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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

	Case 3:10-cv-00750-BR
AYMAN LATIF, et al., *Plaintiffs*, v. ERIC H. HOLDER, JR., et al., *Defendants*.	**DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT: PLAINTIFF PERSAUD** **ORAL ARGUMENT REQUESTED** **UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL**

Pursuant to Fed. R. Civ. P. 56, Defendants hereby cross-move for summary judgment in their favor on Plaintiff Persaud's procedural due process and APA claims. The revised DHS TRIP process provided to redress inquiries relating to the No Fly List fully satisfies the requirements of the Constitution by providing for appropriate disclosure of information, where possible, and an opportunity

to be heard, without compromising the paramount interest in protecting the national security. For the same reasons, Defendants oppose Plaintiff's motion for summary judgment on his procedural due process claims and APA claims. A memorandum in support of Defendants' cross-motion and in opposition to Persaud's motion for summary judgment is filed concurrently herewith. The parties made a good faith effort through written correspondence and telephone conferences to resolve the dispute pursuant to LR 7-1 and have been unable to do so.

Dated: May 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was delivered to all counsel of record via the Court's ECF notification system.

s/ Amy E. Powell
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AYMAN LATIF, et al., *Plaintiffs*, v. ERIC H. HOLDER, JR., et al., *Defendants*.	Case 3:10-cv-00750-BR **DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF STEPHEN PERSAUD'S MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED** **UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL**

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INTRODUCTION

The Government has taken concrete steps to balance the liberty of suspected terrorists with the serious national security concerns protected by the No Fly List. As with any procedural due process challenge, the Court is called upon to determine (i) what process is constitutionally required under the circumstances, (ii) whether the challenged government procedures satisfy the constitutional requirement, and (iii) assuming the challenged procedures are constitutional, whether the procedures were fairly applied to the particular plaintiff. The first question was addressed by the Court in its June 24, 2014 order. The second question is the primary subject of the consolidated brief filed today, and the third question is addressed here with respect to Plaintiff Stephen Persaud.

The Government determined that Plaintiff Persaud poses a continuing threat to civil aviation or national security, in part because of [redacted] The revised redress process carefully considered what information could be disclosed in order to provide Mr. Persaud with meaningful notice and opportunity to be heard regarding the basis for his inclusion on the No Fly List. He was informed of his status, the criterion under which he was listed, and some of the facts underlying that listing. The Government carefully considered his response and explanations and determined that continued inclusion on the No Fly List is appropriate. The Constitution requires no more. The Court should grant Defendants' motion for summary judgment and deny Plaintiff's motion.

BACKGROUND

Defendants' Combined Memorandum in Opposition to Plaintiffs' Motion and in Support of Defendants' Motion for Summary Judgment ("Defendant's Combined Memorandum" or "Defs' Summ. J. Mem.") describes in detail the background of the No Fly List, this case, and the development of new

redress procedures applicable to U.S. persons who have been denied boarding due to their placement on the No Fly List. Those procedures have been applied to Mr. Persaud.

After the Court directed Defendants to conduct a substantive interim review of the Plaintiffs' inclusion on the No Fly List, *see* Dkt. No. 152, the Government reviewed the derogatory information underlying Mr. Persaud's inclusion on the No Fly List to determine whether inclusion was still appropriate and what information regarding his listing could reasonably be disclosed to him. *See* Grigg Decl. ¶¶ 41, 46; Moore Decl. ¶ 18; Steinbach Decl. ¶¶ 19-21. On November 24, 2014, DHS TRIP notified Mr. Persaud of his status on the No Fly List and the basis for his inclusion. *See* Joint Stmt. Persaud, Dkt. No. 180, ¶ 2, Ex. A. Specifically, the DHS TRIP notification letter indicated that he was deemed a threat to civil aviation or national security because it was determined that Mr. Persaud "represents a threat of engaging in or conducting a violent act of terrorism and . . . is operationally capable of doing so." *Id*. The letter also includes an unclassified summary of the basis for his listing, including [redacted]

