UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,
Plaintiff,

v.

ERIC H. HOLDER, in his official Capacity as Attorney General of The United States, *et al.*,

Defendants.

Case No. 1:11-CV-00050

PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Plaintiff Gulet Mohamed, by and through the undersigned counsel, hereby moves this Court to enter summary judgment on Plaintiff's procedural due process claim. The record is clear that the process afforded to Plaintiff prior to his placement on the No Fly List is nonexistent and the process available to Plaintiff subsequent to his placement is wholly ineffective. Furthermore, the "reasonable suspicion" standard of inclusion—which the record makes clear means anything Defendants would like it to mean—is itself a violation of procedural due process insofar as Defendants are attempting to regulate the conduct of US persons without providing any meaningful notice of how such persons can actually avoid being subject to the No Fly List. For these reasons and those articulated below, summary judgment on Plaintiff's procedural due process claim is warranted.

__/s/__________________

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INTRODUCTION

Procedural due process requires not only process but a modicum of fairness. It is an easy question to determine that where no process prior to the deprivation is provided and the law of this circuit requires it that a procedural due process violation has occurred. It is also easy to see DHS TRIP for what it is: a process aimed at resolving technical misidentification issues without disturbing the substantive derogatory information that led Mohamed and others to be placed on the No Fly List.

The more difficult question is the fairness that procedural due process is aimed to protect. Defendants No Fly List operates as secret law, and while we know more about it now than we have previously, this is due to unauthorized leaks of internal documents—some of which Defendants claimed were states secrets. There is a procedural due process violation embedded in the very enterprise of the No Fly List: placing people on a secret list without telling them how they may avoid being placed on this list is fundamentally unfair. This Court should find that the secret standards of inclusion constitute a procedural due process violation.

STATEMENT OF UNDISPUTED FACTS

I. <u>What Happened to Mohamed</u>

Plaintiff Gulet Mohamed is a naturalized US citizen of Somali descent; he is Muslim. Exhibit A – Affidavit of Gulet Mohamed, ¶ 2. During March 2009, Plaintiff Gulet Mohamed left the United States and traveled to Yemen and Somalia in order to learn Arabic, study Islam, and connect with his family living abroad. *Id* at ¶ 3. In August 2009, Mohamed arrived in Kuwait where he continued studying Arabic and stayed with his uncle. *Id.* at ¶ 4.

On December 20, 2010, Mohamed went to the Kuwaiti International Airport to renew his temporary visa. *Id.* at 5. Instead of renewing his visa, Mohamed was abducted by two men who blindfolded and handcuffed him and drove him to an undisclosed location.

During Mohamed's abduction, his interrogators "bea[t] and tortured" him by striking him in the face "more than a hundred times and "whip[ping] [his] fee and other parts of [his] body with sticks." *Id.* at ¶ 7. He was forced to stand for prolonged periods of time and was left hanging to a ceiling beam until he lost consciousness. *Id.* at ¶ 8.

His interrogators, one of whom "spoke English with an American accent," questioned him about Anwar Al-Awlaki and other matters that were of particular interest to the United States. His interrogators also "knew things about [his] family that were not publicly available." *Id.* at ¶ 9-10.

On December 28, 2010, Mohamed's interrogators transferred him to a deportation facility where he was able to use a fellow detainee's surreptitiously kept cell phone to contact his family. *Id.* at ¶ 12. During his time at the deportation facility, FBI agents visited him twice, interrogating him aggressively and threatening him on one occasion. *Id.* at ¶ 13-15. One of those interrogations persisted long after I had informed the FBI agents that I had retained an attorney and that I would not speak with them without an attorney present. *Id.*

Mohamed's older brother, Mohad Mohamed, traveled to Kuwait to help obtain Mohamed's release from custody, and first spoke with deportation officials on January 4, 2014. Exhibit B – Affidavit of Mohad Mohamed, ¶ 1. The deportation official indicated that Mohamed had not been charged with any crime by Kuwait and that it was the United States that had caused Mohamed's case to be "on hold." *Id.* at 2.

On January 13, 2011, an official with the Kuwaiti deportation facility contacted the uncle with whom Mohamed had been staying and directed him to purchase a ticket back to the US for Mohamed. *Id.* at ¶ 4. On January 16, 2011, when Kuwaiti officials attempted to get Mohamed onto a flight to the United States, they could not because he was on the No Fly List. *Ex* A, ¶ 16.

