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

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

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INTRODUCTION

Terrorism remains a grave and very real threat to U.S. commercial aviation and the national security. As made evident by a series of thwarted attacks since September 11, 2001—Richard Reid (2001), the trans-Atlantic liquid explosives plot (2006), and Umar Farouk Abdulmutallab (2009)—the threat is constant and unlikely to abate. These "near misses" serve to remind that each day, untold numbers of individuals set about to find new ways to target, attack, and indiscriminately kill Americans. They also underscore the potentially catastrophic consequences when U.S. counterterrorism efforts fail.

In the aftermath of the September 11, 2001 attacks, Congress and the Executive Branch have devoted extensive resources to securing the nation and its airways from the threat of terrorism. Of all the steps taken in furtherance of this goal, among the most important for U.S. counterterrorism efforts has been the creation of a consolidated terrorist watchlist, the Terrorist Screening Database ("TSDB"), which allows U.S. authorities to identify known and suspected terrorists seeking to board aircrafts, enter the country, or engage in other potentially threatening activity.

While working to ensure that air travel is safe and secure, the Government has also undertaken efforts to protect civil rights and civil liberties. Before an individual is placed in the TSDB, his nomination undergoes several independent layers of review to ensure that the requisite criteria are met and the underlying information is reliable. When combined with regular post-placement reviews and audits of TSDB information, these procedures offer ample assurance that TSDB placements are appropriately supported and warranted by the underlying information. These safeguards, of course, are not exclusive of the post-deprivation process available to individuals who believe they have been prohibited from boarding a commercial

aircraft because they were wrongfully identified as a threat. Under federal law, such individuals can file for redress with the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP").

Plaintiff is a U.S. citizen who alleges that he was denied boarding on an international flight because he is on the No Fly List, a subset of the TSDB. Plaintiff claims that his alleged placement on the No Fly List violated his right to procedural due process because he was not afforded any pre-deprivation process, and because the post-deprivation process available to him through DHS TRIP does not include notice of the reasons for his alleged placement or a hearing to contest his placement. Plaintiff advances this claim even though (i) he never availed himself of the redress procedures he challenges, (ii) the redress procedures he challenges are no longer in use, and (iii) he has no intention of availing himself of the revised redress procedures that will soon replace the procedures he challenges.

Defendants are entitled to judgment as a matter of law on Plaintiff's procedural due process claim for three reasons. First, Plaintiff is not entitled to pre-deprivation process. The Government has a compelling interest in identifying individuals who pose a risk to transportation and national security and preventing them from boarding an aircraft, and any requirement that notice be provided *before* an individual is placed on the No Fly List would frustrate that interest and risk harm to national security by providing terrorism suspects with operationally valuable information. Second, Plaintiff's attack on DHS TRIP is moot because DHS TRIP no longer applies the redress procedures he challenges, which are currently being revised by the Government.

Finally, Plaintiff has received all of the process that he is constitutionally due with regard

to his alleged placement on the No Fly List. Due process is a flexible remedy that requires the balancing of the private interests at stake and the risk of erroneous deprivation of those interests against the Government's interests and the harm that would flow from any proposed additional procedures. Here, Plaintiff's asserted interests do not require additional process. His alleged inability to travel by airplane does not constitute the deprivation of any right to interstate travel; his ability to travel internationally is subject to reasonable government regulation; and he has not been stigmatized or suffered any harm to his reputation. Moreover, the risk of erroneous deprivation is low because the Government has a multi-layered process, both prior to and after any placement, to ensure the continuing accuracy of the No Fly List. The culmination of that process is an individual's ability to seek redress through DHS TRIP and to seek ultimate review of that redress decision in the court of appeals—two steps that Plaintiff chose to skip. On the other side of the balance is the Government's compelling national security interest in combatting terrorism. The additional process sought by Plaintiff—disclosure of derogatory information underlying placement (which is almost always classified or privileged) and a hearing to contest the reasons for placement—would risk significant harm to the Government's counterterrorism efforts while, at best, only marginally decreasing the risk of erroneous deprivation.

The foregoing presents ample ground for entering judgment for the Government without reaching any issue involving information protected by the Government's state secrets privilege. However, if the Court cannot find on the current record that Defendants are entitled to judgment on Plaintiff's procedural due process claim, then it should dismiss this claim because Defendants are unable to present certain evidence that is protected by the state secrets privilege—including the specific reasons, if any, for Plaintiff's alleged placement, and more specific descriptions of

the processes used to make any such decision—that would be needed to litigate the claims and defenses, and would be otherwise at risk of disclosure in further proceedings. In particular, properly excluded national security information would be relevant to any application of the due process balancing test concerning how available processes may have been applied to Plaintiff. Additionally, the exclusion of the privileged evidence would preclude the Government from defending the due process claim on the ground that applying the allegedly inadequate procedures was harmless error.

For these reasons, summary judgment on Plaintiff's procedural due process claim should be entered for Defendants, or in the alternative, the claim must be dismissed as a result of the assertion of the state secrets privilege.

STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE

In an effort to secure the nation and its airways from the threat of terrorism, various components of the federal government work in concert to investigate, analyze, and share intelligence relating to terrorism threats.[1] The Federal Bureau of Investigation ("FBI") is responsible for investigating and analyzing intelligence relating to both international and domestic terrorist activities. See 28 U.S.C. § 533; 28 C.F.R. § 0.85(l). The National Counterterrorism Center ("NCTC") serves as the primary organization for analyzing and integrating intelligence relating to international terrorism and counterterrorism. 50 U.S.C. §§

[1] Defendants draw these statements of fact from the following declarations: Declaration of G. Clayton Grigg, Deputy Director for Operations, Terrorist Screening Center ("Grigg Decl."), attached as Exhibit A; Declaration of Michael Steinbach, Assistant Director of the Counterterrorism Division, Federal Bureau of Investigation, United States Department of Justice ("Steinbach Decl."), attached as Exhibit B; and Declaration of Elizabeth Gary, Director of the Traveler Engagement Division, Transportation Security Administration ("Gary Decl."), attached as Exhibit C.

3056(a) & (d)(1). The Department of Homeland Security ("DHS") is primarily charged with "prevent[ing] terrorist attacks within the [U.S.]," and "reduc[ing] the vulnerability of the [U.S.] to terrorism." 6 U.S.C. § 111. Within DHS, the Transportation Security Administration ("TSA") is responsible for transportation—including aviation—security. See 49 U.S.C. § 114 (charging TSA with overseeing the "security screen operations for passenger air transportation").

The Terrorist Screening Center and the No Fly List

In 2003, the President ordered the establishment of a governmental organization that would "consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." See Homeland Security Presidential Directive 6 ("HSPD-6"); Grigg Decl. ¶ 2. The creation of TSC satisfied this Presidential Directive. Grigg Decl. ¶ 2. The decision to create TSC was driven by the 9/11 Commission's conclusion that the lack of intelligence-sharing across federal agencies had created vulnerabilities in the nation's security.[2] Before TSC, multiple terrorist watchlists were maintained separately in different agencies; TSC has consolidated and centralized the watchlists, as the 9/11 Commission recommended.

TSC is responsible for maintaining the TSDB, which contains identifying information about individuals known or suspected to be engaging in or aiding in terrorist related conduct. Grigg Decl. ¶ 7. Certain Government agencies nominate individuals to be included in the TSDB if there is sufficient identifying information, and minimum substantive criteria are met. The substantive information supporting a TSDB nomination is known as "derogatory information."

