IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

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| AYMAN LATIF, et al. | |
| Plaintiffs, | Case No. 3:10-CV-750-BR |
| v. | |
| ERIC H. HOLDER, JR., et al. | June 21, 2013 |
| Defendants. | Portland, Oregon |

ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ANNA J. BROWN

UNITED STATES DISTRICT COURT JUDGE

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TRANSCRIPT OF PROCEEDINGS

(In open court:)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Thank you, everyone. Please be seated.

So we are here for oral argument on the cross motions for summary judgment in the case of Latif v. Holder. This is civil number 10-750.

Before we begin, I want to reiterate the general standing order of the Court; that there should be no electronic or audio or photographic recording of any kind going on in this proceeding. I've given permission to Ms. Young, of *The Oregonian*, to use her laptop for note-taking only.

I understand there's another media representative here.

UNIDENTIFIED SPEAKER: I would like to use a laptop for --

THE COURT: Would you stand up, please? I can't hear you or see you.

UNIDENTIFIED SPEAKER: A laptop for note-taking in a text edit format. Is that possible?

THE COURT: No. Not unless you're a member of the media. Are you?

UNIDENTIFIED SPEAKER: The internet blogging community.

UNIDENTIFIED SPEAKER: I'm with The Associated Press.

THE COURT: All right. So members of the media may use their laptops to take notes only, only for word processing programming, not for any kind of Internet or realtime communication, not for any kind of photographic or audio recording, but as a -- as a convenience to you instead of pen and paper.

All right. And, counsel, if you have laptops, you're free to use them for your own note-taking, as well, as normal.

So we're here for argument. We're late in starting. We'll try to make up the time as we go. The time you programmed, counsel, that you need for argument will be provided to you. Let me get that list.

I have a couple of basic questions I'm hoping you will address in the scope of your presentations. Of course each side is seeking an order on summary judgment, which, in the first instance, has to be premised on the absence of any genuine issue of disputed material fact. There are a number of declarations in the record about what the plaintiffs encountered when they were denied boarding in various scenarios, and it does not appear, to me, that any of those declarations have been actually refuted.

The stipulated fact record that's in the case does not

address this particular set of facts. I'm not given any assurance in the record, in other words, that there is or isn't an issue of disputed fact around the contentions the plaintiff makes -- plaintiffs each make about the -- the fact they were denied boarding or the burdens that they encountered once that occurred. I'd like some clarification, please, about what I can assume is the undisputed fact record, at least as a threshold matter, with respect to these -- these motions which address the plaintiffs' first and third claims.

I'm mindful of the fact that plaintiffs say I don't need to be concerned today about what relief the Court might fashion in the event plaintiffs prevail in whole, or in part, on their cross motions. But that is a little bit difficult for me to process that assertion, which is to say I think it's very difficult to analyze the liability assertions that are raised here on the cross motions without knowing more about what it is plaintiffs contend could be fashioned or could be done about their contentions of violation and what the defendants contend cannot be done.

In other words, I appreciate liability is a separate finding from relief, damages, and remedy, but try to understand the margins here around the asserted right to travel or the lack thereof and the government's interest in security and the plaintiffs' interest in their reputation

and their right to travel, I think, requires some suggestion at least by plaintiffs about what it is plaintiffs contend would be the relief that would follow in the event they establish liability; that is to say a judgment in their favor, on the first or third claims, which, as I understand it, are the only two at issue this morning.

So those are two overarching concerns I have. And to the extent you can address them, as you go forward this morning, that would be very helpful.

Ms. Siemion, are you on the line, on the telephone?

MS. SIEMION: Yes, Your Honor, I am.

THE COURT: Have I pronounced your name correctly? Is it Siemion?

MS. SIEMION: Siemion. That's exactly right.

THE COURT: I'll give you the chambers telephone number. If there's any interruption in your connection to these proceedings, please call chambers, because Ms. Boyer won't be able to take a call. Just a moment.

DEPUTY COURTROOM CLERK: She's on the conference line, so she can just call back into the conference line.

THE COURT: Oh, I'm given better information. If you get disconnected, just call back to the line you did call and you should be able to rejoin on a conference format. In any event, if you have difficulty there, the chambers number is (503)326-8350. And then you also have

Ms. Boyer's email address. You can send her an email message. She'll be monitoring there, too. All right?

MS. SIEMION: Okay.

THE COURT: Okay. So I think we should just proceed with plaintiffs' counsels' arguments concerning whether the No Fly List deprives plaintiffs of any protected liberty interest. Somewhere along the way I would also like clarification or confirmation, because it seems, to me, a shifting sand around the question whether it is acknowledged that there is a No Fly List, one -- I think that's subsumed in the stipulated statement of facts -- and some comment about what I should assume is the undisputed factual record around what one or more of the plaintiffs may have been told or how it is they're advised that they're not going to be permitted to board or whether that's even important.

In other words, should I just assume that the record is a plaintiff has a ticket, has normal boarding papers, but is denied boarding, and should I be concerned with what they're said -- what's said to them or not said to them, or are we just stopping at that threshold point, because it seems to be also an issue that varies from plaintiff to plaintiff, and I need to know whether that's important when I get to these -- these threshold motions.

So let's begin there on behalf of the plaintiff, Ms. Choudhury?

MS. CHOUDHURY: Choudhury.

THE COURT: Ms. Choudhury.

MS. CHOUDHURY: Your Honor, do you have a preference as to whether we argue from here?

THE COURT: I would like you to come to the podium, which is why we have it set up, so I can hear you best.

Ms. Choudhury?

MS. CHOUDHURY: Yes.

THE COURT: All right. Good morning.

MS. CHOUDHURY: Good morning.

DEPUTY COURTROOM CLERK: Can you pull the microphone down a little bit?

Great. Thank you.

MS. CHOUDHURY: Your Honor, for the past three years the defendants in this case have prevented our clients, 13 U.S. citizens, including four military veterans, from traveling to be with their spouses and children, to access medical care, to start their jobs, and conduct their businesses by placing them on the No Fly List.

And in those three years the defendants have categorically refused to provide any of the plaintiffs with a single reason why they belong on a list of suspected terrorists.

Defendants contend that plaintiffs have no right to any

process, even though the government has banned them from boarding planes. This position is extreme. If the defendants were correct, the U.S. government could place anyone on the No Fly List and refuse to provide any redress procedure at all.

THE COURT: Could I interrupt you there?

I think that's maybe an overstatement of the defendants' position. Isn't their position that the defendants are entitled to a process, this DHS TRIP process, and I certainly agree that your contention is that's wholly inadequate; but they do contend there is a process as opposed to no process.

MS. CHOUDHURY: Well, respectfully, Your Honor, the first part of their brief argues that plaintiffs have no liberty interests that have been deprived at all by being banned from flying.

THE COURT: Well, that's a little different, though, than saying defendants contend plaintiffs are entitled to no process.

MS. CHOUDHURY: To be clear, Your Honor, if no liberty interest is deprived by inclusion of the No Fly List --

THE COURT: Right.

MS. CHOUDHURY: -- the government isn't required to provide process.

THE COURT: Fair enough.

MS. CHOUDHURY: And that is the implication of their argument.

THE COURT: Okay.

MS. CHOUDHURY: This is because the defendants principally claim that banning people from one mode of transportation, no matter how draconian that restriction, doesn't trigger a right to due process at all, because it doesn't entirely restrict all travel.

But this position is not only deeply troubling, it's contrary to two separate and independent doctrines establishing that plaintiffs do have a right to fair procedures when defendants ban them from traveling by plane.

Inclusion on the No Fly List, Your Honor, deprives the plaintiffs of their liberty interests in travel, and it injures their reputation in connection with altering their legal status.

Under either the liberty interest in travel theory or the stigma-plus doctrine, the plaintiffs have a cognizable right to fair procedures when they're placed on the No Fly List.

I'd like to first make four points about the liberty interest and travel claim before addressing the stigma-plus theory.

First, Your Honor, there's no dispute that the

constitution affords procedural due process protection to the liberty interest in travel. In *Kent v. Dulles* and numerous decisions issued in the subsequent five decades, the Supreme Court has repeatedly recognized that the right to travel is a liberty protected by the Fifth Amendment, and it affirmed that the freedom to travel is a critically important one. It may be necessary for livelihood and may be as close to the heart of the individual as a choice of what he eats or wears or reads.

And the Ninth Circuit held in *DeNieva v. Rayes*, Your Honor, that in 1988 --

THE COURT REPORTER: I'm sorry. The case name again?

THE COURT: You'll need to slow down.

MS. CHOUDHURY: Sorry.

THE COURT: D-E-N-I-E-V-A. Go ahead.

MS. CHOUDHURY: Thank you. In that case the Ninth Circuit held that it was clearly established that since 1988 government action that infringes upon a person's ability to travel -- and that's a quote from the case -- deprives the liberty interest in travel and therefore entitles that person to procedural due process rights.

Plaintiffs, in this case, assert that same right and seek parallel relief. This is consistent with the broader due process jurisprudence. The government may restrict

liberty interests, like the liberty interest in travel, but when it does so, it must provide fair procedures, erroneous deprivation of those liberties.

Second, Your Honor, the undisputed record shows that the No Fly List -- that inclusion on the No Fly List deprives the plaintiffs of this liberty interest in travel because it imparts a draconian restriction.

The Ninth Circuit made clear in *DeNieva* that a person has a right to procedure -- procedural due process when government infringement of travel leaves that person able to travel internationally only with great difficulty.

Inclusion in the No Fly List completely bans listed persons from boarding an aircraft to the United States.

This fact is undisputed. And so are the facts showing that the plaintiff -- their placement on the list has severely restricted plaintiffs' ability to travel.

Plaintiff Steven Washburn has been stranded in New Mexico, unable to see his wife for more than three years, because he cannot travel to Ireland without boarding a prohibited flight.

Plaintiff Salah Ali Ahmed, in Georgia, cannot travel to see his family in Yemen, because he cannot cross the thousands of miles over ocean and land without boarding a prohibited flight.

Mohamed Sheikh Abdirahm Kariye cannot take his mother

on a religious pilgrimage because he can't travel from here, in Portland, to Saudi Arabia, without boarding a plane. These severe burdens on travel more than meets the Ninth Circuit's standards. They show that plaintiffs can engage in international travel and long distance interstate travel only with great difficulty. And that, again, is a quote from the *DeNieva* case. And they are therefore entitled to fair procedures.

Your Honor, the plaintiffs' declarations on those points are undisputed. The plaintiffs have all shown that they were prohibited from boarding flights. Defendants haven't contested those facts, and so the fact of the travel restrictions that the No Fly List imposes on people who are denied boarding is undisputed for purpose of this motion.

THE COURT: Is the reason why they were denied boarding also undisputed; i.e., that each plaintiff purportedly was on the so-called No Fly List?

MS. CHOUDHURY: At this point, for this motion, Your Honor, yes. The plaintiffs have submitted sworn affidavits and declarations attesting to the fact that government officials and airline officials explicitly told each of them that they are on the No Fly List. And the government has chosen, in their litigation position, not to confirm or deny those declarations -- those facts.

The third point, Your Honor, is that the possibility

that plaintiffs might have alternative modes of travel for certain trips that they might want to take does not lessen the severity of the restriction on travel that the No Fly List imparts, nor does it eliminate their right to fair procedures.

In *Goss v. Lopez*, the Supreme Court squarely held that de minimis deprivation of protected interest gives rise to a right of fair procedures. It recognized that while more severe deprivation might give rise to some more process, that doesn't alter the fact that minimal process is required for even anything but a de minimis deprivation.

And in *Brittain v. Hansen*, which we cite in our reply brief, the Ninth Circuit clearly held that even de minimis depravations of liberty interests in contrast to protected property interests, entitle a person to procedural due process.

The No Fly -- the No Fly List flight ban, however, is that from de minimis. It is a draconian restriction. And it is so severe that it entitles plaintiffs to procedural due process even if it is conceivable that the ban could be more restrictive. It is undisputed that the No Fly List restricts travel to or from the United States on commercial aircraft or over U.S. air space.

But the record also shows plaintiffs have submitted facts that are undisputed that it also bans plaintiffs from

boarding ships. And this is because CBP's own final regulations issued to implement the Intelligence Reform and Terrorism Prevention Act of 2004 show that CBP as pursuant to congressional directive, screens passengers on ships departing the United States against the No Fly List, and its purpose of that screening is to deny passage to individuals on the watchlist.

THE COURT: For the record, C-B-P?

MS. CHOUDHURY: Customs and Border Protection, Your Honor.

The deprivation of plaintiff Abudullatif Muthanna, moreover, shows that he was denied boarding on a ship sailing from the United States to Europe and on a ship sailing from Europe to the United Arab of Emirates.

Defendants contend that that decision wasn't the result of Customs and Border Protection action. It was the result of private ship captains. But that doesn't matter. What matters is that the government screens the watchlist, including the No Fly List, against the list of passengers on ships with the express purpose of denying them boarding. And those are in the regulations we cite in our brief.

Fourth, Your Honor -- just to close that point, Your Honor, because No Fly List inclusion not only bans people from flights over U.S. air space, because it may also, and has in the case of at least one plaintiff in this

lawsuit, bans them from trip travel and may even be used by foreign governments, 22 foreign governments who have access to those lists. That just heightens the severity of the travel restriction and the liberty interest deprivation at issue. It simply requires even more process.

But even if Your Honor were to find that the No Fly List only results in restriction on travel on flights, that, in and of itself, is enough. Plaintiffs have a right to fair procedures.

