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

TABLE OF CONTENTS

INTRODUCTION 1

STATUTORY AND REGULATORY BACKGROUND 3

PROCEDURAL BACKGROUND 13

ARGUMENT 14

I. THIS COURT LACKS JURISDICTION TO HEAR PLAINTIFF'S CLAIMS 14

A. Plaintiff's Claim That He Has been Denied the Right To Re-Enter the United States and Reside Therein Is Now Moot and Plaintiff Lacks Standing to Seek Future Injunctive Relief 15

B. Plaintiff's Claim Regarding His Right to Challenge His Alleged Placement On a Terrorist Watch List is Premature and Not Ripe 18

C. This Court Cannot Grant the Relief Plaintiff Seeks Regarding Notice and an Opportunity to Challenge His Alleged Placement on a Terrorist Watch List 20

i. TSA is a necessary and indispensable party that cannot be joined 21

ii. Final orders of TSA can only be challenged in The Court of Appeals 24

II. THE GOVERNMENT'S REDRESS POLICY IS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 18

America Cargo Transport v. U.S.,
625 F.3d 1176 (9th Cir. 2010) 16

Ammex, Inc. v. Cox,
351 F.3d 697 (6th Cir. 2003) 16

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 17

Bassiouni v. FBI,
436 F.3d 712 (7th Cir. 2006) 26

Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen,
586 F.3d 908 (11th Cir. 2009) 16

Blum v. Yaretsky,
457 U.S. 991 (1982) 16

Califano v. Aznavorian,
439 U.S. 170 (1978) 17

Camp v. Pitts,
411 U.S. 138 (1973) 25

Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 25

City of Houston v. FAA,
679 F.2d 1184 (5th Cir. 1982) 17

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 17

Clarke v. United States,
915 F.2d 699 (D.C. Cir. 1990) 15, 16, 17

Cramer v. Skinner,
931 F.2d 1020 (5th Cir. 1991) 17

Ctr. for National Sec. Studies v. U.S. Dep't of Justice,
331 F.3d 918 (D.C. Cir. 2003) 26

Department of Navy v. Egan,
484 U.S. 518 (1988) 26

Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.,
528 U.S. 167 (2000) 15, 16

Gilmore v. Gonzales,
435 F.3d 1125 (9th Cir. 2006) 17, 20

Haig v. Agee,
453 U.S. 280 (1981) 17, 26

Holder v. Humanitarian Law Project,
130 S. Ct. 2705 (2010) 3, 26

Ibrahim v. DHS,
538 F.3d 1250 (9th Cir. 2008) 19, 20, 24

Krikorian v. Department of State,
984 F.2d 461 (D.C. Cir. 1993) 26

League of United Latin America Citizens v. Bredesen,
500 F.3d 523 (6th Cir. 2007) 17

Lindsley v. Natural Carbonic Gas Co.,
220 U.S. 61 (1911) 26

Matthew v. Honish,
233 Fed. Appx. 563, 564 (7th Cir. 2007) 17

McDaniels v. U.S.,
300 F.3d 407 (4th Cir. 2002) 25

Miller Labs. v. Brown,
462 F.3d 312 (4th Cir. 2006) 19

Miller v. Reed,
176 F.3d 1202 (9th Cir. 1999) 17

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 25

Munaf v. Geren,
553 U.S. 674 (2008) 17

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.,
210 F.3d 246 (4th Cir. 2000) 23

O'Donnell v. Bond,
510 F. Supp. 925 (D.D.C. 1981) 13, 22, 24

Ostergren v. Cuccinelli,
615 F.3d *263 (4th Cir. 2006)* 18, 19

Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 25

Phillippi v. CIA,
546 F.2d 1009 (D.C. Cir. 1976) 12

Ragsdale v. Turnock,
841 F.2d 1358 (7th Cir.1988) 16

Rahman v. Chertoff,
530 F.3d 622 (7th Cir. 2008) 27

Republic of Phil. v. Pimentel,
553 U.S. 851 (2008) 23

Rio Grande Silvery Minnow v. Bureau of Reclamation,
601 F.3d 1096 (10th Cir. 2010) 16

Scherfen v. DHS,
No. 3:cv-08-1554, 2010 WL. 456784 (M.D. Pa. Feb. 2, 2010) 13, 17, 20, 24

Scott v. Pasadena Unified Sch. Dist.,
306 F.3d 646 (9th cir. 2002) 19

Shavitz v. City of High Point,
270 F. Supp. 2d 702 (M.D.N.C 2003) 19

Sima Products v. McLucas,
612 F.2d 309 (7th Cir. 1980) 13, 22, 24

Town of Southold v. Town of East Hampton,
477 F.3d 38 (2d Cir. 2007)..... 17

United States v. Hardy,
545 F.3d 280 (4th Cir. 2008) 15

Walter v. City of Chicago,
No. 91 C 6333, 1992 WL. 88457 (N.D. Ill., April 27, 1992) 19