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[2] 9/11 Commission Report, Executive Summary, available at http://govinfo.library.unt.edu/911/report/911Report_Exec.htm.

Id.

The TSDB includes only identifying information; it does not include the underlying derogatory information. Separating the names from the corresponding derogatory information allows identifying information to be shared with government and law enforcement officials who may lack appropriate security clearances; this, in turn, means that a broad array of screening and law enforcement officials have access to TSDB data to positively identify known or suspected terrorists trying to enter the country, board aircraft, or engage in other activity that may pose a risk to national security. Grigg Decl. ¶¶ 7-9; Steinbach Decl. ¶ 6. Because intelligence is continually evolving, the composition of the TSDB, including the identifying information about known or suspected terrorists, is regularly updated. Grigg Decl. ¶ 10; Steinbach Decl. ¶ 6.

The No Fly and Selectee Lists are subsets of the TSDB. Grigg Decl. ¶ 9. The No Fly List is defined as "a list of individuals who are prohibited from boarding an aircraft" and the Selectee List as "a list of individuals who must undergo additional security screening before being permitted to board an aircraft." Id. ¶ 6. To be included on the No Fly or Selectee Lists, there must be reasonable suspicion that the individual meets additional, heightened derogatory criteria beyond the criteria for inclusion in the broader TSDB. Id. ¶¶ 15, 17-18.

Procedural Safeguards and Redress Process

The Government has developed numerous safeguards to ensure that watchlist placements are based on reliable information and to minimize the risk of passengers being wrongfully identified as a threat. One such safeguard is DHS TRIP, which, as discussed in previous submissions, serves as the central administrative redress process for individuals who believe they have been denied or delayed airline boarding as a result of placement on the No Fly List. See

Declaration of Laura Lynch, ("Lynch Decl."), ECF No. 22-3, ¶ 4. But in addition to the post-deprivation remedies provided by DHS TRIP, there are numerous safeguards built into the No Fly List nomination process that work to minimize errors prior to and after placement. These safeguards help ensure that the information supporting watchlisting determinations is current, accurate, and subject to exhaustive review.

Altogether, a decision to place an individual on the No Fly List is subject to five separate levels of review: (1) a decision by the nominating agency to nominate an individual for placement on the No Fly List, (2) a determination by TSC[3] that placement in the TSDB is appropriate; (3) regular reviews and audits of placement determinations by various components of the federal government, (4) redress through DHS TRIP, and (5) judicial review in the court of appeals. These processes, which are described in detail in the declaration of G. Clayton Grigg, TSC's Deputy Director for Operations, are discussed in turn below.

At the first level of review, government agencies nominate known or suspected terrorists to be included in the TSDB or one of its subset lists. Grigg Decl. ¶ 11. Generally, before making a nomination, the nominating agency must be satisfied that the nomination satisfies (i) minimum identifying criteria to allow screeners to identify a match, and (ii) minimum substantive criteria to establish reasonable suspicion that the individual is a known or suspected terrorist. Id. ¶ 16. As discussed below, each agency has internal procedures in place to ensure

[3] For nominations relating to international terrorism, NCTC first determines whether the submission meets the criteria for placement in TIDE. If it does, a TIDE record for the international terrorism subject is created and sent to TSC to determine whether it meets the criteria for placement in the TSDB. Purely domestic terrorist nominations are provided directly from the FBI to TSC. See 28 U.S.C. § 533, 28 C.F.R. § 0.85(l), and 50 U.S.C. § 3056(d)(1); Grigg Decl. ¶¶ 8, 11-12.

that these determinations are carried out properly. Id. ¶ 21.

With respect to identifying criteria, the nominating agency must determine whether the information on hand is sufficient to enable government and law enforcement officials to positively identify a known or suspected terrorist trying to enter the country, board an aircraft, or engage in other activity that may pose a risk to national security. Id. ¶ 13. Such information might include biographic details such as names and dates of birth, or biometric evidence such as photographs, fingerprints, or iris scans. Id. ¶ 7. In any event, the nomination cannot go forward unless the identifying information is sufficient to allow screening and law enforcement agencies to determine whether a passenger matches the identity of a terrorism suspect. Id. ¶ 13.

As for the substantive criteria, before making a nomination to the TSDB, generally, the nominating agency must conclude that the derogatory information supports a "reasonable suspicion" that the individual is a known or suspected terrorist. Id. ¶¶ 15-17. As noted, for nominations to the No Fly List, the nominating agency must also determine that there is a reasonable suspicion that the supporting information satisfies additional criteria, above and beyond the criteria required for inclusion in the TSDB. Id. ¶ 17. Specifically, an individual nominated to the No Fly List must meet at least one of the following criteria:

> the individual poses a threat of (1) committing an act of international terrorism or an act of domestic terrorism with respect to an aircraft; (2) committing an act of domestic terrorism with respect to the homeland; (3) committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or (4) engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Id. ¶ 18 (internal citations omitted). All nominations must rely upon "articulable" intelligence,

and must be based on the "totality of circumstances" and intelligence reviewed. Id. ¶ 16. "Mere guesses or 'hunches,' or the reporting of suspicious activity alone," will not withstand scrutiny. Moreover, nominations must not be based solely on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment. Id.

At the second level of review, TSC reviews the nomination and the underlying derogatory information and determines whether a nominated individual meets the criteria for inclusion in the TSDB and, if appropriate, the additional criteria for inclusion on the No Fly List. Id. ¶ 17. This requires ensuring that a nomination is not based solely on prohibited factors, including, among other things, an individual's race, national origin, or religion, among other civil rights concerns. Id. ¶ 16. Every nomination to the No Fly List is reviewed by No-Fly-Selectee (NFS) subject matter experts ("SME"), who must "undergo specific trainings and coursework and demonstrate proficiency before being qualified and designated as subject matter experts." Id. ¶ 14. Furthermore, in conducting its review, TSC is not limited to the information submitted by the nominating agency. Rather, as part of the review process, TSC coordinates with the nominating agency to determine whether there is any additional information that might support or undermine a nomination, and seeks out additional information from other sources to evaluate the sufficiency of the nomination. Id. ¶¶ 17-18. Following the review, a nomination is either rejected or accepted, and if accepted, an identity record is created in TSDB for export to screening systems. Id. ¶ 19.

The third level of review encompasses a range of quality control measures designed to carry out the Presidential directive to maintain "thorough, accurate and current" information within the TSDB. See HSPD-6; Grigg Decl. ¶ 20. These measures, which include regular post-

placement reviews and audits conducted by the nominating agencies, NCTC (for international terrorists), and TSC, "ensure not only that nominations continue to satisfy the applicable criteria for inclusion; but also that the information offered in support of the nomination is reliable and up to date, and that the appropriate procedures are followed in the course of evaluating, processing and maintaining that information." Grigg Decl. ¶ 20.

At the nominator level, in addition to their responsibility at the first level of review to ensure that watchlist nominations satisfy the applicable criteria for inclusion, the nominating agencies are required to conduct periodic reviews of U.S. Persons (defined as U.S. citizens or Lawful Permanent Residents) they have nominated to the TSDB, and to have in place internal procedures to help them prevent, identify, and correct errors in information shared during the watchlisting process. Grigg Decl. ¶¶ 20 & 21 n.7. Nominating agencies have a continuing obligation to promptly send modification or deletion notices to TSC upon receipt of new information, and these procedures provide for the review of any watchlisting information that the nominating agency may have retracted or corrected. Grigg Decl. ¶ 21.

