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

Motion for Reconsideration

Defendants respectfully move for reconsideration, or in the alternative, clarification of the Order dated August 6, 2014, directing the Defendants to provide an in camera submission. *See* ECF No. 125. The requested submission would not assist the Court in deciding the pending Motion to Dismiss because it is not an appropriate means to test the scope of the assertion of the State Secrets privilege, does not pertain to the claims in the Complaint, and does not address the appropriate legal standard for substantive due process. In the alternative, Defendants request clarification of the purpose of the requested submission so that Defendants may respond appropriately. For further explanation, the Court is respectfully referred to the memorandum of law accompanying the filing of this motion.

Defendants' counsel has conferred with Plaintiff's counsel, who indicated that he intends to file an opposition to this motion. Counsel for both parties agree to waive a hearing on this motion.

Dated: August 22, 2014

Respectfully submitted,

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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:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,	)	
Plaintiff,	)	
v.	)	Case No. 1:11-CV-0050
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, *et al*.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

Defendants respectfully move for reconsideration of the Court's Order dated August 6, 2014, directing the Defendants to provide an *in camera* submission. *See* ECF No. 125 ("Order").[1] In the alternative, Defendants respectfully request clarification of the Order and an extension of time to respond to the Order. The Order appears to direct the Defendants to provide an *in camera* submission either (1) in further support of their Motion to Dismiss on the grounds of the State Secrets Privilege, or (2) in support of a hypothetical motion for summary judgment on

[1] The order requires, in relevant part, that:

> [O]n or before September 7, 2014, the United States submit *in camera*, under seal, all documents, and a summary of any testimony, expert or otherwise, that the United States would present at an evidentiary hearing or trial to establish that inclusion on the No Fly List, as applied to United States citizens who are not under indictment or otherwise charged with a crime and who have not been previously convicted of a crime of violence, is necessary, and the least restrictive method available, to ensure the safety of commercial aircraft from threats of terrorism, and that no level of enhanced screening would be adequate for that purpose.

Order at 1. The order directs that the submission be *in camera* and under seal and does not explicitly indicate that the submission would also be *ex parte*. In light of settled Fourth Circuit case law on the submission of the classified information in support of a State Secrets Privilege, *see infra* at Part I, and the prior practice of Defendants in this matter, Defendants assume that the Court would accept such a submission through the normal practice of *ex parte* lodging, *see* ECF at 103, 113. If that is not the Court's intention, Defendants respectfully request such clarification so that Defendants can determine whether further review would be appropriate.

the merits of Plaintiff's claims, under a legal theory that Plaintiff has not articulated under a standard that parties have not briefed and that Defendants dispute. To the extent the Order requires an additional *in camera* submission in support of the state secrets privilege assertion and motion to dismiss, Defendants seek reconsideration on the ground that the required submission is not appropriate or necessary for evaluation of whether the state secrets privilege should be upheld or whether dismissal is necessary, in light of the information already provided to the Court on those issues. Defendants, however, stand ready to provide further explanation as to why exclusion of the privileged information warrants dismissal of the case. To the extent the Order requires an *in camera* submission regarding the merits of one of Plaintiff's claims, Defendants seek reconsideration because such a process is premature, as the state secrets privilege assertion must first be evaluated in the context of Defendants' motion to dismiss; in addition, the Order raises a legal theory not asserted by Plaintiff in his Fourth Amended Complaint, and does not reference the appropriate legal standard for substantive due process.

If Defendants' motion for reconsideration on these grounds is denied, then Defendants respectfully request clarification concerning whether the requested *in camera* submission is intended to provide further support for Defendants' motion to dismiss on state secrets grounds; to address the merits of Plaintiff's substantive due process claim; or to address some other purpose altogether. Defendants also request an extension of time up to and including October 10, 2014 or 30 days after entry of an order on this motion, whichever is later, in order to prepare an appropriate response.[2]

[2] Counsel for Defendants conferred with Plaintiff's counsel about this Motion by telephone and email. Plaintiff intends to file an opposition to this Motion, but Plaintiff agrees to the submission of the Motion without a hearing.

