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-00050

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STAY

Defendants move to stay this matter pending the Government's revision of the redress procedures available to certain persons who allege that they have been denied boarding as a result of placement on the No Fly List.

Plaintiff's lawsuit challenges (1) an alleged decision by the Government to place him on the No Fly List, and (2) the Government's redress processes relating to his alleged denial of boarding on a commercial aircraft. The Court recently ordered the parties to submit motions for summary judgment on Plaintiff's procedural due process claim by December 1, 2014. ECF No. 144 at 3. The Government, however, is currently reviewing and revising the administrative redress procedures for denials of boarding. These procedures are being developed in connection with an effort to apply revised redress to the plaintiffs in *Latif v. Holder*, Case No. 3:10-cv-0750 (D. Or.). After January 16, 2015, Defendants will be able to offer a similar opportunity to Plaintiff once revised procedures have been completed, implemented, and finally applied to the

Latif plaintiffs.[1] Regardless of whether Plaintiff chooses to avail himself of the revised procedures, a stay of this litigation is in order because the parties should not brief and the Court should not consider any motion for summary judgment based on the soon-to-be-outdated redress procedures.

A stay of this lawsuit for this brief period needed to allow for the development and implementation of these new procedures will provide for the most efficient resolution of this matter on summary judgment. The remedy for any procedural due process violation would be remand to the agencies for the development of new procedures, which is underway already. *See Fla. Power & Light Co. v. Nuclear Reg. Comm'n*, 470 U.S. 729, 744 (1985). A stay therefore avoids inefficient briefing about soon-to-be-outdated redress procedures possibly followed by re-briefing. Moreover, the revised redress procedures may narrow, if not resolve, the legal issues presented by Plaintiff's procedural due process claim, and possibly his substantive due process claim as well. Thus, a brief stay is warranted because it will promote judicial economy, last only a limited time, and possibly obviate the need to further consider whether the case must be dismissed based on the Government's assertion of the state secrets privilege.[2] A stay is also

[1] Defendants fully anticipate that the review and revision process for the *Latif* plaintiffs will be completed by January 16, 2015, such that Defendants may then offer a similar opportunity to Plaintiff. However, should that schedule change, Defendants will promptly notify the Court and Plaintiff.

[2] Defendants also propose that the parties submit a joint status report on January 30, 2015, to advise the Court about the status of the case and how the parties propose to proceed. If Plaintiff chooses to avail himself of the revised redress procedures, Defendants would inform the Court about the status and anticipated timing for completion of that review. If Plaintiff chooses not to avail himself of the new procedures, the parties would propose a schedule for proceeding in this case.

consistent with fundamental administrative law principles that provide agencies with an opportunity to reconsider their actions or policies that are the subject of litigation.

ARGUMENT

A stay of proceedings in this case is appropriate for two reasons. First, a court has the inherent authority to stay a case where, as here, independent proceedings will substantially affect the case to be stayed, and where a stay will ensure the most efficient use of resources by the Court and by the parties. Second, a stay is consistent with the principles of voluntary remand and primary jurisdiction, both of which counsel a court to abstain from immediate adjudication so as to provide an agency with an opportunity to reconsider or address issues that are the subject of litigation.

I. The Court Should Exercise Its Inherent Authority to Enter a Stay Because the Resolution of Independent Proceedings Will Substantially Affect This Case, and Therefore, a Brief Stay Will Promote Judicial Economy and Any Prejudice to Plaintiff Would Be Minimal.

