

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director
Federal Programs Branch

AMY POWELL
amy.powell@usdoj.gov
BRIGHAM J. BOWEN
brigham.bowen@usdoj.gov
ADAM KIRSCHNER
adam.kirschner@usdoj.gov
SAM SINGER
samuel.m.singer@usdoj.gov
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 514-6289
Fax: (202) 616-8470

Attorneys for Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

<p>AYMAN LATIF, et al., <i>Plaintiffs,</i> v. LORETTA E. LYNCH, et al., <i>Defendants.</i></p>	<p>Case 3:10-cv-00750-BR</p> <hr/> <p>DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT</p> <p>UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL</p>
--	---

**DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment with respect to Plaintiff Faisal Kashem. As explained in the opening brief, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Kashem is, “in the generality of cases,” reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court concludes that it is, the only question remaining with respect to Mr. Kashem is whether he in fact received the benefit of that process. With respect to that question, the Government has provided Mr. Kashem with his status on the No Fly List, the reason for which he was listed, and an unclassified summary of information supporting his No Fly List status, to the extent feasible without unduly harming national security. The Government has concluded that Mr. Kashem poses a continuing threat to civil aviation or national security and that he satisfies the applicable criteria, in part because of [REDACTED]

[REDACTED]. The only question before the Court at this time is whether the revised redress process is constitutionally adequate. The Government carefully considered Mr. Kashem’s response and explanations and determined that his placement on the No Fly List is appropriate. This is precisely what was called for under the revised redress procedures, and the Constitution requires no more. Although Mr. Kashem may take issue with the Government’s substantive determination to place him on the No Fly List, he has no plausible argument that he received anything short of the complete process when he sought redress with DHS TRIP. The Court should grant Defendants’ motion for summary judgment.

ARGUMENT

I. Plaintiffs' Arguments About Error Rates Are Misplaced.

Echoing arguments made in Plaintiffs' consolidated opposition brief, Mr. Kashem faults the Government for not incorporating scientific methods in its decision-making process and contends that the predictive judgments underlying his placement on the No Fly List amount to little more than "guessing" at the possibility that he may one day commit an act of terrorism. Kashem Opp. at 2. This line of argument is best addressed in the parties' consolidated briefs. As the Government has argued in its consolidated reply brief, the watchlisting system is reliable and consistent with due process without the benefit of a scientific model. Mr. Kashem's claim presents no particular reasons for separate consideration. Accordingly, the Court is referred to the Government's consolidated reply brief for further discussion of this issue.

In further challenging the Government's decision-making process, Plaintiff tries to bootstrap substantive arguments about the merits of his listing. In particular, he argues that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Kashem Opp. at 3. But these challenges to the reasons for his placement are both irrelevant and wrong. Mr. Kashem's arguments do not support his due process claim. The possibility of alternative interpretations of facts does not mean that the Government acted unreasonably or that the process was unfair. Indeed, it does not suggest anything at all about the process, which is the only question currently before the Court.

The notice letter send to Mr. Kashem provided him notice of the subject matter of the agency's concerns. *See Al Haramain Islamic Found. Inc. v. Dep't of Treasury*, 686 F.3d 965, 982-83 (9th Cir. 2012) ("AHIF") (describing the utility of describing the "subject matter" of the agency's concerns).

Accordingly, Mr. Kashem need not “guess” as to the basis for his listing and could respond, for example, by explaining [REDACTED]

[REDACTED] Indeed, Mr. Kashem did respond, however unpersuasively, by [REDACTED]

[REDACTED].¹ Setting aside the scant nature of these responses, it is nonetheless clear from them that he understands the nature of the Government’s concerns and had a meaningful opportunity to respond.

Moreover, the examples of “error” Plaintiff cites are not procedural error and are not tied to the problems alleged by the Plaintiffs’ declarants. For example, Mr. Kashem notes that [REDACTED]

[REDACTED] Kashem Opp. at 3. But this particular contention — that [REDACTED]

[REDACTED] is not helpful to Plaintiff’s substantive or procedural arguments here. The Government’s determination, based in part on his [REDACTED], is not a prediction that he will engage in terrorism in the future but an assessment that he is a terrorist threat based on this and other information. And in any event, as a matter of due process, Mr. Kashem understands the subject matter of the Government’s concerns.

This factor also does not illustrate the so-called “error rate” described by Plaintiffs’ putative experts, who have not opined on any of the specific listing decisions. Moreover, there is no reason to

¹ Plaintiff’s reliance on a prior submission to this Court, at a different phase of the proceedings, Kashem Opp. at n.2, is misplaced. That declaration was not submitted on the record here, nor was any declaration from Mr. Kashem.

² [REDACTED]

believe that Plaintiffs’ alleged “errors” show any “cognitive bias.” Indeed, the record shows that Defendants are in fact aware of Mr. Kashem’s [REDACTED] his disagreement with the Government’s conclusion that he represents a threat, because the Government specifically considered the submissions of Mr. Kashem in which made these contentions were made. *See* Dkt. No. 176-3 at 3.³ Plaintiff’s disagreement with the Government’s substantive conclusions does not demonstrate procedural error.

II. Plaintiff’s Vagueness Argument Is Baseless.

As discussed in Defendants’ consolidated reply brief, Mr. Kashem cannot demonstrate that the No Fly List criteria are impermissibly vague because threat or risk-based criteria are not inherently vague. *See* Defs.’ Summ. J. Reply at Part II.C. There is a reasonable basis to believe that Mr. Kashem is a known or suspected terrorist who represents a threat to civil aviation or national security, and the Government made that determination applying clear and specific No Fly List criterion to Mr. Kashem’s conduct, upon consideration of Mr. Kashem’s response. *See* Defs.’ Kashem Mem. [Dkt. No. 240] at 9–10; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (“[A] plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice.”).

