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, *et al*.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF
THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT
AS A RESULT OF THE ASSERTION OF THE STATE SECRETS PRIVILEGE

INTRODUCTION

This lawsuit puts at issue whether the Government violated Plaintiff's constitutional rights by allegedly placing him on the "No-Fly List." When an individual asserts claims that his rights have been violated by an alleged No Fly List placement, the particular reasons that the Government may have taken such an action are central to the resolution of the claims. Indeed, for that very reason, Plaintiff has now sought discovery of information related to his claim of alleged and allegedly improper No Fly List placement and the reasons for the Government's alleged actions, including any information about him in the possession of the Federal Bureau of Investigation ("FBI") or the Terrorist Screening Center ("TSC"). In response to Plaintiff's motion to compel such discovery, Attorney General Eric H. Holder, Jr. has asserted the state secrets privilege in order to protect from discovery certain national security information that lies at the heart of Plaintiff's allegations and claims. As explained in the Attorney General's declaration in support of the privilege assertion, as well as in a supporting FBI classified declaration submitted to the Court for its *ex parte* and *in camera* review, information Plaintiff seeks in discovery, including information concerning why a person may have been placed on the No Fly List, typically involves sensitive national security information. As explained by the Attorney General, disclosure of the information Plaintiff seeks in discovery reasonably could be expected to cause significant harm to national security and should therefore be excluded from the case.

If the Attorney General's privilege assertion is upheld, as it should be, the law requires that the Court then consider the consequences of the exclusion of the privileged information. Here, because properly protected national security information would go to the core of the claims

and defenses, this case cannot proceed in the absence of that information, and, under established Fourth Circuit authority, the case must be dismissed. The Government recognizes that dismissal of the Plaintiff's lawsuit, in order to protect national security considerations, would be a significant step; but, based on the information needed to litigate the case, as well as the information sought in discovery, it is a necessary one. Further proceedings risk the disclosure of privileged information, as well as the attendant harms to significant national security interests.

I. The State Secrets Privilege Requires Dismissal of Plaintiff's Claims.

As explained in Defendants' opposition to Plaintiff's motion to compel, a successful assertion of the state secrets privilege to protect national security information results in exclusion of the privileged information from the case. *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007); *Sterling v. Tenet*, 416 F.3d 338, 342-45 (4th Cir. 2005); *see also Kasza v. Browner,* 133 F.3d 1159, 1166 (9th Cir. 1998). Once the court has determined that the information should properly be protected from disclosure, a separate issue arises concerning how the case should proceed in light of the successful privilege claim. "The effect of a successful interposition of the state secrets privilege by the United States will vary from case to case. If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue. But if 'the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the proper remedy.'" *El-Masri*, 479 F.3d at 304 (quoting *Sterling*, 416 F.3d at 348). As set forth below, dismissal is required in this case because the core information needed to litigate Plaintiff's claims falls squarely within the scope of the privilege assertion.

A. State Secrets and Dismissal

The law is clear that dismissal is required where state secrets are inextricably bound up in any consideration of the merits. *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1903-1906 (2011); *El-Masri*, 479 F.3d at 308 ("[A] proceeding in which the state secrets privilege is successfully interposed must be dismissed if 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."); *Fitzgerald v. Penthouse, Int'l, Ltd.,* 776 F.2d 1236, 1241–42 (4th Cir. 1985) ("[I]n some circumstances sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters.").

