

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Fear and liberty must co-exist

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*"[F]ear cannot...allow...the evisceration of the bedrock principle of our Constitution that no one can be arrested without probable cause that a crime has been committed."*

— Farag v. U.S., \_\_F.Supp.2d\_\_, 2008 WL 4965167 (EDNY 2008)

Just before Thanksgiving, the U.S. District Court for the Eastern District of New York addressed the intriguing issue of whether federal agents could rely solely on airline passengers' Arab ethnicity when determining whether probable cause exists for their arrest.

In *Farag v. U.S.*, the plaintiffs brought a *Bivens* claim against governmental entities and employees, asserting that their arrest and subsequent detention and interrogation violated their constitutional rights.

The plaintiffs, both of Egyptian descent, were long-time friends. One was an American citizen and a retired New York City police officer while the other possessed a valid U.S. Visa and was an Egyptian citizen, employed as a sales manager by General Electric.

After vacationing in California, the plaintiffs boarded a plane in San Diego bound for New York City. Counterterrorism agents were on the flight as well and subsequently detained and arrested the plaintiffs based on suspicions of terrorism.

The government asserted probable cause for the plaintiffs' arrest existed based on non-ethnic factors. The court dismissed that argument, then turned to the government's claim that the plaintiffs' Arab ethnicity and use of the Arabic language were relevant factors in the determination of probable cause since the individuals who "participated in the 9/11 terrorist attacks were Middle Eastern males ... [and] the United States continues to face a very real threat of domestic terrorism from Islamic terrorists."

In other words, their position was that, in our post-9/11 world, the mere fact that an airline passenger is believed to be of Arab ethnic-

ity is of great importance when determining probable cause since Arabs have a greater propensity to commit acts of terrorism than non-Arabs.

The court flatly rejected this argument, noting that precedent from both state and federal courts squarely supported the conclusion that ethnicity should not be used as the basis to support governmental intrusion under the Fourth Amendment:

There is no doubt the specter of 9/11 looms large over the case. Although it is the first post-9/11 case to address whether race may be used to establish criminal propensity under the Fourth Amendment, the court cannot subscribe to the notion that in the wake of 9/11 doing so now is permissible. As the Second Circuit recently admonished, "the strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal v. Hasty*, 490 F.3d 143, 159 (Second Cir. 2007), cert. granted sub nom. *Ashcroft v. Iqbal*, \_\_U.S.\_\_, , 128 S.Ct. 2931, \_\_L.Ed.2d\_\_ (2008).

It is heartening to read those words in the context of a court decision, rather than an editorial. The United States is a great country founded on the principles of liberty and freedom from baseless governmental intrusions. Such protections, embodied in our Constitution and Bill of Rights, are what separate us from much of the world.

We cannot allow the horrors of 9/11 to reduce us to a land of people paralyzed by fear, full of hatred and distrust. Our legitimate concerns regarding our safety and the safety of our families must never be permitted to override the liberties and freedoms to which all people are entitled, regardless of their race, religion or creed.

Fear and liberty can co-exist. They must co-exist; otherwise the America we know will be no more.

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