That Mr. Kashem’s statements were considered in the No Fly List determination does not change the fundamental analysis concerning vagueness. *Humanitarian Law Project*, 561 U.S. at 19–20 (reversing Ninth Circuit for improperly blending overbreadth and vagueness inquiries). Here, the mere fact that Plaintiff has been placed on the No Fly List, [REDACTED] [REDACTED] fails to demonstrate that the criteria are vague or indiscriminately applied. And it cannot reasonably be maintained that TSA’s conclusions are based

³ Plaintiff improperly relies on the absence of criminal charges as evidence that there is no “factual basis” for the Government’s conclusions. Kashem Reply at 2. The exercise of prosecutorial discretion, however, depends on numerous factors.

solely on any protected First Amendment activity or are otherwise improper. The law is clear that statements can be evidence of proscribed actions. *See id.* at 20; *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (finding that even protected speech can appropriately be evidence of proscribed actions); *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (an officer “may decide to arrest the suspect because his speech ... suggests a potential threat”); *cf. Wayte v. United States*, 470 U.S. 598, 612-613 (1985) (recognizing that letter of protest written to Secret Service can be relevant “evidence of the nonregistrant’s intent not to comply,” an element of the crime). Even if the Court scrutinized the determination more closely because of the statements at issue, there can be no doubt both that the applicable criteria are clear and were appropriately applied in this case.

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

As described in Defendants’ consolidated reply brief, the revised DHS TRIP process comports with the requirements of due process as contemplated by the Court’s prior decision, and the procedures were properly applied to Mr. Kashem. *See* Defs.’ Summ. J. Reply at Part III. Mr. Kashem’s claim that he is entitled to additional procedures is meritless. Mr. Kashem clearly understands the nature of the information provided and was given ample opportunity to challenge the basis for his listing. Mr. Kashem’s attempt to seek additional information about sensitive sources and methods should fail.⁴ *Id.*; Dkt. No. 240. The Government is not required to provide sensitive or classified information, the disclosure of which would endanger national security. Defs.’ Summ. J. Reply at Part III; Dkt. No. 240.⁵

⁴ Mr. Kashem also states that he is willing to undergo additional screening. This appears to be related to Plaintiffs’ substantive argument that the Government imposed an incorrect security measure on the Plaintiffs because more intrusive screening would account for the Government’s interests. As described in Defendants’ main brief, the appropriateness of TSA’s security screening measures is irrelevant to the due process consideration and beyond the jurisdiction of the Court. *See* Defs.’ Summ. J. Reply at Part IV.

⁵ Even if the Court agreed that the Government were required to disclose investigative information, this is also a good example of how Plaintiffs’ demands for disclosure or a privilege assertion during the administrative process are meritless. *See* Defs.’ Summ. J. Reply at Part III.C. Defendants are not required to surrender their privileges during the administrative process. Defendants, of course, object to

Moreover, it is plain that the Government meaningfully considered his response. Dkt. No. 176-3.

Plaintiff also demands a particular form of evidentiary hearing to rebut the Government's prediction of future 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. Part V.C.; Defs.' Summ. J. Reply Part III.D.

IV. The Harmless Error Doctrine Warrants Judgment For Defendants.

To the extent that the Court finds any error at all in the process provided to Mr. Kashem, he must then show substantial prejudice as a result of the specific error found. *See* Defs.' Summ. J. Reply at Part V; *see AHIF*, 686 F.3d at 998–90 (conducting a harmless error analysis and finding that the failure to consider additional summaries or cleared counsel was harmless in that case). Plaintiff chose not to meaningfully respond to the information provided to him. Instead, he responded to the Government's summary of information with a six-and-a-half-page letter, of which five pages were devoted to critiquing the redress process and the remainder consisting of [REDACTED]

[REDACTED]. His meager response to the information provided (*e.g.*, [REDACTED]) shows that he understands the nature of the concerns; it does not establish that he would have any persuasive evidence to rebut the Government's concerns — at least none he could not already have submitted. For example, he could have submitted a [REDACTED]

[REDACTED]. He had a chance to submit this kind of information but instead sent only a short letter via counsel. In the near absence of any meaningful

the disclosure of privileged information in the context of a No Fly List determination, but the Court would need to consider that issue only when and how it became necessary in the context of a substantive review of the decision.

support for Plaintiff's contention that his inclusion on the No Fly List is in error, there is no basis to infer that the additional procedures sought by Plaintiff would have reduced the risk of erroneous deprivation, and there is no reason to believe that his testimony would alter the Government's reasonable suspicion that he poses a threat of terrorism. The Government was entitled to conclude, in the absence of meaningful responsive information, that Mr. Kashem, [REDACTED] [REDACTED] may be a threat to civil aviation or national security.

V. Plaintiff's Claims Under The Administrative Procedure Act Should Be Rejected.

Judgment should also be entered for Defendants on Plaintiff's Administrative Procedure Act claims for the same reasons given in Defendants' consolidated brief.

CONCLUSION

For all of the reasons discussed above and in the Government's opening briefs and consolidated reply, the Court should deny Mr. Kashem's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process and APA claims.

Dated: October 19, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Branch Director
Federal Programs Branch

s/ Brigham J. Bowen
BRIGHAM J. BOWEN
brigham.bowen@usdoj.gov
AMY POWELL
amy.powell@usdoj.gov
ADAM KIRSCHNER
adam.kirschner@usdoj.gov
SAM SINGER
samuel.m.singer@usdoj.gov
U.S. Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 514-6289
Fax: (202) 616-8470

Attorneys for Defendants

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/ Brigham J. Bowen
Brigham J. Bowen

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order concerning page length, as it comprises fewer than seven 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/ Brigham J. Bowen _____
Brigham J. Bowen