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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

INTRODUCTION

In his Third Amended Complaint, Plaintiff Gulet Mohamed ("Plaintiff" or "Mr. Mohamed") alleges three counts based on: (I) the Fourteenth Amendment's guarantee of a right to citizenship, (II) the Administrative Procedure Act ("APA"), and (III) the Fifth Amendment (alleging a procedural due process violation). Plaintiff brings all Counts against Defendants Eric H. Holder, Jr., Robert Mueller, and Timothy Healy in their official capacities ("Federal Defendants") and apparently brings Counts I and III against certain unidentified "unknown TSC agents" in their individual capacities.[1] Plaintiff seeks declaratory and injunctive relief against the Federal Defendants.[2]

With respect to Count I, the Fourteenth Amendment claim, Plaintiff brings the very same "right of reentry" claim that the Court dismissed in its April 29, 2011 Order. The claim should again be dismissed. As explained in the Federal Defendants' Motion to Dismiss the Second Amended Complaint (and not subsequently addressed by the Court), Plaintiff returned to the United States on January 20, 2011. He was not, and never has been denied entry, and he continues to reside here today. He thus lacks standing to assert an entry claim, and any claim he might have had is now

[1] The Court dismissed the counts in the previous Complaint against those purported Defendants identified as "unknown agents" but not the counts against "unknown TSC agents." These "unknown" individuals have not been identified or served in this action and therefore are not properly before the Court at this time. *See Omni Capital Int'l v. Rudolph Wolff & Co*., 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). It is the Plaintiff's responsibility to identify and serve anonymous defendants. *See Strauss v. City of Chicago*, 760 F.2d 765, 770 n. 6 (7th Cir. 1985) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642-43 (9th Cir. 1980); *Figueroa v. Rivera*, 147 F.3d 77, 82-83 (1st Cir. 1998). Until such time as Plaintiff satisfies this responsibility, these individuals are properly served, and a determination is made that government counsel is authorized to represent these individuals, undersigned counsel is not appearing on their behalf.

[2] The Complaint also purports to seek compensatory and punitive damages. The Complaint is unclear as to what the basis for such a claim could be, but the Government assumes that such claims are brought against the individual "unknown TSC agent" defendants because Plaintiff cites no waiver of sovereign immunity that would permit an award of damages against the Government.

moot. Further, Plaintiff has not subsequently been denied entry to the United States and he has not shown a real and immediate threat of future injury to establish standing for the prospective relief he seeks.

Count III alleges that the Federal Defendants have failed to provide him with proper due process to challenge his alleged inclusion on the No Fly List. But as explained in the Federal Defendants' previous motions here and before the Court of Appeals, Plaintiff's alleged harm can be redressed through DHS TRIP, an administrative remedy he has chosen not to pursue. Until Plaintiff chooses to avail himself of DHS TRIP, neither his APA claim nor his accompanying due process claim is ripe for review. Further, Plaintiff lacks standing to bring either claim. If and when Plaintiff utilizes DHS TRIP, Plaintiff may then seek judicial review of both the resulting final agency action and the sufficiency of the process itself (including pursuant to 49 U.S.C. § 46110).

But even if the Plaintiff's due process challenge were ripe, DHS TRIP provides a constitutionally sufficient mechanism for challenging one's inclusion on the No Fly List. As an initial matter, no liberty interest is at stake: Plaintiff has no constitutional right to travel by airplane on any single mode of transportation. DHS TRIP, moreover, provides sufficient process to satisfy the requirements of procedural due process. The redress process provided by DHS TRIP balances interests of travelers challenging alleged inclusion on the No Fly List with the Government's compelling interests in ensuring the security of air travel and the protection of classified and sensitive information that supports placement on the No Fly List.

Finally, Plaintiff's APA claim appears to rehash his constitutional claims and fails for the same reasons. The Third Amended Complaint makes no allegation supporting a claim that any watchlisting decision or procedure was arbitrary and capricious.

In sum, Plaintiff has been afforded ample opportunity to plead a cause of action and has failed to do so. As such, this Court should dismiss Plaintiff's claims with prejudice.

PROCEDURAL BACKGROUND

At the outset of this litigation, Plaintiff was located in Kuwait and wished to return home by traveling on commercial airlines. TAC ¶ 7. On January 18, 2011, Plaintiff's counsel filed a motion for a temporary restraining order, a preliminary and permanent injunction, and other relief on behalf of Plaintiff, asking the Court to require Federal Defendants to allow him to return to the U.S., subject to "suitable screening procedures." *See* Dkt. # 3. This Court held a hearing the same day, which was continued until January 20, 2011. *See* Dkt. # 6. As a result of the parties' efforts, Plaintiff returned to the United States on January 21, 2011. On March 21, 2011, the Federal Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint. *See* Dkt. # 10. After oral argument, the Court granted Federal Defendants' Motion to Dismiss and granted Plaintiff leave to amend his Complaint. *See* Dkt. # 19. The Court directed Plaintiff to plead with specificity: (1) the facts Plaintiff contends establish standing and jurisdiction; (2) the legal rights that Plaintiff contends were violated and the source of those rights; (3) the specific cause of action; (4) the facts that state a plausible claim to relief; and (5) the relief that Plaintiff seeks. *See* Dkt. #19 at 4-5. On May 20, 2011, Plaintiff filed his Second Amended Complaint. In its Opinion dated August 26, 2011, the Court dismissed any claims based solely on his alleged placement in the Terrorist Screening Database or on the No Fly List, as opposed to those claims based on his alleged inability to fly as a result of being placed on such lists. *See* Dkt. # 32. The Court also transferred his remaining claims to the Court of Appeals, holding that the Court of Appeals had exclusive jurisdiction under 49 U.S.C. § 46110. The Court of

Appeals vacated and remanded the case, in an unpublished opinion holding that Plaintiff's claims were not brought under Section 46110.

