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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,*	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., *Defendants*.	**DEFENDANTS' SUPPLEMENTAL BRIEF**

INTRODUCTION

On August 28, 2013, the Court issued an Opinion and Order regarding the parties' cross-motions for partial summary judgment with respect to Plaintiffs' procedural due process claims. At the Court's request, the parties then conferred regarding an appropriate means to provide the Court with additional information regarding the judicial review that is available to individuals

who have been denied boarding on account of their alleged placement on the No Fly List. The parties filed a Third Joint Statement of Stipulated Facts on September 26, 2013. *See* ECF No. 114. Pursuant to the briefing schedule proposed by the parties, Defendants now submit this supplemental brief.

BACKGROUND

The Court's opinion granted in part Plaintiffs' motion for partial summary judgment, after finding that Plaintiffs have alleged the deprivation of protected liberty interests in international air travel and reputation. *See* Mem. Op., ECF No. 110, at 20, 37. The Court's order addressed the first *Mathews* factor – "the private interest that will be affected by the official action" – but it reserved ruling on the second and third factors – "the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and the governmental interests at issue. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

With respect to these remaining issues, the Court indicated that it needed additional information regarding the judicial review available under 49 U.S.C. § 46110 to individuals who believe that they have been placed on the No Fly List. The Court recognized that, in such cases, the government will file an administrative record with the appellate court, but said that it "does not have any other information about the review process such as what specifically would be in the administrative record submitted to the appellate court, what other materials might be submitted, or the nature of the record or materials that deems them sensitive and/or classified so they cannot be revealed to anyone other than the appellate court." Mem. Op., ECF No. 110, at 34. The Court stated that "the current record in this case is not sufficiently developed as to the

judicial-review process for the Court to resolve" whether the judicial review available under 49 U.S.C. § 46110 is sufficient to satisfy the requirements of due process, and "to determine whether additional or alternative procedural requirements are necessary or appropriate." *Id.* at 35, 36.

On September 26, 2013, the parties filed their Third Joint Statement of Stipulated Facts. *See* ECF No. 114. The stipulated facts provide additional information regarding the judicial review process available under 49 U.S.C. § 46110 to individuals who have been denied boarding on commercial aircraft and believe that their denial is a direct result of being included on the No Fly List. These stipulations supplement the factual information already provided with the parties' briefing. Specifically, the parties previously filed a Joint Statement of Stipulated Facts on January 31, 2013, which set forth undisputed facts regarding the DHS Traveler Redress Inquiry Program ("TRIP") process. *See* ECF No. 84. In addition, Defendants have provided the Court with the Declaration of Cindy A. Coppola, the Acting Deputy Director for Operations of the Terrorist Screening Center ("TSC"), which provides additional information regarding the criteria for placement on the No Fly List; the process through which names are added to and removed from the list; the procedures for frequent reviews of individuals included on the list; and the harms to national security that would result from disclosing an individual's inclusion or non-inclusion on the No Fly List and the substantive reasons therefor. *See* Coppola Decl., ECF No. 85-2.

DISCUSSION

The parties' stipulated facts concerning the judicial review available in the courts of appeals provide this Court with additional information regarding the final stage of a multi-layer

set of processes and procedures designed to provide redress to individuals who have been denied boarding on commercial aircraft scheduled to fly to, from, or over the United States, and who believe that their denial is a direct result of being included on the No Fly List. Each layer of review in the administrative redress process is designed to diminish the possibility of erroneous inclusion on the No Fly List, while also ensuring that the list includes those individuals who present a threat to air travel or national security. Additionally, each layer of the redress process is designed to protect sensitive information, the disclosure of which could harm national security interests. Review in the court of appeals operates at the end of this multi-layered administrative process and provides for review of sensitive information submitted by the government as part of an administrative record. When considered in its entirety, and with reference to all of the evidence submitted to this Court, the redress process is robust and adequately protects the liberty interest in international travel by air recognized by this Court, while ensuring that the government's critical national security interests are not compromised.

