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

DEFENDANTS' RESPONSE TO COURT'S FEBRUARY 2, 2015 ORDER

On February 2, 2015, after having heard oral argument on the parties' cross-motions for summary judgment on Plaintiff's procedural due process claim, the Court scheduled an *ex parte* and *in camera* sealed hearing "to provide defendants with the opportunity to provide and the Court to consider additional information concerning the defendants' claims concerning the existence of state secrets and their relevance to the pending procedural due process claims." ECF No. 173 at 1. In particular, the Court's order listed eight questions about which it sought additional information. Id. at 1-2. Defendants submit this memorandum, along with two related *ex parte* and *in camera* submissions, see ECF No. 181 & 182, in response to the questions raised by the Court.

I. Question 1

In Question 1, the Court asked for additional information "concerning state secrets or national security information the defendants may wish to present to the Court not reflected in the documents previously filed *ex parte*, *in camera* and under seal" in response to the Court's orders.

ECF No. 173 at 2. Defendants have previously submitted to the Court declarations describing the privileged information and documents sought in discovery which contain privileged information, and have set forth in support of their motion to dismiss why privileged information would be directly at issue in further adjudication of the claims and defenses in this matter. See ECF Nos. 103 (*ex parte* declaration), 104-105 (motion to dismiss), 142 (*ex parte* submission), 158-159 (motion for summary judgment), 168 (summary judgment reply), 170 (*ex parte* submission), 181-182 (*ex parte* submissions). Defendants will be prepared to address further at the *ex parte* hearing the reasons why privileged information would be inherently at issue in any further proceedings, should the Court still believe a hearing is necessary after considering Defendants' recent submissions. Defendants note that, as explained in a prior filing, the Attorney General asserted the state secrets privilege over certain categories of information wherever it may exist, whether in particular documents sought by Plaintiff in discovery, or in other documents or declarations or any testimony that would be needed to adjudicate the claims. See ECF No. 171 at 3; see also ECF No. 104-1 at ¶ 6.

II. Questions 2 through 5

In response to Questions 2, 3, 4, and 5,[1] Defendants have submitted, *ex parte* and *in camera*, the Declaration of G. Clayton Grigg, Deputy Director for Operations of the Terrorist

[1] In questions 2 through 5, the Court asked "(2) how the under seal documents as to which the state secrets privilege is claimed precludes adjudication of the procedural due process claims without their use and disclosure; (3) how the defendants apply the criteria for placement on the No Fly List consistent with the restrictions listed in its publicly disclosed criteria at ECF No. 158-1 (Dec. 9, 2014 Grigg Declaration) at ¶¶ 16-18; (4) any criteria other than those publicly disclosed for the purpose of placing United States citizens on the No Fly List; [and] (5) how defendants distinguish between United States citizens that are placed on the No Fly List and those placed on the Selectee List and the need to have a level of security beyond those protections afforded through the Selectee List." ECF No. 173 at 2.

Screening Center. See ECF No. 181. The publicly releasable version of that Grigg Declaration is attached hereto as Exhibit A. The Grigg Declaration addresses these questions by explaining further how specific information contained in the 28 privileged documents submitted by Defendants in response to the Court's September 15, 2014 Order for an *ex parte* submission would be critical to any adjudication of the procedural safeguards surrounding placement on the No Fly List by demonstrating the rigorous, exacting, and careful process utilized in these determinations. Moreover, Defendants' prior briefs have addressed why consideration of information over which the Attorney General has asserted the state secrets privilege is necessary for the resolution of Plaintiff's procedural due process claim. See Def. MSJ at 37-40; Def. MSJ Reply at 18-20; ECF No. 171 at 6-8; Def. MTD, ECF 105 at 2.

III. Question 6

In Question 6, the Court asked "whether, and if so how, national security considerations make it impractical or otherwise undesirable to submit for *ex parte*, *in camera* judicial review and approval the placement of United States citizens on the No Fly List, either before a citizen's placement on the No Fly List or within a specific time period after placement on the No Fly List." ECF No. 173 at 2. As set forth below, the process of judicial approval of No Fly determinations suggested by the Court raises significant legal, practical, and national security concerns.