ARGUMENT

I. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE HIS ALLEGED DENIAL OF ENTRY.

Plaintiff cannot challenge his alleged denial of entry into the United States because he cannot show a cognizable injury. Simply put, Plaintiff was never denied entry into the United States. And even if Plaintiff could demonstrate some injury, whatever claims for relief he may have had are now moot, as he currently resides in the United States. Nor can Plaintiff maintain his claims for prospective, injunctive relief related to his alleged inability to enter the United States because he fails to allege sufficient facts demonstrating that he is likely to suffer future harm. The Court recognized this failure in its April 29, 2011 Order, but provided Plaintiff an opportunity to file an amended complaint that would include the facts Plaintiff contends support his claims and this Court's jurisdiction. *See* Dkt. #19 at 4-5. The Court's August 26, 2011 ruling did not address this portion of the standing issue. Plaintiff has offered no new support for his right of "re-entry" claim. Count I and the portion of Count II related to denial of reentry therefore should be dismissed with prejudice.

A. Plaintiff Has Never Been Denied Entry into the United States.

Article III's limitation on judicial power requires at a minimum that a party must demonstrate that he has suffered an actual or threatened injury to establish standing. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Yet here, Plaintiff has failed to identify any injury-in-fact, and indeed, cannot identify such an injury because he has never been denied entry into the United States. Denial of boarding on

an airplane does not constitute a denial of entry into the United States. Lawful entry of U.S. citizens into the United States does not occur until the individual citizen has presented himself or herself at a U.S. port of entry and been permitted to enter by U.S. Customs and Border Protection ("CBP"). *See* 8 C.F.R. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section."). On direct flights from Kuwait to Dulles International Airport, the port of entry is Washington Dulles International Airport. *See* Port of Entry-Washington-Dulles http://www.cbp.gov/xp/cgov/toolbox/contacts/ports/dc/5401.xml (last visited 9/27/2013). When Plaintiff presented himself at the Port of Entry at Washington Dulles International Airport on January 21, 2011, following his flight from Kuwait, he was permitted to enter the United States after he appeared before a CBP official. Therefore, any claim that he was denied entry into the United States is baseless.

B. Even if Plaintiff Had Been Denied Entry, That Claim Would Now Be Moot.

Plaintiff alleges that the government has denied him his right to reside in and enter the United States by allegedly placing him on the No Fly List. *See* TAC ¶¶ 53-57. Setting aside the fact that Plaintiff has never been denied entry, even if he could identify some injury, his claim is moot because Plaintiff has now returned to the United States. TAC ¶ 50.

The mootness doctrine is based on the Constitution's case-or-controversy requirement. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180 (2000) (citing U.S. Const. art. III, § 2). Whereas standing is determined at the time the lawsuit is filed, the question of mootness arises during the pendency of the lawsuit: "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id*. at

189 (citing quotations omitted). A case is moot if the issues are no longer live and the court is unable to grant effective relief. *United States v. Hardy*, 545 F.3d 280, 282 (4th Cir. 2008). Thus, even if there is a live controversy when the case is filed, courts should refrain from deciding issues "if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *See Clarke v. United States,* 915 F.2d 699, 701 (D.C. Cir. 1990) (internal quotation marks omitted). Here, because Plaintiff entered the United States on January 21, 2011, his Fourteenth Amendment claim is no longer a live controversy. Consequently, his claim must be dismissed as moot.

C. Plaintiff Cannot Demonstrate That He Will Likely Suffer Harm in the Future and Therefore, He Cannot Be Granted Prospective Injunctive Relief.

Plaintiff also lacks standing to seek injunctive relief regarding future travel because he cannot make the requisite showing of imminent, certain future injury. *See Lyons*, 461 U.S. at 102 (requiring "real and immediate threat of repeated injury") (citation omitted). To obtain prospective relief, Plaintiff must point to "an invasion of a legally protected interest which is . . . "'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

Any future decisions about terrorist watchlisting or screening are necessarily sensitive, highly fact-specific assessments that depend on the facts and resources available at the future time to the responsible agencies; the information is dynamic, making it impossible to give future guarantees about an individual's status. *See* Declaration of Christopher Piehota (previously filed in support of Defendants' Motion to Dismiss the Second Amended Complaint, *see* Docket #22-1) ("Piehota Dec.") ¶¶ 18-19. Given the lapse in time, the dynamic nature of the watchlist renders any claim about future travel speculative. Moreover, other than his denial of boarding in January 2011,

Plaintiff has not alleged any additional denials of boarding or entry to the United States, despite being given the opportunity to amend his complaint. His plans for future travel continue to be, at best, pure speculation and devoid of any facts that would support his fear of denial of entry in the future. TAC ¶ 53 ("Defendants' inclusion of Mr. Mohamed on the No Fly List that prevents him from again departing the United States to visit family in Somalia and Canada and to complete a religious pilgrimage to Mecca, Saudi Arabia"). Notably, although Plaintiff claims that "the year that [Plaintiff] is removed from the No Fly List is the year he travels by plane to Mecca and returns to the United States," he does not allege even an immediate desire to make these trips, much less actual plans to do so – only that the Federal Defendants are preventing him from making the trips. *Id*. ¶ 5. Plaintiff's new allegation that he will depart the United States someday is precisely the type of allegation that the Supreme Court found too speculative in *Lyon*s to confer standing or to entitle a party to prospective injunctive relief. Further, it is well established that, in general, U.S. citizens who arrive at a U.S. port of entry are permitted to enter the United States after they establish to the satisfaction of a CBP officer that they are in fact U.S. citizens. 8 C.F.R. § 235.1(b).[3] Because Mr. Mohamed has never been denied reentry, and because there a standing rule permitting reentry of U.S. citizens, and because he has made no plans to leave the country, Plaintiff is not entitled to prospective relief.

