

# **The Identity Project**

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U.N. Human Rights Committee  
Secretariat, Attn: Gabriella Habtom  
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SWITZERLAND  
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**List of issues prior to reporting by the United States of America:  
5th periodic review of implementation by the USA of  
the International Covenant on Civil and Political Rights:**

**Interference with Freedom of Movement  
(ICCPR Articles 12, 17, 21, & 22)**

**I. Issue: Violations of Freedom of Movement, Assembly, Association, and Privacy**

**II. Reporting Organization: The Identity Project ([PapersPlease.org](http://www.PapersPlease.org))**

The Identity Project (IDP), <<http://www.PapersPlease.org>>, is part of the First Amendment Project, a nonprofit organization (NGO) providing legal and educational resources to protect and promote rights protected by the First Amendment to the U.S. Constitution and corresponding provisions of international human rights treaties.

**III. Issue Summary**

The government of the United States of America has put in place a comprehensive system of suspicionless surveillance and permission-based prior restraint of air travel by common carrier, including both travel within the U.S. and international travel.

Intimate details pertaining to travelers who are not suspected of any violation of law are retained in secret permanent files, and used along with other secret data as the

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basis for extrajudicial decisions to grant or deny permission to airlines to issue boarding passes. Pursuant to U.S. Federal regulations, before issuing a boarding pass, an airline must send information about the would-be traveler to the Department of Homeland Security (including, for any international flight, a complete copy of their reservations including all information collected or obtained by the airline for its commercial purposes), and receive individualized, per-passenger, per-flight permission in the form of a “cleared” message. The default in the absence of a response from DHS is, “No”.

U.S. government decisions to deny permission to travel are made on the basis of secret criteria, including family associations, group affiliations, and other algorithmic profiling. Permission to travel can be denied without any reasonable suspicion that the individual whose movements are restricted has violated any law or poses any threat.

The U.S. is a large country, and it is impossible to travel between some U.S. states and territories by any means except by air. Air travel is the only feasible means of travel on most intercontinental routes. Denial of air travel amounts to a near-total denial of the ability to move freely within the U.S., to leave the U.S., or to return to the U.S.

#### **IV. Policies and Practices of the U.S. Government**

No U.S. court has reviewed the substantive basis for a government no-fly order. The U.S. government has consistently argued that U.S. courts have no jurisdiction to review the basis for such orders or to see the evidence, if any, on which they are based.<sup>1</sup>

In the only case in a U.S. court attempting to challenge the basis for a no-fly order to come to trial – after eight years of litigation at a cost to the plaintiff of US\$3.9 million in legal fees and expenses – the government admitted shortly before the trial that there was not, and never had been, any basis for suspicion of Dr. Rahinah Ibrahim, but that she had been placed on the U.S. government’s “no-fly list” because an FBI agent assigned to investigate mosques and Muslims misunderstood the no-fly list “nomination” form.<sup>2</sup>

Despite the court’s order that the plaintiff be removed from the “no-fly” list, she remains barred from returning to the U.S. – despite having been a U.S. resident, having received her degrees including her Ph.D. from U.S. universities, and having children who were born in the U.S. and are U.S. citizens – for reasons that have not been disclosed to the courts reviewing the no-fly decision. The U.S. does not recognize entry to the U.S. as a human right, but only as a privilege of U.S. citizenship, and does not provide a

- 1 See Declaration of Attorney General Eric H. Holder, Jr., in *Ibrahim v. DHS*, March 14, 2013, available at <<https://papersplease.org/wp/wp-content/uploads/2013/12/ibrahimholderstatesecrets.pdf>>. Note that the alleged “state secret” which could not be disclosed was that an FBI agent had made a mistake.
- 2 See the detailed history of the case and the government’s efforts to obstruct judicial review in the most recent appellate decision, *Ibrahim v. U.S. (Ibrahim III)*, 9th Circuit Court of Appeals, *en banc*, 2 January 2019, <<http://cdn.ca9.uscourts.gov/datastore/opinions/2019/01/02/14-16161.pdf>>.

mechanism for non-U.S. citizens to challenge denial of entry to the U.S.

An asylum claim cannot be made or adjudicated until after a claimant arrives in a country of refuge. Asylum seekers cannot be required to have any specific documents, and their inability to obtain travel documents from a government from which they are fleeing may be part of the evidence supporting their asylum claim.

A common carrier has an obligation to transport all passengers willing to pay the fare in its tariff.