Yashenko v. Harrah's NC Casino Co., LLC,
446 F.3d 541 (4th Cir. 2006) 21, 23

Zadvydas v. Davis,
533 U.S. 678 (2001)..... 26

FEDERAL STATUTES

5 U.S.C. § 706(2) 25

6 U.S.C. § 111(A) 4

6 U.S.C. § 111(B) 4

6 U.S.C. § 202 4

28 U.S.C. § 533..... 4

49 U.S.C. § 114..... 4

49 U.S.C. § 114(a) 5

49 U.S.C. § 114(b) 5

49 U.S.C. § 114(e)(1)..... 4, 5

49 U.S.C. § 114(h)(3) 5

49 U.S.C. § 114(h)(3)(A) 5, 21

49 U.S.C. §114(l) 5, 12

49 U.S.C. § 114(r) 7

49 U.S.C. § 114(r)(1) 7

49 U.S.C. § 114(r)(1)(c) 7

49 U.S.C. § 1486(a) 12

49 U.S.C. § 1486(a) 12

49 U.S.C. § 40101 13

49 U.S.C. § 40113 12

49 U.S.C. § 44901 12

49 U.S.C. § 44902 12

49 U.S.C. § 44903 12

49 U.S.C. § 44903(b) 5

49 U.S.C. § 44903(j)(2)(A) 5

49 U.S.C. § 44903(j)(2)(C) 10, 22

49 U.S.C. § 44903(j)(2)(C)(iii) 6

49 U.S.C. § 44903(j)(2)(G)(i) 6

49 U.S.C. § 44903(j)(2)(G)(ii) 6

49 U.S.C. § 44903(j)(2)(c)(iii)(I) 6

49 U.S.C. § 44909(c)(6) 6, 10, 22

49 U.S.C. § 44925(b)(1) 5

49 U.S.C. § 44926 10

49 U.S.C. § 44926(a) 10, 22

49 U.S.C. § 46110 ..... *passim*

49 U.S.C. § 46110(a) 21, 24

50 U.S.C. § 4040(a) 4

50 U.S.C. § 4040(d)(1) 4

Pub. L. No. 107-71, 115 Stat. 597 (2001) 4

Pub. L. No. 107-296, 116 Stat. 2135 (2002)
§ 403 5
§ 423 5
§ 424 5

Pub. L. No. 108-458, 118 Stat. 3638 (2004) 6

Pub. L. No. 109-295, 120 Stat. 1382 (2006) 7

Pub. L. No. 110-161, 121 Stat. 2069 (2007) 7

Pub. L. No. 110-329, 122 Stat. 3682 (2008) 7

Pub. L. No. 111-83, 123 Stat. 2170 (2009) 7

RULES AND REGULATIONS

8 C.F.R. § 235.1(b) 18

28 C.F.R. § 0.85(l) 4

49 C.F.R. § 1500.3 5

49 C.F.R. Pt. 1520 7

49 C.F.R. § 1520.5(b)(9)(ii) 10

49 C.F.R. § 1520.7 7

49 C.F.R. § 1520.9 7

49 C.F.R. § 1520.9(a) 8

49 C.F.R. § 1520.9(a)(2) 7

49 C.F.R. § 1520.11(a)(1) 8

49 C.F.R. § 1520.17 7

49 C.F.R. § 1560.201 ..... *passim*

49 C.F.R. § 1560.205(d) 11, 12

49 C.F.R. § 1560.207 ..... *passim*

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 19(b) 22

LEGISLATIVE MATERIAL

H.R. Rep. No. 107-296, at 53 (2001),
reprinted in 2002 U.S.C.C.A.N. 589 5

UNITED STATES CONSITITUTION

U.S. Const. art. III, § 2 15

MISCELLANEOUS

9/11 Commission Report, Executive Summary,
http://govinfo.library.unt.edu/911/report/911Report_Exec.htm 8

Charles A. Wright & Arthur R. Miller,
Fed. Practice & Proc. § 3532.6 (3d ed. 2004) 19

INTRODUCTION

In the aftermath of the September 11 terrorist attacks, Congress and the Executive Branch have devoted extensive resources to enhancing aviation security. Multiple federal agencies have worked together to strengthen the security of our nation, including by creating and utilizing a consolidated terrorist watch list, the Terrorist Screening Database ("TSDB"), to facilitate the identification by United States authorities of those individuals known or suspected of engaging in terrorist activity. Throughout this process, Congress and the Executive Branch have worked to balance the civil rights and liberties of the traveling public with the paramount need to ensure that air travel is safe and secure. For example, pursuant to statutory authority and Executive Branch action, individuals who believe they have been wrongfully placed in the TSDB can seek redress with the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP").

Plaintiff Gulet Mohamed is a naturalized United States citizen who alleges that he is on the government's No Fly List, a subset of the TSDB, and that as a result of that listing he was denied boarding on a flight to the United States. He argues that any infringement on his ability to fly into the United States from abroad is a denial of his constitutional right to re-enter the country, in contravention of his Fourteenth Amendment right to United States citizenship. Plaintiff further claims that Defendants have not provided him with a "fair and effective" mechanism to challenge his alleged inclusion on the No Fly List, and argues that Defendants' actions are therefore arbitrary and capricious. These claims for relief are now moot and should be dismissed, as Plaintiff has returned to the United States. To the extent, however, that Plaintiff challenges his alleged placement on the No Fly List or the Congressionally-mandated process

through which individuals may seek redress when they believe they have been placed on the No Fly List, that claim must also be dismissed.

By law, the Department of Homeland Security ("DHS") and the Transportation Security Administration ("TSA") are responsible for security measures surrounding transportation, including implementing the No Fly List, and, through DHS TRIP, taking the lead role in administering redress for travelers who have been delayed or denied airline boarding due to security screening by TSA. The DHS TRIP process culminates in determination letters issued by TSA that respond to complaints of denied or delayed boarding due to security screening by TSA. Those letters constitute final orders by TSA, whose Office of Transportation Security Redress ("OTSR") was designated by the DHS Secretary to be the lead agent managing DHS TRIP. Challenges to DHS TRIP determination letters by individuals alleging denied or delayed airline boarding must be filed in the United States Courts of Appeal, pursuant to 49 U.S.C. § 46110, because they are final orders of TSA. Likewise, challenges to the DHS TRIP process itself, codified at 49 C.F.R. §§ 1560.201-1560.207 as part of the recently implemented Secure Flight program, must be brought in the United States Courts of Appeal because the regulation itself constitutes a TSA final order.

