

# Abuse of the No Fly List



By Paul Engel

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- When does the No Fly List become a tool of tyranny?
- Can government actors avoid the consequences of their actions by simply calling them moot?
- Could you be on the No Fly List and not even know it.

While looking through recent oral arguments at the Supreme Court, I stumbled across the case *FBI v. Fikre*. At first, I thought it was another simple procedural case, but something about it caught my attention. The oral arguments held before the Supreme Court were about whether Mr. Fikre's rights were violated when he was placed on the No Fly List, and was not moot because he had been removed from the list. As I started looking deeper into the case though, I found intrigue worthy of a Grisham novel.

## The No Fly List

Most Americans have heard of the "No Fly List". Created after the 9/11 terrorist attacks, the "watch list" is actually two lists.

The Terrorist Screening Center, a division within the FBI's National Security Branch, maintains a terrorism watchlist. Two components of that watchlist are the No Fly List, which contains the names of individuals who are prohibited from flying within, to, from, and over the United States, and the Selectee List, which contains the names of individuals who must undergo enhanced security screening before being permitted to board a flight.

## [FBI v Fikre – Petition for Certiorari](#)

According to Laura K. Donohue in her book *The Cost of Counterterrorism: Power, Politics, and Liberty*, when the watch list was created, the No Fly and Selectee lists contained less than 1,000 names. By April, 2005, those lists contained over 70,000 names. Updated numbers are hard to obtain since the FBI keeps membership in the list secret, even from those on the list.

Individuals can appeal travel-related issues through DHS's Traveler Redress Inquiry Program (TRIP). See 49 C.F.R. 1560.205. Before 2015, individuals who requested redress using DHS TRIP were not told whether they were on the No Fly List and were not given any reasons or evidence supporting their possible inclusion on that list. ...

In 2015, the government revised DHS TRIP to include additional procedural safeguards. See *ibid.* United States citizens and lawful permanent residents seeking redress now are told whether they are on the No Fly List and, to the extent possible consistent with national-security and law-enforcement interests, the reasons for their status.

## [Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

### **Fikre v. FBI**

Which brings us to Mr. Yonas Fikre and his encounter with the No Fly List and the FBI.

Fikre is an American citizen who, until 2009, lived in Portland, Oregon and worked for a cellular telephone company. In late 2009, Fikre traveled to Sudan to establish a consumer electronics business in East Africa. In April 2010, while still in Sudan, Fikre was approached by two FBI agents who questioned him about his association with the as-Saber Mosque in Portland and his commercial finances. The agents told Fikre

that he had been placed on the No Fly List, which identifies individuals who are prohibited from flying into, out of, or over the United States and Canadian airspace by commercial airlines.

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

A United States citizen travels to Sudan for work, where he is approached and questioned by two FBI agents. While I did not find the details in the Ninth Circuit opinion, it appears that the primary, if not only reason, the FBI questions Mr. Fikre was his association with a mosque and his business. Somehow, this was enough to place Mr. Fikre on the infamous No Fly List. Or was it?

The FBI agents offered to remove Fikre from the list if he became a government informant. Fikre refused.

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

Here's where red flags flew up for me. Is Mr. Fikre a danger to air travel, or merely a potential informant for the FBI? Either way, Mr. Fikre was unable to return to the country of his citizenship because he had been put on a list. But his tribulations were not over.

Fikre's business took him to the United Arab Emirates (UAE) in September 2010. As recounted by Fikre, Emirati secret police seized him from the place where he was staying in June 2011 and transported him to an unknown location where he was imprisoned and tortured for 106 days. During this time, Fikre was interrogated about his connection to the as-Saber Mosque and the nature of his financial dealings.

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

Why was the UAE interested in a mosque in Portland, OR?

One of the interrogators told Fikre that the FBI had requested his detention.

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Mr. Fikre was released by UAE officials in September 2011. Since he was unable to return home because of being on the No Fly List, he sought refuge in Sweden.

### **Getting Off the No Fly List**

While the process for being placed on the No Fly List is shrouded in secrecy, the government was nice enough to provide a way to challenge your placement.

The Department of Homeland Security (DHS)'s Traveler Redress Inquiry Program (TRIP) allows individuals the opportunity to have the Transportation Security Administration review and, if appropriate, correct their files if it determines that a person has been erroneously placed on a watchlist.

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

It appears, when it comes to the No Fly List, you're considered guilty until proven innocent. That is, if you could actually find out you were on the No Fly List.