But the U.S. imposes civil fines on airlines and other carriers that transport unsuccessful asylum seekers. These “carrier sanctions” turn inherently unqualified airline ticket sales and check-in clerks into *de facto* asylum judges of first and last resort, with a government-imposed financial incentive to err on the side of denial of transport. For asylum seekers, denial of air transportation either acts as a categorical bar to reaching U.S. territory to make a claim for asylum, or leads asylum seekers to use irregular and often fatally unsafe routes and modes of land or sea travel to reach the U.S.<sup>3</sup>

U.S. citizens are prohibited by law from attempting to leave, or to return to, the U.S. without having a U.S. passport. But no right to a passport is recognized in U.S. law, and not every U.S. citizen who wants or needs to leave or return to the U.S. has a passport. The U.S. government has declined to issue or renew passports to U.S. citizens, without explanation, denying them the ability to legally leave or return to the U.S.<sup>4</sup> Those affected have included Yemeni-American U.S. citizens seeking to leave the war zone in Yemen, who were placed in imminent mortal peril by the withholding of U.S. passports.<sup>5</sup>

In parallel with the bulk acquisition by the U.S. National Security Agency of records of telephone calls and Internet communications from telecom companies, airline reservations (“Passenger Name Records”) are obtained by the U.S. Department of Homeland Security (DHS) from commercial database hosting companies.<sup>6</sup> It’s impossible

3 See “Carrier sanctions kill. Airlines collaborate.” The Identity Project, 21 February 2017, <<https://papersplease.org/wp/2017/02/01/carrier-sanctions-kill-airlines-collaborate/>>.

4 See e.g. “The US State Department is still denying passports to US citizens”, The Identity Project, 4 September 2018, <<https://papersplease.org/wp/2018/09/04/the-us-state-department-is-still-denying-passports-to-us-citizens/>>, and “U.S. citizen stranded in South America without a passport”, The Identity Project, 14 April 2017, <<https://papersplease.org/wp/2017/04/14/u-s-citizen-stranded-in-south-america-without-a-passport/>>.

5 Report of the Office of Inspector General, U.S. Department of State, “Review of Allegations of Improper Passport Seizures at Embassy Sana’a, Yemen”, October 2018, <<https://www.oversight.gov/sites/default/files/oig-reports/ESP-19-01.pdf>>.

6 See the overview of the airline passenger data ecosystem, “What’s in a Passenger Name Record (PNR)”, by Edward Hasbrouck, <<https://hasbrouck.org/articles/PNR.html>>.

for a traveler to provide personal information to an airline without also providing it to the government. The entirety of each international PNR is passed on to the DHS and included in a permanent travel history, even if the traveler is not suspected of any violation of law. If a customer service representative enters derogatory free-text comments about a traveler in a PNR, that too is acquired by the DHS and included in permanent travel history files.<sup>7</sup>

## 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."

ICCPR Article 17: "No one shall be subjected to arbitrary... interference with his privacy, family, home or correspondence."

ICCPR Article 21: "The right of peaceful assembly shall be recognized."

ICCPR Article 22: "Everyone shall have the right to freedom of association with others."

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... [O]bstacles making it more difficult to leave the country... include, *inter alia*,... the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from... family members; [and] unreasonable delays in the issuance of travel documents".

<sup>7</sup> See examples of PNR data and other DHS travel history records obtained from the DHS in response to Privacy Act and Freedom Of Information (FOIA) requests in the slideshow, "Government Surveillance and Control of Travelers", Edward Hasbrouck, The Identity Project, 2 April 2103, <<https://hasbrouck.org/articles/Hasbrouck-Cato-2APR2013.pdf>>

## **VI. Recommended Questions**

(1) What means of judicial review, subject to what substantive criteria and procedures, are available to individuals who are the subject of U.S. government orders to common carriers denying transportation to, from, within, or overflying the U.S.?

(2) Does the U.S. recognize the right of a U.S. citizen to a U.S. passport? What means of judicial review are available to a U.S. citizen if the U.S. seizes or holds, or neither grants nor denies an application for issuance or renewal of, a U.S. passport?

(3) Does the U.S. assert jurisdiction over who is allowed to board foreign-flag aircraft at foreign airports, if their destination is in the U.S.? If the U.S. asserts such jurisdiction, what means of judicial review are available to an individual, including an asylum seeker, who is denied transportation to the U.S. by a common carrier?

(4) Does the U.S. recognize any limits on what information concerning travelers can be demanded by the government as a condition of the exercise of the right to travel?

## **VII. Suggested Recommendations**

(1) The U.S. should restrict travel by common carrier, including domestic or international air travel, only on the basis of judicial orders issued through adversary proceedings in which the right to freedom of movement is recognized and in accordance with General Comment Number 27 of the U.N. Human Rights Committee.

(2) Personal information pertaining to the exercise of the right to freedom of movement, such as details of airline reservations, should be collected or retained only on the basis of individualized orders based on probable cause to suspect violations of law.

Sincerely,

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The Identity Project

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