

HOWARD UNIVERSITY SCHOOL OF LAW
BRYANT-MOORE INVITATIONAL
MOOT COURT COMPETITION

2012 APPELLATE RECORD

INFORMATION REGARDING BRIEF PREPARATION:

1. The statute and the jurisdictions discussed in the problem are fictitious.
2. Limit your analysis of the statute to the Constitutional issues presented below. Do not include any discussion of existing federal privacy law or the Patriot Act.
3. Competitors may only use documents included in the record for use as the official record. (This rule is not meant to preclude competitors from conducting independent research of case law or policy in order to bolster any point in the Argument section of the Brief.)
4. Issues on appeal are limited to the two questions presented. Do not argue standing, ripeness, jurisdiction, preemption, or qualified immunity.
5. For complete details regarding submission of the Brief, see the Official Rules of the 2012 Bryant-Moore Invitational Moot Court Competition.

WRIT OF CERTIORARI

**IN THE
SUPREME COURT OF THE UNITED STATES**

**RASHID MOHAMMED AND RASHEEDA
MOHAMMED,**

Plaintiffs-Appellants, Cross-Appellees

v.

THE UNITED STATES OF AMERICA

Defendant-Appellee, Cross-Appellant

**ORDER GRANTING PETITION
FOR WRIT OF CERTIORARI**

November 15, 2011

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit in the above captioned case:

The petition is hereby GRANTED on the following questions:

1. Does a federal statute violate Fifth Amendment due process rights when it a) allows federal law enforcement to place individuals on a watch-list without notice or an opportunity for a hearing, or b) allows the Secretary of State to temporarily revoke an individual's passport without an opportunity for a hearing?
2. Do federal law enforcement agents violate the Fourth Amendment guarantee against unreasonable search and seizure when they obtain warrantless disclosures of email and social networking content?

OPINION BELOW

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

**RASHID MOHAMMED AND RASHEEDA
MOHAMMED,**

Plaintiffs-Appellants, Cross-Appellees

v.

THE UNITED STATES OF AMERICA

Defendant-Appellee, Cross-Appellant

CV 2011-1999

OPINION

Appeal from the United States District Court for the District of Bryant-Moore

September, 14 2011, Decided

Before HOUSTON, *Chief Judge*, and HAMILTON and CHARLES, *Associate Judges*.

OPINION BY: HOUSTON.

I. INTRODUCTION

The events that lead to this appeal demonstrate the tension between an individual's civil rights and the Government's objective to protect the country through preventive action, a tension amplified by advancements in communications and surveillance technology. Twins Rashid and Rasheeda Mohammed, permanent residents of Bryant-Moore, U.S.A., together brought suit in the District Court for the District of Bryant-Moore against the Federal Government, seeking injunctive and declaratory relief from the Electronic Subversion of Foreign Policy Prevention

Act (2011) (the E-Subversion Act) and the conduct of the Secretary of State and Federal Bureau of Investigations (FBI) under the Act's authority.

The Mohammeds' suit presents a federal constitutional question under 28 U.S.C. § 1331 and alleges that the E-Subversion Act, and the conduct of the Executive Branch that the statute engenders, infringes on the Mohammeds' right to due process and of their right to be free from unreasonable search and seizure. Upon cross motions for summary judgment, the District Court found for the Federal Government on the due process claims and for the Mohammeds on the claims of unreasonable search and seizure. Both parties now appeal. For the reasons below, we affirm the District Court's rulings on both the Fourth and Fifth Amendment Claims.

II. FACTS

The following facts have been stipulated to by the parties.

Background

Beginning December 18, 2010, an unprecedented wave of popular revolts occurred in the Arab world. Scores of young citizens in the Middle East and North Africa began to organize massive social protests against those governments in what has become known as the Arab Spring. The source of the protests has been attributed to a Pan-Arab collection of youth living throughout the world who, largely through social media, have remarkable global ties and access to each other.