As initially implemented in 2007, the government responded to TRIP inquiries without confirming a traveler's inclusion on the No Fly List. Fikre attempted in November 2013 to rectify his situation through TRIP, but the DHS neither confirmed nor denied his placement on the No Fly List in response to this first inquiry; it stated only that "no changes or corrections [we]re warranted at th[at] time."

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals –](#)

## Opinion

Basically, the United States government would neither confirm, nor deny, that Mr. Fikre was on the No Fly List, even though he was not allowed to board an airplane to the United States because he was on the list. Standard bureaucratic double-speak.

In 2015, the DHS modified TRIP to comply with the judgment in *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014). The revised TRIP protocol includes additional procedural safeguards that were unavailable at the time Fikre filed his action. Requesters are now apprised of their presence or absence on the No Fly List and the unclassified reasons for their status. Applying the revised procedures, in February 2015 the DHS informed Fikre that he was and would remain on the No Fly List because he had been “identified as an individual who may be a threat to civil aviation or national security.” No other reasons were provided for the decision to maintain Fikre on the No Fly List.

## [Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

Eight years after its implementation, the Traveler Redress Inquiry Program now actually admits if someone is on the No Fly List. Now this program admits Mr. Fikre is, in fact, on the No Fly List. The only reason given is that someone thinks he is a threat to civil aviation or national security. Apparently, the concept of Due Process is as foreign to the FBI as the idea of liberty and justice for all.

### **Fighting Back**

What did Mr. Fikre do in response to this revelation from the FBI? He filed a lawsuit.

Fikre avers that these events damaged his reputation by stigmatizing him as a suspected terrorist and so strained his

marriage that his wife divorced him while he was stranded outside of the country.

Fikre brought the instant suit against the government raising a variety of common law, statutory, and constitutional claims. As relevant here, Fikre alleged that the FBI violated his right to substantive due process by depriving him of his liberty interest in his reputation and international travel, and by conditioning his removal from the No Fly List upon his agreement to become a government informant. Fikre's complaint also maintained that the FBI denied him procedural due process by placing and keeping him on the No Fly List without adequate notice and an opportunity to be heard. Fikre prayed for injunctive and declaratory relief for both due process claims and asked, among other things, for a declaration by the government that he should not have been added to the No Fly List.

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The court noted that Mr. Fikre's original complaint contained 16 causes of action, but the appeal only dealt with his due process and Fourth Amendment claims.

This is when the next twist in our saga appeared.

The Defendants moved to dismiss the operative complaint and, shortly thereafter, notified Fikre that he had been removed from the No Fly List. In a joint status report filed at the district court's direction, Fikre agreed that, to the extent he sought an injunction requiring the Defendants to remove him from the list, that claim was moot. Fikre contended, however, that he remained entitled to other injunctive and declaratory relief.

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

Now that they're being sued, the FBI removes Fikre from the No Fly List, then claims he no longer has a cause of action because he's not on the list anymore. The Ninth Circuit Court noted:

The district court subsequently dismissed Fikre's remaining procedural and substantive due process claims in a detailed decision. The court reasoned that the government's removal of Fikre from the No Fly List was "a sufficiently definite action" to render his claims moot. In reaching this conclusion, the district court observed that the Defendants had publicly stated that Fikre was no longer on the No Fly List, that more than six months had elapsed since this change in status, and that the record did not indicate a lack of good faith on the government's part. The district court also "emphasize[d]" that "the courthouse doors will be open to [Fikre]" were he to be reinstated to the No Fly List in the future.

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Not only did the District Court ignore the consequences of the FBI placing Mr. Fikre on the No Fly List, it actually claimed there was no lack of good faith on the government's part. To my knowledge, the FBI has yet to produce any evidence of probable cause that Mr. Fikre was ever a threat to air travel or national security. Furthermore, the FBI tried to extort Mr. Fikre to become an informant in exchange for not only being removed from the list, but being allowed to go home. There is also testimony that the FBI engaged a foreign entity, the United Arab Emirates, to detain and torture Mr. Fikre in what appears to be an attempt to circumvent U.S. law and the Constitution. How much bad faith does the District Court need?

We reverse the district court's dismissal of Fikre's due process claims and remand for further proceedings.