This November 24 letter did not include any classified or otherwise privileged details that may have been considered with respect to Mr. Persaud's inclusion on the No Fly List. By letter dated January 5, 2015, Mr. Persaud submitted a response to DHS TRIP. Joint Stmt. Persaud ¶ 14, Ex. B. In

[redacted]

addition to procedural objections, Mr. Persaud addressed some, but not all, of the factual statements in the November letter. For example, [redacted]

The agencies who administer the No Fly List considered Mr. Persaud's submission and on January 28, 2015, the Acting Administrator of TSA issued a final determination. *See* Joint Stmt. Persaud ¶ 15, Ex. C. That final order of TSA includes a statement that TSA considered Mr. Persaud's denials but nonetheless determined that inclusion on the No Fly List was appropriate. *Id*. The final order affirms that the January 28, 2015 letter does not include the full basis for the Acting Administrator's decision and that it was necessary to withhold additional information in order to avoid harm to national security, law enforcement activities and third party privacy concerns. *Id*.

ARGUMENT

The revised DHS TRIP process provides a meaningful opportunity for suspected terrorists to be heard concerning their inclusion on the No Fly List. DHS TRIP, as applied to Mr. Persaud, fully satisfies the requirements of due process, is consistent with case law governing disclosures of information where national security interests are implicated, and is squarely responsive to the Court's June 2014 order.

I. The Revised DHS TRIP Process Provides Meaningful Notice And An Opportunity To Be Heard.

As described in Defendants' Combined Memorandum, due process is a flexible concept without rigid requirements that fit every context, and in civil, administrative matters concerning national security, the requirements of due process do not include live trials or the application of the Federal Rules of Evidence. *See generally* Defs' Summ. J. Mem. at Parts I-V. Rather, the law requires meaningful

notice of the subject matter of the Government's concerns and a meaningful opportunity to be heard. *Id*. This Court's June 2014 Opinion also held that due process required the Government to consider certain mitigating measures where classified information was withheld. *Id*; *see also* Dkt. No. 136, at 61-62 (June 24, 2014).

The revised DHS TRIP process is reasonably calculated to provide U.S. persons denied boarding because of their status on the No Fly List with a meaningful opportunity to contest their listing. *See generally* Defs' Summ. J. Mem. Accordingly, a finding that the revised DHS TRIP procedures were fairly applied to Mr. Persaud -- *i.e.*, that Mr. Persaud received the benefit of a constitutionally adequate redress process – would foreclose Mr. Persaud's claim that he was entitled to additional process. *See Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (9th Cir. 2012) (*en banc*) (same). The contention that a fair process produced a result unsatisfactory to a particular plaintiff cannot form the basis for a procedural due process claim.

As described in Defendants' primary brief, the revised DHS TRIP process comports with all of these requirements, and the procedures were properly applied to Mr. Persaud. First, the notification letter advised Mr. Persaud of his status on the No Fly List, that he meets the statutory standard, and that he meets a particular substantive criterion for inclusion, namely, that he "represents a threat of engaging in or conducting a violent act of terrorism and … is operationally capable of doing so." Joint Stmt. Persaud ¶ 2, Ex. A. This describes the "reason" for his inclusion on the No Fly List and the "subject matter of the agency's concerns." *See Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012) ("*AHIF II*"); Dkt. No. 136, at 55–56.

The notification letter also includes an unclassified summary of the basis for his listing, including [redacted]

[redacted] The letter is more than adequate for Mr. Persaud to understand the subject matter and nature of the government's concerns and to respond to those allegations.

Mr. Persaud clearly understood the nature of those allegations and was given ample opportunity to challenge the basis for his listing. He responded with general denials and explanations that go to the reasons for the No Fly List determination. *See* Joint Stmt. Persaud Ex. B. [redacted]

Both the notification letter and the final determination acknowledge that DHS TRIP considered additional information that could not be provided to Mr. Persaud without risking harm to national security, law enforcement activities, or privacy concerns of third parties. As established in Defendants' main brief, due process does not require the Government to choose between preventing a suspected terrorist from flying on a civilian aircraft or allowing a suspected terrorist to view sensitive and classified sources and methods. *See Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir.

