

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

GULET MOHAMED,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:11-CV-0050
)	
ERIC H. HOLDER, JR., in his official capacity as)	
Attorney General of the United States, <i>et al.</i> ,)	
)	
Defendants.)	

DEFENDANTS’ RESPONSE TO COURT ORDER

The Court ordered Defendants to submit ex parte and in camera “any specific documents, not previously produced, which defendants claim are protected under the state secrets privilege and they need to use in order to adequately present their claims or defenses with respect to the procedural due process claims that are the subject of the pending cross-motions for partial summary judgment.” ECF No. 165 at 2. As part of that order, the Court reiterated its prior observation “that the [28] documents [previously submitted for ex parte and in camera review] did not contain information to support the assertion of the state secrets privilege as articulated in U.S. v. Reynolds, 345 U.S. 1, 10 (1953).” Id. at 1-2 (citing ECF No. 144).¹ Defendants submit the following response to this order, along with the related ex parte and in camera submissions

¹ In its prior order, the Court observed that “the information presented to date ... as to these documents [previously submitted for ex parte and in camera review] is insufficient to allow the Court to conclude that there is a ‘reasonable danger’ that disclosure ... would ‘expose military matters which, in the interest of national security, should not be divulged.’” ECF No. 144 at 1 (quoting Reynolds, 345 U.S. at 10).

that have been lodged with the Classified Information Security Officer (ECF 170), in further support of their motion to dismiss based on the assertion of the state secrets privilege. See Def. MSJ, ECF No. 158-159, 168; Def. MTD, ECF No. 104-105.

The Government has today made further in camera, ex parte submissions in response to the Court's order.² Those submissions seek to further explain why documents and information properly subject to the state secrets privilege and excluded from this case is necessary—indeed, vital—to litigating the claims raised in this case, including information needed in order to present applicable defenses to those claims. This ex parte, in camera submission seeks to further explain the connection between properly privileged documents and information and the evidence that would be at issue in litigating the claims and defenses on the merits of Plaintiff's procedural due process claim. The submission demonstrates that adjudication of this claim is not possible without risking or requiring disclosures of privileged information that reasonably could be expected to cause significant harm to national security. If the Court has specific questions concerning this submission, Government counsel stand ready to further address the Court's questions or concerns in an appropriate forum. In the meantime, this memorandum addresses several important issues for the Court's consideration as it reviews the ex parte, in camera submission.

² Defendants previously submitted the public declaration of Attorney General Holder, as well as several, detailed ex parte and in camera filings, explaining why the information that they seek to protect qualifies as privileged under the state secrets doctrine. See ECF NO. 104-1 (Holder Decl.); ECF No. 103 (notice of ex parte and in camera filing of classified declaration of Joshua Skule and a privilege log); ECF No. 142 (notice of ex parte and in camera filing of declaration addressing the 28 non-plaintiff specific documents).

First, the Attorney General's assertion of the state secrets privilege in this case is not limited to certain physical documents that Plaintiff seeks to compel through discovery, but rather covers evidence and information that would be needed to litigate the claims presented in this lawsuit in whatever form it appears, i.e., whether that evidence or information is reflected in the documents at issue in discovery, in other documents, or in any testimony that might be presented to establish claims or defenses. Thus, an assessment of the privilege assertion encompasses not just the information set forth in the four corners of a particular document, but also the broader context of the privileged information which that document reflects.

Second, as the Government has attempted to explain previously, a challenge to the constitutionality of alleged placement on the No Fly List necessarily requires consideration of the particular means and reasons by which such a placement occurred. And in order to address such allegations, it should be apparent that documents and information properly protected from disclosure by the state secrets privilege are squarely at issue because any procedural due process challenge demands an analysis of the specific processes provided to a person, the specific information about a person that was considered as part of those processes, and the particular information underlying the Government's concerns about a person that would be at issue when considering proposed substitute procedures. Indeed, the disclosure of any such information concerning Plaintiff is precisely what this lawsuit seeks.