In such cases, dismissal is required for several distinct but interrelated reasons -- because the state secrets are so central to the case that litigating without them is impossible; because further litigation without reliance on state secrets presents an unacceptable risk of disclosure; because a plaintiff may not be able to make out a prima facie case; or because a defendant may not be able to present evidence in support of a valid defense. *See Gen. Dynamics*, 131 S. Ct. at 1903-1906; *El-Masri*, 479 F.3d at 308; *Farnsworth Cannon, Inc. v. Grimes,* 635 F.2d 268, 279–81 (4th Cir. 1980) (en banc) (requiring dismissal where privileged secrets were so central to the dispute that "[i]n an attempt to make out a prima facie case during an actual trial, the plaintiff and its lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit."); *Sterling*, 416 F.3d at 341 (requiring dismissal where evidence in the case would have consisted primarily of documents and testimony regarding the assignments and performance evaluations of covert operatives, whose very identities were state secrets); *see also*

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc) ("[E]ven if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets."); *Kasza*, 133 F.3d at 1166 ("[I]f the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.") (quoting *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992)) (emphasis in original).

B. Claims and Allegations at Issue in This Case

Here, all of Plaintiff's claims involve an alleged (and allegedly improper) placement on the No Fly List. Plaintiff asserts three causes of action: (1) that he has been deprived of his right to return to the country, which, in its January 22, 2014 Opinion, this Court construed as a "substantive due process" claim (Dkt. 70, Mem. Op. at 26); (2) that Defendants have acted in violation of the Administrative Procedure Act in acting to deny him his rights to travel and return to the country (a claim that "essentially conflate[s] with [Plaintiff's] constitutional claims" (Mem. Op. at 31)); and (3) that Defendants have failed to provide him with a "constitutionally sufficient" legal mechanism for challenging his alleged No Fly Listings (a procedural due process claim) (Mem. Op. at 28).[1]

[1] As the Court previously noted in its earlier opinion, Plaintiff's APA claim is essentially duplicative of his constitutional claims. Mem. Op. at 31. As a result, Defendants have not separately analyzed the APA claim here.

In his factual allegations, Plaintiff makes a series of assertions about Defendants' allegedly improper reasons for placing him on the No Fly List. In particular, he alleges that Defendants placed him on the No Fly List "while he was abroad in order to pressure him to forgo his right to counsel, submit to invasive questioning, and become an informant for the FBI upon returning to the United States." Dkt. 85, 4th Amend. Compl., ¶ 2 ("Compl."). Similarly, Plaintiff alleges that Defendants have not provided him with a way to "rebut Defendants' [No Fly] conclusion" (*id.*, ¶ 6); and that Defendants' actions were "arbitrary and capricious" (*id.*, ¶ 61); and Plaintiff asks for an opportunity to "rebut the government's charges and to clear his name either prior to or subsequent to inclusion" (*id.*, at 15). Since the Court's decision denying Defendants' motion to dismiss, Plaintiff has propounded discovery requests, seeking information related to his claims and allegations, namely, information concerning the watchlisting program generally and his situation individually.[2] As explained in the opposition to Plaintiff's motion to compel, this information is properly protected pursuant to the state secrets privilege and should be excluded from the case; for the reasons set forth in this motion, the exclusion of this information necessarily forecloses litigation of Plaintiff's claims and therefore requires dismissal.

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[2] *See, e.g.*, Interrogatories 1, 2, 17 (information about Plaintiff's detention and alleged placement and the alleged security measures used on his flight to the U.S.); Interrogatories 6, 10, and 18 (reasons for the removal of persons from the Terrorist Screening Database ("TSDB"), Selectee or No Fly Lists); Request for Production 4 (seeking documents regarding the No Fly List's utility as a security measure); Request for Production 8 (documents about US citizens placed on the No Fly List while abroad); Requests for Production 9, 10, 12 (documents related to the processing of all redress requests for persons on the No Fly List); Request for Production 11 (all documents concerning Plaintiff).

II. Plaintiff's Claims Require Dismissal Because Privileged Information Is at the Heart of the Case, or is Required to Litigate Plaintiff's Claims or Defendants' Defenses.

