UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,

PLAINTIFF,

v.

ERIC H. HOLDER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,

DEFENDANTS.

Case No. 1:11-CV-00050

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT

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INTRODUCTION

The Federal Defendants submit this reply memorandum in further support of their Motion to Dismiss the Third Amended Complaint. Plaintiff Gulet Mohamed ("Plaintiff" or "Mr. Mohamed") continues to argue that he was "stranded" overseas despite having returned to the United States nearly three years ago and having resided here since that time. Upon his return from a trip to Yemen, Somalia and Kuwait, Mr. Mohamed was permitted to enter the United States, and he cannot plausibly argue that the single denial of boarding a few days prior to his return constitutes a denial of his right to citizenship. As a result of that single denial of boarding, Plaintiff claims that he is entitled to extraordinary process – a full adversary hearing, prior to listing, with full access to sensitive and classified information related to his alleged inclusion on the No Fly List. His claims are without merit.

ARGUMENT

I. COUNT ONE SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS NOT BEEN DENIED ENTRY TO THE UNITED STATES AND CANNOT DEMONSTRATE THAT HE WILL BE DENIED ENTRY INTO THE UNITED STATES IN THE FUTURE

Plaintiff has never been denied entry to this country. He continues to argue that he was "denied entry" to the United States based on a single denial of boarding on an aircraft in early 2011. Shortly after this denial of boarding, Mr. Mohamed boarded another flight for the U.S. and was permitted to enter when he arrived at a U.S. port of entry. Indeed, as Plaintiff recognizes, his successful return to the U.S. stemmed in part from coordination efforts by U.S. government officials. *See* Pl's Opp. at 7. Accordingly, he lacks standing to assert any injury of denied entry. Moreover, Plaintiff's claim is moot because he is in the United States. He has not

attempted to fly domestically or internationally since his 2011 entry, and he cannot save his complaint by speculating about any hypothetical future injury from hypothetical future travel.

A. Plaintiff Lacks Standing to Challenge the Alleged Denial of Entry

Plaintiff has failed to show either an actual or a threatened injury sufficient to establish Article III standing. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). He resides in the United States, *see* Dkt # 19 ("The parties agree that plaintiff has returned to the United States"), and was permitted to enter the United States when he presented himself at the U.S. Port of Entry. TAC ¶50. As discussed in prior briefs and below at Part I.C, denial of boarding onto an airplane does not constitute a denial of entry into the United States, and Plaintiff cites no case law to the contrary.[1] Even assuming for the purposes of this Motion that Defendants were responsible for the denial of boarding, Mr. Mohamed was able to fly back to the United States shortly thereafter, and he has not identified any injury to support a claim of denied entry.[2]

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[1] There is some overlap between the standing argument – that Plaintiff was never injured – and the Rule 12(b)(6) argument – that he was never denied his right of entry. Nonetheless, the questions are distinct. Even if Plaintiff was somehow injured by having sought assistance to make a return flight, that purported "injury" does not give rise to a cause of action under the Fourteenth Amendment. Defendants maintain that Plaintiff lacks standing and fails to state a cause of action with respect to Count One.

[2] Plaintiff's own recitation of events makes clear that the Kuwaiti Government insisted on his deportation by air travel, not the U.S. Government. *See* Pl's Opp. at 6-7, 10 (indicating that Mohamed was in custody and "Kuwaiti officials would only deport Mohamed if he could use a one-way plane ticket back to the United States."). The U.S. Government is not responsible for the Kuwaitis' procedures for deporting foreign nationals. *Cf. Lujan*, 504 U.S. at 560-61 (requiring "causal connection" between the injury and the conduct and redressability by the Court). The Court, in any event, has no ability to redress actions taken by a foreign government, which could deny any foreign national the ability to leave the country. International travellers always take the risk that they will be detained or denied admission to foreign countries. Similarly, U.S. citizens are subject to the actions of foreign governments when abroad. *See, e.g., Rouse v. Dep't of State*, 567 F.3d 408, 418-19 (9th Cir. 2009) (U.S. citizen arrested by the Philippines had no private right of action against U.S. government for alleged failure to assist him); *see also Munaf v. Geren*, 553 U.S. 674, 694-95 (2008) (Constitution does not prevent US citizens abroad from being subject to foreign law); *Neely v. Henkel*, 180 U.S. 109, 123 (1901) (same); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the

Moreover, Plaintiff identifies no facts to support the proposition that denial of entry to the United States is a "certainly impending" future injury such that he has standing to seek future injunctive relief. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) (requiring alleged injury to be "certainly impending" to establish standing). In short, and at best, Plaintiff offers conditional speculation of possible future injury regarding denial of boarding on a plane while abroad. The law requires more. *Clapper*, 133 S. Ct. at 1143.[3]

B. Plaintiff's Denial of Entry Claims are Moot

As explained in the Government's motion, even if Plaintiff had been denied entry to the United States, that claim would be moot because Plaintiff is in the United States, and there is thus no case or controversy to litigate. *See* Defs' MTD at 5-7. Faced with the obvious mootness of his entry claim, Plaintiff argues that he has decided not to leave the United States because he fears he will not be permitted on a returning aircraft. Of course, if Plaintiff were correct that he is on the No Fly List, he also would not be able to depart the United States via aircraft, although he could leave and return by any other means. Plaintiff's alleged injury, then, is not in fact a repeated denial of entry; instead, his purported injury is that he is allegedly deterred from international travel by his preferred mode of transportation.[4] These arguments cannot overcome the fundamental mootness of his entry claim.

