UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

GULET MOHAMED,

Plaintiff,

v.

ERIC H. HOLDER, JR., et al.,

Defendants.

Case No. 1:11-CV-00050

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR DISMISSAL IN PART

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

INTRODUCTION

There is a fundamental disconnection between Plaintiff's procedural due process claim and the evidence he offers to support it. Plaintiff claims that the process surrounding his alleged placement on the No Fly List is inadequate, but, with few exceptions, the evidence he offers in support of that claim concerns the criteria used for inclusion in the broader Terrorism Screening Database ("TSDB"). It bears repeating that the criteria for inclusion in the TSDB are separate and distinct from the criteria for inclusion on the No Fly List, and that individuals who are only in the TSDB are not prohibited from boarding flights. As established in Defendants' earlier briefing, the criteria for placement on the No Fly List require a more rigorous inquiry into the nature of an individual's suspected terror threat and his or her likely targets or operational capabilities. Plaintiff does not contend that inclusion in the TSDB makes it any more or less likely that an individual will satisfy the heightened criteria for inclusion on the No Fly List. In fact, discussion of the No Fly List criteria is strikingly absent from Plaintiff's Opposition.

The weakness of Plaintiff's evidentiary case is critical: he asks the Court to strike down the procedures surrounding placement on the No Fly List without providing a single reason why the most important feature of those procedures—the process and criteria used to determine placement—is inadequate. This is reason enough to grant Defendants judgment; but if the Court needed more, the evidence of the current procedures is well-documented and largely uncontested, and the Government is entitled to judgment as a matter of law for three reasons: first, Plaintiff is not entitled to additional pre-deprivation process and his arguments to the contrary lack evidentiary support and are based on a misreading of the law; second, an unrebutted declaration demonstrates that Plaintiff's attack on DHS TRIP is moot; third, if Plaintiff's claim is not moot, then Defendants are entitled to summary judgment because

undisputed evidence demonstrates that (i) Plaintiff's claimed liberty interests are weak at best and non-cognizable at worst; (ii) the Government's extensive pre- and post-deprivation procedures for placing an individual on the No Fly List significantly minimize the risk of erroneous deprivation; and (iii) the Government has compelling national security interests that would be undermined by the substitute procedures proposed by Plaintiff.

Alternatively, if the Court does not find on the current record that the procedures for placement on the No Fly List comport with due process, then it should dismiss the case because the exclusion of evidence pursuant to the state secrets privilege prevents Defendants from fully litigating several aspects of this as-applied procedural due process claim, including the particular circumstances of the individual as they relate to the necessity of pre-deprivation process, the full panoply of pre- and post-deprivation procedures provided, the specific information considered in the process, and the particular nature of the Government's concerns and how those would be affected by any proposed substitute procedures. The exclusion of evidence prevents the Government from presenting facts directed at any of those issues, as well as presentation of a harmless error defense.

STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiff disputes only three of the propositions in Defendants' statement of material facts. Pl.'s Opp. at 6-7. Each of the Plaintiff's factual disputes is based in whole or in part on a purportedly leaked version of the Government's Watchlisting Guidance. See Pl.'s Opp. at 6. The Government has neither confirmed nor denied the authenticity of the purportedly leaked document. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir. 1975) (holding that purportedly leaked national security information "was not in the public domain unless there

had been official disclosure of it"). Because the document relied upon by Plaintiff cannot be authenticated, see Fed. R. Ev. 901(a), it is inadmissible and therefore may not be considered as part of the record on summary judgment, see Fed. R. Civ. P. 56(c)(1)(B) & (c)(2).

Additionally, Plaintiff's responses to Defendants' statements do not identify any genuine issues of material fact. With regard to Plaintiff's first response, the undisputed evidence in the record establishes that TSC considers the nomination of an individual to the No Fly List in order to determine whether that individual meets the substantive criteria for such placement. See Def. MSJ, ECF No. 159, at 6-9. Plaintiff's second response cites a DOJ Inspector General report to claim that Defendants' statement that "an individual nominated to the No Fly List must meet at least one of the following [four] criteria" is disputed because the "FBI has a process whereby '… non-investigative subjects[]' are placed on the No Fly List." Pl.'s Opp at 6 (citing Pl.'s MSJ Exh. F). But the fact that a person who is not under investigation by the FBI *may* be placed on the No Fly List has no bearing on the criteria that must be satisfied in order for the placement to take effect; the No Fly List criteria must be satisfied regardless of investigative status.