[3] While United States citizens have a right to re-enter the country, citizens do not have a constitutional right to rearrive at a port of entry via a specific mode of transportation. *See, e.g.*, *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 534 (6th Cir. 2007) (holding that there is no protected right to a particular mode of transportation). In particular, there is no constitutional right to air travel. *Gilmore v. Gonzales*, 435 F.3d 1125, 1136-37 (9th Cir. 2006). *But see Latif v. Holder*, 2013 WL 4592515 (D. Or. 2013) (only court thus far to find a constitutionally protected liberty interest in air travel).

D. Because Plaintiff was Never Denied the Right to Reenter the United States, he has also Failed to State a Claim under 12(b)(6)

Count One also fails to state a claim for which relief can be granted. As noted, Mr. Mohamed was not denied return and entry into the United States. Moreover, Plaintiff does not allege that he was unable to return to the United States at all, only that he was (temporarily) unable to return by his preferred means of travel. He does not plausibly allege the inability to return by ship, for example, only a single denial of boarding over two years ago, after which the Federal Defendants assisted Mr. Mohamed's return to the United States. There is no allegation at that time that Plaintiff even attempted to travel by sea. Nor does Plaintiff plausibly allege he lacked alternative means of access to a U.S. port of entry via travel through other nations, such as Mexico or Canada. Moreover, the Federal Defendants have established that there is a process for resolving the travel issues of U.S. persons located abroad who have been prohibited from boarding a flight returning to the United States. Piehota Dec. ¶ 33. Accordingly, there is no reason to think that Plaintiff has been or would be prevented from returning to the United States.

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

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

Plaintiff alleges that the agencies involved in administration of the No Fly List have treated him unfairly and complains that the process is insufficient. Plaintiff, however, has failed to take advantage of the very process he complains is deficient. As explained in Federal Defendants' previous motion, DHS TRIP provides an adequate remedy to grant Plaintiff both forms of relief he seeks – removal from his alleged placement on the No Fly List and a process through which to seek

removal. That Plaintiff has opted not to avail himself of this process renders his claim unripe and improper for adjudication.

The Court previously determined that exhaustion should not prevent Plaintiff's claims from being transferred to the Court of Appeals, but agreed at the Status Conference on August 16, 2013, that the issue may be revisited in light of subsequent developments.

A. *DHS TRIP Provides Redress for Travelers Who Allege They Have Been Denied Boarding.*

In response to the terrorist attacks on the United States on September 11, 2001, Congress enacted the Aviation and Transportation Security Act (Pub. L. No. 107-71, 115 Stat. 597 (2001)), which charged TSA with overseeing the "security screening operations for passenger air transportation." *See* 49 U.S.C. § 114(e)(1). Congress required TSA to secure commercial air travel against the threat of terrorism by establishing policies and procedures that require air carriers to prevent boarding for certain individuals. 49 U.S.C. § 114(h)(3). Specifically, TSA must work "in consultation with other appropriate Federal agencies and air carriers" and "use information from government agencies" to identify travelers who may pose a threat to national security, so that it can "prevent [those] individual[s] from boarding an aircraft." *Id.* § 114(h)(3)(A), (B); *see also* Piehota Dec., ¶ 2, 4. TSA is also responsible for prescreening passengers against the No Fly and Selectee Lists. *See* 49 U.S.C. § 44903(j)(2)(C). Pursuant to that authority, TSA implemented the Secure Flight program, codified at 49 C.F.R. Parts 1540, 1544, and 1560, through which it performs the watchlist matching functions previously conducted by aircraft operators. Secure Flight was fully implemented for all U.S. airlines on June 22, 2010 and for all covered airlines on November 23, 2010. Declaration of Laura Lynch (previously filed in support of Defendants' Motion to Dismiss the Second Amended Complaint, *see* Docket #22-3 ("Lynch Dec."), ¶ 7 n.1.

As part of its prescreening functions, the Government is also required to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii)(I). The Assistant Secretary of Homeland Security is further required to "establish a timely and fair process for individuals identified as a threat under one or more of subparagraphs (C), (D), and (E) to appeal to the [TSA] the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i).[4] Pursuant to these authorities, the Government provides redress to passengers who were delayed or denied boarding due to alleged placement on the No Fly or Selectee Lists through DHS TRIP, which was codified at 49 C.F.R. §§ 1560.201-1560.207 as part of Secure Flight.

In February 2007, DHS TRIP was launched as the central administrative redress process for individuals who have, for example, been denied or delayed airline boarding; denied or delayed entry into or exit from the United States at a port of entry; or been repeatedly referred to additional (secondary) screening. *See* Lynch Dec., ¶ 4; Piehota Dec., ¶ 26. Persons who have been denied boarding, or been subject to additional screening, may file a complaint with DHS TRIP. *See* 49 C.F.R. § 1560.201; Lynch Dec., ¶ 5. They are required to complete a traveler inquiry form, either on-line, via e-mail or by hard copy. *See* Lynch Dec., ¶ 6.

[4] The process must "include the establishment of a method by which the Assistant Secretary will be able to maintain a record of air passengers and other individuals who have been misidentified and have corrected erroneous information. To prevent repeated delays of misidentified passengers and other individuals, the [TSA] record shall contain information determined by the Assistant Secretary to authenticate the identity of such a passenger or individual." 49 U.S.C. § 44903(j)(2)(G)(ii).

Other agencies, including Federal Defendants, are involved in the DHS TRIP process. Specifically, if the traveler is an exact or near match to an identity in the Terrorist Screening Database ("TSDB"), the matter is referred to the Terrorist Screening Center ("TSC") Redress Unit. *See* Lynch Dec., ¶ 9; Piehota[5] Dec., ¶¶ 30-32; *see also* 49 C.F.R. § 1560.205(d).[6] After that referral, the TSC Redress Unit reviews the available information to determine whether the DHS TRIP complainant is an exact match to a TSDB identity, and if so, whether the individual's status should be modified or removed from the TSDB. *See* Piehota Dec., ¶ 31. As part of this process, TSC contacts the agency that originally nominated the individual for inclusion in the TSDB and "determine[s] whether the complainant's current status in the TSDB is suitable based on the most current, accurate, and thorough information available." Piehota Dec., ¶ 30.