Traditional news media publicized the events globally, but social networking and technology contributed an added dimension to reporting by allowing protesters to communicate descriptions of their actions and internal motivations to broad audiences. For example, protesters created community pages on Facebook, a social networking website, to plan and organize concerted action among many. They also used the microblogging service Twitter to describe

events happening in real time or to give their location information and attract even more participants. Smartphones, mobile devices that offer capabilities more advanced than those of regular mobile phones, facilitated this process and allowed participants to post pictures of events. These unique characteristics brought both critics and supporters from the Western Hemisphere. Critics decried the fact that uprisings facilitated by laptops and cell phones might upset the balance of carefully maintained relations in the region.

Thus far, full-scale revolutions have occurred in Egypt and Tunisia; a civil war and regime change has occurred in Libya; civil uprisings in Yemen, Syria and Bahrain; major demonstrations in Jordan, Iraq, Algeria, Morocco and Oman; and minor demonstrations in Western Sahara, Sudan, Mauritania and Saudi Arabia. Palestinian demonstrations at the Israeli borders were also inspired by surrounding protests.

The Federal Government

The Federal Government, under intense pressure from its allies in the region, took the official position that while it supported freedom for all persons, it was a proponent of organized and gradual change in the Arab world so as to minimize potential violence. As part of this effort, Congress passed the Electronic Subversion of Foreign Policy Prevention Act (2011). This piece of legislation, known as the E-Subversion Act, was enacted with the stated goal to “inhibit homegrown digital organization of uprisings abroad that will contribute to the disruption of U.S. foreign relations.” Among its operative provisions, the E-Subversion Act 1) makes it a federal offense to knowingly incite or encourage political violence abroad using electronic communication devices in the United States 2) authorizes the FBI to compile a list of those suspected of E-Subversion and to monitor their internet activity and 3) allows the Secretary of State to temporarily revoke passports for individuals suspected of E-Subversion efforts without

granting a hearing. The term “political violence” is defined in the statute as armed revolution, civil strife, terrorism, war and other such causes that can result in injury or loss of property.

In monitoring the internet activity related to the Arab Spring, FBI agents covertly created fake Facebook accounts. Agents trolled community pages related to protests to identify U.S. citizens who might/may have engaged in E-Subversion; agents also gained access to nonpublic information and mapped social relationships/networks using Facebook. Once agents identified potential suspects, they obtained secret administrative subpoenas with built-in gag orders from Federal courts. FBI agents then served the subpoenas on online email providers such as Google, and social media platforms like Facebook, whereby the providers were obligated to turn over the contents of a subscribers email or Facebook profile without the subscribers’ knowledge or permission. Questions began to arise as to the legitimacy of the practice without a search warrant; however there have been few legal challenges as subscribers are rarely aware they are under surveillance.

Rashid and Rasheeda Mohammed

Rashid and Rasheeda are twin brother and sister. They are United States citizens by birth; their parents are naturalized citizens from Saudi Arabia. They are 28 years old.

Rasheeda is a PhD candidate at Howard University in the Political Science Department; she has a double concentration in Political Theory and Comparative Politics. Having done coursework at the London School of Economics, Rasheeda has lived outside of the United States for periods of several months, to years at a time. As part of her doctoral research, Rasheeda attends academic conferences throughout the world. Rasheeda connects with other academics on Facebook and posts musings on the conferences she attends on Twitter. On both her Facebook

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and Twitter profile pages, Rasheeda has a link to her blog entitled “Pan-Arab Politics?” hosted on Blogger.com, a web-blogging service.

Rashid is a PhD candidate in Computer Science at the Massachusetts Institute of Technology (MIT) in the Theoretical Computer Science Research Field. Rashid completed a Master’s Degree in Computer Science at Howard University. He too travels internationally to attend academic conferences. Rashid writes a blog, which he maintains on his personal web hosting server, entitled “Algor-isms.” Rashid does not use Facebook, but he does interact with others on Twitter and online messageboards like 4chan.

Like many Arab Americans, Rashid and Rasheeda took note of the demonstrations happening in North Africa and the Middle East. They discussed what they saw or read in the media on the digital platforms described above. They each generally expressed support for the youth-led efforts, under the belief that the participants’ calls for more democratic, open governments were positive signs for the future of the Arab world. Each twin dedicated several blog posts to their reactions and thoughts on The Arab Spring.