Once the privileged national security information is properly excluded from this case, the Plaintiff's claims cannot proceed. The privileged information is at the heart of the issues in this case, as set forth in more detail below. Plaintiff would need the privileged information to attempt to set forth a basis for his claims, and/or the Defendants would need privileged information to present a valid defense to these claims. In any event, throughout the discovery and litigation process, privileged information would be at risk of disclosure. Indeed, Plaintiff's own discovery requests reflect the centrality of the privileged information to this case. At the very least, these claims implicate the nature of any FBI interest, or lack thereof, in Plaintiff. At bottom, there is no reasonable way to litigate Plaintiff's claims without putting sensitive national security information at risk of disclosure and, as a result, the case should be dismissed.

A. No Fly Listings Involve Classified and Sensitive Information

Congress required the Transportation Security Administration ("TSA") to prevent individuals who may pose a threat to civil aviation or national security from boarding an aircraft, or to take other appropriate action. 49 U.S.C. § 114(h)(3). *See also* 49 U.S.C. § 44903(j)(2)(A) (requiring TSA to use a prescreening system to "evaluate all passengers before they board an aircraft" and to ensure that "individuals selected by the system and their carry-on and checked baggage are adequately screened"). TSA consults federal databases (including the No Fly and Selectee Lists, subset lists of the Terrorist Screening Database ('TSDB")), which contain the identities of individuals who may pose a threat "to transportation or national security." *See* 49 U.S.C. § 114(h)(1); *see also* 49 C.F.R. § 1560.1(b) ("The purpose of this part is to enhance the security of air travel within the United States and support the Federal government's

counterterrorism efforts by assisting in the detection of individuals identified on Federal government watch lists who seek to travel by air, and to facilitate the secure travel of the public. This part enables TSA to operate a watch list matching program known as Secure Flight, which involves the comparison of passenger and non-traveler information with the identifying information of individuals on Federal government watch lists."); Secure Flight Program, 73 Fed. Reg. 64018-01, 64026 (Oct. 28, 2008) ("If TSA determines that the passenger is a match to the No Fly List, the covered aircraft operator must not issue a boarding pass to the passenger unless authorized by TSA."); Mem. Op. at 9-10.

Both the process of matching airline passenger data to the No Fly and Selectee Lists and the process of compiling the lists involve the use of classified and sensitive information. When passenger data appears to match an identity on a watchlist, TSA checks "classified and unclassified governmental terrorist, law enforcement, and intelligence databases maintained by the Department of Homeland Security, Department of Defense, National Counter Terrorism Center, and Federal Bureau of Investigation (FBI), in order to resolve the possible match between the individual and the watchlist." 73 Fed. Reg. 64018-01, 64025. Compiling the watchlists also involves classified and sensitive information: information supporting the identification of an individual as a threat to aviation or national security is generally derived from intelligence reporting, including information from clandestine or confidential sources and methods, information obtained from foreign government organizations, and information derived from investigations into terrorism and other similar activities. *See* 73 Fed. Reg. 64018-01, 64043 ("TSA will not disclose the names on the watch list, because this information is derived from classified and sensitive law enforcement and intelligence information. Releasing this

information would hamper the Federal government's efforts to protect national security."). Such sensitive national security information is properly protected by the state secrets privilege in litigation.[3] *See* Declaration of Eric Holder, Attorney General ("Holder Decl."), ¶¶ 6-11, Attached as Exhibit 1.

B. Plaintiff's Substantive Due Process Claim Must Be Dismissed.

Plaintiff's first claim seeks relief related to purported violations of his substantive due process rights. "The touchstone of due process is protection of the individual against arbitrary action of the government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Only "the most egregious official conduct" qualifies as constitutionally arbitrary. *Huggins v. Prince George's Cnty., Md.*, 683 F.3d 525, 535 (4th Cir. 2012) (quoting *Sacramento v. Lewis*, 523 U.S. at 846). To give rise to a substantive due process violation, the alleged 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." *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991). Thus, by its very nature, this claim turns on the reasons for any government action at issue.