The TSC Redress Unit will then make a determination on whether the record should remain in the TSDB, or have its TSDB status modified or removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. Piehota Dec., ¶ 31. In such cases, TSC will only prepare a recommendation for the decision-making agency and will implement any determination once made. *Id*. When changes to a record's status are warranted, the TSC will ensure such corrections are made, and will verify that such modifications or removals carry

[5] TSC, which was established by Homeland Security Presidential Directive 6 in 2003, maintains a consolidated database of identifying information about persons known or reasonably suspected of being involved in terrorist activity. TSC then feeds that information to front-line screening agencies and law enforcement officials so that they can positively identify known or suspected terrorists trying to obtain visas, enter the country, board aircraft, or engage in other activity of concern. The TSC is responsible for maintaining the federal government's consolidated terrorist watch list, the TSDB, which contains identifying information about individuals known or suspected to be engaged or aiding in terrorist related conduct. Piehota Dec., ¶ 8; Declaration of Mark F. Giuliano (previously filed in support of Defendants' Motion to Dismiss the Second Amended Complaint, *see* Docket #22-2) ("Giuliano Dec."), ¶ 6.

[6] This interagency review process is described in the Memorandum of Understanding on Watchlist Redress Procedures, which was executed on September 19, 2007, by the Secretaries of State, Treasury, Defense, and Homeland Security, the Attorney General, the FBI Director, the NCTC Director, the CIA Director, the ODNI, and the TSC Director. *See* Piehota Dec., ¶ 28.

over to the various screening or law enforcement systems that receive TSDB data (*e.g.*, the Selectee and No Fly Lists). *Id*.

For inquiries that involve complaints about delayed or denied boarding due to TSA security screening, DHS TRIP, in conjunction with TSA's Office of Transportation Security Redress, subsequently sends a determination letter to the complainant as required under 49 U.S.C. §§ 44903 and 44926. *See* Piehota Dec., ¶ 32; Lynch Dec., ¶ 10; *see also* 49 C.F.R. § 1560.205(d). This multi-agency collaboration ensures the efficacy of DHS TRIP. *See* Piehota Dec., ¶¶ 26-33.[7]

B. Until Plaintiff Avails Himself of DHS TRIP to Challenge His Alleged Placement on the No Fly List, his APA and Due Process Claims are Barred and are Not Ripe for Review.

Over two years have elapsed since Plaintiff was denied boarding and yet he has failed to avail himself of the Congressionally-mandated process — DHS TRIP— that would provide him with the relief he seeks, i.e., removal from his alleged placement on the No Fly List. Until Plaintiff does so, his claims are not ripe. *See* 13B Charles A. Wright & Arthur R. Miller, *Fed. Practice & Proc.* § 3532.6 (3d ed. 2004) ("[R]ipeness may be used to express the exhaustion principle that administrative remedies should be tried before running to the courts.").

Ripeness occurs only when a dispute is definite and concrete. *See Ostergren v. Cuccinelli***,** 615 F.3d 263, 288 (4th Cir. 2010). Ripeness cannot, however, occur when "problems such as the inadequacy of the record . . . or ambiguity in the record . . . will make a case unfit for adjudication on

[7] Inter-agency collaboration is precisely the point of centralizing and sharing the contents of the TSDB and the No Fly and Selectee Lists. Indeed, the lack of this kind of centralized information sharing was specifically cited as a government failing by the 9/11 Commission. *See* 9/11 Comm'n Report, Exec. Summary, at http://govinfo.library.unt.edu/911/report/911Report_Exec.htm ("The missed opportunities to thwart the 9/11 plot were also symptoms of a broader inability to adapt the way government manages problems to the new challenges of the twenty-first century. Action officers should have been able to draw on all available knowledge about al Qaeda in the government. Management should have ensured that information was shared and duties were clearly assigned across agencies, and across the foreign-domestic divide.").

the merits," *Ostergren*, 615 F.3d at 288 (quoting *Scott v. Pasadena Unified Sch. Dist.,* 306 F.3d 646, 662 (9th Cir. 2002)) (internal quotations omitted); *Reg'l Mgmt. Corp. v. Legal Servs. Corp*., 186 F.3d 457, 465 (4th Cir. 1999) (considering the agency's interest in "crystallizing its policy before that policy is subject to review" and the court's interest in "avoiding unnecessary adjudication and in deciding issues in a concrete setting."). Without having allowed the redress process to run its course, the Court would be ruling on the hypothetical deficiencies of a process that the Plaintiff has not tested and would be without the benefit of the agency's expert assessment. Indeed, Plaintiff's refusal to avail himself of DHS TRIP also deprives him of standing. Plaintiff cannot be allowed to invoke the jurisdiction of this Court by refusing to avail himself of an existing administrative process that may redress his alleged harm. *See, e.g.*, *Shavitz v. City of High Point*, 270 F. Supp. 2d 702, 710 (M.D.N.C 2003) (where "Plaintiff has failed to use the process provided to him, he cannot show that he has suffered injury because of the insufficiency of the process provided[]"); *see also Vicari v. Ysleta Indep. Sch. Dist.*, 291 Fed. Appx. 614, 2008 WL 4111407, at *2 (5th Cir. Aug. 28, 2008) (a plaintiff "cannot ignore the [state remedy] process duly extended to him and later complain that he was not accorded due process"); *Wilson v. MVM, Inc*., 475 F.3d 166, 176 (3d Cir. 2007).