In this case, Plaintiff has never availed himself of the DHS TRIP process. Accordingly, Plaintiff's challenges to both his alleged inclusion on the No Fly List and to the redress process itself are not ripe and should be dismissed. Plaintiff has also failed to include TSA or DHS as a defendant in this action even though both are necessary parties to grant the relief he seeks. Because TSA cannot be joined, however, Plaintiff's claims should be dismissed under Rule 19(b) of the Federal Rules of Civil Procedure.

Nor can the broader polices, practices, and procedures at issue here reasonably be considered arbitrary and capricious. In maintaining and managing the TSDB and its No Fly List subset specifically, the government is acting pursuant to legislation passed by Congress in the wake of the September 11, 2001 terrorist attacks to protect the security of the United States and air passengers. Repeated attempts by terrorists in the intervening years establish unequivocally that airplanes remain a primary target and that terrorists will attempt to exploit any perceived deficiencies in the air security system. To the extent that Plaintiff asks this Court to remove him from any terrorist watch list he may be on, Plaintiff seeks to involve the Court in second-guessing determinations made by the Executive Branch regarding national security risks imposed by particular individuals. As the Supreme Court has made clear, courts should avoid taking on such a role: "when it comes to collecting evidence and drawing factual inferences in [the national security context], the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (citation omitted). Accordingly, Plaintiff's claims, even if interpreted in the broadest way possible, must be dismissed.

STATUTORY AND REGULATORY BACKGROUND

At present, several different components of the federal government work together to secure the nation (and its airways) from terrorist threats. The Federal Bureau of Investigation ("FBI") has responsibility for investigating and analyzing intelligence relating to both international and domestic terrorist activities, and the National Counterterrorism Center ("NCTC") serves as the primary organization for analyzing and integrating intelligence relating to international terrorism and counterterrorism. *See* 28 U.S.C. § 533; 28 C.F.R. § 0.85(l); 50

U.S.C. § 4040(a)&(d)(1). DHS is primarily charged with "prevent[ing] terrorist attacks within the [U.S.]," and "reduc[ing] the vulnerability of the [U.S.] to terrorism." 6 U.S.C. § 111(A), (B). Within DHS, U.S. Customs and Border Protection ("CBP") is responsible for securing the United States border against terrorist threats, and TSA is responsible for transportation – including aviation – security. *See* 6 U.S.C. 202; 49 U.S.C. § 114. Finally, the Terrorist Screening Center ("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. All of these agencies are involved in the effort to stop known or suspected terrorists from boarding planes traveling to, from, or within the United States.

Creation of TSA After 9/11

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 created TSA within the Department of Transportation. The legislation charged TSA with overseeing the "security screening operations for passenger air transportation." *See* 49 U.S.C. § 114(e)(1). In enacting this law, and creating an agency tasked with aviation security, Congress legislated a "fundamental change in the way it approaches the task of ensuring the safety and security of the civil air transportation system" as a result of the "terrorist hijacking and crashes of passenger aircraft on September 11, 2001, which converted civil aircraft into guided bombs for strikes against the [U.S.] . . ." H.R. Rep. No. 107-296, at 53 (2001), *reprinted in* 2002

U.S.C.C.A.N. 589, 590. The new statute provided that the Administrator for TSA was to be an Under Secretary of the Department of Transportation. 49 U.S.C. § 114(a), (b).[1]

The TSA Administrator is responsible for "day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation under sections 44901 and 44935." 49 U.S.C. § 114(e)(1). Congress also tasked TSA with a number of duties, including the issuance of regulations with respect to screening passengers and securing commercial air travel. *See* 49 U.S.C. § 44903(b); 49 U.S.C. § 114(l).

TSA is required by statute to secure commercial air travel against the threat of terrorism including 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] individuals from boarding an aircraft." *Id.* § 114(h)(3)(A), (B); *see also* Piehota Dec., ¶ 2, 4. TSA is also specifically responsible for prescreening passengers against the No Fly and Selectee Lists. *See* 49 U.S.C. § 44903(j)(2)(A). 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 watch list matching functions previously conducted by aircraft operators. TSA has been transitioning to the Secure Flight program since January 2009. Secure Flight was fully

[1] TSA was subsequently transferred to the Department of Homeland Security as part of the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, §§ 403, 423, 424, 116 Stat. 2135, 2178, 2184 (2002). Within DHS, the Under Secretary of Transportation for Security underwent a title change to Administrator of TSA, *see* 49 C.F.R. § 1500.3, and now is also known as the Assistant Secretary of Homeland Security for TSA, *see, e.g.*, 49 U.S.C. § 44925(b)(1).

implemented for all U.S. airlines on June 22, 2010 and for all covered airlines on November 23, 2010. Lynch Dec., ¶ 7 n.1.

As part of its prescreening functions, TSA is also required to provide redress to travelers who have been delayed or denied airline boarding. Specifically, 49 U.S.C. § 44903(j)(2)(C)(iii), enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638 (2004), requires the Assistant Secretary of Homeland Security 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 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).[2] A similar requirement is prescribed for international passengers. Under 49 U.S.C. § 44909(c)(6), the Secretary is required to "compare passenger information for any international flight to or from the United States against the consolidated and integrated terrorist watchlist maintained by the Federal Government before departure of the flight[]" and to "establish a timely and fair process for individuals identified as a threat" to appeal the determination to the Department and correct any erroneous information.

[2] 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 Transportation Security Administration 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).

Pursuant to these authorities, TSA provides redress to passengers through DHS TRIP, a process described in more detail below that was codified at 49 C.F.R. §§ 1560.201-1560.207 as part of Secure Flight.

