

I. Issue: Permission-Based Government Controls on Air and Surface Travel

II. Reporting Organization: The Identity Project (PapersPlease.org)¹

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization (NGO) based in Oakland, California, providing legal and educational resources dedicated to protecting and promoting rights protected by the First Amendment to the U.S. Constitution and corresponding provisions of international human rights treaties.

III. Issue Summary

Since the U.S. Second and Third Periodic Reports to the UNHRC, the U.S. has implemented a comprehensive permission-based system of government control of all air travel to, from, within, or through the airspace of the U.S.

Pursuant to the Secure Flight² (domestic air travel) and APIS³ (international air and surface travel including trains, buses, and ships) regulations, common carriers are required to transmit detailed information about each would-be passenger and their itinerary to the U.S. Department of Homeland Security (DHS), and receive individualized per-passenger, per-flight permission before allowing each passenger to board the vessel. In the absence of a "cleared" message or boarding pass printing authorization from the DHS, the default is, "No".

No-fly orders and related messages are contained in Security Directives issued in secret by DHS staff and/or contractors to airlines and other common carriers. Airlines and other carriers are forbidden to disclose either the general directives or any specific orders or messages with respect to specific passengers.

Although procedures exist in U.S. law for the issuance of judicial orders (restraining orders or injunctions) restricting travel and movement), the DHS has never applied to a court for such an order. Instead, the DHS has relied exclusively on extrajudicial administrative no-fly orders. No substantive or procedural standards for the issuance of administrative no-fly orders (or, conversely, "cleared" or permission-to-board messages) have been made public.

Although U.S. law guarantees "the public right of freedom of transit through the navigable airspace"⁴ and requires the DHS to consider this right whenever it issues regulations, the DHS

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2 Comments of the Identity Project, "Secure Flight Program" (October 22, 2007), <<http://hasbrouck.org/IDP/IDP-SecureFlight-comments.pdf>>; "Secure Flight FAQ", <http://papersplease.org/sf_faq.html>.

3 Comments of the Identity Project, "Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States" (October 12, 2006), <<http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>>.

4 49 USC § 40101, 40103.

has never explicitly considered this right when it has issued regulations related to the Secure Flight, APIS, or no-fly programs. DHS has taken no action on complaints that these programs violate the ICCPR, and has claimed that these programs are "authorized" by U.S. law.⁵ This suggests that the U.S. believes that it can lawfully enact national legislation derogating from the ICCPR, or "authorizing" actions inconsistent with U.S. treaty obligations.

Numerous individuals, including U.S. citizens, residents, visitors, and people seeking to transit U.S. airspace without seeking to enter U.S. territory, have been prevented from boarding flights as a result of no-fly orders from the U.S. government or failure to issue "cleared" or permission-to-board messages.

Some foreign visitors have been trapped in the U.S., unable to return home. Some U.S. citizens have been trapped overseas, unable to return home, and effectively subjected to indefinite, standardless administrative banishment from the country of their citizenship. In the worst-case scenarios, at least two U.S. citizens, Yonas Fikre⁶ and Gulet Mohamed⁷, were made the subject of no-fly orders while they were being detained and tortured in foreign countries. Mr. Mohamed's captors tried to deport him to the U.S., but the U.S. ordered all airlines not to transport him back to the U.S. After being refused boarding on a deportation flight as a result of the U.S. no-fly order, he was returned to continued detention and torture. Mr. Fikre, unable to return to the U.S., is seeking asylum in another country.

The policy of the U.S. government is never to confirm or deny whether a no-fly order has been issued with respect to any particular passenger. As a result, passengers who airlines (or international surface carriers) have been prohibited from transporting are unable to establish their standing to challenge the no-fly orders issued by the U.S. government to airlines or other carriers. No U.S. government no-fly order has yet been reviewed on its merits by any U.S. court.

Rather than treating travel as a protected activity (as claimed in Paragraph 251 of the U.S. Fourth Periodic Report), and subjecting travel controls, permission requirements, and no-fly orders to heightened judicial scrutiny, the U.S. treats travel – whether on public rights-of-way or by common carrier – as an inherently suspicious activity that justifies warrantless, standardless, extrajudicial administrative controls. Controls on travel have been subjected to reduced, not heightened, scrutiny, or have been deemed nonreviewable, by U.S. courts.