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amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted).

[3] Plaintiff's reliance on *Cherri v. Mueller*, Case No. 12-11656, 2013 WL 2558207 (E.D. Mich. June 11, 2013), is misplaced. In that case the Court found that Plaintiffs were able to demonstrate a certainly impending injury based on allegations of numerous incidents at ports of entry where they alleged that they had been repeatedly and consistently subjected to unlawful questioning. *Id* at *7.

[4] Plaintiff thus attempts to conflate his right to enter the United States with an alleged right to travel internationally by air. But there is no right to international travel, *see Haig v. Agee*, 453 U.S. 280, 306-07

Plaintiff cites two readily distinguishable cases in support of his novel theory of a continuing injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184-85 (2000); *Suhre v. Haywood Cty*, 131 F.3d 1083, 1088 (4th Cir. 1997). In *Laidlaw*, the Plaintiffs were directly injured in their use of an outdoor area by the Defendants' discharges. *Laidlaw*, 528 U.S. at 184-85. The *Laidlaw* plaintiffs' decision to avoid the damaged area was the original injury-in-fact, however, and resulted from the repeated and continuing damage to that particular area. Here, there is a single allegedly unconstitutional act in early 2011, and Plaintiff has not adequately alleged that it will recur.[5] Similarly, in *Suhre*, the Court collected instances in which Establishment Clause plaintiffs had established standing by alleging that they avoided contact with ongoing and unconstitutional religious displays in public places. *See* 131 F.3d at 1087, (describing the injury as "the spiritual affront of unwelcome contact with religious symbolism"). Neither case is comparable to Plaintiff's claimed injury.

Plaintiff also cites two exceptions to the mootness doctrine. First, under the "voluntary cessation" exception, "voluntary cessation of a challenged practice" moots an action only if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189. Plaintiff claims that he was only

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(1981), let alone a right to engage in such travel by a preferred means of transportation, *see* Def's MTD at 18-20.

[5] Plaintiff submits a declaration of counsel. Other than authenticating government documents, virtually none of the matters in the declaration are appropriate for consideration with regard to this Motion to Dismiss. The declaration contains hearsay, *see* Abbas Dec. ¶¶ 3, 4, 13-16; contains speculation, ¶15; lacks foundation or personal knowledge, ¶¶14-16; violates the Best Evidence Rule, ¶¶ 5-12; and contains improper lay opinion, among other faults. It is also highly inappropriate for counsel of record to put himself forward as a fact witness on these matters, given the points noted above, as well as long-standing prohibitions on allowing attorneys to simultaneously serve as both counsel of record and a witness. *Cf.* ABA Model Rule 3.7 (prohibiting counsel from serving as a witness in a trial in which he is also counsel under most circumstances); VA State Bar Guidelines 3.7 (prohibiting counsel from serving as an advocate in an adversarial proceeding in which he is a necessary witness).

able to return as a result of the "judicial process." *See* Pl's Opp. at 15. This is incorrect. The Court issued no such order, and in fact, as explained to the Court at the hearing on Plaintiff's motion for emergency relief, there is a process in place to resolve the travel difficulties of U.S. citizens denied boarding on flights back to the U.S. *See* Piehota Dec. ¶33. That process was triggered by Plaintiff's denial of boarding, and, after this denial, Mr. Mohamed was able to travel expeditiously, less than a week later. After arriving at Dulles Airport, Plaintiff entered the U.S.[6]

Second, the "capable of repetition yet evading review" exception imposes two necessary criteria: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Williams v. Ozmint*, 716 F.3d 801, 809-10 (4th Cir. 2013). However, courts also have cautioned that this is a narrow exception, which is limited to the "exceptional situation[ ]." *Id, quoting Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Plaintiff wholly ignores the first criterion: that the injury must be inherently limited in duration so as to preclude judicial review. Here, rather than challenging action of a finite duration, Plaintiff alleges a fixed prohibition on air travel via his alleged placement on the No Fly List, and he does not specify any length of time with respect to his entry claims.[7] As to the second

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[6] Plaintiff attaches a handful of newspaper articles in support of its allegation that U.S. citizens are frequently denied entry to the United States. The handful of articles submitted, even if taken at face value, do not support Plaintiff's contention; rather, the news stories show that such individuals have been able to both return to and enter the United States. *See* Pl's Ex. 6. In any event, Plaintiff cannot assert the rights of third parties. *See Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

