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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **PLAINTIFFS' RESPONSE TO DEFENDANTS' SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Defendants' supplemental filing underscores the inadequacy and unfairness of their revised No Fly List redress process. In that filing, Defendants maintain their categorical refusal to provide each Plaintiff all of the reasons on which Defendants are relying to keep that Plaintiff on the No Fly List, any actual evidence, or a live hearing. Defendants provide Plaintiffs and the Court with no new information to justify their secrecy. Instead, they recite generalized concerns about the disclosure of national security and law enforcement information without even invoking any privilege under long-established procedures mandated by the courts. Indeed, as Defendants admitted during oral argument, the information they have provided Plaintiffs is a *summary* of material Defendants deem unclassified and unprivileged. This only begs the question why Defendants have not fully disclosed even unclassified and unprivileged information. In short, after six years of litigation, Defendants put the Court in the position of adjudicating what process is due to each Plaintiff on the basis of secret reasons to which Plaintiffs have had no opportunity to respond. Defendants' revised redress procedures violate procedural due process.

II. ARGUMENT

A. Defendants Fail to Minimize Information Withheld From Plaintiffs.

Plaintiffs' position remains that due process requires Defendants to provide notice of all of the reasons on which they are relying to maintain their placement of Plaintiffs on the No Fly

List. Even though the Court has not accepted this position as a general matter, Defendants' obligation to implement adequate minimization procedures is beyond dispute. The Court made clear that "Defendants must implement procedures to minimize the amount of material information withheld" from Plaintiffs. Op. and Order, ECF No. 321 at 8. That directive follows from the Court's earlier holding, in which it stated that notice must be "reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List." Op. and Order, ECF No. 136 at 61.

Critically, as Defendants' counsel conceded at oral argument, the DHS TRIP notification letters to Plaintiffs only summarized unclassified, unprivileged information. Oral Arg. Tr., ECF No. 318 at 76-77. Defendants have not explained why they have only summarized this information, which is not protected by any privilege, rather than disclosing it in full to Plaintiffs. Nor have Defendants even attempted to summarize information that they unilaterally deem classified or privileged.

Instead, Defendants' supplemental filing shows they have not fulfilled their minimization obligation. As a threshold matter, Defendants say nothing new in their supplemental filing. They merely recycle their prior rationale for withholding information, almost verbatim. *Compare* Declaration of Michael Steinbach ("Second Steinbach Decl."), ECF No. 327-1, ¶¶ 16-26 *with* Declaration of Michael Steinbach, ECF No. 254 ¶¶ 23-34. Defendants' perfunctory statement that they have withheld "the identities of subjects of investigation or intelligence interest," "sources and methods information," and "law enforcement information" is neither informative nor helpful. *See* Second Steinbach Decl. ¶ 27.

Having said nothing new, Defendants also have made no effort to disclose, segregate, or adequately explain to Plaintiffs their withholding of material information and evidence. A clear example of this failure is Defendants' refusal to provide Plaintiffs even *their own statements*, which should not be deemed national security information or law enforcement privileged, and which must be disclosed in full. The DHS TRIP notification letters to Plaintiffs make clear that Defendants are relying in significant part on Plaintiffs' alleged prior statements as a justification

for maintaining their placement on the No Fly List, but in no case have Defendants disclosed their full record of Plaintiffs' statements. The consequences of withholding prior alleged statements are not merely hypothetical. In Mr. Meshal's case, for instance, the notification letter refers only to some of Mr. Meshal's alleged statements while he was being detained unlawfully and interrogated coercively by the FBI in East Africa. *See* Meshal Notification Letter, ECF No. 187, Ex. A. Denying Mr. Meshal and the Court access to the complete statements—including his multiple requests for access to counsel—violates his right to due process. In their supplemental filing, Defendants do not even attempt to explain their continued refusal to provide Plaintiffs' prior statements.

Other aspects of Defendants' supplemental filing underscore their failure to minimize their withholdings. For instance, Defendants withhold other material information—such as statements of witnesses, and promises made to those witnesses that could indicate bias—without any specific explanation or justification. Defendants even insist that material exculpatory information about Plaintiffs—"to the extent any such information exists"—cannot be disclosed to them. Second Steinbach Decl., ECF No. 327-1 ¶ 29.