My fourth point, Your Honor, is that defendants rely on the wrong law to argue that plaintiffs do not have a right to procedural due process due to the deprivation of their liberty interest in travel. They rely heavily on the *Gilmore* case; the Ninth Circuit's decision in *Gilmore v. Gonzales*. That case concerned a person who didn't want to show identification before boarding a plane. He didn't challenge a travel ban banning his ability to fly, period. He brought a claim seeking to invalidate this TSA identification policy under a different right at issue in this motion, the fundamental right to interstate travel. He did not bring what plaintiffs assert here, a claim under the procedural due process right for fair procedures to guard against the erroneous deprivation of their ability to travel.

The Ninth Circuit held that Mr. Gilmore didn't show a

violation of a fundamental right, because the identification policy applied only to air travel. And that reasoning may be applicable to the fundamental rights line of cases, but it's wholly inapplicable to this line of cases. The line of cases of *DeNieva* and the claim that plaintiffs bring here.

THE COURT: You're -- are you equating, effectively, the revocation of a passport to being on the No Fly List? Are you pretty much equating those?

MS. CHOUDHURY: Well, we don't dispute that the revocation of a passport may be a greater restriction and deprivation of the liberty interest in travel.

THE COURT: But for practical purposes, relative to the burdens that you're pointing to, are you saying the analysis of *Green* and *DeNieva* apply equally to denial of boarding because someone is on a No Fly List?

MS. CHOUDHURY: Your Honor, I'm saying that the infringement of travel that the passport revocation decision in *DeNieva* imposed is akin to the restriction of travel that the No Fly List imposes. There may be some lesser deprivation in this case than that one, and that we acknowledge; but the restriction is draconian, and it is sufficient to rise to the level.

The Ninth Circuit made -- was explicitly stated in *DeNieva* that the passport revocation left her, quote, able to travel internationally only with great difficulty, if at

all. It didn't premise its finding on a complete travel restriction. And that is key. And that makes sense, in light of *Goss v. Lopez*, the Supreme Court's decision, and the Ninth Circuit's decision in *Brittain v. Hansen*. Even de minimis deprivations of liberty interest gives rise to fair produce. So here the restriction is far or more than de minimis.

To answer Your Honor's question about *Green, Green* was brought under a stigma-plus theory. The plaintiffs there didn't allege an independent liberty interest in travel claim. But even if they had, the plaintiffs there were able to board planes. They were all able to board planes. They challenged the fact that they were screened extra and those screens lasted for less than an hour.

Now, while there may be some dispute about whether being able to board but being secondarily screened for an amount of time less than an hour, whether that is a restriction of the liberty interest in travel. There may be some dispute there. And that court was not persuaded that there was a deprivation of a liberty interest. But this is different. Plaintiffs can't board planes at all. And they've tried to fly multiple times. Many of the plaintiffs have tried to board multiple times and aren't able to do so and have all been told that they're on a list of suspected terrorists called a No Fly List. It is undisputed that the

list exists and that the list results in denial of boarding on commercial flights over U.S. air space.

So, Your Honor, the *Gilmore* line of cases that focus on that fundamental right to interstate travel deal with a right that plaintiffs don't assert is impacted by the restriction of their ability to fly.

Those cases are different. They -- the Ninth Circuit reasoning that alternative modes of transportation were available in *Gilmore* doesn't lessen the deprivation of plaintiffs' liberty interests here. The plaintiff there didn't invoke procedural due process. And the Ninth Circuit's decision, quite remarkably, did not discuss any of the liberty interest in travel cases that Supreme Court's authority in *Kent v. Dulles*, in *Aptheker v. Secretary of State* or even the Ninth Circuit's decision in *DeNieva*. That decision didn't purport to overrule what the Ninth Circuit had found in *DeNieva*, which is that a restriction upon a person's ability to travel, that leaves travel possible only with great difficulty, gives rise to a right to procedural due process.

If Your Honor doesn't have any questions about the liberty interest in travel, I can --

THE COURT: Well, that would be an overstatement.

MS. CHOUDHURY: I'm happy to answer your questions.

THE COURT: No, your argument is helpful. Go ahead.

MS. CHOUDHURY: So, you know, as we discussed, for the same reasons *Green v. TSA* is actually not on point at all for the liberty interest in travel argument for that claim.

Separate and apart from the right to travel claim, Your Honor, the plaintiffs show an independent right to fair procedures based on the stigma-plus doctrine. There is no dispute that defendants' inclusion of the plaintiffs' names on the No Fly List has smeared them has suspected terrorists; one of the most reprehensible labels of our time. The plaintiffs were all denied boarding publicly in ways that made them feel deeply stigmatized as suspected terrorists.

Marine veteran Abe Mashal was surrounded by approximately 30 security officials at O'Hare Airport when he was denied boarding on flight. He and Ayman Latif, Ray Knaeble, and Steven Washburn, all military veterans of the United States, when they were denied public boarding in a public fashion, felt that their reputation as military veterans was tarnished. And Stephen Persaud was surrounded by security officials and denied boarding in front of his wife and his son; Elis Mohamed in front of five of his classmates at university. These experiences publicly marked

the plaintiffs with a badge of suspected terrorist; a fact that defendants do not dispute in their briefs. The parties' only dispute is whether the plaintiffs have showed the plus factor.

Under controlling Ninth Circuit law, Your Honor, they have. And that's for two reasons. First, plaintiffs have shown that the defendants altered their legal status, and that is what the Ninth Circuit made clear satisfies the plus factor. They have shown that the defendants altered their legal status because, once listed, they were legally unable to do something they could otherwise do. And that's a quote from the Ninth Circuit's decision in *Humphries*.

Plaintiffs were unable to board planes by operation of law under 49 USC § 114(h), TSA is required to use the watchlist to deny boarding to people on the No Fly List. And there -- in its decision in *Miller* and *Humphries*, the Ninth Circuit made clear that rendering individuals legally unable to do something they could otherwise do satisfies the plus and makes the stigma-plus claim cognizable.

This alteration of legal status actually is notably parallel to the one in the seminal case that established the stigma-plus doctrine itself, and that's *Wisconsin v. Constantineau* where the plaintiff was stigmatized as a drunkard or an alcoholic, was placed on a list, and then prohibited from buying alcohol. Just as she could not buy

alcohol, plaintiffs here, on the No Fly List, are legally prohibited from boarding planes.

Second, Your Honor, the plaintiffs have shown the required connection between government injury to their reputation and the alteration in legal status. Here, the same action caused both. The defendants' placement of the plaintiffs' names on the No Fly List both smear them as suspected terrorists, since it's undisputed that that is a list of suspected terrorists, and it legally prevented them from flying. Where the same action causes both stigma and plus, the plaintiffs have shown the required connection.

Your Honor, the defendants' principal argument that plaintiffs haven't satisfied the plus factor is they haven't shown a deprivation of a fundamental right to interstate travel or a separate and independent liberty interest in travel. And the Ninth Circuit's decision in *Humphries* and in *Miller* makes clear that an alteration in legal status is sufficient.

Plaintiffs are not required to show the extinguishment of a separate and independent right. Although, you know, we argue that they have here with the liberty interest in travel.

In *Humphries*, the plaintiffs in that case were placed on a list of child abusers that was disseminated to certain government agencies. It didn't even result in their denial

of a license or a benefit. It simply was consulted by certain government agencies and would have been if they applied for a license or a benefit, and the Ninth Circuit found that that possibility, that mere consultation of a list containing those stigmatizing statements, satisfied the plus factors.

But here the plaintiffs have shown far more. They are legally unable to board planes, and there is no dispute that persons on the No Fly List are denied boarding on planes, and that the plaintiffs were each individually denied boarding on planes.

Finally, Your Honor, is the defendant -- defendants rely on *Green v. TSA* to argue that because the plaintiffs in that case failed to show the required plus factor, that the plaintiffs in this case have failed to do so, as well.

But, as I mentioned before, all of the plaintiffs in that case were able to fly.

What they challenge is extra security screening. And while there may be some question whether being permitted to fly while being screened additionally prior to boarding, whether that satisfies the alteration and legal status test, there should be no serious dispute that people who are legally prohibited from boarding planes have satisfied the plus factor.

Your Honor, those are the points that I wanted to make

with respect to those two liberty interest claims.

Would you like to --

THE COURT: Were you or one of your colleagues going to address the balance, then, against the government's interests in security --

MS. CHOUDHURY: My colleague will address that.

THE COURT: All right. Thank you very much.

And the 25 minutes that was allocated to you has been used. That sounds fair in the end.

All right. Next? Mr. Risner, is it?

MR. RISNER: Yes.

THE COURT: Good morning.

MR. RISNER: Good morning, Your Honor. I want to start by talking about plaintiffs' first theory, that notion that there's been a deprivation of a liberty interest. I think the question is what -- what is the liberty interest in travel, and the cases that -- we obviously have decades of cases that have looked and interpreted the concept of liberty interest covering a range of issues, but when they talk about travel, they're talking about a deprivation of a liberty interest in interstate or international travel. And the plaintiffs' cases also overwhelmingly talk about the deprivation of the ability to use a passport, whether a revocation or suspension or denial. And there is a very significant difference between the revocation or denial of

the ability to use a passport and the alleged inclusion on the No Fly List.

The Supreme Court recognized that in the *Aptheker* case when it talked about the fact that the deprivation of a passport was a severe restriction that imposed a prohibition against worldwide travel and actually recognized that the laws in place made it a crime for a U.S. citizen to travel outside the Western Hemisphere or to Cuba without a passport. That's a very serious deprivation that's not present here.

What we have in this case is the alleged inclusion on the No Fly List, which controls one method of travel. It does not deprive an individual of all ability to travel internationally or in interstate travel and --

THE COURT: So just explain to me and the plaintiffs how that works, then. How is it a person, like one of the plaintiffs who's been denied boarding in the manner that they've encountered, being overseas and the like, unless they're extraordinarily wealthy and have weeks and months of time to get from port A back to the U.S., how is that not literally the practical equivalent of not having a passport?

MR. RISNER: It's not the practical equivalent of not having a passport, because the passport actually denies the ability or right to --

THE COURT: Effectively, plaintiffs are asserting they have been denied that right because all they get is "no" at the gate and nothing more.

MR. RISNER: Well, I think that for this question, the liberty interest question, we have to separate the notice arguments and the process arguments. I think that this issue --

THE COURT: So let -- let's do that.

MR. RISNER: Yeah.

THE COURT: They're told no. That is asserted to be the practical equivalent of not having the passport. They're treated exactly the same as the person who doesn't have the passport, in that they're not permitted to get on the aircraft.

MR. RISNER: For that -- that might be an equivalent for air travel. I certainly agree to that.

THE COURT: That's what we're talking about here is not flying; not not walking or boating or swimming or whatever. This is an air travel problem; right?

MR. RISNER: Exactly. And I don't think that there is a suggestion that there is a liberty interest in air travel itself. We have to consider the broader context of what the interest in travel, whether interstate or international, actually is. And so the availability of alternative means is relevant.

THE COURT: So tell me what those are, please.

MR. RISNER: So the alternative means that are available, as the plaintiffs' cases -- plaintiffs' situations in this case demonstrate, there are available alternatives through travel by land and travel by sea. And you can look at the plaintiffs allegations in this case and recognize that several of them were returned to the United States through alternate means. They were not by air. Mr. Persaud, Mr. Washburn, and Mr. Knaeble have returned by alternate means; whether by land or by sea.

Of course we're not suggesting that there is not a convenience in air travel. That's certainly the case. And I think that the Ninth Circuit addressed that in *Gilmore*. It is a different legal construct to look at fundamental rights or liberty interests, but the Ninth Circuit in that case accepted the plaintiff's allegations that air travel is a necessity and not replacement by other forms of transportation.

But, that said, it's just one means of transportation. There are still other ways that these plaintiffs have shown -- I think it's important to recognize that none of the plaintiffs -- largely, this case concerns international travel for these plaintiffs' circumstances, but none of the plaintiffs who've wished to return to the United States have been denied the ability to do that.

THE COURT: Well, only after filing of a lawsuit and only after engaging in enormous effort.

MR. RISNER: I'm not sure that factually they all filed a lawsuit first.

THE COURT: Fair enough. But only after engaging in this kind of process. It's not as if they could just dial up TSC and say: Oh, please, I'm stuck here in Yemen. I do want to get home to my family or my job or whatever.

MR. RISNER: In fact, there is a process that we've described that several of the plaintiffs have gone through in which the government works with U.S. citizens who have trouble returning to the United States. And, in this case in particular, in addition to Mr. Persaud, Mr. Washburn, and Mr. Knaeble, several of the plaintiffs have flown to the United States -- that's alleged in the declarations -- that they've worked with the government to provide that assistance that Mr. Ghaleb, Mr. Latif, and Mr. Muthanna have returned to the United States by air.

Additional plaintiffs have actually refused that assistance, because they don't like the fact that the government will not guarantee their ability to travel in the future. But there is -- there is not a deprivation of all means of travel, and I think that what we're talking about in the passport context, it is, I think, dramatically different.

I do want to point to *Green*, because I think *Green* is instructive, while on the stigma-plus claim primarily, it's instructive on this issue, as well, because the Court recognizes there is no right to travel without impediments and that burdens on a single form of transportation that aren't unreasonable don't give rise to a right, and that's what's happening here.

I think that air travel is unique. That is true in convenience, as the Ninth Circuit recognized. And that's also true because of the tremendous threat from terrorist attacks. But the deprivation of an individual's ability to fly but not take alternative means of transportation does not give rise to a liberty interest, absent some allegation that has denied them a right to reenter the country, which is not the case here, or has denied them the right to present at a port of entry and enter, which is not the case here.