Congress also directed TSA to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1)(c) (formerly § 114(s)). Such information is known as Sensitive Security Information ("SSI"), and TSA is authorized by Congress to determine whether particular material is SSI, and, if so, whether and to what extent it may be disclosed. *See id.*§ 114(r)(1); 49 C.F.R. Pt. 1520. As a general matter, SSI may only be disclosed to "covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT." 49 C.F.R. § 1520.9(a)(2); *see also* 49 U.S.C. § 114(r). For example, SSI may be released to covered individuals or entities (such as law enforcement agencies or airline or airport personnel) to "carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT." 49 C.F.R. § 1520.11(a)(1); *id.* § 1520.7 (defining covered persons).[3] The regulations impose on covered persons an express duty to protect the information. *See id.* § 1520.9. Among other things, the regulations specifically require that

[3] Section 525(d) of the Department of Homeland Security Appropriations Act, 2007, Public Law No. 109-295, § 525(d), 120 Stat. 1382 (Oct. 4, 2006), as reenacted by Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 522, 121 Stat. 2069 (Dec. 26, 2007); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 510, 122 Stat. 3682 (Sept. 30, 2008); and the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title V, § 510, 123 Stat. 2170 (Oct. 28, 2009) ("Section 525(d)"), permits the disclosure of certain SSI in civil discovery in federal court to a "party or party's counsel" under limited circumstances. *See id.* § 525(d). If Plaintiffs seek such access, Section 525 contains several statutory prerequisites that must be satisfied.

covered persons "[t]ake reasonable steps to safeguard SSI . . . from unauthorized disclosure[,]" and "[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS." *Id.* § 1520.9(a). Violation of these and related additional non-disclosure requirements "is grounds for a civil penalty and other enforcement or corrective action[.]" *Id.* § 1520.17.

Creation of the Terrorist Screening Center

In 2003, the President ordered the establishment of a governmental organization that would "consolidate the Government's approach to terrorism screening and provide for the appropriate and lawful use of Terrorist Information in screening processes." *See* Homeland Security Presidential Directive 6. Piehota Dec., ¶ 6. The creation of the TSC satisfied this Presidential Directive.[4] The creation of the TSC was driven by the administration's conclusion that the lack of intelligence-sharing across federal agencies had created vulnerabilities in the nation's security.[5] Before TSC, multiple terrorist watch lists were maintained separately in different agencies; the TSC has consolidated and centralized the terrorist watch lists, as the 9/11 Commission recommended. Piehota Dec., ¶¶ 5-6.

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[4] TSC is an interagency entity that was created through a Memorandum of Understanding entered into by the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of Central Intelligence in order to fulfill the requirements of HSPD 6. Piehota Decl., ¶ 2; Lynch Decl. ¶ 9. TSC is administered by the Department of Justice (through the FBI) and is staffed by government officials from a variety of agencies, including TSA, CBP, and the Department of State. Piehota Decl., ¶ 2.

[5] *See* 9/11 Commission Report, Executive Summary, available 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 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; Giuliano Dec., ¶ 6. Government agencies (such as members of the intelligence community and the FBI) nominate individuals to be included in the TSDB. Nominations require sufficient identifying information and certain minimum substantive criteria, including a "reasonable suspicion" based on the "totality of circumstances" that the individual is a known or suspected terrorist. Piehota Dec., ¶ 12; Giuliano Dec., ¶ 12. The substantive information supporting a TSDB nomination is known as the "derogatory information." Piehota Dec., ¶ 9; *see generally* Giuliano Dec., ¶¶ 7-8. The TSDB contains terrorist identity information (*i.e.*, name, date of birth, etc.). *See* Piehota Dec., ¶ 6, 24; Giuliano Dec., ¶ 7.

The TSDB only includes identifying information; it does not include the underlying derogatory information. Separating the classified derogatory information from the identifying information allows identifying information to be shared with government and law enforcement officials who may lack appropriate security clearances but who nevertheless need to be able to positively identify known or suspected terrorists who try to obtain visas, enter the country, board aircraft, or engage in other activity that may pose a risk to national security. *See* Piehota Dec., ¶ 13; Giuliano Dec., ¶ 9. Because intelligence is continually evolving, the composition of the TSDB, including the identifying information about known or suspected terrorists, is regularly updated. *See* Piehota Dec., ¶ 18; Giuliano ¶ 10.

No Fly and Selectee Lists

The No Fly and Selectee Lists are subsets of the TSDB. Piehota Dec., ¶ 15. The No Fly List is "a list of individuals who are prohibited from boarding an aircraft" and the Selectee List as "a list of individuals who must undergo additional security screening before being permitted to board an aircraft." *Id.,* ¶ 16. To be included on the No Fly or Selectee list, an individual must be on the TSDB and meet heightened criteria above the general reasonable suspicion standard for inclusion in TSDB. *Id.,* ¶ 10.

The government treats the No Fly and Selectee list criteria as SSI; as a result, neither the No Fly and Selectee list criteria, nor the implementation guidance, are publicly released. *See* 49 C.F.R. § 1520.5(b)(9)(ii); Piehota Dec., ¶ 17. There is no bar to including United States citizens or lawful permanent residents on either the No Fly or Selectee Lists. Piehota Dec., ¶ 9. If a person is denied boarding and wishes to file a complaint about that denial, he or she may do so with DHS TRIP, as explained below. *See* Piehota Dec., ¶ 26; Lynch Dec., ¶¶ 4, 5.

Redress Procedures for Travelers Denied Boarding

As discussed above, Congress required TSA to create a redress process for passengers who have been delayed or denied airline boarding due to TSA security screening. *See* 49 U.S.C. § 44903(j)(2)(C); 49 U.S.C. § 44909(c)(6). Congress also enacted 49 U.S.C. § 44926, as part of the legislation implementing the recommendations of the 9/11 Commission. This provision requires DHS, *inter alia*, to "establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were misidentified as a threat under the regimes utilized by the TSA, U.S. Customs and Border

Protection, or any other office or component of the Department of Homeland Security." *Id.* § 44926(a).