"[A] District Court has broad discretion to stay proceedings." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) (quoting *Landis*, 299 U.S. at 254-55); *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (describing "the inherent power in courts under their general equity powers and in the efficient management of their dockets to grant [a stay]"). "[A] trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending

resolution of independent proceedings which bear upon the case," *Int'l Painters & Allied Trades Indus. Pension Fund v. Painting Co.*, 569 F. Supp. 2d 113, 120 (D.D.C. 2008) (quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979)), no matter the nature of those independent proceedings and even if the outcome of the independent proceedings would not be controlling in the case to be stayed, *see Leyva*, 593 F.2d at 863-64. *Cf. Va. Innovation Sciences, Inc. v. Samsung Elec. Co., Ltd.*, 983 F. Supp. 2d 713, 759 (E.D. Va. 2014) ("[A] stay is particularly appropriate, and within the court's sound discretion, where the outcome of another case may substantially affect or be dispositive of the issues in a case pending before a district court.") (citations and internal quotation marks omitted).

To determine whether a stay is warranted, a court should "weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. The party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward[] if there is even a fair possibility that the stay [requested] will work damage to someone else." *Id.* at 255. "Especially in cases of extraordinary public moment, the [plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Id*. at 256. A district court may grant a stay pending the resolution of another proceeding regardless of whether "the parties to the two causes [are] the same and the issues identical." *Id*. at 254. Even if the other proceeding "may not settle every question of fact and law in [this] suit[,] … in all likelihood it will settle many and simplify them all." *Id.* at 256.

As explained in the recently filed status reports and a recently issued case management order in *Latif v. Holder*, attached as Exhibits 1-3, the Government is revising current redress procedures to increase transparency of the process for certain persons denied boarding on

commercial aircraft. *See* Exh. 1. These are the very procedures that would form the basis of any summary judgment briefing on Plaintiff's procedural due process claim in this case.

A stay of proceedings in these circumstances is appropriate for three reasons. First, a stay of proceedings is warranted because the Government's revision of its redress procedures will substantially affect the motion for summary judgment briefing ordered by the Court. Plaintiff's procedural due process claim will be directly impacted—and potentially mooted—by the Government's revision of its redress procedures, the exact procedures that Plaintiff alleges to be constitutionally inadequate. Thus, litigating this case on the basis of procedures that the Government is currently revising risks inefficient use of both the Court's and the parties' limited resources. *See Fla. Power & Light Co.*, 470 U.S. at 744 (holding that the proper remedy for unlawful agency action, "except in rare circumstances, is to remand to the agency for additional investigation or explanation"); *see also Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1095-96 (E.D. Cal. 2008) (stay warranted pending proposed agency rulemaking). Similarly, the revisions to the redress procedures may also impact Plaintiff's substantive due process claim by altering the process through which placement on the No Fly List—which Plaintiff alleges in this case—is reviewed. For an individual who is on the No Fly List, the development of new procedures may affect the universe of information relied upon in support of the placement decision, or even the placement decision itself. In this way, the revised procedures could affect the nature of the legal claims to be resolved. Moreover, once the revised procedures are in place, Plaintiff's claims may be moot or, at the least, in need of reformulation should he decide to continue litigating the case. *See Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) (amendment to statute rendered case challenging prior law moot). For these reasons,

the interests of judicial economy and avoiding unnecessary litigation counsel against requiring the parties to proceed with litigation challenging a policy that the Government is in the process of revising. *Cf. Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 199 (D.D.C. 2005) (granting stay pending appellate review of core issues before the district court).

Second, any prejudice to Plaintiff would be minimal because a stay of proceedings would be for a short and definite period of time. Granting a stay is not an abuse of discretion so long as the length of the stay is moderate and the stay does not endure for an indefinite period of time absent a pressing need. *See Landis*, 299 U.S. at 255-56. The Government informed the *Latif* court that it expects to complete its review and revision of the redress procedures for the *Latif* plaintiffs by January 16, 2015, approximately two and a half months from now. *See Ass'n of Irritated Residents*, 634 F. Supp. 2d at 1096 (staying case for possibly more than six months pending completion of rulemaking). The *Latif* court has incorporated the Government's timetable into its scheduling order for further proceedings, and while it has required interim status reports, it will not take further action on the merits of the claims until after the policy revisions are complete and applied to the *Latif* plaintiffs. *See* Exh. 3 at 4. Defendants seek a stay of this matter for only the limited period of time necessary to complete the reconsideration of the *Latif* plaintiffs' redress inquiries under revised procedures, after which the Government will be able to offer revised redress procedures to Plaintiff. At that time, the parties can evaluate whether further litigation of this matter is necessary and, if so, how it should proceed.