After this lawsuit commenced, Defendants allowed Mohamed to fly back to the United States on January 21, 2011. However, when he landed at Washington Dulles Airport, security personnel detained Mohamed for a prolonged period of time, demanding that he provide passwords to his electronic devices. *Id.* at ¶18. Mohamed refused, and he was eventually allowed to leave. *Id.*

Because of his placement on the No Fly List, Mohamed cannot complete *hajj,* the religious pilgrimage that is a "pillar of [his] faith." *Id.* at ¶ 19. He also refrains from international travel because "the No Fly List will prevent [him] from returning to the United States." *Id.* at ¶ 20.

II. <u>The No Fly List</u>

The No Fly List is a subset of the Terrorist Screening Database ("TSDB"), which was created pursuant to HSPD-6 and is "the U.S. Government's consolidated watchlist." Exhibit C – Declaration of Christopher Piehota (Ex. C), ¶ 1-3. Information contained in the TSDB is "sensitive but unclassified terrorist identity information." *Id.* at ¶ 3. The TSDB is maintained by TSC. *Id.*

While TSC maintains the No Fly List, persons get listed through a nomination process. *Id.* at ¶ 7-10. The FBI is the agency that collects, maintains, and nominates so-called "domestic terrorists." *Id.* at ¶ 7. Though several agencies may nominate individuals to the No Fly List, it is ultimately TSC that decides "either to accept or reject the TSDB nomination." *Id.* at 13.

III. Standards for Inclusion

Placement on the No Fly List is not always based on information specific to the person nominated for inclusion. Defendants have designed the No Fly List "to enable categories of individuals to be temporarily upgraded in watchlist status. Exhibit D – Watchlisting Guidance (Ex. D), 26. Thus, a person's racial, ethnic, religious, or national origin traits can be used as a basis for mass listing. Furthermore, information from foreign countries about potential listees are sometimes "presumed to meet the standard for inclusion in TSDB" without any US determination that they actual satisfy the standard. *Id.* at ¶ 38.

As a "genera[l]" matter, however, nominations to the No Fly List are "based on whether there is reasonable suspicion to believe that a person is a known or suspected terrorist." Ex. C at ¶ 12.

To satisfy reasonable suspicion, Defendants "rely upon articulable intelligence or information, which, taken together with rational inferences from those facts, reasonably warrants a determination that an individual is known or suspected to be or has been knowingly engaged in conduct constituting, in preparation for, in aid of, or related to TERRORISM and/or TERRORIST ACTIVITIES." Ex. D, 33. Defendants' articulation of their reasonable suspicion expressly disclaims the need for "concrete facts" to be the basis of a nomination. *Id.* at 34.

Defendants guidance on what constitutes reasonable suspicion includes "travel for no known lawful or legitimate purpose to a locus of TERRORIST ACTIVITY." *Id.* Individuals who are "acquitted or against whom charges are dismissed for a crime related to TERRORISM" may still be placed on the No Fly List. *Id.* at 38. And unless one's associations with a TSDB listees are "neutral…such as janitorial, repair, or delivery services of commercial goods," such associations may support a finding of reasonable suspicion.

Of the 468,749 nominations made to the TSDB in 2013, only about one percent were rejected by TSC. Exhibit E – Defendants' Interrogatory Response, p. 11.

IV. Consequences of Inclusion

While it is undisputed that the No Fly List prevents listees from flying into, out of, or through US airspace, placement also impacts a listee's ability to board a ship. 72 Fed. Reg. 48,320, 48,322 (Aug. 23, 2007) (passengers on vessels departing the United States are vetted against consolidated terrorism watch list). Persons on the No Fly List are also unable to obtain hazmat licenses and, like Mohamed, may be detained in foreign countries.

V. The Administrative Processes Prior and Subsequent to Listing

The decision to place a person on the No Fly List involves only the nominating agency and TSC. Ex. C, ¶ 6-12. There is no notice that a nomination is under review, no opportunity for the nominee to be heard, and no indication as to the factual basis of the nomination. Similarly, subsequent to being placed on the No Fly List, DHS TRIP does not offer any notice or opportunity to be heard.