[7] This is in contrast to the situation in *U.S. v. Howard*, 429 F.3d 843 (9th Cir. 2005), superseded by 463 F.3d 499 (9th Cir. 2006), superseded by 480 F.3d 1180 (9th Cir. 2007), the twice-superseded Ninth Circuit opinion in which the court retained appellate jurisdiction over arguments that the criminal defendants were improperly shackled during initial court hearings. Conditions of pre-trial confinement are as a matter of policy necessarily brief, thus ensuring that the shackling could not be subject to appellate review. *See Howard v. U.S.*, 480 F.3d 1007, 1009 (9th Cir. 2007).

criterion, as discussed above, Plaintiff has indicated that he will not be subject to the same injury again because he will not leave the U.S.[8]

C. Count One is Meritless because Plaintiff Was Not Denied Entry

As previously established, Plaintiff has not been denied entry to the United States. He attempts to conflate the right of entry, which is a right of "citizenship," with a right to travel internationally by a specific means of transportation. As an initial matter, there is no right to international travel, and such travel is "subordinate to national security and foreign policy considerations." *See Haig v. Agee*, 453 U.S. 280, 306-07 (1981); *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978). Because there is no right to international travel, the only right even arguably at issue is the right to actually enter the country. Plaintiff has not alleged any facts to support that claim.

Although a citizen's ability to enter and reside in the United States has a constitutional dimension, such a right is not explicitly delineated in the Constitution, and there have been very few occasions for courts to pass upon the contours of the citizen's "right" to enter and reside in the United States. Plaintiff primarily cites *dicta* from cases on other issues, none of which stand for the proposition that the right to citizenship is any broader than the right to enter the United States. None of these cases even imply that the right to citizenship is a right to the most convenient form of travel. *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298 (1922) (recognizing, *in dicta*, a right to *domestic* travel for U.S. citizens in Puerto Rico); *Hernandez v. Cremer*, 913 F.2d 230 (5th Cir. 1990) (finding that the INS had arbitrarily deprived a U.S. citizen of Fifth

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[8] Moreover, Plaintiff's own experience indicates that an overseas "stranding" is not likely to recur. After he was allegedly stranded, he was subsequently able to obtain assistance when he was denied boarding on a flight back to the U.S., and he was permitted to enter at a U.S. port of entry.

Amendment due process by excluding him from the country while processing him for an exclusion hearing intended for aliens). Plaintiff also cites decisions in which courts have upheld the power of the Government to deport the parents of minor U.S. children, even though such deportation made it difficult, as a practical matter, for the citizens to stay in the United States. *Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977) (upholding deportation of the parents of a U.S. citizen even though it effectively forced the minor U.S. citizen to leave as well); *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984) (same); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981) (same).[9]

Plaintiff also leans heavily on a Fifth Circuit case which held that a U.S. citizen cannot be subject to criminal penalty for entering the country without a passport. *See Worthy v. U.S.,* 328 F.2d 386, 394 (5th Cir 1964). Since the statute in question actually prohibited and punished the ingress of U.S. citizens where they had misused a validly issued passport, it is readily distinguishable from the present matter, where U.S. citizens generally are permitted to enter the country (and, indeed, are sometimes assisted in reaching a port of entry, as happened in the present case). *Worthy* does not stand for the broad right to travel that Plaintiff claims.

Perhaps recognizing that he has not pled a denial of any right of citizenship, Plaintiff now claims his right to enter the country was "burdened" because his alleged placement on the No Fly List made it more difficult to reach a port of entry in the United States. He cites no authority whatsoever for striking down Congressional or Executive action that may have made it less

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[9] The other cases cited by Plaintiff are similarly unhelpful in defining the nature of this right, and none are in this Circuit. *See Cerrillo-Perez v. INS*, 809 F.2d 1419,1423-25 (9th Cir. 1987) (ordering BIA to consider hardship to citizen children in case of separation); *Lozada-Colon v. Dep't of State*, 2 F. Supp. 2d 43, 46 (D.D.C. 1998) (upholding denial of Puerto Rican resident's attempt to renounce his U.S. citizenship); *U.S. v. Valentine*, 288 F. Supp. 957, 980 (D.P.R. 1968) (holding that citizens not fluent in English could be excluded from jury service without depriving Puerto Rican defendants of due process).

convenient for a U.S. citizen to travel overseas.[10] Indeed, it appears that what Plaintiff is actually claiming is not a right of entry at all. Instead, Plaintiff is seeking to claim a very different "right" – the right to travel from abroad by a particular means of transportation.

In lieu of any relevant precedent in support of Plaintiff's novel theory that he is entitled to a convenient means of travel, he analogizes the right to reside in the United States to the right to marriage, citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). In *Zablocki*, the Court struck down a state statute that prohibited (and indeed, criminalized) the decision to marry if the individual had unsatisfied child support obligations. *Id*. at 375. There are nearly unlimited ways to distinguish this case. First, the *Zablocki* Court's analysis stemmed from the right to marry as an aspect of the right to privacy, which is not at issue here. Second, the challenged statute actually prohibited the protected activity under certain circumstances, whereas Mr. Mohamed's right to enter and reside in the country is unhindered. *See* 8 C.F.R. § 235.1(b). Third, the *Zablocki* class was in fact prevented from marrying; Plaintiff was not prevented from entering the U.S.[11]