In addition to ripeness and standing, courts may require exhaustion as a prudential matter before a Plaintiff can seek judicial review. *See Patsy v. Bd. of Regents of State of Fla*., 457 U.S. 496, 501 (1982) ("[C]ourts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided."). When "Congress has not clearly required exhaustion, sound judicial discretion governs" whether or not exhaustion should be required. *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992) ("The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency

ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.").[8] The Fourth Circuit has considered three factors in determining whether to require administrative exhaustion:

> (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision;
> (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and
> (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.

Garcia-Bonilla v. Ashcroft, 89 Fed. Appx. 846, 848 (4th Cir. 2004) (unpublished); *see Noriega-Lopez v. Ashcroft,* 335 F.3d 874, 881 (9th Cir. 2003) (same).

Applying these principles, the Sixth Circuit dismissed the claims of a traveler who failed to exhaust her remedies through DHS TRIP. *See Shearson v. Holder,* 725 F.3d 588 (6th Cir. 2013), 2013 WL 3968800, at *5-7. The Sixth Circuit reasoned that an exhaustion requirement in this context promotes judicial efficiency, encourages administrative accuracy and creates an administrative record. *See id*. at *6. The same reasoning justifies rejection of Mr. Mohamed's claims here. He seeks to challenge the specific notice provided under, and procedures used in, a process which he refuses to go through and which may resolve his claims. While he postulates that the notice and process would be inadequate to address his claims and concerns, he does not dispute that this process could provide him with some of the relief he seeks.

This Court previously rejected the Federal Defendants' motion to dismiss on exhaustion grounds, relying in part on its conclusion that jurisdiction was vested in the Court of Appeals, who

[8] Although the Supreme Court decision in *Darby v. Cisneros*, 509 U.S. 137 (1993), held that courts may not impose exhaustion as a discretionary prerequisite for an APA claim when plaintiffs challenge an agency action that is otherwise final, the reasoning in *Darby* does not apply to the constitutional claims. *See id*. at 153-54. Darby also does not affect the ripeness or standing requirements. *See, e.g., Howell v. INS*, 72 F.3d 288 (2d Cir. 1995) (Walker, J., concurring) (reasoning that *Darby* did not affect ripeness analysis).

could decide what exhaustion was required.[9] Slip Op. at 17-18 ("The Court therefore declines to prevent review of plaintiff's due process claims by recognizing an exhaustion requirement that may or may not be imposed by the Court of Appeals."). The Fourth Circuit subsequently held that Plaintiff's challenges were not channeled exclusively to the Court of Appeals and expressed no opinion with respect to exhaustion. CTA Slip Op. at 5 & 6 n.2. DHS TRIP was mandated by Congress to redress the claims of travelers, and is intended to address claims like Mr. Mohamed's. It results in an expert administrative review of Plaintiff's claims and reconsideration, if appropriate, of his purported placement on a list. The *Shearson* court recognized that even if the DHS TRIP process were in fact deficient, Plaintiff should attempt the process he criticizes; to do so could afford him relief, remedy errors in the watchlisting process, or otherwise clarify or narrow the issues for judicial review. Requiring exhaustion in a context in which the administrative process could remedy an alleged harm promotes judicial efficiency by ensuring that individuals seeking review of matters that could be resolved at the administrative level do not "clog the courts with unnecessary petitions." *Kurfees v. INS*, 275 F.3d 332, 336 (4th Cir. 2001).[10]

This Court also cited *Chamblee v. Espy*, 100 F.3d 15 (4th Cir. 1996), where the Court held that agency action was already "final" and therefore subject to APA review before completion of an

[9] The Court also indicated that a TSA "order" would not necessarily result from exhaustion of the administrative process. This seems to be a factual error. Although not all TRIP inquiries result in a final order, those determination letters which conclude the redress process for persons alleging placement on a No Fly List are final orders of TSA and indicate that relief may be sought in the Court of Appeals under Section 46110. *See* Lynch Dec. ¶ 11. Plaintiff has argued that the letters are constitutionally defective because they do not reveal one's status with respect to the No Fly List, but even if Plaintiff were correct, the fact that the determination letters do not reveal status is not a reason why they are not TSA "orders."

[10] This evaluation necessarily implicates the Executive Branch's expertise in national security and intelligence matters. *See CIA v. Sim*s, 471 U.S. 159, 178 (1985); *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir.), cert. denied, 552 U.S. 947 (2007). The Supreme Court emphasized in *McCarthy*, 503 U.S. at 145, that "[e]xhaustion concerns apply with particular force when * * * the agency proceedings in question allow the agency to apply its special expertise."

administrative review process because the practical effect of delay would have been loss of the land in dispute regardless of the outcome of the administrative appeal. Here, on the contrary, the redress process could accomplish at least part of what Plaintiff seeks – reconsideration of his alleged placement on a list. The other part of what Plaintiff seeks – a more robust process – is more easily reviewed by a court in light of the specific process he may receive.

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

Plaintiff's procedural due process claim also fails on the merits. Plaintiff claims that the Federal Defendants are denying him procedural due process by not providing "a constitutionally sufficient legal mechanism for challenging his [alleged] inclusion on the No Fly List," TAC ¶ 63. But the redress process available through DHS TRIP is constitutionally sufficient to address Plaintiff's claims, given the limited private interest at issue, the profound government interest in protecting the security of civil aviation, and the negligible value of additional measures given the robust internal review of highly sensitive information by experts tasked with protecting national security.