ARGUMENT

VI. Defendants have violated Mohamed's procedural due process rights

To establish a due process violation, a plaintiff has to demonstrate that he had a protected interest, that the defendant deprived him of that interest, and that the deprivation was without due process of law. *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*, 420 F.3d 322, 328 (4th Cir. 2005). "The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Washington v. Harper*, 494 U.S. 210, (1990); *see also United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th

Cir. 1997) (explaining that whether notice is adequate depends on the facts of each case). If a government deprivation concerns an interest protected by the Due Process Clause, a court must weigh three factors to determine what process is due:

> First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

"It is a familiar and basic principle. . . that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Aptheker v. Secretary of State*, 378 U.S. 500, 507–09 (1964) (internal quotations omitted). But despite this principle, Defendants continue to deprive Mohamed of his Fifth Amendment rights.

a) Defendants placement of Mohamed on the No Fly List deprives him of his right to international travel, to reenter the US, and to live free of state-imposed stigma

1) Defendants are violating Mohamed's protected right to international travel

This Court has made clear that a "U.S. citizen's right to reenter the United States entails more than simply the right to step over the border after having arrived there." *Mohamed v. Holder*, 2011 U.S. Dist. LEXIS 96751, *26 (E.D. Va. Jan. 22, 2014). It has also characterized this right as including the ability to "exit and return" to the United States. *Id.* at 27. Defendants have deprived Mohamed of this bundle of rights—the right to international travel—by placing him on the No Fly List.

The "right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law." *Kent v. Dulles*, 357 U.S. 116, 126-127 (1958); *Regan v. Wald*, 468 U.S. 222, 240 (1984) (internal quotations omitted); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964). "As such this 'right' can only be regulated *within the bounds of due process*." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (emphasis added); *see also Califano v. Aznavorian*, 439 U.S. 170, 177 (1978) (saying same). This right encompasses the right to travel out of the country, *Kent v. Dulles*, 357 U.S. at 129, and into the country, *United States v. Ju Toy*, 198 U.S. 253, *Worthy*, 328 F.2d at 394, *Hernandez v. Cremer*, 913 F.2d 230, 238 (5th Cir.).

A deprivation of the right to international travel is effected as long as the practical effect is to shut down the possibility for travel. In *Regan v. Wald*, 468 U.S. 222, 240-242 (U.S. 1984), the Court discussed the restrictions on travel at issue in *Zemel v. Rusk*. In *Zemel*, the Secretary of State stopped certifying passports for travel to Cuba. The Court assumed this was a deprivation of the right to travel; this had the "*practical effect* of preventing travel to Cuba by most American citizens." *Id*. Here, Mohamed's placement on the No Fly List has the same "practical effect" of preventing international travel. For Mohamed, it prevents travel to see his family in Somalia or Kuwait, or to perform his religious pilgrimage to Mecca. Mohamed works full-time, and he simply does not have the weeks and months to cross continents and oceans by land and sea. Furthermore, because the No Fly List is disseminated to ship captains and at least 22 other countries, it also prevents many sea and overland travel routes. Therefore, Defendants have deprived Mohamed of his constitutional travel rights.

The only court to discuss this issue recently found that placement on the No-Fly List is a deprivation of the constitutionally protected right to travel because of the immense and practical

burden such a placement has on the ability to travel at all.[1] *Latif v. Holder*, 3:10-CV-00750-BR, 2013 U.S. Dist. LEXIS 122533, at *26–27 (D. Or. June 24, 2014). *Latif* explained that the "realistic implications of being on the No-Fly List are far-reaching" because, in addition to prohibiting listees from flying, TSC "shares watch-list information with 22 foreign governments, and United States Customs and Border Protection makes recommendations to ship captains as to whether a passenger poses a risk to transportation security." *Id.* at 28. Indeed, being placed on the No Fly List "can also result in interference with an individual's ability to travel by means other than commercial airlines." *Id.* at 29. And it is self-evident that international travel without flight is impractical if not impossible. Defendants continue to deprive Mohamed of his liberty interest in international travel.