I want to briefly address the notion of the -- that CBP is somehow responsible for denying boarding on ships. The plaintiffs have pointed to the declaration of Mr. Muthanna who says that he was denied boarding on a ship by the vessel operator at the recommendation of CBP. And plaintiffs say that that fact that it was the operator's decision doesn't matter. But I think it of course matters that it was the operator's decision to board or not board particular

individuals.

The No Fly List is designed to protect air travel, and that is the set of allegations we're working from here. And I think that you can look at Mr. Persaud's claims and in his declaration and then also in the complaint he alleges he was able to return by ship. So the fact that an individual operator might make an adverse determination on boarding is not attributable to -- not -- not the responsibility of CBP, let alone the defendant before the Court right now.

I also want to address the stigma-plus claims. The different theory obviously. Where I think that the plaintiffs have --

THE COURT: Can I clarify that the defendants agree there is a stigma to be associated with denial of boarding because of the No Fly List association?

MR. RISNER: We don't dispute, for purposes of this motion, the stigma claim -- the stigma component of the claim is satisfied. But where the plaintiffs have gone wrong is on the plus part of this claim, and I think that there's -- there no suggestion there's a balancing of the two. They're really independent criteria that both have to be met.

The plaintiffs have not articulated a plus, in that they have not articulated a right or status that was previously recognized by law that has been altered. And I

think that *Humphries* actually speaks to that. In *Humphries*, as counsel indicated, you have parents that were identified in the Child Abuse Registry, and there were consequences for the loss of rights that were provided by the State in that case.

The listing on the Child Abuse Registry in California was used by the California state government in its consideration of eligibility for state benefits, like employment, state-issued licenses, and adoption. It was also used by other states, as well. But in that case you have benefits or status that are afforded by state law to all individuals, employment, licenses, adoption, and so on, and then taken back through this plus. That's not the case here. You don't have a legal status offering a right or status to fly by federal law that is then taken back by the plus.

I think that the plaintiffs' reliance on *Miller* is a bit odd, because in that case the Court actually found that there was no change in state law that would give rise to a plus.

In *Miller* you had noncustodial grandparents who were claiming rights to -- rights -- liberty interest as grandparents to their grandchildren. The grandfather in that case was placed in the child abuse index, and the Court found that there was no stigma-plus, because there was no

deprivation of a liberty interest that directly affected plaintiffs' rights under the existing law.

And I think that that's what you have here. You don't have the federal or state government conferring rights to everyone and then taking them back from certain individuals on a plus.

THE COURT: Everyone has the right to go to the airport with their papers and documentations and ticket and boarding pass to present themselves. You go through the screening and hopefully board the aircraft, but those who are on the list don't get to go there. Why is that argument you're making -- how does that reconcile with the reality? Everybody has the right to travel unless the TSC has taken it away.

MR. RISNER: I don't think that -- I think that the difference is not everyone has that right. That right has not been provided by the federal government. That distinguishes this case from a lot of the liberty interests we're talking about.

THE COURT: Where does it come from, then? It's just a function of commerce or what?

MR. RISNER: I think that's probably a better way of looking at it. I think that's not a -- this is not a case where you have employment benefits or some kind of financial or assistance benefits provided by a state. It's

not a case where you have employment that's provided by a state, where if a state gives someone something and then wants to take it back, there's a deprivation of this interest in that thing that's been given.

THE COURT: But, I mean, it's the government and not United Airlines or Alaska Airlines denying boarding. It's the government telling the boarding agent as a matter of law, you are not to let this person on board.

MR. RISNER: I think --

THE COURT: If the government has that right or that power to restrict that access, how can you say there wasn't something there that was government-originated or just inherent in the natural right of human beings that -- that it preexisted and that it is now being taken away?

MR. RISNER: Well, I think that the *Paul v. Davis* from the Supreme Court addresses that question. I mean, that's sort of a seminal case on stigma-plus, and *Paul* says -- that case says that -- in that case the police put Davis's name on a flier that was distributed to 800 merchants that described him as a shoplifter. As a result of that, Paul was -- sorry, Davis was alleging that shoplifters were denying him the opportunity to shop -- I'm sorry -- not shoplifters -- merchants were denying him the opportunity to shop. That's obviously an opportunity or a right, to use the analogy, that is afforded to all

individuals.

THE COURT: How is that any different than a right to board an aircraft, then? I mean, if a merchant has a store open for people to come in and shop and now the government has interfered with that by labeling Mr. Davis, what's different than all the airlines having the same opportunity competitively to entice you to fly with them or whatever only -- only to have the government prevent your boarding the aircraft? Why is that any different?

MR. RISNER: I think that's right. I think in *Paul* they found there was no plus in that case. So that analogy, I think, would hold.

THE COURT: Okay.

MR. RISNER: There's not a loss of the status that's being given.

THE COURT: Because there's not a fundamental right to go shopping at the A & P or what?

MR. RISNER: No, it's not that there's not a fundamental right -- and that's a different analysis that sort of ignored the stigma part --

THE COURT: I should not have --

MR. RISNER: -- or liberty interest. I guess it's a different, I guess, question there. The difference is it's not a right or a status that's recognized under federal or state law.

I think that the *Green* case speaks a little bit, too. I think that it is actually analogous that obviously the deprivation of allegedly being included on the No Fly List is -- is qualitatively different than being delayed boarding on its own, but in *Green*, the reasoning of the Court is still -- is still on point, because it recognized there was no plus when somebody was denied the ability to travel without impediments.

THE COURT: Except the impediment there was solved. After an hour's worth of screening, the passenger was reinstated to the same status as everybody else. And to the extent there was any stigma, it's mitigated. He's on the aircraft, so he must be okay.

MR. RISNER: I'm not sure if that really would dissipate the stigma. The -- the plus was changed. I certainly recognize that. But the *Green* court also recognized that as a matter of law, under the stigma-plus claims, that there was no plus associated with a burden on a single mode of transportation. That's what you have here.

Again, you're really coming back to a plus that attaches, if at all -- which I don't think there's a plus here -- but if there is one, it's a plus that attaches only to a single mode of transportation.

THE COURT: Which is effectively, say the plaintiffs, the only mode of transportation.

You know, this argument that you can take a boat just seems wrong. It seems fundamentally wrong to assume that that has any -- any meaningful access for a person who needs to get from here to the other side of the world, say, for a family medical emergency or for a brief vacation to go home to see ailing grandparents.

This -- I'm just really having trouble with the idea that a person in Portland, Oregon, is not significantly burdened by being prevented from flying internationally because maybe they can get on a vessel that in weeks and maybe months and tens of thousands of dollars can get them to a point after someone has already died or after an important family event has occurred.

I'm troubled with the fundamental assertion you're making that this travel right, whatever it's for, isn't significantly burdened by the No Fly List, because you can maybe get a boat or a rocket ship, for that matter. I don't know.

MR. RISNER: I don't know what the record will say about rocket ships, but I want to -- I think I'll point to two things to sort of try to respond to your question. The first is the analysis in *Gilmore*, which accepts this allegation as the starting point that air travel is, in the Ninth Circuit's word, a necessity. But, at the same time, it's one method of travel. I don't know of a -- of any case

that's recognized as a liberty interest in one form of travel. And the plaintiffs haven't pointed to one, to my knowledge. I don't know of a -- any legal support for the notion that a convenience is determinative in this arena.

THE COURT: That's my point, Counsel. To call it convenience is really, I think, marginalizing the argument. I don't think you can fairly say it's just a matter of inconvenience. It's hugely expensive, it's hugely time-consuming, and who knows what other impediments exist between, say, the Port of Portland and some other place on the other side of the world; how many other authorities a person might have to encounter from here. To say it's merely inconvenient, I think, undermines the point of what the plaintiffs are arguing.

And it -- to me, their argument deserves more credit than that. And it -- I think it's not sufficient to simply say all forms of transportation have been denied the plaintiffs, because, effectively, I don't see that this record shows any practical alternative to a ticket on an aircraft to get from here to the other side of the world for whatever reason a person lawfully would want to travel.

MR. RISNER: I would just point back to the declarations in this case of the individuals who have returned, whether by air or by other means, that that has happened.

THE COURT: Am I wrong in resisting that -- the comfort you're trying to give me? Because these people didn't just get to get on an aircraft. I mean, there was a lot of effort each had to go to to be permitted to come back or to get to wherever they were going. I'm having trouble accepting the solace you're offering that they get to come home eventually.

MR. RISNER: I think I would just maybe end this point by just pointing to the -- whether it is a matter of convenience or something greater than that, has to be grounded in a constitutional construct of what the liberty interest is. And I think that even if that's true --

THE COURT: What is it? What is the liberty interest around being able to travel out of the country to an important event or even a less important one, but I don't want to bother our argument now with, "I want to go on vacation." What if a person needs to travel for important reasons we would all recognize; the death of a loved one, the birth of a child, some important matter that any human being would want to encourage? And what if a person having once been denied boarding and having gone through a process where nothing is resolved in any explicit way, the person then goes to the trouble to make an air reservation and buy a very expensive ticket to go, hopefully, to say the last goodbyes to a dear family member and then is again denied

boarding?

What right -- isn't there some basic problem with this notion that the person would continue and repeatedly be denied boarding for that sort of --

MR. RISNER: I'm not sure why the person would continually need to do it, but I think that that gets to the balancing, and we're happy to talk about that. Maybe the second part, but --

THE COURT: Okay. I want to make sure I haven't just misunderstood you.

So let's take a hypothetical where a person has a family member overseas and there is a time-sensitive reason to get there, like the person is -- overseas is a family member and very ill. So the traveler wants to go and is denied boarding and is told, as I'm -- as I said is undisputed here, "You're on the No Fly List. We can't let you get on the aircraft." The person investigates shipping options -- we don't have things like, you know, transporter rooms from Star Trek -- I mean, the only other option is by water, really -- and can't get there in time. So the person tries again. You want to know why? Why would they try again? Because it's important to be there at the death bed. So they buy another ticket, and they're denied again.

I don't think the why should they try again is really a productive line of inquiry. The issue is shouldn't they

have the right to get on the aircraft to go for some important purpose, if not an unimportant purpose, and if they're denied, shouldn't they have the means to resolve the issue affirmatively so that when the next relative is ill and dying they can plan five months in advance to get on some freighter? I don't know. The idea that this isn't important is really troubling me.

MR. RISNER: I want to be clear when I say -- when I asked the question about them trying again, I think that gets back to the beginning of your colloquy with plaintiffs' counsel that if there is a liberty interest here, the government's suggestion is not that an individual in that situation is entitled to no process.

The government's position is that the process that they're currently provided is adequate under due process, and, so, in that sense --

THE COURT: I guess that we're drifting to the process part.

MR. RISNER: Right. Yeah.

THE COURT: But, to me, they're inextricably intertwined, these issues, because the sufficiency of the process is only important if you have some interest, and you're contending there isn't one, and I'm challenging that at the most basic level.

How can there not be a right to travel to go see a

relative dying?

MR. RISNER: I think that in that I would just point back to *Gilmore*, which recognized that it was talking about one method of travel, which was air travel, and it referred to it as a necessity. But, in that case, it was a fundamental right inquiry, but there wasn't a right to do that.

And, obviously, if you're not able to -- to exercise a right to air travel in that situation, when it is recognized by the Ninth Circuit to be the most convenient way, the alternative will be less convenient, but I don't know of a liberty interest that attaches to a method of travel because it's the most convenient.

THE COURT: Well, you're right there isn't any case that explicitly addresses it and you're right that the Ninth Circuit case framed the issue, as you've noted, because they didn't have to. But what I'm saying is I think we have to confront that issue here.

It's not reasonable to say air travel is merely a convenience in this world, in this time, and so if your argument rises or falls on it's a mere convenience, I find that response quite unsatisfactory. There has to be more to the definition of what this means than it's merely inconvenient.

MR. RISNER: And I think it's not -- I'm not

suggesting that the line is drawn merely at convenience.

THE COURT: Where is it drawn?

MR. RISNER: I think the question is do they still have the ability to engage in this type of interstate or international travel.

THE COURT: Why should any rationale court -- I hope we're all on the rationale side. Why should any neutral -- any arbiter of this reach a conclusion that there is any alternative to air travel in today's world for these kinds of issues, given the record that I have? I mean, maybe once in many weeks, after a lot of money, someone can get from point A to point B.

MR. RISNER: On that precise question, I think that's what the Ninth Circuit recognized in *Gilmore*. While it was a different legal analysis, the question was, was there an alternative means of travel? The fact that it was going to be much more convenient or, you know, much better to use this method I don't think was dispositive for *Gilmore*, and it shouldn't be dispositive here.

THE COURT: So your counsel --

MR. RISNER: So there was an alternative.

THE COURT: Your counsel is assume -- assume that there is another method?

MR. RISNER: I don't think Your Honor has to assume it, because you can look at Mr. Persaud's

declaration, you can look at Mr. Washburn's declaration, and you can look at Mr. Knaeble's declaration.

THE COURT: And see that they eventually got there from here somehow?

MR. RISNER: Or whichever way they're going, right.

THE COURT: Right. Or got here from there?

MR. RISNER: Right. You can look at the declarations of the individuals who did return to the United States with the assistance of the government, but I think that it's just not accurate to say it's actually a constitutionally protected liberty interest that attaches when we're talking about one method of travel.

THE COURT: All right. So give maybe another look at this from the perspective of other cases that have recognized similar rights or not recognized similar rights, since we've obviously beat *Gilmore* and have gone around that bush many times. Help me with the analogy to understand why the defendants' position is legally correct that there should not be recognized here in this case, and maybe the first time, a right to travel in 2013 internationally by air.