In February 2007, DHS launched DHS TRIP 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. By designation from the Secretary of DHS, TSA's OTSR, which predated the establishment of DHS TRIP, acts as DHS's lead agent managing DHS TRIP. *See* Lynch Dec., ¶ 4. As noted above, as part of its implementation of Secure Flight, TSA recently codified its passenger redress program for passengers who have been delayed or denied boarding as a result of TSA's passenger prescreening at 49 C.F.R. §§ 1560.201-1560.207.

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 or via e-mail or hard copy. *See* Lynch Dec., ¶ 6. If the applicable DHS component determines that the complainant is an exact or near match to an identity in the TSDB, the matter is referred to the TSC Redress Unit. *See* Lynch Dec., ¶ 9; Piehota Dec., ¶¶ 30-32; *see also* 49 C.F.R. § 1560.205(d).[6] To date, less than 1% of all DHS TRIP complaints relate to persons actually included in the TSDB (or by extension, the No Fly or Selectee Lists). *See* Lynch Dec., ¶ 9; Piehota Dec., ¶ 29.

[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.

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 whether the person should be removed entirely 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 thorough, accurate, and current information available." Piehota Dec., ¶ 30. The TSC Redress Unit makes a determination as to whether any adjustment in the individual's status, including a modification or removal, is required and informs DHS TRIP accordingly. For inquiries that involve complaints about delayed or denied boarding due to TSA security screening, DHS TRIP, in conjunction with TSA OTSR, 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). Pursuant to the government's current "Glomar" policy, the letter does not confirm or deny whether the individual is in the TSDB, or on the No Fly or Selectee subset lists. Piehota Dec., ¶ 32; Lynch Dec. ¶¶ 8, 10.[7]

The passenger redress program implemented by TSA pursuant to Congressional mandate, codified at 49 C.F.R. §§ 1560.201-1560.207, is subject to review only by a U.S. Court of Appeals pursuant to 49 U.S.C. § 46110, because the Secure Flight regulations were issued under 49 U.S.C. §114(l), well as 49 U.S.C. §§ 40113, 44901, 44902, and 44903, which are contained in

[7] "Glomar" refers to a "neither confirm nor deny" response. This response was first judicially recognized in the national security context, *see Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), which raised the issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*.

Part A of Subtitle VII of the Title 49 of the U.S. Code. *See, e.g.*, 49 U.S.C. § 46110 (providing that orders issued by the Administrator of TSA in whole or in part under certain sections of Title 49 (Parts A or B of Subtitle VII, or section 114(l) or (r)), are subject to review only in the courts of appeals); *Sima Prods. v. McLucas*, 612 F.2d 309 (7th Cir. 1980) (holding that a regulation that was subject to notice and comment rulemaking may be considered an order pursuant to 49 U.S.C. § 1486(a), 49 U.S.C. § 46110's predecessor statute); *O'Donnell v. Bond*, 510 F. Supp. 925, 928 (D.D.C. 1981) (holding that the definition of a final order under 49 U.S.C. § 1486(a) includes "procedures and regulations adopted . . . through informal notice-and-comment rulemaking[,]" and that challenges thereto must be brought in a federal court of appeals).

Likewise, the DHS TRIP determination letters that respond to complaints regarding delayed or denied boarding due to TSA security screening are final orders of TSA pursuant to 49 U.S.C. § 46110. *See* Lynch Dec. ¶ 11. Judicial review of such letters is available only in the Courts of Appeal. *See Scherfen v. DHS*, No. 3:cv-08-1554, 2010 WL 456784, at *11 (M.D. Pa. Feb. 2, 2010) (holding that DHS TRIP was established pursuant to "a statute encompassed by the jurisdictional grant conferred by § 46110 over security-related orders issued pursuant to statutory authority established in 49 U.S.C. §§ 40101 through 46507.").

PROCEDURAL BACKGROUND

The Plaintiff is a naturalized United States citizen who alleges he was denied boarding on a flight to the United States. *See* Verified Complaint ("Compl."), ¶ 1. Plaintiff asserts two claims for relief, one for an alleged Constitutional violation of the Fourteenth Amendment, and one for an alleged violation of the Administrative Procedure Act ("APA") with regard to his re-

entry into the United States. Compl., at 11-13. Plaintiff has not filed a complaint with DHS TRIP. *See* Lynch Dec. ¶ 13.

At the outset of this litigation, Plaintiff was located in Kuwait and wished to return home by traveling on commercial airlines. Compl., ¶ 1. 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 Defendants to allow him to return to the U.S., subject to "suitable screening procedures." *See* Compl., at 13. This Court held a hearing the same day, which was continued until January 20, 2011. *See* Dkt. # 6. On January 20, 2011, Defendants reported that the Kuwaiti government confirmed that Plaintiff would be on a flight to the United States that evening. *See* Dkt. # 9. The Court declined to enter a judgment, and instead ordered the parties to return to Court on January 21, 2011, if Plaintiff had not returned to the United States. As a result of the parties' efforts, Plaintiff returned to the United States on January 21, 2011.[8]

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR PLAINTIFF'S CLAIMS.

Plaintiff's claims should be dismissed because they are moot, lack ripeness, and the relief Plaintiff seeks cannot be granted by this Court. Because Plaintiff has been back in the United States since January 21, 2011, any claim relating to his right of re-entry is now moot. Further, to the extent that Plaintiff challenges his alleged placement on the No Fly List, his claim is not ripe because he has failed to avail himself of the redress process provided by TSA through DHS

[8] On January 31, 2010, counsel for Defendants called Plaintiff's counsel in order to determine Plaintiff intended to pursue his case in light of his return to the United States. Defendants' counsel has not yet heard back from Plaintiff's counsel.