"[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal citation omitted). Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id*. (internal citation omitted). "[A]ssessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected.'" *Jones v. Flowers*, 547 U.S. 220, 229 (2006). In cases involving national security and the possibility of terrorist activities, the government's interest is at its zenith. "[N]o governmental interest is more compelling than the security of the Nation." *Haig*, 453 U.S. at 307;

see also Wayte v. United States, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning."). The fundamental requirement of due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Plaintiff alleges that he is entitled to "meaningful notice of the grounds for his inclusion on a government watch list, and an opportunity to rebut the government's charges and to clear his name." TAC, ¶ PRAYER FOR RELIEF. Due process procedures may vary "'depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). At bottom, the due process evaluation "is flexible and calls for such procedural protections as the *particular situation demands*." *Mallette v. Arlington Cnty. Emps' Supplemental Retirement Sys. II*, 91 F.3d 630, 640 (4th Cir. 1996) (emphasis added) (internal citations omitted). In this case, DHS TRIP provides sufficient due process to Plaintiff, particularly in light of the compelling national security concerns related to the No Fly List and the fact that there is no constitutional right to fly. *See Gilmore,* 435 F.3d 1125. Plaintiff's refusal to avail himself of that due process, however, is outside the control of the government.

In evaluating whether the government has provided sufficient due process, the Court should consider three factors: (1)"'the private interest that will be affected by the official action'"; (2) "'the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards'"; and (3) "'the Government's interest,'" including the function involved and the fiscal and administrative burdens that the

additional or substitute procedural requirements would entail. *Gilbert*, 520 U.S. at 931-32 (quoting *Mathews*, 424 U.S. at 335). Because Plaintiff has no constitutional right to travel by airplane or any single mode of transportation, and because DHS TRIP provides sufficient process to review the government's actions, DHS TRIP satisfies the requirements of procedural due process.

A. Plaintiff Has Not Articulated a "Private Interest" That Requires More Process Than What DHS TRIP Provides.

Plaintiff asserts that he has a liberty interest in "being able to return to the United States;" in "traveling by air like other American citizens," and in being "free from false governmental stigmatization as a terrorist." TAC ¶ 62. Because none of these interests was infringed, Plaintiff has failed to plead the deprivation of a cognizable protected interest.

Plaintiff alleges that Federal Defendants, by allegedly denying him the right to fly, have denied him the right to enter the United States. As explained above, however, Plaintiff was never denied entry into the country. On the contrary, he successfully reentered the United States. And even if he were at some point in the future to be denied the use of a particular mode of transport, he has no constitutional right to travel by a preferred mode of transportation. *Gilmore,* 435 F.3d at 1136. Nor is there a right to international travel; such travel is "subordinate to national security and foreign policy considerations." *See Haig*, 453 U.S. at 306. Indeed, the freedom to travel internationally is simply an aspect of the liberty protected by the due process clause, and the restrictions on international travel are permissible unless "wholly irrational[.]" *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978). Even in the context of interstate travel, a more heavily protected interest, courts have repeatedly held that there is no right to any particular means of travel, even if the most convenient means of travel is restricted. *See League of United Latin Am. Citizens*, 500 F.3d at 534 (holding that there is no protected right to a particular mode of transportation);

Matthew v. Honish, 233 Fed. Appx. 563, 564 (7th Cir. 2007); *Gilmore,* 435 F.3d 1125 (holding there is no right to air travel)*; Miller v. Reed,* 176 F.3d 1202 (9th Cir. 1999) (no right to drive); *see also Town of Southold v. Town of E. Hampton*, 477 F.3d 38 (2d Cir. 2007)("Travelers do not have a constitutional right to the most convenient form of travel"); *Cramer v. Skinner,* 931 F.2d 1020, 1031 (5th Cir. 1991) (same); *City of Houston v. FAA,* 679 F.2d 1184 (5th Cir. 1982) (same).

Plaintiff has also not been stigmatized. TAC ¶ 62. Procedural due process protections apply to reputational harm only when a plaintiff suffers stigma from governmental action plus alteration or extinguishment of "a right or status previously recognized by state law." *Paul v. Davis*, 424 U.S. 693, 711 (1976). This is known as a "stigma-plus" claim. *See Green v. TSA*, 351 F. Supp. 2d 1119, 1129-30 (W.D. Wash. 2005). First, there is no allegation that the Government publicly disclosed Plaintiff's alleged status on the No Fly List.[11] Indeed, this Court has previously rejected the Plaintiff's stigma-plus claim, at least as it applies to his alleged inclusion on the No Fly List. *See* Slip Op. at 15. The same analysis justifies rejection of his latest articulation of the stigma-plus claim. Moreover, the Constitution contains no reference, implied or otherwise, to a right to travel by plane. As a result, Plaintiff cannot meet the standards required for a stigma-plus claim. *See Green*, 351 F. Supp. 2d at 1130 (rejecting plaintiffs' claim that delayed boarding due to mistaken association with the No Fly List sufficed for stigma-plus claims). The *Green* court held that plaintiffs could not make out a stigma-plus claim, because they did "not have a right to travel

[11] Plaintiff's perceived inability cannot constitute public stigma because such information is not even shared with the individual who is denied boarding. Indeed, pursuant to the government's current "*Glomar*" policy, government officials do not confirm or deny whether an individual is in the TSDB, or on the No Fly or Selectee subset lists. Guiliano Dec., ¶¶ 13-17; Piehota Dec., ¶¶ 21-23, 32; Lynch Dec. ¶¶ 8, 10. It is also notable that Plaintiff himself has been actively publicizing his alleged inclusion on the No Fly List. *See* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012107042.html (last visited May 23, 2011). Although Plaintiff speculates that unspecified "listed persons" are "regularly" told that they are on the No Fly List, *see* TAC ¶ 29, these allegations are unsupported and conclusory, and are contradicted by established policy and practice.

without any impediments"; because "burdens on a single mode of transportation do not implicate the right to interstate travel"; and because plaintiffs "have not alleged any tangible harm to their personal or professional lives that is attributable to their association with the No-Fly List, and which would rise to the level of a Constitutional deprivation of a liberty right." 351 F. Supp. 2d at 1130. Because the same is true here, Plaintiff has failed to plead any cognizable stigma claim.

B. There is Little Risk of Erroneous Deprivation Given the Quality Controls Over the TSDB (and the even Smaller Subset of the No Fly List) and the Right to Appeal TSA Final Orders in the Court of Appeals.