Rasheeda, impressed by what she described as a welcome wave of social activism in the region, discussed the political implications of the Arab Spring in several blog posts. Although she supported the general intent of the demonstrations, she questioned their ultimate potential for long-term success and dedicated multiple posts to making academic recommendations for how participants could successfully translate the momentum from the movement into workable governing and political systems. In the process, however, Rasheeda appeared to advocate disrupting United States diplomatic and foreign relations in favor of bringing about political change in the regions affected during the Arab Spring. For example, in a March 1, 2011 entry, she wrote:

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Rather than a new phenomenon birthed solely out of Facebook and cell phones, the recent revolutions in the Arab world represent the promises of the post-colonial revolutions of the 1950s, 1960s and 1970s come home to roost. Participants' cries for democracy, constitutionalism and access to jobs are the ideological descendants of the cries that lead to the creation of the Arab nation-states today, those cries against Western imperialism and the dynastic regimes controlled by it. This is, as Hamid Dabashi (Columbia professor of Iranian Studies and Comparative Literature) put it, "a collective act of deferred post-colonial defiance."

"Pan-Arab Politics?" Excerpt from Blogger.com entry posted on March 1, 2011.

On March 5, 2011, Rasheeda wrote:

Arab nations in the midst of revolution face a conundrum. What type of government should replace the current regimes? While calls for democracy fueled some protesters, socialists and other voices from the left share this concern: with democracy comes capitalism and with capitalism will come neoliberal policies that allow corporate interests to engulf the region, leaving protesters worse than before they began. Unfortunately, the shadow of Western imperialism may be the one constant between pre- and post-revolution.

"Pan-Arab Politics?" Excerpt from Blogger.com entry posted on March 5, 2011.

Around the same time, Rashid mused on how technology and social networks contributed to the Arab Spring. "The ideas associated with the Arab Spring seem to spread across the internet (and thus the world) like a meme, I think it would make an interesting exercise to map, or track, the movement of these ideas." Rashid Mohammed, *Algor-isms* <http://www.algor-isms.com/posts/0123456789.shtml>. By mid-March, he had designed a digital dashboard that visualized Twitter data captured on international networks about activity in North Africa and the Middle East. The interface featured four quadrants, each capturing revolutionary activity differently. The top right quadrant listed the total number of tweets for the day about developments for each country; the top left graphed those numbers; the bottom left showed the

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hashtag (or keyword) distribution for those countries getting the most attention on Twitter; and the bottom right quadrant featured a Twitter stream of all tweets related to the Arab Spring. Eventually, the fervor of the Arab Spring subsided from its height, and each twin went back to focusing on their normal research.

The Act's Effect on the Mohammeds

Rashid and Rasheeda Mohammed both maintained email accounts with Google's Gmail service. Unbeknownst to either twin however, the FBI had begun ordering and obtaining secret subpoenas for their emails. On March 20, 2011, FBI agents contacted Google and formally requested that they preserve all future incoming and outgoing email messages of each twin. Google complied with the request and began preserving copies of emails that would not otherwise exist without the preservation request. A few weeks later on April 15, agents served Google with a subpoena to surrender the emails they had archived. Neither Mohammed received notice of the preservation request, nor the compelled disclosure. Agents similarly subpoenaed Facebook (on April 16, 2011), requesting that they disclose Rashida's Friend List, which she maintained as private. Facebook also complied with the request without notifying Rashida.

On May 1, 2011, Rashid and Rasheeda Mohammed each received explanatory notices from the Secretary of State that their passports had been revoked until further notice for internet activity that was likely to cause political violence in the Middle East and Northern Africa; the notice said that because it was a temporary revocation, the Secretary would not offer an opportunity for a hearing. Upon further inquiry with the Department of State, the Mohammeds learned that they had been placed on the E-Subversion List by FBI agents. They submitted Freedom of Information Act (FOIA) requests to the FBI to find out why they were placed on the list. Claiming that the reasoning and findings which led to their placement were sensitive

security information and therefore could not be divulged, the FBI responded by sending each twin files containing printed pages documenting some of their internet activity since the previous January, including blog posts, Facebook profile pages, Twitter profile pages, message board posts, etc. Arguing that they had no intentions or plans of inciting any violence, the Mohammeds asked the FBI to remove them from the E-Subversion List and inquired about the possibility of a hearing in which to clear their names from suspicion. The FBI refused to remove either twin, claiming that they had not completed their investigation and that there is no appropriate process for a hearing that would not compromise the agency's intelligence efforts. Neither twin was ever charged with violating the E-Subversion Act. On June 1, 2011, the Mohammeds filed suit in District Court for the District of Bryant-Moore against the Federal Government.

