

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

GULET MOHAMED,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:11-CV-0050
)	
ERIC H. HOLDER, JR., in his official capacity as)	
Attorney General of the United States, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS’ NOTICE OF FILING
OF PUBLIC VERSION OF EX PARTE DECLARATION**

On January 30, 2015, the Court heard oral argument on the parties’ respective motions for summary judgment on Plaintiff’s procedural due process claim. On February 2, the Court scheduled an *ex parte* and *in camera* sealed hearing “in order to provide defendants with the opportunity to provide and the Court to consider additional information concerning the defendants’ claims concerning the existence of state secrets and their relevance to the pending procedural due process claims.” ECF No. 173 at 1. The Court identified eight specific issues about which it sought additional explanation or information. *Id.* at 2-3. Defendants prepared two *ex parte* submissions to address some of the issues raised by the Court’s order. *See* ECF No. 181 & 182. In order to place as much information as is possible on the public record, Defendants have reviewed each of their *ex parte* submissions to determine if they can be filed publicly. Defendants previously filed a redacted, public version of their first *ex parte* submission. *See* ECF No. 183-1. Today, the Federal Bureau of Investigation has completed its review of the second *ex parte* submission, and hereby attaches a redacted, public version to this notice.

Dated: March 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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DATED: MARCH 13, 2015

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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-0050

~~Filed In Camera, Ex Parte~~

IN CAMERA, EX PARTE DECLARATION OF MICHAEL STEINBACH

I, Michael Steinbach, hereby declare the following:

1. (U) I am the Assistant Director of the Counterterrorism Division, Federal Bureau of Investigation ("FBI"), United States Department of Justice.
2. (U) As Assistant Director, I have official supervision and control over the files and records of the Counterterrorism Division of the FBI. In this capacity, I am the principal FBI supervisory official for all FBI counterterrorism investigative activities, and I oversee the FBI's Counterterrorism Division. I was appointed to the position of Assistant Director of the FBI's Counterterrorism Division in July 2014. Prior to holding this position, I served as a Deputy Assistant Director in the Counterterrorism Division, and thus have personal knowledge and experience in the conduct of FBI counterterrorism investigative activities, as well as the need for and process of nominating individuals for watchlisting purposes. The FBI, along with other agencies, is responsible for nominating certain individuals to the Terrorist Screening Database ("TSDB"), the consolidated terrorist watchlist maintained by the Terrorist Screening Center ("TSC"), which itself is an entity administered by the FBI.

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3. (U) Each paragraph in this declaration is marked with letters indicating the level of classification and restrictions on dissemination applicable to that paragraph. Paragraphs marked with a "U" are unclassified. Paragraphs marked with "LES" are considered to be Law Enforcement Sensitive, i.e., information the disclosure of which could undermine ongoing law enforcement investigations or law enforcement techniques. Given that this declaration contains law enforcement sensitive information, it is being provided to the Court solely for *ex parte, in camera* review.
4. (U) I submit this declaration in this case in response to questions raised by the Court in its order of February 2, 2015, and in further support of the dispositive motions filed by the government in this case. The matters stated herein are based on my personal knowledge, my background, training, and experience relating to counterterrorism; my consideration of information available to me in my official capacity; and information furnished by Special Agents and other employees of the FBI, as well as other Department of Justice ("DOJ") employees.

(U) BACKGROUND

5. (U) Through the exercise of my official duties, I have become familiar with this civil action in which the plaintiff, Gulet Mohamed ("Plaintiff"), challenges his alleged placement on the government's No Fly List. Plaintiff generally alleges that he has been denied various constitutional rights in connection with his alleged placement on the No Fly List. I have been informed that by order on February 2, 2015, the Court scheduled an *ex parte* and *in camera* hearing for Defendants to address eight questions raised by the Court, which include seeking a further explanation of why certain documents and information subject to the Attorney General's state secrets privilege assertion would be at issue in further litigation of Plaintiff's claims and the Government's defenses to those claims. I submit this declaration to address the sixth question raised by the Court—namely, "whether, and if so how, national security considerations make it impractical or otherwise

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undesirable to submit for *ex parte, in camera* judicial review and approval the placement of United States citizens on the No Fly List, either before a citizen's placement on the No Fly List or within a specific time period after placement on the No Fly List."