A. TSDB and No Fly List Criteria

This Court's review should begin with a consideration of the specific substantive criteria that must be satisfied before an individual can be added to the Terrorist Screening Database ("TSDB"). *See* Stipulated Facts, ECF No. 84, ¶ 15; Coppola Decl., ECF No. 85-2, ¶ 8. These criteria require a nomination to the TSDB to be supported by "articulable facts which, taken together with rational inferences, reasonably warrant the determination that an individual 'is known or suspected to be, or has been engaged in conduct constituting, in preparation for, in aid of or related to, terrorism and terrorist activities.'" Stipulated Facts, ECF No. 84, ¶ 16. Not all individuals included in the TSDB are eligible to be included on the subset No Fly List. Rather,

to be included on the No Fly List, the derogatory information must satisfy additional criteria specifically applicable to that list. *Id.* ¶ 17. *See also* Coppola Decl., ECF No. 85-2, ¶¶ 15-18 (describing No Fly List criteria). The application of these criteria mean that individuals are placed in the TSDB and on the No Fly List only when available evidence supports their inclusion. To ensure that inclusions on the No Fly List are based on appropriate information, all nominations are reviewed and must be approved by subject matter experts at the TSC. *Id.* ¶¶ 19-21.

B. Administrative Checks and Frequent Reviews for U.S. Persons on the No Fly List

The quality control measures implemented by the government continue following an individual's placement on the No Fly List. Pursuant to a mandate in Homeland Security Presidential Directive 6 ("HSPD-6") that the watchlist be based on "thorough, accurate, and current information," the government conducts periodic reviews and audits to guarantee the integrity of the contents of the TSDB. *Id.* ¶ 23. These reviews are especially frequent and thorough for the small fraction of TSDB records concerning U.S. citizens or lawful permanent residents. *Id.*

C. The DHS TRIP Redress Process

The government also provides a vigorous administrative redress process that begins with DHS TRIP, the mechanism for individuals to seek redress for travel-related screening issues related to denied or delayed airline boarding. *See* Stipulated Facts, ECF No. 84, ¶ 4. For a DHS TRIP applicant who is an exact or near match to an identity in the TSDB, DHS TRIP will refer the inquiry to TSC for a review of all available information, including the information and

documentation provided by the traveler, to determine if the traveler is an exact match to an identity in the TSDB and, if so, whether the traveler should continue to be in the TSDB. *Id.* ¶ 9. Through this process, TSC "will work with the agency that originally nominated the individual to be included in the TSDB to determine whether his current status in the TSDB is suitable based on the most current, accurate, and thorough information available." Coppola Decl., ECF No. 84-2, ¶ 49. If TSC determines that the individual's current status in the TSDB is not suitable based on current available information, TSC can downgrade the individual's status within the TSDB or remove that individual entirely from TSDB. This process allows the government to correct misidentifications. If, after conducting its review, TSC determines that an individual was misidentified, the government can address the misidentification by correcting the traveler's record or taking other appropriate action.

The effectiveness of the current review process is demonstrated by statistics showing that TSC has regularly removed or downgraded individuals who no longer meet the criteria for inclusion in the TSDB or its subset lists. *See id.* ¶ 52. A recent GAO report has also recognized the government's successful implementation of administrative measures that minimize and correct mistakes in the watchlist database. The GAO found that the government has improved the watchlist process by conducting continuous checks every time the watchlist is updated, and by implementing Secure Flight, which has significantly reduced the risk of misidentifications, in part through the use of information provided by DHS TRIP applicants. *See* U.S. Gov't Accountability Office, GAO-12-476, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Action since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (2012) (*available at* http://www.gao.gov/assets/600/591312.pdf), at 17, 41, 45. This report, from May

2012, shows that Plaintiffs' primary concerns about the integrity of the watchlisting process have already been addressed. Plaintiffs' reliance on earlier reports discussing outdated statistics about the composition of the TSDB simply cannot meaningfully inform the Court's analysis of the current watchlisting process.

D. Petitions for Review in the Courts of Appeal Under 49 U.S.C. § 46110

If an individual alleges that he has experienced delayed or denied boarding as a result of inclusion on the No Fly List, and is unsatisfied with the results of his or her DHS TRIP inquiry, he or she may file a petition for review in the court of appeals pursuant to 49 U.S.C. § 46110. Stipulated Facts, ECF No. 114, ¶¶ 1-3. This provides a petitioner with meaningful review of his or her watchlist status by a federal court. In the event a petitioner is not on the No Fly List, the government will inform the appellate court of that fact. *Id.* ¶ 4. If, after the DHS TRIP review, the government determines that the petitioner should remain on the No Fly List, the government will submit an administrative record to the court of appeals that includes the information that the government relied upon to maintain that listing. *Id.* ¶ 5. This information will be provided along with any information that the petitioner provided to the government as part of the DHS TRIP process. *See id.* ¶ 6.