In his third response, Plaintiff claims that Defendants' statement that "'[m]ere guesses or hunches, or the reporting of suspicious activity alone,' will not withstand scrutiny" is disputed because, "[o]f the 468,479 nominations made to the TSDB in 2013, only 4915—or slightly more than 1.04 percent of nominations—were rejected." Pl.'s Opp. at 6-7 (citing Pl.'s MSJ Exh. E). But this argument is based on the mistaken assumption that the number of nominations to the TSDB in 2013 reflects the nominations of unique individuals to the TSDB. See Def. MSJ Opp., ECF No. 163, at 6. Defendants explained in their supplemental interrogatory responses (which were provided to Plaintiff before summary judgment briefing began) that TSC has three types of

nominations (add, modify, and delete). For example, an individual in the TSDB may be the subject of several nominations modifying the information included in that particular TSDB entry. Id., Exh. 1 at 7-8. Therefore, the number of nominations considered and rejected does not create a genuine issue of fact about the type of information that TSC can or cannot rely upon when considering a nomination.

ARGUMENT

I. The Constitution Does Not Require Pre-Deprivation Process Prior to Placement on the No Fly List.

Plaintiff reiterates his claim for pre-deprivation process, insisting that "prospective victims of government defamation must have access to a pre-deprivation process." Pl. Opp. at 9-10 (internal citations and quotations omitted). Plaintiff relies primarily on Sciolino v. City of Newport News, 480 F.3d 642 (4th Cir. 2007), a due process case arising from the dismissal of a police officer. Sciolino does not support the proposition Plaintiff advances, and even if it did, the proposition could not be reconciled with the Supreme Court's pre-deprivation case law.

The issue in Sciolino was whether the plaintiff alleged facts demonstrating that the damaging information the city placed in his personnel file were "made public." Id. at 646. The Fourth Circuit upheld the district court's determination that the plaintiff had failed to state a claim but held that the district erred in not granting the plaintiff leave to amend his complaint. Id. at 651. The Fourth Circuit did not hold that the city was required to provide the plaintiff with a name-clearing hearing prior to the filing of his termination letter, and it assuredly did not hold that all "prospective victims of government defamation must have access to a pre-deprivation process." See Pl. Opp. at 9-10. The Fourth Circuit's statement that "an opportunity to clear your

name after it has been ruined by dissemination of false, stigmatizing charges is not 'meaningful,'" Pl. Opp. at 10, considered in light of the limited nature of the holding, simply does not mean that pre-deprivation process is required in that case or in this matter, particularly where Plaintiff has not submitted any evidence showing a likelihood that the public at large would have become aware of his alleged status on the No Fly List absent this lawsuit.

Even if Sciolino could be interpreted as setting forth a rigid rule requiring prior process in government defamation cases, such a rule could not be squared with the flexible demands of the pre-deprivation process inquiry, which proceeds from the principle that "[a]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," may in certain cases justify delaying process until after the initial deprivation.[1] FDIC v. Mallen, 486 U.S. 230, 240 (1988). Under Plaintiff's reading of the pre-deprivation law, there would be no reason for the Court to determine whether the law strikes a suitable balance among the public and private interests at stake. See Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.").

Beyond this, analogous case law makes clear that pre-deprivation process is particularly inappropriate where terrorism-related concerns are at issue. For example, such notice is generally not required in the context of terrorism finance because of the need for asset blocking to take effect immediately after designation. See Def. MSJ at 15. Plaintiff argues that the "outcome in those cases derives from the nature of money," which (Plaintiff says) is more

[1] Moreover, Plaintiff would not benefit from such a rule because he points to no evidence that his alleged No Fly List placement has caused actionable harm to his reputation. See infra, 15-16.

difficult to monitor than someone on a watchlist. Pl. Opp. at 10. But post-deprivation process was appropriate in those cases not because of the "nature of money" or the special concerns presented by asset transfers, but rather because advance notice would have afforded the designated entities an opportunity to change their behavior in a way that would frustrate the purpose of the underlying sanctions program. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 77 (D.D.C. 2002) ("prior notice to such [designated] persons of measures to be taken pursuant to this order would render these measures ineffectual.") (internal citations and quotations omitted); GRF v. O'Neill, 207 F. Supp. 2d 779, 804 (N.D. Ill. 2002) (same).