In sum, the Court's apparent suggestion that proceedings required by the Fourth Amendment in a search and seizure context might also be required to place a U.S. citizen on the No Fly List is simply incorrect; such proceedings are *not* required by the Fifth Amendment, and they would intrude impermissibly upon the Executive's national security authorities.

Defendants are not aware of any procedural due process precedent that would allow a court to interject itself into the middle of the Executive's intelligence-driven decision-making process—which has been authorized by Congress, see 49 U.S.C. § 114—concerning who or what constitutes a present threat to civil aviation or national security by requiring judicial approval of No Fly determinations prior to or soon after placement.[2] The proper balancing of the respective interests at issue in a No Fly determination under the Due Process Clause requires no pre-deprivation notice or judicial review. See Def. Mot. for Summary Judgment ("Def. MSJ"), ECF No. 159, at 14-22; Def. MSJ Reply, ECF No. 168, at 4-8. Indeed, as explained in the March 9, 2015 Declaration of Michael Steinbach, Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation, a requirement of advance judicial approval or post-hoc

[2] Indeed, the hypothetical judicial review posed by the Court in Question 6 would present a serious question as to whether a federal district court would have Article III jurisdiction to consider whether to approve placing a U.S. citizen on the No Fly List in advance or within some specific time period thereafter. "[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.'" Muskrat v. United States, 219 U.S. 346, 356 (1911). "The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and *to measure the authority of governments* . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (internal citations and quotations omitted). Review of a No Fly determination of the kind contemplated by Question 6 (*ex parte* advance or prompt post-hoc approval of the Executive's determination) would appear to amount to an advisory opinion as to whether the Executive Branch has discharged its authority in conformity with applicable constitutional or other legal requirements. In this setting, judicial approval to place a U.S. citizen on the No Fly List would amount to "an abstract declaration of the law." In re Summers, 325 U.S. 561, 567 (1945). Moreover, these Article III limitations could not be avoided by assigning judicial review to a U.S. Magistrate, as the legality of such a referral would ultimately depend on control and authority remaining with an Article III judge. See 28 U.S.C. § 636(b)(1); see also Roell v. Withrow, 538 U.S. 580, 589 (2003). There would also be practical and logistical concerns related to the sharing of national security information with magistrate judges, who may not have the requisite security clearance to review classified material.

approval within a specific time period would impose significant burdens on the FBI's process for nominating individuals to the No Fly List, as well as on the FBI's investigation of counterterrorism cases, and thereby risk potentially significant harms to certain national security interests. See ECF No. 182; see also Def. MSJ Exh. B, ECF No. 158-2, Dec. 8, 2014 Declaration of Michael Steinbach (addressing general harms of pre-deprivation notice and judicial review).

Although courts have long performed oversight of government searches and seizures by conducting *ex parte* review of warrant and wiretap applications, such proceedings occur pursuant to an express Constitutional requirement in the Fourth Amendment. The Fourth Amendment has been interpreted to require a judicial determination that the government has established probable cause before a warrant can issue. See Gerstein v. Pugh, 420 U.S. 103, 117 (1975); United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. 297, 318 (1972) ("Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.").[3] Thus, insofar as the Court based its question about *ex parte* judicial approval on *ex parte* warrant proceedings, the analogy is inapposite because there is no express constitutional

[3] Similar reasoning has been adopted by courts in upholding the use of *ex parte* court orders in modern surveillance law. The Foreign Intelligence Surveillance Act ("FISA") imposes a system of *ex parte* judicial review adapted from the law of criminal investigations. 50 U.S.C. § 1803 (2012). Courts have upheld *ex parte* review of FISA surveillance applications by analogizing to the traditional function of courts in reviewing warrant applications. Matter of Kevork, 634 F. Supp. 1002, 1014 (C.D. Cal. 1985) ("The FISA court retains all the inherent powers that any court has when considering a warrant."); United States v. Megahey, 553 F. Supp. 1180, 1197 (E.D.N.Y. 1982) ("Applications for electronic surveillance submitted to [Foreign Intelligence Surveillance Court] pursuant to FISA involve concrete questions respecting the application of the Act and are in a form such that a judge is capable of acting on them, much as he might otherwise act on an *ex parte* application for a warrant.").

requirement of judicial approval for No Fly determinations or for any analogous Executive Branch decision-making process.

