

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,

PLAINTIFF,

v.

ERIC H. HOLDER, *ET AL.*,

DEFENDANTS.

Case No. 1:11-CV-00050

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS
AS A RESULT OF THE ASSERTION OF THE STATE SECRETS PRIVILEGE**

Plaintiff, Gulet Mohamed, by and through the undersigned counsel, hereby respectfully submits his Opposition to Defendants’ Motion to Dismiss as a Result of the Assertion of the State Secrets Privilege. Doc. Entry 104 (“Def. Motion”).¹

INTRODUCTION

Less than a year ago, a federal court in California conducted the first ever No Fly List trial and concluded that “the government’s TRIP program...is inadequate.” *Ibrahim v. DHS*, No. C 06-00545 WHA, 29 (Jan. 14, 2014). On June 24, 2014, another federal court, this one in Oregon, held at summary judgment that the absence of “any meaningful procedures” that allow persons on the No Fly List to challenge their placement “violates [their] rights to procedural due process.” *Latif v. Holder*, 2014 U.S. Dist. LEXIS 85450, *68 (D. Or. June 24, 2014). Along with this Court’s

¹ Plaintiff incorporates by reference all arguments made in his Reply to Defendants’ Opposition to Plaintiff’s Motion to Compel. In his reply, Plaintiff disputes the process by which Defendants invoked the state secret privilege as well as particular applications of the privilege to Mohamed’s discovery requests. To the extent that those arguments are relevant to this brief, Plaintiff incorporates them by reference.

order denying the government's previous motion to dismiss, the government's attempts to defend in court its use of the No Fly List have not been going very well.

These setbacks are likely why Defendants have adopted a new tactic here. Having failed in other cases to defend its extra-judicial use of the No Fly List, the government has availed itself of the litigation equivalent of the nuclear option: the government wants to kick 21 year old Gulet Mohamed completely out of court because Attorney General Holder submitted an affidavit invoking the state secrets privilege.

Though two other courts—one of which culminated in a lengthy bench trial—have adjudicated the merits of No Fly List claims, Defendants have not previously filed a motion to dismiss either case on the basis of the state secrets privilege.² Indeed, this conduct is as telling as Defendants' approach to discovery was in *Ibrahim v. DHS*, during which Judge Alsap noted that the manner in which the government was litigating “casts doubt upon any suggestion that defendants had a legitimate basis for targeting Ibrahim in the first place.” *Ibrahim v. DHS*, No. C 06-00545 WHA, Doc. 434, 6 (March, 7, 2013). Simply put, just as federal courts in *Latif* and *Ibrahim* found a way to litigate the merits of No Fly List claims without imperiling state secrets, this Court can do so here as well.

And while this Court may deny Defendants' motion on its merits, it may also do so based on Defendants failure to meet-and-confer “to narrow the area of disagreement” prior to filing a motion that, if successful, would prevent Mohamed from having an adjudication on the merits. LCR 7(E). This is not a mere technicality. On May 28, 2014, when Defendants filed its Motion

² In *Ibrahim v. DHS*, subsequent to the close of discovery, the government did argue briefly in 2 pages that it should be granted summary judgment on the basis of the state secret privilege it had previously invoked and the court, in part, had sustained. See Doc. Entry 534, 31-34. This argument was denied by the Court.

to Dismiss, Mohamed learned for the first time that Defendants were invoking the state secrets privilege, the scope of that assertion, and its basis. Mohamed's counsel would have happily worked with Defendants' counsel to narrow his discovery requests, find non-privileged alternatives to privileged information sought, and otherwise work to avoid even seeking information that is actually covered by the state secrets privilege. The gravity of the government's motion is not an excuse to ignore the rules of this Court. Indeed, it is without question that a meet-and-confer would have narrowed the information Mohamed sought from Defendants, rendering many of the arguments Defendants make superfluous.

Setting aside Defendants' disregard for the rules of this Court for the moment, the government's motion surfaces profound existential questions about the relationship between the judiciary and the executive branches of government. The government has invited this Court to help perpetuate the fundamental injustice of the government's No Fly List: its needless imposition of punishment on innocent Americans, in secret and indefinitely. This Court should remind the federal government that the judiciary's role is to restrain the executive branch and not accept the United States' invitation to do the opposite.