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[10] On the contrary, the government routinely engages in acts that might "burden" such travel, and none have been found to "burden" the right to enter. *See, e.g., Acosta*, 558 F.2d at 1158 (upholding deportation of parents of minor U.S. citizen); *Haig v. Agee*, 453 U.S. 280 (1981) (revoking a passport); *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959); *U.S. v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (border searches); *Rahman v. Chertoff*, 530 F.3d 622, 624 (7th Cir. 2008) (same); 42 U.S.C. § 264 (quarantine); *U. S. ex rel. Siegel v. Shinnick*, 219 F. Supp. 789 (E.D.N.Y. 1963) (same). These actions – all of which have been upheld as lawful – can delay, complicate or render prohibitively expensive international travel, including one's return to the United States. But these are routinely upheld as crucial to the protection of compelling public interests.

[11] Plaintiff also speculates that hypothetical other individuals who are "elderly, feeble or destitute" will be deterred from international travel. *See* Pl's Opp. at 11. But Plaintiff (who has filed an individual complaint and not a class action) cannot claim that his "right to return" is burdened because some other hypothetical plaintiff may be deterred from travelling abroad. Nor does he explain why the "elderly, feeble or destitute" are likely to be deterred by actions allegedly taken against Mr. Mohamed. To the extent he relies on language from *Zablocki* about a broader deterrent effect, unlike the present case,

Even if Plaintiff's novel theory of "burdens" on the right of entry were correct, he has not clearly identified a burden. In his brief (but not in the Complaint), the Plaintiff claims that the No Fly List increases "the amount of time, physical endurance, and permissions of third party countries Plaintiff would need in order to exercise his right to return to the United States." Pl's Opp. at 11. Plaintiff says nothing about the availability, frequency, or expense of other means of travel to the United States. According to his Complaint, less than a week transpired between the alleged denial of boarding and his return home, TAC ¶¶49-50. Such incidental delays do not rise to the level of a serious burden. If he had needed to travel by boat or by means of flight to an intermediary country – which he did not – he makes no allegation that he would have been unable to do so. Indeed, he acknowledges that a U.S. citizen "will find some way, however difficult, to return to the United States." Pl's Opp. at 16. Plaintiff also claims that the Kuwaiti government would not have permitted any other means of departure, but as discussed above, the laws and rules of other governments are not a basis for a claim against the United States.[12]

In any event, the import of Plaintiff's argument here is that the Government could never prohibit a U.S. citizen from boarding a plane to the United States from abroad, regardless of the risk posed by that individual to aviation security, even temporarily, because to do so would be the equivalent of violating the individual's fundamental right to enter the United States. This is

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Zablocki was a class action and thus the Court's reasoning could reach beyond the named plaintiff in that case.

[12] At least in the case of Mr. Mohamed's travel to Yemen as described in the Complaint, the allegations that the No Fly List subjects him to the permissions of third-party countries is particularly puzzling. Plaintiff does not allege that he attempted to take direct flights, or even that direct flights to Yemen exist. Accordingly, Mr. Mohamed's travel to Yemen is always subject to the permissions of third-party countries, as well as subject to the permission of Yemen itself.

an alarming, and plainly incorrect, proposition with potentially dangerous real-world consequences.

In sum, Plaintiff has no basis for immediate or prospective relief regarding his Fourteenth Amendment reentry claim or his APA claim related to reentry.

II. PLAINTIFF'S CLAIMS ARE UNRIPE BECAUSE HE HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Although Plaintiff alleges that the agencies involved in administration of the No Fly List have treated him unfairly and complains that the process is insufficient, he has failed to take advantage of the very process he complains is deficient, despite having had over two years in which to do so. Plaintiff does not address at all the standing and ripeness cases indicating that judicial review is precluded where Plaintiff has avoided the very process he seeks to challenge. *See* Def's MTD at 12-13 & n.8; *see Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2010) (quoting *Scott v. Pasadena Unified Sch. Dist.,* 306 F.3d 646, 662 (9th Cir. 2002)).

Instead, Plaintiff presumes that exhaustion can only be required as a matter of discretion as it was in *Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013), and argues that such discretion is not available or is inappropriate over his Administrative Procedures Act ("APA") claims in light of *Darby v. Cisneros,* 509 U.S. 137 (1993). To begin, *Darby* does not apply to claims brought outside the APA, and Plaintiff has brought both APA and constitutional claims.[13] *See Darby*, 509 U.S. at 153. So, even if Plaintiff were correct that *Darby* governed this case, his claims would be reduced to those he has properly stated under the APA. But *Darby* only holds that absent a separate exhaustion requirement, the APA provides for review of any final agency

[13] Indeed, as noted infra at Part IV, there are almost no allegations relevant to Plaintiff's APA claims, and the bulk of the Complaint is addressed to his constitutional claims.

action, and in that case, agency regulations explicitly indicated that administrative appeals were optional. Here, it is clear that Congress intended that agencies be permitted to resolve claims of inappropriate denial of boarding based on one's alleged status on the No Fly List. Plaintiff concedes that Congress established an administrative process for the very type of allegations he raises regarding security screening when attempting to travel via commercial air transportation. Congress required the Secretary of Homeland Security to "establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat." 49 U.S.C. § 44926(a).[14]