Third, as set forth further below, the Government respectfully submits that the Court's observation that the 28 documents that Defendants previously submitted for ex parte and in camera review did not contain information to support the state secrets privilege was in error and may have been based on an improperly narrow construction of the scope of the privilege.

The ex parte, in camera submission made today, along with prior such submissions, demonstrate that, unless the procedural due process claim is otherwise dismissed for the reasons set forth in Defendants' summary judgment motion, properly privileged national security information would be at issue in any further proceedings on this claim.

I. The Impact of the State Secrets Privilege in this Case Applies Not Only to “Specific Documents” But More Broadly to Information Over Which Privilege Has Been Asserted.

The Court ordered the ex parte and in camera production of “specific documents” that Defendants would need to “adequately present their claims or defenses with respect to the procedural due process claims that are the subject of the pending cross-motions for partial summary judgment.” ECF No. 165 at 2. In so doing, that order appears to circumscribe the scope of Defendants' assertion of the state secrets privilege—and, consequently, the relationship of that assertion to this case—by focusing on the specific documents that Plaintiff seeks in discovery. But dismissal under the state secrets doctrine is warranted (as in other cases in which the United States has sought dismissal on this basis) here not merely because certain documents, including those sought in discovery by Plaintiff, contain information subject to an assertion of the state secrets privilege and may themselves be needed in litigating plaintiff's claims and presenting any defense thereto; rather, dismissal is required under the state secrets doctrine when “the circumstances make clear that privileged *information* will be so central to the litigation that any attempt to proceed will threaten that information's disclosure.” El-Masri v. United States, 479 F.3d 296, 308 (4th Cir. 2007) (emphasis added). The question to be answered, then, is whether this case can be “fairly litigated without resort to the privileged information.” Id. at 306.

Further, and again, regardless of whether documents are at issue, restricting the prospect of dismissal to instances in which the privileged information is needed for a valid defense is too narrow a reading of the relevant case law. Instead, where state secrets are inextricably bound up in any consideration of the merits—whether in defense of a claim, in support of it, or otherwise inherently at risk of disclosure in further proceedings—dismissal is the appropriate course. See also Fitzgerald v. Penthouse Int’l Ltd., 776 F.2d 1236, 1241-42 (4th Cir. 1985); Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 279-81 (4th Cir. 1980); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc); Moliero v. FBI, 749 F.2d 815, 819, 822 (D.C. Cir. 1984).

These circumstances exist here. It is difficult to see how Plaintiff could establish and prove a prima facie case without information reflecting the reasons why he may be on the No Fly List and information bearing on the process governing his nomination and placement. But assuming, arguendo, Plaintiff could do so, the Government could not fully and adequately respond to Plaintiff’s challenge without presenting such information. Under established Fourth Circuit precedent, dismissal is required in these circumstances. See El-Masri, 479 F.3d at 308. Establishing the parameters and substance of any process applied to Plaintiff in the first place—including individualized reasons why pertinent information may have been considered in that process—squarely puts at issue the disclosure of properly protected national security information, as explained in the Government’s ex parte, in camera submissions. See Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948) (“It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”).

II. Plaintiff's As-Applied Procedural Due Process Claim Requires a Fact-Intensive Review of the Record.

The foregoing principles apply in particular to the procedural due process claim in this case. The Government's ex parte, in camera submission further details the documents and information subject to the assertion of the state secrets privilege and explains why it would be at issue in the Government's defense in the event the Court does not enter judgment for the Government on the unclassified record. As demonstrated by the Government's summary judgment briefing, the current record compels the conclusion that the additional process sought by plaintiff—pre-deprivation notice, hearing, and disclosure of derogatory information—is not required by due process under any circumstances. However, if the Court concludes from the current record that there are circumstances where additional process is appropriate, the Court would then have to determine whether such circumstances are present in this case, which presents an as-applied procedural due process challenge filed by Plaintiff Gulet Mohamed. It is that pending question, should the Court reach it, which implicates information subject to the state secrets privilege.