[Fikre v. FBI \(16-36072\) – Ninth Circuit Court of Appeals – Opinion](#)

In 2018, eleven years after his saga began, the Ninth Circuit reversed the District Court's decision of mootness. This means the case went back to the District Court to be heard. One might hope that Mr. Fikre's ordeal was over, but no. The District Court again found Mr. Fikre's case moot, although with a few modifications. Once again, Mr. Fikre appealed to the Ninth Circuit.

The panel reversed the district court's dismissal on mootness grounds of Yonas Fikre's substantive due process and non-stigma-related procedural due process No Fly List claims; vacated the district court's dismissal of Fikre's stigma-plus procedural due process claim; and remanded to the district court to consider, in the first instance, whether Fikre stated a viable stigma-plus procedural due process claim considering both his past placement on the No Fly List and his alleged inclusion in the Terrorist Screening Database.

[Fikre v. FBI \(20-35904\) – Ninth Circuit Court of Appeals – Opinion](#)

Meanwhile the District Court separated the stigma-related and non-stigma-related claims, the Circuit Court pointed out.

The panel held that because the government failed to follow the instructions given by this Court the last time Fikre's case was before the court, see *Fikre v. FBI* (Fikre I), 904 F.3d 1033 (9th Cir. 2018), the district court erred by dismissing as moot Fikre's No Fly List claims.

[Fikre v. FBI \(20-35904\) – Ninth Circuit Court of Appeals – Opinion](#)

**What did the government fail to do?**

In *Fikre I*, the Court held that an exception to mootness – the



voluntary cessation doctrine – applied to Fikre’s No Fly List claim. On remand, FBI Supervisory Special Agent Christopher Courtright filed a declaration in support of the government’s motion to dismiss. The panel held that the Courtright Declaration did not provide the assurances specified by Fikre I as adequate to overcome the voluntary cessation to mootness. The government has assured Fikre only that he does not currently meet the criteria for inclusion on the No Fly List. It has not repudiated the decision to place Fikre on the list, nor has it identified any criteria for inclusion on the list that may have changed. Because Fikre I governs, the district court should not have dismissed the No Fly List due process claims as moot.

[Fikre v. FBI \(20-35904\) – Ninth Circuit Court of Appeals – Opinion](#)

So the FBI basically said “Oops”, and thought that would get them off the hook. Well, the Ninth Circuit didn’t buy that. And since the FBI did not buy the Ninth Circuit’s opinion, they appealed to the Supreme Court.

**Supreme Court**

The court of appeals erred in holding that respondent’s claims challenging his placement on the No Fly List are not moot even though he was removed from that list seven years ago and the government has submitted a sworn declaration stating that he “will not be placed on the No Fly List in the future based on the currently available information.”

[FBI v Fikre – Petition for Certiorari](#)

Not surprising, the FBI seems to be ignoring those inconvenient facts found in the Ninth Circuit case. The reasoning behind their appeal? It’s that other circuits have found differently.

The court’s holding directly conflicts with decisions of the

Fourth and Sixth Circuits that have found similar No Fly List claims moot upon the execution of declarations materially identical to the one in this case.

### [FBI v Fikre – Petition for Certiorari](#)

Yet Sopan Joshi, attorney representing the FBI, stated in his opening remarks during oral arguments at the Supreme Court claimed:

Respondent's No Fly List claims are moot. He's not on the list. He hasn't been on the list in eight years. And he won't be put back on the list in the future based on the currently available information. That makes it absolutely clear that his return to the list for the same reasons he was put on it initially can't reasonably be expected to recur.

### [FBI v. Fikre – Oral Arguments before the Supreme Court](#)

How is it absolutely clear that Mr. Fikre will not be returned to the No Fly List for the same reason he was initially put on it, if the FBI refuses to identify the reason he was put on the list in the first place? And how can Mr. Fikre avoid being placed on the list if the FBI won't identify what changed to have him removed from the list?

### **Conclusion**

What at first seemed to be little more than a procedural case has really captured my attention. Intrigue, spy craft, and black lists reminds me of the Tom Clancy novels I used to enjoy. Imagine being stranded overseas, unable to return home, and not knowing the reason why? He was interrogated first by the FBI, and next by a foreign power's secret police. Then, when you finally get your day in court, the government simply changes its mind and expects to get away scot-free.

This should be an interesting opinion to read. I wonder how many U.S. citizens have been captured by the No Fly List

without any probable cause or due process? This is also not the first time a government has attempted to get away with illegal acts by changing things after the fact and calling the claims against them moot. All in all, it could be a very interesting opinion indeed.

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