Third, a stay is also appropriate here in light of the Defendants' assertion of the state secrets privilege and the related motion to dismiss. Although the Court has denied without prejudice Defendants' motion to dismiss insofar as it relates the Plaintiff's procedural due

process claim, ECF No. 144 at 3, at this time Defendants anticipate that information subject to the assertion of the state secrets privilege would have been necessary, at least in part, for the presentation of a valid defense to the procedural due process claim. In its order, the Court recognized that Defendants may argue that they "cannot adequately defend against [the procedural due process] claims without the use of a specific document claimed to be protected under the state secrets privilege," and it instructed that it will consider such an argument "in that specific context." ECF No. 144 at 2-3. Depending upon the nature and the extent of the state secrets information needed for any defense that would be set forth in any summary judgment briefing, it may be necessary for Defendants to renew their motion for dismissal based on the state secrets privilege.

In these circumstances, a stay is appropriate because the revised redress procedures may affect the Government's need to rely on information subject to the assertion of the state secrets privilege or the need to move again for dismissal. This approach is consistent with the state secrets case law, as well as with the Attorney General's policies and procedures governing invocation of the privilege, which favor consideration of other grounds for disposition of a case before addressing the need for dismissal based on the state secrets privilege. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 53–54 (D.D.C. 2010) (stating that the Government "also correctly and forcefully observe[d] that this Court need not, and should not, reach their claim of state secrets privilege because the case can be resolved on the other grounds they have presented," and declining to address privilege); Attorney General's Policies and Procedures Governing Invocation of the State Secrets Privilege, ECF 104-1 Exh. 1, ¶ 1.B ("The Department [of Justice] will seek to dismiss a litigant's claim or case on the basis of the state secrets privilege only when

doing so is necessary to protect against the risk of significant harm to national security.”).[3] Here, because the Government is revising the redress procedures in a manner that may resolve, narrow, or otherwise affect the issues to be resolved in any summary judgment briefing on Plaintiff’s procedural due process claim, granting a short stay to allow completion of that revision process may obviate the need for the parties to further litigate, or for the Court to decide, whether the case should be dismissed on the basis of the state secrets privilege. This brief stay will permit the parties and the Court to consider how or if this case should proceed after the redress procedures have been revised, and after any reassessment of Plaintiff’s case is completed.

In sum, staying the case until January 16, 2015 will ensure that this lawsuit appropriately presents a live case or controversy, will clarify the issues for review, and will serve the interests of all parties by possibly avoiding an unnecessary dismissal on state secrets grounds.

II. The Administrative Law Doctrines of Voluntary Remand and Primary Jurisdiction Counsel in Favor of a Stay.

A stay is also consistent with the fundamental principles of administrative law reflected in the doctrines of voluntary remand and primary jurisdiction.

Under the doctrine of voluntary remand, “[w]hen a court reviews an agency action, the agency is entitled to seek remand ‘without confessing error, to reconsider its previous position.” *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028, 1029 (Fed. Cir. 2001)). “An agency must be allowed to assess the wisdom of its policy on a continuing basis.” *Id.* (internal quotation marks

[3] While dismissal to protect state secrets serves the greater public good of protecting national security information, courts have recognized that the consequences of dismissal can be harsh for individual litigants. *See Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998).

and citations omitted); *see also Trujillo v. Gen. Elec. Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."). "In the case where an intervening event may affect the validity of the agency action at issue, a remand is generally required." *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23 (D.D.C. 2008) (citing *SKF USA Inc.*, 254 F.3d at 1028-29). *Cf. Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249-50 (D.C. Cir. 1990) (holding that voluntary remand is consistent with "the general principle that an agency should be afforded the first word on how an intervening change in the law affects an agency decision pending review"). A voluntary remand also avoids "needlessly wasting the Court's and the parties' resources." *Sierra Club*, 560 F. Supp. 2d at 25.