In an as-applied procedural due process challenge, “[t]he procedural issue concerns the minimum procedures required by the Constitution for determining that the individual’s liberty interest *actually* is outweighed in a particular instance.” Mills v. Rogers, 457 U.S. 291, 299 (1982) (emphasis added). “Striking a balance between those two competing interests cannot be done in the abstract.” Al Haramain Islamic Foundation, Inc. v. U.S. Dep’t of Treasury, 686 F.3d 965, 980 (9th Cir. 2011) (“AHIF”). “Factual context and [Plaintiff’s] circumstances are critical.” Field Day LLC v. County of Suffolk, 463 F.3d 167, 174 (2d Cir. 2006); see also Bazetta v.

McGinnis, 430 F.3d 795, 803 (6th Cir. 2005) (holding that as-applied procedural due process claim could not proceed in the absence of “factual findings as to the application of the regulation to [a] particular prisoner.”).

Here, a complete review of the as-applied procedural due process claim would require “a fact-intensive consideration of the personal liberties involved, the government’s compelling interests in combating terrorism, the procedures used in connection with the No Fly List, and the use made of the No Fly List.” Mem. Op. at 31. Specifically, the risk of erroneous deprivation (Mathews factor (2)), the governmental interest (Mathews factor (3)), and the issue of harmless error would be impossible to fully assess absent the information excluded pursuant to the state secrets privilege.

Although the Government has presented information showing the general policies and procedures governing nomination to and placement on the No Fly List, adjudication of any application of those procedures as applied to Plaintiff, if he were on the No Fly List, would put at issue whether or what information pertaining to Plaintiff was appropriately considered and whether such information reasonably led to Plaintiff’s placement, if any, on the No Fly List. This type of robust explanation is critical to defend the process afforded to Plaintiff. See AHIF, 686 F.3d at 983 (rejecting the government’s contention that any additional process would be unduly burdensome as an “abstract concern[]” with “little practical reality”).

Proceeding without such privileged information, as required by operation of the state secrets doctrine, would also preclude the Government from setting forth the underlying reasons for its actions and how its interests would be compromised by the substitute procedures proposed by Plaintiff. Although the current public record supports the Government’s general interest in

protecting the viability of the No Fly List and withholding national security related watchlisting information from individuals who could use it to circumvent counterterrorism efforts, properly privileged information would further explain the Government's precise interests in not providing this particular individual (if he is on the No Fly List) with the particular process requested (hearing and disclosure of derogatory information underlying placement) at the particular time he requests it (prior to placement). The privileged information at issue goes to the heart of the evidence needed to fully establish these interests, and any defense of the Government's actions without that evidence necessarily would be incomplete.

Finally, information subject to the assertion of the state secrets privilege would be necessary to demonstrate the harmlessness of any procedural due process violation. Even if Plaintiff could demonstrate that he was deprived of due process in connection with his alleged placement on the No Fly List, he would not be entitled to relief unless he could show that the violation affected the outcome of his alleged No Fly List determination. But the Court could not determine whether Plaintiff would have benefited from the additional process he seeks without examining the derogatory information, if any, underlying his alleged placement on the No Fly List. See Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 303 (2007) (concluding that even if plaintiff's procedural due process rights were violated, such a violation was harmless beyond a reasonable doubt); see also Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint as a Result of the Assertion of the State Secrets Privilege, May 28, 2014, ECF No. 105 at 10.

III. The Court’s Suggestion that the 28 Non-Plaintiff Specific Documents May Not Contain the Type of Information Protected by the State Secrets Privilege Is Incorrect.