III. DISCUSSION

A. The District Court

The Mohammeds allege two claims: 1) the Electronic Subversion of Foreign Policy Prevention Act (2011) violates their Fifth Amendment due process rights by a) allowing the FBI to place them on a watch-list without notice and b) allowing the Secretary of State to revoke their passport without an opportunity for rehearing; and 2) the FBI violated the Fourth Amendment guarantee against unreasonable search and seizure by obtaining warrantless disclosures of their email and social networking content. Along with their prayer for declaratory and injunctive relief, the Mohammeds request to be removed from the E-Subversion List. Both parties submitted cross-motions for summary judgment. In an unpublished opinion, the District Court found for the Federal Government on the Fifth Amendment Claims and for the Mohammeds on the Fourth Amendment Claims. Both parties now appeal.

B. Standard of Review

Because this appeal concerns the District Court's grant of summary judgment we will review the District Court's grant of summary judgment *de novo*, applying the same standard of review as that applied by the District Court and reviewing the record and evidence in light most favorable to nonmoving party. *Viacom Intern. Inc. v. Icahn*, 946 F.2d 998, 1000 (2d Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992).

C. Merits

1. Fifth Amendment Claims

The Due Process Clause of the Fifth Amendment guarantees that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Due Process Clause has both procedural and substantive components. *United States v. Salerno*, 481 U.S. 739, 746-47 (1987). Procedural due process ensures that Government deprivations of an individual's life, liberty, or property are “implemented in a fair manner.” *Id.* Substantive due process prevents the Government from engaging in conduct that shocks the conscience or that interferes with “rights implicit in the concept of ordered liberty.” *Id.* The Mohammeds allege that both their substantive and procedural due process rights have been infringed. We look at both allegations in turn.

a) Substantive Due Process

In the District Court, the Mohammeds argued that their right to international travel was impermissibly infringed when the Secretary of State revoked their passports for being suspected of E-Subversion efforts. When fundamental rights or suspect classification are not at issue, courts review claimed violations of substantive due process under the “rational basis” standard of scrutiny. *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). International travel does

not parallel the fundamental right to interstate travel and therefore can be reasonably regulated within the bounds of due process. See *Haig v. Agee*, 453 U.S. 280, 306-07 (1981) (upholding constitutionality of regulation authorizing the revocation of passport on the ground that the regulation authorized revocation only where the holder's activities in foreign countries are causing or are likely to cause serious damage to national security).

Under the rational basis test, the provision of the E-Subversion Act that allows the Secretary of State to temporarily revoke the passport of those suspected of E-Subversion is presumed to be valid and we will uphold the provision if it is rationally related to a legitimate governmental interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The Federal Government responds that it was pursuing an important goal in passing the E-Subversion Act to protect the foreign policy interests of the United States. *Agee* made clear that no governmental interest is more compelling than the security of the Nation. 453 U.S. at 307. “Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized.” *Id.* Like the court found of *Agee* himself, those committing E-Subversion endanger the interests of countries other than the United States and create serious problems for American foreign relations and foreign policy. See *id.* at 308. Lest we forget, governmental action that infringes the right to travel abroad will be upheld unless it is “wholly irrational.” *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978). We find guidance from *Agee* that restricting their foreign travel is not only rational, but sufficiently related to protecting this important interest. We reject the Mohammeds’ substantive due process claim, especially given the fact that the passport revocation is merely temporary.

b) Procedural Due Process

“When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.” *Salerno*, 481 U.S. at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Mohammeds argue that neither the Secretary’s revocation of their passports nor the FBI’s placement of their names on the E-Subversion list was conducted in a fair manner, violating their right to procedural due process.