Similar procedures are in place at TSC, which plays "a critical role" in the quality control effort. Id. ¶ 24. Separate from its role as final arbiter in the nomination process, TSC takes proactive steps to ensure that information in the TSDB is accurate and up to date, such as conducting biannual reviews of U.S. Person records, as well as additional review of an individual's record each time a nominating agency provides new information about that individual, or each time that individual is encountered by Government personnel. Id. ¶¶ 14, 25. TSC also regularly audits the work of its analysts to ensure that the appropriate procedures are being followed. Id. ¶ 25.

The final two levels of review are administrative redress through DHS TRIP and judicial review in the courts of appeals. With respect to the No Fly List, DHS TRIP provides a means for persons who have experienced travel issues, such as denial of boarding, to seek redress from the Government by submitting any information that may be relevant to the particular travel difficulties they experienced. Id. ¶ 27. If DHS TRIP determines that the complainant relates to an identity in the TSDB, the matter is referred to the TSC Redress Unit, which reviews the available information to determine whether the complainant is an exact match to a TSDB identity, and if so, whether the individual's status should be modified or maintained. Id. ¶¶ 30-32. DHS TRIP then sends the complainant a determination letter, which, under previous procedures challenged by Plaintiff, provided all individuals on the No Fly List receiving a letter with a response without disclosing the individual's status on the No Fly List or any particular reasons for placement.[4] Id. ¶ 33; Lynch Decl. ¶ 8. The DHS TRIP determination letters that respond to complaints regarding delayed or denied boarding are final orders of TSA pursuant to 49 U.S.C. § 46110, with judicial review of such letters available in the U.S. Courts of Appeal. Lynch Decl. ¶ 11.

ARGUMENT

Summary judgment is appropriate when, viewing the facts in a light most favorable to the non-moving party, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex

[4] "DHS TRIP no longer applies the redress procedures that were previously in place and would have applied to Plaintiff Gulet Mohamed's complaint about denied boarding if he was, as he alleges, on the No Fly List. These particular redress procedures are no longer applied, and any such redress complaints are being held in abeyance, because new procedures are actively being developed." Gary Decl. ¶ 4.

Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Defendants are entitled to judgment as a matter of law on both parts of Plaintiff's procedural due process claim. Plaintiff first claims that he was entitled to challenge his alleged inclusion on the No Fly List prior to his placement. Pl.'s Fourth Am. Compl., ECF No. 85 ("FAC"), ¶ 64. But the Government may dispense with pre-deprivation process where it has an important interest that would be frustrated by prior notice or hearing, particularly where there are safeguards in place to minimize the risk of erroneous deprivation. Defendants are not required to provide pre-deprivation notice or hearing prior to placement on the No Fly List because such process would be contrary to the Government's paramount interest in protecting the national security and largely unnecessary in light of safeguards in place that reduce the risk of erroneous deprivation.

Second, supposing pre-deprivation process is not required, Plaintiff still contends that the process he was provided is constitutionally deficient. FAC ¶ 64. At the outset, Plaintiff's post-deprivation procedural due process claim is moot because the Government no longer applies the DHS TRIP redress procedures he challenges. Additionally, the redress procedures that were available to Plaintiff through DHS TRIP were constitutionally sufficient given the nature of the private interests he alleges, the negligible value of additional measures in light of the robust

internal review procedures already in place, and the profound government interest in protecting the security of civil aviation.

Alternatively, if the Court cannot make those findings on the current record, dismissal of Plaintiff's procedural due process claim would be appropriate because information properly protected by the state secrets privilege would be required or at risk of disclosure in litigating the claim, including the presentation of valid defense. See El-Masri v. United States, 479 F.3d 296, 309-10 (4th Cir. 2007).

I. The Government's Procedures for Placing an Individual on the No Fly List Provide All of the Process that Is Due.

Plaintiff contends that he was entitled to an opportunity to contest his alleged inclusion on the No Fly List prior to placement. FAC ¶ 64. But the Constitution does not require the Government to provide advance notice to individuals prior to or shortly after their placement on the No Fly List. While due process sometimes calls for prior notice and hearing, the Supreme Court has struck the due process balance so as to dispense with a requirement for pre-deprivation process where prior notice and hearing could not be accomplished without presenting great risk or cost to the public. Requiring advance notice of placement on the No Fly List would present precisely that. Information about the government's interest in a terrorism suspect is always valuable for planning terrorist operations, but is especially valuable when disclosed prior to any deprivation, because it reveals crucial information concerning who the United States believes may or may not be a threat to aviation and national security. Such information provides insight to adversaries as to who may or may not be available to carry out an attack, and might even induce them to accelerate their operations or attack sooner. These and other risks weigh against

requiring pre-deprivation notice, particularly when viewed in light of the safeguards in place to reduce the risk of error in the nomination process.

A. The Due Process Clause Does Not Require the Government to Provide Pre-Deprivation Process before Placing Individuals on the No Fly List.

1. Post-Deprivation Proceedings Alone Can Be Sufficient.

"[A]ssessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected.'" Jones v. Flowers, 547 U.S. 220, 229 (2006) (citation omitted). While "the [Supreme] Court usually has held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property," Zinermon v. Burch, 494 U.S. 113, 127 (1990), the Court has also recognized "that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." Gilbert v. Homar, 520 U.S. 924, 930 (1997); see also Zinermon v. Burch, 494 U.S. 113, 129 (1990); Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). The Homar decision relied on a long line of cases permitting the government to take actions that affect private property or liberty interests prior to affording a hearing. See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (no process required prior to administering corporal punishment on junior high student); Barry v. Barchi, 443 U.S. 55 (1979) (the suspension of a professional license); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (the seizure of a yacht subject to civil forfeiture).

As these cases show, where the government's interest is important, the circumstances pressing, and the risk of error low, notice and hearing can be postponed until after deprivation without impinging on due process. See, e.g., Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230,

240 (1988) ("An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation."). Particularly relevant here, courts have repeatedly held in the context of terrorism finance that the need for asset blocking to take effect immediately after designation renders pre-deprivation process impractical and not constitutionally required. See, e.g., GRF v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) ("Nor does the Constitution entitle [plaintiff] to notice and a pre-seizure hearing, an opportunity that would allow any enemy to spirit assets out of the United States."); Holy Land Found. for Relief & Dev. v. Ashcroft ("HLF"), 219 F. Supp. 2d 57, 77 (D.D.C. 2002) ("Money is fungible, and any delay or pre-blocking notice would afford a designated entity the opportunity to transfer, spend, or conceal its assets, thereby making the [statutory sanctions] program virtually meaningless."), aff'd, 333 F.3d 156, 163-64 (D.C. Cir. 2003). In each of these cases, pre-deprivation notice was not required because it would have directly undermined the purpose of the sanctions program by giving targets an opportunity to transfer or conceal financial assets. Similar concerns hold true in this context, because providing pre-deprivation notice to terrorism suspects of their nomination to the No Fly List would give them an opportunity to adjust their planning or behavior to avoid the consequences of placement. Steinbach Decl. ¶¶ 13, 15.

2. In Light of the Government's Compelling Interest in Combatting Terrorism, Pre-Deprivation Process Is Not Required Here.