MR. RISNER: Are you asking about just the liberty interest claim or the stigma-plus argument?

THE COURT: Either one. And give me some case

analysis from another perspective that I can analogize to this to understand why it should not be regarded as a right, even though -- well --

MR. RISNER: It should not be regarded as a right because of all the cases that reject that argument on a passport theory. A passport actually denies someone the ability to travel internationally, either by air or by ship or by land. That is a more serious deprivation.

THE COURT: What is the process that attaches to a passport revocation, as opposed to denying boarding on an aircraft?

MR. RISNER: A lot.

THE COURT: It's a lot different; right?

MR. RISNER: I'll certainly say it's a lot different. I think that takes us into the process argument, too, which I'm happy to --

THE COURT: But if your point is that passport revocation is permitted because -- why? There's a right that -- you have the passport. It's been taken away. Now we have a hearing about it and a process. And if denying boarding on an international flight is the equivalent, in practical terms, of not having a passport, why isn't the same kind of process then due and why isn't it treated the same way, from your perspective?

MR. RISNER: I just don't think that the predicate

is accurate.

THE COURT: The premise that it's the equivalent.

MR. RISNER: I don't think it is the equivalent, right.

THE COURT: Why?

MR. RISNER: Because of the availability of alternative means.

THE COURT: So we're back to the boat?

MR. RISNER: I think that's right. I think that is the major distinction.

THE COURT: What is the record with respect to that availability? Because I made all kinds of hyperbolic references here, what is the actual record as to the availability of alternate means today to an international traveler denied boarding?

MR. RISNER: The record, if on the -- with respect to the boat, is that Mr. Persaud was able to take a ship to enter the United States. That's in his declaration, which is docket 91-13 at paragraph 9. The record indicates that Mr. Muthanna alleges that he was not permitted to board a boat from Philadelphia to Belgium. He indicates that the operator of that commercial vessel, the private operator, denied him the right to boat at the recommendation of CBP. That's in his declaration at docket 91-27, paragraph 20.

I think that's the -- the record on that issue.

THE COURT: Okay.

MR. RISNER: And then we get to the question of whether or not it's accurate that it doesn't matter that the operator made a decision.

THE COURT: I -- I've been interrupting you, and I don't want you to not have the chance to finish up what you've needed to make a point. Even though we're at about 25 minutes, go ahead, and I'll try to resist the urge to interrupt you again.

MR. RISNER: I think you've walked me through all my points.

THE COURT: Is there anything else you wanted to say before we wrap and take a short recess?

MR. RISNER: On the issue of the liberty interest, no.

THE COURT: What about the plus? You already covered there wasn't a right there that was -- preceded the stigma.

MR. RISNER: Right. I think *Green* speaks to -- while factually different, *Green's* legal analysis speaks to this case quite accurately.

Nothing further.

THE COURT: Shall I assume, as a matter of undisputed fact, for purpose of these motions only, the interruption in travel, as asserted by each of the

plaintiffs in their declaration, since the defendants did not refute them -- and here I'm not getting at the -- all of the associated burden that the declarants have described, but simply the fact of denial of boarding and the fact of the assertion that that was because they were on a No Fly List -- may I assume that is undisputed for purposes of these motions?

MR. RISNER: The fact that the individuals were denied boarding is undisputed. I think that what we think are immaterial allegations are the allegations of certain government employees told them or certain airline employees told them the circumstances for that. But the fact that they were denied boarding on an aircraft to or from the United States is not disputed.

THE COURT: So you've asserted the immateriality of the assertion for the reason why they were denied boarding. May I assume that it is undisputed that each plaintiff was directed to the TSC process to deal with a non-boarding issue?

MR. RISNER: Yes. Each of the individuals in this case filed a DHS TRIP redress request and received a response from the agency.

THE COURT: Were they directed to do that?

MR. RISNER: You know, I don't think there are allegations in the record for each of the plaintiffs -- I

don't want to overstate it -- as to who told them how to go about that process. But it's not disputed that they did go about that process.

THE COURT: Regardless whether defendants contend it's material or immaterial, defendants have not controverted on these motions, the plaintiffs' assertions that they were denied boarding and they were told they were denied boarding in one form or another because they were on the so-called No Fly List.

MR. RISNER: I don't think that all the plaintiffs make the last allegation as to exactly why they were denied boarding or what they were told. What we -- what I mean when I say that I think some of the allegations are immaterial -- I think we'll probably get to this next part, but the government does not confirm whether a particular individual is or is not on the No Fly List.

THE COURT: All right. That's your choice.

On summary judgment, with these declarations, though, I have them unrefuted. And that's your choice not to have refuted them?

MR. RISNER: That's correct. We have not responded to the factual allegations in any of the declarations.

THE COURT: I think --

MR. RISNER: I think that's accurate. With the

exception of the Coppola declaration, which we filed. To the extent that addresses any of the issues, then obviously those issues, we think, are material.

THE COURT: All right. Let's take a 15-minute recess, please, everyone. Thank you.

(A recess was taken.)

DEPUTY COURTROOM CLERK: All rise.

THE COURT: Thank you, everyone. Please be seated.

Before we continue, I wanted to go back to what we were discussing just before the break.

Mr. Risner, you can stay where you are. *Gilmore* and *Green* were not cases that involved international travel on their facts; right?

MR. RISNER: I think that's correct.

THE COURT: So when the Court was noting the alternative to air traveling within the Continental United States, there's obviously available cars, trains, bicycles, and other modes of transportation. Why should one import that statement, the quote to which you were referring, from cases that don't involve international travel, to this case?

MR. RISNER: I think because the other means are still available. They're -- in *Gilmore*, the Court recognized that air travel was a much better alternative. It accepted the allegations that air travel was a much

better alternative. That is what's alleged here; that there are other means that are -- that it's not that they're less convenient. They're much less convenient in certain cases, but the analysis is still the same. It's still available.

I want to just -- if I could sort of clarify one thing from before, too; that when an individual is located outside the United States and would want to return and would be considering the possibility of boats, there's also an alternative option of flying to another country that does share land borders with the United States and then traveling by land from there. And that's happened in these cases here. It's not that boats are a necessity. There's the opportunity to fly to --

THE COURT: Mexico.

MR. RISNER: -- a county like Mexico or somewhere else in Latin America and then come on a land border. I'm not suggesting that that is as convenient than flying directly to the United States in any way, but it is an available alternative. I think under *Gilmore* and *Green* that that analysis is still appropriate.

THE COURT: Thank you for answering my question.

MR. RISNER: Thank you.

THE COURT: All right, Counsel, you may proceed.

MR. ARULANANTHAM: Thank you, Your Honor. I want to clear up just a few small issues about the deprivation of

liberty, as well, and then spend the bulk of my time talking about the notice and opportunity to be heard arguments, Your Honor. But just briefly on the question about the stigma claim and the discussion you were having with government counsel about *Paul v. Davis*, I just wanted to clarify that the distinction in *Davis* -- the reason why there's no plus in that case, Your Honor, is because a vendor is not required to check the list of, you know, a known shoplifter. So it's not a mandatory constraint.

We're much more like *Wisconsin v. Constantineau*, which is the case that preceded *Paul v. Davis*, where it's a ban on buying alcohol. And buying alcohol is also a right that's -- you know, it's just in commerce. It's just what you were talking about, Your Honor, just like flying on a plane, and it's illegal for our clients to board a commercial aircraft.

The government counsel had also mentioned and you had asked about cases about one form of travel, and I just wanted to point to you driver's licenses, which it's mentioned *Bell v. Burson* is the case, and it's on page 7 of our reply. It's our reply in support of our summary judgment motion.

And driver's license revocations are subject to due process protections. And, obviously, you can take a bus and you can walk and you can do many other things. Nonetheless,

it is a deprivation of liberty in which you have a liberty interest in being able to drive, and therefore it does trigger due process protections, even though it's not impossible to go from one place to another without a car.

Just a couple of other short things regarding your questions about the record, Your Honor. Your hypothetical about a person who's going to visit a family member who's dying is very close to the facts of Salah Ahmed, which, I apologize, maybe that's why you mentioned it, Your Honor. I just wanted to make it clear his brother's funeral is happening in the Middle East and he can't go. And it really trivializes this case to compare that to *Gilmore*, you know; a man who refused to give his ID at the airport.

You know, Mr. Ahmed would have gladly given his ID and gone through the security screening. All of our plaintiffs would have gone through the security screening in order to be with their wives or parents, or, you know, whatever it is, and obviously that is a very serious deprivation of liberty.

There was also a question about the special arrangements under which people were returning to the U.S. That did happen after -- in every case of these 13 people after the complaint was filed and after the preliminary injunction was filed. And in each of those it was made clear that it's a one-time waiver that allows these people

to come here. It does not mean that they can fly now.

You know, in fact, Steven Washburn, he didn't take the waiver, but he got through the U.S. by taking five flights and ended up in Mexico. He got imprisoned in Mexico, because Mexico shares, you know, the information with the United States -- we presume that's why. He eventually made it here. But his wife is in Ireland, and he can't go back, because he can't afford the money to take a cruise ship to get back to Ireland.

And so when the government counsel says, "Well, why aren't other people taking that waiver," they're worried about that exact thing. If you look at, for example, Ms. Rana's declaration, she has a small child, and she's with her husband in Pakistan. Her parents are in the U.S. She would like to take her child -- to bring her child to see their grandparents, but, if she does and takes a waiver, then she's going to separate her child from the child's dad, and she may not ever be able to get back. She doesn't know how she'll be able to get back to see the father.

So the fact that there's a one-time waiver that was allowed for some plaintiffs does not do much to minimize the deprivation of liberty that we're talking about.

I think the last thing I wanted to say before we get to the notice issues, Your Honor, is, just, there is in the record -- there are at least some places where it is

impossible to travel. We don't think we have to show that. We think it's a very serious deprivation of liberty, even if, you know, the only way to travel is to, you know, hire a team from the America's Cup and sail a boat to Hawaii, you know, which is what Amir Meshal would have to do to see his brother and sister-in-law in Hawaii.

But even if you leave that aside, there are some places -- Muthanna is the plaintiff -- there's a declaration -- he cannot get to Yemen. It's actually impossible for him to get there. And I'm sure there must be other places in the world. You know, I'm sort of speculating; but, like, South Africa or, you know, India. There must be places where it's actually impossible to actually get there without -- without taking a plane.

Your Honor, you had mentioned at the outset that in your view it's difficult to separate the question of liability from the question of remedy, and I struggle with that.

THE COURT: Only in the sense that it seems to me that when you're speaking of degrees of rights or the extent to which a deprivation is significant, fundamental, constitutional, that discussion, that sliding scale, necessarily implicates what the consequence is, and this opportunity to address the problem, I think, is as a, at least a practical matter, if not a legal one, fundamentally

tied up with what the right is. Because a right without a remedy, I think we can all agree, in the context of just common parlance, isn't a right at all.

That's the only reason I connected the two.

MR. ARULANANTHAM: I think we agree with that, Your Honor, in the sense that if there were no way -- it was actually impossible to do anything more than what the government is doing now, by way of notice and opportunity to be heard, then could you rule for them on the summary judgment motion, and there's no further question to be addressed.

But our view is that the -- that the Court -- well, what we're asking the Court to do today, or at this stage, is declare the existing redress system unconstitutional, insufficient, and to set certain basic parameters for what an adequate hearing process -- redress process would look like. And then the details of that process we would ask be filled out in briefing on the remedy, and that -- that's the process, Your Honor, that district court in the *Kindhearts* litigation did -- it was our litigation -- there's actually two published opinions. There's a published opinion finding -- it's the 647 F. Supp 2d opinion. It's an opinion finding violations. And then there's a separate one, the 710, is a -- is a separate opinion after the Court obviously took further briefing, which is about what remedies are

available. It's also the approach, for whatever it's worth, that the Supreme Court recommended -- the plurality, you know, the four justices recommended in *Hamdi*, the enemy combatant detention case.

So we think it has a logic here, Your Honor, in part, because the government -- let's say the Court holds, as we hope you will, Your Honor, that notice and a complete statement of reasons -- I'll get into this -- you know, and a hearing is required, then the government has not had an opportunity to say anything at all about what the content of that should be, and obviously we would also like the opportunity to say much more about it than we have in our briefs.

So the basic parameters that we -- that we believe are required by the due process clause, Your Honor, post deprivation notice, so you don't need to tell people when you place them on the list, but after they've gone to the airport and haven't been able to get on the plane and in most case have been -- well, in all cases have been told, and usually by an FBI agent, that they're on the No Fly List, at that point they're entitled to a notice that that is, in fact, the case, and then a complete statement of reasons, which would mean enough information that would allow them, Your Honor, to contest the facts, the facts that the government contends are sufficient to put them on this

list, and the application of those facts, enough to be able to contest the application of those facts to a standard and then an in-person hearing before a neutral decision-maker where they -- their credibility can be assessed, because, at the end of the day, the government -- well, at this stage of the litigation they won't even confirm or deny it; but, presumably, either they'll say they're not on the list or they will confirm that they're viewed that these people are associated with terrorism or related to terrorism or terrorism suspects and, for that reason, a threat to aviation security.

All of our clients have said in sworn declarations that that's not true.

There's going to have to be a credibility assessment that has to be made at some level, and that's going to require some kind of hearing before a neutral decision-maker.