Indeed, the Supreme Court has established a wholly different analytical framework for determining whether and to what extent the Fifth Amendment requires due process before or after government action. That framework requires the Court to balance three factors: (1) "the private interest that will be affected by the official action," (2) "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 (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Defendants have explained why the current process surrounding placement on the No Fly List—including the pre-deprivation nomination and review process, post deprivation administrative review through DHS TRIP, and the availability of subsequent judicial review in the Court of Appeals—strikes an appropriate balance under Mathews. See Def. MSJ at 24-37, Def. MSJ Reply at 10-18. Defendants have also explained why pre-deprivation notice of placement on the No Fly List (*i.e.*, notice *before* a person is denied boarding) is neither workable nor required by the Due Process Clause. See Def. MSJ at 14-22, Def. MSJ Reply at 4-8. But even if the Court rejects these arguments and concludes that Mathews requires different or additional process, there is no basis for suggesting that due process requires *ex parte* judicial review and approval either before or promptly after placement on the No Fly List.[4] Defendants

[4] Seeking advance *ex parte* judicial approval for a No Fly determination would add little to the protections already afforded in the nomination and review process, and the slight additional

are not aware of any procedural due process case in which the judiciary has inserted itself into the middle of the Executive's decision-making process, as suggested by Question 6, as the newly created additional or substitute procedural safeguard under the second Mathews prong, especially when national security is at stake. In fact, as Mathews itself makes plain, the ultimate question is "when, under our constitutional system, *judicial-type* procedures"—not actual review by the judiciary—"must be imposed on administrative action to assure fairness." Id. at 348 (emphasis added). In this way, the judicial approval procedure suggested by Question 6 would go beyond anything contemplated by Mathews in the procedural due process context.

It would be particularly inappropriate for the Court to require judicial review of watchlisting decisions in advance (or shortly after placement)—as opposed to simply holding that the existing process is inadequate—in the fluid, intelligence-driven context in which decisions to place an individual on the No Fly list are made. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988); see also Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to … national security are rarely proper subjects for judicial intervention."). Moreover, the President's

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benefit it might provide is not sufficient to overcome the practical and legal burdens that would ensue. See Mathews, 424 U.S. at 335 (requiring the weighing of the Government's interests against the value added and burdens imposed by additional or substitute procedural safeguards). As explained, watchlisting decisions are subject to several layers of rigorous review. See Dec. 9, 2014 Grigg Decl. ¶¶ 11-26. By the time a U.S. Person has been placed on the No Fly List, multiple analysts from at least two federal agencies have examined the underlying derogatory information and determined that the applicable criteria have been satisfied. Moreover, advance *ex parte* judicial review does not address Plaintiff's charge that Defendants' procedures are inadequate because they involve too much *ex parte* review. See, e.g., ECF 164 at 5 (describing the watchlisting process as "the regulation of US persons pursuant to secret law.").

authority to ensure the nation is secure from terrorist threats, and particularly from terrorist threats against the aviation industry, is not in doubt. See e.g., United States v. Hartwell, 436 F.3d 174, 179 (3d Cir. 2006). Consistent with this Constitutional and statutory authority, the President ordered the establishment of a governmental organization—now known as the Terrorist Screening Center—that would "consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." Homeland Security Presidential Directive 6, 2003 WL 22302258 (Sept. 16, 2003). The Terrorist Screening Center maintains the Terrorist Screening Database and its subset No Fly List. Congress similarly has authorized—and, in fact, required—the Executive to ensure that individuals who pose a threat to civil aviation and national security are prohibited from boarding commercial aircraft. See, e.g., 49 U.S.C. § 114(h)(3)(A) & (B) (requiring the Transportation Security Administration "to use information from government agencies to identify [travelers] who may be a threat to civil aviation or national security," and to "prevent [those] individual[s] from boarding an aircraft").