Plaintiff further argues that exhaustion would be futile and would subject him to irreparable injury. He does not, and cannot, dispute the fact that DHS TRIP inquiries regarding individuals who allegedly are on the No Fly List are routed to TSC for review. Accordingly, TSC can and does provide relief via DHS TRIP. Plaintiff instead argues that this relief is itself futile because it provides inadequate notice and hearing and does not inform the petitioner of his or her status with respect to the No Fly List. The *Shearson* Court rejected this precise argument, noting that even if the process was ultimately deemed inadequate, the process could nonetheless serve to afford at least partial relief, remedy errors, and clarify the issues for review. *See Shearson v. Holder*, 725 F.3d 588 (6th Cir. 2013). While DHS TRIP does not provide for a hearing in which a complainant would be privy to any sensitive or classified information that may pertain to him, it does result in the appropriate agencies reviewing his specific allegations

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[14] The Secretary is further required to ensure that the process includes a method to maintain a record of individuals who have been misidentified and "have corrected erroneous information." 49 U.S.C. § 44926(b)(2). Congress also enacted 49 U.S.C. § 44903, requiring TSA to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because [it was] determined that they might pose a security threat, to appeal such determination and correct information contained in the system." *Id.* § 44903(j)(2)(C).

and correcting any errors they identify. DHS TRIP can result in an individual being removed from the No Fly List. Moreover, through DHS TRIP, a complainant receives a Redress Control number that can be used when making future air travel plans, potentially preventing future travel-related difficulties.[15]

Next, Plaintiff argues that exhaustion is inappropriate where the administrative process cannot review his constitutional claims, citing the Ninth Circuit decision in *Latif*. But the *Latif* Plaintiffs did in fact submit DHS TRIP inquiries, and the Ninth Circuit was opining on a different question – whether, after exhaustion, the Plaintiffs' due process claims had to be heard in the Court of Appeals under 49 U.S.C. § 46110. *See Latif v. Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012). And the statement that "DHS TRIP does not appear to provide any mechanism" for a due process challenge misses the point entirely. DHS TRIP actually provides the process being challenged and could afford at least a partial remedy for Plaintiff's claims and develop an administrative record.

Finally, Plaintiff argues that filing for DHS TRIP would subject him to irreparable harm. Even if Plaintiff were still under arrest in Kuwait, it is unlikely that he would have a plausible argument.[16] But he has not been in detention for almost three years and can identify no possible

[15] Plaintiff also repeats the argument that because the DHS TRIP determination letters do not provide the petitioner's status, they are "non-substantive" and "not orders." As previously explained, this is at best an argument why DHS TRIP does not provide adequate process, not an argument as to why they are not orders or why the process is futile.

[16] To be clear, Mr. Mohamed was not in a Kuwaiti deportation facility "because Defendants had placed him on the No-Fly List." *See* Pl's Opp. at 24. Rather, accordingly to his own allegations, Plaintiff was in a Kuwaiti deportation facility because the Kuwaiti Government did not renew his visa and did not want him in Kuwait. The only alleged consequence of his alleged placement on the No Fly List is that he was denied boarding on a flight on which he may have been deported a few days earlier. According to his allegations, he was not held incommunicado during those few days; indeed, he successfully retained counsel and filed a lawsuit. It would have been a simpler matter to file a DHS TRIP inquiry, which would have been resolved long before now with no possible harm done to Plaintiff.

harm that would result from the DHS TRIP process (or would have resulted) if he had pursued the obvious step of utilizing the process available. He complains that the process is "open-ended," but although there is no hard deadline by which response to a DHS TRIP inquiry must issue, the agencies generally must respond within a reasonable amount of time.[17]

III. DHS TRIP SATISFIES PLAINTIFF'S PROCEDURAL DUE PROCESS.

If the Court were to reach Plaintiff's procedural due process claim, Plaintiff has failed to plead deprivation of a cognizable liberty interest and failed to demonstrate that the DHS TRIP is inadequate. In light of the paramount governmental interests in the context of aviation and national security, and taking into consideration each of the *Mathews* factors, *see Mathews v. Eldridge*, 424 U.S. 319 (1976), the redress process made available to Mr. Mohamed, which culminates in impartial judicial review, is appropriately balanced and should be upheld.

A. Plaintiff has not Alleged Deprivation of a Cognizable Liberty Interest

With respect to the first *Mathews* factor, Plaintiff alleges deprivation of his interest in international travel, of his "right to return" and of an interest in his reputation. None of these alleged deprivations rises to the level of liberty interest under the due process clause. To the extent there has been any such deprivation, the liberty interest is attenuated and carries little weight in light of the government's compelling interests in aviation security. First, Plaintiff claims "the practical effect" of his alleged placement on the No Fly List "is to shut down the

[17] Plaintiff also complains that the TSDB is not properly updated, but the information cited is wholly irrelevant because it does not relate to the redress process or to the No Fly List. The 2009 OIG Audit information cited relates only to nomination procedures and found that FBI was not acting quickly enough to update the TSDB as investigations opened, closed or changed. *See* Pl's Ex. 3. Insofar as this data has any relevance here, it is sorely out of date; more recent investigation has shown improvements to the nominations process. *See* Pl's Ex. 4 (2012 GAO reports detailing changes in watch-listing practices).

possibility for travel." Pl's Opp. at 27.[18] As Defendants established in the Motion to Dismiss, the liberty interest in international travel does not extend to any particular means of transportation. Defs' MTD at 18-19.