The same concerns are present here. Just as the need to prevent the flight of assets and the destruction of records justified the post-deprivation process in the terrorism-finance cases, the need to prevent terrorists or terrorist organizations from acting on their plans, once alerted to the Government's concern that they are a risk to aviation security, or taking countermeasures to evade investigative or intelligence scrutiny justifies post-deprivation process under these circumstances. Steinbach Decl. ¶ 15. Plaintiff's unsupported claim that individuals notified of their watchlist status can be "monitored, accompanied, investigated, indicted, or arrested in the same manner as he [could] before that notice," Pl. Opp. at 10, fails to demonstrate that pre-deprivation notice is required, let alone appropriate. The Government has explained that surveillance is far more difficult when the target knows he is under scrutiny, and that notifying individuals prior to or shortly after their placement on the No Fly List would hamper future law enforcement and surveillance efforts by enabling targets to avoid detection and providing terrorist organizations with insight as to who may or may not be able to carry out a terrorist attack. See Steinbach Decl. ¶¶ 13, 15.

Similarly, Plaintiff's insistence that individuals on the No Fly List will learn of the Government's interest in them as a result of being denied boarding "whether or not there is pre-deprivation notice," Pl. Opp. at 11, does not advance his position. The argument assumes that every individual placed on the No Fly List will eventually be denied boarding but, in fiscal year 2013, "a substantial number of U.S. Persons on the No Fly List never attempted to board a commercial aircraft within or bound for the United States, or which crossed over U.S. airspace, under their known identities." Steinbach Decl. ¶ 14. Providing notice to these individuals before or just after placement would mean revealing the Government's concerns about the threat those individuals pose to aviation or national security well before any such concerns may have come to their attention. Id. A requirement that pre-deprivation notice be provided would also undermine the significant strategic advantage that exists prior to a denial of boarding—uncertainty about the effectiveness of particular individuals, which makes planning civil aviation attacks more difficult—because the absence of such notice would serve as an "implicit confirmation" to a terrorist that the Government has not taken an interest in him.[2] Steinbach Decl. ¶ 16.

[2] Even apart from the terrorism-finance cases, the Supreme Court and Fourth Circuit have repeatedly allowed the government to dispense with prior process in cases where the government's interest is less compelling than preventing terrorist attacks, see, e.g. Dixon v. Love, 431 U.S. 105, 114 (1977) (highway safety); Slade v. Hampton Roads Regional Jail, 407 F.3d 243, 254 (4th Cir. 2005) (defraying costs of incarceration); as well as cases where the private interest is stronger than traveling internationally by the most convenient means, see, e.g., Haig v. Agee, 453 U.S. 280, 309 (1981) (pre-revocation hearing is unnecessary for passport revocation "when there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of [the individual's conduct]"); Jordan by Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) (upholding summary removal of a child from his parents' custody without prior notice or hearing). As in Haig, a case in which the Supreme Court held that pre-deprivation process was not required for the complete revocation of a passport (arguably a more severe restriction on a person's ability to travel internationally, as Plaintiff seems to concede, Pl. Opp. at 10-11), the immediate threat to national security by notifying a person of the

II. The Unrebutted Gary Declaration Demonstrates that Plaintiff's Procedural Due Process Claim Is Moot.

Plaintiff contends that his challenge to DHS TRIP is not moot for two reasons, Opp. at 13-14, neither of which is availing.[3] Plaintiff first argues that Defendants have not satisfied the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." Pl.'s Opp. at 13 (quoting Adarand Constructors v. Slater, 528 U.S. 216, 222 (2000)). This argument is based on the "voluntary cessation" doctrine, which holds that in certain circumstances the voluntary cessation of allegedly unlawful conduct may not moot a case. See Adarand, 528 U.S. at 222. But Defendants have met that burden through the submission of the declaration of Elizabeth Gary, ECF No. 158-3 (Def. MSJ Exh. C), which states that the DHS TRIP procedures that Plaintiff challenges "are no longer applied … because new procedures are actively being developed." Id. ¶ 4. The declaration, which Plaintiff does not address, provides no basis to infer that the challenged redress procedures would "start up again."

Plaintiff also suggests that Defendants have not carried their burden because they "provide no information about their revis[ed] [procedures]." Opp. at 14. Plaintiff's statement is incorrect,[4] but regardless, it is also a misstatement of the law. The voluntary cessation doctrine only requires the party raising mootness to make a showing that the challenged conduct will not

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Government's concerns far outweighs the need or purpose of pre-deprivation notice.

