UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,

PLAINTIFF,

v.

ERIC H. HOLDER, *ET AL.*,

DEFENDANTS.

Case No. 1:11-CV-00050

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER THIS COURT'S AUGUST 6TH ORDER

Plaintiff, Gulet Mohamed, by and through the undersigned counsel, hereby respectfully submits his Opposition to Defendants' Motion for Reconsideration.

INTRODUCTION

The government has long operated the No Fly List under the impression that it was free to do what it pleases to those Americans placed on its watch list. This Court's Memorandum Opinion, however, made clear that this impression was incorrect, that there are real limitations on the unprecedented authority the government has given itself.

It is within this context that the government filed its motion to reconsider the Court's August 6th Order. Through its filing, the government hopes to avoid what it has never had to do: explain why placing Americans on the No Fly List makes us even an iota safer and why the obvious alternatives to it cannot be relied upon to protect passengers and planes.

But the reason this Court asked Defendants to proffer a summary of its evidence is simply to assist the Court in determining how it goes about resolving their state secrets-based motion to dismiss and Plaintiff's motion to compel. The Fourth Circuit expressly gives this Court this authority, and that authority's reason for existence is for cases like Gulet's, where the baselessness of the federal government's assertion of the state secrets privilege leaps off the pages of government filings.

This inquiry is particularly warranted here where it is not at all clear that the federal government even possesses the basic features of a constitutionally compatible explanation for why it has imposed the No Fly List onto Americans neither charged nor convicted of any crime. Contrary to Defendants' briefing, the state secrets privilege—which is the judiciary's common law doctrine—was never intended to provide the federal government with a blank check to usurp the rights of Americans in novel and profound ways.

Indeed, this deeper inquiry is warranted by the logical fallacy upon which the government built its No Fly List. The No Fly List presumes that there are Americans who are too dangerous to fly but not dangerous enough to be arrested. But there is no such person. If the government has evidence that an American poses a threat to an airplane, it should not be wasting its time and imperiling our safety by marching an American through the watch-listing bureaucracy. Rather, when it has evidence of wrongdoing, the federal government should make arrests. That is a much better way of preventing harm to passengers and planes.

There will be a time in this case where Plaintiff will be able to show that the government's reliance on the No Fly List actually diminishes our safety rather than enhances it. But for now, it is enough to make clear that this Court's August 6th Order is an appropriate exercise of its authority

to subject the federal government's limiting-principle-free assertion of the state secrets privilege to some scrutiny.

I. This Court Has the Authority to Review *In Camera* Materials the Government Claims to be Secret

Defendants have narrowly construed the authority of this Court to subject their assertion of state secrets to scrutiny. While Defendants' motion to reconsider regurgitates the same vague, boilerplate points they have made in prior briefings—that, for instance, the "very nature of Plaintiff's claims and Defendants' likely defenses necessarily implicate information subject to the state secrets privilege—these generalities are tantamount to the government asking this Court to just take their word for it. It is a good thing that the law of the Fourth Circuit clearly provides this Court with the authority to determine independently whether dangers to national security can reasonably be expected to follow as a result of litigating this case.

The Fourth Circuit has made clear that "[j]udicial involvement in policing the privilege is important." *Sterling v. Tenet,* 416 F. 3d 338 (4th Cir. 2005). It has also empowered district judges to make particularized assessments based on the unique wrinkles of the cases that come before it, explaining that "[w]hat is required to satisfy a district judge will depend on the circumstances of the case." *Id.* Indeed, the Fourth Circuit has noted that where "the danger to national security [is] sufficiently unclear" it may be "required" to conduct an "in camera review of all materials…to evaluate the claim of privilege." *Id.*

This Court has the authority to issue the order that it did. And as the following section demonstrates, a recently leaked document shows just how warranted this Court's scrutiny is.

II. This Court has an Extensive Factual Basis for Doubting the Propriety of the Government's Privilege Assertion

Plaintiff has long known that there was a document known as the Watchlisting Guidance which generally governed how Defendants operated its terrorist watchlist, of which the No Fly List is a subset. And Plaintiff sought to obtain that document in discovery. But Defendants argued vehemently, in their briefs and during oral argument, that "disclosure of the Watchlisting Guidance…could also cause significant harm to national security." Dkt. 102, 14-15. Recent events make clear that this Court has ample reason to doubt that assertion.

On July 23, 2014, less than a week after oral argument on the motions pending before this Court, The Intercept published the 2013 Watchlisting Guidance in full that Plaintiff's sought through discovery. Defendants had asserted the state secrets privilege over this document, but because it is now publicly available, this Court can consider it in its entirety.[1] In short, the government's accountability-free watchlisting bureaucracy is every bit as objectionable as one would expect it to be. Included among the many shocking details are the following:

(1) US persons can be placed in the TSDB without "concrete facts" to justify their placement
(2) Defendants' watchlisting infrastructure is built to allow mass profiling, giving a single executive branch official the unfettered authority to list entire categories of people at once
(3) Defendants intend their watchlist to be used by local police during routine traffic stops
(4) US persons can be placed on the watchlist as a result of the uncorroborated social media posts of others
(5) US persons can be placed on the watchlist if any immediate family member, an "associate," or if they are believed to have a "possible nexus" to terrorism (whatever that means)
(6) All nominations to the watchlist are "presumptively valid"

[1] Because of the size of the document—over 100 mbs—Plaintiff is linking to the article (http://goo.gl/q8DnVb) and the Watchlisting Guidance (http://goo.gl/djO6kb) as it appears on the publisher's website. These documents will also be submitted as part of Plaintiff's proposed Fifth Amended Complaint.

(7) US persons can be placed on the watchlist even if they are "acquitted" or their "charges are dismissed for a crime related to terrorism"

As much as anything else, the Watchlisting Guidance shows just how poorly conceived and inane Defendants' terrorist watchlisting bureaucracy is. And in addition to all of the other information showing that the No Fly List is actually used to coerce American Muslims into becoming informants, that it does not enhance airline safety, and that obvious alternatives exist, Defendants' Watchlisting Guidance makes clear that Defendants' privilege assertion simply goes too far and that, because of the particular circumstances of this case, warrants scrutiny.

III. Plaintiff's Challenge to the No Fly List is a Challenge to the Government's Authority to Include Innocent Americans on it

Though the briefing has made clear that Plaintiff's substantive due process challenge to the No Fly List regards more than the particular facts of his case, out of an abundance of caution and to avoid appellate issues, Plaintiff will file a Motion to Amend his complaint to clarify the scope of his challenge. Because the amendment simply clarifies the legal theory that Plaintiff is pursuing, such an amendment is appropriate at this stage of the case.

CONCLUSION

For the above reasons, this Court should deny Defendants' Motion for Reconsideration.

Respectfully Submitted,

_/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014 I caused the above to be sent electronically to all counsel of record.

__/s/_____

Gadeir Abbas