6. (U) A requirement that the FBI present evidence *ex parte* to a court in order to receive judicial approval before or within a specified period of time after placing a U.S. citizen on the No Fly List, as suggested in the Court's sixth question, would raise several significant concerns and, in my judgment, would risk harm to national security. As explained below, such a requirement could delay the placement of an individual on the No Fly List beyond the time when the Executive Branch has determined that such placement is necessary and appropriate, thereby potentially risking the very harms such placement is intended to help prevent: a threat to aviation security or other terrorist acts being committed by that individual. In addition, such a requirement could detract, perhaps significantly, from ongoing actions being taken to investigate, detect, and prevent terrorist activities by imposing a judicial process on the government before it is allowed to take a key preventive measure. Indeed, the need to undertake the proposed process of judicial approval could have the effect of slowing or inhibiting the Executive Branch in making a watchlisting decision. These are among the key reasons a requirement of judicial review of No Fly decisions would not only be impractical and undesirable, but also potentially harmful to national security.
7. (U) In considering the impact of judicial approval for No Fly determinations, it is important to understand as a general matter the role of the FBI. The investigation and collection of information on threats posed by terrorists is a priority for the FBI. The FBI and other components of the U.S. Government use the TSDB and its subsets, including the No Fly and Selectee List, as preventative measures to protect against the threats posed by known or suspected terrorists and terrorist attacks. In furtherance of this mission, the FBI may nominate individuals to the TSDB pursuant to the

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standards for identifying terrorist threats developed by the Executive Branch and set forth in the Watchlisting Guidance. Such nominations must be reviewed and approved by FBI officials and TSC subject matter experts responsible for applying the watchlisting standards. To be sure, the FBI at times may present evidence to a court pursuant to Title III or to the Foreign Intelligence Surveillance Court pursuant to the Foreign Intelligence Surveillance Act ("FISA") in order to obtain judicial approval to collect more information, as required by statutory law and the Fourth Amendment. But the investigative purpose for doing so and the reasons why the FBI submits evidence to a court in those circumstances differs in fundamental respects from the preventative purpose and reasons why the FBI nominates an individual to the No Fly List. In placing someone on the No Fly List, the Government is taking steps to prevent or at least substantially reduce the risk of a terrorist attack based on investigative and intelligence information it has received, and on the basis of predictive judgments by intelligence experts that a person poses a threat of terrorism. The foremost goal of a No Fly placement is to protect people from harm, not to collect more information relative to a threat to national security or for an investigation (though that may also result). Thus, a requirement such as the one suggested in the Court's sixth question that the FBI submit to *ex parte* review as it would when it seeks a search warrant as part of an investigation conflates different actions taken by the FBI, and risks jeopardizing the effectiveness and agility of the U.S. Government's watchlisting process and the very harms to national security it is designed to prevent.

8. (U//~~LES~~) As explained further below, a requirement that the FBI present evidence *ex parte* to a court in order to receive judicial approval for placing a U.S. citizen on the No Fly List would impose a significant burden on the watchlisting process and would risk severely degrading the effectiveness of the No Fly List as a counterterrorism tool. [REDACTED]

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[REDACTED]

A. (U//~~LES~~) Potentially Harmful Impact of Advance Judicial Review on Preventing Terrorism

9. (U//~~LES~~) A requirement that the FBI present evidence to a court in order to receive judicial approval prior to placing a U.S. citizen on the No Fly List, if applicable in all cases, would hinder the FBI's ability to act quickly to address and possibly prevent threats posed by terrorists or terrorist attacks. At times, the FBI may need to act quickly by adding an individual to the No Fly List in order to thwart the imminent travel of an individual assessed to present a terrorist threat or possibly even to prevent an imminent terrorist attack. [REDACTED]

[REDACTED]

[REDACTED] Simply put, in some circumstances, any delay associated with waiting for judicial approval *to protect an aircraft or prevent an act of terrorism* could be highly detrimental to national security.

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B. (U//~~LES~~) Potentially Harmful Impact of Judicial Approval of Placement on Preventing Terrorism

10. (U//~~LES~~) A requirement that the FBI present evidence to a court "within a specific time period after placement" of a U.S. citizen on the No Fly List in order to receive judicial approval for that placement presents different serious concerns. Obviously, this option would permit the placement of a person on the list before judicial approval and would thus mitigate to some extent the need to act swiftly. [REDACTED]

[REDACTED]

[REDACTED] Even a requirement of after-the-fact approval within a short period of time would involve a deadline at some point after which a person would either have to be approved for or removed from the No Fly List. In my judgment, this raises significant concerns.