Defendants mention surveillance as one investigative method that could be revealed if they were required to disclose further information. *See id.* ¶¶ 20-22. But Defendants nowhere state that the information they have withheld is limited either to that particular investigative method or to methods that must be protected to preserve national security. In any event, Plaintiffs are entitled to notice of such surveillance and the information derived from it because Defendants have signaled their intention to use that information in these proceedings. *See, e.g.*, 50 U.S.C. § 1806(c) (electronic surveillance under the Foreign Intelligence Surveillance Act ("FISA")); 50 U.S.C. § 1825(d) (FISA physical search); 50 U.S.C. § 1842(c) (FISA pen register); 18 U.S.C. §2518(8)(d) (surveillance under Title III). In addition to these statutory requirements, due process also mandates that Plaintiffs receive notice of the surveillance techniques that led Defendants to determine that they should remain on the No Fly List. *See United States v. U.S. District Court (Keith)*, 407 U.S. 297, 324 (1972). This notice ensures that

Plaintiffs may seek review of both the lawfulness of that surveillance and whether Defendants' alleged reasons for including them on the No Fly List are actually derived from it. *See id.* Defendants have provided no notice and their supplemental filing does not explain the lack of notice.

The rationale that Defendants provide in their supplemental filings for withholding material information echoes their earlier claims of harm from *any* disclosure to Plaintiffs, including Plaintiffs' status on or off the No Fly List. *See, e.g.*, Declaration of Cindy Coppola, ECF No. 85-2 ¶¶ 40-44 ("I have concluded that the disclosure of any individual's inclusion or non-inclusion in federal terrorism screening or law enforcement databases . . . reasonably could be expected to cause serious harm to the national security of the United States."). That those warnings have proven incorrect at the very least raises questions about the credibility of Defendants' current claims. For example, Defendants cite the possibility of endangering past or future investigations, including "whether a particular individual is the subject of an investigation or intelligence operation," as a reason for withholding information. *See* Second Steinbach Decl. ¶¶ 17, 18, 25. But that possibility does not suffice as a free-floating justification for denying Plaintiffs greater disclosure at this point, when it is obvious that each Plaintiff has been the subject of "investigative or intelligence interest." *See id.* ¶ 17. Defendants themselves revealed that interest when they initially placed Plaintiffs on the No Fly List and again when they decided to maintain each Plaintiff on the List. *See* Pls.' Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 98-1 at 27 & n.41, 42. Six years later, Defendants offer no assurance that information from past investigations is not now stale, nor do they attempt to identify any point at which past investigatory information can no longer be withheld in full. *See* Oral Arg. Tr., ECF No. 318 at 23-24 (Court questioning Defendants' counsel about staleness of information). And the possibility of a *future* investigation, *see* Second Steinbach Decl. ¶ 25, cannot constitute a basis for denying due process in the present.

Defendants' other predictions of harm are based on a misconstruction of Plaintiffs' arguments. Defendants state that "requiring nominating agencies to disclose all of the reasons

for including individuals on the No Fly List would cause significant harm to ongoing counterterrorism investigative or intelligence activities." *Id.* ¶ 17. They also warn about the "potentially dangerous chilling effect" on the government if Defendants are required to disclose "all evidence considered in making the No Fly determination." *Id.* ¶ 26. But Plaintiffs' position is that Defendants must disclose all reasons and evidence they are *relying on* to *maintain* their placement of Plaintiffs on the List, not that they must disclose any and all information relevant to the original decision to place Plaintiffs on the List. Defendants must choose for themselves what to rely on, and therefore what to disclose.

In sum, Defendants' supplemental filings neither satisfy due process nor comply with the Court's order requiring them to minimize their withholdings from Plaintiffs.

B. Defendants Fail to Justify Their Categorical Withholdings.

Plaintiffs have repeatedly objected to Defendants' attempts to raise the general specter of privilege as a categorical basis for denying due process-mandated disclosures and safeguards. *See, e.g.*, Pls.' Reply in Supp. of Cross-Mot. for Summ. J., ECF No. 104 at 16; Pls.' Opp. to Defs.' Cross-Mot. for Summ. J., ECF No. 267 at 20-22; Pls.' Suppl. Mem. in Supp. of Mot. for Summ. J., ECF No. 320 at 4-5. And this Court ordered Defendants to identify the information they withhold, provide a justification for the withholding, and explain why they could not make additional disclosures. Yet perhaps because the Court cited to general national security concerns in its opinion, ECF No. 321 at 61, Defendants now choose merely to refer to national security and law enforcement privileges without differentiation, without specific references to particular information, and without meeting the legal requirements for invoking any actual privilege.