TRIP. Finally, even after Plaintiff completes the DHS TRIP process, in order to challenge the outcome and the adequacy of that redress process, he must bring a claim in the Court of Appeals, pursuant to 49 U.S.C. § 46110.

A. Plaintiff's Claim That He Has Been Denied the Right To Re-Enter the United States and Reside Therein Is Now Moot and Plaintiff Lacks Standing to Seek Future Injunctive Relief.

In the first count of his Complaint, Plaintiff alleges that the government has denied him his right to reside in and re-enter the United States because he was denied boarding on a direct flight to the United States. *See* Compl., ¶¶ 32-34. Because Plaintiff has now returned to the United States and has made no credible allegation of certain, impending future injury, Plaintiff's Fourteenth Amendment claim is moot because there is no existing injury that the Court can redress.

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. *U.S. 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. U.S., 915 F.2d 699, 701 (D.C. Cir. 1990) (internal quotation marks omitted). Here, the Plaintiff has entered the United States, thereby mooting his Fourteenth Amendment claim.

Although there are exceptions to the mootness doctrine, none apply here. Plaintiff may argue that this is a case of voluntary cessation, which ordinarily will not moot a case unless it is clear that the allegedly wrongful behavior could not reasonably be expected to recur. *See Laidlaw Envtl. Servs*., 528 U.S. at 189. Although ordinarily "[c]ourts are understandably reluctant to declare a case moot based on the defendant's voluntary cessation of the challenged activity[,]" "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties." *Am. Cargo Transp. v. U.S*., 625 F.3d 1176, 1179, 1180 (9th Cir. 2010) (quoting *Ragsdale v. Turnock*, 841 F .2d 1358, 1365 (7th Cir.1988)). *See also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010); *Beta Upsilon Chi Upsilon Chapter at the Univ. of Fla. v. Machen*, 586 F.3d 908, 916-17 (11th Cir. 2009); *Ammex, Inc. v. Cox,* 351 F.3d 697, 705 (6th Cir. 2003).

Moreover, there is no additional relief the Court could order. It would be beyond the Court's power to order that Plaintiff always be permitted to board flights to the United States or to prescribe the screening and security procedures that should be applied to him, and Plaintiff does not appear to be seeking such future relief. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) (a plaintiff "who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."). Any future decisions about terrorist watch listing or screening are 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 generally* Piehota Dec. ¶ 18; Giuliano Dec. ¶ 10. Accordingly, Plaintiff's Fourteenth Amendment claim is moot because "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*, 915 F.2d at 701.

Finally, because Plaintiff cannot show immediate, certain denial of future injury, he does not have standing to seek injunctive relief regarding future travel. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (requiring "real and immediate threat of repeated injury")(citation omitted); *Scherfen*, 2010 WL 456784 at *13 (finding No Fly List claims moot).[9]

[9] While United States citizens have a right to re-enter the country, they do not have a constitutional right to re-enter by a specific mode of transportation. As an initial matter, there is no right to international travel, and such travel is "subordinate to national security and foreign policy considerations." *See Haig v. Agee*, 453 U.S. 280, 306 (1981). Unlike the right to interstate travel, 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 v. Bredesen*, 500 F.3d 523, 534 (6th Cir. 2007) (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 v. Gonzales,* 435 F.3d 1125 (9th Cir. 2006) (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 East 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). Therefore, any inability to return to the United States by airplane cannot reasonably be equated with denial of re-entry into the country.

While Plaintiff may claim that actions of the Kuwaitis limited his options for returning to the United States, anyone who travels abroad always takes the risk that they will be detained or otherwise subjected to foreign law, and they cannot hold the United States responsible for the actions of foreign nations. *See Munaf v. Geren*, 553 U.S. 674, 694-95 (2008) (Constitution does not prevent US citizens abroad from being subject to foreign law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign state to be [reexamined] and perhaps condemned by the courts of another would very certainly

Although the government cannot provide assurances with respect to future air travel, there is no indication that Plaintiff would be prohibited from entering the United States in the future. Generally, United States citizens who arrive at a United States port of entry are permitted to enter the country once they establish to the satisfaction of a CBP officer that they are in fact United States citizens. *See* 8 C.F.R. § 235.1(b). Under these facts, Plaintiff simply cannot show that future denial of entry is in any way likely, and therefore, his claim should be dismissed as moot.

B. Plaintiff's Claim Regarding His Right to Challenge His Alleged Placement on a Terrorist Watch List Is Premature and Not Ripe.

To the extent Plaintiff challenges his alleged placement on a terrorist watch list, and the existing mechanism through which individuals may seek removal, those claims are premature. Plaintiff has failed to avail himself of the redress process that Congress mandated, and that he now seeks to challenge. As such, Plaintiff's claim is not ripe and not appropriately before the Court at this time.

Ripeness occurs only when a dispute is definite and concrete. *See Ostergren v. Cuccinelli*, 615 F.3d 263, 288 (4th Cir. 2006). "[I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . ." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148 (1967). Ripeness is determined

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

Moreover, past experience cannot be the basis for the future injunctive relief Plaintiff seeks. In order to obtain future injunctive relief, Plaintiff would have to show that he would once again be detained by a third party, and any such claim would be entirely speculative.

by balancing "the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Miller Labs v. Brown,* 462 F.3d 312, 319 (4th Cir. 2006)(internal quotations omitted). Ripeness cannot, however, occur when there are "problems such as the inadequacy of the record ... or ambiguity in the record ... will make a case unfit for adjudication on 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).