Here, Plaintiff contends that his alleged No Fly List placement constitutes an unlawful and improper restriction on his right to travel to and from domestic and international locations by air. When an individual asserts a claim that his substantive rights have been violated by an alleged No Fly List placement, the reasons for any such No Fly List placement are central to any consideration of such a claim; the very nature of a substantive due process inquiry is to probe the

[3] Information supporting No Fly List determinations may also warrant classification under Executive Order 13526 because its disclosure reasonably could be expected to cause damage to the national security. *See* Exec. Order 13526 § 1.4(c), 74 Fed. Reg. 707, 709 (Dec. 29, 2009).

reasons why a challenged government action was taken. Accordingly, in order to proceed with this case, it would be necessary for Plaintiff to show the reasons for any such determination and for the Defendants to present the lawful basis, if any, for Plaintiff's alleged placement on the No Fly List as a defense to the alleged restrictions on his travel. Such a showing would also be required to the extent that Plaintiff is not on the No Fly List. As discussed in Defendants' opposition to Plaintiff's motion to compel, and as noted previously, the basis for any individual's placement on the No Fly List derives from sensitive and classified national security information. The determination that an individual poses a threat to aviation or national security may involve information reflecting whether or why the individual is the subject of an investigation or the target of an intelligence operation. Any such information is subject to the Attorney General's assertion of the state secrets privilege in this matter. *See* Holder Decl. ¶¶ 6-11.

Because information subject to the state secrets privilege would be central to the litigation of Plaintiff's claims, this case must be dismissed. An action must be dismissed when privileged state secrets information is "so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *El-Masri*, 479 F.3d at 306 (internal quotation marks omitted); *see also Totten v. United States,* 92 U.S. 105, 107 (185); *Reynolds v. United States*, 345 U.S. 1, 11 n.26 (1953); *Sterling*, 416 F.3d at 347-48; *Fitzgerald,* 776 F.2d at 1241–42; *Farnsworth Cannon, Inc.,* 635 F.2d at 279–81. That is indisputably the case here, where properly protected national security information is at the heart of any action Defendants may have taken with respect to Plaintiff's placement, if any, on the No Fly List. The very subject matter of this case — why Defendants took whatever action they did here with

regard to Plaintiff's alleged placement on a watchlist — is a state secret, and under established Fourth Circuit law, dismissal of Plaintiff's substantive due process claim is therefore appropriate.

Additionally, any defense to Plaintiff's claim would require the Government to explain its reasons for the allegedly unconstitutional conduct. Plaintiff's substantive due process claim cannot proceed further without Defendants being able to explain the reasons for any alleged actions that may have been taken with respect to Plaintiff in order to show that such actions were not "unjustified in any circumstance" and not in violation of his substantive rights. It is well-settled that a claim should be dismissed under the state secrets privilege where exclusion of national security information precludes presentation of evidence related to a valid defense. *El-Masri*, 479 F.3d at 309–10. *See also Gen. Dynamics*, 131 S. Ct. at 1907; *Kasza*, 133 F.3d at 1166; *Bareford*, 973 F.2d at 1141. Thus, where "avenues of defense," "possible defenses," and opportunities to establish facts in support of such defenses are unavailable to a defendant, dismissal is required. *El-Masri*, 479 F.3d at 309–310.[4] This is the case here. Precisely because the Government's defense would consist predominantly (if not entirely) of the reasons, if any, for any purported decision to place Plaintiff on the No Fly List, exclusion of any such material pursuant to the privilege necessarily leads to the conclusion that the substantive due process claim cannot be litigated.

C. Plaintiff's Procedural Due Process Claim Must Be Dismissed

Plaintiff also contends that Defendants have not established a constitutionally sufficient process by which he can challenge his alleged No Fly List placement, which he alleges is

[4] The valid defense inquiry does not require proof that the defendant would prevail in order to determine whether dismissal is warranted under the state secrets privilege. *See El-Masri*, 479 F.3d at 309–10.

unlawful. For a procedural due process claim, a plaintiff must satisfy three elements: (i) the liberty or property interest of the individual, and the injury threatened by the official action; (ii) the risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and (iii) the costs and administrative burden of the additional process, and the interests of the Government in efficient adjudication. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This claim also must be dismissed in light of the state secrets assertion, as a result of the centrality of the excluded information.