ARGUMENT

The Federal Rules of Civil Procedure provide that "any order or other decision ... may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). The resolution of such motions is "committed to the discretion of the district court." *Am. Canoe Ass'n, v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) (citations omitted); *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1473 (4th Cir. 1991) (reconsideration permissible "as justice requires"). In making this determination, courts may consider but are not bound by those factors considered in reconsideration of a final judgment. *See id*. Courts have also held that "[a] motion to reconsider is appropriate when the court has obviously misapprehended a party's position or the facts or applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence." *Madison River Mgmt. Co. v. Business Mgmt. Software Corp.*, 402 F. Supp. 2d 617, 619 (M.D.N.C. 2005) (quoting *Fidelity State Bank v. Oles*, 130 B.R. 578, 581 (D. Kan. 1991)).

Here, because the Court's Order was issued *sua sponte* and the issues raised by the order have not been addressed by the parties in previous briefing or argument, the issues raised herein have not been previously before the Court for resolution. Rather, this motion is the first opportunity for Defendants to respond to the procedures proposed in the Order. Thus, this is not a request to "reevaluate the basis upon which [the Court] made a prior ruling[]," and Defendants are not "merely seek[ing] to reargue a previous claim." *United States. v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 977 (E.D. Va. 1997) (citation omitted).

I. The Proposed *In Camera* Submission Is Not an Appropriate Means to Evaluate an Assertion of the State Secrets Privilege and Motion to Dismiss.

As explained above, the Court's Order appears to seek either additional information in

support of the Government's state secrets privilege assertion and dismissal motion or the submission of classified substantive briefing on the merits of the claims. Insofar as the Court's Order relates solely to the Court's consideration of Defendants' assertion of the state secrets privilege and accompanying motion to dismiss, the Government of course stands ready to provide a further explanation as to how the privileged information at issue is directly at issue in litigating the pending claims and why exclusion of that information requires dismissal. The Government would be pleased to present a further brief on that question, by reference to the declaration it submitted, and addressing the legal theory and standard set forth in the Court's Order. Defendants respectfully submit, however, that the requested *in camera* submission is not an appropriate means to evaluate either Defendants' assertion of the privilege or the consequences of the privilege assertion.

To begin with, the submission required by the Order does not appear to be relevant to the threshold question raised by the state secrets privilege assertion: whether the Government has demonstrated that the information at issue in the privilege assertion is properly protected from disclosure—an inquiry which turns on whether harm to national security reasonably could be expected to result from disclosure of the privileged information. *See* Defs' Opp. to Pl.'s Mot. to Compel, ECF No. 102, at 6-9. The effect of the privilege assertion on the litigation or merits of any of Plaintiff's claims is not related to the threshold and distinct issue set forth in the state secrets privilege assertion as to whether harm to national security would result from the disclosure of information. *Id.*

Once the Court has determined that the information subject to the state secrets assertion should properly be protected from disclosure, the Court must then decide how, if at all, the case may proceed in light of the successful invocation of the privilege and the exclusion of the

privileged information. Mem. in Support of Defs' Mot. to Dismiss, ECF No. 105, at 2 ("Defs' MTD"). As to this inquiry, the Fourth Circuit has explained that "a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007); *see also Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010). As discussed at greater length in Defendants' Motion to Dismiss, dismissal in such cases may be required for several distinct but interrelated reasons—because the state secrets are so central to the case that litigating without them is impossible; because further litigation presents an unacceptable risk of disclosure; because a plaintiff may not be able to make out a prima facie case; or because a defendant may not be able to present evidence in support of a valid defense. *See* Defs' MTD at 3-4.

Here again, the information needed to decide these issues has already been provided to the Court in the classified declaration submitted for *in camera, ex parte* review in support of the privilege assertion. Defendants asserted the state secrets privilege over information that Plaintiff sought to compel disclosure of through discovery and explained in the motion to dismiss how the very nature of Plaintiff's claims and Defendants' likely defenses necessarily implicate information subject to the state secrets privilege. *See* Defs' MTD at 4-5. Like the Court of Appeals in *El-Masri* and *Sterling*, this Court should be able to readily determine from the nature of the claims in the case that further litigation presents a reasonable danger of exposing the privileged information. To the extent the Court requires a further explanation of how the privileged information would be implicated by further proceedings—particularly under the legal theory and standard set forth in the Court's Order (which Defendants dispute)—Defendants