Regarding the revocation of their passports, the Mohammeds acknowledge that they received notice of the Secretary of State’s decision, but contend that they should be allowed a hearing to rebut the revocation. The Federal Government argues that the Secretary’s post-revocation notification satisfied Fifth Amendment concerns because the revocation is only temporary; and thus, the Mohammeds are not entitled to a post- revocation hearing. The Government further asserts that a post-revocation hearing would endanger United States intelligence, as it would be required to support the temporary revocation in a public forum with information that is paramount to maintaining national security. We agree with the Government and think that the Secretary’s post-revocation notification satisfies the Fifth Amendment’s due process requirements.

“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ ” *Mathews*, 424 U.S. at 333, 96 S.Ct. 893 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The Supreme Court has held that a pre-revocation hearing is unnecessary to revoke an individual’s passport for national security or foreign policy reasons. *Agee*, 453 U.S. at 310. However, the Court has held also that to revoke a U.S. Citizen’s passport, “the Constitution’s due process guarantees call for . . . a statement of reasons and an opportunity for a prompt post-revocation hearing.” *Id.*

Here, unlike previous passport cases, we are confronted with the *temporary* revocation of two citizens' passports for national security reasons, which appears to neither require a pre-revocation hearing, nor a prompt post-revocation hearing. Though not a case about procedural requirements, the D.C. Circuit Court of Appeals's reasoning in *Lynd v. Rusk*, 389 F.2d 940, 948 (D.C. Cir. 1967), is most instructive on when and what process is due for a temporary passport revocation:

We think that reasonably concrete and specific travel outside the country must be in contemplation before a complainant can obtain injunctive relief. There may be an inconvenience and irritation resulting from the temporary revocation of a passport during a period when the applicant has no desire to travel, but it is not an interest requiring injunctive relief either of a conventional or mandatory nature, directed to the Secretary, and the prayer for such relief may properly be tabled for want of equity.

The court's reasoning suggests that temporary revocation coupled with a lack of specific travel plans do not implicate normal procedural due process concerns. We agree with the premise, especially in this instance where a hearing could jeopardize United States intelligence. The Mohammeds have not alleged that the temporary revocation bars them from anticipated travel plans, but the Federal Government has alleged a need to protect sensitive information. We therefore hold that the Secretary satisfied the requirements of due process when they notified the Mohammeds that their passports had been temporarily revoked, and affirm the District Court's grant of summary judgment in the Government's favor.

Regarding their placement on the E-Subversion list, the Mohammeds contend that that they should have been given notice of and opportunity to rebut the decision. The Government contends that to provide notice and opportunity for a hearing would jeopardize their investigation into the truth of the matter, as such notification would cause suspects to change their behavior to

be less detectible and having to present at such a hearing would endanger United States intelligence.

Where the Government infringes on a liberty or property interest, courts generally conduct a balancing test to determine what process is due to protect individuals from arbitrary deprivations. *Mathews*, 424 U.S. at 335. The Mathews test weighs the following factors:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

The Mohammeds claim their placement on the E-Subversion list implicates their privacy interest because it allows the FBI to monitor and create files keeping track of their internet activity. We assume without deciding, that the Mohammeds have stated a legitimate privacy interest. The Federal Government claims an interest in protecting the foreign policy efforts of the United States. As stated above, this is a substantial governmental interest. The Government also contends that the Mohammeds received any notice that was due when the Secretary of State temporarily revoked their passports, informing them it was because of the FBI's designation. When presented with two legitimate interests in conflict, the deciding factor in a Mathews inquiry will likely be the second: the risk of an erroneous deprivation and the probable value, if any, of additional procedural safeguards. See *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1135-36 (D. Ill. 2001); *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1194 (9th Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 447 (2010) (in the child offender database context).

The Mohammeds allege that placement on the E-Subversion list means one is only *suspected* of illegal activities; therefore the risk of an erroneous deprivation is significant. The Government contends that consideration of the probable value of additional procedural safeguards diminishes any such significance. Placement on the E-Subversion list is the FBI's professional determination that an individual is worthy of investigation. It is neither conviction nor sentence; it is not even a charge. The probable value of such a hearing is limited because any suspect's disavowals are unlikely to persuade the FBI before they have completed a full investigation, an investigation which they intend to pursue even in the absence of a hearing. We agree with the Government that the low probable value of additional procedural safeguards has a limiting effect on the weight we should give to the risk of erroneous deprivation.

