No. 17-35634

In the United States Court of Appeals for the Ninth Circuit

MOHAMED SHEIKH ABDIRAHMAN KARIYE; FAISAL NABIN KASHEM; RAYMOND EARL KNAEBLE IV; AMIR MESHAL; STEPHEN DURGA PERSAUD,

Plaintiffs-Appellants,

v.

JEFFERSON B. SESSIONS III, Attorney General of the United States; CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation; CHARLES H. KABLE IV, Director, Terrorist Screening Center,

Defendants-Appellees.

PLAINTIFF-APPELLANTS' EXCERPTS OF RECORD VOLUME II OF IV

On Appeal from the United States District Court for the District of Oregon
Portland Division
Case: 3:10-cv-00750-BR

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(UNDER SEAL)

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. JEFFERSON B. SESSIONS, et al., *Defendants*.	Case 3:10-cv-00750-BR **NOTICE OF APPEAL**

Notice is hereby given that Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble IV, Amir Meshal, and Stephen Persaud, Plaintiffs in the above-captioned case, appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment in this action dated June 9, 2017, and entered on the docket on June 12, 2017.

Pursuant to Ninth Circuit Rule 3-2, Plaintiffs concurrently submit a Representation Statement, attached hereto as Exhibit 1.

Dated: August 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice was delivered to all counsel of record via the Court's ECF notification system on August 7, 2017.

/s/ Hina Shamsi
Hina Shamsi

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA E. LYNCH, et al., *Defendants*.	Declaration of TIMOTHY P. GROH

DECLARATION OF TIMOTHY P. GROH

I, TIMOTHY P. GROH, hereby declare the following:

1. I am the DEPUTY DIRECTOR FOR OPERATIONS of the Terrorist Screening Center ("TSC") and I have held this position since April 23, 2016.

2. I make this declaration in support of the government's Motion to Dismiss for Lack of Jurisdiction in *Latif v. Lynch*, 10-cv-750 (D. Ore.). The matters stated herein are based on my personal knowledge and my review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, as well as other government agency employees or contract employees acting in the course of their official duties.

3. I incorporate by reference the declaration of G. Clayton Grigg, then-Deputy Director for Operations at the TSC, filed in this case on May 28, 2015 (Dkt. No. 253). The purpose of this declaration is to provide additional information regarding the roles of the TSC, TSA and other relevant agencies in the redress process for individuals who were denied boarding a commercial aircraft due to their placement on the No Fly List. This

declaration supplements the Joint Stipulations Regarding Jurisdiction filed on December 20, 2016 (Joint Stipulations) in *Latif v. Lynch*, 10-cv-750 (D. Or.). In particular, I address below the process of interagency consultations concerning the sharing and disclosure of information in the redress process with both the applicant and with the TSA Administrator before TSA makes a final determination and issues a final order.

4. In determining what information can be disclosed in the redress process, either in DHS TRIP correspondence with an individual who files a redress inquiry or in the TSA Administrator's final order, as described in Joint Stipulations 15, 18, and 21, the agencies that control the information ultimately decide what, if any, unclassified information can be released to the individual through DHS TRIP correspondence, and what information must be withheld from or may be disclosed in a final TSA order. While these determinations are subject, in the ordinary course, to interagency deliberation, discussion, and negotiation, if the agency controlling the information has made a final determination about what can or cannot be disclosed, neither the TSC nor TSA has the authority to override this decision.

5. Similarly, in preparing its recommendation to the TSA Administrator as described in Joint Stipulation 17, the TSC consults relevant agencies to determine what information can be included in the recommendation. The TSC does not necessarily include all information the TSC has access to in its files about the individual, but includes sufficient information to support the recommendation and any material information regarding the individual's inclusion on the No Fly List. In all cases, questions about inclusion or exclusion of information, or the basis for a determination or recommendation, are resolved through interagency consultation, discussion, and negotiation.

