ACLU files lawsuit challenging “no-fly” list

Don Knowland
7 May 2003

The American Civil Liberties Union and the co-publishers of an antiwar newspaper have challenged the Bush administration’s compiling of a secret “no-fly” list of persons who allegedly are a threat to airline safety because of terrorist links.

They filed a federal lawsuit in San Francisco last month asking the court to force the FBI and the federal Transportation Security Administration (TSA) to disclose the criteria for placing names on watch lists. They also demanded information on who maintains the lists and what means exist to correct mistaken or groundless listings.

The suit states: “Without even basic information about the no-fly list or other watch lists, the public cannot evaluate the government’s decision to use such lists.” At a press conference announcing its filing, ACLU lawyer Jayashri Srikantiah asked, “Is the government using the no-fly list as it appears, with no safeguards or procedures to ensure that the lists are inaccurate?”

The two individual plaintiffs, Rebecca Gordon and Janet Adams, co-publish *War Times*, which has been critical of the Bush administration’s “anti-terror” policies. They were detained in August 2002 at the San Francisco airport by airline officials who told them they appeared on the “master” list and that they could not leave until FBI or police got there to question them. Although ultimately permitted after police questioning to board their flight to Boston, they were then given boarding passes bearing a large red “S”, and subjected to additional searches before boarding.

The ACLU then sought records under California law from the San Francisco airport, which revealed that 339 persons had been detained since 9/11 under a “no-fly” list and an FBI “selectee list.” It also sought records under the federal Freedom of Information Act from the FBI and the TSA concerning the numbers of persons on flight watch lists, the numbers of airport detentions and procedures for removing names from the lists.

The FBI stonewalled this request, claiming that it kept no such records. The ACLU appealed that obviously false determination but has received no response to its appeal. The TSA simply ignored the document request from the outset.

Questioned about the suit, TSA spokesperson Nico Melendez said: “There is one no-fly list. It is composed of individuals who pose or are suspected of posing a threat to aviation or to national security. No one gets on the list by being a peace activist; nor does TSA maintain a separate list for peace activists.”

A law enforcement official, who spoke only on the condition of anonymity, told the *New York Times* that the FBI provided intelligence on people suspected of links to terrorism, which was sent to the TSA, which then provided airlines and airports with lists of people to detain and question at airports. According to the *Times*, the official claimed that “people that are expressing their constitutional rights of free expression would not come to the attention of the FBI.”

Contrary to these government assertions, in a widely reported incident last year, two dozen members of a group called Peace Action of Wisconsin, including a nun, a priest and students, were detained in Milwaukee and missed their flight. There likewise exists no other grounds for the names of both Adams and Gordon to have appeared on the no-fly list except for their political activity.

TSA recently proposed implementation of a blacklist which would permanently bar people from air travel. Under the Computer Assisted Passenger Prescreening System (CAPPS II), airlines will be required to check law enforcement, intelligence and credit databases each time someone buys an airline ticket.

Each air passenger will be subject to a risk assessment “score.” Persons scoring “green” will have unfettered passage. Those rated “yellow” will face

heightened scrutiny, searches and inspections. A red score will bar the person from travel and result in referral to law enforcement. Reportedly, Delta Airlines will soon test the system.

The government's proposal runs roughshod over the federal constitutional right to travel. Although not explicitly mentioned in the US Constitution, the US Supreme Court long ago recognized that there is a constitutional right to pass freely from state to state that is among the rights and privileges of national citizenship.

The Supreme Court has consistently held that constitutional rights are virtually unqualified, which means it can be interfered with only on the basis of the very strongest showing of governmental necessity. (In contrast, the right to international travel has been considered to be no more than an aspect of the liberty protected by the Due Process Clause of the Fifth Amendment of the Constitution, which may be regulated within the bounds of due process).

For example, in 1941, the Supreme Court invalidated a California criminal statute aimed at excluding indigent sharecroppers and tenant farmers during the Depression. The Court has also decided that the right to travel is so fundamental that it may be asserted against private as well as governmental interference, such as that by airlines. Thus, in 1971 the Court permitted suit against private persons who attempted to keep civil rights workers and freedom riders from entering Mississippi.

Not only do restrictions on air travel impinge this fundamental right, keeping persons from traveling, or otherwise abridging that right because of political views, would plainly violate First Amendment rights to free speech and freedom of association.