ARGUMENT

I. Publicly Available Facts and Those Obtainable From Sources Other Than Defendants, Not State Secrets, are at the Heart of Mohamed's Claims

Though Plaintiff will seek additional non-privileged information from Defendants, it is important to note at the outset that Plaintiff can, if need be, litigate this case without further discovery from Defendants. This is because there is ample admissible evidence in the public domain, information Defendants have previously supplied in affidavits, and answers and documents Defendants have already produced that regard how the No Fly List operates, its

constitutionally inadequate standards for inclusion, and the manner in which Defendants abuse the extra-judicial authority with which they have anointed themselves. Indeed, the plaintiffs in *Latif* did not propound any discovery requests at all. Instead, they agreed with the government to a basic set of stipulated facts, an option Mohamed is open to if this Court sees no other alternative. *See Latif v. Holder*, 2014 U.S. Dist. LEXIS 85450, *3 (D. Or. June 24, 2014) (explaining that “the parties filed a Third Joint Statement of Stipulated Facts”). To the extent that this Court agrees with Defendants arguments for dismissal, Mohamed emphasizes that the record is already voluminous and provides the facts needed to sustain his claims now.

For example, while the government in its latest filings claims—shockingly—that “the specific details about how and why the government selects persons for watchlisting” are a state secret, Defendants have already publicly shared the critical facts relevant to Mohamed’s claims. Def. Motion, 12. Defendants described the standard they utilize to place “suspected terrorists” on the No Fly List in the following manner.

A suspected terrorist is an individual who is reasonably suspected to be, or have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on articulable and reasonable suspicion. Piehota Decl., n. 5

This Court summed up the basic problem with this standard by noting that “an American citizen can find himself labeled a suspected terrorist because of a “reasonable suspicion” based on a “reasonable suspicion.” Mem. Opinion, 18. Upon information such as this already supplied to this Court by Defendants, Mohamed can sustain the brunt of the elements that comprise his claims. The remainder of his evidentiary burden, if need be, can be derived from airport security experts who will make clear the utterly ineffectual nature of the No Fly List and the availability of obvious alternatives to indefinite flight bans.

A. The Key Facts Necessary to Sustain Mohamed’s Procedural Due Process Claim are Already Beyond Dispute

Mohamed’s procedural due process claim requires this Court to consider the “private interest[s]” the No Fly List implicates, the “risk of erroneous deprivation” of that interest through existing procedures as well as the possibility of alternatives, and “the government’s interest” in imposing that deprivation *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). But once there is a showing of a deprived interest, the “fundamental requirement of due process” arises and mandates that there be an “opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.* at 333.

This Court has already eloquently delineated the extent of the private interests deprived by placement on the No Fly List. The No Fly List “labels an American citizen a disloyal American who is capable of, and disposed toward committing, war crimes.” Mem. Opinion, 14. Placement “transforms a person into a second class citizen, or worse.” *Id.* The No Fly List “limits education, employment and professional opportunities” as well as the ability to undertake “religious travel.” *Id.* These consequences are well-known among the hundreds of Americans languishing on the No Fly list and Mohamed can establish them without any reference to government-supplied information.

With respect to the other factors, the key facts relevant to them also do not rely on the state secrets Defendants suggest exist. As this Court noted and Defendants acknowledged, Mohamed and others placed on the No Fly List—the public examples show this group to be overwhelmingly Muslim and almost universally not charged with any crime—do not “receive any notice of [] placement on the list, pre-deprivation or otherwise, or the reasons for [] inclusion.” Mem. Opinion, 30. This is the basic procedural due process infirmity at the heart of Mohamed’s claim, and it is already known and Defendants would not dispute it. Simply put, it is beyond dispute that the

ostensible process—DHS TRIP—that the government has identified lacks the basic ingredients of procedural due process: an “opportunity to be heard at a meaningful time and in a meaningful manner.” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).³