Even if Plaintiff could plead a cognizable private interest, the government's current procedures for including individuals on the No Fly List protect against erroneous or unnecessary infringements of liberty. The TSDB is regularly updated; it is also reviewed and audited on a regular basis to comply with quality control measures. *See* Piehota Dec., ¶ 19. Nominations to the No Fly List are reviewed by TSC personnel to ensure that they meet the required criteria. *Id*. To the extent an individual is denied boarding, and wishes to complain, he or she can file a complaint with DHS TRIP, which then triggers a subsequent review of the individual's status. *See* Lynch Dec., ¶¶ 5-8; Piehota Dec. ¶¶ 30-33.[12] If the individual is unsatisfied with the TSA Final Order he or she receives, then the individual may file a Petition for Review against TSA in the relevant Court of Appeals. *See* Lynch Dec., ¶¶ 11, 13. *See Scherfen v. DHS,* 2010 WL 456784 (M.D. Pa. Feb 02, 2010), at *7 (noting the availability of review of a DHS TRIP determination).

[12] The Third Amended Complaint includes a variety of allegations about the size of the watchlist and procedures for review. TAC ¶¶ 24-30. Some of these allegations are outdated; none address the effectiveness of the redress process. *See generally* U.S. Gov't Accountability Office, GAO-12-476, *Terrorist Watchlist: Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts* (2012) (available at http://www.gao.gov/assets/600/591312.pdf) (detailing substantial efforts to improve watchlisting processes since 2009).

C. Protecting Terrorist Watchlisting Status, and the Underlying Information, is Crucial to the Government's Counterterrorism Efforts

Finally, consistent with established precedent, due process does not require disclosure of either watchlist status or the information underlying an individual's inclusion on the No Fly List. The DHS TRIP process thus allows a traveler to resolve a travel-related issue without burdening the government's aviation and national security interests. The government has a paramount interest in ensuring that the TSDB information used for screening or law enforcement purposes can be broadly shared among government agencies to maximize the country's counterterrorism efforts related to aviation and national security, without fear that such information will be disclosed whenever anyone cannot travel as he or she chooses.

Most of the derogatory information relied on by nominating agencies to the TSDB consists of operational facts derived from underlying international counterterrorism investigations or intelligence collection methods, which are generally classified to protect intelligence sources and methods. *See* Piehota Dec., ¶ 20. When separated from the classified means by which they were obtained, the identity information stored in the TSDB is deemed sensitive but unclassified for terrorist watchlisting, law enforcement, and screening purposes. This allows government officials to access TSDB data for law enforcement or screening purposes without compromising an investigation or intelligence collection methods. *Id*.

Assuming (*arguendo*) that the basis for Plaintiff's alleged inclusion on the list includes national security information, and that Plaintiff seeks access to such information, Plaintiff's position contravenes precedent holding that the Executive is primarily responsible for protecting such information, and for assessing the risks — like those discussed here — inherent in its disclosure. *See, e.g., Stehney v. Perry*, 101 F.3d 925, 931–32 (3d Cir. 1996) (finding that judicial review of the

merits of an Executive Branch decision to grant or deny a security clearance would violate separation-of-powers principles). As the D.C. Circuit explained in *NCRI v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001), 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 208–09.

Given the profound government interest in effective watchlisting, due process cannot require disclosure of one traveler's status on the No Fly List. As the events of recent years have demonstrated, "there can be no doubt that preventing terrorist attacks on airplanes is of paramount importance." *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006). To that end, Congress has required the establishment of a list of individuals who may be a threat to civil aviation and national security. 49 U.S.C. §§ 114(h)(3), 44903(j)(2)(A). Courts have recognized the vital role watchlisting plays in securing our nation. *See Tooley v. Bush*, No. 06-306 (CKK), 2006 WL 3783142, at *20 (D.D.C. 2006), *judgment aff'd, Tooley v. Napolitano*, 586 F.3d 1006 (D.C. Cir. 2009) (If the Government "were to confirm in one case that a particular individual was not on a watch list, but was constrained in another case merely to refuse to confirm or deny whether a second individual was on a watch list, the accumulation of these answers over time would tend to reveal [sensitive security information]."); *Bassiouni v. CIA*, 392 F.3d 244, 245-46 (7th Cir. 2004) (explaining that if the "CIA opens its files most of the time and asserts the state-secrets privilege only when the information concerns a subject under investigation or one of its agents, then the very fact of asserting the exemption reveals that the request has identified a classified subject or source").

Because disclosure of watchlist status would reveal operationally valuable information to potential terrorists, courts have upheld the Government's ability to withhold this kind of information.

See, e.g., *Tooley*, 2006 WL 3783142, at *20 (upholding Government's position that confirming or denying records indicating plaintiff's presence on watch lists would reveal SSI); *see also Bassiouni*, 392 F.3d at 245–46. Thus, for example, the Government is not required to confirm whether the names of particular individuals "appear on any watch lists," *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1037 (N.D. Cal. 2005); is not required to confirm or deny the existence of "watch list records concerning [a particular individual]," *Tooley*, 2006 WL 3783142, at *19, *20; is not required to produce information about an individual "which may or may not be in the TSDB," *Al-Kidd v. Gonzales*, No. CV 05-093, 2007 WL 4391029, at *8 (D. Idaho Dec. 10, 2007); and is not required to produce "information regarding individuals nominated to the TSDB by the FBI," *Raz v. Mueller*, 389 F. Supp. 2d 1057, 1062–63 (W.D. Ark. 2005); *Barnard v. DHS*, 531 F. Supp. 2d 131, 134 (D.D.C. 2008) (upholding withholding of records in response to plaintiff's FOIA request to "obtain records related to him that could explain why he has been detained, questioned, and/or searched in airports during and after his international trips beginning in January 2003").