2002) ("The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives.") (internal citation omitted).

II. Additional Procedures Are Not Required.

As explained above, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Persaud is, reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court finds that it is, the due process inquiry is complete, and there is no reason to entertain Plaintiff's claim that he was entitled to additional procedures. But even if the Court considers Plaintiff's request for additional process, the claim would still fail on its merits. Plaintiff rejects the parameters previously set by the Court and attempts to relitigate the standard for due process, arguing for additional, novel procedures not required by this Court's order, nor by any relevant case law. But Mr. Persaud received all process to which he is entitled.

A. Mr. Persaud Is Not Entitled To Additional Notice.

Mr. Persaud argues that the notice provided during the DHS TRIP process is constitutionally deficient because it does not include "all" reasons for listing, does not include "any . . . evidence" and does not include "material and exculpatory evidence." *See* Persaud Summ. J. Mem. at 4–6. As described above, the notice provided to Mr. Persaud fully comports with the Court's order and applicable law, and his attempt to ferret out additional information about sensitive sources and methods should fail. *See also* Defs' Summ. J. Mem. at Part V.A.

Plaintiff argues that he is entitled to "full notice" of the reasons for his inclusion on the No Fly List, but this argument ignores both the notice that he has received and this Court's order, which permits a "summary" and acknowledges that in some cases no information at all may be provided. *See* Dkt. No. 136 at 61-62. Mr. Persaud has been notified of the criterion under which he was included on the No Fly List (*i.e.*, the "reason" for his listing or the "subject matter of the agency's concerns," *see AHIF II*, 686

F.3d at 983) and at least a general summary of the underlying factual basis, including any unclassified, non-privileged facts that have been segregated for disclosure. *See* Grigg Decl. ¶¶ 41, 46; Moore Decl. ¶ 18; Steinbach Decl. ¶¶ 19-21. Because No Fly List determinations are typically based on sensitive law enforcement and classified national security information, this summary necessarily may not reflect the complete factual basis for inclusion. *See* Joint Stmt. Persaud ¶¶ 6-7; Joint Comb. Stmt., Dkt. No. 173, ¶¶ 18-19; Grigg Decl. ¶¶ 41, 46; Moore Decl. ¶¶ 13-14, 18; Steinbach Decl. ¶¶ 19-21. Nonetheless, the Government has considered the mitigating measures available to provide notice and disclosed what information it could in order to make the notice as meaningful as possible under the circumstances. *Id.* That is all that is required by the due process clause.

Similarly, Plaintiff Persaud complains that he did not receive "any . . . evidence" supporting his inclusion on the No Fly List, including [redacted] *See* Persaud Summ. J. Mem. at 5-6. Presumably, the term "evidence" is a reference to original source materials, such as documents, because the information given to Mr. Persaud is evidence – information considered by the agency decisionmakers. The documents considered – and where possible, summarized – by the Government typically include classified national security or law enforcement privileged information. *See* Steinbach Decl. ¶¶ 23-37. To the extent possible, in the interests of maximizing disclosure, Defendants have segregated unclassified, non-privileged statements from those sensitive documents, including the relevant statements regarding [redacted] and provided summaries that place the information in the overall context of the agency's reasoning. *Id.* ¶19-21; Grigg Decl. ¶¶ 41-42; Moore Decl. ¶ 18. The due process clause does not impose additional requirements for the production of original documents. The question before the Court is not whether it is possible to conceive of additional disclosures but whether the notice that the Government determined it could provide – without

threatening national security or law enforcement investigations — satisfies due process.[2] The notice provided in this case is an adequate description of the basis for the decision under the circumstances.