Defendants essentially argue that they can merely identify privileges that *might* apply without actually invoking them. Defendants have cited no authority in support of that argument, and Plaintiffs have located none. Rather, the question remains what process is due to each individual Plaintiff—a question that must be answered regardless of whether the matter potentially implicates national security. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("[T]he United States Constitution . . . most assuredly envisions a role for all three branches

when individual liberties are at stake."); *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) ("No matter how tempting it might be to do otherwise, we must apply the same rigorous standards even where national security is at stake."). If Defendants seek to invoke a privilege protecting against disclosure of national security or law enforcement information, they must do so by reference to specific information and according to the established procedures governing assertion of those privileges. They have failed to do so.

That Defendants' generalized assertions of privilege are inadequate becomes clear when one considers what would happen had they invoked specific privileges over particular pieces of evidence. For example, assertion of the state secrets privilege would require an independent review and determination by the Court as to whether the specific information is privileged. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079-80 (9th Cir. 2010). If so, the privileged information would be removed from the case, and the Court would have to decide how the case should proceed in light of the unavailability of that information. *Id.* Similarly, assertion of the law enforcement privilege is subject to judicial review under a multi-factor test, *see In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988), and the result of a successful invocation of the privilege would be removal of the privileged evidence from the case. *See Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975) ("Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties . . . .").

Plaintiffs in other No Fly List cases have obtained evidence over which the government asserted state secrets and law enforcement privileges, making clear that judicial review of such privilege assertions can and must be rigorous. *See Mohamed v. Holder*, Case No. 1:11-cv-50 (AJT/MSN) 2015 WL 4394958 at *12 (E.D. Va. July 16, 2015) (determining, following review of the government's purported state secrets information, that not all of the information was subject to the privilege); *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 (WHA), 2009 WL 5069133, at *15-16 (N.D. Cal. Dec. 17, 2009) (ordering disclosure of certain documents despite

government's assertion of law enforcement privilege), *vacated on other grounds*, 669 F.3d 983, 998 (9th Cir. 2012).

The Constitution does not permit Defendants to deprive Plaintiffs of notice categorically because of the possibility or even the likelihood that Defendants' decision to deprive Plaintiffs of their liberty may be based to some degree on classified or sensitive information. By citing that possibility as an argument against additional process and safeguards now, Defendants are attempting to circumscribe Plaintiffs' ability to meaningfully participate in—and the Court to adjudicate—the substantive due process phase of this case.

C. Defendants Fail to Justify Their Withholdings for Individual Plaintiffs.

In ruling on the parties' cross-motions for summary judgment as to the revised redress process, the Court concluded that "the record is insufficient for the Court to make any ruling as to the constitutional sufficiency of the specific disclosures made to each of the six remaining Plaintiffs." Op. and Order, ECF No. 321 at 42. Defendants' supplemental filing does not remedy that insufficiency.

Indeed, Defendants' filing shows the dangers of broad judicial deference to the government on matters involving national security or potentially classified information. *See, e.g.*, Op. and Order, ECF No. 321 at 7-8 (allowing Defendants to withhold disclosures altogether if they would "create an undue risk to national security"). Instead of explaining or defending the specific disclosures—or lack thereof—to each Plaintiff, as noted above, Defendants merely cite generalized concerns about the potential disclosure of national security and law enforcement information. *See* Second Steinbach Decl. ¶ 27. They do not explain, for instance, their basis for withholding any information except a grossly incomplete, one-sentence disclosure to Mr. Knaeble. They do not explain why they cannot disclose the witnesses they are using against Mr. Kariye, or disclose that those witnesses' testimony is beset by credibility problems. Nor do they explain why they could not disclose the same information to Mr. Kariye in this case that they disclosed in the government's denaturalization action against him. They do not explain why they

are withholding from Mr. Meshal reports or recordings of his own alleged statements that were the result of coerced interrogation during months of unlawful detention in East Africa. They do not explain their basis for withholding those same inherently unreliable statements, which they are apparently using against Mr. Persaud, from him. And they do not explain why they are withholding all but piecemeal, incomplete disclosures from Mr. Kashem. Defendants' failure to address their specific withholdings from Plaintiffs shows that their revised redress process as applied to each Plaintiff violates due process.