[3] Plaintiff's contention that "there is no post-deprivation process at all this time," Pl. Opp. at 13, mischaracterizes the Gary declaration, which states that redress requests are being held in abeyance while new procedures are being developed. Gary Decl. ¶ 4.

[4] See, e.g., ECF No. 146-1 at 3-4 ("… Defendants intend to make changes to the existing redress process regarding the No Fly List … with full consideration of the Court's opinion [finding that DHS TRIP violates procedural due process]. … [T]he Government will endeavor to increase transparency for certain individuals denied boarding who believe they are on the No Fly List and have submitted DHS TRIP inquiries …"); see also Latif v. Holder, No. 3:10-cv-0750 (D. Or.), ECF No. 153-1 (letter identifying plaintiffs who are not currently on the No Fly List).

"start up again"; it does not require any showing about the replacement procedures, which are subject to challenge in their own right. In fact, Plaintiff's claim is inconsistent with a Fourth Circuit decision dismissing a lawsuit as moot even though the challenged programs remained in place for one year pending development of new programs. Disabled in Action of Balt. v. Bridwell, 820 F.2d 1219 (table decision), 1987 WL 36137, at *3 (4th Cir. June 2, 1987). The court held that, "[t]hough there may technically still exist a constitutional case or controversy, prudential considerations require[] [dismissal as moot]," id. (citation omitted), because "any court considering this case would be compelled to consider the validity of superseded regulations," id. at *4. The court concluded that "[t]he [prior] regulations no longer exist and it would be fruitless to allow plaintiffs to establish their invalidity." Id. at *3.[5]

Plaintiff further contends that "Defendants misinterpret [his] claim" because he "is not challenging DHS TRIP," but rather "the absence of [a] fair process infecting the entire watchlisting enterprise." Opp. at 13. Plaintiff adds that "[h]e has not utilized DHS TRIP, and this Court has not required it of him." Id. Plaintiff's argument is both internally inconsistent and meritless. Plaintiff has repeatedly asserted that the redress procedures (DHS TRIP) are a critical component of his procedural due process claim. Id. at 14-20 (arguing "DHS TRIP is Not Adequate Process"); Complaint, ECF No. 85 at ¶¶ 33-38 ("Inadequacy of Redress Procedure");

[5] Moreover, application of the voluntary cessation doctrine varies depending upon the context and circumstances of a particular case. Unlike Adarand, a government contracts case, for challenges to law or policy, the Fourth Circuit has held that "[t]he practical likelihood of reeanactment of the challenged law appears to be the key to the Supreme Court's mootness jurisprudence," Am. Legion Post 7 v. City of Durham, 239 F.3d 601, 606 (4th Cir. 2001); see also Doe v. Shalala, 122 Fed. App'x 600, 603 (4th Cir. 2004) (holding, in response to a voluntary cessation defense, that "[i]t is of no consequence that the challenged conduct in this case is administrative rather than legislative in character").

Pl. MSJ at 17-19. The Court also recognized that DHS TRIP is at issue in its order on Defendants' motion to dismiss. ECF No. 70 at 28-31. Moreover, Plaintiff's contention to the contrary raises a distinction without a difference because, at bottom, he challenges the constitutionality of the notice and the opportunity to be heard provided to individuals who allege they are on the No Fly List, and those challenged procedures are part of DHS TRIP.

III. If Plaintiff's Claim Is Not Moot, then the Government's Placement Procedures and Former Redress Procedures Fully Comport with Due Process.

A. Private Interests Claimed by Plaintiff

Plaintiff claims that two liberty interests are at stake in this lawsuit—a right to travel and a right to be free from a government-imposed stigma—but he has not demonstrated a constitutional deprivation of either interest, and this fact alone is sufficient to sustain summary judgment for Defendants. Even assuming a constitutional deprivation, however, the nature of the private liberty interests claimed by Plaintiff—both of which, he argues, center on his right to travel internationally—is weak because international travel is subject to reasonable regulation and, as the Supreme Court held in Haig, may be foreclosed entirely within the boundaries of the Constitution.[6]

1. Right to Travel

Plaintiff spends nearly the entire discussion of his claimed right to travel attempting to deconstruct an "analogy" between "the right to interstate migration" and "the right to travel" that

[6] The caption for Plaintiff's argument states that "[his] [p]rivate [i]nterests [c]omprise the [l]aw of [t]h[e] [c]ase," Pl. Opp. at 14, but the Court's findings on a motion to dismiss, which concern the sufficiency of Plaintiff's allegations, are quite different from a motion for summary judgment, which tests the sufficiency of the evidence after development of the claims. See, e.g., Maraschiello v. City of Buffalo Police Dep't, 709 F.3d 87, 97 (2d Cir. 2013). Regardless, the Court may reconsider any non-final judgment at any time. See Fed. R. Civ. P. 54(b).

has not been made, see Pl. Opp. at 15-18,[7] and does not address whether he has been deprived of a liberty interest in international travel and, if so, the weight that should be given to that interest.