Finally, Mr. Persaud argues that the Government is required to provide all potentially "exculpatory" information just as it would to a criminal defendant facing prison time. But the only "exculpatory" information he identifies are the same reports regarding his own statements that have already been summarized for him. *See* Persaud Summ. J. Mem. at 6. As discussed in Defendants' Combined Memorandum, inclusion on the No Fly List does not require the process due in criminal proceedings, and *Brady* and its progeny apply only in the criminal context. *See* Defs' Summ. J. Mem. at Part V.B. Moreover, even the existence of arguably "exculpatory" information would not give Plaintiff a due process right to access classified national security or law enforcement sensitive information, such as sources and methods. Here, the unclassified summary provided arguably "exculpatory" information, such as [redacted] *See* Joint Stmt. Persaud, Ex. A. The DHS TRIP redress process then permitted him the opportunity to put forth his own "exculpatory" information, such as [redacted]

Here, the Government has provided Mr. Persaud an opportunity to present any evidence he deems relevant, including mitigating or exculpatory information regarding his prior statements or conduct, and although he has little to say, he has done so. Defendants have segregated unclassified, non-privileged information and provided summaries that place such information in the overall context of the agency's reasoning. The due process clause imposes no additional requirement.

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[2] The DHS TRIP process is not a vehicle for discovery and document requests. The Freedom of Information Act already provides a means for requesting agency records, and Plaintiffs have been free to utilize those procedures. Otherwise, any "error" in not providing any underlying documents with redactions is not pertinent to the due process issue where unclassified information concerning the No Fly List determination has been summarized.

B. Mr. Persaud Is Not Entitled to a Particular Form of Live Hearing.

Plaintiff also demands a particular form of evidentiary hearing to rebut the agency's prediction of potential threats to national security, including a live hearing with the right to cross-examine witnesses and a particularly high burden of proof. But such a hearing is not required by law, would add little value to the process, and reasonably could be expected to harm national security. *See* Defs' Summ. J. Mem. at Part V.C.

First, Mr. Persaud argues that he should be allowed to "testify" at a hearing to explain himself, and he remonstrates that he should have the opportunity to test the credibility of the FBI agents and any witnesses by means of an adversarial hearing. He is not entitled to an adversarial hearing. Setting aside clear law not requiring an adversarial hearing in order for due process to be satisfied, such a proceeding inherently would put at risk sensitive information, including sources and methods information. Plaintiff's desire to examine [redacted]. Moreover, Plaintiff has been able to put his own story into the record without a "live" hearing (and, notably, without subjecting Plaintiff to cross-examination and the potential for self-incrimination). He had no story to tell. Should Plaintiff have wished to present his own third-party witnesses by way of additional statements accompanying his, he could have done so, but he chose not to include any additional information. Due process requires no more.

Nor does any due process concern arise from any reliance on hearsay. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2004) (upholding use of hearsay from FBI and intelligence sources, as well as the findings of foreign governments); *Nat'l Council of Resistance of Iran v. U.S. Dep't of State*, 251 F.3d 192, 196 (D.C. Cir. 2001). The Terrorist Screening Center is not subject in the course of performing its operational functions and duties to the Federal Rules of Evidence, which apply in United States Courts, *see* Fed. R. Evid. 101. Any notion that it should be so limited is

profoundly misguided. Application of a rule against "hearsay" in No Fly determinations would plainly eviscerate the flexibility needed to make sensitive national security determinations based on, *inter alia*, sensitive intelligence sources, foreign governments, and information obtained in the midst of ongoing investigations.

Finally, Mr. Persaud argues that the standard of proof is too low and that the Government should have to conclude that he is a threat by "clear and convincing evidence." Defendants' primary brief demonstrates why this demand is misplaced as a matter of law. *See* Defs' Summ. J. Mem at Part V.C. Indeed, this case presents a clear-cut example of why the standard should not be so extraordinary. The record indicates that [redacted] These facts alone warrant the conclusion that he may pose a threat to civil aviation or national security sufficient to prevent him from accessing commercial flights. The notion that this predictive conclusion about the threat he poses must be proved by "clear and convincing" evidence is squarely at odds with the predictive nature of the task. Due process requires no such standard.