2) Defendants are violating Mohamed's right to be from government-imposed stigma

The reputational harms suffered by Mohamed and imposed by Defendants are also a Fifth Amendment-protected liberty interest. When the complainant has shown damage to his reputation as well as the removal of an "interest from the recognition and protection previously afforded by the state," the complainant has suffered a harm protected by the Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 711 (1976). To demonstrate a stigma-plus claim requires "1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed

[1] This case is thus distinguishable from *Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (9th Cir. 2006) in that the Gilmore plaintiff was attempting to engage in interstate and not international travel. That right is sourced elsewhere in the Constitution and exists as a separate body of law, possibly from the Commerce Clause. *Griffin v. Breckenridge*, 403 U.S. 88, 105–06 (1971); *United States v. Guest*, 383 U.S. 745, 758–59 (1966). While being denied boarding from a plane in interstate travel may be akin to denying a mode of transport, when it comes to international travel the right to board a plane is tantamount with that right. *Latif v. Holder*, 3:10-CV-00750-BR, 2013 U.S. Dist. LEXIS 122533.

alteration of the plaintiff's status or rights." *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (internal citations omitted).

While Defendants' may argue that Mohamed has not been stigmatized, they cannot obfuscate the fact that their No Fly List is disseminated to screening agencies throughout the US government, "22 foreign governments," and even "ship captains" in addition to domestic and international air carriers. Latif v. Holder, 2013 U.S. Dist. LEXIS 122533 (D. Or. Aug. 28, 2013). Defendants placed Mohamed on a watch list for terrorists and disseminated that list across the globe. This constitutes a publication and satisfies the stigma prong.

The "plus" prong is met when the government denies some "tangible interest" or the "alteration of a right or status" recognized by law, but the "plus" does not need to rise to the level of a constitutional violation. *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005); *Humphries v. County of L.A.*, 554 F.3d 1170, 1187–88 (9th Cir. 2009). In fact, whether or not there is a rights violation is simply not relevant to determining if Mohamed satisfies the plus factor.

The logic of *Doe v. Dep't of Pub. Safety ex rel. Lee*[2] corroborates this. F.3d 38 (2d Cir. Conn. 2001). In *Doe,* the Second Circuit sought to determine what would be sufficient to constitute a plus factor in accordance with the seminal stigma-plus decision, *Paul v. Davis*. *Id.* at 54. *Doe* reasoned that *Paul* concluded that the liberty identified by the Fourteenth Amendment could not "encompas[s] an individual's unadorned interest in his or her reputation," because if it did the

[2] While the Supreme Court did reverse *Doe,* it did so for reasons unrelated to *Doe's* plus factor analysis. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (U.S. 2003) (noting that it was "unnecessary to reach" the question of whether the state actor had "deprived [the plaintiff] of a liberty interest.") The review of *Doe* simply held that there was no disputed fact "relevant to the inquiry at hand" for which procedural due process could require the government to "accord the plaintiff a hearing to prove or disprove a particular fact." *Id.* a question of first impression for this Court, and Appellants urge the Court to adopt the reasoning of *Doe*.

existence of a federal procedural due process claim would depend "entirely on whether the defendant happened to be a state officer or a private citizen." Id. at 53-54. In order to avoid this outcome—which is the purpose of the plus factor—a plaintiff must identify "some material indicium of governmental involvement beyond the mere presence of a state defendant." Id. at 54. It would be enough, then, for "an allegation of defamation" to be accompanied by "other government action adversely affecting the plaintiff's interests." Id. at 55. Therefore, the plus factor does not have to be a violation of Mohamed's legal rights.

Doe's holding is also consistent with controlling precedent. In *Paul v. Davis*, the Supreme Court held that "reputation alone, apart from some more tangible interests," is insufficient to give rise to a procedural due process claim, and in doing so, established the plus factor requirement. *Paul v. Davis*, 424 U.S. 693, 701 (U.S. 1976). The reason that the Court reached its decision was because it wanted to avoid turning the Fourteenth Amendment into a "font of tort law to be superimposed upon" state law. Id. In other words, *Paul*'s objective was to prevent all state law defamation claims against a state actor from becoming Fourteenth Amendment procedural due process claims that could be brought in federal court. Therefore, a procedural due process claim exists only when the state actor's imposition of a stigma also imposes upon "more tangible interests." *Id.*

And while most relevant cases finding a plus factor deal with the loss of government employment or an alteration or deprivation of a legal right, *Seigert v. Gilley* makes clear that a plus factor exists so long as the damage identified does not "flo[w] from injury caused by [Defendants] to [Mohamed's] reputation." *Siegert v. Gilley*, 500 U.S. 226 (U.S. 1991). In Seigert, the defendant provided a former employee's prospective employer with a negative reference that prevented the employee from being hired. Id. The employee alleged that the defendant's negative reference was

defamatory and that, because it prevented him from being hired by the prospective employer, he also satisfied the plus factor. Seigert, however, held that the employee did not have a plus factor. The Supreme Court indicated that the key fact upon which it relied was that the injury alleged "flow[ed] from the injury to [the employee's] reputation" rather than from an additional government-imposed effect unrelated to the defamation itself. *Id.* at 234.