Any discussion of the adequacy of the process that was afforded to Plaintiff necessarily requires a complete explanation of the evaluation of the information, if any, underlying Plaintiff's purported placement on the No Fly List. Such an explanation is not available when such information is properly excluded by the privilege. Here, without the privileged evidence, the particular information relevant to any placement decision with respect to Plaintiff could not be presented to the Court. Moreover, the Attorney General's privilege assertion covers the Government's Watchlisting Guidance, the comprehensive collection of the specific details about how and why the Government selects persons for watchlisting. Holder Decl., ¶ 14. Adjudication of the procedural due process claim necessarily would entail a discussion not only of the sensitive policies and procedures used in the watchlisting process, but also the substantive information concerning Plaintiff (if any) in order to determine whether the applicable procedures led to valid conclusions. With these categories of information properly protected by the state secrets privilege, as they should be, details concerning the process by which any No Fly List determination is made would not be available in litigation of Plaintiff's claims, including for any defense by the Government. *El-Masri*, 479 F.3d at 309-10.

In addition, inquiry into the possibility of substitute procedures – one of the other *Mathews* factors – may also be complicated as a result of the privileged evidence. In this suit, both in discovery and as part of his prayer for relief, Plaintiff seeks additional disclosures of sensitive information; he has asked the Court to require the Government to provide "meaningful notice of the grounds for his [alleged] inclusion on a government watch list, and an opportunity to rebut the government's charges and to clear his name either prior or subsequent to inclusion." Compl. at 14-15. Without the information excluded by the privilege, Defendants would not be able to fully demonstrate the harms presented by these additional disclosures. Moreover, and fundamentally, because the *Mathews* inquiry is ultimately a balancing test, it is not possible to fully separate the prongs of the analysis, meaning that Defendants would be forced to make their defense on less-than-complete terms were Plaintiff's claim to proceed.

Because No Fly List nominations derive from sensitive national security information, any attempt to litigate how these nomination procedures were applied in this case, to the extent that Plaintiff is or was on the No Fly List, risks disclosure of the privileged information. For example, Defendants could not demonstrate whether any information pertaining to Plaintiff was appropriately considered; whether Defendants properly understood and evaluated the sources of that information; or whether any such information reasonably led to Plaintiff's placement, if any, on the No Fly List. This type of explanation would be crucial for the Court to decide whether the watchlisting nomination process, which is necessarily intra-governmental, is constitutionally adequate. *See, e.g.*, *Shirvinski v. U.S. Coast Guard*, 673 F.3d 308, 319 (4th Cir. 2012) (affirming dismissal of plaintiff's procedural due process claim against Coast Guard for termination of his at-will consulting agreement with subcontractor in relation to Coast Guard project; concluding

not only was the Coast Guard "remove[d] from the dismissal decision" but it "could hardly be expected to do nothing when serious concerns about subcontractor performance were brought to its attention"); *Boston v. Webb*, 783 F.2d 1163, 1167 (4th Cir. 1986) (characterizing state's interest in plaintiff's due process challenge as "being able expeditiously to terminate the employment of a public employee it had reasonable cause to believe was engaged in serious misconduct directly threatening to the morale and performance of his department, and to avoid in the process having its absolute right to terminate . . . converted into a full-blown adversarial inquiry").