In this case, by providing an administrative redress process that culminates in an opportunity for judicial review, without requiring the government to reveal information that ought not to be revealed, DHS TRIP balances the public and private interests fairly and provides a suitable substitute for an evidentiary hearing.[13] DHS TRIP gives an individual who has experienced difficulties during screening at airports, or was prohibited from boarding an airline, an opportunity to be heard at a meaningful time and in a meaningful manner by permitting that individual to complain with

[13] The Third Amended Complaint continues to allege that "TSC has no administrative process" to seek removal. TAC ¶ 32. As previously established and never disputed by Plaintiff, however, DHS TRIP is an interagency process that includes TSC, and as part of that process, TSC can and does in fact make a determination as to whether or not watchlisting is appropriate. *See* Piehota Dec. ¶¶ 26-32; Lynch Dec. ¶¶ 9-10.

specificity to the appropriate authorities: (1) about the difficulties that he or she has experienced; (2) to have his or her alleged No Fly List status reviewed; (3) to have appropriate changes made to applicable records; and (4) if unsatisfied, to seek judicial review. *See Mathews*, 424 U.S. at 333 (quoting *Armstrong*, 380 U.S. at 552); *see also Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004). This robust redress process, combined with the availability of judicial review, is sufficient to protect the limited private interests at stake.[14]

In sum, the DHS TRIP process offers sufficient due process to the Plaintiff, who wishes to resolve travel-related problems, without jeopardizing the government's compelling aviation and national security interests. Therefore, Plaintiff's procedural due process claim should be dismissed.

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

Plaintiff has also failed to plead a cognizable claim under the APA. Pursuant to the APA's limited waiver of sovereign immunity, a reviewing court must uphold an agency decision unless it is (1) arbitrary and capricious; (2) an abuse of discretion; or (3) otherwise not in accordance with law. *See* 5 U.S.C. § 706; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The scope of judicial review under this standard is a narrow and deferential one, and a court cannot substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiff's Third Amended Complaint appears to simply restate his Fourteenth and Fifth Amendment claims. TAC ¶ 60. He makes no allegation that supports a conclusion that Federal

[14] Although the Fourth Circuit found that Plaintiff's claims can be heard in district court, the fact that individuals may choose to bring these particular claims in the district court does not mean that they are required to do so. As a general matter, individuals may still obtain review in the court of appeals in order to challenge a specific redress decision issued through the DHS TRIP process as a result of a complaint for delayed or denied boarding by TSA. *See, e.g.*, *Arjmand v. DHS*, Dkt. No. 11-13, 15, No-12-71748 (9th Cir. filed June 2012) (certified index of record filed).

Defendants' actions are arbitrary and capricious, nor cites any authority for the proposition that the APA requires something more than what Federal Defendants have done in this context. Further, to the extent that Plaintiff wants the Court to establish new substantive and procedural rules to govern the TSDB, or its subset lists, the No Fly and Selectee Lists, Plaintiff's request is improper because matters of national security "are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Courts "owe considerable deference to [the Executive branch's] assessment in matters of national security[,]" *Bassiouni v. FBI*, 436 F.3d 712, 724 (7th Cir. 2006), and must be "reluctant to intrude upon the authority of the Executive" in such affairs. *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *see also Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 932 (D.C. Cir. 2003) (holding "that the courts must defer to the executive on decisions of national security. In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."); *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001); *Krikorian v. Dep't of State*, 984 F.2d 461, 464-65 (D.C. Cir. 1993).

The Supreme Court's decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), underscores the deference due to both the Legislative and Executive Branches in review of factual conclusions and legal matters that implicate national security, even when constitutional concerns are raised. *See id.* at 2727 ("But when it comes to collecting evidence and drawing factual inferences in [national security and foreign relations], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate.") (internal quotation

marks and citation omitted); *see also Rahman v. Chertoff*, 530 F.3d 622, 627-28 (7th Cir. 2008) ("modesty is the best posture for the branch that knows the least about protecting the nation's security and that lacks the full kit of tools possessed by the legislative and executive branches."). Plaintiff's requested relief — that the Court order Federal Defendants to remove him from any terrorist watchlist he may be on — plainly implicates sensitive national security Executive judgments that are entitled to deference.

CONCLUSION

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

Dated: September 27, 2013

Respectfully submitted,

STUART DELERY
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

DANA J. BOENTE
ACTING UNITED STATES ATTORNEY

DIANE KELLEHER
ASSISTANT BRANCH DIRECTOR
FEDERAL PROGRAMS BRANCH

AMY POWELL
ATTORNEY
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20001
TELEPHONE: (202) 514-3948
FAX: (202) 616-8202
E-MAIL: amy.powell@usdoj.gov

/S/
R. JOSEPH SHER
ASSISTANT UNITED STATES ATTORNEY
OFFICE OF THE UNITED STATES ATTORNEY
JUSTIN W. WILLIAMS UNITED STATES ATTORNEYS BUILDING
2100 JAMIESON AVE.,
ALEXANDRIA, VA. 22314
TELEPHONE: (703) 299-3747
FAX: (703) 299-3983
E-MAIL JOE.SHER@USDOJ.GOV

ATTORNEYS FOR THE DEFENDANTS

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

Gadeir Abbas
Council on American Islamic Relations
453 New Jersey Avenue, SE
Washington, DC 20003
Phone: (202) 742-6410
Fax: (202) 488-0833
gabbas@cair.com

DATED: SEPT. 27, 2013

/S/

R. JOSEPH SHER
ASSISTANT UNITED STATES ATTORNEY
OFFICE OF THE UNITED STATES ATTORNEY
JUSTIN W. WILLIAMS UNITED STATES ATTORNEYS' BUILDING
2100 JAMIESON AVE.,
ALEXANDRIA, VA. 22314
TELEPHONE: (703) 299-3747
FAX: (703) 299-3983
E-MAIL JOE.SHER@USDOJ.GOV