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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. ERIC H. HOLDER, JR., et al., *Defendants*.	Case 3:10-cv-00750-BR **DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT: PLAINTIFF KARIYE** **ORAL ARGUMENT REQUESTED** **UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL**

Pursuant to Fed. R. Civ. P. 56, Defendants hereby cross-move for summary judgment in their favor on Plaintiff Kariye's procedural due process and APA claims. The revised DHS TRIP process provided to redress inquiries relating to the No Fly List fully satisfies the requirements of the Constitution by providing for appropriate disclosure of information, where possible, and an opportunity to be heard, without compromising the paramount interest in protecting the national security. For the

same reasons, Defendants oppose Plaintiff's motion for summary judgment on his procedural due process claims and APA claims. A memorandum in support of Defendants' cross-motion and in opposition to Kariye's motion for summary judgment is filed concurrently herewith. The parties made a good faith effort through written correspondence and telephone conferences to resolve the dispute pursuant to LR 7-1 and have been unable to do so.

Dated: May 28, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs,* v. ERIC H. HOLDER, JR., et al., *Defendants.*	Case 3:10-cv-00750-BR **DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF KARIYE'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Government has taken concrete steps to balance the liberty of suspected terrorists with the serious national security concerns protected by the No Fly List. As with any procedural due process challenge, the Court is called upon to determine (i) what process is constitutionally required under the circumstances, (ii) whether the challenged government procedures satisfy the constitutional requirement, and (iii) assuming the challenged procedures are constitutional, whether the procedures were fairly applied to the particular plaintiff. The first question was addressed by the Court in its June 24, 2014 order. The second question is the primary subject of the consolidated brief filed today, and the third question is addressed here with respect to Plaintiff Kariye.

The Government determined that Mr. Kariye poses a continuing threat to civil aviation or national security, [redacted] The revised redress process carefully considered what information could be disclosed in order to provide Mr. Kariye with meaningful notice and opportunity to be heard regarding the basis for his inclusion on the No Fly List. He was informed of his status, the criterion under which he was listed, and [redacted] facts underlying that listing. The Government carefully considered his response and explanations and has determined that continued inclusion on the No Fly List is appropriate. The Constitution requires no more. The Court should grant Defendants' motion for summary judgment and deny Plaintiff's motion.

BACKGROUND

Defendants' Combined Memorandum in Opposition to Plaintiffs' Motion and in Support of Defendants' Motion for Summary Judgment ("Defs.' Summ. J. Mem.") describes in detail the background of the No Fly List, this case, and the development of new redress procedures applicable to U.S. persons who have been denied boarding due to their inclusion on the No Fly List. Those procedures have been applied to Mr. Kariye.

After the Court directed Defendants to conduct a substantive interim review of the Plaintiffs' inclusion on the No Fly List, *see* Dkt. No. 152, the Government reviewed the derogatory information underlying Mr. Kariye's placement on the No Fly List to determine whether inclusion was still appropriate and what information regarding his inclusion could reasonably be disclosed to him. *See* Grigg Decl. ¶ 46; Moore Decl. ¶ 18. On November 26, 2014, DHS TRIP notified Mr. Kariye of his status on the No Fly List and the basis for his listing. *See* Joint Stmt. Kariye ¶ 3 & Ex. A. Specifically, the DHS TRIP notification letter indicated that he was deemed a threat to civil aviation or national security because it was determined that Mr. Kariye "represent[s] a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government." *Id.* ¶ 4. The letter also included an unclassified summary of the basis for his listing.

This November 26 letter did not include any classified or otherwise privileged details that may have been considered with respect to Mr. Kariye's inclusion on the No Fly List. Joint Stmt. Kariye Ex. A. On December 16, 2014, Mr. Kariye submitted a response to DHS TRIP. Joint Stmt. Kariye ¶ 14 & Ex. B.

The agencies who administer the No Fly List considered Mr. Kariye's submission and on January 21, 2015, the Acting Administrator of TSA issued a final determination. *See* Joint Stmt. Kariye

¶ 15 & Ex. C. That final order of TSA included a statement that TSA considered Mr. Kariye's contentions but nonetheless determined that the inclusion was appropriate. *Id*. The final order affirmed that the January 21, 2015 letter did not include the full basis for the Administrator's decision and that it was necessary to withhold additional information in order to avoid harm to national security and law enforcement activities. *Id*. at 3.