Rather than dealing with the precedent to that effect, Plaintiff leans heavily on the single interlocutory district court decision to the contrary in *Latif,* which held that placement on the No Fly List was a deprivation of a liberty interest for the purposes of the Due Process Clause. *Latif v. Holder*, __ F. Supp. 2d __, 2013 WL 4592515 (D. Or. Aug. 28, 2013).[19] The Government respectfully disagrees with that decision. The *Latif* Court distinguished the cases holding that there is no liberty interest in any particular means of transportation because those cases "involve burdens on the right to *interstate* travel as opposed to *international* travel." *Latif*, 2013 WL 4592515, at *8; *compare Gilmore v. Gonzales,* 435 F.3d 1125 (9th Cir. 2006) (holding there is no right to air travel). But restrictions on international travel are subject to *less* scrutiny than those on interstate travel. *See, e.g., Fisher v. Reiser*, 610 F.2d 629, 637-38 (9th Cir. 1979); *see also Califano*, 439 U.S. at 177. If restrictions on a specific means of interstate travel do not trigger or offend the Constitution, this is even more clearly true for international travel. *See Haig v. Agee*, 453 U.S. at 306-07 (recognizing that the freedom to travel abroad is "subordinate to national security and foreign policy considerations"); *Regan v. Wald*, 468 U.S. 222, 240-43 (1984) (citing "the traditional deference to executive judgment in this vast external realm of foreign affairs" in upholding international travel restrictions) (internal quotation marks omitted).

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[18] Plaintiff's reliance on *Zemel v. Rusk*, 381 U.S. 1 (1965) is misplaced. Those Plaintiffs did not allege their travel was difficult or burdensome; rather, they were totally unable to travel without a proper passport. Accordingly, they had been wholly deprived of a liberty interest in international travel.

[19] The court in *Latif* has not yet resolved the plaintiffs' Due Process claims, having asked for supplemental briefing on the availability of judicial review for DHS TRIP determinations.

Moreover, in *Latif* the Court found that international air travel is not "a mere convenience in light of the realities of our modern world," given the potential that individuals may want or need to travel overseas quickly for various reasons. *Latif*, 2013 WL 4592515, at *8. But the question of whether a protected liberty interest in air travel exists abroad does not turn on the relative convenience of international air travel; that question goes primarily to the degree of deprivation. Whether there is an interest in the first instance depends on other factors, such as the diminished scope of personal entitlements abroad as opposed to at home, and the role of the Executive (as opposed to the courts) in foreign affairs and national security. These factors counsel that the individual's liberty interest is diminished, not increased, in the context of international as opposed to interstate travel.[20]

Second, Plaintiff presses again his "right to return" to the United States, by his preferred means of transportation. As established, there is no such right and he was not deprived of his right to enter the country. And it is particularly weak as a *Mathews* factor given the ease with which Plaintiff actually entered the United States.

Plaintiff also presses his "stigma-plus" claim, but apparently concedes there was no public disclosure of his alleged status, much less a public disclosure that has affected a legal right or status. *See, e.g., Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012) (requiring a "plus" that altered the plaintiff's legal status). Plaintiff instead appears to argue that the confidential sharing of watchlisting information within the government affects his travel plans and that the

[20] Plaintiff also cites to the allegations in *Latif* that portions of the No Fly List are shared with foreign countries, who may take action against the listed individuals as a result. As discussed supra note 2, the Court has no ability to redress actions taken by a foreign government, regardless of whether or not such action was based on intelligence allegedly shared by the United States. Plaintiff further cites a sentence in the *Latif* decision that references "ship captains" as potential recipients of watchlisting information. It is unclear what the basis was for this statement by the *Latif* court. In any case, there is no allegation here that Mr Mohamed's watchlist status was or would be so shared

hypothetical intelligence-sharing with foreign governments could affect him. But intelligence-sharing within the government is not a public disclosure, much less intelligence-sharing with foreign governments. Moreover, Defendants have already established that boarding an aircraft is not a legal right. Accordingly, Plaintiff's reliance on *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1188 (9th Cir. 2008), *rev'd by Los Angeles County v. Humphries*, __ U.S. __, 131 S. Ct. 447 (2010) is misplaced. There, state officials consulted a child abuse registry for purposes of assessing entitlement to state benefits and eligibility for employment — benefits afforded by state law. Here, there are no such benefits, and there is no "plus."[21]

Finally, it bears noting that even if the Court were to find a deprivation of some liberty interest, the Plaintiff's "deprivation" of his preferred means of transportation pales in light of the substantial government interests at issue. *See* Def's MTD at 21-23.