Further, for purposes of the procedural due process claim, the existence of privileged national security information, to the extent it exists, would foreclose the Government's ability to present evidence concerning harmless error in any procedures that were followed. Assuming, *arguendo*, that the Court were to weigh the *Mathews* factors in Plaintiff's favor, harmless error would nonetheless remain a valid defense to the extent any No Fly List determination was otherwise properly and adequately supported. That is, even if additional process was required for any No Fly List determination, if additional process would not have changed Plaintiff's status with respect to the No Fly List (*i.e.*, on or off), such procedural issues would at best constitute harmless error. *See, e.g.*, *Al-Haramain Islamic Found. v. Dep't of Treasury*, 686 F.3d 965, 989 (9th Cir. 2011) (concluding government was not liable to Plaintiff on a procedural due process claim because "substantial evidence" supported the agency's action, even if the process involved procedural errors). The Fourth Circuit has recognized, as the Supreme Court has, that "'most constitutional errors can be harmless.'" *Richmond v. Polk*, 375 F.3d 309, 334-35 (4th Cir. 2004) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)); *Tenn. Secondary Sch. Athletic Ass'n v.*

Brentwood Acad., 551 U.S. 291, 303 (2007) (applying harmless-error analysis to procedural due process claims).[5] Accordingly, harmless error would constitute a valid defense to Plaintiff's procedural due process claim. Here, however, the exclusion of the information related to the reasons for Plaintiff's No Fly List placement (if any) deprives the Defendants of such a defense to Plaintiff's procedural due process claim.

III. Future Proceedings Put the Privileged Information at Risk of Disclosure.

Finally, regardless of which particular claim is considered, the Government stresses that dismissal of this case is warranted because future proceedings will inherently put the privileged information at risk of being disclosed. Where further proceedings would risk or require the disclosure of information protected by the state secrets privilege, the matter must be dismissed. *See, e.g.*, *Gen. Dynamics*, 131 U.S. at 1904, 1907 (discussing appropriateness of dismissal when litigation would risk disclosure of state secrets); *El-Masri*, 479 F.3d at 306-308; *Sterling*, 416 F.3d at 344; *Fitzgerald*, 776 F.2d at 1241–42; *Jeppesen*, 614 F.3d at 1079; *Kasza*, 133 F.3d 1168-69; *see also Zuckerbraun v. Gen. Dynamics Corp*., 935 F.2d 544, 549 (2d Cir. 1991).

This case is presently in the pre-trial discovery stage. Plaintiff has propounded broad discovery requests, aimed at the watchlisting program and his alleged status. Because the state

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[5] The Supreme Court "has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (Rehnquist, J., concurring for a majority of the Court). Indeed, the Court has opined that this standard applies, for example, in capital cases where a trial court erroneously admits a coerced confession, *id.* at 295, or psychiatric testimony obtained in violation of the Sixth Amendment, *Satterwhite v. Texas*, 486 U.S. 249 (1988); where the Fifth Amendment is violated by improper prosecutorial comments about a defendant's failure to testify at trial, *see Chapman v. California*, 386 U.S. 18, 22 (1967), or to rebut the government's case, *United States v. Hasting*, 461 U.S. 499, 512 (1983); where a judge has improper *ex parte* communications with a juror, *Rushen v. Spain*, 464 U.S. 114 (1983).

secrets privilege has been asserted, the question for the Court is whether this case can proceed through pre-trial civil discovery, with both sides being able to access the necessary information related to claims and defenses. Further proceedings in this case will inherently risk disclosure of privileged information. The allegations at issue here — Plaintiff's unconfirmed statements, speculation, and hearsay about his purportedly illegal No Fly List placement — would necessarily be probed in discovery, and the actual facts would be ascertained under the rules of evidence, including sworn testimony.

Such proceedings present an unacceptable risk of disclosure of sensitive national security information. As the Fourth Circuit cautioned in *Sterling,* "Courts 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." 416 F.3d at 344; *see also id*. at 347 (finding that "almost any relevant bit of information could be dangerous to someone"). This concern counseled against trying to create alternative procedures, where the chances of improper disclosure were too high:

> [Plaintiff's] argument that the court could devise special procedures that would allow his suit to proceed must therefore fail. Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial—or even in camera—is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

Id. at 348. The Ninth Circuit echoed these concerns in *Jeppesen*:

> Adversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable. Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a

> boundary between privileged and unprivileged evidence would risk disclosure by implication.

Jeppesen, 614 F.3d 1089.