At the outset, Plaintiff does not address whether he has suffered a constitutional deprivation of his right to travel in the first instance. Plaintiff concedes he is not advancing a claim that Defendants have violated his right to interstate travel. See Pl. MSJ at 8-10; Pl. Opp at 15 (explaining that his claimed liberty interest is "unrelated to the right of interstate travel"). These cases are still relevant because the right to interstate travel does *not* include a right to travel by a particular mode of transportation and, therefore, a restriction on one mode of transportation does not amount to a constitutionally cognizable deprivation of that right. See Def. MSJ at 26-27 (collecting cases); see also Gilmore v. Gonzales, 435 F.3d 1125, 1137 (9th Cir. 2006) (no "fundamental right to travel by airplane even though it is the most convenient mode of travel"). If the inability to board an airplane does not amount to a constitutional deprivation in the context of interstate travel—which, unlike international travel, is a fundamental right, see Saenz v. Roe, 526 U.S. 489, 498-99 (1999)—a fortiori, it cannot amount to a constitutional deprivation in the lesser-protected context of international travel. Significantly, Plaintiff admits as much when he argues that he "is still able to leave the US, though with increased difficulty." Pl. Opp. at 11. The failure to prove the constitutional deprivation of a protected interest, by itself, is sufficient to grant Defendants summary judgment.

[7] The purpose of this distinction and Plaintiff's analysis of the privileges and immunities clause is unclear, Pl. Opp. at 15-18, and Defendants cite cases like Gilmore and Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991), that address interstate travel under the due process clause of the Fifth Amendment. Regardless, although inter-state discrimination cases concern state action and are brought under different constitutional provisions (Privileges and Immunities Clause, Fourteenth Amendment), they both address the constitutional right to travel and, to the extent the analysis is different, Plaintiff has not explained how or why those differences matter here.

Plaintiff only briefly addresses Defendants' argument that, even if he has suffered a constitutional deprivation, the Court must evaluate the weight of the interest at stake. See Def. MSJ at 25; Def. Opp. at 13. Plaintiff responds that, although "Defendants [] argue that the slew of passport cases indicates that the deprivation … is minor … [he] has provided ample evidence to demonstrate that protected activity can be the basis of listing [an individual on the No Fly List]." Pl. Opp. at 18 n.3. Plaintiff's response confuses the nature of the private interest at stake with the second Mathews factor, the risk of erroneous deprivation. Plaintiff thus fails to address the point that any liberty interest in international travel is weak because it is subject to reasonable government regulation, is subordinate to national security concerns, and thus may constitutionally be restricted. See Def. MSJ at 27-29 (citing, among other cases, Haig, 453 U.S. at 306-07). Plaintiff later argues that the No Fly List is unlawful even under Haig because, by "allow[ing] [] persons [on the No Fly List] to go to malls, ride trains, and drive large trucks … is so disconnected to [] what a common sense response to a suspected terrorist (*sic*) as to not even be reasonable." Pl. Opp. at 18 n.3. But, even assuming the accuracy of Plaintiff's argument, which logically would result in "No Mall," "No Drive," and "No Train" Lists, an alleged failure to limit all possible harms does not render an effort to limit one harm unreasonable, especially in light of the particularly catastrophic harms posed by threats to civil aviation, see Def. MSJ at 1.

