

THE NO FLY LIST AND DOJ'S NOTICE CONCESSIONS

Congratulations to the ACLU, which last week got 6 of its 13 No Fly List plaintiffs moved off the No Fly List.

Seven American citizens who were banned by the government from air travel [received word](#) yesterday evening that they are cleared to fly. For them, the notice ends a years-long struggle to find out why they were blacklisted and clear their names. As of last night, the seven can finally make plans to visit family, travel for work, and take vacations abroad.

The seven – six men and one women – had been on the government No Fly List, which prevented them from flying to, from, and over U.S. airspace. Even after they were surrounded by TSA agents at the airport and questioned by the FBI, the government refused to officially confirm that they were included on the list. They were also never provided reasons for being banned from air travel, or given a meaningful opportunity to contest the ban. In short, our clients have been locked in a fight to regain their freedoms with virtually no information.

The notice that the seven are “not currently on the No Fly List” came after a federal court last week [set deadlines](#) for the government in the ACLU’s [challenge to the No Fly List](#). The court ruled that the government must notify our clients of their status on or off the No Fly List, give reasons to those still on the list, and provide an opportunity for them to challenge those

reasons. The first of those deadlines was yesterday, and the government must complete reconsideration of the remaining cases by January 16.

The remaining 6 (2 of whom, curiously, worked in the Middle East with tech companies) will now be given some kind of due process.

Which got me thinking about this Charlie Savage story from several weeks ago. It describes how, following DOJ's recognition that it needs to give notice to some, but definitely not all of the people identified using Section 702, the government is now debating whether it needs to give those sanctioned by the Treasury notice under FISA. At the very end of the story, Savage notes that legal experts say DOJ may have to give notice to some on the No Fly List as well.

Legal specialists said the government could also be invoking arguments against providing a FISA notice even at the court stage, which is adversarial. It may say, for example, that Congress could not have intended the law to apply in situations where the recipients of the notice could not do anything with that information. For example, most foreigners abroad could not argue that the warrantless surveillance violated their rights – because the Constitution does not cover them – and so they could not ask to have the evidence suppressed.

Still, the experts said surveillance-derived information could affect Americans who did have constitutional rights, like the approximately 800 people placed on the “no fly” list, which prevents people from boarding aircraft, as well as applicants for licenses like those that allow people to work behind [airport security](#) checkpoints.

“Very significant decisions about

people's lives are made on this kind of evidence," said Jameel Jaffer, an American Civil Liberties Union lawyer. "When all this takes place in secret, you don't have an opportunity to challenge the constitutionality of the government's surveillance methods."

In June, a Federal District Court judge [struck down](#) the process for challenging being put on the "no fly" list, saying it was too opaque and violated Americans' due-process rights. She ordered the government to give people more information about why they are on the list.

Which has me wondering: what may distinguish the 7 ACLU plaintiffs who were removed from the No Fly List from the 6 who remain on it is how they were identified. That is, the government can avoid giving notice simply by moving people off the list.

There is some reason to believe the government does use Section 702 data – and nothing more – to put people on the No Fly List. If that's right, then the legal requirement that those affected get more notice may make the government more cautious about whom it places on the list.