ARGUMENT

The revised DHS TRIP process provides a meaningful opportunity for individuals on the No Fly List like Mr. Kariye to be heard concerning their inclusion on the No Fly List. DHS TRIP, as applied to Mr. Kariye, fully satisfies the requirements of due process, is consistent with case law governing disclosures of information where national security interests are implicated, and is squarely responsive to the Court's June 2014 order.

I. The Revised DHS TRIP Process Provides Meaningful Notice And An Opportunity To Be Heard.

As described in Defendants' Consolidated Summary Judgment Memorandum, due process is a flexible concept without rigid requirements that fit every context, and in civil, administrative matters concerning national security, the requirements of due process do not include live trials or application of the Federal Rules of Evidence. *See generally* Defs.' Summ. J. Mem. Rather, the law requires meaningful notice of the subject matter of the Government's concerns and a meaningful opportunity to be heard. *Id*. This Court's June 2014 Opinion also held that due process required the Government to consider certain mitigating measures where classified information was withheld. Dkt. No. 136 at 61–62.

The revised DHS TRIP process is reasonably calculated to provide U.S. persons denied boarding because of their status on the No Fly List with a meaningful opportunity to contest their inclusion. Accordingly, a finding that the revised DHS TRIP procedures were fairly applied to Mr. Kariye — *i.e.*, that Mr. Kariye received the benefit of a constitutionally adequate redress process — would foreclose Mr. Kariye's claim that he was entitled to additional process. *See Mathews v. Eldridge*, 424 U.S. 319,

344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (9th Cir. 2012) (en banc) (same). The contention that a fair process produced a result unsatisfactory to a particular plaintiff cannot form the basis for a procedural due process claim.

As described in Defendants' main brief, the revised DHS TRIP process comports with all of these requirements, and the procedures were properly applied to Mr. Kariye. First, the notification letter advised Mr. Kariye of his status, that he meets the statutory standard, and that he meets a particular substantive criterion for inclusion, namely, that he "represent[s] a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government." This describes the "reason" for his inclusion on the List and the "subject matter of the agency's concerns." *See Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012) ("*AHIF II*"); Dkt. No. 136 at 55–56.

The notification letter also includes an unclassified summary of the basis for his listing,

[redacted]

Mr. Kariye clearly understood the nature of the information provided and was given ample opportunity to challenge the basis for his listing. His counsel's DHS TRIP response itself demonstrates the meaningfulness of the opportunity provided. [redacted]

Both the notification letter and the final determination acknowledge that DHS TRIP considered additional information that could not be provided to Mr. Kariye without risking harm to national security, law enforcement activities, or privacy concerns of third parties. As established in Defendants'

[1] [redacted]

main brief, due process does not require the Government to choose between preventing a suspected terrorist from flying on a civilian aircraft or allowing a suspected terrorist to view sensitive and classified sources and methods. *See Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) ("The Constitution would indeed be a suicide pact if the only way to curtail enemies' access to assets were to reveal information that might cost lives." (internal citation omitted)).

II. Additional Procedures Are Not Required.

As explained above, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Kariye is, "in the generality of cases," reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court finds that it is, the due process inquiry is complete, and there is no reason to entertain Plaintiff's claim that he was entitled to additional procedures. But even if the Court were to consider Plaintiff's request for additional process, the claim would still fail on its merits. Plaintiffs reject the parameters previously set by the Court and attempt to relitigate the standard for due process, arguing for additional, novel procedures not required by this Court's order or by any relevant case law. But Mr. Kariye received all process to which he is entitled.

A. Mr. Kariye Is Not Entitled To Additional Notice.

Mr. Kariye argues that the notice provided during the DHS TRIP process is constitutionally deficient because, *inter alia*, it does not include "any of the Defendants' evidence against him," does not provide "full notice" or a "complete statement" of the reasons for inclusion, does not permit him the opportunity to cross-examine individuals with pertinent information, and relies on alleged "second- and even third-hand statements of several witnesses." *See* Kariye Summ. J. Mem. at 4–6. As described above, the notice provided to Mr. Kariye fully comports with the Court's order and applicable law, and his attempt to feign an inability to respond and to ferret out additional information about sensitive sources and methods should fail.