While the Constitution ultimately constrains the Executive's discretion in such matters, it does not require that the Executive subordinate that authority to the Judiciary in order for it to be exercised at all. See Holder v. Humanitarian Law Project ("HLP"), 561 U.S. 1, 34 (2010) ("[W]hen it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate.") (internal quotation marks and citation omitted). Such a requirement not only would impede the President's ability to carry out his constitutional powers, but, in cases where the courts disagree with the Executive's assessment, or where the window to respond to an

imminent threat closes before the judicial approval process can run its course, it would *foreclose* the exercise of such discretion. In this way, under the suggested judicial approval procedure, federal judges would come to hold veto power over a process at the heart of the Executive's counter-terrorism efforts.[5]

This is not to suggest that the lawfulness of Executive decisions cannot be challenged in court by an aggrieved party. Indeed, the Government has maintained that judicial review is available in the courts of appeals pursuant to 49 U.S.C. § 46110 for challenges to TSA's regulations, policies, and procedures implementing the No Fly List—namely, challenges to denials of boarding allegedly due to placement on the No Fly List, and challenges to TSA orders establishing and resulting from the process available for seeking redress of such denials.[6] But the imposition of additional judicial oversight and approval of intelligence-driven Executive actions in the national security area in particular, under the guise of Mathews, would be inconsistent with the deference due the underlying substantive decision of the Executive that is inherent in any procedural due process analysis. Procedural due process concerns the fairness of the procedures surrounding an Executive decision that affects a constitutionally protected liberty

[5] The March 9, 2015 Steinbach Declaration sets forth even more specific concerns as to the harms judicial approval of No Fly determinations would impose on ongoing counter-terrorism efforts. See ECF No. 182.

[6] See 49 U.S.C. § 46110(a) (providing for review in the courts of appeals of TSA final orders, including those resulting in denials of boarding and those providing for the related redress procedures). Although the Court of Appeals for the Fourth Circuit allowed Plaintiff's challenge to "restrictions on his ability to travel" to proceed in this Court, Mohamed v. Holder, No. 11-1924, ECF No. 86, the Court did not hold that it is precluded from hearing similar challenges to TSA orders regarding the No Fly List and related redress procedures. Thus, it is the Government's position that judicial review remains available in the Court of Appeals, and the Government maintains that it is the proper venue.

or property interest. It is not concerned with the merits of the decision itself.[7] But implicit in the Court's question is the suggestion that, in order to ensure fairness in the Executive's decision-making process, the Executive must cede the ultimate decision-making authority to the courts. Such an approach fails to afford the Executive (and Congress) deference for the ultimate decision to be made, and conflates the procedures of due process with the substance. Cf. Mathews, 424 U.S. at 349 ("In assessing what process is due [], substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of [the challenged program] that the *procedures* they have provided assure fair consideration of the entitlement claims of individuals.") (citation omitted) (emphasis added); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (rejecting an "effectiveness" evaluation for determining Fourth Amendment rights because courts should not "transfer from politically accountable officials to [themselves] the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger").

A requirement of judicial approval prior to or soon after placement, as suggested by the

[7] In contrast, a substantive due process claim directly challenges the underlying government action based on an interpretation of the due process clause that "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 301-02 (1993); see also Snider Intern. Corp. v. Town of Forest Heights, Md., 739 F.3d 140, 150 (4th Cir. 2014) ("To give rise to a substantive due process violation, the arbitrary action must be 'unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." (quoting Rucker v. Harford Cnty., 946 F.2d 278, 281 (4th Cir. 1991)). Although Defendants have not read Plaintiff's Complaint to have raised a substantive due process challenge apart from his right to reentry claim, see ECF No. 129 at 8-14, Plaintiff has not shown, and cannot show, that he has been deprived of a fundamental right because Defendants have not deprived him of his right to interstate travel and there is no fundamental right to international travel. See, e.g., Def. MSJ at 26-29.

Court, would be especially intrusive where an ongoing counter-terrorism determination is at stake because the court would be interjecting itself into a process that is inherently predictive, and based on an assessment of intelligence and other investigative information that bear upon how best to protect the nation from attack. See HLP, 561 U.S. at 34 ("One reason for that respect [for the Government's conclusions] is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess.").