Asked in 2006 and 2008 about the possibility of judicial review of no-fly orders, Secretary of Homeland Security Chertoff stated that, "we don't conduct court hearings on this.... we're not about to let them do that... because we would be inundated with proceedings," and, "if you are

5 The Identity Project, "DHS responds to our complaints of human rights treaty violations" (December 1, 2011) <<http://www.papersplease.org/wp/2011/12/01/dhs-responds-to-our-complaints-of-human-rights-treaty-violations/>>.

6 The Identity Project, "US citizen exiled to torture by 'no-fly' list seeks asylum in Sweden" (April 27, 2012), <<http://www.papersplease.org/wp/2012/04/27/us-citizen-exiled-to-torture-by-no-fly-list-seeks-asylum-in-sweden/>>.

7 The Identity Project, "More US violations of citizens' right of return" (January 6, 2011), <<http://papersplease.org/wp/2011/01/06/more-us-violations-of-citizens-right-of-return/>>.

asking if we would do a court process where we litigate it, I mean, that effectively would shut it down."⁸ No official of the U.S. Government has publicly repudiated these statements.

As discussed in our submission to the UNHRC on government-issued ID as a prerequisite for travel, air travel is often the only available means of travel, and restrictions on air travel also restrict the rights of assembly and association.

IV. U.S. Government Report

The U.S. Fourth Periodic Report does not mention permission-based controls on travel, despite formal complaints filed with the U.S. government that these requirements violate U.S. obligations pursuant to the ICCPR.

Paragraph 251 of the U.S. Fourth Periodic Report claims that, "governmental actions affecting travel are subject to ... heightened judicial review".

V. Legal Framework

ICCPR Article 12: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.... Everyone shall be free to leave any country, including his own.....

No one shall be arbitrarily deprived of the right to enter his own country."

General Comment No. 27: Freedom of movement (Art. 12): "It is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures ... must be appropriate to achieve their protective function; [and] they must be the least intrusive instrument amongst those which might achieve the desired result.... States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.... The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity.... These conditions would not be met, for example,... if an individual were prevented from travelling internally without a specific permit.... The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."

VI. Recommended Questions

(1) Does the U.S. believe that, consistent with the ICCPR, travel by common carrier can be conditioned on prior affirmative government permission?

8 Remarks at the Federalist Society's Annual Lawyers Convention (November 17, 2006), <<http://www.fed-soc.org/publications/detail/michael-chertoff-address-event-audio>>; interview with Ryan Singel, Wired (August 6, 2008), <<http://www.wired.com/threatlevel/2008/08/chertoff/>>; both quoted at <http://hasbrouck.org/blog/archives/001497.html#judicial_review>.

(2) Do Secretary Chertoff's statements that the U.S. will never allow judicial review of no-fly orders continue to reflect the position of the U.S. government?

(3) In light of the policy of the U.S. government neither to confirm nor deny the existence of a no-fly order, and the orders to airlines not to disclose these orders, how would an individual who is the subject of a no-fly order establish standing to obtain judicial review of the order? How would such an individual obtain sufficient information about the basis for the order to permit a meaningful opportunity for factual and legal challenge and review of the basis for the order?

(4) Do the provisions of 49 USC § 40101 and 40103 recognizing the "public right of transit through the navigable airspace", and requiring agencies to consider this right in rulemaking, effectuate Article 12 of the ICCPR? Would failure to consider this right in rulemaking provide a basis for judicial review by a U.S. court of a rule alleged to infringe rights guaranteed by Article 12 of the ICCPR?

VII. Suggested Recommendations

(1) No-fly orders and lists should be limited to those people whose movements and right to travel have been restricted by court orders in accordance with procedural due process and based on the substantive criteria in General Comment No. 27 of the UNHRC on freedom of movement under Article 12 of the ICCPR.

(2) As part of the due process required by the ICCPR, any individual who is the subject of a no-fly order should receive notice and an opportunity for judicial review of the order and the factual and legal basis for the order.

(3) In the absence of an appropriate judicial order (arrest warrant, injunction, or restraining order) or probable cause for arrest without warrant, common carriers should be required to transport all would-be passengers willing to pay the applicable fare and comply with the general conditions in their tariff.