Plaintiff argues that he is entitled to "full notice" of the reasons for his inclusion on the No Fly List, but this argument ignores both the notice that he has received and this Court's order, which permits a "summary" and acknowledges that in some cases no information at all may be provided. *See* Dkt. No. 136 at 61–62. Mr. Kariye has been notified of the criterion under which he is included on the List (*i.e.*, the "reason" for his listing or the "subject matter of the agency's concerns," *see AHIF II*, 686 F.3d at 983) and a summary of the underlying factual basis, including any unclassified, non-privileged facts that have been segregated for disclosure. Grigg Decl. ¶ 46; Moore Decl. ¶¶ 13–14. Because No Fly List determinations are typically based on sensitive law enforcement and classified national security information, this summary necessarily may not reflect the complete factual basis for inclusion. *See* Joint Comb. Stmt. ¶ 18; Grigg Decl. ¶ 41; Steinbach Decl. ¶ 23; Moore Decl. ¶¶ 13–14. Nonetheless, the Government has considered the mitigating measures available to provide notice and disclosed what information it could in order to make the notice as meaningful as possible under the circumstances. That is all that is required by the Due Process Clause.

Similarly, Mr. Kariye complains that he did not receive "any evidence" supporting his inclusion on the No Fly List. *See* Kariye Summ. J. Mem. at 5–6. Presumably, this is a reference to original source materials, such as documents, as opposed to the [redacted] evidence the Government did provide him. The documents considered — and where possible, summarized — by the Government typically include classified national security or law enforcement privileged information. Steinbach Decl. ¶ 23. To the extent possible, in the interest of maximizing disclosure, Defendants have segregated unclassified, non-privileged statements and provided a summary that places the information in the overall context of the agency's reasoning. Undisclosed documents [redacted] implicate national security and law enforcement interests, are properly protected from disclosure, and

have not been disclosed. The Due Process Clause does not impose additional requirements for the production of original documents, particularly here, and particularly in light of the [redacted] disclosures already made. The question before the Court is not whether it is possible to conceive of additional disclosures but whether the notice that the Government determined it could provide — without threatening national security or law enforcement investigations — satisfies due process.[2] The notice provided in this case is a more-than-adequate description of the basis for the decision under the circumstances.

Mr. Kariye also argues that the Government is required to provide all potentially "exculpatory" information just as it would to a criminal defendant facing prison time. *See* Kariye Summ. J. Mem. at 6–7. As discussed in Defendants' main brief, inclusion on the No Fly List does not require the process due in criminal proceedings, and *Brady* and its progeny apply only in the criminal context. Moreover, even the existence of arguably "exculpatory" information would not give Plaintiff a due process right to access classified national security or law enforcement sensitive information, sources, and methods.

Here, the Government has provided Mr. Kariye an opportunity to present any evidence he deems relevant, including mitigating or exculpatory information regarding his prior statements or conduct, and he has done so. Defendants have segregated unclassified, non-privileged information and provided summaries that place such information in the overall context of the agency's reasoning. The Due Process Clause imposes no additional requirement.

B. Mr. Kariye Is Not Entitled To A Particular Form Of Live Hearing.

Plaintiff also demands a particular form of evidentiary hearing to rebut the agency's prediction of future threats to national security, including a live hearing with the right to cross-examine witnesses and

[2] The DHS TRIP process is not a vehicle for discovery and document requests. The Freedom of Information Act already provides a means for requesting agency records, and Plaintiffs have been free to utilize those procedures. Otherwise, any "error" in not providing any underlying documents with redactions is not pertinent to the due process issue where unclassified information concerning the No Fly List determination has been summarized.

a particularly high burden of proof. But such a hearing is not required by law, would add little value to the process, and reasonably could be expected to harm national security. *See* Defs.' Summ. J. Mem. Part V.C.