would be pleased to address that issue in a supplemental *ex parte* brief in support of its motion to dismiss. However, the Court's Order requires an *in camera* submission that goes well beyond that specific purpose and that is not necessary for the Court to find that dismissal is appropriate in this case. To satisfy one of the various grounds for dismissal under the state secrets doctrine, it is sufficient to demonstrate that further litigation of Defendants' defenses (and Plaintiff's claims) risks or requires disclosure of the privileged information. *See* Defs' MTD at 3-4; *see also El-Masri*, 479 F.3d at 309–10 (describing various hypothetical defenses to plaintiff's claims that would require disclosure of state secrets to litigate); *Sterling*, 416 F.3d at 345-47 (discussing the nature of the evidence likely to be relevant); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (dismissal warranted where "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."). Clear Fourth Circuit precedent applying the state secrets privilege does not require the Government to submit classified merits briefing in order for a district court to determine whether the privilege should be upheld or the claims dismissed. Accordingly, an *in camera* submission of privileged documents, evidence and information that the Defendants may choose to rely upon should the case proceed to the merits is not necessary for the Court to determine that the categories of properly privileged information already identified and explained in detail in the current record foreclose the possibility that this case could be adjudicated without risking or requiring the disclosure of privileged information.[3]

[3] Defendants also note that a the very nature of the information requested in the Court's Order—information "establish[ing] that inclusion on the No Fly List … is necessary, and the least restrictive method available, to ensure the safety of commercial aircraft from threats of terrorism, and that no level of enhanced screening would be adequate for that purpose"—demonstrates that the privileged information is squarely at issue and, indeed, would require the presentation of information that is not properly the subject of litigation, including, among other things, current intelligence regarding the nature and scope of the threats to civil aviation and the means by which the United States seeks to address those threats.

Further, the Fourth Circuit has made clear that a court should not engage in more *ex parte* review of classified information than is necessary to evaluate the assertion of the state secrets privilege. In general, "once a formal and proper claim of privilege has been made, district courts frequently can satisfy themselves of the sufficiency of that claim through the explanation of the department head who is lodging it." *Sterling*, 416 F.3d at 344. Although the Fourth Circuit left open the possibility that *in camera* review of all materials could be necessary in a case where the threat to national security was unclear, where a court reviewing a privilege assertion can satisfy itself that "the dangers asserted by the government are substantial and real, he need not—indeed, should not—probe further." *Id*. at 345.

Here, the Government has provided in its opposition to the motion to compel, motion to dismiss, and accompanying declarations, a thorough description of the harm to national security that would result from the disclosure of the privileged information. The additional submissions ordered by the Court would not assist in that determination. Indeed, in rejecting proposals for alternative procedures when national security information is at issue in a case, the Fourth Circuit noted that the Supreme Court has "plainly held that when 'the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.'" *See El-Masri*, 479 F.3d at 311 (*quoting Reynolds v. United States*, 345 U.S. 1, 10 (1953)); *Sterling*, 416 F.3d at 344 ("Once the judge is satisfied that there is a 'reasonable danger' of state secrets being exposed, any further disclosure is the sort of 'fishing expedition' the Court has declined to countenance. Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists.") (internal citations omitted).

For these reasons, if the Court has requested the *in camera* submission as part of its evaluation of the state secrets privilege and the consequences of the removal of privileged information from this case, then Defendants respectfully move the Court to reconsider its Order and to decide the Motion to Dismiss as previously submitted. At most, the Court should order supplemental briefing by Defendants (but not an evidentiary submission) to address the specific question of the consequences of the state secrets privilege assertion under the theory of substantive due process set forth in the Court's order (which Defendants would be pleased to provide, even though they dispute the correctness of the legal theory articulated by the Court).

II. If Intended to Permit Evaluation of One of Plaintiff's Claims on the Merits, the Court's Order is Premature and Does Not Relate to the Plaintiff's Claims as Pleaded or as Framed When Defendants Moved to Dismiss Those Claims and When the Fourth Circuit Dismissed the Transfer of the Case Under 49 U.S.C. § 461110.