B. The Single Avenue of Defense the Government States it Will Rely Upon Against Mohamed’s Substantive Due Process Claim is Not Actually a Defense

The absence of state secrets implications is even more pronounced with respect to Mohamed’s substantive due process claim. Simply put, there is nothing that Defendants claim to be shielded by the state secrets privilege that is actually relevant to Mohamed’s claim. As this Court explained, quoting *Collins v. City of Harker Heights*, substantive due process “protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.” Mem. Opinion, 26. Defendants, however, ignored this Court’s Order and substantive due process jurisprudence when they suggest, without citation, that “the very nature of a substantive due process inquiry is to probe the reasons why a challenged government action was taken.” Def. Motion, 9-10. For adjudicating Mohamed’s substantive due process claim, It actually does not matter why the government placed Mohamed or anyone else on the No Fly List. What matter is only that the government interfered with a fundamental right and whether, in so doing, the government used the least restrictive means. *See Aptheker v. Secretary of State*, 378 U.S. 500, 514 (U.S. 1964) (holding that “precision must be the touchstone of legislation so affecting basic freedoms”).

³ Defendants also claim that their inability to use state secrets evidence would prevent them from availing themselves of a “harmless error” defense. *See* Def. Motion, 14. Mohamed’s claim, however, does not simply regard the outcome of Defendants’ No Fly List procedures but the absence of meaningful process contained therein. Thus, because this harmless error defense is based entirely on the outcome of a procedure rather than the process itself, this showing, even if the government could make it, would not defeat Mohamed’s claim.

As this Court repeatedly alluded to in its Memorandum Opinion, there are obvious alternatives to an absolute and indefinite flight ban, such as a “comprehensive pre-flight screening and searches.” Mem. Opinion, 17. Additionally, Mohamed will be able to show just how easily the No Fly List is circumvented by any person or organization who wished to do so, rendering it entirely ineffective. None of this requires Defendants to disclose anything.

Critically, the government does not suggest any other defense against Mohamed’s substantive due process claim. The government is unequivocal in its reliance on the reasons why Defendants placed Mohamed on the No Fly List as their only possible defense to his substantive due process claim. Defendants state that their defense to Mohamed’s substantive due process claim “would consist predominantly (if not entirely) of the reasons, if any, for any purported decision to place Plaintiff on the No Fly List.” Def. Motion, 11. Because this “defense” is not relevant to Mohamed’s substantive due process claim, there is no state secret implicated and thus no reason to dismiss Mohamed’s claim.

II. The Fleeting Small Risk of State Secret Disclosure does not Justify the Dismissal of Mohamed’s Claims

Defendants breathlessly argue that the risk of inadvertent disclosure of state secrets, if this Court allows Mohamed’s case to proceed, constitutes a risk this Court is unable to manage, suggesting that courts “are not required to play with fire.” Def. Motion, 16 (internal citations omitted). But this sweeping argument ignores the fact that the government has litigated to the merits claims similar to Mohamed’s, at trial and on summary judgment, without an inadvertent disclosure of state secrets. It also ignores the fact that Defendants have answered interrogatories about DHS TRIP and the No Fly List and produced more than a thousand pages of responsive documents. Defendants have done this without inadvertently disclosing state secrets. It is entirely within their power to continue to do so if this case proceeds further.

And Defendants need not worry about special procedures and accommodations to navigate whatever aspects of the state secrets privilege this Court sustains. There is ample evidence in the record already, and workable alternatives abound to categories of information Mohamed has sought if this Court finds that the privilege protects the disclosure of this information. These alternatives would likely include simply abandoning entirely the disclosure of privileged information, rather than fashioning exotic procedures that Defendants forewarn would imperil their state secrets.

Simply put, Defendants were able to avoid disclosing state secrets in *Latif* and in *Ibrahim*. The government can do the same here.

CONCLUSION

For the above reasons, this Court should deny Defendants' Motion to Dismiss as a Result of the Assertion of the State Secrets Privilege

Respectfully Submitted,

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 7nd day of July 2014 I caused the above to be sent electronically to all counsel of record.

____/s/_____

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