B. DHS TRIP Provides Due Process

Plaintiff alleges several deficiencies in the DHS TRIP process. First, he claims that DHS TRIP has a high risk of error. But the cited statistics related to purported deficiencies in the nomination process, not the redress process, and have long since been superseded by events, including numerous improvements in watchlisting processes. *See* Pl's Ex. 4 (2012 GAO reports detailing changes in watch-listing practices); *see also* Piehota Dec. ¶¶8-20 (describing nomination and review process); *id.* ¶¶26-32 (describing redress process). For example, a General Accounting Office ("GAO") 2012 report explains that, while the TSDB does contain

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[21] The citation to *Doe v. Dep't of Pub. Safety ex rel. Lee*, 271 F.3d 38 (2d Cir. 2001), rev'd 538 U.S. 1 (2003), is similarly unavailing. The Second Circuit opinion, reversed by the Supreme Court on other grounds, found a liberty interest in not being a registered sex offender, a status to which various legal obligations attach. Even assuming the reversed Second Circuit opinion was correct, this case is readily distinguishable because Plaintiff's alleged status has not been published and he has not alleged that any such legal obligations arise from his alleged status.

some errors, as any database does, Defendants have taken affirmative steps to create new safeguards to ensure that mistakes are minimized and that a process exists to correct those mistakes. *See*, *e.g.*, *id.* at 12. Given Plaintiff's reliance on this older data, absent from his presentation is the DOJ OIG's conclusion (as early as 2007) that the No Fly List contained no discernible errors. U.S. DOJ OIG, *Follow-up Audit of the Terrorism Screening Center*, Audit Report 07-41 (2007), (public version), xiii, at http://www.justice.gov/oig/reports/FBI/a0741/final.pdf). And this is all without reference to the implementation of Secure Flight in 2011, which, the GAO concluded, substantially increased accuracy and removed the frequency of errors in the Government's watchlisting databases as a whole. GAO-12-476 at 42–43.

More generally, Plaintiff claims that a "standardless" procedure has a high risk of error. The available evidence establishes, however, that there are standards, established by both statute and agency guidance. *See, e.g.,* Piehota Dec. ¶12. Although the full content of the guidance is not available to the public, it is used by the agency and might be reviewable by a court in an appropriate case.

Second, Plaintiff argues that he is entitled to pre-deprivation due process. But there are many instances in which pre-deprivation process is not constitutionally required. The Supreme Court has held that "due process is not denied when postponement of notice and hearing is necessary" to ensure prompt government action in a variety of circumstances, such as where advance warning might frustrate the purpose of the action. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *see also Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240-41 (1988). It would be facially absurd to reach out to suspected terrorists and inform them

that they are being considered for inclusion on the No Fly List, and much more irrational to provide the suspected terrorist with the specific underlying intelligence supporting the belief that he or she is a threat to civil aviation. Terrorist organizations could leverage that information to avoid deploying operatives who were under suspicion and to use only those who were not yet deemed suspicious. *See generally* Defs' MTD at 22-23 (collecting cases on maintaining the secrecy of watchlisting); Giuliano Dec. ¶¶13-22 (explaining the specific harms that could result from disclosure of status or derogatory information); *see also Al Haramain Islamic Found., Inc. v. Dep't of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) ("[T]he Constitution certainly does not require that the government take actions that would endanger national security."); *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). The process would plainly obviate the purpose of watchlisting if it permitted suspected terrorists to know who was (and therefore who was not) suspected.[22]

Plaintiff does not address the copious case law establishing that due process does not require that classified information be disclosed. *See Jifry v. FAA*, 370 F.3d 1174, 1181–84 (D.C. Cir. 2004) (upholding *ex parte* review of wholly classified administrative record because due process did not require that plaintiffs be given the "specific evidence" upon which the determinations are based); *Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007); *Stehney v. Perry*, 101 F.3d 925, 931–32 (3d Cir. 1996) (finding that judicial review of the merits of an

[22] Plaintiff's citation to an asylum case in support of his argument for predeprivation process is off the mark. *See Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002). Such petitioners are entitled to a hearing before being deported permanently from the United States, never to return, and they often have a significant personal interest in remaining in the United States.

Executive Branch decision to grant or deny a security clearance would violate separation-of-powers principles); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001) ("[T]hat strong interest of the government [in protecting against the disclosure of classified information] clearly affects the nature … of the due process which must be afforded petitioners."). As the D.C. Circuit explained in *NCRI*, disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *Id.* at 208–209.