Insofar as the Court's Order is directed at litigating one of Plaintiff's claims on the merits, Defendants also seek reconsideration.[4] The Court's Order appears to reframe Count I of the Fourth Amended Complaint—Plaintiff's reentry claim—as a substantive due process challenge to the existence of a No Fly List with respect to a certain category of U.S. persons. Plaintiff has never argued for, and Defendants have never read his complaint to allege, a facial challenge to the No Fly List. Indeed, it has been clear from the beginning of this case that Plaintiff is asserting an as-applied challenge to his purported placement on the No Fly List as a result of his inability to fly. Plaintiff has never challenged the relevant statutes authorizing the establishment of the No Fly List as unconstitutional, but instead contended that ways in which he was not permitted to fly, allegedly as a result of the administration of the List, were unlawful. *See* Fourth Am. Compl. at

[4] As a threshold matter, to the extent national security information subject to the state secrets privilege is at issue in litigation, clear-cut Fourth Circuit authority governing the state secrets doctrine does not contemplate an *ex parte, in camera* submission in order to address the merits of Plaintiff's claims but, rather, to evaluate the assertion of the state secrets privilege. *See, e.g., Sterling*, 416 F.3d at 345; *see also Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (discussing circumstances in which a case may be "dispose[d] of the merits of a case on the basis of *ex parte, in camera* submissions); *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995), *vacated on jurisdictional grounds by* 525 U.S. 471 (1999).

Prayer for Relief (seeking removal from a watchlist and a name-clearing hearing). Consequently, Defendants respectfully request that the Court reconsider its Order because such a reframing of Plaintiff's Complaint should first be the subject of further dispositive motion briefing, which would set forth Defendants' compelling jurisdictional and non-jurisdictional arguments for dismissal. Additionally, the Court should also require Plaintiff to seek leave to re-plead so as to allow Plaintiff to make clear the nature of his claim.

The Fourth Amended Complaint (like all previous versions of the Complaint) appears to challenge Plaintiff's placement on the No Fly List. This claim, on the face of the Complaint and in the briefing, has never been presented as a facial challenge to the No Fly List or to the Government's choice of security measures, including whether alternative security or screening measures would satisfy the Government's interests. Count I of the Complaint makes a claim based on "the right to citizenship under the Fourteenth Amendment" and pleads that Mr. Mohamed was improperly denied entry to the United States and that Defendants "have substantially burdened his fundamental right to return to the United States." *See* Fourth Am. Compl. ¶¶ 55-59.

The Court granted in part and denied in part the Defendants' Motion to Dismiss a previous version of this claim in Plaintiff's Third Amended Complaint. The Court dismissed Plaintiff's claim as it related to past actions, reasoning that "the four to five-day delay that Mohamed experienced in his ability to reenter the United States did not unduly burden his right of reentry and therefore, as a matter of law, did not constitute a constitutional deprivation." Mem. Op., ECF No. 70, at 27. The Court also found, however, that "Whether Mohamed's alleged disabilities as a result of his alleged inclusion on the No Fly List unconstitutionally burden the exercise of his right of exit and reentry cannot be decided at this stage as a matter of law." *Id.*at

28.[5]

After the Court's ruling, Plaintiff amended his Complaint, but still has not explicitly made a substantive due process claim presenting a facial challenge to the No Fly List, much less a substantive due process claim based on a denial of a right to travel. Even if the Court views Plaintiff's Fourth Amended Complaint as stating such a substantive due process claim despite explicitly being framed otherwise (*see* Mem. Op. at 26 ("Count I['s reentry claim] is, in essence, a substantive due process claim.")), there is no basis for reframing it as a challenge to anything other than a denial of Plaintiff's *own* alleged right to return, as the Complaint explicitly states. Accordingly, the only question posed by the Complaint is whether *Plaintiff's* alleged placement on a list could result in *Plaintiff* being unfairly denied entry to the United States, and if so, whether such a denial would infringe an alleged fundamental right to return in violation of substantive due process. If Plaintiff had pleaded a substantive due process claim along the lines the Court envisions the Defendants now addressing, Defendants would have had a compelling motion to dismiss on 12(b)(6) grounds. *See* Part III (discussing the appropriate standard for evaluating a substantive due process claim).