Here, Defendants' listing of Mohamed has a government-imposed effect distinct from the stigma it attaches to him. And this logic is consistent with this Court's prior order which explained the result of *Joint Anti-Fascist Refugee Committee v. McGrath* by finding that what made the listing at issue in *McGrath* actionable was the "dissemination of that list…to government departments and agencies, which then used the listed to take actions against" the listees. *Mohamed v. Holder*, 2011 U.S. Dist. LEXIS 96751 (E.D. Va. Aug. 26, 2011). Because Mohamed has pled both a "stigma" and a "plus," he has alleged an actionable claim for the deprivation of his liberty interest in his reputation.

b) <u>The risk of erroneous deprivation is extreme</u>

There is a very large risk of mistake where, as here, a person's right to return to the United States is controlled by an opaque executive branch process. *Hernandez v. Cre*mer, 913 F.2d 230, 237 (5th Cir. 1990) (citing *Ng Fu Ho v. White*, 259 U.S. 276, 284–85 (1922); *Chin Yow v. United States*, 208 U.S. 8, 13 (1908); *Rosado v. Civiletti*, 621 F.2d 1179, 1197 (2d Cir.1980), *cert. denied*, 449 U.S. 856 (1980)). Where the agency challenged enjoys "extremely broad discretion" and there is a "lack of any written guidelines regarding the exercise of that discretion," the "virtually standardless" procedure that results leads to a "significant" risk of mistake." *Hernandez v. Cremer*, 913 F.2d 230, 238 (5th Cir. 1990). And the risk of erroneous deprivation is further heightened where "the consequences of a mistaken determination may result in a lengthy exile for the citizen

while he awaits final determination of his citizenship claim by an immigration judge." *Id.* This is applicable here, because Mohamed's placement in the TSDB led to an exile of several weeks.

Here, Defendants' discovery responses help quantify the risk of mistake in placing or neglecting to remove someone from the TSDB. And the risk of mistake has been exacerbated by the lack of any check or oversight on the TSDB compilation process. The TSC practice is to essentially allow every nominated individual to the watchlist: Defendants own records indicate that only about one percent of nominees are rejected.

Indeed, without any notice, a listee at best can only "guess[] what evidence" is responsive to Defendants allegations and thus simple make "every possible argument against denial at the risk of missing the critical one altogether." *Barnes*, 980 F.2d at 579. It is an assumption upon which our civil and criminal process is built that the absence of lack of "adequate and timely notice creates a substantial risk of wrongful deprivation" because it leads to "[a]n inability to rebut". *Kindhearts,* 647 F. Supp. 2d at 904. Without notice of the "exact reasons" for the government's decision or "the particular statutory provisions and regulations they are accused of having violated," affected persons cannot "clear up simple misunderstandings or rebut erroneous inferences." *Gete v. I.N.S.*, 121 F.3d 1285, 1297 (9th Cir. 1997).

The government compounds this risk of error when it fails to provide a hearing permitting confrontation and rebuttal of the bases for the deprivation. See *De Nieva*, 1989 WL 158912, at *7 (lack of "an adjudicative hearing of any type" concerning passport seizure "maximized the risk of mistaken deprivation"), aff'd, 966 F.2d 480 (9th Cir. 1992); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) (adversarial process reduces the risk of error because "[s]ecrecy is not congenial to truth-seeking"). In contrast,

explaining the specific reasons for the decision increases the likelihood of error correction. *Barnes*, 980 F.2d at 579.

