.

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

Mr. Washburn 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. Washburn respectfully requests that the Court grant this renewed motion for partial summary judgment.

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Respectfully Submitted,

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