After the government files an administrative record, the court of appeals will review the record "to determine if the government reasonably determined that the petitioner satisfied the minimum substantive derogatory criteria for inclusion" on the No Fly List. *Id.* ¶ 8. If the court determines that the individual's placement is not supported by the administrative record, the court may remand the matter to the government for appropriate action. On remand, the

government may, for instance, engage in further fact-finding and, if appropriate, remove the individual from the No Fly List.

ARGUMENT

The Procedures For Inclusion on the No Fly List – Including Initial Placement, Administrative Redress, and Judicial Review in the Court of Appeals – Comport with Procedural Due Process

Considered in its entirety – from initial placement on the No Fly List, through periodic reviews and other quality control measures, to the DHS TRIP process and review in the court of appeals – the watchlisting process includes ample safeguards and protections to diminish the risks that an individual will erroneously be included on the No Fly List. This is particularly true when the Court considers the compelling national security concerns related to the use of the No Fly List and the protection of the information that underlies that list.

The additional measures to which Plaintiffs claim entitlement – notice of their alleged inclusion on the No Fly List and the substantive reasons for such inclusion – would cause significant harm to the government's interests in national security and are not required to satisfy the constitutional guarantee of due process. Plaintiffs are not entitled to such notice because such disclosures would cause significant harm to national security and law enforcement operations. *See* Defs.' Mot., ECF No. 85-1, at 25-27; Defs.' Reply, ECF No. 102, at 26-34. *See also, e.g.*, Coppola Decl., ECF No. 85-2, ¶ 27 (explaining that disclosing status would allow individuals, and the groups that they are associated with, to take new precautions against surveillance, and that previous releases of such information has compromised ongoing investigative efforts and placed FBI agents in personal danger).

Likewise, an individual who is included on the No Fly List is not entitled to access information explaining the substantive basis for his or her inclusion because that information is often classified or otherwise privileged and may include information obtained from human sources, foreign governments, and signals intelligence. Stipulated Facts, ECF No. 114, ¶¶ 5-6. Indeed, as the government has explained in supporting declarations, "[m]ost of the derogatory information relied on by nominating agencies consists of operational facts derived from underlying international counterterrorism investigations or intelligence collection methods, which are generally classified to protect intelligence source and methods."[1] Coppola Decl., ECF No. 85-2, ¶ 25.

Contrary to Plaintiffs' argument, the government has balanced the need for meaningful review with the need to protect such information from individuals who are on the No Fly List. The stipulated facts explain that if, after reviewing a DHS TRIP application, the government determines that an individual should remain on the No Fly List, the administrative record submitted to the court of appeals *ex parte* and *in camera* "will include information that the government relies upon to maintain that listing." Stipulated Facts, ECF No. 114, ¶ 5. This process allows the government to protect such information, while also ensuring that an individual

[1] Such classified information could pertain to various categories of information under Executive Order 13526, including "(b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; [and] (d) foreign relations or foreign activities of the United States, including confidential sources." Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), § 1.4. It is not surprising – indeed, it is axiomatic – that information used to nominate individuals to a list of persons known of being involved with or associated with terrorists or terrorism would involve sensitive information that implicates significant national security concerns. The TSDB would hardly serve its purpose if the government was constrained from using sensitive information to nominate individuals to the No Fly List because of a concern that information would be shared in litigation.

has an opportunity to seek review of the information through an additional layer of review outside of the administrative process.[2]

While the information would be provided to the court of appeals, Defendants' briefing has explained at length why such information cannot be disclosed to a petitioner, even under a protective order. *See* Defs.' Mot., ECF No. 85-1, at 25-27; Defs.' Reply, ECF No. 102, at 26-34. *See also* Coppola Decl., ECF No. 85-2, ¶¶ 27-44. Through their briefing and in oral argument, Plaintiffs have failed to account for the consequences of their claim, in that they have failed to recognize the harms that additional or alternative procedural measures would cause to the government's interests. The government has a compelling interest in the protection of classified information, and "that strong interest of the government clearly affects the nature" of the process owed to Plaintiffs. *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001). *See also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing that the authority to determine who may have access to classified information "is committed by law to the appropriate agency of the Executive branch").

The nature of the information at issue in challenges to inclusion on the No Fly List is critical to the due process analysis, because "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal citation omitted). Instead, the requisite procedures

[2] Defendants previously filed with the Court a notice identifying three cases pending in the courts of appeals in which individuals have sought review of final agency decisions received through DHS TRIP. *See* Defs.' Notice, ECF No. 107. In two of those cases, the government has filed a certified index of records that includes materials filed *in camera* and *ex parte*, and in one case the government has also filed an administrative record that includes materials filed *in camera* and *ex parte*.

may vary "depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985). Terrorism screening for air travel presents a factual context that is dramatically different from the cases relied on by Plaintiffs to support their demand for the information underlying placement on the No Fly List.