First, Mr. Kariye argues that he should be allowed to present additional information to explain himself, and he remonstrates that he should have the opportunity to test the credibility of witnesses and call his own witnesses. He is not entitled to an adversarial hearing. Setting aside clear law not requiring an adversarial hearing in order for due process to be satisfied, such a proceeding inherently would put at risk sensitive information, including sources and methods information. Plaintiff's desire to examine witnesses [redacted]. Moreover, Plaintiff has been able to put his own story into the record without a "live" hearing (and, notably, without subjecting Plaintiff to cross-examination and the potential for self-incrimination). Should Plaintiff have wished to present his own third-party "witnesses" by way of additional statements accompanying his, he could have done so through DHS TRIP, but chose not to. Mr. Kariye also could have provided additional substantive evidence [redacted] but chose not to.[3] Due process requires no more.

Finally, Mr. Kariye argues that the standard of proof is too low and that the Government should have to conclude that he is a threat by "clear and convincing evidence." Defendants' primary brief demonstrates why this demand is misplaced as a matter of law. *See* Defs.' Summ. J. Mem Part V.C. Indeed, this case presents a clear-cut example of why the standard should not be so extraordinary. [redacted]

[3] [redacted]

[redacted] These grounds alone warrant the conclusion that he may be a threat to civil aviation or national security sufficient to prevent him from accessing airplanes. The notion that this predictive conclusion about the threat he poses must be proved by "clear and convincing" evidence is squarely at odds with the predictive nature of the task. Due process requires no such standard.

C. Mr. Kariye Is Not Entitled To CIPA-like Proceedings.

For the same reasons explained in Defendants' main brief, Mr. Kariye is not entitled to the same kind of procedures applied in criminal cases pursuant to statutory law where classified information is at issue. *See* Defs.' Summ. J. Mem. Part VI.

D. The No Fly List Criteria Are Not Unconstitutionally Vague.

As applied to Mr. Kariye's case, the No Fly List criteria are not unconstitutionally vague. As discussed in Defendants' main brief, Mr. Kariye cannot demonstrate that the No Fly List criteria are impermissibly vague as applied to his own conduct, particularly in light of the disclosures made to him. TSA determined that Mr. Kariye represents a particularly identified threat and DHS TRIP identified the precise conduct (insofar as it could be disclosed) on which that assessment was based. A reasonable person in Mr. Kariye's position would know that the conduct described [redacted] both satisfies the applicable criterion and is conduct that the Government would inherently consider in making No Fly List determinations. In substance, this is exactly the type of information that reasonably supports the conclusion that would lead anyone to conclude that an individual poses a threat. In short, Plaintiff's counsel's protest that they do not understand why TSA concluded that Mr. Kariye poses a threat is disingenuous in light of the information provided to him.

III. If The Court Deems The Revised Process Insufficient, The Harmless Error Doctrine Warrants Judgment For Defendants.

To the extent that the Court finds any error at all in the process provided to Mr. Kariye, he must then show substantial prejudice as a result of the specific error found. *See AHIF II*, 686 F.3d at 998–90 (conducting a harmless error analysis and finding that the failure to consider additional summaries or clear counsel was harmless in that case). Even on the basis of the unclassified information here, there is ample reason to conclude that any "error" was harmless.

As it is rightly empowered to do, the Government has assessed, based on available information, that, solely for the purpose of preventing Mr. Kariye access to airplanes,[4] [redacted] *See* 49 U.S.C. § 114(h). The evidence shared with Mr. Kariye in this respect more than establishes a legitimate basis for the designation.[5]

Finally, while Mr. Kariye argues for the opportunity to participate in a live hearing, he has not put forward any evidence to support his allegations beyond the bare statements in his response letter. Indeed, he has not even offered his own sworn declaration, even for the purpose of moving for summary judgment. Accordingly, his assertions are entitled to no weight in this Court. There is no reason to believe that his testimony would alter the Government's reasonable suspicion that he poses a threat of committing a terrorist attack.

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[4] [redacted]

[5] To the extent necessary, full consideration of the harmless error doctrine would put at issue underlying classified national security information, which should not be subject to discovery or disclosure in this proceeding and should not be necessary to dismiss Plaintiff's procedural due process claims.

IV. Plaintiff's Claims Under The Administrative Procedure Act Should Be Rejected.

Judgment should also be entered for Defendants on Plaintiff's Administrative Procedure Act Claims for the same reasons given in Defendants' main brief.

CONCLUSION

For all of the reasons discussed above, the Court should deny Mr. Kariye's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process and APA claims.

Dated: May 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order concerning page length, as it comprises fewer than fifteen pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Brigham J. Bowen
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