Finally, no case law suggests that procedural due process in such a fluid national security environment require advance judicial review. Outside the criminal setting, where "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights," U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. at 318, there is no expectation that the Executive Branch will obtain judicial approval prior to exercising its power in a manner that may implicate individual liberties, especially in the area of national security. To the contrary, the Executive Branch routinely takes actions in the area of national security without advance judicial review. See Haig, 453 U.S. at 292 (Secretary of State has power to revoke passport without advance judicial review); Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 77 (D.D.C. 2002) aff'd, 333 F.3d 156, 163-64 (D.C. Cir. 2003) (Department of Treasury has authority to block assets of designated terrorist organization without advance judicial review).[8]

[8] Although the Supreme Court has recognized circumstances where pre-deprivation *ex parte* proceedings help to satisfy due process, it has never suggested that such proceedings must be created by the federal courts. Specifically, the Supreme Court has considered the extent to which an existing, pre-deprivation *ex parte* proceeding reduced the risk of erroneous deprivation in

IV. Question 7

In Question 7, the Court asked "whether, and if so how, national security considerations make it impractical or otherwise undesirable for United States citizens who challenge their inability to board a commercial aircraft to receive information concerning their placement on the No Fly List under procedures comparable to those employed in criminal matters under the Classified Information Procedures Act ('CIPA')." ECF No. 173 at 2.

The use of CIPA-like procedures is inappropriate for two reasons. First, where the Government has invoked the state secrets privilege, the Fourth Circuit has squarely held that, under well-established law, substitute procedures are inappropriate. In El-Masri v. United States, 479 F.3d 296 (2007), the court held that the use of "some procedure under which state secrets would have been revealed to [plaintiff], his counsel, and the court, but withheld from the public … is expressly foreclosed by Reynolds [v. United States, 345 U.S. 1 (1953)], the Supreme Court decision that controls this entire field of inquiry." Id. at 311. The court explained that

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Federal Deposit Insurance Corporation v. Mallen, 486 U.S. 230 (1988), and in Gilbert v. Homar, 520 U.S. 924 (1997). In Mallen, the defendant FDIC suspended plaintiff Mallen as the president and as a director of a bank after a grand jury indicted him for making false statements. 486 U.S. at 236-38. As part of its procedural due process analysis, the Supreme Court found that Mallen's suspension "was supported by findings that assure that the suspension was not baseless" because the grand jury's "*ex parte* finding of probable cause provides a sufficient basis for an arrest, which of course constitutes a temporary deprivation of liberty." Id. at 241. The Court reached a similar conclusion in Homar, where the defendant state university suspended plaintiff Homar after state police arrested and filed a criminal complaint charging him with a drug felony, because the arrest and charges "served to assure that the state employer's decision to suspend the employee is not 'baseless or unwarranted' in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime." Homar, 520 U.S. 924 (quoting Mallen, 486 U.S. at 240). Notably, in both cases, the Supreme Court relied upon *existing* pre-deprivation *ex parte* procedures to conduct its analysis about the risk of an erroneous deprivation.

"Reynolds plainly held that when 'the occasion for the privilege is appropriate, … the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.'" Id. (quoting Reynolds, 345 U.S. at 10).

The Fourth Circuit also addressed this question in Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005). In Sterling, the court held that, "[o]nce the judge is satisfied that there is a 'reasonable danger' of state secrets being exposed, … [c]ourts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." Id. at 344. Thus, when presented with the argument that "the district court should have attempted to devise 'adequate protective measures' to allow the case to proceed even if classified materials were a part of it," id. at 345, the Fourth Circuit roundly rejected that claim and held that "[s]uch procedures, whatever they might be, still entail considerable risk [of] [i]nadvertent disclosure during the course of a trial—or even in camera—[which] is precisely the sort of risk that Reynolds attempts to avoid," id. at 348. The court explained that, "[a]t best, special accommodations give rise to added opportunity for leaked information[;] [a]t worst, that information would become public, [exposing the very sources and methods that the Government sought to protect]." Id. For these reasons, the Fourth Circuit's decisions in El-Masri and Sterling provide that the CIPA-like procedures referenced in the Court's seventh question are impermissible as a matter of law.