The doctrine of primary jurisdiction, a related but distinct doctrine of administrative law, "requires the court to enable a 'referral' to the agency, staying further proceedings so as to give a reasonable opportunity for the agency to make an administrative decision bearing on the plaintiff's claims."[4] *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). The purpose of the doctrine is "to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996); *see also Alltell Tenn., Inc. v. Tenn. Pub. Serv. Comm'n*, 913 F.2d 305, 309 (6th Cir. 1990) ("The principal reasons for the doctrine of primary jurisdiction are to obtain the benefit of the expertise and experience of the administrative agencies and the desirable

[4] The doctrine of primary jurisdiction is also distinct from, yet "analytically analogous" to, the doctrine of exhaustion of administrative remedies. *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 303 F.3d 316, 322 n.10 (4th Cir. 2002).

uniformity which occurs when a specialized agency decides certain administrative questions."); *Advamtel, LLC v. Sprint Comm'cns Co.*, 105 F. Supp. 2d 476, 480 (E.D. Va. 2000) (The doctrine of primary jurisdiction "serves judicial economy because the dispute may be decided by the administrative agency and obviate the need for court intervention."). "Referral of the issue to the administrative agency does not deprive the court of jurisdiction; [instead, the court] has discretion . . . to retain jurisdiction" over the case and hear the plaintiff's claims following the agency action on referral. *Reiter*, 507 U.S. at 268.

The doctrines of voluntary remand and primary jurisdiction both counsel in favor of a stay of this case pending the Government's revision of the very redress procedures that form the basis of Plaintiff's procedural due process claim. A stay pending the completion of this revision is consistent with administrative law principles that allow a court to grant a voluntary remand of a challenged agency action to allow the agency to reconsider its prior policy or decision. *See Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) (noting that it can be an "abuse of discretion to prevent an agency from acting [on its own] to cure the very legal defects asserted by plaintiffs challenging federal action").

A stay is also consistent with the doctrine of primary jurisdiction, which provides that a court should temporarily abstain from adjudication to allow an agency to apply its expertise by making a decision that will bear on a plaintiff's claims. *See Syntek Semiconductor Co. v. Microchip Tech., Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (describing the primary jurisdiction doctrine as "a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts"). No "fixed formula" exists for the application of the doctrine,

United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956), but the "'[t]he advisability of invoking primary jurisdiction is greatest when the issue is already before the agency,'" *CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33, 35 (4th Cir. 1980) (quoting *Miss. Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412, 419 (5th Cir. 1976)). Here, there is no doubt that the Government is actively already reviewing the issue of the adequacy of the redress procedures available to individuals like Plaintiff who allege a denial of boarding.[5] In light of the fact that the Government's revision of the very procedures that Plaintiff has challenged is already underway, the doctrine of primary jurisdiction counsels that the agencies should have the first opportunity to determine what new procedures are appropriate before the Court decides the issue.

CONCLUSION

For the foregoing reasons, the case should be stayed until January 16, 2015.

[5] *Compare Hendricks v. StarKist Co.*, No. 13-cv-729, 2014 WL 1244770, at *9 (N.D. Cal. Mar. 25, 2014) ("Unless and until there is some indication beyond mere speculation that the FDA may change the regulation, the Court sees no need to defer under the primary jurisdiction doctrine."), *with Lucre, Inc. v. Qwest Comm'cns Co., LLC*, No. 1:09-cv-902, 2011 WL 2694577, at *1-3 (W.D. Mich. Jul. 11, 2011) (administratively closing a case under the primary jurisdiction doctrine because the FCC had already begun an "overhaul" of a regulatory system applicable to the parties and relevant to their claims).

Dated: November 14, 2014

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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