Defendants also must address the Court’s observation in its January 8 order that 28 documents previously submitted for ex parte, in camera review “did not contain information to support the assertion of the state secrets privilege as articulated in U.S. v. Reynolds, 345 U.S. 1, 10 (1953).” ECF No. 165 at 1-2. The Court’s order refers to a prior order regarding those documents, id. at 1 (citing ECF No. 144), in which the Court observed that “the information presented to date . . . is insufficient to allow the Court to conclude that ‘there is a reasonable danger’ that disclosure of these documents to at least plaintiff’s counsel, under the protections of an adequate protective order, would disclose information that would ‘expose military matters which, in the interest of national security, should not be divulged.’” ECF No. 144 at 1 (quoting Reynolds, 345 U.S. at 10).

First, to the extent the Court is suggesting that the state secrets privilege is limited to “military matters,” it is incorrect. The privilege “performs a function of constitutional significance” by allowing the Executive “to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities.” El-Masri v. United States, 479 F.3d 296, 303 (4th Cir.) (citing and discussing United States v. Nixon, 418 U.S. 683, 710 (1974)). This means that the privilege protects a broad range of information, including disclosures that could reasonably be expected to lead to the “impairment of the nation’s defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.” Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983); see also El-Masri, 479 F.3d at 308 (discussing the “reasonable danger that [] disclosure will expose military (or

diplomatic or intelligence) matters which, in the interest of national security, should not be divulged”). The privilege also protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information. Ellsberg, 709 F.2d at 57 n.31; Halkin v. Helms, 690 F.2d 977, 993 & n.57 (D.C. Cir. 1982) (“Halkin II”).

Beyond this point, the public and ex parte, in camera declarations submitted by Defendants explain in detail how the disclosure of certain information reflected in those 28 documents would risk significant harm to national security and how the privileged information in those documents would be squarely at issue in any adjudication of the procedural due process claim. See ECF No. 104-1 (public Holder Decl.), ECF No. 103 (notice of classified declaration regarding all information subject the privilege assertion); ECF No. 142 (notice of classified declaration regarding the 28 non-Plaintiff specific documents subject to the privilege assertion).

To be sure, the Government fully recognizes that “the state secrets doctrine does not represent a surrender of judicial control over access to the courts.” El-Masri, 479 F.3d at 312; Mohamed v. Jeppesen, 614 F.3d 1070, 1079–90 (9th Cir. 2010) (en banc). The Government also recognizes that, “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.” Ellsberg, 709 F.2d at 58. It is with these principles in mind that the Government seeks to address the questions raised by the Court through the ex parte, in camera submissions directed by the Court.

At the same time, “[i]n assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the ‘utmost deference’ to the responsibilities of the executive branch.” El-Masri, 479 F.3d at 305 (quoting Nixon, 418 U.S. at 710); see also Halkin

v. Helms (“Halkin I”), 598 F.2d 1, 9 (D.C. Cir. 1978) (“Courts should accord the ‘utmost deference’ to executive assertions of privilege upon grounds of military or diplomatic secrets” in determining whether “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”) (quoting Reynolds, 345 U.S. at 10). “Such deference is appropriate not only for constitutional reasons, but also practical ones: the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information ... [and] [t]he courts ... are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.” El-Masri, 479 F.3d at 305 (internal quotation marks and citation omitted).³

The Government’s showing as to why disclosure of the privileged information reasonably could be expected to result in significant harm to national security, and why that information is central to any further proceedings in this matter, is clear and compelling. The Government again stands ready to address specific further questions the Court may have on these issues.

CONCLUSION

For the foregoing reasons, the Attorney General’s assertion of the state secrets privilege should be upheld and, if summary judgment cannot be entered for Defendants on the existing

³ See also El-Masri, 479 F.3d at 305 (“The executive branch’s expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which ‘[t]he significance of one item of information may frequently depend upon knowledge of many other items of information,’ and ‘[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.’”) (quoting U.S. v. Marchetti, 466 F.2d 1309, 1318 (4th Cir. 1972)).

public record, then dismissal as a result of the assertion of the state secrets privilege is appropriate.

Dated: January 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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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