2. Right to be Free from Government-Imposed Stigma

Plaintiff contends that he has satisfied both required prongs for his stigma-plus claim, but his position is incorrect as a matter of fact and law.[8] Plaintiff argues that Defendants have

[8] Plaintiff suggests that Defendants are acting inconsistently by disputing the stigma prong because they did not dispute this issue in Latif v. Holder, -- F. Supp. 2d --, 2014 WL 2871346

publicized the allegedly stigmatic statement (placing his name on the No Fly List) by "disseminat[ing] it to thousands of airline employees, to foreign governments, to state and local law enforcement officers, and even to ship captains." Pl. Opp. at 18-19. Plaintiff argues that this dissemination is no different than the distribution of shoplifter posters to 800 merchants in Paul v. Davis, 424 U.S. 693 (1976). Id. at 18. But Plaintiff's statement that he was denied boarding on one flight, Pl. MSJ Exh. A at ¶ 16, and his admission that "no reason was present[ed] to him," id. Exh. B at ¶ 9, simply do not support his claim. Second, Plaintiff has not provided any evidence that the information was disclosed to the public at large. See Sciolino, 480 F.3d at 645. Intra-government or inter-government communications do not constitute a dissemination to the general public. See Johnson v. Martin, 943 F.2d 15, 17 (7th Cir. 1991) (no public disclosure when statements not disseminated beyond proper chain of command); Def. Opp. at 16-17 (citing cases concerning sharing information with foreign governments). Nor does the dissemination of information to regulated entities or to limited private parties constitute a public dissemination sufficient to satisfy the first prong. See Tarhuni, 8 F. Supp. 3d at 1275; Judicial Watch, Inc. v. Dep't of Def., 963 F. Supp. 2d 6, 12 (D.D.C. 2013) (limited disclosure of otherwise-exempt information to filmmakers did not place information in public domain). The limited and tightly controlled dissemination of No Fly List information to government entities and regulated private parties is thus unlike the dissemination of the shoplifter poster in Paul, which was disseminated

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(D. Or. June 24, 2014). Pl. Opp. at 18. Notably, however, the district court judge who decided Latif also found Tarhuni v. Holder, 8 F. Supp. 3d 1253 (D. Or. 2014) that an instruction to an airline not to permit boarding does "not constitute dissemination of the stigmatizing information in such a way as to reach the community at large." Id. at 1275. In any event, the Government is not obligated to make the same arguments in every case, especially when the facts vary. See United States v. Mendoza, 464 U.S. 154, 159-63 (1984).

without restriction and ended up with the public at large, 424 U.S. at 696.

With regard to the second prong—requiring evidence of a "plus" factor—Plaintiff cites only his inability to board an airplane. Pl. Opp. at 19 n.4. But that alleged harm is precisely the same harm Plaintiff claims as part of his right to travel. Plaintiff has not provided any evidence demonstrating that he has suffered a harm that flows from the stigma associated with his alleged placement on the No Fly List, and he cannot bootstrap a claimed liberty interest in being free from reputational harm by basing it on his claimed liberty interest in international travel.

B. Risk of Erroneous Deprivation

1. Plaintiff Does Not Dispute the Evidence Demonstrating that the Risk of Erroneous Placement on the No Fly List Is Low.

Plaintiff asserts that DHS TRIP is inadequate because "there is no notice or hearing, no opportunity to rebut the allegations made against listees, no disclosure of the allegations made against listees, and not even confirmation that a person is actually on the No Fly List." Pl. MSJ at 17. But this attack on DHS TRIP fails to engage in the Mathews balancing test based on the specific circumstances of his claim. For example, in the context of the designation of a foreign terrorist organization, the D.C. Circuit has held that the "strong interest of the government [in protecting against the disclosure of classified information] clearly affects the nature . . . of the due process which must be afforded petitioners." Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207 (D.C. Cir. 2001). Nor does Plaintiff address his own mistake concerning the number of nominations to the TSDB—the lone piece of evidence cited to support the alleged risk of error. See Def. Opp. at 6. Instead, he relies upon inapposite case law to argue generally that the mere absence of a procedural mechanism increases the likelihood of error. See

Pl. Opp. at 13 n.2. Plaintiff also fails to address the Jifry decision, in which the D.C. Circuit held that, "[w]hatever the risk of erroneous deprivation, the [plaintiffs] had the opportunity to file a written reply to the TSA's initial determination [letters] and were afforded independent *de novo* review of the entire administrative record by the Deputy Administrator of the TSA . . . , and *ex parte, in camera* judicial review of the record. In light of the governmental interests at stake and the sensitive security information, substitute procedural safeguards may be impracticable, and in any event, are unnecessary under our precedent [Nat'l Council of Resistance of Iran]." Id. at 1183-84. Thus, Jifry provides a persuasive analog for why the challenged redress procedures are constitutionally sound and why Plaintiff's claim concerning the legal and factual need for substitute procedures is misplaced.