For example, Plaintiffs attempt to analogize their claims to due process challenges concerning utility subsidies and welfare benefits. *See* Pls.' Mot., ECF No. 98-1, at 21-23. The private interests at issue in those cases are more substantial than Plaintiffs' interest in international air travel here. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (considering termination of utility subsidies, and recognizing that "[u]tility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety"). And the government's interests in those cases are far less significant than the interests at issue here. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). Providing additional information or process when terminating a fiscal benefit does not result in the disclosure of classified or other protected national security information. Moreover, the termination of utility subsidies and welfare benefits does not concern the government's unquestionably compelling interests in transportation and national security in light of the "terrorist hijacking and crashes of passenger aircraft on September 11, 2001, which converted civil aircraft into guided bombs for strikes against the United States." H.R. Rep. No. 107-296, at 53-54 (2001), as reprinted in 2002 U.S.C.C.A.N. 589, 590 (discussing the enactment of the Aviation and Transportation Security Act (Pub. L. No. 107-71, 115 Stat. 597 (2001)). The No

Fly List serves these security interests; it is one of the best tools for ensuring safe air travel and disrupting terrorist attacks because it allows the government to identify individuals who may pose a threat to transportation security and prevent them from boarding an aircraft. The serious national security concerns at issue in this case tip the balancing of due process factors in the government's favor.

Even if individuals included on the No Fly List have been deprived of protected liberty interests in international air travel and reputation, as this Court has found, the government retains a compelling interest in protecting the information underlying such inclusion. The disclosure of classified information by definition would cause damage to the national security, including by jeopardizing intelligence sources and methods. Coppola Decl., ECF No. 85-2, ¶¶ 29, 40-43. By shielding that information from disclosure, the government also ensures the integrity of investigations into terrorism and other threats to national security. *Id.*, ¶¶ 27, 33, 40-43. Similarly, protecting TSDB information enables agencies to share that information across the government, without fear that it will be disclosed whenever anyone sues after he or she cannot travel as he or she might choose – a critical form of information sharing that was identified by the 9/11 Commission as necessary to prevent future terrorist attacks. *See The 9/11 Commission Report*, Exec. Summary (2004).

The compelling governmental interests at issue here set the boundaries of the process owed to Plaintiffs. By affording a petitioner the opportunity to challenge his or her alleged inclusion on the No Fly List before the court of appeals, the redress process ensures that information underlying an individual's placement may be reviewed by a federal court, while still

respecting the government's need to keep the information protected from disclosure, so that its national security and law enforcement operations are not compromised.

Contrary to Plaintiffs' arguments, opportunities for confrontation and rebuttal are not absolute requirements of due process, particularly in cases where the information upon which the government acts is highly sensitive. *See Jifry v. FAA*, 370 F.3d 1174, 1183-84 (D.C. Cir. 2004) (In determining whether plaintiffs posed threats to civil aviation, "substitute procedural safeguards may be impracticable [in those cases] and, in any event, are unnecessary" because of "the governmental interests at stake and the sensitive security information" involved; as a result, due process did not require that plaintiffs be given the "specific evidence" upon which the determinations were based.). Plaintiffs have not identified additional or alternative procedures that could be implemented without harming the government's critical interests in watchlisting and protecting sensitive information. *See* Defs.' Reply, ECF No. 102, at 20-23 (discussing demand for disclosure of watchlist status); *id.* at 24-27 (discussing demand for disclosure of substantive information supporting inclusion on the No Fly List).

In establishing and refining the watchlisting system, the government has carefully considered how to ensure that intelligence information is used effectively to include appropriate individuals on the No Fly List without jeopardizing the necessary secrecy of such information. The current redress process represents the government's best efforts to provide redress in this complex and sensitive area, and the government's best judgment based on experience in counterterrorism should not be set aside on account of Plaintiffs' contrary assessments regarding how sensitive intelligence information should be protected. *See United States v. Hawkins*, 249 F.3d 867, 873 n.2 (9th Cir. 2001) (recognizing that "courts have long recognized that the Judicial

Branch should defer to decisions of the Executive Branch that relate to national security"). A proper balancing of the private and governmental interests demonstrates that the government's redress process comports with procedural due process. Plaintiffs' procedural due process claim should therefore be denied.

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Respectfully submitted,

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