We therefore find that the Government should not be required to hold a hearing in this instance; we also find that the Mohammeds received sufficient notice of their placement on the E-Subversion list when the Secretary of State described that as the reasoning behind the decision to temporarily revoke their passports. Accordingly, we affirm the District Court and reject the Mohammeds' due process claims, finding that neither the E-Subversion Act, nor the Executive Branch conduct authorized by it, violated the Mohammeds' Fifth Amendment rights.

2. Fourth Amendment Claims

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). This inquiry embraces two questions : (1) whether the individual "exhibited an actual (subjective) expectation

of privacy” and (2) whether that expectation is “one that society is prepared to recognize as reasonable.” *Katz*, 389 U.S. at 361 (Harlan, J., concurring). As a general rule, where a person has a reasonable expectation of privacy, the Fourth Amendment requires that police obtain warrants “issued by an independent judicial officer” before conducting a search. *See California v. Carney*, 471 U.S. 386, 390 (1985).

a) Email Communications

Relying heavily on a recent case out of the Sixth Circuit, the Mohammeds argue that the compelled disclosure of their private emails without a warrant violated their Fourth Amendment right to be protected against unreasonable search and seizure. In *United States v. Warshak*, the Sixth Circuit held that there is a reasonable expectation of privacy for email content and that the Government violated appellee’s Fourth Amendment rights when it compelled his Internet Service Providers (“ISP”) to disclose the contents of his private emails without a warrant. *Id.*, 631 F.3d 266, 274 (6th Cir. 2010). In so holding, the court determined that “[g]iven the fundamental similarities between email and traditional forms of communication, it would defy common sense to afford emails lesser Fourth Amendment protection,” than is afforded to tangible mail or telephone calls. *Id.* at 285-86. As a result, the court concluded that an ISP “is the functional equivalent of a post office or a telephone company,” and just as “the police may not storm the post office and intercept a letter” they are likewise prohibited from using an ISP to intercept an email transmission without first obtaining a warrant. *Id.* at 286.

Few other courts have addressed the privacy expectations associated with the contents of an email communication, however the Supreme Court has cautioned against “elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” *City of Ontario v. Quon*, 130 S.Ct. 2619, 2629 (2010) (citing *Olmstead v.*

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United States, 277 U.S. 438, (1928) overruling by *Katz v. United States*, 389 U.S. 347, 353 (1967)). In *Quon* the Court declined to hold that a Government employee has a reasonable expectation of privacy in text messages and instead determined that the Government's interest in maintaining the workplace outweighed any expectation of privacy its employee's might have in text message communications. *Id.* at 2630.

While we are cognizant of the Court's concern about the ever changing role of technology in society, we are persuaded that the role of email in our society has been sufficiently established as a legitimate means of communication among citizens, much like postal mail. Given that email has developed to house so many facets of personal life and communications, we agree with *Warshak*, *id.* at 288, and hold that subscribers enjoy a reasonable expectation of privacy in the contents of emails and the Government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. *Contra United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (no reasonable expectation of privacy exists in email received by the addressee). Therefore, we conclude that FBI agents violated the Fourth Amendment when they obtained the contents of the Mohammeds' emails pursuant to a subpoena instead of a warrant.

b) Facebook

With regard to the information in the Mohammed's Facebook account, we are persuaded that the nature of the information is such that they enjoyed a reasonable expectation of privacy to it as well. Facebook allows users to adjust their privacy settings such that posted content is available to the public or limited to specific groups of people. Rasheeda maintained a private Friend List. Rasheeda manifested a subjective expectation of privacy in her Friend List when she made it available to no one but herself. This is in direct contrast to most of her postings on

Facebook, as she makes those available to the public because she shares scholarly articles and would like to raise her profile as an academic. Regarding the second prong of a *Katz* inquiry, we find that society recognizes a reasonable privacy interest in privately maintained information in social networking content, as hundreds of articles discuss how to strengthen one's Facebook privacy settings. Analogously, the Supreme Court has held that that which we put in an opaque container enjoys a reasonable expectation of privacy, even if the container is in a public space. *See Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality opinion) (overruled by *United States v. Ross*, 456 U.S. 798, 824-25 (1982) based on the limited context of automobile searches). With guidance from *Robbins*, we hold that though Facebook is a public space, maintaining a private Friend List such that only you can see it is akin to an opaque container. Therefore Rasheeda has a reasonable expectation of privacy in her private Facebook Friend List.