Now, Your Honor, we don't -- we realize that's for several aspects of due process that we're asking to be set, and this stage of the case is the basic parameters, but we're not writing on a clean slate. Most obviously Judge Graber's opinion in the Ninth Circuit and *Al Haramain* sets out almost all of what I just set out, which is our view.

And I -- I want to take a little time to talk about *Al*

*Haramain*, because I think -- you know, it's February of last year, Ninth Circuit opinion, on a very close subject, and that case involved the seizure of property. So it's not a liberty case. It's only a property case. But it's a seizure of all the properties of an organization that is sending money abroad.

And I also want to note, Your Honor, that one of the board members is the prominent -- one of the board members of the organization, who is living in Saudi Arabia, is a specially designated global terrorist. The government has designated him as such, and he has not challenged that designation.

And the government says: We can't give any notice. We can't give any reasons or show any evidences as to why they've done this because that would create security problems to give information to these people about why we have done this, and the disclosure of this would necessarily require disclosing classified information. So it's very, very similar arguments to the arguments the government is making here.

Of course the Ninth Circuit rejects that and holds it's unconstitutional and says, in this property case, right, at a minimum, a true and complete statement of the reasons has to be provide with enough information to rebut the factual errors, in which they say could clear up very

straightforward mistakes and then determine if the charges are correctly applied. Which, you know, if you -- if you translate to that here, it would mean we have to know why the government says our clients are a threat to aviation security. You know, sufficient so that they actually can't ever board an aircraft.

The Ninth Circuit also --

THE COURT: Would it be sufficient in this hypothetical process for the government simply to declare that the person no long is on the list, as opposed to having to make disclosures?

MR. ARULANANTHAM: Yes. Absolutely, Your Honor.

And when you go -- our clients are scared to go to the airport, because, you know, they've been through this and in some cases multiple times. Agents swarm them and all the people around see it, "Oh, my God, we've caught the person who was about to blow up the plane." So to be told, "You are no longer on the No Fly List," and then they can go about their lives would be a huge, huge benefit for our clients. Definitely.

Your Honor, the *Al Haramain* decision relies extensively on *Kindhearts*. It cites it multiple times. And although the question in *Al Haramain* is not addressed about whether a hearing is required, I'm not sure why that is, but there's no discussion about it one way or the other in the opinion.

There's extensive citations to *Kindhearts*, and *Kindhearts* -- and *Kindhearts* required it. It requires a prompt, meaningful hearing at which the evidence can be assessed.

As I said, I think our deprivation of liberty on this record is much more significant than the property deprivation in *Al Haramain*. So I think, you know, in our view, there's a floor. The government's DHS TRIP process is way below that floor, way below the floor that's being discussed in *Kindhearts* and *Al Haramain*. We think that's -- we're entitled to more than what is present in those cases.

Now, the government's, sort of, central argument against the notice is that their -- their litigation position is that they cannot confirm or deny anyone is on the list. I stress it's a litigation decision, because there's no dispute that, in fact, our clients have been told that they were on the No Fly List.

Ms. Choudhury covered this a little bit, but I just wanted to say it's footnote -- because there's some ambiguity, I think, in the exchange here. It's footnote 47 and 48 in opposition to the government's motion for summary judgment.

THE COURT: So plaintiffs' opposition 47, 48?

MR. ARULANANTHAM: Yes. Thank you, Your Honor.

Those two footnotes you can see all the paragraph

citations to the declaration. In four of those cases an FBI agent is trying to recruit one of our clients to be an informant. So the FBI agent says, "You're on the No Fly List. We can help you with that if you can work with us." It really, I think, undermines the strength of the government's position, because it's a matter of convenience in that the government does, in fact, disclose this information when it's helpful for the government to do so.

Beyond that, I just think, from a common sense approach, it's sort of hard to take seriously, right, that you go to the airport and -- I mean, how many reasons can there be for why you're denied boarding? You don't even get to the security screening in the situation. The first time you give your ID, that sort of sets off the whole thing, and agents come and swarm you, and they take you to a room, and they interrogate you for hours. The notion that this person is not tipped off that the government is, you know, suspecting them of something is just preposterous, Your Honor.

So, you know, like Ibraheim Mashal, you know, he's an honorably discharged marine. He's trying to go to Seattle to meet his dog training clients. You can read the account of it in the declaration. Dozens of agents come in and swarm him. The idea that it would tip him off to tell him that he's on the No Fly List, it doesn't make any sense.

And we don't seek pre-deprivation notice. For a person who hasn't gone through that notice, we don't see it.

The other point that's worth mentioning on this is there's a global entry program that DHS runs, which allows you to escape some of the security screening measures. And if you -- there's just -- this is Exhibit A, actually, to the Choudhury -- my co-counsel -- her declaration, Docket 91-17. And you can read this thing -- the policy there. If you apply -- it lists off, I think it's five reasons, for why you can be denied. And there's only a few reasons. You know, if you lie on your application, you can be denied. If you have a criminal history or a Customs history where you've been -- you violated the Customs's rules, you can be denied. And then one of the reasons you can be denied is basically that they can't confirm that you're -- you know, safe on -- you know, not on any watchlist.

So another reason is if you're not admissible to the U.S. Well, our clients were all U.S. citizens, so that's not an issue. It's not hard to figure out, right, that if you're not one of these things, that might be a reason for your denial.

Apart from that, Your Honor, of course, many people go through the global entry program, and they do get, you know, accepted into it, and then they can fly without having to go

through whatever procedures it exempts you from.

Well, all of them know they're not on the No Fly List; right? So if you're a suspected terrorist and you apply for global entry and you get through, then you know that the government, in fact, doesn't have you on its watchlist.

So the notion that they can't confirm or deny can't be reconciled with the fact that they have a program. One of the conditions of entry into is that you be confirmed as not being on a watchlist.

I had mentioned earlier the point on the notice issue that the government's position cannot be squared with the property cases that I was talking about, so I won't reiterate all of that, but *Al Haramain*, *Kindhearts*, the D.C. Circuit's decision in the *NCRI* decision, National Council of Resistance of Iran, actually holds that pre-deprivation notice is required for the designation of a charity as a terrorist organization. And then there's GETE, G-E-T-E, which is the INS property seizures case. It says there has to be an exact statement of reasons. There has to be a citation to the relevant statute or regulation. Obviously, that's because that statute or regulation gives the criteria that the government is applying to take away their property.

And although it's not a national security case, it gets cited in *Al Haramain*, and the Court says, "We think this case is applicable. We haven't seen any explanation to why

it's not applicable."

And then the last thing I'll say on notice, Your Honor, is I really think the government is stretching to find authority to uphold what is essentially a zero notice policy. Their policy is zero notice. Cannot confirm and cannot deny.

There's certainly no Ninth Circuit case that even comes close to that proposal. You know, they can't suspend you from school, they can't shut off the power if you have subsidized utilities without giving you some notice. And the government's cases on this are all cases where people had no due process rights.

So, like, *Hunt* is a FOIA case, and obviously there's no constitutional right to the government's evidence. It's just a matter of statute. It cites the case of *Jifry* which is about -- it's a D.C. Circuit case. It's about airline pilots who are abroad, who are trying to fly abroad, and haven't even been in the U.S. for a number of years. And every case involving due process rights requires some amount of notice.

The second thing that we were talking about was a complete statement of reasons. And, as I mentioned, it's enough to -- it has to be enough so we can clear up factual mistakes. We believe that and our clients have stated that none of them are threats to aviation security, so they

needed to have a chance to prove that by seeing why the government thinks that's not true.

And the second thing is to determine the application of those facts to whatever legal standard the government is applying. And you will hear from Ms. Siemion about the issues concerning the problems with the government's auditing process for the DHS TRIP system; but, you know, it's our position -- the plaintiffs' position is that whatever -- whatever the situation is with all the auditing system, as a matter of law, when you have a completely one-sided process, it produces error.

That's actually what the Ninth Circuit said in *Al Haramain*. They cited the Ninth Circuit -- prior Ninth Circuit decision *ADC v. Reno*. Those are both national security cases. They say something like you'd be hard pressed to design a system that was more likely to produce error than one where there's only one side. Right?

And related to that, Your Honor, the -- you know, the government says, "Well, you can seek judicial review of the DHS determination." Right? But what good is the judicial review if you never knew what the evidence was? What do we get to put in the record for the appellate court to review if we never even had a chance to show that the reasons that were given about our clients weren't true. So that's why there has to be a statement of reasons.

And as for there being an in-person hearing with a neutral decision-maker -- I think I mentioned that at the beginning -- but because credibility is so important, there has to be an actual hearing where somebody has a chance to testify. And this is actually -- I think some of our best authority for this is actually in the *DeNieva* decision, which I know you were discussing earlier in the day. But there the Ninth Circuit says under no circumstances has the Supreme Court permitted a deprivation of life, liberty, or property without any hearing whatsoever. That's the government's position; that they can do all these things and there's no hearing. You never get to hear what is against you. You never get to confront it in any way. You never get to give any testimony to convince any judge who's actually neutral in some way that you're not a threat; that you're not going to do anything bad at the airport. There's no opportunity to make those statements. And we think that that's not the law.

And, as I said, *Kindhearts*, even for property, says you need a prompt and meaningful hearing. And here surely we need it, as well.

And the last thing, in particular, that I wanted to discuss was about the problems arising from classified or sensitive information.

But does the Court have any questions on anything else

before we get there?

THE COURT: No. Thank you. Go ahead.

MR. ARULANANTHAM: The government says -- I mean, there's sort of two big reasons I think they're saying why this is all impossible, which is what I think they have to win in order to stop the case today. Any other process, anything more, is impossible.

In fact, the one thing that the Glomar explains about, they can't confirm or deny any of this, and I think that's wrong, for the reasons I said.

The other -- the other argument the government says is that any process no matter what you do, anything more that you provide is going to implicate, necessarily, disclosure of classified information, which would threaten national security. Right?

I guess the first thing we were -- sort of funny to ask the judge this, but don't prejudge, in the sense that don't decided today that you know for certain that there is no way to deal with all those problems when we don't even know what those problems are going to look like.

As you said, Your Honor, it might be that some of the clients -- the only notice they're going to say is you're not on the No Fly List. If that's true, then it would be a shame not to afford them at least the relief that would be permitted because of a hypothetical concern that there may

be classified information, which, in fact, there isn't, that would bar them from having any kind of notice obligation.

Now, the other -- the other particular authority I wanted to point out on the beginning on this is that *Al Haramain*, in that context, property instruction -- classified information should be dealt with on a case-by-case basis. Right? On a case-by-case basis. Look at the particular problem and see, in this particular case, with this particular evidence, what is it that can be done?

I think that the Ninth Circuit, although obviously the holding of the Ninth Circuit in this case was all about jurisdiction, I do think there's that last line in the opinion where they say, you know, "We're -- we're the district court. We'll deal with sensitive intelligence information in this case," and they cite CIPA, the Classified Information Procedures Act.

So I think it's -- if the Court thought it was impossible to litigate this case, there's no way to do it, in light of the fact that there could be classified information involving some of the plaintiffs.

THE COURT: That's really not a plausible concern. I mean, clearly, there are procedures that deal with classified information, statutory and constitutional, but those are driven by the nature of the underlying proceeding.

So in a criminal case, where there's a constitutional

right to confront and if the accuser's data is classified, then one has to deal with it.

So there are ways to do it. It's obviously extraordinarily cumbersome. And if you're dealing with a population of all the travelers who want to board aircraft to travel to or from the United States or over air space, you're dealing with a universe much larger than the -- the -- that subset of people who are ever accused of criminal conduct based on classified information. But that -- that goes into the burden of -- of a balancing process later.

But you needn't worry that I am assuming that every case will require disclosure of classified information under circumstances that can't be addressed. I just don't know how. But then that's not really for the judicial branch to worry about.

If there was a need to reconstruct the process that exists, surely it's not going to be this judicial officer who reconstructs it. It would have to be turned back to those with authority to do it.

MR. ARULANANTHAM: Well, Your Honor, let me say a few things about that.

THE COURT: Keeping track of the time, however, because there are many of you still wishing to speak and only about 50 minutes left, so --

MR. ARULANANTHAM: Okay. Let me just say, then, obviously, as you say, there are various different alternatives, and those are discussed in the decisions. With respect to what happens at that next stage, though, and if the Court determines that, today or in a ruling coming shortly, that there has to be --

THE COURT: How about in a ruling coming eventually?

MR. ARULANANTHAM: -- some opportunity to be heard, right, then we can then brief the question about declassification and --

THE COURT: All I was trying to do is to assure you that I make no assumptions that the fact that the government's decisions about people on the No Fly List may be based on classified information requires one result or another. It just is what it is, and we'll have to deal with each important issue as it arises if the case proceeds past these motions.

MR. ARULANANTHAM: All right. Well, then I think the only last thing I wanted to say, Your Honor, was that the government -- we're only talking about a burden for these 13 people, in the sense that these people have been unable to fly for a number of years, and, you know, they seek relief that this Court has jurisdiction to grant for them.

Obviously, the contours of any ruling that Your Honor makes, the government will have to conform to the legal requirements in such a ruling, and, as applied to other people, they can do whatever they believe to create an administrative system that complies with the due process ruling that this Court makes.

But as for these 13 people, that's the question of burden that -- that -- or that's the -- you know, we just want relief for them, you know, with respect to this Court's handling of whatever classified information will come.

THE COURT: So you're not purporting or suggesting at all that this is some kind of class action or some kind of effort to broaden the process for anyone other than these 13?

MR. ARULANANTHAM: That's right, Your Honor.

THE COURT: Okay.