c) What process currently exists is constitutionally inadequate

3) The standards for inclusion are deficient

While the absence of notice and an opportunity to be heard are clear procedural due process deficiencies, so too is the infinitely permeable standard Defendants utilize to include persons on the No Fly List. As this Court has noted, Defendants standard allows persons to be placed on the No Fly List based on a "reasonable suspicion" that is based on a "reasonable suspicion." The Supreme Court explained that, while "enactments with civil rather than criminal penalties" can be less precise, the "degree of vagueness that the Constitution tolerates" is not absolute. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 456 U.S. 950 (1982). Defendants No Fly List is defective, not only because it lacks the typical ingredients of process, but because its standards for inclusion—which we only know about because of a document leak—are too vague and intended to apply to US persons secretly. In short, Defendants are attempting to regulate the behavior of US persons without disclosing to them how they may avoid being placed on a watchlist. This is secret law, and a violation of the core principle of fairness that procedural due process is intended to protect.

4) There is no pre-deprivation notice or process

Due process required "the opportunity to be heard at a meaningful time and in a meaningful manner" as well as consideration of the risk of mistake inherent in the existing procedure and the likelihood that additional process can solve deficiencies. *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976); *Hernandez*, 913 F.2d at 238. "The Fourth Circuit has also made clear that prospective

victims of government defamation must have access to a pre-deprivation process." *Mohamed v. Holder*, 2011 U.S. Dist. LEXIS 96751 (E.D. Va. Aug. 26, 2011) (quoting *Sciolino*, 480 F.3d at 653). Under this standard, Mohamed has not been given the constitutionally-required amount of process before being placed on the No-Fly List and prevented from flying.

Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 340 (1950). Here, there was no notice or a hearing at all on Mohamed's placement on the No-Fly List. Mohamed was not given a chance to learn of the evidence against him and rebut it. In fact, Mohamed was not even told of his list placement until after his family had purchased him a plane ticket he could not use.

Even non-citizens have protected liberty interests in their right to enter the country that warrant some due process. "[D]ue process requires, at a minimum, that the INS adopt procedures to ensure that asylum petitioners are accorded an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., that they receive a full and fair hearing on their claims." *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002). Mohamed did not receive any such notice or hearing; thus, as a US citizen, he is receiving less process on his right to return to America than non-citizens are.

Placement on a list that leads to a subsequent deprivation of a protected interest also warrants a pre-listing hearing in other contexts. In *Perry v. City of Norfolk*, 1999 U.S. App. LEXIS 22768, 16-18 (4th Cir. Sept. 20, 1999), the court held that listing in a child abuser registry must be preceded by notice and a hearing. In *Perry*, the plaintiff had "a liberty interest in not being listed as a child abuser in the CANIS registry, an assumption that appears reasonable because this listing indirectly cost him his job." *Id.* (citing Cf. *Paul v. Davis*, 424 U.S. 693, 701). "If a liberty interest

is implicated, due process requires that Perry be given a hearing to contest the determination that he was a child abuser *before* his name could be listed in the CANIS registry." *Perry* at *17 (emphasis added) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("some form of hearing is required before an individual is finally deprived" of a protected interest)). Notice of this hearing is also required. *Perry* at *17 (citing *Lane Hollow Coal Co. v. DOWCP*, 137 F.3d 799, 807 (4th Cir. 1998)).

Therefore, in comparison to the process typically required for Fifth Amendment Liberty deprivations, Defendants have notably provided no process.

5) DHS TRIP is not a post-deprivation process

As has been articulated by this Court and *Latif,* DHS TRIP is inadequate for numerous reasons: there is no notice or hearing, no opportunity to rebut the allegations made against listees, no disclosure of the allegations made against listees, and not even confirmation that a person is actually on the No Fly List. All of these shortcomings are beyond dispute and each provides a basis for concluding that DHS TRIP is not the process that is due to Mohamed and other persons languishing on Defendants' No Fly List. But it is also important to note that DHS TRIP is designed this way in line with what Congress intended.

The language of the law that directed TSA to create DHS TRIP, 49 U.S.C. § 44903, demonstrates—unequivocally—that Congress directed DHS TRIP to redress misidentification injuries TSA inflicts but not Plaintiff's placement injuries for which Defendants are liable. Thus, to the extent that Defendants utilize DHS TRIP for anything else, Defendants are exceeding the authority Congress delegated to them.

The statute authorizes DHS to establish a "timely and fair process for individuals identified as a threat" by TSA to challenge this determination. 49 U.S.C. § 44903(j)(2)(G)(i).