Although Plaintiff attacks the adequacy of the DHS TRIP process, he has not applied to TSA for redress through DHS TRIP. Plaintiff's Complaint will not be ripe until he has tested his arguments by utilizing the Congressionally-mandated redress process provided by DHS TRIP. *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."). Without having allowed this process to run its course, the Court would be without the benefit of the agency's assessment and if needed, a formal administrative record. This defect could also be viewed through the prism of standing – Plaintiff has no standing to challenge the adequacy of the DHS TRIP if he has never even attempted to use it. *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[]"); *Walter v. City of Chicago*, 1992 WL 88457, at *3 (N.D. Ill., April 27, 1992) (questioning whether plaintiff has standing to challenge procedures where plaintiff "never made use of them").

Even if this Court determines that Plaintiff's claim is ripe, he must bring his claim in the Court of Appeals, consistent with the Ninth Circuit's decision in *Ibrahim v. DHS*, 538 F.3d 1250

(9th Cir. 2008).[10] Ms. Ibrahim brought her claim in the Northern District of California prior to TSA's development of DHS TRIP. When the Ninth Circuit heard her appeal, therefore, the question of jurisdiction regarding that redress process was not before the court. *See Scherfen*, 2010 WL 456784, at *10. In *Ibrahim*, the Ninth Circuit held that a challenge to the "policies and procedures implementing the No Fly List" was a challenge to an "order" of TSA and therefore must be brought in a Court of Appeals. 538 F.3d at 1257; *see also Gilmore*, 435 F.3d 1125. Indeed, the court noted that any "'order' of an agency . . . named in section 46110" must be challenged in the Court of Appeals. *Ibrahim*, 538 F.3d at 1255.

Like the "policies and procedures" at issue in *Ibrahim*, TSA's passenger redress program, as codified at 49 C.F.R. §§ 1560.201-1560.207, is subject to review only by a U.S. Court of Appeals pursuant to 49 U.S.C. § 46110. Likewise, DHS TRIP determination letters that resolve complaints about denied or delayed airline boarding caused by alleged placement on a watch list are final orders issued by TSA, which administers DHS TRIP. Thus, even if Plaintiff's claim were ripe, any challenge to the DHS TRIP process or to a DHS TRIP determination letter received by Plaintiff must be brought in the Courts of Appeals.

C. This Court Cannot Grant the Relief Plaintiff Seeks Regarding Notice and an Opportunity to Challenge His Alleged Placement on a Terrorist Watch List.

Even if Plaintiff had availed himself of the DHS TRIP process and had received a determination letter from TSA, this Court would be unable to grant the relief Plaintiff appears to

[10] The only other court to consider DHS TRIP has also held that any challenge to TSA's determination under the redress process must be brought in a Court of Appeals. In *Scherfen v. Department of Homeland Security*, the court dismissed the case because "the existence of TRIP determination letters in this case means that, unlike *Ibrahim,* there are orders issued by an agency named with § 46110." *Scherfen*, 2010 WL 456784 at *11.

seek: a "mechanism through which [he] can challenge [his] inclusion on the No Fly List." Compl. ¶ 17. That relief necessarily requires that TSA be a party to the lawsuit. Pursuant to 49 U.S.C. § 46110(a), however, such a lawsuit must be filed in a Court of Appeals.[11]

i. TSA is a necessary and indispensable party that cannot be joined.

The Complaint appears to ask this Court to require the government to provide Plaintiff with an opportunity to challenge his purported inclusion on the No Fly list, because Plaintiff contends that the DHS TRIP process is constitutionally inadequate. Yet, not only has Plaintiff failed to avail himself of the statutorily-mandated process for seeking redress, he has also failed to include two necessary parties – DHS and TSA – in this suit. Including DHS and TSA in this case is required by Rule 19 of the Federal Rules of Civil Procedure; without DHS and TSA, "the plaintiff could not obtain complete relief[.]" *Yashenko v. Harrah's NC Casino Co., LLC,* 446 F.3d 541, 552 (4th Cir. 2006). The regulations governing the DHS TRIP process, as well as the DHS TRIP determination letters regarding complaints about denied or delayed airline boarding due to TSA security screening are final orders by TSA, which administers DHS TRIP. The

[11] 49 U.S.C. § 46110(a) provides that "[e]xcept for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509 (f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the [U.S.] Court of Appeals for the District of Columbia Circuit or in the court of appeals of the [U.S.] for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day."

Complaint should be dismissed as a result, pursuant to Rule 19(b), and judgment should be entered for Defendants, because TSA is a necessary party that cannot be joined.

As explained above, TSA is responsible for identifying travelers who pose a threat to national security and for preventing those individuals from boarding an aircraft. *See* 49 U.S.C. § 114(h)(3), (f)(1)-(4). TSA and DHS are also responsible for providing a redress process to travelers who complain that they have been delayed or denied boarding due to wrongful placement on the No Fly or Selectee Lists. *See* Lynch Dec. ¶ 4; 49 U.S.C. § 44926(a); *see also* 49 U.S.C. §§ 44903(j)(2)(C), 44909(c)(6). Accordingly, the relief Plaintiff requests – that this Court require the government to provide him with meaningful notice of the basis for his alleged inclusion on the watchlist and an opportunity to rebut the government's charges – requires that both DHS and TSA be included as defendants in the case. TSA's passenger redress program, as codified at 49 C.F.R. §§ 1560.201-1560.207, is subject to review only by a U.S. Court of Appeals pursuant to 49 U.S.C. § 46110. *See, e.g.*, *Sima Prods.*, 612 F.2d at 312-13 (holding that a regulation can be final order when it otherwise meets the definition of a final order); *O'Donnell*, 510 F. Supp. at 928 (same). Likewise, DHS TRIP determination letters that resolve complaints about denied or delayed airline boarding caused by alleged placement on the No Fly or Selectee Lists are final orders issued by TSA, which administers DHS TRIP. As a result, this action belongs in the Court of Appeals.