Moreover, the Complaint claims that Plaintiff's alleged placement on the No Fly List was unconstitutional as applied to him; it does not make the much broader claim that the Government cannot maintain such a list at all or, as the Court suggests in its Order, that the Government cannot maintain such a list of "United States citizens who are not under indictment or otherwise charged with a crime and who have not been previously convicted of a crime of violence." The standard for showing the facial unconstitutionality of a federal statute is quite high, and had such a facial claim been asserted by the Plaintiff, Defendants would have marshalled additional

[5] The Court also has stated that the No Fly List burdens a liberty interest in international travel generally, *see* Mem. Op. at 17-19, but did not conclude as a matter of law that such a deprivation constituted a deprivation of a fundamental right within the meaning of substantive due process, *see id.* at 28.

arguments for a 12(b)(6) motion. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] facial challenge must fail where the statute has a 'plainly legitimate sweep.'"); *United States v. Moore*, 666 F.3d 313, 318-319 (4th Cir. 2012) ("Under the well recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application."). Likewise, Defendants' assertion of state secrets privilege and arguments for dismissal were based on the as-applied nature of Plaintiff's claims; as set forth in Defendants' motion to dismiss, evaluation of an as-applied challenge necessarily entails consideration of the specific reasons any action may have been taken with respect to Plaintiff. This is in contrast to materials related to Congressional and the Executive Branch's policy justifications for a No Fly List, as apparently envisioned by the August 6 Order—topics that Defendants' motion to dismiss based on the state secrets privilege assertion did not address because Plaintiff did not frame his claim as a broader facial challenge. *See* Defs' MTD at 8-11 (arguments for dismissal of Plaintiff's as-applied substantive due process claim regarding an alleged fundamental right to reenter the United States).

Finally, the claim reflected in the Court's Order raises significant new jurisdictional issues that neither this Court nor the Court of Appeals considered concerning the airline security measures used by the Transportation Security Administration ("TSA"). The Court of Appeals has exclusive jurisdiction over certain "orders" of TSA under 49 U.S.C. § 46110. As a general matter, Congress has charged the TSA Administrator with responsibility for civil aviation security, 49 U.S.C. § 114(d). The Administrator must "assess current and potential threats to the domestic air transportation system" and take "necessary actions to improve domestic air transportation security," including by providing for "the screening of all passengers and

property" before boarding to ensure that no passenger is "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." *Id.* §§ 44901(a), 44902(a), 44904(a), (e); *see also id.* § 114(e); § 44903(b) (requiring the promulgation of "regulations to protect passengers and property on an aircraft" from "criminal violence or aircraft piracy"); 49 C.F.R. §§ 1540.105(a)(2), 1540.107(a). TSA has established "Screening Checkpoint Standard Operating Procedures" ("SOPs") that govern the screening of passengers and property at airport security checkpoints. *See, e.g.*, *Blitz v. Napolitano*, 700 F.3d 733, 735-37 (4th Cir. 2012). Although the No Fly List is maintained by TSC (as a multi-agency entity housed within the FBI) rather than TSA, one of TSA's primary responsibilities is to ensure aircraft security by implementing the No Fly List; Congress has directed TSA to deny boarding to persons deemed a threat. 49 U.S.C. § 114(h)(1)-(3).

Thus, if the Court's Order is intended to construe Plaintiff's Complaint to plead a facial challenge to the establishment of the No Fly List and the constitutionality of the relevant statutes, this Court may well be without jurisdiction to consider any such challenge, and nothing in the prior decision of the Court of Appeals suggests otherwise. The Fourth Circuit held that this Plaintiff's claims could be addressed in district court rather than as a challenge to an order of TSA because it could not ascertain Congressional intent to channel No Fly List placement claims to the courts of appeal; according to the Fourth Circuit, challenges to an alleged inclusion on a list by TSC required consideration of actions by both TSC and TSA, and thus "the efficacy of [appellate] review is limited by [the] inability to directly review the TSC's actions [and] direct the agency to develop necessary facts or evidence." Case No. 11-1924, ECF No. 86, Order at 6-7 (May 28, 2013).

But a facial challenge to the No Fly List would not focus solely on Plaintiff's alleged