This Court noted in its denial of Defendants' motion to dismiss Plaintiff's procedural due process claim that it must have an "informed, fact-based record that allows an assessment of the unavoidable trade-off between security and personal liberties and whether the No Fly List, and its associated procedures and uses, strikes the appropriate balance between the two." Mem. Op. 70 at 11-12. But as in *El-Masri*, *Sterling*, and *Jeppesen*, an extensive and exacting discovery process will plainly risk or require the disclosure of specific privileged information, including information described in the Attorney General's Declaration.

Given the centrality of the privileged information to the claims and defenses in this case, dismissal is the only appropriate way to protect information the disclosure of which reasonably could be expected to cause significant harm to national security. While dismissal undoubtedly may be a harsh result for a plaintiff, courts have recognized that the results are harsh in either direction, because proceeding in the case could risk harm to the overall national security interests of the nation. *See Sterling*, 416 F.3d at 348 ("We recognize that our decision places, on behalf of the entire country, a burden on [plaintiff] that he alone must bear," but "there can be no doubt that, in limited circumstances like these, the fundamental principle of access to court must bow to the fact that a nation without sound intelligence is a nation at risk."); *Kasza,* 133 F.3d at 1167 ("While dismissal of an action based on the state secrets privilege is harsh, 'the results are harsh

in either direction and the state secrets doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal.'") (quoting *Bareford*, 973 F.2d at 1144).[6]

There is no exception in the law to this outcome simply because the claims are asserted on the basis of constitutional rights or involve alleged government misconduct. *See El-Masri*, 479 F.3d at 312 (declining to create an exception to state secrets dismissals based on alleged government misconduct). In any case, the need to protect national security in litigation does not turn on the kinds of claims a plaintiff chooses to assert. *See Halkin v. Helms*, 598 F.2d 1, 10-11 (D.C. Cir. 1978) *Al-Haramain v. Bush*, 507 F.3d 1190, 1204-1205 (9th Cir. 2007); *Doe v. CIA*, 576 F.3d 95, 97–98 (2d Cir. 2009) (rejecting argument that dismissal of constitutional claims on state secrets grounds was itself a constitutional violation of the right of access to the courts).

Ultimately, the claims at issue in this case, and the information needed to address them, including for any defenses available to Defendants, involve sensitive national security information properly subject to protection pursuant to the state secrets privilege. Further

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[6] *Ibrahim v. DHS*, in which the state secrets privilege assertion was upheld but the case proceeded to trial, is not instructive here. In *Ibrahim,* the plaintiff alleged that she had been erroneously placed on the No Fly List. *See* Second Am. Compl., *Ibrahim v. DHS*, No. 3:06-00545, Dkt. 161, ¶ 123 (Mar. 27, 2009). At trial, the Government did not contest that the plaintiff's inclusion on the No Fly List was in fact the result of a clerical error. *See Ibrahim v. DHS*, No. 3:06-00545, Dkt. 682 at 30, n.*("In the instant case, the nomination in 2004 to the no-fly list was conceded at trial to have been a mistake."). Although the case went to trial, the underlying information supporting the plaintiff's inclusion in the TSDB or any of its subset lists was excluded from the case as a result of the state secrets invocation. Instead, the primary question before the court at trial was whether the plaintiff was harmed by any erroneous inclusion in the TSDB, given that she did not have a valid visa and therefore could not travel to the United States in any event. That question is not relevant to this case because Plaintiff is a U.S. citizen who is currently in the United States. Moreover, there is no allegation of clerical error in this case; rather, Plaintiff brings a direct challenge to the basis for his alleged inclusion on the No Fly List. Here, because the privileged information would be central to both the claims and defenses at issue, and at risk of disclosure in the event of further proceedings, dismissal is necessary.

proceedings will inevitably implicate the privileged information at issue and place sensitive national security information at risk of disclosure. Such risk should not be permitted, and, as a result, this case should be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint.

Dated: May 28, 2014

Respectfully submitted,

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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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