Second, even if the state secrets privilege doctrine were not at issue in this case, attempting to craft procedures analogous to those provided in criminal proceedings under CIPA through which national security information can be provided to a civil litigant challenging

alleged placement on the No Fly List would be impermissible and inappropriate for several reasons. At the outset, the analogy to CIPA fails because procedures applicable to the use of classified information in criminal cases are statutorily mandated, and thus simply do not apply here. See Classified Information Procedures Act, 18 U.S.C. app. 3 ("CIPA"). By its plain terms, CIPA is inapplicable in civil cases. See CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) ("An act to provide certain pretrial, trial and appellate procedures for criminal cases involving classified information."); see also id. § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any *criminal case* in a district court of the United States." (emphasis added)). As the Supreme Court observed in Reynolds itself, there are critical differences between civil litigation and criminal prosecutions. In the latter, the Government makes an affirmative decision whether to bring charges, including in cases where classified national security information may be implicated, and seeks to deprive a person of his most basic liberty interest: freedom from incarceration. As Reynolds explains, in that setting:

> [T]he Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party . . . .

Reynolds, 345 U.S. at 12. Thus, on its face, Reynolds shows that the procedures applicable to a state secrets privilege assertion differ from those applicable in a criminal setting. In a criminal case, the Government may choose to withdraw evidence, dismiss charges, or dismiss an indictment rather than disclose classified information. But the opportunity to unilaterally end

litigation in which classified information is at issue does not apply in the same way once a civil case is brought against the Government as a defendant.[9]

Further, an attempt to utilize CIPA-like procedures to enable an individual to challenge his or her inability to board a commercial aircraft conflicts with the designation and protection of national security information.[10] For example, as previously described in a number of Defendants' filings, such information is at the heart of most No Fly List nominations, because individuals are nominated to the No Fly List as representing threats of engaging in or committing violent acts of terrorisms. The disclosure of such privileged documents and information supporting these determinations to private parties or counsel thus would risk or result in harm to the national security of the United States. The authority to determine who may have access to such information "is committed by law to the appropriate agency of the Executive Branch," which enjoys exclusive responsibility for the protection and control of national security information. Egan, 484 U.S. at 527. An attempt by the Court to impose procedures that would grant Plaintiff's counsel (or Plaintiff) access to such information would contravene that

[9] In fact, Congress originally enacted CIPA to protect *the Executive* from the threat of disclosure of classified national security information. See United States v. Moussaoui, 591 F.3d 263, 281 (4th Cir. 2010) ("'Originally enacted by Congress in an effort to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the charge against him,' CIPA provides procedures for protecting classified information without running afoul of a defendant's right to a fair trial." (quoting United States v. Abu Ali, 528 F.3d 210, 245 (4th Cir. 2008)); see also United States v. The Sum of $70, 990, 605, No. 12-cv-1905, Mem. Op., ECF No. 174, at 13 (D.D.C. Mar. 6, 2015) ("CIPA is a procedural tool for the district court to rule on the admissibility of classified information and to govern the disclosure of classified information in a *criminal case*.") (emphasis in original).

[10] The Court's question does not specify any particular procedures, drawn from CIPA by analogy, that it would seek to utilize in this case.

authority.[11] See also CIA v. Sims, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of [the Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information]."). Judicially created procedures that would provide Plaintiff's counsel (or Plaintiff) access to national security information would transform access determinations from a discretionary judgment by the Executive to one that arises from a private litigant's decision to file a civil action that—intentionally or not—puts national security information at issue.

In addition, any court-mandated disclosures of privileged national security information to private parties or counsel would, in themselves, abrogate the state secrets privilege assertion to the extent of whatever privileged information is ordered disclosed, and would risk still further disclosures as the course of litigation proceeds. The very nature of adversarial litigation heightens the risk of disclosure, inadvertent or otherwise, of the national security information