placement on the No Fly List. Instead, such a facial challenge would also attack the particular security measures authorized by Congress and chosen by TSA to ensure aviation security more generally. The relevant security regulations directly implicate TSA's statutory authority to deny boarding, *see* 49 U.S.C. §114(h); § 44903(j)(2)(C)(ii), and to establish and conduct screening procedures, *see* 49 U.S.C. 114(e), pursuant to rules established under TSA rulemaking authority in this area. *See generally* 49 U.S.C. §§ 114(*l*), 44903(b). If Plaintiff had made claims of this type, as suggested by the Court's Order, then Defendants would have a compelling argument that this Court does not have jurisdiction to consider these claims because such challenges must be brought directly in the Court of Appeals under 49 U.S.C. § 46110. *See Blitz*, 700 F.3d at 735-37; *see also Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254-56 (9th Cir. 2008) (holding that § 46110 requires challenges to TSA orders, like the Security Directive implementing the No Fly List, to be filed directly in the court of appeals); *Gilmore v. Gonzales*, 435 F.3d 1125, 1133 (9th Cir. 2006) (holding that a TSA Security Directive implementing the agency's airline passenger identification policy is a final order within the meaning of § 46110 that must be challenged in a court of appeals). At the very least, the agency action challenged would be inextricably intertwined with a TSA order, providing another basis for the action to be heard in the Court of Appeals. *See id.*; *Ligon v. LaHood*, 614 F.3d 150, 154-57 (5th Cir. 2010) (discussing the "inescapably intertwined" doctrine in reference to 49 U.S.C. § 46110 and collecting cases). Accordingly, although the Court of Appeals has concluded that this Court has jurisdiction to consider a challenge to Plaintiff's alleged placement on the No Fly List—as Plaintiff originally articulated his claim—the manner in which the Court's Order appears to frame Plaintiff's claim now squarely implicates TSA security measures and regulations, and such a challenge can be brought only in the court of appeals under 49 U.S.C. § 46110.

As a result, insofar as the Court's Order seeks to adjudicate Count I as a facial challenge to the No Fly List, Defendants respectfully request that the Court reconsider its Order, or require the Plaintiff to seek leave to re-amend the Complaint so as to clearly state the claim now being contemplated, and to permit dispositive briefing on such a claim (which has not yet occurred).

III. If Directed at the Merits of Plaintiff's Claims, the Court's Order for an *In Camera* Submission Prematurely Assumes the Appropriate Legal Standard for Evaluating a Substantive Due Process Challenge to the No Fly List.

Insofar as the Court's Order construes Plaintiff's Complaint as having raised a facial substantive due process challenge—or an as-applied challenge to a category of persons that seems to include Plaintiff—to the No Fly List, the Court should reconsider its Order because the Order assumes a substantive due process standard (i.e., "least restrictive method") that Defendants dispute, and the applicability of which has not yet been briefed or resolved by the Court. The parties have not briefed this issue (because it was not directly raised by the Complaint or any previously briefed issue), and it was not resolved in the Court's January 2014 opinion. Defendants respectfully request reconsideration of the Court's Order as it requires an *in camera* submission based upon a legal standard that Defendants dispute, and that has not had the benefit of briefing or argument.

The appropriate legal standard for a substantive due process claim is determined by the nature of the claim. "[T]he touchstone of due process is protection of the individual against arbitrary action of the government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845) (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)); *see also Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 150 (4th Cir. 2014). However, "[w]hile due process protection in the substantive sense limits what the government may do both in its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it

is legislation or a specific act of a government officer that is at issue." *Lewis*, 523 U.S. at 846 (internal citations omitted); *see also Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999).[6] Here, the No Fly List is a product of legislation, regulation, and Executive action, so the relevant legal standard depends upon how Plaintiff has framed his challenge. As noted above, Plaintiff's Complaint does not expressly set forth a facial, substantive due process challenge to the No Fly List.

If the Court construes Plaintiff's Complaint as having raised a facial, substantive due process challenge, Defendants believe that further dispositive motion practice is necessary. If the claim is construed as challenging Executive action, Plaintiff has not alleged any facts that would meet the antecedent requirement of behavior that "shocks the conscience." *See Lewis*, 523 U.S. at 846-47; *see also Snider Int'l Corp.*, 739 F.3d at 150 ("To give rise to a substantive due process violation, the arbitrary action must be 'unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." (quoting *Rucker v. Harford Cnty.*, 946 F.2d 278, 281 (4th Cir. 1991))).