Rule 19(b) provides the factors that a Court should consider to determine whether, when joinder is not feasible, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). These factors include: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the

existing parties; (2) the extent to which any prejudice could be lessened or avoided by shaping the judgment or the relief; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed. *See Yashenko,* 446 F.3d at 552 (applying Rule 19(b) factors). The Rule 19(b) factors support dismissal here.

The first two factors weigh in favor of dismissal. The Court cannot order DHS and TSA to improve the DHS TRIP process if they are not parties to the suit. DHS and TSA have a significant stake in how DHS TRIP operates. DHS and TSA have been charged by Congress with satisfying the Congressional command that a "timely and fair [redress] process" be established for persons delayed or denied boarding; through DHS TRIP and TSA Office of Transportation Security Redress, TSA and DHS thus fulfill the statutory command to provide redress to persons who allege they were wrongfully denied or delayed boarding due to TSA security screening. *See* supra at 10-13. As a result, the judgment cannot be shaped to exclude DHS and TSA but still provide relief. Moreover, a judgment regarding Plaintiff's status or rights via-a-vis the No Fly or Selectee Lists without DHS and TSA will be inadequate. The Court cannot effectively order any changes to DHS TRIP without including as parties the entities responsible for DHS TRIP. In such circumstances, the Court is not in a position to order an "adequate" judgment. *See, e.g., Republic of Phil. v. Pimentel*, 553 U.S. 851, 870-71 (2008). Plaintiff's Complaint refers at times to TSA's role in airline security (*see* Compl., ¶11), but he chose not to sue TSA, likely because he knew he would face a jurisdictional bar to district court litigation if he did so. A party's *preference* for a particular forum does not change a Court's Rule 19(b) analysis.

Under the third factor of Rule 19, the Court must examine "whether a judgment without the absent person will be adequate." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 253 (4th Cir. 2000). In this case, the practical effect is clear: a successful outcome for Plaintiffs would likely require changes to the way DHS TRIP operates; require DHS and TSA to alter their regulations regarding redress and screening; and require TSA to alter its final orders.

Critically, Plaintiff has an alternative remedy, the last factor implicated by Rule 19(b); he can challenge a DHS TRIP determination letter in the Court of Appeals, after he has utilized the DHS TRIP process. Congress has explicitly required that all suits challenging TSA final orders proceed in the Court of Appeals. Plaintiff's preference for litigation in district court cannot trump the jurisdictional bar to joining TSA in this district court litigation.

ii. Final orders of TSA can only be challenged in the Court of Appeals.

Even if Plaintiff's claim were ripe, it would still be subject to dismissal. Pursuant to 49 U.S.C. § 46110(a), challenges to DHS TRIP's response to complaints of denied or delayed airline boarding due to TSA security screening may only be brought in the Courts of Appeals, because DHS TRIP determination letters are final orders of TSA, *see Scherfen,* 2010 WL 456784*,* at *11, and because such complaints implicate the sections of regulations implementing Secure Flight that pertain to passenger redress, *see, e.g.*, *Sima Prods.*, 612 F.2d at 312-13; *O'Donnell*, 510 F. Supp. at 928.

Availing himself of DHS TRIP will also produce an administrative record for a Court of Appeals to review. *See* Lynch Dec., ¶ 8, *see also Ibrahim*, 538 F.3d at 1256 (holding that the lack of an administrative record was one impediment to Circuit Court review); *Scherfen*, 2010

WL 456784, at *10 ("One of the reasons that the majority in *Ibrahim* found that the placement of a person on the No Fly List fell outside the scope of § 46110 was the absence of any administrative record to review. Where, however, the TRIP process has been invoked, there is indeed a record for review by the appellate court."). Thus, once Plaintiff utilizes the redress process offered through DHS TRIP, he will have a final order from TSA, a reviewable administrative record, and a claim that can only be heard in a Court of Appeals.

II. THE GOVERNMENT'S REDRESS POLICY IS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW

Even if the Court were to determine that it, and not the Court of Appeals, has jurisdiction to hear Plaintiff's claims, judgment should be entered for Defendants on Plaintiff's APA Claim. 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(2)(A); *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). Under arbitrary and capricious review, the court does not undertake its own fact-finding; rather, the court must review the administrative record as prepared by the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). As long as the agency's decision was supported by a rational basis, it must be affirmed. *See, e.g., McDaniels v. U.S.,* 300 F.3d 407, 412 (4th Cir. 2002) citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729, (1984) (holding that as long as "'a statute is supported by a legitimate legislative purpose furthered by rational means, judgments

about the wisdom of such legislation remain within the exclusive province of' the promulgating entity"); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78, (1911) (holding that under rationality review, a law should be invalidated only where it lacks "any reasonable basis and therefore is purely arbitrary").

Plaintiff's Complaint makes no allegation that supports the conclusion that Defendants' terrorist watch listing procedures are arbitrary and capricious, nor cites any authority for the proposition that the APA requires something more than what 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*, 453 U.S. at 292. 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. U.S. Dep't of Justice*, 331 F.3d 918, 926, 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 recent 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 at 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 Defendants to remove him from any terrorist watch list he may be on plainly implicates sensitive national security Executive judgments that are entitled to deference.

Judgment should thus be entered for Defendants on Count II of Plaintiff's Complaint.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

Dated: March 21, 2011

Respectfully submitted,

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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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DATED: MARCH 21, 2011 /S/

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