2. The No Fly List Criteria Are Constitutionally Adequate.

Plaintiff contends that the standard for inclusion on the No Fly List is "completely alien to our jurisprudence" and "independently constitute[s] a procedural due process violation." Pl. Opp at 7. According to Plaintiff, under the current procedures, "an American citizen can find himself labeled a suspected terrorist because of a 'reasonable suspicion' based on a 'reasonable suspicion.'" Pl. Opp. at 7 (quoting Mem. Op. at 18).

This argument conflates two separate issues. Contrary to Plaintiff's suggestion, an individual cannot be placed on the No Fly List because of a "reasonable suspicion based on a reasonable suspicion," Pl. Opp. at 7, which is Plaintiff's characterization about a criterion for placement in the *TSDB*.[9] To be placed on the *No Fly List*, an individual must meet at least one of

[9] Plaintiff mistakenly attacks one criterion for placement in the TSDB: reasonable suspicion that an individual is a suspected terrorist. See Def. Opp. at 18-21. Regardless, Plaintiff's apparent

four separate criteria, each of which requires a sharply focused risk assessment unrelated to the alleged deficiencies Plaintiff ascribes to the TSDB criteria. See Def. MSJ at 21. The No Fly List criteria require more than a mere link to terrorist activity; rather, there must be concrete information about the nature of the terrorist threat (e.g., domestic or international) and the likely targets (e.g., the homeland, aircraft, military installations), or, where there is no information about targets, information about the individual's operational capability to carry out an attack. Def. MSJ at 21. Common to each criterion is a focus on *violent* acts of terrorism. See Def. MSJ at 8 (listing No Fly List criteria). The first three criteria incorporate the statutory definitions of domestic and international terrorism, which presuppose "violent acts," 18 U.S.C. § 2331(1)(A) (international terrorism), or "activities that involve acts dangerous to human life," (18 U.S.C. § 2331(5)(A) (domestic terrorism), while the fourth criterion requires "engaging in or conducting a violent act of terrorism" by its own terms. In this way, the criteria strike an appropriate balance—general enough to encompass a range of terrorist activity, and sufficiently restrictive to exclude individuals who are associated with terrorism but have not been assessed to pose an operationally capable violent threat or a violent threat to a particular target.[10]

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vagueness challenge would fail because the Court found that a constitutional challenged to alleged TSDB placement alone does not involve a cognizable harm (denial of boarding). Mohamed v. Holder, No. 1:11-CV-50, 2011 WL 3820711, at *7 (E.D. Va. Aug. 26, 2011). It would also fail because courts are not inclined to find a term unduly vague when it is "readily definable" and has a "long precedential history," ACLU v. Gonzales, 237 F.R.D. 120, 130 (E.D. Pa. 2006), and "reasonable suspicion" has a settled meaning and deep roots in constitutional jurisprudence. See Doyon v. Home Depot U.S.A., Inc., 850 F. Supp. 125, 131 (D. Conn. 1994).

[10] Even if Plaintiff had advanced a vagueness argument about the No Fly List criteria, he would not succeed for several reasons. First, such a challenge would be procedurally deficient because, in the absence of a First Amendment claim, "the vagueness claim must be evaluated as the statute is applied to the facts of this case." Chapman v. United States, 500 U.S. 453, 467 (1991). Here, Plaintiff would have to have demonstrated that he was allegedly placed on the No Fly List

C. Plaintiff Says Nothing to Call into Question the Government's Compelling Interest in Protecting the Viability of the No Fly List.

Contrary to Plaintiff's suggestion, the Government's interest in protecting the viability of the No Fly List is hardly "abstract." Pl. Opp. at 19. The relief Plaintiff seeks would require overhauling the procedures surrounding the No Fly List by transforming the placement process into a quasi-judicial proceeding and requiring the disclosure of highly sensitive watchlisting information. In the best case scenario, these disclosures would reveal the Government's interest and concerns about the threat a person poses to aviation security well before such concerns would have come to their attention. Steinbach Decl. ¶ 14. In the worst case, they would provide terrorists with operationally valuable information that will make it more difficult for the Government to stop terrorist attacks before they happen. Id. ¶ 13.