As this Court and other courts have acknowledged, the government has a compelling interest in protecting the national security. See Haig v. Agee, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."); Wayte v. United

States, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning."); Mem. Op., ECF No. 70 ("MTD Order"), at 30 ("[T]he government's interest in combating terrorism is no doubt substantial."). In particular, and as pertinent here, the Government has a significant interest in preserving the viability of the No Fly List, a tool that plays a critical role in guarding our nation from the rapidly evolving threat of terrorism. See MTD Order at 12 (observing that the No Fly List is intended to "avert a possible catastrophic air disaster"). And in recognizing the crucial role that watchlisting plays in securing our nation, courts have upheld the government's ability to withhold watchlist information. Bassiouni v. CIA, 392 F.3d 244, 245-46 (7th Cir. 2004); Tooley v. Bush, No. 06-306, 2006 WL 3783142, at *20 (D.D.C. 21, 2006), aff'd, Tooley v. Napolitano, 586 F.3d 1006 (D.C. Cir. 2009) (upholding government's position that confirming or denying records indicating plaintiff's presence on watch lists would reveal [sensitive security information]). For these reasons, the district court in Ibrahim v. DHS found that pre-deprivation notice was not required. – F. Supp. 2d --, 2014 WL 6609111, at *18 (N.D. Cal. Jan. 14, 2014) ("[P]ost-deprivation remedies are efficacious, especially where, as here [with a challenge to alleged placement on the No Fly List], it would be impractical and harmful to national security to routinely provide a pre-deprivation opportunity to be heard of the broad and universal type urged by plaintiff's counsel. Such advance notice to all nominees would aid terrorists in their plans to bomb and kill Americans.") (citing Haig, 454 U.S. at 309-10.

The Declaration of Michael Steinbach, Assistant Director of the FBI's Counterterrorism Division, explains why requiring the pre-deprivation disclosure of watchlist information would interfere with law enforcement investigations and jeopardize national security. See Exh. B,

Steinbach Decl. Notice of an individual's pending nomination to or placement on the No Fly List, before any actual denial of boarding, would alert that individual to the nature of the Government's interest in him or her, and provide a reasonable basis to infer that the pending nomination relates to counterterrorism intelligence-gathering or a law enforcement investigation. Steinbach Decl. ¶¶ 12-13. Specifically, placement on the No Fly List, which necessarily includes placement in the TSDB, reveals that the individual is "known or appropriately suspected to be or to have engaged in conduct constituting, in preparation for, in aid of, or related to terrorism," the criteria for placement in the TSDB, see HSPD-6, in addition to being suspected of further involvement in terrorism under the heightened criteria for inclusion on the No Fly List. Steinbach Decl. ¶ 12; see also Grigg Decl. ¶ 18.

Such information would be operationally valuable to individuals planning terrorist attacks at any point, but the value of the information increases exponentially the further in advance it is provided. With the benefit of notice prior to or soon after placement, terrorism suspects would lower their profile, change their location, or take other countermeasures to avoid detection and circumvent surveillance. Steinbach Decl. ¶¶ 13, 15; see also O'Neill, 315 F.3d at 754 (requiring a pre-blocking hearing in financial sanctions context "would allow any enemy to spirit assets out of the United States"); HLF, 219 F. Supp. 2d at 77 ("[P]rompt action by the Government was necessary to protect against the transfer of assets subject to the blocking order."). For suspects who are actively planning a terrorist operation, pre-nomination notice would provide specific information about who the United States believes may or may not be a threat to aviation and national security, which could potentially induce adversaries to accelerate operations or attack sooner, or at least provide them with insight as to who may or may not be available to carry out

an attack against an aircraft. Steinbach Decl. ¶¶ 13-16. It also could endanger investigators by making it easier for suspects to determine their identities. Id. ¶ 13.

Given these dangers, the Government has a compelling interest in protecting watchlist information for as long as it is feasible to do so, and at least until the Government denies an individual boarding in order to avert the threat assessed to be posed by that individual. See Steinbach Decl. ¶¶ 14-15. Providing notice before or just after placement would mean disclosing the Government's interest and concerns about the threat a person poses to aviation security well before any such interest may have come to that person's attention. Id. ¶ 14. Notably, in fiscal year 2013, "a substantial number of U.S. persons on the No Fly List never attempted to board a commercial aircraft within or bound for the United States, or which crossed over U.S. airspace, under their known identities." Id. Had the Government been required to notify each of these individuals of their nomination to the No Fly List, as Plaintiff contends, significant governmental national security concerns would have been needlessly harmed or otherwise limited. Id.

Furthermore, where pre-deprivation notice is required, silence from the Government would amount to an "implicit confirmation" that an individual is not on a watchlist. Steinbach Decl. ¶ 16. Such confirmation might prompt that individual to act on that fact, so that he is in a better position to commit an act of terrorism before he comes to the attention of the Government. Id. At a minimum, providing pre-deprivation notice would undermine the very basic governmental interest in keeping covert investigations covert. There is deterrent value in the Government's current policy, which keeps terrorism suspects in the dark about any potential

governmental interest in them until, at the earliest, they are denied boarding.[5] Id. This uncertainty makes it harder for terrorists to plan operations, because terrorist organizations cannot be sure which operatives are more or less likely to invite additional scrutiny, let alone which operatives will be allowed to board an aircraft. Id. Similarly, some individuals who are notified of their nomination to the No Fly List might be prompted into action, seeing that their window to commit a terrorist attack is closing. Id. ¶ 15.

Moreover, Plaintiff requests much more than mere notice of nomination to or placement on the No Fly List; he contends that pre-deprivation notice should also include a "meaningful opportunity" to contest his alleged inclusion on the No Fly List prior to placement. FAC ¶ 64. As discussed below, due process does not require the disclosure of information that Plaintiff seeks. See, infra 34-37. But requiring the disclosure of this information *before* the placement decision is even made would risk even greater harm to the national security and investigative efforts by, among other things, introducing significant delay into the watchlisting process by requiring the Government to defend its decision in a quasi-judicial setting, Steinbach Decl. ¶ 17; as well as by potentially compromising sources and methods (which are typically classified or, at the least, protected by the law enforcement privilege) and thereby disrupting any ongoing counterterrorism investigations, see Defs.' Mot. to Dismiss, ECF No. 104-105; Declaration of Eric H. Holder, Jr. ("Holder Decl."), ECF No. 104-1, ¶¶ 11-13.

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[5] At the point of a denial of boarding, it would be reasonable for a person to infer some level of governmental interest in him or her. But even then, denial of boarding falls short of official confirmation that the Government is nominating or placing an individual on the No Fly List, leaving a certain degree of doubt regarding the nature, source, and extent of the Government's interest, and therefore minimizing interference with law enforcement efforts. Steinbach Decl. ¶ 14 n.5.

Significantly, courts traditionally afford the Executive broad discretion in the exercise of national security judgments. See, e.g., Haig, 453 U.S. at 292 ("Matters intimately related to … national security are rarely proper subjects for judicial intervention."). Therefore, the Executive's determination of the harm that would flow from providing pre-deprivation notice is entitled to deference from the Court because it is based on the "collecting [of] evidence and drawing [of] factual inferences" regarding national security, an area in which "'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate." Holder v. Humanitarian Law Project, 561 U.S. 1, 34 (2010) (internal citation omitted).

3. Postponing Process until after Deprivation Is Further Supported by Safeguards in Place to Reduce the Risk of Erroneous Deprivation.

