UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED, Plaintiff, v. ERIC H. HOLDER, in his official Capacity as Attorney General of The United States, *et al.*, Defendants.	Case No. 1:11-CV-00050

PLAINTIFF'S RESPONSE TO DEFENDANTS' OPPOSITION TO HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

The political branches will never impose any meaningful limitations on the federal government's authority to place Americans, though they have been charged or convicted of no crime, on terrorist watchlists. Democratic processes will not protect the rights of what will likely remain a small minority of innocent Americans that languish on the No Fly List. There are no reforms coming from Congress or the Executive—not now and not in the coming decades. It is simply a concession to reality that any limitations on the government's authority to place innocent Americans on watchlists will only come from the judiciary.

That is why this Court should move past the easy questions of notice and an opportunity to be heard—both clearly absent before and after listing—to the crux of the matter: the standards Defendants utilize to include innocent Americans on their No Fly List. As explained below, it is the No Fly List's standards for inclusion that comprise its most profound procedural due process violation.

Simply put, this Court should find that classifying innocent Americans as "suspected terrorists" and placing them on the No Fly List is a violation of procedural due process. No state places suspected child molesters in its sex offender registries. And procedural due process should require that we treat innocent Americans neither charged nor convicted of any crime at as well as we treat suspected child molesters.

ARGUMENT

I. Vagueness argument applies to No Fly List placement

Defendants's response to Mohamed's argument that the No Fly List's standards for inclusion constitute a procedural due process violation makes a critical concession. The response does not dispute that procedural due process imposes thresholds of fairness, not just on the availability and substance of notice and hearings, but also on the adjudicative standards employed *See* Def. Opp. 8-9. Indeed, as *Hamdi v. Rumsfeld* makes clear, the standard for adjudication can itself be the procedural due process violation.

In *Hamdi,* the Supreme Court assessed the procedural due process sufficiency of the federal government's enemy combatant classification practices. 542 U.S. 507 at 509. Among many issues, *Hamdi* passed judgment on the federal government's efforts to adopt a "some evidence standard" for determining whether an enemy combatant classification was appropriate. *Id.* at 527. Under a "some evidence standard," a court would not conduct any "weighing of the evidence" but simply determine "whether there is any evidence in the record that could support the conclusion" reached. *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill,* 472 U.S. 445, 455-457, 86 L. Ed. 2d 356, 105 S. Ct. 2768 (1985). The Supreme Court determined that there was a procedural due process violation, in part, because "the proposed 'some evidence' standard is inadequate." *Hamdi,* 542 U.S. at 537. The decision in *Hamdi* underscores the point that Defendants do not challenge: procedural due process rights regard adjudicative standards just as much as they regard adjudicative steps. And just like the adjudicative standards the Supreme Court rejected in *Hamdi,* those employed by Defendants to include Mohamed and others on the No Fly List are so minimal and vague as to allow Defendants to list whoever they would like.

Though Defendants seem eager to distance Mohamed's No Fly List claims from TSDB's novel "reasonable suspicion based on a reasonable suspicion" standard of inclusion that this Court previously pilloried, this standard is a part of the No Fly List process. But Defendants have taken the surprising position that the standard for inclusion in the TSDB "does not apply to placement on the No Fly List." Def. Opp. 8-9. Defendants argument here, however, is inconsistent with years of briefing that has been filed with this Court. Indeed, a substantial portion of Defendants prior briefing and the declarations previously submitted have regarded the standard of inclusion in the TSDB, not as an idle and irrelevant concern, but because the TSDB standard is obviously relevant to the No Fly List.

The evidence corroborates this. Defendants' Watchlisting Guidance states clearly that "in order to be included on either the No Fly or Selectee List," the "minimum identifying criteria" and the "minimum substantive derogatory criteria…must both be met." *See* Exhibit D, Watchlisting Guidance, p. 50. Prior declarations submitted by Defendants to this Court corroborate this. Defendants' Piehota Declaration states the following:

> This unclassified terrorist identity information is derived from classified intelligence or derogatory information that supports a finding that the individual is a known or suspected terrorist. If the individual is being nominated for the No Fly or Selectee lists, additional derogatory information must exist demonstrating that the individual meets the requisite criteria. Piehota Decl, ¶ 8. (emphasis added).

This "additional derogatory information" presupposes the derogatory information relied upon to support TSDB inclusion in the first place. Furthermore, the Piehota Declaration explains plainly that the "No Fly List and Selectee Lists are subsets of [the] TSDB." *Id.* at ¶ 15. So, in order to be on the No Fly List, one must first make it onto the TSDB. Thus, both pieces of evidence—the Piehota Declaration and the Watchlisting Guidance—make clear that a finding that an individual

is reasonably suspected to be a "known or suspected terrorist," which is the basis for inclusion in the TSDB, is a prerequisite to being placed on the No Fly List. Simply put, the standards for TSDB inclusion are relevant insofar as one must be found to be a "known or suspected terrorist" prior to being placed on the No Fly List.

Because of this, Defendants cannot disown TSDB's reasonable suspicion based on a reasonable suspicion standard. Satisfying it is the first step of the No Fly List process. And it is worth emphasizing here that Defendants do not dispute Mohamed's characterization of the TSDB inclusion standard.

Unsurprisingly, a close analysis of this novel standard reveals that it is substantially lower than the "some evidence" standard *Hamdi* rejected insofar as at least the "some evidence" standard requires an evidentiary showing that supports an actual conclusion, that a person is an enemy combatant. In contrast, TSDB's standard simply requires evidence that creates a reasonable suspicion that someone is a suspected terrorist. Being a "suspected terrorist" is not a crime and thus not actually a conclusion. In this way, the "some evidence" standard *Hamdi* found inadequate is more demanding than the reasonable suspicion based on a reasonable suspicion standard utilized by the TSDB.