C. Mr. Persaud Is Not Entitled To CIPA-like Proceedings.

For the same reasons explained in Defendants' Combined Memorandum, Mr. Persaud is not entitled to the same kind of procedures applied in criminal cases pursuant to statutory law where classified information is at issue. *See* Defs' Summ. J. Mem. at Part V.D.

D. The No Fly List Criteria Are Not Unconstitutionally Vague.

As applied to Mr. Persaud's case, the No Fly List criteria are not unconstitutionally vague. As discussed in Defendant's primary brief, Mr. Persaud cannot demonstrate that the No Fly List criteria are impermissibly vague as applied to his own conduct. *See* Defs' Summ. J. Mem. Part VI. TSA determined that Mr. Persaud "represents a threat of engaging in or conducting a violent act of terrorism and . . . is operationally capable of doing so." *See* Joint Stmt. Persaud ¶ 4, Ex. A. The FBI has reason

to believe that [redacted] A reasonable person in Mr. Persaud's position would know that the conduct described both satisfies the applicable criterion and is conduct that the Government would inherently consider in making No Fly List determinations. In substance, this is exactly the type of information that reasonably supports the conclusion that an individual poses a threat. In short, Plaintiff's counsel's protest that he does not understand why TSA concluded that Mr. Persaud poses a threat is disingenuous in light of [redacted]

Mr. Persaud also complains that the information against him has no nexus to aviation security. But such a requirement would obviously be too narrow. *See* Grigg Decl. ¶ 21. The Government need not wait until it has specific information that a potential terrorist plans to hijack a plane, nor must it limit its No Fly List determinations to this particular threat. *See* 49 U.S.C. § 114(h)(3)(A) (threat to civil aviation or national security). Rather, the Government has determined that, because Mr. Persaud poses a threat of terrorist activity and is operationally capable of conducting a terrorist attack, he should not be permitted to board a commercial flight.

III. If The Court Deems The Revised Process Insufficient, The Harmless Error Doctrine Warrants Judgment For Defendants.

To the extent that the Court finds any constitutional infirmity in the process provided to Mr. Persaud, Plaintiff must then show substantial prejudice as a result of the specific infirmity found. *See AHIF II*, 686 F.3d at 998-90. (conducting a harmless error analysis and finding that the failure to consider additional summaries or clear counsel was harmless). Even on the basis of the unclassified

information here, there is ample reason to conclude that any "error" was harmless. *See* Defs' Summ. J. Mem. Part VII.[3]

Mr. Persaud presented no evidence in support of his DHS TRIP submission, [redacted]

[redacted]

[3] To the extent necessary, full consideration of the harmless error doctrine would put at issue underlying classified national security information, which should not be subject to discovery or disclosure in this proceeding and should not be necessary to dismiss Plaintiff's procedural due process claims.

[4] [redacted]

Finally, although Mr. Persaud asks for a live hearing, he has not described any evidence that might support his allegations beyond the bare statements in his response letter. He has not even offered his own sworn declaration for the purpose of moving for summary judgment. Accordingly, his assertions are entitled to no weight in this Court, and he has not shown substantial prejudice. There is no reason to believe that his testimony would alter the Government's reasonable suspicion that he poses a threat of committing a terrorist attack and is operationally capable of doing so.

IV. Defendants Are Entitled to Summary Judgment on the APA Claims

Judgment should also be entered for Defendants on Plaintiff's APA Claims for the same reasons given in Defendants' Combined Memorandum. Defs' Summ. J. Mem. Part VIII.

CONCLUSION

For all of the reasons discussed above, the Court should deny Mr. Persaud's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiff's procedural due process claims.

Dated: May 28, 2015

Respectfully submitted,

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s/ Amy E. Powell
Amy E. Powell

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order concerning page length, as it comprises fewer than fifteen pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Amy E. Powell
Amy E. Powell