The extent to which pre-deprivation notice would frustrate the Government's compelling interest in providing for the national security is not offset by Plaintiff's private interest, in light of the considerable pre-deprivation process that an individual receives prior to placement on the No Fly List.[6] Indeed, the nomination and review process bears several hallmarks of pre-deprivation processes found to be consistent with due process in other contexts. See, e.g., Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 301 (1981) (a statute that provides criteria "specific enough to control government action" will decrease the risk of erroneous deprivation); Fed. Deposit Ins. Corp., 486 U.S. at 241 (finding that the risk of erroneous action was low where a grand jury, which provided an independent assessment of the findings or

[6] Plaintiff's interest in traveling by plane, while not insignificant, is unlike the other liberty interests which courts have said could be infringed without pre-deprivation process. See, e.g., Ingraham, 430 U.S. at 675 (corporal punishment); Dixon v. Love, 431 U.S. 105, 113 (1977) (license to operate a motor vehicle); Calero-Toledo, 416 U.S. at 678-80 (asset seizure).

conclusions that triggered the deprivation, had determined that indictment was based on probable cause); Homar, 520 U.S. at 934 (finding that an employment suspension was likely warranted where an independent third party determined that probable cause existed for an arrest and charges had been filed). The Government's procedures for placing individuals on the No Fly List and verifying the reliability of such placements incorporate both of these safeguards.

For an individual to be included on the No Fly List, both the nominating agency and TSC must determine not only that there is reasonable suspicion that the individual meets the criteria for inclusion in the TSDB—that the individual is known or suspected to be or have engaged in conduct constituting, in preparation for, in aid of, or related to terrorism—but also that there is reasonable suspicion to meet at least one of the four additional, heightened criteria required for inclusion on the No Fly List. Grigg Decl. ¶¶ 13-18; see also, supra 8-9. For their part, the No Fly List criteria call for concrete information about both the nature of the terrorist threat (e.g., domestic or international) and the likely targets (e.g., the homeland, aircraft, military installation) or, in the absence of information about targets, information about the individual's operational capability to carry out an attack. Grigg Decl. ¶ 18. The criteria are appropriately restrictive, and certainly no broader than other standards found sufficient to control executive action in prior cases. Hodel, 452 U.S. at 301-02 (finding that the statutory and regulatory standards governing the Secretary of the Interior's authority to stop surface mining operations that posed an imminent threat to public health and safety were specific enough to reduce the risk of an erroneous deprivation); Grayden v. Rhodes, 345 F.3d 1225, 1235 (11th Cir. 2003) (finding that the definition of nuisance in the Orlando City Code, "while somewhat vague," could adequately guide the city building inspector and therefore reduced the risk of an erroneous deprivation).

Moreover, the criteria are bolstered by the requirement that nomination determinations be made on the basis of objective, articulable information rather than on hunches or standalone reports of suspicious activity; and that they not be based solely on race, ethnicity, national origin, religion, or activities protected by the First Amendment. Grigg Decl. ¶ 16.

Furthermore, by utilizing multiple levels of independent review, the pre-deprivation procedures reduce the risk of error and ensure that all individuals in the TSDB or one of its subset lists (i.e., the Selectee or No Fly Lists) have been properly nominated. See Mallen, 486 U.S. at 241. As explained, the nomination process begins with the nominating agency's determination, on the basis of objective, articulable facts that the individual being nominated satisfies the applicable substantive criteria for inclusion and was not nominated based solely on a prohibited factor. Grigg Decl. ¶ 16. Before accepting any information into the TSDB, TSC personnel review each nomination to verify (i) that it includes minimum identifying criteria to allow screeners to discern a match, and (ii) that it satisfies certain substantive derogatory criteria establishing that the individual may be a known or suspected terrorist. Id. Nominating agencies have processes in place for reviewing and auditing nominations to ensure that all appropriate standards and procedures have been employed and that information relied upon during the nomination process is accurate and reliable. Id. ¶ 21. When viewed in combination with the post-deprivation remedies available to passengers who are denied boarding, addressed below, these safeguards provide all the pre-deprivation process due to individuals who have been nominated to the No Fly List.

B. Plaintiff's Post-Deprivation Procedural Due Process Claim Is Moot Because the Government No Longer Uses the Redress Procedures that He Challenges.

Plaintiff's post-deprivation procedural due process claim is moot because the redress procedures that he challenges are no longer in use and will soon be replaced by revised procedures, which are currently being developed. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726-26 (2013) (internal quotation marks and citations omitted). Thus, even if there is a live controversy when the case is filed, courts should refrain from deciding claims if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." 21st Century Telesis Joint Venture v. FCC, 318 F.3d 192, 198 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

"Withdrawal or alteration of administrative policies can moot an attack on those policies." Bahnmiller v. Derwinski, 923 F.2d 1085, 1089 (4th Cir. 1991) (collecting cases); see also Disabled in Action of Balt. v. Bridwell, 820 F.2d 1219, at *3 (4th Cir. 1987) (table decision) ("Though there may technically still exist a constitutional case or controversy, prudential considerations require [dismissal as moot]."). Cf. Doe v. Shalala, 122 Fed. App'x 600, 602 (4th Cir. 2004) ("A legislature may voluntarily cease allegedly illegal conduct by amending or repealing the challenged law or by allowing it to expire. In general, the amendment, repeal, or expiration of a statute moots any challenge to that statute.") (citing Lewis v. Cont'l Bank Corp., 494 U.S. 472, 474 (1990) and Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 116 (4th Cir.

2000)). As noted in Defendants' motion to stay, ECF No. 146-47, the Government is in the process of revising the current redress procedures for certain individuals who were denied boarding because they are on the No Fly List. See Gary Decl. ¶ 4. The Government's review process is ongoing.[7] Id. So, if Plaintiff submitted a DHS TRIP inquiry about his denial of boarding today, DHS TRIP would not apply the procedures that Plaintiff claims to be constitutionally inadequate. Id. As a result, there is no jurisdiction for the Court to consider Plaintiff's challenge to the now-dated redress procedures. See Phillips v. McLaughlin, 854 F.2d 673, 678 (4th Cir. 1988) ("Because plaintiffs have requested only prospective relief from a regulation which no longer applies to them …, our judgment on the merits would not resolve an extant case or controversy.").

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

Plaintiff further alleges that "Defendants have failed to provide [him] with a meaningful opportunity to challenge his inclusion on the No Fly List … subsequent to his placement." FAC ¶ 64; id. at 14 (Count III: "failure to provide [] post deprivation notice and hearing"). However, in the circumstances presented by this case, where the Government must balance an individual's private interests against the Government's paramount interest in protecting the national security, the version of the redress procedures that was available to Plaintiff when he was denied boarding provided all the process he was due. In evaluating a due process claim, the Court should

[7] The revised redress procedures have not yet been finalized, see Gary Decl. ¶ 4, and therefore any attempt to challenge them at this time would not be ripe. A case is "fit for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon the future uncertainties of intervening agency rulings." Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208 (4th Cir. 1992).

consider 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 requirements would entail. Homar, 520 U.S. at 931-32 (quoting Mathews, 424 U.S. at 335).

Under the Mathews balancing test, the nature of the private interests asserted by Plaintiff—a right to travel and reputational harm—is offset by the low risk of erroneous deprivation in light of the robust administrative procedures and judicial review in the court of appeals; and outweighed by the Government's paramount interest in protecting national security.

1. Private Interests Claimed by Plaintiff

"[T]he significance of the [plaintiff's] interest in avoiding erroneous [deprivation]" must be considered when determining "the procedural protections to which [plaintiff is] entitled," and those protections may be "more limited" in circumstances where the liberty interest at stake is weak. Wilkinson v. Austin, 545 U.S. 209, 225 (2005). The private interests asserted by Plaintiff are (i) "being able to return to the United States," (ii) "traveling by air like other American citizens," and (iii) "being free from false governmental stigmatization as a terrorist." FAC ¶ 64.[8] But none of these interests would be significantly diminished by placement on the No Fly List, and in any event, they require no more process than what the redress procedures provide.