Further, if the claim is construed as one in regard to both Executive action and legislation, Plaintiff has not alleged the deprivation of a fundamental right. There is no

[6] In the context of challenged legislation, a court must first determine whether the claimed violation implicates one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1998) (internal quotation marks and citations omitted). The Supreme Court instructed that a court must provide "a careful description of the asserted fundamental liberty interest," which it requires because the Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Id.* at 720-21. Second, if the claim involves such a fundamental right or liberty, "the government [may not] infringe … *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). If the claim does not involve a fundamental right or liberty, then the legislation in question is entitled to rational-basis judicial review. *Id.* at 728. In the context of challenged executive action, "only the most egregious official conduct … 'can properly be characterized as arbitrary or conscience shocking, in a constitutional sense.'" *Lewis*, 523 U.S. at 846-47 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992)). Only after addressing this "issue antecedent" should the court engage in the fundamental right/rational-basis analysis described above.

fundamental right to international travel. "[T]he *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States." *Haig v. Agee*, 453 U.S. 280, 306 (1981). "[T]he freedom to travel abroad … is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation." *Id.*[7] Moreover, insofar as Plaintiff alleges an inability to travel interstate by commercial aircraft, courts have held that there is no fundamental right to a particular mode of transportation, so allegations regarding an inability to fly domestically do not constitute an infringement upon the fundamental right to interstate travel. *See, e.g., League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 534 (6th Cir. 2007); *Matthew v. Honish*, 233 F. App'x 563, 564 (7th Cir. 2007); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38 (2d Cir. 2007); *Gilmore v. Gonzalez*, 435 F.3d 1125, 1136-37 (9th Cir. 2006); *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991). Thus, in the absence of a fundamental right, rational-basis review would apply, and not the "least restrictive method" review suggested in its Order.

Defendants therefore request that the Court reconsider its August 6 Order because the Order identifies an incorrect standard, not argued by the parties in prior submissions.

IV. In the Alternative, Defendants Move for Clarification and an Extension of Time for Making Any *Ex Parte* Submission.

If the Court declines to reconsider its Order for the reasons set forth above, Defendants

[7] In its order on Defendants' motion to dismiss, the Court quoted the Supreme Court's decision in *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964), to note that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Mem. Op. at 28. In its later decision in *Haig*, however, the Supreme Court distinguished *Aptheker*—which involved the revocation of a passport because of membership in the Communist party—by explaining that "[t]he protection accorded beliefs standing alone is very different from the protection accorded conduct." 453 U.S. at 305. The Supreme Court held that the statute at issue in *Aptheker* "sweep[s] unnecessarily broadly" because of the "tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe." 378 U.S. at 508, 514. So, while the basis for the travel restrictions at issue in *Aptheker* was beliefs, the primary basis for the travel restrictions at issue in *Haig*—which involved a plaintiff whose "conduct … present[ed] … [a] serious danger to the national security"—was conduct. 453 U.S. at 305-06. Here, a case challenging alleged placement on the No Fly List is much closer to *Haig*, but in any event, *Aptheker* does not require a heightened standard of review.

nonetheless seek clarification that the *in camera* submission is either (1) in support of the Motion to Dismiss on the grounds of the State Secrets Privilege (rather than a submission of the merits), or (2) intended to address substantive due process on the merits, as set forth in the Court's Order. Defendants also respectfully ask the Court to clarify if it requested the *in camera* submission for a different purpose altogether.

In addition, should the Court deny the motion for reconsideration for the reasons stated herein, Defendants respectfully request additional time to make such an *in camera* submission, specifically until October 10 or at least 30 days after the Court issues a ruling on this motion, whichever is later. Although Defendants already have begun the process of attempting to identify what information, if any, they could provide in response to the Court's Order, they will not be able to provide an appropriate response until the Court clarifies the purpose and expectations of its Order. In addition to needing clarification of the Court's expectations with respect to the Order, Defendants need additional time to compile any relevant privileged national security information from federal agencies and to coordinate among those agencies. This process requires interagency coordination and careful handling of sensitive national security information that is or would be the subject of various privileges in this matter, which is necessarily a time-consuming process. Defendants respectfully request up to and including October 10, 2014 to make the submission or 30 days after entry of an order on this motion, whichever is later.

Dated: August 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 22, 2014, I electronically filed the foregoing Opposition 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:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, *et al*., Defendants.	)	Case No. 1:11-CV-0050

[PROPOSED] ORDER

Having considered the submissions of the parties, it is hereby ORDERED that the Defendants' Motion for Reconsideration is GRANTED, and the Court's August 6 Order is VACATED.

Dated: _____ _____

U.S. DISTRICT JUDGE ANTHONY J. TRENGA