Without addressing the evidence put forth by the Government or presenting any evidence of his own, Plaintiff seeks to minimize the importance of the No Fly List by measuring it against the criminal justice system. Describing the No Fly List as a "redundancy," Plaintiff insists that persons for whom the Government has "actual evidence of terrorist actions" should be arrested rather than listed, while persons still under investigation for their ties to terrorism should be

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because of the vagueness of the criteria rather than suspected terror activity and, even if such a claim were present, it could not be properly assessed without reaching the issue of the state secrets privilege. See Def. MSJ at 37-39. Second, the criteria satisfy the most important element of the vagueness doctrine by providing "explicit standards for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Third, the criteria are no less restrictive than criminal prohibitions on conduct relating to terrorism that have withstood vagueness challenges. See, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 21-23 (2010) (upholding material support statute against vagueness challenge). If such provisions could pass muster under the heightened scrutiny for criminal legislation, under the lesser scrutiny for civil regulation, the No Fly criteria would also be sufficient. See Arriaga v. Mukasey, 521 F.3d 219, 222 (2d Cir. 2008) ("The 'void for vagueness' doctrine is chiefly applied to criminal legislation.").

disregarded until "[the Government's] suspicions are confirmed or dispelled." Pl. Opp. at 20.

This argument is predicated on a false dichotomy between arrest and inaction. Federal law provides for countless preventative measures, short of arrest, designed to stop threats to commercial aviation before they materialize. See, e.g., 49 U.S.C. § 44901(a) (requiring "the screening of all passengers and property . . . before boarding"). The Government's authority to take such preventative measures is not challenged here. Rather, the question before the Court is whether the Government, in implementing one particular preventative measure (the No Fly List), employed adequate procedures to guard against erroneous deprivation.

Similarly off point is Plaintiff's contention that the Government has other, supposedly less intrusive means (e.g., airport screening, heightened searches, air marshal escorts) to protect the nation's airways. See Pl. Opp. at 20. But the Court's present task is not to decide whether the No Fly List is the least intrusive means of securing the nation's airways, a substantive due process consideration, see ECF No. 129 at 14-15; it is to decide whether the procedures surrounding placement on the No Fly List comport with due process. Plaintiff's attempt to blur the distinction between these two issues is unavailing.

IV. The Court Has Not Denied Defendants' Motion to Dismiss as a Result of the Assertion of the State Secrets Privilege, and Plaintiff Has Not Refuted the Reasons for Dismissal.

The Government has demonstrated that litigating Plaintiff's claim would risk or require disclosure of information properly protected by the state secrets privilege See Def. MSJ at 37-40; Holder Decl. ¶¶ 6-11. In response, Plaintiff argues that "[t]h[e] Court has already held that none of Defendants' documents sought by [him] 'are so related to [his] procedural due process claims as to prevent either the plaintiff or the defendant from presenting or defending against

those claims without the use of any of these documents." Pl. Opp. at 21 (citing ECF No. 144 at 2). Plaintiff's characterization of that order is incorrect because, far from deciding the issue, the Court ruled that Defendants might renew their motion to dismiss as part of summary judgment briefing;[11] and because the Court's prior ex parte and in camera review addressed only 28 non-Plaintiff specific documents that the Court reviewed ex parte and in camera. See ECF No. 143.

Dismissal is appropriate because the exclusion of evidence pursuant to the privilege prevents Defendants from fully litigating several aspects of the procedural due process claim, as well as from presenting a harmless error defense. Contrary to Plaintiff's suggestion, a review of the specific circumstances of a challenged government action is precisely what procedural due process precedent requires in this as-applied constitutional challenge. See, e.g., Gilbert v. Homar, 520 U.S. 924, 930 (1997) ("[O]n many occasions, [] where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfied the requirements of the Due Process Clause."); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) ("[A] generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant[.]"); Fields v. Durham, 909 F.2d 94, 97 (4th Cir. 1990) ("[T]o determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided[.]"); Norton v. Macy, 417 F.2d 1161, 1166 (D.C. Cir. 1969) ("[T]he sufficiency of the charges against appellant must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do."). Thus, the question of whether and how properly privileged state

[11] The Court recently reaffirmed that Defendants may renew their motion to dismiss during summary judgment briefing on this claim. ECF No. 165 at 2 (quoting ECF No. 144 at 2-3).

secrets impacts litigation of the procedural due process claim remains very much alive in this litigation and subject to further proceedings. If this claim is not resolved on other grounds, the Government will continue to show the need for such privileged evidence requires dismissal of the claim.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment on the procedural due process claim or, in the alternative, their motion to dismiss that claim, should be granted.

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Respectfully submitted,

/s/_____

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I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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