Any showing Defendants might have made to the Court *ex parte* and *in camera* does not mitigate the due process violation. As Plaintiffs have repeatedly argued, the Court cannot adjudicate procedural deficiencies in Defendants' submissions without the benefit of adversarial process. Courts, moreover, generally do not resolve claims on the merits based on *ex parte* submissions absent a proper invocation and adjudication of privilege. Cf. *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986).[1] Although the Court in its order of March 28, 2016 raised the possibility that Defendants could make an *ex parte* submission for *in camera* review, Defendants' categorical withholdings *from Plaintiffs* renders their revised redress process entirely inadequate.

D. Defendants' Supplemental Filing Reinforces That the Revised Redress Process Is One-Sided and Inadequate.

Defendants' supplemental filing makes clear that the inadequacies of the revised redress process virtually mirror those of the original process. Indeed, the filing places Plaintiffs in a position similar to where they would have been had they filed petitions challenging the DHS TRIP determinations in the court of appeals under the original redress process. And they place the Court in a position in which it will effectively be asked to rubber-stamp determinations that Defendants made without meaningful process.

[1] Although the court in *Abourezk* acknowledged exceptions to this "main rule," it cautioned that those exceptions are "few and tightly contained." 785 F.2d at 1061. The court noted a single instance in which a court relied on *ex parte* material to resolve the merits of the dispute, and that came after the formal invocation of the state secrets privilege by the government. *Id.*

That judicial review under the original redress process was not meaningful should no longer be at issue. Review was limited to an administrative record compiled by the government and consisting only of its reasons and evidence, along with any information an affected individual provided based on guesses about those secret reasons and evidence. As the Ninth Circuit observed of the original redress process nearly eight years ago, "[t]here was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know, there is no administrative record of any sort for us to review. . . . So if any court is going to review the government's decision . . . it makes sense that it be a court with the ability to take evidence." *Ibrahim v Dep't of Homeland Sec.*, 538 F.3d 1250, 1256 (9th Cir. 2008). The Ninth Circuit remanded this case nearly four years ago "for such further proceedings as may be required to make an adequate record to support consideration of [Plaintiffs'] claims" and cited the Classified Information Procedures Act as one way "to handle discovery of what may be sensitive intelligence information." *Latif v. Holder*, 686 F.3d 1122, 1129-30 (9th Cir. 2012). In its June 2014 order, the Court concluded that, "[w]hile judicial review provides an independent examination of the existing administrative record, that review is of the same one-sided and potentially insufficient administrative record that [the Terrorist Screening Center] relied on in its listing decision without any additional meaningful opportunity for the aggrieved traveler to submit evidence intelligently in order to correct anticipated errors in the record." Op. and Order, ECF No. 136 at 38-39.

Defendants' supplemental filing shows that the original unconstitutional review process is now essentially resurrected. Although Defendants have provided summaries of some of the information underlying their placement of Plaintiffs on the No Fly List, unless Plaintiffs happen to guess the undisclosed reasons and evidence, they cannot correct errors or explain misunderstandings.

Ex parte judicial review by this Court of Defendants' secret reasons and evidence is scarcely more likely to be meaningful than review of the government's one-sided administrative record in the court of appeals under the original process. Just as no amount of internal review by

Defendants can correct for information they lack—such as Plaintiffs' explanation of why Defendants' reasons and evidence are incorrect or incomplete—no amount of *ex parte* review of those reasons and evidence can correct errors and provide Plaintiffs the process they are due. As Plaintiffs emphasized in their earlier supplemental memorandum, *see* ECF No. 320 at 3, judicial review of agency actions must be meaningful, and judicial review in the absence of an adequate record or fact-finding capabilities is a denial of due process.

III. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant their individual cross-motions for summary judgment and deny Defendants' cross-motions for summary judgment.

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CERTIFICATE OF SERVICE

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

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