[8] To the extent that Plaintiff alludes to the deprivation of any other private interests, "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 789 (1980).

a. Right to Travel

With respect to the first two interests,[9] any liberty interest Plaintiff has in traveling has not been significantly diminished by his alleged placement on the No Fly List. While Plaintiff does have a liberty interest in *interstate* travel, he is not deprived of that interest when he is precluded from taking one mode of transportation; and while Plaintiff may have a liberty interest in *international* travel, that interest is weak because it is subject to reasonable government regulation, is subordinate to national security concerns, and thus may constitutionally be restricted.

Although the Supreme Court has recognized a fundamental right to interstate travel, see Saenz v. Roe, 526 U.S. 489, 498-99 (1999), that constitutional right does not include a right to travel by a particular mode of transportation, see, e.g., Town of Southold v. Town of East Hampton, 477 F.3d 38, 54 (2d Cir. 2007); League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 535 (6th Cir. 2007); Gilmore v. Gonzales, 435 F.3d 1125, 1136 (9th Cir. 2006); Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991). In other words, restrictions on one mode of transportation do not amount to the deprivation of that constitutional right because other, albeit less convenient, modes of transportation are available. See Mathews, 424 U.S. at

[9] The Grigg Declaration makes clear that the Defendants have a process in place to resolve the travel issues of U.S. persons abroad who have been prohibited from boarding a flight to the United States. Grigg Decl. ¶ 34. Insofar as Plaintiff challenges this policy, the Court has dismissed that part of Plaintiff's Complaint for failure to allege a constitutional deprivation. See MTD Order at 27. Separate and apart from that claim, in Count I of his Complaint, Plaintiff asserts a Fourteenth Amendment claim about his "right … to reenter the United States from abroad" and his "right to citizenship," id. ¶¶ 55-59. The Court has construed this "right to reenter" claim as a substantive due process claim. See MTD Order at 26-28. For these reasons, Plaintiff's only remaining allegation about a right to return to the United States is not at issue in this summary judgment briefing on his procedural due process claim.

421 ("[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."). As the Ninth Circuit reasoned in Gilmore, Plaintiff "does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him," even assuming that "air travel is a necessity and not replaceable by other forms of transportation." 435 F.3d at 1136-37. Also, contrary to the Court's suggestion, MTD Order at 29 n.22, the plaintiff in Gilmore was deprived entirely of his right to fly because his refusal to abide by the Government's airline passenger identification policy prevented him from boarding any flight. Id. at 1129-30.

With regard to international travel, the Supreme Court has held that "the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment," and "the freedom to travel abroad … is subordinate to national security and foreign policy considerations … [and] is subject to reasonable governmental regulation." Haig, 453 U.S. at 306-07. For this reason, "the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States," Haig, 453 U.S. at 306, and therefore governmental action "which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel," Califano v. Aznavorian, 439 U.S. 170, 176-77 (1978).

In its motion to dismiss order, the Court stated that the No Fly List "clearly infringes upon a citizen's right to travel," MTD Order at 17, relying on the Supreme Court's decisions in Kent v. Dulles, 357 U.S. 116, 125 (1958) and Aptheker v. Secretary of State, 378 U.S. 500 (1964), MTD Order at 14-17. But both Kent and Aptheker pre-date the Supreme Court's

decision in Haig v. Agee, 453 U.S. 280 (1981), a decision that synthesized and clarified the Court's prior holdings in Kent and Aptheker. Haig, 453 U.S. at 304-06. Additionally, Kent and Aptheker, which concerned U.S. citizens denied passports based on political beliefs or affiliations, addressed a much narrower and more complicated question than the one presented in Haig. See id. at 304 (noting that "[t]he Kent Court had no occasion to consider [Executive authority to revoke a passport based on] *conduct* [that] is damaging [to] the national security"); Regan v. Wald, 468 U.S. 222, 241-42 (1984) ("Both Kent and Aptheker, however, were qualified the following term in Zemel v. Rusk, 381 U.S. 1 (1965) … The Court in Zemel distinguished Kent on grounds equally applicable to Aptheker … [because] no First Amendment rights of the sort that controlled in Kent and Aptheker were implicated … [a]nd the Court found the Fifth Amendment right to travel, standing alone, insufficient to overcome the foreign policy justifications supporting the restriction."); see also MTD Order at 17 (noting that Kent and Aptheker "assessed the extent of [government] authority based on broader national security justifications more directly associated with rights of association and freedom of speech"). Thus, in Kent and Aptheker, the due process analysis became intertwined with First Amendment concerns. These concerns set Kent and Aptheker apart from other right-to-travel cases, and the Supreme Court has declined to extend those holdings to other cases involving international travel restrictions based on *conduct*, as opposed to political beliefs.[10] See Haig, 453 U.S. at 305 ("The

[10] See Regan, 468 U.S. at 240-41 (upholding Treasury Department regulation restricting travel to Cuba against a claim that the regulation violated the right to travel); Haig, 453 U.S. at 309-10 (rejecting a constitutional challenge to revocation of passport for engaging in overseas anti-CIA operations); Califano, 439 U.S. at 176 (holding that the right to travel was not infringed by the nonpayment of Supplemental Security Income to recipients who chose to leave the country for

protection accorded beliefs standing alone is very different from the protection accorded conduct.).

For these reasons, the Supreme Court's line of decisions related to Haig—and not its decisions in Kent and Aptheker—provide the most relevant guidance for considering the degree of Plaintiff's asserted liberty interest and whether the Government may lawfully restrict his ability to travel internationally based upon his conduct. Those cases instruct that, insofar as placement on the No Fly List restricts international travel, any infringement on a liberty interest is weak because such restrictions are appropriate insofar as they are "reasonable," Haig, 453 U.S. at 306, and not "wholly irrational," Califano, 439 U.S. at 177, particularly in light of the national security concerns that inform the No Fly List, Haig, 453 U.S. at 306-07. Here, Plaintiff—who, if he is on the No Fly List, is prohibited from traveling internationally by plane—is far less restricted than the plaintiff in Haig, who had his passport revoked and could not travel internationally at all. Accordingly, although Plaintiff does have some liberty interest in traveling internationally, that liberty interest must give way to government regulation that is "reasonable" and not "wholly irrational."

b. Reputation

Plaintiff also alleges that "Defendants have failed to provide [him] with a meaningful opportunity to challenge his inclusion on the No Fly List either prior or subsequent to his placement, depriving him of his liberty interest in … being free from false governmental stigmatization as a terrorist." FAC ¶ 64. Plaintiff, however, fails to allege any facts or to adduce

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more than 30 days); Zemel, 381 U.S. at 13 (upholding Secretary of State's decision not to validate passports for travel to Cuba).

any evidence proving the deprivation of a reputational interest protected by the due process clause of the Fifth Amendment, and therefore summary judgment for Defendants on this part of the procedural due process claim is warranted.

Plaintiff has not been stigmatized. "[I]njury to reputation by itself [is] not a 'liberty' interest protected under the [Due Process Clause]." Shirvinski v. U.S. Coast Guard, 673 F.3d 308, 315 (4th Cir. 2012) (quoting Siegert v. Gilley, 500 U.S. 226, 233 (1991)). Procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of "a right or status previously recognized by state law." Paul v. Davis, 424 U.S. 693, 711 (1976). This is known as a "stigma-plus" claim. See Shirvinski, 673 F.3d at 315 (stigma-plus doctrine); see also Green v. TSA, 351 F. Supp. 2d 1119, 1129-30 (W.D. Wash. 2005) (applying the stigma-plus doctrine in the context of a lawsuit alleging unlawful delays and denials of boarding). To demonstrate a stigma-plus claim, a plaintiff must allege "both a stigmatic statement and a 'state action that distinctly altered or extinguished' his legal status." Evans v. Chalmers, 703 F.3d 636, 654 (4th Cir. 2012) (quoting Shirvinski, 673 F.3d at 315) (citation and internal quotation marks omitted); see also Green, 351 F. Supp. 2d at 1129 (noting that the first requirement is "public disclosure of a stigmatizing statement by the government").