[11] The grant of access to classified information requires the Executive Branch to make two determinations: first, a favorable determination that an individual is trustworthy for access to classified information and, second, a separate determination "within the executive branch" that an individual has a demonstrated "need-to-know" classified information – that is, the individual "requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) §§ 4.1(a)(3), 6.1(dd). Both determinations are crucial to the protection of sensitive information – in other words, a prior determination of trustworthiness does not by itself provide adequate protection. See Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1904 (2011) (noting that disclosure of sensitive information to a limited number of cleared lawyers nevertheless led to several unauthorized disclosures of military secrets). As the Supreme Court has recognized, "[p]redictive judgments" about the possible "compromise [of] sensitive information" involve the determination of "what constitutes an acceptable margin of error in assessing the potential risk" and thus "must be made by those with the necessary experience in protecting classified information." Egan, 484 U.S. at 528-29. Here, the Executive Branch has not granted Plaintiff's counsel access to the information at issue in the state secrets privilege assertion. Moreover, it cannot reasonably be said that granting access in this case (or any other brought to vindicate a private litigant's interests) would serve a *governmental* function.

that the Government is seeking to protect. As the Fourth Circuit has explained in the state secrets context, if litigation were to proceed, "the parties would have every incentive to probe dangerously close to the state secrets themselves." Fitzgerald v. Penthouse Int'l, 776 F.2d 1236, 1243 (4th Cir. 1985); cf. Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) ("The rationale for th[e] rule [that a trial judge being called upon to assess the legitimacy of a state secrets privilege claim should not permit the requester's counsel to participate in an *in camera* examination of putatively privileged material] is that our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order."). In this manner, a process whereby the Government has acted to protect national security would be transformed through CIPA-like procedures into one where national security would be put at risk if the Government became obligated to grant access to private counsel or litigants. Such a scenario, multiplied by the numerous civil cases that are brought against the Government just in the watchlisting context alone, would continually compound the risk of harmful disclosures (intentional or inadvertent); indeed, such a policy would create a further incentive for litigants to force disclosures by filing suit.[12] That outcome would not comport with established law in this circuit, which makes clear that private interests do not outweigh the need to protect the overall public interest in protecting national security. See El-Masri, 479 F.3d at 313.

[12] Cf. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1149 n.4 (2013) (recognizing that requiring the Government to submit information about individuals it targeted for surveillance *in camera* "would allow a terrorist (or his attorney) to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government's surveillance program").

Finally, to the extent the Court does not contemplate a CIPA-like process in which privileged national security information is actually disclosed to a private party or counsel, but whether, for example, unclassified summaries can be made available to them, Defendants note that this may not be possible either, depending on the sensitivity of the information at issue. Moreover, whether such a summary is possible is among the matters the Government would consider as part of the redress process (DHS TRIP). See Def. MSJ Reply at 8-10. For example, in Latif v. Holder, No. 3:10-750 (D. Or.), the Government has provided plaintiffs challenging their alleged placement on the No Fly List with their No Fly List status (on or off) and, to the extent feasible without compromising national security, unclassified statements identifying the reasons for their placement on the No Fly List. See id., ECF No. 165. Thus, insofar as the Court seeks further development of an unclassified record, to the extent that is possible,[13] it should reconsider whether to direct Plaintiff—who, to date, has refused to engage in the redress process—to seek redress before considering his claims.

CONCLUSION

The foregoing is submitted in response to the Court's questions, along with declarations submitted by Defendants in response to those questions, and prior declarations and submissions that also provide information responsive to the Court's questions.[14]

[13] "With regard to the unclassified information DHS TRIP was able to reveal, the scope and volume of that information varied depending on the nature and sensitivity of relevant information relating to each individual." ECF No. 165 at 2. As the district court recognized in Latif, "in some cases such a disclosure may be limited or withheld altogether because any such disclosures would create an undue risk to national security," Latif, ECF No. 136, Mem. Op. at 62, and "the Court cannot and will not order Defendants to disclose classified information to Plaintiffs," id. at 42.

[14] The Court's Order inadvertently numbers the last two questions as "(7)." In the eighth

question set forth in the Order, the Court asked if there is "any other national security information that the defendants believe is necessary for the Court to consider in connection with its consideration of the procedural due process claims and any remedies that may be ordered with respect to any constitutional violations that the Court may ultimately find." ECF No. 173 at 3. This question appears to be similar to prior questions seeking to elicit the impact of national security information on this case.

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Respectfully submitted,

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