But Congress, as well as Defendants' administrative scheme, makes clear that TSA is not actually making threat determinations but simply matching passenger information to the threat determinations made by other defendants.

Congress delineated the meaning of the phrase "identified as a threat" *Id* in granular detail. The statute directs TSA to identify individuals "as a threat" by "comparing passenger information" to Defendant TSC's "selectee and no fly lists." 49 U.S.C. § 44903(j)(2)(C)(i). When TSA receives passenger information that matches the information Defendant TSC maintains on its watchlists, TSA makes the determination that the person is a "threat." 49 U.S.C. § 44903(j)(2)(G)(i). TSA's identification of a person as one whom Defendant TSC has placed on its watchlists—persons TSA identifies as a "threat"—is the determination from which 44903 authorizes a challenge. If Plaintiff's lawsuit claimed that TSA misidentified him as a "threat"—that is, a person Defendant TSC placed on its watchlists—DHS TRIP would allow him to challenge that misidentification and even "correct any erroneous information" that might have led TSA to mistakenly conclude that he is on the No Fly List. *Id.* But this is not the basis of Plaintiff's lawsuit. Plaintiff challenges Defendant TSC's placement of him on its No Fly List. And Congress offers no mechanism through which Plaintiff may challenge Defendant TSC's determinations Defendants have inflicted upon Plaintiff are not among those that Congress intended DHS TRIP to redress.

Tellingly, TSA also believes that Congress did not intend for DHS TRIP to redress Plaintiff's injuries. TSA's own regulations state that DHS TRIP will accept applications for redress—not from all persons delayed or denied boarding onto an aircraft—but only from those who were "as a result of the Secure Flight program." 49 C.F.R. § 1560.201. Secure Flight, as Defendants have explained, is the program through which TSA "performs the watch list

matching functions." This is the process TSA utilizes to comply with Congress's law requiring it to "compar[e] passenger information" to Defendant TSC's "selectee and no fly lists." 49 U.S.C. § 44903(j)(2)(C)(i). The condition that these regulations establish—that the injury occurs as a result of a deficiency in TSA's screening procedures enshrined in its Secure Flight program—limits the class of individuals who "may seek assistance through the redress process." 49 C.F.R. § 1560.205. Only those who, "as a result of the Secure Flight program," believe TSA has improperly "delayed or prohibited" their boarding can seek redress through DHS TRIP. 49 C.F.R. § 1560.201**.** But Plaintiff is not in this class of persons. He does not allege that, through some defect of TSA's Secure Flight program, TSA denied him boarding. Rather, Plaintiff challenges Defendants' placement of him on the No Fly List. And this Court should just take TSA at its word: the agency's own regulations do not claim for DHS TRIP the authority to redress Plaintiff's placement on the No Fly List. Because TSA apparently agrees that Congress did not intend for DHS TRIP to redress Plaintiff's injuries, this is an additional reason to conclude that DHS TRIP is inadequate process.

d) Defendants' interests are advanced by incorporating constitutionally sound process

Providing Mohamed with pre-placement and dissemination notice, and with even any type of hearing to rebut his No-Fly List placement, would create no unreasonable burden on Defendants. *See Kendall v. Balcerzak*, 650 F.3d 515, 529 (4th Cir. 2011). Even where a substantial government purpose exists, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Even where there are national security concerns, "the Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end, unduly to

infringe' a constitutionally protected freedom.'" *Aptheker* (citing *Cantwell v. Connecticut*, supra, at 304). "Ordinarily, [] predeprivation process is required; 'absent the necessity of quick action by the State or the impracticality of providing any predeprivation process, a post-deprivation hearing [is] constitutionally inadequate.'" *Presley v. City of Charlottesville*, 464 F.3d 480, 489 (4th Cir. 2006) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)). "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship." *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (citing *Mendoza-Martinez* at 164-65).

Defendants thus cannot just point out that national security interests are important to them – they have not cited any case law that exempts them from the bounds of procedural due process. Indeed, the law supports pre-deprivation process.

CONCLUSION

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

__/s/__________________

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, I caused the foregoing motion to be filed with the Court by CM/ECF and served on all ECF-registered attorneys representing Defendants.

Dated: December 9, 2014

___/s/___________________________

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