The fifth version of Plaintiff's Complaint includes only one allegation that touches upon his claim of reputational harm, and that allegation merely recites the legal standard for such a claim. See FAC. ¶ 4 ("[Plaintiff's] inclusion [on the No Fly List] deprives him of his liberty interest in … being free from the government-imposed stigma that being on a terrorist watch list

inflicts.”).[11] At this point, Plaintiff has offered no evidence in support of either required prong, and therefore Defendants are entitled to summary judgment. First, Plaintiff does not allege, let alone provide evidence of, “a stigmatic statement” publicly disclosed by the Government, Evans, 703 F.3d at 654, and an instruction to an airline not to permit boarding does “not constitute dissemination of the stigmatizing information in such a way as to reach the community at large,” Tarhuni v. Holder, No. 3:13-001, 2014 WL 1269655 (D. Or. Mar. 26, 2014); see also Green, 351 F. Supp. 2d at 1129. Second, Plaintiff does not allege or prove a “plus” factor, namely any facts showing the deprivation of any previously held right that flowed from an alleged reputational harm. Green, 351 F. Supp. 2d at 1130. Without these kinds of allegations or evidence, Defendants are entitled to summary judgment.

2. Risk of Erroneous Deprivation

When an individual is placed on the No Fly List, that placement decision undergoes several layers of review: (1) a decision by the nominating agency to nominate an individual for placement on the No Fly List, (2) a determination by TSC that placement in the TSDB is appropriate; (3) regular reviews and audits of placement, (4) redress, and (5) judicial review in the court of appeals. Individually and in the aggregate, these processes protect against erroneous or unnecessary infringements on liberty.

At the initial stage, a nominating agency must decide that an individual meets the

[11] As a matter of law, Plaintiff’s Complaint fails to state a claim for a procedural due process violation based on a reputational injury for which relief can be granted, and should be dismissed. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 555 & 557 (2007)).

reasonable suspicion standard for inclusion in the TSDB, as well as any other heightened criteria required for placement on any subset list like the No Fly List. Grigg Decl. ¶¶ 15-16. At the second stage, TSC makes the ultimate determination whether a nominated individual does, in fact, meet the standards for inclusion in the TSDB and, if appropriate, the heightened criteria for inclusion on any subset list.[12] Id. ¶ 17. A qualified subject-matter expert reviews every nomination to the No Fly List. Id. ¶ 14. As part of this second stage, TSC also ensures that a nomination is not based solely on an individual's race, national origin, or religion, among other civil rights concerns. Id. ¶ 16. TSC is also able to request additional information from the nominating agency or to seek out information from additional sources to evaluate the sufficiency of the nomination. Id. ¶ 13. At the third stage, TSC conducts regular reviews and audits of persons in the TSDB and on its subset lists. In particular, TSC conducts a biannual review of any U.S. persons placed on the No Fly List to determine if any change in status is warranted. Id. ¶ 25. TSC also conducts a re-review of an individual's record each time that individual is encountered by U.S. government personnel, or each time a nominating agency provides new information about that individual. Id. ¶ 24. Fourth, if a person on the No Fly List submits an

[12] The Fourth Amended Complaint includes a variety of allegations about the size of the watchlist and procedures for review. FAC ¶¶ 27-30. Many of these allegations are outdated; none address the effectiveness of the redress process. See generally U.S. Gov't Accountability Office, GAO-12-476, Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts (2012) (available at http://www.gao.gov/assets/600/591312.pdf) (detailing substantial efforts to improve watchlisting processes since 2009) (produced in this matter as DEFSMAY20_0229-0280); U.S. Dep't of Justice Inspector General Audit Rep. 14-16, Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations (March 2014) (available at http://www.justice.gov/oig/reports/2014/a1416.pdf) (produced in this matter as TSC_000364-000536.

inquiry through DHS TRIP, the TSC's Redress Unit—a unit separate and apart from the TSC unit that processes and reviews nominations—reviews that individual's record to determine if changes to that individual's current status are warranted. Id. ¶ 32. Fifth, as instructed in the final determination letter received by the complainant, an individual who remains dissatisfied with the results of DHS TRIP may file a petition for review in the court of appeals. Lynch Decl. ¶ 11.

The totality of this process is appropriate and adequate to protect Plaintiff's alleged liberty interest from the risk of erroneous deprivation. Plaintiff contends that DHS TRIP is inadequate because it does not provide him with information about his alleged status on the No Fly List, including any underlying derogatory information, or afford him the right to a hearing. See generally FAC ¶ 1; Count III. Notably, however, Plaintiff has refused to participate in DHS TRIP (part 4), and refused to file a petition for review of the agency decision in the court of appeals (part 5). Yet Plaintiff asserts that these redress procedures are inadequate even though they have never been applied to him. Plaintiff's decision not to engage in two parts of the redress process employed by the Government to reduce the risk of erroneous deprivation is a fact that the Court may construe in Defendants' favor when evaluating how those processes work.

Regardless, for the reasons explained below, the right to a hearing is not an absolute requirement for all government proceedings, especially in cases where the information at issue may be highly sensitive. See, infra at 36-37. Thus, while the additional procedures Plaintiff seeks may undoubtedly add value to the process, the touchstone of a constitutional due process analysis is not whether value is added but rather how much the added value reduces the risk of erroneous deprivation, weighed against the harm that the proposed procedures pose to the Government's interests. Here, given the strength of the Government's pre- and post-deprivation

processes, the value of additional procedures would do little to decrease the already small risk of erroneous deprivation, especially when weighed against (i) the Government's constitutionally vested expertise in making predictive judgments about national security matters, see Humanitarian Law Project, 561 U.S. at 34, and (ii) the harm that these proposed additional procedures would pose to the Government's paramount interest in providing for the national security. See Rahman v. Chertoff, 530 F.3d 622, 627 (7th Cir. 2008) ("Any change that reduces the number of false positives on a terrorist watch list may well increase the number of false negatives.").

3. The No Fly List Serves the Government's Paramount Interest in Combatting Terrorism, and the Additional Procedures Sought by Plaintiff Pose Significant Risks to National Security.

The final element to be weighed in the balance is the Government's paramount interest in preventing acts of terrorism through the maintenance of an effective watchlisting system. That interest would be significantly harmed by the additional process Plaintiff seeks—disclosure of the derogatory information, if any, underlying his alleged placement; and a hearing to contest that information—which would require or risk disclosure of sensitive and classified information each time a terrorism suspect is denied boarding, without permitting the Executive Branch to weigh the important national security interests related to disclosure.

In light of the Government's strong interest in protecting sensitive and classified information relating to terrorism, due process does not require the disclosure of all information underlying No Fly List nominations. This result is consistent with authority upholding the Government's right to withhold even information relating to an individual's watchlist status, which is comparatively less sensitive than the underlying derogatory information. See, e.g.,

Tooley, 2006 WL 3783142, at *19-20 (holding that the government was not required to confirm or deny the existence of "watch list records concerning [a particular individual]"); Al-Kidd v. Gonzales, No. 05-093, 2007 WL 4391029, at *8 (D. Idaho Dec. 10, 2007) (holding that government is not required to produce information about an individual "which may or may not be in the TSDB"). The DHS TRIP process that was available to Plaintiff struck an appropriate balance between the Government's compelling interests in air security and protecting classified information and the travel burdens imposed during the airline screening process.

