

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GULET MOHAMED,)
)
)
Plaintiff,) Civil Action No. 1:11-cv-50 (AJT/TRJ)
v.)
)
ERIC H. HOLDER, JR., *et al.*,)
)
)
Defendants.)
)

ORDER

Pending is Defendants' Motion for Reconsideration [Doc. No. 128] of this Court's Order dated August 6, 2014 [Doc. No. 125]. In that Order, the Court directed the government to submit, *in camera* and under seal, any evidence relating to certain issues implicated by an individual's placement on the No Fly List. Defendants object to the Order on the grounds that: (1) the Court's purpose in issuing the Order is not clear, in particular whether the Order relates to the defendants' pending Motion to Dismiss [Doc. No. 104] or a hypothetical motion for summary judgment; (2) the Court's intent, as perceived by the government, is to consider prematurely the merits of the plaintiff's challenge to the No Fly List; (3) the Order evidences an intent to consider substantive due process claims broader than those raised by the plaintiff, including a facial challenge to the constitutionality of the No Fly List based on an inappropriate standard of review and which raises jurisdictional issues not previously addressed by the Fourth Circuit; and (4) there is no need for the Court to actually review any documents as to which the state secrets privilege is claimed in order to satisfy itself that the documents contain state secrets, that state secrets are implicated in Plaintiff's claims, or that it would be impossible to litigate those claims without disclosing those state secrets, positions already embedded in Defendants' pending Motion to Dismiss.

Based on these objections, the Court grants the Motion for Reconsideration and has reconsidered its Order dated August 6, 2014. Upon reconsideration of its Order, however, the Court finds that none of these objections justifies vacating the Order, as the defendants request. The Court therefore affirms its Order. However, the Court will hold that Order in abeyance until such time as the Court reviews those documents that are to be produced under this Order, as described herein.

This case involves complex and unsettled issues pertaining to the respective roles of the legislative, executive and judicial branches. As discussed in the Court's Memorandum Opinion dated January 22, 2014 [Doc. No. 70], Plaintiff's claims raise issues concerning the extent to which and the methods by which a citizen's freedom of travel and associated liberties can be curtailed in the name of national security, given the fundamental interest of all citizens in being protected from terrorist violence. One central issue is the extent to which the War on Terrorism may expand the ability of the executive branch to act in ways that cannot otherwise be justified.

Contrary to the defendants' assertions, the Court must deal with these issues regardless of whether the plaintiff's challenge is a "facial" or "as applied" challenge to the No Fly List and whether the plaintiff's claims are characterized as procedural due process, substantive due process, or Administrative Procedure Act claims, all of which are intertwined. These issues are necessarily imbedded in both the pending Motion to Dismiss [Doc. No. 104] and the pending Motion to Compel [Doc. No. 91]; and the Court's Order dated August 6, 2014 was intended to allow the Court to incrementally assess the merits of both pending motions, without going further than necessary to discharge its judicial obligations within this challenging context.

Much of the defendants' concern appears to emanate from their position that it is inappropriate for the Court to progress beyond the explanations set forth in the privilege log and

declarations submitted to the Court *in camera*. The Court has considered the guidance provided by the Supreme Court and the Fourth Circuit in assessing how to proceed in the face of an invocation of the state secrets privilege. It understands its limited institutional competence to assess claims of national security and its obligation not to extend its review of claims of state secrets beyond what is necessary for the Court to perform its institutional role. In that regard, the Court has spent considerable time and effort in evaluating whether it is necessary to go beyond the information provided by the defendants and actually review the underlying documents in order for the Court to satisfy itself that the existence of state secrets precludes the plaintiff's ability to litigate his claims without compromising those state secrets.

Having considered the information provided in the context of the plaintiff's claims, the Court concludes that it is necessary for the Court to review at this stage certain of the underlying documents as to which the state secrets privilege is asserted. In reaching this conclusion, the Court has reviewed those cases in which no further inquiry was necessary and finds those cases distinguishable in important respects from this case. First, this case involves the extraordinary exercise of executive branch authority to operate a program that results in the deprivation of basic liberties according to secret executive branch decision making, without pre-deprivation judicial review, based on criteria that require, at a minimum, nothing more than a suspicion of future dangerousness, and without the opportunity for an affected citizen to learn of, and respond to, the information relied upon for the government's decision, either before or after the deprivation. The Court has a particularly strong and heightened institutional responsibility in these circumstances to review and assess the propriety of such executive branch activity since to dismiss this case as the defendants request would, in essence, judicially sanction conduct that has

far-reaching implications, as the Court has already discussed. *See Memorandum Opinion dated January 22, 2014 [Doc. No. 70].*

In the privilege log they have submitted to the Court for *in camera, ex parte* review, the defendants have listed certain documents within the scope of the plaintiff's document requests and the nature of the privileges asserted as to each listed document. In addition, the Court has received declarations from various officials, including the Attorney General, in which those officials describe the content of certain documents. In many instances, the privilege claims are conclusory, and it is difficult, if not impossible, to assess the merits of those claims and their impact on the litigation based on the descriptions of the documents, as given in either the privilege log or the declarations. For example, in his public declaration filed in this case, the Attorney General lists three categories of documents that implicate state secrets, all of which pertain to the identification of particular terrorist suspects. *See Doc. No. 104, Ex. 1.* However, it is not clear that all of the documents as to which the defendants have invoked the state secrets privilege fall into at least one of those three categories.