MR. ARULANANTHAM: The very last thing I'll say is that if the government feels that whatever information is arising is information that they don't want to turn over, they can always do what they already did for the plaintiffs in this case when they gave them these one-time waivers and brought them back to the country and said, "You have to fly out of a U.S. air carrier. You'll have a couple days' notice." I presume they're putting a marshal on the airplane to go with them. So if there's ever a situation

where it's just impossible for them to provide a fair process in a hearing, it is not as though their hands are tied. And they can always do what they already said they did, and, in fact, did, when faced with a preliminary injunction that was going to -- you know, that we -- we were litigating to win the right of our clients to come back home.

Unless the Court has further questions --

THE COURT: Well, not that I should take the time to raise right now.

Thank you, Counsel. I appreciate that.

MR. ARULANANTHAM: Thank you, Your Honor.

THE COURT: Ms. Siemion, I guess you're next on the ordered agenda that you all have provided.

You may proceed.

MS. SIEMION: Good morning, Your Honor. This is Rita Siemion. I represent The Constitution Project in this case. Thank you for the opportunity to participate today.

THE COURT: Ms. Siemion --

MS. SIEMION: The Constitution Project -- (phone transmission unintelligible.)

THE COURT: Ms. Siemion?

MS. SIEMION: Yes.

THE COURT: We're having trouble, first, with the quality of your transmission. So before you get in any

further into your argument, I need to --

MS. SIEMION: Okay.

THE COURT: -- get to -- you're on a speakerphone?

MS. SIEMION: I am. Let me see if --

THE COURT: Can you pick up a handset, please?

MS. SIEMION: Is this better?

THE COURT: It is better. Just read a sentence to us of some kind, so we can test the quality of what we're hearing.

MS. SIEMION: Well, what I was about to say is that The Constitution Project recognizes the important rules of the watchlist, including the No Fly List, by protecting national security.

THE COURT: That helps. So we need two more things from you. First, you need to speak --

MS. SIEMION: Okay. And --

THE COURT: Hold on, please. You need to speak slower and more distinctly. You've chosen to participate this way. It's a burden to listen to you right now, unless you speak slower and more distinctly. So please try to keep that in mind.

MS. SIEMION: I apologize. I'll try to speak very slowly.

THE COURT: Go ahead.

MS. SIEMION: So The Constitution Project accepts

that some individuals on the No Fly List actually belong there. But the data, which I will discuss, demonstrate that there is also a high risk of being included on the list in error. And this case that is before you is about providing a meaningful opportunity to correct that error.

There are two issues that I would like to address today, in addition to answering any questions that the Court may have.

THE COURT: Go ahead.

MS. SIEMION: The first issue I would like to address is the type of error that is at issue in this case and to clarify why changes in watchlisting procedures, cited by the defendants, do not address or correct this particular kind of error.

And then the second point that I would like to address, just briefly, is why post-deprivation process would not give rise to national security concerns that were cited by the defendants.

Now, turning to the first issue, The Constitution Project is concerned about the high risk of erroneous deprivations that are presented by the error-ridden No Fly List.

Multiple government audits, which we cited in our brief, have found that the data in the terrorist screening database and the No Fly and Selectee List are housed by that

database is grossly inaccurate and the risks of being included as a result of error is extremely high.

Now, I want to be clear that this risk of over-inclusion is distinct from the problem known as a misidentification. A misidentification occurs when someone who is not actually on the list mistakenly triggers a match to the list during screening because they have similar biographic information to someone who is actually on the list. This is the Ted Kennedy type of problem.

But misidentifications are not the type of error alleged in this case. The plaintiffs assert that they are actually on the list, but they're on the list as a result of mistake or error or insufficient evidence. This type of error does not address or correct by the recent developments that were cited by defendants. And those two developments are secure flight program and the watchlisting guidance from 2010.

Now, the May 2012 report by the Government Accountability Office addresses both of these two types of changes, and it reveals that neither of these address the risk of being placed on the No Fly List in error.

The GAO report provides an overview of the secure flight program and it explains its purpose, which is to review the number of individuals who are misidentified as being on the No Fly List, the type of problem I just

described earlier.

The goal is to make it easier to match individuals correctly.

So what the secure program does is it collects biographic information from travelers, all travelers, such as their date of birth and their gender, makes it easier for computer algorithms and analysts to make a correct match. The -- this program is completely irrelevant for individuals who are actually on the list.

Now, the second and actually the main focus of the 2012 report by the GAO is the impact of this 2010 watchlisting guidance, and it explains that the purpose of this guidance was to address the hold in the watchlisting nomination policies that led to not putting Abdulmutallab, who was convicted of committing the attempted attack of Northwest Flight 253, but of him not actually being on the No Fly List.

The changes were meant to address was the problem of under-inclusion. And to address those weaknesses, the guidance actually broadened the criteria for nominating individuals for the list, which makes the risk of over-inclusion higher, not lower.

Now, the 2012 report reached two overarching conclusions. First, that broadening the criteria resulted in a massive influx of data and that the Terrorist Screening

Center, the National Counterterrorism Center, and the various nominating agencies were overwhelmed by this massive influx, and those agencies expressed serious concerns about the increasing volume information -- volumes of information and their ability to process that information in a timely manner.

The report also describes that there's a massive initiative at this time in which thousands of individuals were upgraded from the database to the terrorist screening database, or from the terrorist screening database up to the No Fly List or the Selectee List.

And as a result of this initiative, the number of U.S. persons on the No Fly List more than doubled and the number of U.S. persons on the Selectee List increased by 10 percent.

Now, we know also from testimony of the former Terrorist Screening Center director, which was cited in the defendants' brief, that some of the individuals were upgraded to this list because of the troubling criteria, including being from a particular country.

Now, the second conclusion in this 2012 report was that there was no single entity that was responsible for assessing the government-wide impact of these changes and how U.S. citizens were being affected or to determine the overall level of errors that were occurring.

Both of these conclusions in the 2012 report suggest an increase in error, not improvements in the risk of error. And this report does not address any improvements in the over-inclusion problem or they said the causes of error details in the previous audit were fixed.

Now, the previous audit, there are two that are relevant here. One was the 2009 DOJ OIG audit of the FBI's nomination practices and the other was a 2007 audit of the Terrorist Screening Center itself.

Now, the 2009 audit found very troubling problems with the FBI's nomination practices to the No Fly List and the terrorist screening database. The audit found that watchlist nominations were inaccurate and incomplete and that the FBI failed to modify Washington's records, as they were required to do, when new information became available. But the FBI failed to remove subjects from the watchlist for months or even years when they were required to do so and that they failed to remove 8 percent of the record after a case was closed at all, just meaning that the individuals remained on the list even though investigations of those individuals were closed.

And then, most disturbingly, the 2009 report found that there was a general lack of understanding among FBI agents in the field regarding the requirements for updating watchlist records and the entire watchlisting process.

Now, the earlier report, the 2007 report, is the one that specifically details the inaccuracies in the No Fly List itself. And what that report describes is a one-time special project review of the No Fly List that the TSC conducted. And in that review the TSC determined that at the time there were 71,872 records on the No Fly List and that somewhere between 38 percent and 52 percent of those records should not have been on the No Fly List at all.

Now, there's a range of a percentage here, because both the numerator and denominator are moving targets, because the database is changing and the records were being added and removed during that time. But, in any event, we know that that is an extremely high error rate, and those are over-inclusions records and individuals that are on the No Fly List who should not be on the No Fly List.

Now, those numbers show that the procedures that were used -- from both those reports, that the procedures that are used to nominate records from the No Fly List for inclusion, modification, or removal is alarmingly inaccurate, and the process to correct these errors -- you know, first of all, that process is to correct only certain types of errors. And the report also shows that the process took six months or more to complete.

So I want to be clear that the suggestion that the No Fly List is sort of updated daily for accuracy is really not

correct.

Now, the plaintiffs have already addressed why as a matter of law the risk of error is too high. But what the factual record shows is that, just as a question of fact, the risk of error is too high. And there's nothing that has been pointed to by defendants that dispute that this risk of error is high.

Now, DHS TRIP is not sufficient to correct the risk of error that I just described because it does not provide even the two most basic elements that are mandated by the procedure of due process, which plaintiffs have already discussed today, notice of the government's reasons for its actions, and the opportunity to respond to those reasons.

The opportunity to simply guess at the factual basis for the action of putting someone on a No Fly List is not a substitute for actual notice. And without adequate notice individuals do not have the opportunity to clear up misunderstandings or correct factual errors or to rebut erroneous inferences.

Now, the need to provide meaningful notice and the opportunity to be heard relates to my second point, which is that both of these two core requirements of due process can be provided to individuals who have been denied boarding without harming national security.

Now plaintiffs have already addressed this, so I will

only touch on it briefly; but The Constitution Project recognizes in its report that pre-deprivation notice, individuals who do not know that they are on the watchlist could undermine the purpose of the watchlist or it could be detrimental to national security.

But The Constitution Project is concerned about the expected secrecy in defendants' overly broad position, described by plaintiffs, that can never, under any circumstance, confirm or deny that a person is on the No Fly List, even after that person has already been denied boarding, would harm national security.

Now, on this point in our brief we cited the decision by the District Court of the Northern District of Illinois in the *Rahman* case, and -- which is authority for the Court and was reversed by the Second Circuit on entirely unrelated grounds. And we cited this case because the government there presented identical national security concerns, and the Court provided a very detailed analysis explaining why each and every one of those concerns simply do not apply in the situation that we have here where plaintiffs are seeking post-deprivation notice and they have already been tipped off that they are under government scrutiny.

There's not a single national security concern that has been raised in this case that would be implicated that is not already triggered by the denial of boarding itself,

which is why post-deprivation notice, which is what it's got here, may be provided consistent with the national security purposes of the watchlist.

Now, notice of the factual basis for including an individual on the No Fly List and an opportunity to respond to that basis can also be provided without raising national security concerns the defendants have raised, such as jeopardizing classified and sensitive information.

Now plaintiffs have also touched on this, as well, but The Constitution Project is very concerned about foreclosing cases that should otherwise proceed, rather than proceeding on a case-by-case basis, as the Ninth Circuit has said that this Court should in protecting classified and sensitive information, using the wide range of tools that are available to this Court.

Both the Supreme Court and the Ninth Circuit have plainly stated that district courts have both the authority and the expertise to handle this type of information.

And if there are no further questions, those are the only points I hoped to address today.

You know, The Constitution Project urges the Court to find that the No Fly List procedures, as they stand today, present too high of a risk of erroneous deprivation, hold as a matter of law, but also, for the reasons I explained, is a matter of undisputed facts, and we urge the Court to ensure

that Americans who find themselves on this No Fly List in error are not denied the most basic requirements of procedural due process.

THE COURT: Thank you, Ms. Siemion. I appreciate your participation.

Mr. Risner?

Folks, just, in the interest of time, I'm going to note that you're probably not going to have the opportunity to make these wrap-up closing arguments you planned for. We'll just go through the merits part and you'll have to leave me with your advocacy on those main points.

Go ahead, sir.

MR. RISNER: Thank you, Your Honor. I want to start with what you started the hearing with and then what plaintiffs' counsel started with, which is what could be seen as the question between liability and a remedy phase, and I want to just emphasize that the -- these questions need to be addressed now on some level, because the very question of the third factor in the *Mathews* balancing are what are the governmental interests at issue in this case and what are the governmental interests at issue in what additional procedures could exist or could be applied. And I think that it's essential that plaintiffs really own the consequences of what they're really asking for in this case and that the Court weigh those consequences when it's

looking at whether the process that's been offered now is appropriate and whether the balancing that's been undertaken on the due process is -- is appropriately satisfied.

I think that there's a -- I think plaintiffs' counsel said something rather tremendous, which is that if the government doesn't want to disclose the complete reasons it could simply remove someone from the No Fly List. And I think that --

THE COURT: No, that was my question to them. If, for example, a process was pursued and the government, for whatever reason, determined it was no longer necessary to allow -- to maintain a person on the list, they could simply disclose that, and that would then moot the issue as to that particular person. But, as I understand the process, as it's been described over the life of this case, even that would not be disclosed to a plaintiff; that they've been removed in the list.

MR. RISNER: It wouldn't be. I think there are two things going on there. The first is whether or not, as the process is completed, if an individual is on the No Fly List and the government determines he does not need to be or no longer needs to be on the No Fly List, would the government take that action? Would that process be available to the plaintiffs? It would be already, because the process, as it goes on, would entail --

THE COURT: But of course the only way -- the only way the plaintiff would know that is to go to the trouble of buying a new ticket and showing up and taking their chances to see if they're going to make it through or not. Right?

MR. RISNER: That's essentially true, and I think, for the reasons I want to talk about in a minute for why the government does not officially disclose whether someone is on the list, that is essential. But I think that what plaintiffs were saying is it's slightly different, which is that if the -- if the government is required to disclose the reasons for someone's inclusion -- let's say the government believes that is appropriate and they're going to keep the person on the No Fly List, plaintiffs' position is that the government must provide a complete -- complete reasons for that listing. And if the government does not want to disclose that information, given the nature of the information, they could simply remove the person from the list. A person --

THE COURT: Or they could send, as counsel says, a marshal with that person so they can fly in reasonable security.

MR. RISNER: Every time that anyone on the No Fly List that the government did not want to disclose classified information to, every time that person went to fly the government would have to undertake extraordinary proceedings

in order to make that happen.

That, I think, fails to account for --

THE COURT: What do you mean by that?