Public policy obliges us to begin delineating the spaces that individuals can consider private on the Internet according to reason, as it is unfair to merely say "user beware." We find that FBI agents violated the Fourth Amendment when they obtained Rasheeda's private Friend List pursuant to a subpoena instead of a warrant. Accordingly we affirm the District Court and find for the Mohammeds regarding their Fourth Amendment claims: the FBI conducted unreasonable searches and seizures of the content of their email accounts and social networking profiles.

IV. CONCLUSION

For the forgoing reasons, the judgment of the District Court is **AFFIRMED**.

_____/s/_____

Hon. Howard HOUSTON
U.S. Court of Appeals for the
Fourteenth Circuit

HAMILTON, *Associate Judge*, Dissenting:

I respectfully dissent from my esteemed colleagues in the majority. I would reverse the District Court's decisions for summary judgment and hold that 1) the E-Subversion Act, and the conduct of the FBI and Secretary of State pursuant to its authority, violated the Mohammeds' due process rights and 2) the FBI did not violate the Mohammeds' rights against unreasonable search and seizure for the following reasons.

1) Due Process

Substantive Claims

Regarding the Mohammeds' substantive due process claims, the majority fails to consider that the restriction on international travel here is in effect more similar to *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) than to *Haig v Agee*, 453 U.S. 280 (1981). In *Aptheker*, petitioner challenged a statutory provision which made it a crime for any member of a Communist organization to attempt to use or obtain a passport. 372 U.S. at 502-05. The Court held that this flat prohibition was unconstitutional because it "too broadly and indiscriminately restrict[ed] the right to travel and thereby abridge[d] the liberty guaranteed by the Fifth Amendment." *Id.* at 505. In *Agee*, petitioner challenged the Secretary's conduct on a constitutional basis, 453 U.S. at 306, and for a lack of statutory authority, *id.* at 289; also, the record found Agee had committed acts that endangered the nation's security and foreign policy, *id.* at 308.

Here, the Mohammeds challenge the provision of the E-Subversion Act which expressly allows for the passport revocation of all those merely *suspected* of E-Subversion. Unlike Agee, the Mohammeds have not been found to have committed any conduct endangering the foreign policy of the nation. Therefore, they are more akin to the Communists suspected of traitorous

activities whom the Court protected in *Aptheker*. They have yet to even be charged with E-Subversion. That the statute allows this revocation without a hearing for rebuttal further stains the provision as overly broad and indiscriminate, especially given that the provision calls for revocation *prior to* conviction.

Given this fact, Justice Black's concurring opinion is persuasive:

I think the whole Act, including [the particular provision], is not a valid law, [as] it sets up a comprehensive statutory plan which violates the Federal Constitution because (1) it constitutes a 'Bill of Attainder,' which Art. I, s 9, of the Constitution forbids Congress to pass; (2) it penalizes and punishes appellants and restricts their liberty on legislative and administrative fact-findings that they are subversives, and in effect traitors to their country, without giving them the benefit of a trial according to due process, which requires a trial by jury before an independent judge, after an indictment, and in accordance with all the other procedural protections of the Fourth, Fifth, and Sixth Amendments; and (3) it denies appellants the freedom of speech, press, and association which the First Amendment guarantees.

Aptheker, 378 U.S. at 518 (Black, J., concurring).

The E-Subversion Act seems to work similarly. At a minimum, its passport provision impermissibly restricts the right to international travel.