11. (U//~~LES~~) [REDACTED]

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[REDACTED]

12. (U//~~LES~~) [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Such an endeavor would likely evolve into a highly significant undertaking that would hamper ongoing investigative actions.

13. (U//~~LES~~) Judicial approval of No Fly determinations for U.S. citizens, either before placement or soon after, would also impact the time and resources of those organizations directly involved in the watchlisting and No Fly List nomination process. The FBI's Terrorist Review and Examination Unit ("TRES") is the unit at TSC responsible for ensuring that all subjects of FBI domestic and international terrorism investigations are appropriately nominated and placed on the watchlist. TRES is also responsible for processing the modifications of all FBI watchlist records, as well as the processing of the removals of FBI terrorism subjects as appropriate. In sum, all FBI nominations of individuals to the TSDB, no matter the location of the FBI field office in charge of the investigation, must come through TRES. As the central processing unit for all FBI watchlisting efforts, TRES ensures that the FBI is applying the standards set forth in the Watchlisting Guidance and FBI

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watchlisting policies consistently, and also ensures that FBI watchlist records remain current, accurate, and thorough. [REDACTED]

14. (U//~~LES~~) Similarly, the TSC's Nominations and Data Integrity Unit ("NDIU"), and specifically its sub-units the Nominations Work Group and Subject Matter Expert Group, is the TSC unit responsible for processing all nominations to the TSDB. [REDACTED]

[REDACTED] Moreover, for the nomination of a U.S. citizen to the No Fly List, NDIU standard operating procedure requires review by a senior analyst and by a subject matter expert, even if the nomination is also reviewed by a basic or an advanced analyst. [REDACTED]

15. (U//~~LES~~) For both TREX and NDIU, a requirement that the FBI seek judicial approval before or just after placing a U.S. citizen on the No Fly List would necessitate the diversion of TREX analysts and NDIU senior analysts or subject matter experts who have reviewed the nomination at issue to prepare for the judicial review of that nomination. [REDACTED]

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[REDACTED]

16. (U//~~LES~~) Another factor contributing to the likely added time and resource burdens of judicial approval of No Fly determinations before or shortly after placement results from the process that often occurs in reviewing and analyzing information related to No Fly determinations. In short, the No Fly nomination and review process is dynamic and ongoing. It can often entail "back and forth" discussion within the FBI (for example with investigative agents and within TSC), or with the Intelligence Community. In this process, information is assessed and analyzed, new information and insights are gained as a result, and new judgments are reached by intelligence professionals. The body of information at issue often is not static, and in fact may vary as analysis proceeds among individuals who bring to bear years of experience as investigators with expertise in counterterrorism matters. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Instead of focusing solely on making predictive judgments as to the risk a person may pose, based on intelligence information and investigative experience, in the scenario suggested by the Court's sixth question, the focus of concern may shift in part to whether the basis of the determination would be clear to a judicial officer, who lacks similar expertise and is not privy to the day-to-day intelligence, at the time of placement in light of the information then available. In this way, the requirement of judicial review to approve a No Fly determination could impact ultimate decision-making and potentially increase the risk of an erroneous determination.

17. (U//~~LES~~) [REDACTED]

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[REDACTED]

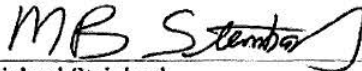
[REDACTED] At issue in No Fly determinations is whether someone is a threat to aviation security or poses a risk of committing an act of terrorism. In my opinion, the Court should defer to the judgment of the trained and skilled professionals at the FBI in consultation with other experts in the Intelligence Community. The risk of harmful intrusion on ongoing intelligence and investigative activities aimed at detecting and preventing terrorist acts—activities that take place in a dynamic and ever-changing threat environment—would be increased with a process requiring judicial approval of No Fly List determinations before or shortly after placement.

(U) CONCLUSION

18. (U) For these reasons, in my judgment, *ex parte* judicial review in order to obtain approval by a court before or just after a U.S. citizen is placed on the No Fly List would present significant risks of harm to national security.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of March 2015.



Michael Steinbach
Assistant Director
Counterterrorism Division
Federal Bureau of Investigation
Washington, DC

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