MR. RISNER: The very nature of having to assign -- if that were -- if that were the remedy here, the very nature of having to undertake those proceedings would be, I think, tremendously burdensome to have to accommodate the travel of someone who has appropriately been determined to be on the No Fly List in order to avoid the disclosure of classified information.

THE COURT: But, Counsel, your premise is that the underlying designation is appropriate. And that's a premise that's not yet subject to challenge in any way feasible.

So what counsel's point was is this: If there is a right and the government's interests in security are such that the process plaintiffs propose or assert they're entitled to cannot be provided without other very serious implications, there are less onerous methods to protect the national interests and permit the flying, such as when a United States marshal accompanies a person in custody. I mean, we do this quite regularly in our judicial system. People get escorted for travel, and it isn't extraordinary. It's just done.

I'm not suggesting that a United States citizen should have to have the companionship of an assigned marshal, but

what I'm saying is you were mischaracterizing the plaintiffs' point.

MR. RISNER: I respectfully -- I don't -- I don't think that's the case. I think that what we're talking about here are allegations by individuals who allege they were included on the No Fly List. What we're talking about are procedures and a process that exists that is made available to everyone that alleges they were denied or delayed boarding on a flight. That obviously extends to people who are properly on the No Fly List. And under plaintiffs' construct of the government having to provide the list of those reasons to people who are properly on the No Fly List, that forces the government into making a decision. It will either disclose classified information, under court order, or -- as a matter of just process, or it will have to remove those persons from the No Fly List, or it will have to undertake what I think are actually quite extraordinary circumstances. What we're getting into here is a real rebalancing of how the government has determined it is best to protect the national security with respect to air travel. I think that --

THE COURT: Could I ask you a clarifying point before you move on? Is it a fact that every placement on the No Fly List is based on classified information?

MR. RISNER: TSC is not aware of any individual

included on the No Fly List, where the basis for the inclusion of that individual does not include classified information.

THE COURT: So it's fair for me to assume the former, for purposes of this analysis, that a person does not get on the list, in the absence of some classified information.

MR. RISNER: I don't want to say that as a matter of the watchlisting guidelines that that couldn't happen; but, as a practical matter, we're talking about the inclusion of individuals where the basis of the inclusion is classified information. And I think that that is really significant here.

Of course, like the -- I think that the -- of course every court has recognized that there's no compelling interest greater than the security of the nation and the threats to air travel posed by terrorism are a paramount uniqueness and importance to the government in attempting to protect air travel within, to, and from the United States.

And this is an area of national security where the government's conclusions about how best to administer a watchlisting system, as required by Congress, are entitled to significant deference from a court that is not to put itself in the position of having to reweigh these interests.

THE COURT: You're not looking at someone who

wishes to take from the Executive or the Legislative Branch the serious responsibilities they have undertaken for national security.

I'm trying to understand, though, what -- what the -- what the universe of these potential options might be, because I -- I continue to believe that is connected to the notion of what -- what's at the heart of this problem.

So remind me, please, what agency or what part of the federal government actually developed this process, DHS TRIP, that the government here or the defendants here assert is sufficient, to the extent there's any right implicated.

MR. RISNER: The DHS TRIP is a process provided -- part of Homeland Security that applies to -- or it offers a redress procedure for individuals in a wide range of circumstances. One of which is --

THE COURT: Was that --

MR. RISNER: I'm sorry.

THE COURT: I'm sorry. It was that agency that developed this process?

MR. RISNER: That developed DHS TRIP, as required by Congress. That's correct.

THE COURT: And did Congress provide any oversight to the DHS TRIP mechanism and bless it in any way?

MR. RISNER: So Congress has, by statute, required DHS to implement a -- establish a timely and fair process

for individuals identified.

THE COURT: That wasn't my question.

MR. RISNER: I'm sorry. I just wanted to -- sorry.

THE COURT: My question is once the process was established by the Department of Homeland Security, has there been -- does the record show any congressional oversight or actual approval of this process in the manner in which it's currently being executed?

MR. RISNER: Well, Congress has done nothing since enactment of that statute in 2004 and the establishment of DHS TRIP in 2007, which I think is -- should be taken as a -- a real indication that Congress is not upset about the process that exists, but has approved it.

THE COURT: You know, in light of revelations over the last couple of weeks, one might not make that argument, so I'm confident about what Congress is aware of and what Congress is not aware of. So my question is quite serious. There has not been any congressional study or review, that you know of, of the manner in which DHS has chose to implement the congressional direction. Is that right?

MR. RISNER: I don't know if that's quite accurate. Congress has hearings. Timothy Healy, the previous director of the TSC, has appeared before Congress, as Ms. Siemion noted, and the parties have -- I think the

defendants have attached his testimony.

The OIGs, multiple agencies, and the GAO, have issued reports on these, and we walked through some of those. Those are congressional reports, but I don't think it's accurate to say there hasn't been any oversight over the process as it exists, but I just want to -- I take your point very seriously, obviously, but I want to be clear that DHS TRIP, this process, has been known. It's been known since it was established, and the -- and what happens in that process is not -- is not a secret. It's been outlined in our declaration.

THE COURT: It's neither confirmed or denied; right?

MR. RISNER: Well, it is confirmed how the process works, and I think that if Congress were unhappy with that process, then Congress could do something differently, but it hasn't. And I think that it's important to look at what that process is, as it exists, because there is a redress process available, and it culminates in judicial review that is made available to individuals who believe they have improperly --

THE COURT: Tell me about that judicial review. You know, in the history of this case, particularly, and in light of the circuit's view of that avenue of relief, as expressed in this case, particularly, what is it an

appellate court would review and have available for review in the event one of the plaintiffs sought that option?

MR. RISNER: If an individual is unsatisfied with the results of the DHS TRIP process as it relates to a delayed or denied boarding, they can submit a petition for review, challenging that determination that comes from TSA, and that petition for review would lead the government to file a record in that case.

THE COURT: What kind of record would be before an appellate court?

MR. RISNER: The Court would receive a record of the information that -- well, let me break it down. It depends on if the person is on the No Fly List. If the person is not on the No Fly List, then it would be a short record.

THE COURT: Let's assume it's one of these plaintiffs and let's assume each has pursued the DHS process and got the neither confirmed nor denied routine response, took a chance, bought a ticket, went back to the airport, got denied again; tried it again, assume I'm on the list here and I'm not going to get anywhere and I don't have any process, so now I want to appeal, let's say that person appeals, what would the appellate court have?

MR. RISNER: Assuming that person is on the No Fly List, when they submit that petition, they would receive a

record of the information that the agency relied on in determining they were appropriately maintained on the No Fly List.

THE COURT: And that might, and likely would, include classified information?

MR. RISNER: It would. It would be provided to the Court of Appeals ex parte and in camera.

THE COURT: Under CIPA?

MR. RISNER: It would not -- it would not be provided under CIPA. CIPA is a statute that applies only to criminal proceedings. It's a different authority of the Court of Appeals to take ex parte and in camera information, including --

THE COURT: Where is that authority? What's the source of that authority?

MR. RISNER: The Court of Appeals have recognized that there's an inherent authority to accept this information.

THE COURT: Because Congress laid at their feet the -- the obligation to review this, so they -- they conclude we've got to have something, so they say, "Bring us your ex parte sealed record"; right?

MR. RISNER: I'm not sure it comes from Congress as a determination in the statute, but I think that's essentially right.

THE COURT: So the Court of Appeals would have an ex parte sealed record to review on its own, without the benefit of advocacy by the party affected. Is that right?

MR. RISNER: That's correct. That is a procedure that would happen. And I want to emphasize, for purposes of due process, I think that, first of all, I'm not sure plaintiffs are satisfied by that procedure, but I think it's important that we acknowledge that it exists.

THE COURT: I'm not sure a court would be satisfied with that procedure. That's why I'm trying to understand what it involves.

MR. RISNER: And that was my second point.

THE COURT: So, tell me, a Court of Appeals, then, gets this sealed ex parte communication, presumably with the kinds of assurances that would support the accuracy of the information, perhaps declarations of government agents, perhaps something to authenticate that which is presented on a one-sided basis. What is the court supposed to do with that, in terms of testing its reliability or evaluating it, as the Court is supposed to presume all of that is true and then just evaluate that as an unchallenged assertion of true facts, or what?

MR. RISNER: The Court would look at that evidence and apply the watchlisting guidelines for criteria for inclusion on the No Fly List and determine if the agency's

action was appropriate. And I think that that is a procedure that the Ninth Circuit, in *Meridian*, recognized is appropriate.

In *Meridian*, the Ninth Circuit said that ex parte review of the government's dispositive filing can adequately balance the government and private interests, because the private interests as a litigant are satisfied by the decision of an impartial district judge.

Similarly, the D.C. Circuit in *Jifry* reaches largely the same conclusion. It said that an individual was afforded independent de novo review of the entire administrative record by the agency and an ex parte review by the Court of Appeals, and, in light of the governmental interests in that case and the sensitivity of the information, substitute procedural safeguards may be practicable, but, in any event, were unnecessary.

And I think that *Jifry* is in some ways a closely analogous case. As I think counsel indicated, *Jifry* concerned two individuals who were denied airmen certificates and were identified as national security concerns, and the Court of Appeals received a record from the agency that supported the revocations and determined that on ex parte review that that was sufficient to satisfy due process.

THE COURT: So is the defendants' position here,

fundamentally, that each of the plaintiffs should appeal to the Court of Appeals in the area where they live and have a Court of Appeals review ex parte and under seal whatever it is the government has or doesn't have? Is that your view of what process they should be following if they're not satisfied with not knowing?

MR. RISNER: I've never encouraged anyone to appeal; but, yeah, essentially that is right. That is an availability as part of the process. If you wanted to look at process as a whole, which I think due process requires --

THE COURT: I'm not talking about the process as a whole. I'm talking about the process that each of the 13 asserts they're entitled to. You're saying that they should go to a court of appeals and present their cause there individually for a court of appeals to review it ex parte.

MR. RISNER: That is -- that's correct. That is the judicial review that is available, is the culmination of the process available to someone who believes they are improperly included on the No Fly List, and that judicial review helps demonstrate that the government's balancing of interests here is proper and that the process available satisfies due process.

THE COURT: And at the risk of opening an old wound, I've thought we went there once in this case, albeit on a jurisdictional concern, but it didn't seem, to me, like

the Ninth Circuit thought it was in a position to evaluate the status of these plaintiffs. I mean, it sounded, to me, as I read the opinion, the Court was quite blunt about the fact that there needs to be something done at a trial court before the Court of Appeals can do anything.

So how am I to deal with this appeal to an appellate court process argument in the context of what's been remanded here when the plaintiffs say really they have no process?

MR. RISNER: Well, they -- I think -- I want to walk through this case and then talk about some of the other cases that exist in the Ninth Circuit, but in -- in this case, the Ninth Circuit was looking at the procedural due process claim and the substantive due process claim and indicated that the procedural claim should be here.

On the substantive claim, the government's argument was that 46 -- sorry, 49 USC 46110 provided exclusive jurisdiction for the Court of Appeals, and the Court of Appeals disagreed with that and indicated that the district court would have jurisdiction over such a claim when it was brought against TSC or FBI.

The Court of Appeals has not in that case, or in *Ibrahim*, or in any other case I'm aware of indicated that the Court of appeals would not have jurisdiction over a petition for review under 46110 challenging TSA's

determination as the ultimate decision-maker in the judicial review of the redress -- I'm sorry, the DHS TRIP process.

THE COURT: Has that happened? Has that happened?

MR. RISNER: It has. It's happening right now in the *Arjmand* case, which we've cited -- identified in the briefs, where an individual filed a petition for review of the Court of Appeals with the Ninth Circuit and the government has filed an ex parte record in that case. That's the procedure that will be available to plaintiffs here or other individuals who believe they've been improperly included on the No Fly List.

THE COURT: Do I need to concern -- be concerned with the existence of that process, as I evaluate the plaintiffs' argument that the DHS TRIP process is inadequate fundamentally and I should use the Court's authority to require something to happen?

MR. RISNER: I think, yes, we have to consider the availability of judicial review and considering whether the current process is adequate. That is essential. It might not be the judicial review that plaintiffs seek, but the availability of review by an impartial judiciary is, of course, meaningful and fundamental to what due process requires.

As far as what else plaintiffs think should be required, then we have to look at what are the governmental

interests in those issues and why can those additional processes not be provided consistent with those interests. And now we're talking about notice and a complete reason of -- complete reasons for inclusion on the list. And that's why we went directly into the significant government interests in not disclosing, officially, status on the No Fly List and not disclosing the reasons underlying inclusion when that information is classified or otherwise sensitive.

I want to make clear that the cases that the plaintiffs are talking about are dramatically different than this case for two different reasons. First, they have very weak government interests compared to this. This is about the government's protection, about national security, and how to protect air travelers. And the plaintiffs are pointing to cases where the due process question is looking at a deprivation of monetary benefits, where the government's interest in the issues might be administrative burdens. They're looking at cases like *Guantanamo* habeas petitions where the courts are talking about involuntarily confinement of individuals; a private interest that is much greater than what we have here. And they're looking at cases where the government has already disclosed an individual's status. That's a fundamental distinction between this and the *Al Haramain* litigation. *Al Haramain* is a case about blocking of assets by OFAC, by Office of Foreign Assets

Control, the Department of Treasury, and designations under that statutory authority are made public to allow for effective administration of the blocking by financial institutions.

This, by contrast, is not made public in this case, where whether an individual is officially included on the No Fly List or not. And the deprivation that counsel talked about in *Al Haramain* is very different, because in blocking cases like *Al Haramain*, the entity is being deprived of the use of its property. The entity that's designated cannot pay an electric bill without a license from the government. That is a fundamentally different deprivation, as the courts have -- have concluded, that I think makes this case quite different than *Al Haramain* and different than *Kindhearts* and other cases like it.