Importantly, Plaintiff apparently seeks disclosure to him, and not solely to an impartial adjudicator, such as the court of appeals. This demand is clearly misguided. *See Jifry*, 370 F.3d at 1181–84 (rejecting due process claim arising from withdrawal of airman's certificates, in part because of the availability of *ex parte*, *in camera* judicial review); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (rejecting "claim that the use of classified information disclosed only to the court *ex parte* and *in camera*" concerning the designation of a foreign terrorist organization violated due process); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (statute not unconstitutional because it "authorizes the use of classified evidence that may be considered *ex parte* by the district court"); *Patterson v. FBI*, 893 F.2d 595, 600 n.9, 604–605 (3d Cir. 1990) (unfairness remedied by "*in camera* examination by the trial court of the withheld documents and any supporting or explanatory affidavits"); *Islamic Am. Relief Agency v. Unidentified FBI Agents,* 394 F. Supp. 2d 34, 45 (D.D.C. 2005), *aff'd in part*, 477 F.3d 728 (D.C. Cir. 2007) (recognizing in IEEPA context plaintiff's review of the administrative record is "limited only to those portions of the administrative record that are not classified" while the Court "has before it both the classified

and unclassified administrative record”). As these cases demonstrate, the availability of review by a neutral decisionmaker, even when that review is *ex parte* and *in camera*, is a significant factor in assessing due process and, because such review is provided here, warrants rejection of Plaintiff’s claim. *See, e.g.*, *Jifry*, 370 F.3d at 1181–84; *see also Meridian Int’l Logistics, Inc. v. United States*, 939 F.2d 740, 745 (9th Cir. 1991) (civil litigant’s “interests as a litigant are satisfied by the ex parte/in camera decision of an impartial district judge”); *cf. Stehney*, 101 F.3d at 936 (finding that an agency may revoke a security clearance without affording the holder of the clearance “[t]he right to confront live witnesses, review information from prior investigations, or to present live testimony” because affording those rights would not “improve[] the fairness of the revocation process”); *Holy Land Found.*, 333 F.3d at 164.

In *Jifry*, the government revoked airman certificates to certain individuals. Assuming *arguendo* that this withdrawal implicated a property interest, the Court concluded that the pilots’ interests, even though their livelihood was implicated, “pales in significance to the government’s security interests in preventing pilots from using civil aircraft as instruments of terror.” 370 F.3d at 1183.[23] Moreover, “[w]hatever the risk of erroneous deprivation,” that risk was countered by the pilots’ ability to file an administrative challenge, obtain *de novo* administrative review, and seek *ex parte*, *in camera* judicial review of the record. *Id.* Thus, the Court concluded, “[i]n light of the governmental interests at stake and the sensitive security information, substitute procedural safeguards may be impracticable, and in any event, are unnecessary under our precedent.” *Id.* Unlike the asylum process or sex offender registry cases cited by Plaintiff, Mr. Mohamed’s claim is closely analogous to that rejected in *Jifry*. And, as in *Jifry*, Mr. Mohamed’s

[23] Notably, this holding did not depend on the merits of the revocation, *i.e.*, that the pilots were appropriately deemed a security risk. 370 F.3d at 1183.

interest in further process pales in comparison to the Government's interest in protecting the nation's airways.

Finally, Plaintiff argues that "it is premature at this stage of the litigation to determine whether the governmental interest requires dismissal." Pl's Opp. at 35-36. But the adequacy of DHS TRIP can be decided as a matter of law. The parties agree on what DHS TRIP entails and the only questions currently presented by the due process claim are the validity of Plaintiff's claimed "liberty interest" and the adequacy of the Defendants' stated justifications for the DHS TRIP process. Plaintiff's suggestion that it is necessary to develop the record is not accompanied by any indication that more information is needed or that there is a dispute about facts relevant to the operation of the redress process.[24]

IV. THE GOVERNMENT'S TERRORIST WATCHLISTING PROCEDURES ARE NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW.

Plaintiff asserts, for the first time, that he has an APA claim, separate from his constitutional claims, and that Defendants' action was arbitrary and capricious. Neither the Complaint nor the Opposition articulates any basis for that claim or any way in which he believes it was arbitrary and capricious (other than the previously articulated constitutional claims). Accordingly, the claim is not adequately pled.[25] Plaintiff is correct that review of such claims, when they are made, is generally on the basis of an administrative record, but there is

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[24] Plaintiff's citation to the *Latif* decision here is unavailing. The Court merely asked for supplemental briefing on the available process and the government interest. The parties are actually in agreement in that case that the due process challenge can be decided based on stipulated facts. *See, e.g.*, 2013 WL 4592515, at *14; and Stipulated Facts, Dkt #s 41, 84, 115, Case No. 3:10-cv-00750 (D. Ore.).

[25] Plaintiff also argues, contrary to well-established precedent, that *de novo* review is appropriate. *See* Defs' Opp. at 24-26. In any case, the narrow exception cited hypothetically in *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 414 (1971) appears in 5 U.S.C. §702(2)(F) ("unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court"), which is not applicable here.

nothing inappropriate or even unusual about the use of supporting affidavits. *See, e.g., Acumenics Research & Tech. v. DOJ*, 843 F.2d 800, 806 (4th Cir. 1988) (permitting reliance on affidavit that elaborated and explained the record); *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) ("there is nothing improper in receiving declarations that merely illuminate reasons obscured but implicit in the administrative record."); *see also Camp v. Pitts*, 411 U.S. 138, 141-43 (1973). In any case, it is quite impossible to compile an appropriate administrative record without knowing what aspects of the agency's actions are alleged to be arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Federal Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint should be granted.

Dated: November 6, 2013

Respectfully submitted,

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