The additional process Plaintiff seeks is not constitutionally required, and the Court should not order the release of information which could put the Government's national security interests at increased risk. Disclosure of classified and otherwise sensitive information could, for instance, provide potential terrorists with operationally valuable information about the nature of the government's interest in them, as well as exposing Government sources and methods related to the specific reasons a particular individual is on a watchlist, the Government's assessment of the risk he poses to national security, or any intelligence-gathering or counter-terrorism methods used in obtaining the relevant derogatory information. See Steinbach Decl. ¶¶ 12-13; see also Bassiouni, 392 F.3d at 246 (disclosing confidential information could demonstrate "how the CIA is deploying its resources and what subjects it is investigating," which "could be useful to both nations and terrorists."); Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."). The risk of these harms would increase if an adversarial hearing were required.

Moreover, Plaintiff's suggestion that due process requires disclosure of all of the evidence supporting an individual's placement on the No Fly List cannot be squared with established law that the Executive has discretion as to who may obtain access to classified information and for assessing the risks inherent in its disclosure. See, e.g., Stehney v. Perry, 101 F.3d 925, 931-32 (3d Cir. 1996) (finding that judicial review of the merits of an Executive Branch decision to grant or deny access to classified information would violate separation of powers principles). Any order requiring the disclosure of such information, or requiring an evidentiary hearing on the information, raises serious separation of powers issues. See U.S. Const. art. II, § 2, cl. 1; Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) ("[The Executive's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President"). Due process does not require the government to put national security at risk by providing the process that Plaintiff demands. See Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207 (D.C. Cir. 2001) ("[T]hat strong interest of the government [in protecting against the disclosure of classified information] clearly affects the nature . . . of the due process which must be afforded petitioners.").

In contrast, DHS TRIP strikes an appropriate balance by providing a process in which individual complaints may be heard and reviewed while still preserving the Executive's ability to protect sensitive watchlisting information. The Government provides an individual who has been prohibited from boarding a commercial aircraft an opportunity to be heard at a meaningful time and in a meaningful manner by permitting that individual to complain with specificity to the appropriate authorities about the difficulties that he or she has experienced; to have his or her

watchlist status reviewed; to have appropriate changes made to applicable records; and if unsatisfied, to seek direct judicial review.

II. If the Court Cannot Find on the Current Record that the Procedures for Placement on the No Fly List Comport with Due Process, Then Dismissal Is Appropriate Based on the State Secrets Privilege.

If the Court cannot determine that Defendants are entitled to judgment as a matter of law on Plaintiff's procedural due process claim, dismissal of the claim is nevertheless appropriate because information properly protected by the state secrets privilege would be required or at risk of disclosure in litigating Plaintiff's claims, including for presenting valid defenses. See Holder Decl. ¶¶ 6-11. First, the privilege encompasses certain evidence demonstrating that, under the Mathews balancing test, Plaintiff has received all of the process that he is due. Second, the exclusion of the particular evidence about Plaintiff's No Fly Listing (if any) also prevents the presentation of information relevant to a defense that any procedural defects that could be identified by the Court would constitute harmless error. Either defense is an independent basis for dismissal.[13] See El-Masri, 479 F.3d at 309-10.

1. Adjudication of the Procedural Due Process Claim Requires Review of Information, if any, about Plaintiff's Particular Circumstances and the Processes for Placing an Individual on the No Fly List.

Evidence protected from disclosure by the state secrets privilege is central to the resolution of Plaintiff's contention that he was deprived of a meaningful opportunity to contest his alleged inclusion on the No Fly List. The very nature of the procedural due process inquiry requires this because, "unlike some legal rules, [it] is not a technical conception with a fixed

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[13] To the extent the Court would find it helpful, Defendants are prepared to submit an ex parte, in camera filing further explaining how evidence subject to the state secrets privilege is related to the adjudication of Plaintiff's procedural due process claim.

content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." Homar, 520 U.S. at 930 (citations, internal quotation marks, and alteration omitted). This Court concluded that the constitutional inquiry, by its very nature, "cannot be responsibly addressed without an informed, fact-based record that allows an assessment of the unavoidable trade-off between security and personal liberties. . . ." MTD Order at 11-12.

The state secrets privilege protects from disclosure two types of evidence that must be considered in any evaluation of Plaintiff's procedural due process claim. First, the Court would have to consider any evidence underlying Plaintiff's alleged placement on the No Fly List in order to determine whether the existing procedures, based on the evidence available, resulted in reasonable conclusions and minimized the risk of erroneous deprivation. See MTD SSP at 11-12. With regard to Plaintiff's claim for pre-deprivation process, specific information about Plaintiff, if any, would be necessary to fully demonstrate the harms presented by advance notice of placement on the No Fly List. Resolution of Plaintiff's claim that he is entitled to disclosure of the reasons for his alleged placement on the No Fly List and a hearing necessarily puts at issue any specific information about Plaintiff, which would be necessary to demonstrate the nature of the Government's interest in Plaintiff, if any, and how any information about Plaintiff was processed; and to articulate the risk of harm to national security presented by the procedures Plaintiff seeks. See, e.g., Shirvinski, 673 F.3d at 319 (emphasizing "serious concerns about subcontractor performance" in affirming dismissal of due process claim against Coast Guard arising from termination of consulting agreement).

Second, the Court would also have to consider information about the process provided to

Plaintiff in order to evaluate the risk of erroneous deprivation in the value of substitute procedures. The possibility of substitute procedures requires the Court to consider "the entire panoply of predeprivation and postdeprivation process provided." Fields, 909 F.2d at 97. Here, however, certain evidence—specifically, the Watchlisting Guidance, documents derived in substantial part from the Guidance, policies and procedures related to watchlisting, and internal training documents about how to apply the Guidance or the watchlisting policies and procedures, see ECF No. 143 at 2-3—is properly excluded pursuant to the state secrets privilege. See MTD Order at 11. Such evidence would be necessary to demonstrate exactly how the No Fly List decision-making process minimized the risk of erroneous deprivation and reached the proper conclusion based on the available evidence.

2. The Exclusion of Information about Plaintiff's Particular Circumstances Also Forecloses a Harmless Error Defense.

Absent dismissal on non-privilege grounds, the Court should dismiss Plaintiff's procedural due process claim because information excluded by the state secrets privilege is pertinent to consideration of whether any constitutional violation was merely harmless error. See Defs.' Mot. to Dismiss at 13-14. The Fourth Circuit, like the Supreme Court, has recognized 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)); see also Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 303 (2007) (applying harmless-error analysis to procedural due process claims). Thus, even if the Court were to find that the Government's watchlisting and redress procedures are constitutionally deficient, privileged information would be relevant to showing that Plaintiff's No Fly placement (if any) is justified nonetheless because

any procedural errors are harmless. See, e.g., Al Haramain Islamic Found. v. Dep't of Treasury, 686 F.3d 965, 989 (9th Cir. 2012) (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). Accordingly, dismissal of Plaintiff's claim would be appropriate where evidence relevant to presenting such a harmless error defense is properly protected and excluded. See El-Masri, 479 F.3d at 309-10.

CONCLUSION

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

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Respectfully submitted,

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