What plaintiffs are ultimately asking, though, is for disclosure of reasons. I don't think a confirming status is really what they're talking about. They want to know the reasons for someone's alleged inclusion on the No Fly List. And on that issue, like I said, the information is already provide to the Court of Appeals, which *Meridian* and the Ninth Circuit recognized is adequate to respect due process. And, given the type of information at issue, whether its classified or SSI or LES, there is a tremendous governmental interest in not being required to disclose that information

to someone.

I recognize that plaintiffs have alleged that they are of no concern to the government, but it's important to emphasize that the processes they're talking about and the processes that they should be more openly advocating for, consistent with their position, those processes would be extended to everyone who's a U.S. citizen who is on the No Fly List properly. And the government has a tremendous interest in not being required to disclose the reasons for someone's inclusion. That would disclose the sources and methods that the government uses in obtaining that information. It would discourage agencies from sharing that information, and, of course, it would be inconsistent with the well-recognized authority of the Executive to determine access to classified information.

I think on that point you can look to the *NCRI* case that plaintiffs cited to where the Court recognized that the strong interest of the government in protecting against the disclosure of classified information clearly affects the nature of the due process which must be afforded, because the disclosure of classified information is within the privilege and prerogative of the Executive, and we do not intend to compel a breach in the security which that branch is charged to protect.

So I don't think it's realistic to say that the

government should simply provide the information or remove someone from the No Fly List as an alternative. I don't think that accounts for the significant government interests that are at issue in this case.

THE COURT: Yet, the government's argument here, defendants' argument here, doesn't seem to account for the plaintiffs' rights. I absolutely respect the point you're making around national security, but it seems that the argument defendants are making stops there and refuses to acknowledge what we've spent all morning talking about; that this is not just a matter of convenience.

I'm -- I'm quite troubled that the defendants don't go beyond the point that all of the interests weigh in favor of the government. There seems to be an unwillingness to acknowledge there could be a middle ground or a way to respect the government's security burdens and what the plaintiffs seek, which is traveling, unless there really is a good reason, tested in a fair process, to prevent them from doing it.

MR. RISNER: Respectfully, Your Honor, I don't think that's quite right, because I think that, first of all, we have to separate the, sort of, two issues here. One is the existence of protected liberty interests and the second is --

THE COURT: Let's assume --

MR. RISNER: Right. Right. Exactly.

THE COURT: Please assume, and I haven't gotten there, but for me to make sense out of your argument, I need you to assume that there is a protection. And what I'm pointing you to, Counsel, is the fact that you seem to wish to stop the analysis at the point that the government has this very valid, important interest and not to go beyond it to what to do with the plaintiffs' rights in the face of that interest.

MR. RISNER: And I think that -- I understand that. And, of course, if you determine there's a liberty interest, then we get to the second part, which is the balancing under *Mathews*. And if there wasn't a liberty interest, we wouldn't have to talk about the process, as counsel accurately said.

But if Your Honor finds that there is, then we look at what the process is. And the private interest is one factor to be considered. I completely recognize that. At the same time you can have a liberty interest where you were completely deprived of a significant liberty interest, but there would be no additional process required, because the governmental interest is that strong or because -- and/or -- sorry -- and/or because the existing processes were already sufficient to provide due process for the deprivation of that interest.

THE COURT: And there you are relying on the Court of Appeals as a means to review the underlying reasons and -- and only that?

MR. RISNER: No, Your Honor, it's not only that. It begins with the criterion that are applied by the agency for watchlisting. It then goes to the regular audits and reviews that the agency does for the accuracy of the list. It then goes to DHS TRIP and the redresses available. And then it goes to the Court of Appeals for determination by an impartial court about the person's inclusion on the No Fly List.

THE COURT: What data is there about such appeals to the Court of Appeals? How many cases have there been?

MR. RISNER: There have been very few, Your Honor. I think in the Ninth Circuit the one I'm familiar with in this type of -- the way it's derived is *Arjmand*.

THE COURT: Is there any record of these decisions? Are they recorded on Westlaw? Is there any way for the Court to find out what -- what use there's been made of the appellate court process and its results?

MR. RISNER: I'm not aware of a decision I can point you to, Your Honor. I think one of the challenges that will arise in this context is that because an individual is not publicly -- it's not confirmed that the person is not on the No Fly List, there would not be a

robust public explanation of --

THE COURT: Surely, there would be a case; right?

MR. RISNER: -- a review. Right. I don't know -- I don't know of an authority for a case that has actually reached that point of merits determination.

THE COURT: Surely, the Department of Justice knows, if it's litigated in an appellate court, a case by a traveler appealing.

MR. RISNER: And I can just point you to *Arjmand* as a case that's going on now. I don't have authority for a case that's actually gone through that process yet or not.

THE COURT: Can you find out?

MR. RISNER: If there's a case I'm not aware of, I'll find out.

THE COURT: Well, what I need to know is whether there's only one case ever, the one you're naming, or whether there have been others where travelers have used this process, made a petition to an appellate court, and an appellate court has actually reviewed it. I don't know if that's classified, too, or not, but to the -- I would think that the fact that a person files something in an appellate court is not, itself, classified.

MR. RISNER: Certainly.

THE COURT: The filing wouldn't be classified, and the disposition of affirmed, denied, or something, would not

be classified.

MR. RISNER: Certainly.

THE COURT: Can you check and can you file in the record here something that tells me the results of your efforts?

MR. RISNER: Certainly we'll do that.

THE COURT: And really what I'm after is just some sense of the accessibility of that process. That's the inference I'll draw from it. But how many travelers have actually filed such petitions? Are there -- is there any public record of them in their disposition? Something -- something that helps me deal with it, I'd appreciate that.

MR. RISNER: Okay. I'll be happy to address that.

THE COURT: Sorry. Sorry to redirect you.

MR. RISNER: No.

THE COURT: We're running out of time. I need you to be able to finish up what you have to do and give plaintiffs one more chance. But, folks, you know, sands are running through the hourglass, and I turn into a pumpkin pretty quickly here.

So go ahead, Mr. Risner.

MR. RISNER: Your Honor, I don't think I have anything more to add to what I said. I just want to emphasize that we have to look at what the additional

process would actually entail and what are the governmental interests in that process and -- and what are the interests in what that process would add as to what is already in place.

THE COURT: So, fundamentally, the defendants' premise is the person in the shoes of any one of the plaintiffs with, the facts that I need to assume are true for purposes of these motions, may never know the real reasons, because -- real reasons for being on a No Fly List, because that would implicate such a national security interest that those reasons never could be disclosed to that traveler, and the only process that traveler should be permitted to pursue to its ultimate conclusion would be the one already in existence, which culminates in a Court of Appeals ex parte process, where the traveler is never given an opportunity to challenge even the truth of the underlying assertions.

MR. RISNER: The information in that situation would not be able to be disclosed because of a classified or otherwise sensitive nature of that information and that --

THE COURT: Even if it's wrong?

MR. RISNER: That is --

THE COURT: Pardon me. Ladies, if you wish to be here, you need to please control yourselves.

MR. RISNER: Given sensitivity and the interests

at issue that the government has in protecting classified information and in protecting air travel to, from, within the United States, the courts would find that the government has adequately balanced the private interest in this issue with the government's interests when it's developed the process as it exists, including the opportunity to submit redress petitions to the agency and the opportunity to have independent judicial review of that redress petition and the individual's alleged inclusion on the No Fly List.

THE COURT: Ms. Siemion has pointed to data and reports that continue to call into question the accuracy of the information that you're pointing to as fundamental to what you're contending is a sufficient process. Did you want to address her assertions?

MR. RISNER: If I can just briefly address it, I think what Ms. Siemion has done is kind of walk you through a series of generalities about reports that largely predate the plaintiffs' allegations in this case. She has told you that misidentifications are not relevant to the question before the Court and then their briefing has relied on the OIG's statement about that very issue when they say things like the OIG for DOJ found that 38 percent of the records were incorrectly included in the list, there -- that report is talking about the TSDB as it existed in 2007. The OIG goes on to say -- and something not cited or mentioned today

by TCP -- that when the OIG did a separate review of the No Fly List, it found virtually no errors.

I think that what they've done -- what TSC has done, respectfully, is not really address the issue that we're talking about here, and I don't think that the citations to these old reports really captures what the government has done to change the process, to improve the guidelines, and to strengthen the quality controls that are available for DHS TRIP and for the TSDB and the No Fly List.

I'm happy to address any particular questions you have about the presentation, but I think I'm otherwise content to rest on that.

THE COURT: Thank you.

MR. RISNER: Thank you.

THE COURT: I appreciate it.

All right. Final comments by the government -- or, I'm sorry, plaintiffs?

MS. CHOUDHURY: Your Honor, just three brief points. The government's interests in this case are serious, Your Honor, but so are the private interests at stake, and the government's argument has shown how stark and extreme their position is.

The plaintiffs object to the categorical denial of notice and process, and DHS TRIP and the judicial review under DHS TRIP doesn't satisfy the most basic due process

safeguard.

As Your Honor noted, that process is wholly ex parte. There is no way for the plaintiffs -- for somebody contesting their placement on a list of suspected terrorists that bans them from flying. There's no way for them to contest the specific evidence or any of the reasons underlying the government's decision. And, for that reason, that process inherently renders a situation where innocent people are left on the list.

The government -- my second point, Your Honor, points to the *Arjmand* docket. If you look up the record in that case, it's simply a declaration from the government setting forth its Glomar position; that it can provide none of the information, none of the reasons, none of the evidence underlying those reasons to the petitioner in that case. And what you have, again, is an ex parte process that doesn't let the plaintiffs contest or correct any of the misinformation, misunderstandings, or lack of information that the government is relying upon in making that decision.

That process doesn't satisfy the most basic procedural due process safeguards of notice or an opportunity to be heard.

Finally, Your Honor, the Ninth Circuit's holding in this case made clear that review under 49 USC 46110, from an appeal of a DHS TRIP determination letter, is not a process

that let's the petitioner challenge and contest the decisions of the decision-maker at issue, and that is the Terrorist Screening Center. That system is one that is run by TSA through DHS. They are messengers in that system. And what is lacking is an opportunity to be heard before the actual decision-maker who's rendering a decision in the case.

So review under 46110, although the defendants might want to point to it as something that would satisfy due process, is anything but. And this -- the Ninth Circuit's earlier decision in this case makes that clear.

Thank you, Your Honor.

THE COURT: One final point to clarify here. On these motions, are plaintiffs relying at all on the allegations of bill of attainder that are in the third amended complaint?

MS. CHOUDHURY: Not in these --

THE COURT: Not in these motions?

MS. CHOUDHURY: Not in the procedural due process claim.

THE COURT: What about the APA claim?

MS. CHOUDHURY: So, Your Honor, we do still advance an APA claim. And for -- there are two separate prospect claims. The first is that under 706(2)(B) of the APA, the bar against agency action that is contrary to

constitutional law for the very same reasons that the DHS TRIP system in defendants' action violating the due process clause, they also violate that bar, an unconstitutional agency action.

Separate and apart from that claim, plaintiffs bring an arbitrary and capricious standard claim under section 706(2)(A). And Congress, in three different provisions, directed defendants, directed the Executive, to create a redress system that is, quote, fair, and, quote, lets individuals identified as a threat correct errors in underlying information, supporting their placement on a watchlist.

That is Congress's directive. And the two parts of that directive that are important are the fair part and the part that the individual who is identified as a threat has a chance to correct any erroneous information.

Those directives were given to the Executive, with discretion, and the Executive chose to use that discretion to create a process that is both unfair and does not permit error correction.

The record that shows for the very same reasons that the process violates the due process clause also shows that it's unfair and doesn't permit error correction as directed by Congress, and that satisfies the State Farm standard.

The government can't show a rational connection between

that directive from Congress and the TRIP system that is actually implemented as the only redress system for people who are denied or deprived boarding on the No Fly List.

THE COURT: Is that a bill of attainder argument or is that an APA argument?

MS. CHOUDHURY: It's a straight APA argument.

THE COURT: I was just wanting to know if I needed to address bill of attainder, too.

MS. CHOUDHURY: No, you do not.

THE COURT: Okay.

MS. CHOUDHURY: Thank you.

THE COURT: Thank you. Bill of attainder for another day.

Well, what a morning. There is much to do here.

Mr. Risner, I'd appreciate that additional filing in due course. You know, a couple of weeks, or so, would be helpful. Not that I will be ready in that amount of time. I just think it would be helpful. If it's going to take you much longer than that, let us know what will be a reasonable time. I think it will be a useful data point to have in the record here for purposes of understanding your last argument.

I'm taking these motions under advisement, and I'll do what I can with what you've given me, and my own analysis and decision will issue when I'm finished with that process.

I can't give you any estimate of that. It's, as you know, a very difficult problem. So if, in the meantime, you manage to figure out a way to resolve these 13 plaintiffs' concerns, you should. I invite that continued discussion, in any event.

Thank you, everyone. We're in recess on this matter.

(Oral argument concluded.)

C E R T I F I C A T E

AYMAN LATIF, et al. )
)
Plaintiffs, )Case No. 3:10-CV-750-BR
)
v. )
)
ERIC H. HOLDER, JR., et al. )
)
Defendants. )
_____)

I certify, by signing below, that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Erwin
_____
Jill L. Erwin, RMR, RDR, CRR Date: July 2, 2013
Official Court Reporter