Procedural Claims

The majority erred in finding that the procedures for both placing the Mohammeds on the E-Subversion List and revoking their passports were constitutionally adequate. My esteemed colleagues note that due process *requires* the opportunity to be heard, then immediately endorse both governmental actions that deny the Mohammeds that opportunity. The Mathews balancing test is available to determine what process may be given (or how it may be given) by considering the interests of the individual and of the Government. It is not available to endorse the Government's decision to refuse process when the Constitution requires it. Even in a military

prison during times of conflict, due process requirements can and must be upheld. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (holding that procedural due process requires citizen detainee be given notice of and opportunity to contest the factual basis for his detention before a neutral adjudicator).

Again, concurring opinions from the Supreme Court should persuade us on how to view the case at hand. In *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125 (1951), the Attorney General, designated certain organizations as Communist on a list furnished to the Civil Service Commission. There was no majority opinion, but in separate concurrences Justices Black (*id.* at 143), Frankfurter (*id.* at 173), Douglas (*id.* at 176) and Jackson (*id.* at 186–87) stressed that the Fifth Amendment's due process clause barred the Government from so condemning organizations without giving them notice and opportunity to be heard.

The Secretary of State should have given the Mohammeds an opportunity to be heard. The FBI should have given them both notice and an opportunity to be heard. We should not approve such refusals to follow constitutional requirements.

2) Search and Seizure

Though our statutory scheme with regard to Government surveillance of individual communications is less than clear, constitutional inquiries are simple: where there is no reasonable expectation of privacy, there is no search for Fourth Amendment purposes. Regarding the Mohammeds' Fourth Amendment Claims, The Supreme Court has not yet addressed the question of privacy rights in email or social networking material and, as the majority has acknowledged, has expressly cautioned against courts construing a privacy interest in email communication “before its role in society has become clear.” *Discussed, supra*, at 17 (quoting *Quon*, 130 S.Ct. at 2629 (2010)). The Mohammeds and the majority rely exclusively on

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Warshak to establish the compelled disclosures as Fourth Amendment searches; however, they ignore the Second Circuit's prior holding in *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004), that, although individuals generally have a reasonable expectation of privacy in their home computers, no similar expectation of privacy exists in Internet communications or e-mail received by the addressee.

Regarding social networking content, the majority cannot point to any case law that directly supports their premise. However the Supreme Court, and several circuits have previously held that information relayed to a third party, including subscriber information given to Internet Service Providers, does not enjoy a reasonable expectation of privacy. *See United States v. Miller*, 425 U.S. 435, 442 (1976) (bank records); *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (telephone numbers); *United States v. Perinne*, 518 F.3d 1196 1204-05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation") (citing Fourth, Sixth, and Ninth Circuits cases); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008) ("[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit . . ."). Furthermore, the case law that speaks to social networking content holds against a reasonable expectation of privacy. *See, e.g., Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (no legitimate expectation of privacy for materials publicly posted on Internet bulletin boards); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 656 (N.Y. Sup. Ct. 2010) (no reasonable expectation of privacy in information published on social networking sites, where users consent that information will be shared upon creation of account).

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That the Mohammeds did not allege that the compelled disclosure of Rashid's 4chan postings constituted a Fourth Amendment search is telling. 4chan is an image-based bulletin board that is intended to facilitate the public exchange of ideas. Likewise, Facebook is intended to facilitate the public exchange of personal content among its users. Consideration of this premise leads to the logical conclusion that social networking users do not enjoy a reasonable expectation of privacy in the content they post either. Unfortunately, the structure of the Internet and Internet communications (most are facilitated by third-party service providers that give notice of their intent to share in their terms of service) means that much of its content is unlikely to be protected from Government surveillance. Absent action by Congress clarifying privacy standards to protect citizens amidst changing technology, courts are constrained to follow the law as it exists in construing Constitutional protections.

Thus, even if the majority is correct in finding legitimate privacy interests in email and social networking communications, I believe the majority erred in not finding that the Government qualifies for the special needs exception to the warrant requirement: when the Government requires a search more expansive than normal law enforcement is authorized to conduct, and the situation makes obtaining a warrant impractical, a court will suspend the need for a warrant or probable cause as long as the Government's needs outweigh those of the citizen being searched. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). I believe such a situation existed here and justified the Government's search of the Mohammeds' social networking activities. As a result, I do not agree with the majority that a Constitutional violation occurred and I respectfully dissent.