Rather than defend the adequacy of their TSDB standard, Defendants offer this Court the promise of a separate and purportedly "heightened" set of criteria they utilize for inclusion on the No Fly List. But with regards to the four heightened criterion that Defendants—for the first time in any case—have disclosed to this Court, the evidence does not indicate that Defendants employ a "reasonable suspicion" standard as the term is typically understood. In many ways, the infirmities in the No Fly List criteria mirror those in the TSDB criteria.

While the Grigg Declaration appears to inaccurately describe how the No Fly List criteria actually work, even accepting it as true, these criteria do not require a reasonable suspicion of criminal wrongdoing. Rather, though Grigg suggests that each of the four No Fly List prongs does require a "reasonable suspicion" finding, that finding is not that Mohamed or any other listee is a terrorist but that they are a "threat." Grigg Decl. ¶ 18. The reasonable suspicion standard, in traditional parlance, regards underlying actionable conduct whereas what "represents a threat" regards defendants perception alone. Because the No Fly List criteria refer to Defendants' perceptions rather than prospective listee's conduct, it is not simply a permissive standard; it is entirely subjective, left to the whims of Defendants' agents without the possibility of an adjudicative check at all.

Furthermore, though the Grigg Declaration suggests that there must be reasonable suspicion "that the individual meets additional heightened derogatory criteria" to be included on the No Fly List, that is not reflected in the Watchlisting Guidance. *See* Exhibit D, 51. The Watchlisting Guidance discusses reasonable suspicion extensively as it regards TSDB inclusion, but with regards to the standards for being placed on the No Fly List, there is no indication at all that reasonable suspicion is required. But whether reasonable suspicion is required or not, the procedural due process infirmities are striking.

For example, the Watchlisting Guidance indicates that a person can be placed on the No Fly List if he "represent[s]…a threat" of "engaging in or conducting a violent act of TERRORISM and who is OPERATIONALLY CAPABLE of doing so." Exhibit D, 51. The guidance elaborates that being "operationally capable" means that a person "reasonably appears to have the ability, knowledge, opportunity, and intent or is actively seeking the opportunity to engage in a violent act of TERRORISM." *Id.* Thus, even crediting the Grigg declaration, someone can be placed on the

No Fly List because they are reasonably suspected to "represent a threat" of "reasonably appear[ing]" to have some intention or ability to commit an act of terrorism. This appears to be an even lower standard than the "reasonable suspicion" based on a "reasonable suspicion" standard Defendants utilize for No Fly List inclusion.

In sum, to be placed on the No Fly List is a two-step process that startles at both stops along the way. First, Defendants require a finding that a person is reasonably suspected to be a suspected terrorist. This is what allows someone to be placed in the TSDB. And second, to be included on the No Fly List, Defendants must have a reasonable suspicion that a person "represents a threat."

The problem with either standard is the same: at no time do Defendants actually have to have any evidence of criminal wrongdoing. They can include a person in the TSDB because they reasonably suspect, not criminal wrongdoing, but that someone is a suspect. And they can place someone on the No Fly List because they reasonably suspect that he "represents a threat." These standards provide just a thin veneer on Defendants' list-whoever-we-want approach to No Fly List inclusion as it regards US persons not indicted, charged, or convicted of any crime.

Because of this, it is the standard of No Fly List inclusion itself that constitutes an independent basis for finding a procedural due process violation.

II. Exhibit D's Watchlisting Guidance is Admissible

Defendants make a single, brief argument that this Court cannot consider their now publicly available Watchlisting Guidance—provided to this Court as Exhibit D—that confuses the admissibility of a self-authenticating document with the affect of hearsay reports published in the media. Defendants' reliance on *Alfred A. Knopf v. Colby* is thus misplaced, because in that case,

the Fourth Circuit was dealing with "[r]umors and speculations" that might "get into print" rather than an actual document. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. Va. 1975). The Watchlisting Guidance does not need Defendants' official confirmation, because this Court can authenticate it from its contents. Not only does the document appear to be a government document by its markings, its content is perfectly consistent with the declarations Defendants have variously provided to this Court to describe the No Fly List. In particular, the Watchlisting Guidance, which was published before Defendants had ever publicly identified what additional criteria they use to place people on the No Fly list rather than the Selectee list, accurately reflects the criteria articulated by the Grigg Declaration. *See* Exhibit D, p. 51 and Grigg Decl. ¶18.

Additionally, because this Court will be reviewing Defendants' Watchlisting Guidance pursuant to its January 8, 2015 order to review certain documents *in camera*, this Court can require Defendants to provide Mohamed with a heavily redacted version of the Watchlisting Guidance, which will further allow him to authenticate the document. It would be a simple matter for this Court to conclude that, at the very least, the parts of the Watchlisting Guidance that regard (1) processes and standards that Defendants have already disclosed, (2) the cover page and other innocuous sections such as the signature portions of Appendix 3, for example, and (3) purely technical components such as Section VIII's Quality Control Measures. Mohamed could then utilize the portions of the Watchlisting Guidance over which no state secrets privilege can be asserted to authenticate the copy of the Watchlisting Guidance publicly available.

CONCLUSION

For the above reasons, Plaintiff requests that this Court grant his motion for summary judgment.

__/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, I caused the foregoing motion to be filed with the Court by CM/ECF and served on all ECF-registered attorneys representing Defendants.

Dated: December 9, 2014

___/s/_____

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