Moreover, as the Attorney General's declaration states, the invocation of the state secrets privilege extends to at least one unclassified document, the Watchlisting Guidance, which, "although unclassified, contains national security information that, if disclosed, . . . could cause significant harm to national security." Doc. No. 104, Ex. 1 at 7. Since the filing of the Attorney General's declaration, a document that purports to be that Watchlisting Guidance has been publicly disseminated. Further, there are many other documents already in the public domain that describe in detail the procedures and criteria used for placement on the No Fly List, including the defendants' own voluminous public declarations, filed in this and other lawsuits. The Court therefore cannot accept, without further inquiry and review, that all of the documents

as to which the state secrets privilege has been invoked in fact contain state secrets, or that any state secrets that might be contained in the listed documents would preclude the litigation of the plaintiff's claims, particularly his procedural due process claim, which is substantially the same as that litigated in *Latif v. Holder*, No. 3:10-cv-750, 2014 WL 2871346 (D. Or. Jun 24, 2014), without any apparent compromise to national security.¹

At this stage, the Court will proceed in a fashion more directly tied to the pending Motion to Dismiss and Motion to Compel. In this regard, the Court will hold its Order dated August 6, 2014 in abeyance pending further order of the Court. The Court shall order the United States to submit, *in camera* and under seal, for *ex parte* review, all documents in Defendants' privilege log that Plaintiff has requested and Defendants have refused to produce on the basis of an assertion of the state secrets privilege except those documents included in their response to Document Request Number 11, which relates to any documents specific to the plaintiff, and those portions of documents included in response to Document Request Numbers 8 or 9 that identify or reveal information concerning specific individuals by name. To the extent Defendants continue to oppose disclosure of those documents to be produced under this Order for reasons other than the state secrets privilege, they shall detail those objections in connection with their submissions to the Court.

¹ The government's assertion of the state secrets privilege in certain cases has been less than reassuring. See *Reynolds v. United States*, 345 U.S. 1 (1953), in which it became apparent years later, after the claimed state secrets document was declassified, that it did not implicate state secrets; and *Ibrahim v. Dep't of Homeland Security*, 3:06-cv-545, in which the government sought dismissal of similar No Fly List claims based on alleged state secrets, only to concede at trial, after the motion to dismiss was denied, that the plaintiff in that case was mistakenly placed on the No Fly List. See also *Islamic Shura Council of S. Cal. v. F.B.I.*, 779 F.Supp.2d 1114 (C.D. Cal. 2011), a Freedom of Information Act case in which the government justified in the name of national security falsely representing to the court that only a limited number of responsive documents had been located.

Accordingly, it is hereby:

ORDERED that Defendants' Motion for Reconsideration [Doc. No. 128] be, and the same, hereby is, GRANTED, and the Court's Order dated August 6, 2014 [Doc. No. 125] be, and the same hereby is, AFFIRMED; provided, however, that the date for the submission of the ordered documents is continued to a date to be designated by further order of the Court; and it is further

ORDERED that Defendants shall submit *in camera* and under seal, for *ex parte* review by the Court, all documents listed in Defendants' privilege log as to which the state secrets privilege is invoked, other than those documents responsive to Request Number 11 of Plaintiff's Request for Production of Documents, and those portions of documents included in response to Request Numbers 8 or 9 that identify or reveal information concerning specific individuals by name; and it is further

ORDERED that Defendants shall submit to the Court the documents required under this Order on or before October 15, 2014.

The Clerk is directed to forward copies of this Order to all counsel of record.



/S/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
September 15, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GULET MOHAMED,)	
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Plaintiff,)	
v.)	Civil Action No. 1:11-cv-50 (AJT/TRJ)
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ERIC H. HOLDER, JR., <i>et al.</i> ,)	
)	
Defendants.)	
)	

ORDER

It is hereby ORDERED that note 1 on page 5 of the Court's Order dated September 15, 2014 [Doc. No. 139] is hereby amended as follows:

The government's assertion of the state secrets privilege in certain cases has been less than reassuring. *See Reynolds v. United States*, 345 U.S. 1 (1953), in which it became apparent years later, after the claimed state secrets document was declassified, that it did not reveal the claimed state secrets; and *Ibrahim v. Dep't of Homeland Security*, 3:06-cv-545, in which the government sought dismissal of similar No Fly List claims based on alleged state secrets, even though it conceded that the plaintiff in that case was mistakenly placed on the No Fly List. *See also Islamic Shura Council of S. Cal. v. F.B.I.*, 779 F.Supp.2d 1114 (C.D. Cal. 2011), a Freedom of Information Act case in which the government justified in the name of national security falsely representing to the court that only a limited number of responsive documents had been located.

The Clerk is directed to forward copies of this Order to all counsel of record, and to replace note 1 at page 5 of the Court's Order dated September 15, 2014 [Doc. No. 139] with the language contained herein.



Anthony J. Trenga
United States District Judge

Alexandria, Virginia
November 7, 2014