6. The TSA Administrator may request additional information or consult with the TSC and/or any affected agencies, including any nominating agency, regarding any concerns that may arise from the recommendation or the record before the TSA Administrator. Such questions and/or concerns are addressed through interagency consultation.

7. Despite the TSC's written recommendation that an individual should remain on the No Fly list, the TSA Administrator has full authority to order the individual removed from the No Fly List, in which case the individual will be removed.

8. In the instant case, as part of the reconsideration of Plaintiffs' DHS TRIP petitions following the Court's order of June 24, 2014, the TSC determined at that time, in consultation with appropriate federal agencies, that certain Plaintiffs were either not on the No Fly List or had been removed. Defendants' counsel thereafter informed those Plaintiffs that, as of October 10, 2014, they were not on the No Fly List.

9. As to the other six Plaintiffs, the TSC recommended each of them remain on the No Fly List and the information included in those recommendations was approved for inclusion by the agency or agencies that controlled the relevant information.

10. All six of the Plaintiffs who were informed they were on the No Fly List responded by seeking additional review. Upon DHS TRIP's receipt of these responses, DHS TRIP forwarded the responses to the TSC.

11. In preparing its recommendations to the Acting TSA Administrator that each remaining named Plaintiff should remain on the No Fly List, the TSC consulted the agency or agencies controlling the relevant information and, pursuant to interagency consultation and discussion, those agencies ultimately determined what unclassified information could be provided to Plaintiffs.

12. The Acting TSA Administrator issued final orders to five of these Plaintiffs on January 21, 2015, and to the remaining one of these Plaintiffs on January 28, 2015. See Joint Stipulation 26.

Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of January, 2017 in Washington, D.C.

TIMOTHY P. GROH
DEPUTY DIRECTOR FOR OPERATIONS
Terrorist Screening Center

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA E. LYNCH, et al., *Defendants*.	SUPPLEMENTAL DECLARATION OF DEBORAH O. MOORE

I, **DEBORAH O. MOORE**, hereby declare as follows pursuant to 28 U.S.C. § 1746:

1. I am the Branch Manager of the Transportation Security Redress Branch in the Office of Civil Rights & Civil Liberties, Ombudsman and Traveler Engagement at the Transportation Security Administration (TSA) of the Department of Homeland Security (DHS). I have held this position since June 16, 2013. As part of my official duties as Branch Manager, I serve as the Director of the DHS Traveler Redress Inquiry Program (DHS TRIP). The statements made within this Declaration are based upon my personal knowledge and information made available to me in my official capacity.

2. On May 27, 2015, I executed a declaration in this case regarding DHS TRIP generally, redress procedures for United States Citizens and Lawful Permanent Residents (collectively known as United States persons) denied boarding because they were on the No Fly List, and the redress procedures applied to the six Plaintiffs in this case. I incorporate by reference all statements made in my prior declaration. I have read the Joint Stipulations regarding Jurisdiction (Joint Stipulations), dated on December 20, 2016.

3. The purpose of this Declaration is to provide the Court with additional information concerning TSA's role in the redress process, in general, and as applied to Plaintiffs. In particular, this Declaration addresses two specific issues: (i) the process by which the unclassified summary is

released to the United States person; and (ii) TSA's consideration of TSC's recommendation and other available information prior to reaching a final determination.

Preparation of DHS TRIP Letter for United States Persons

4. If a United States person requests additional information in response to receiving a letter stating that he or she is on the No Fly List, as referenced in paragraph 13 of my declaration of May 27, 2015, DHS TRIP informs TSC of the request.
5. TSC consults with other federal agencies and, to the extent the Government determines it is feasible, consistent with national security and law enforcement interests, TSC sends to DHS TRIP an unclassified summary of information supporting the person's placement on the No Fly List and authorization to release that information contained in the unclassified summary to the person.
6. Upon receipt of the unclassified summary, DHS TRIP provides it to the TSA Office of Intelligence and Analysis (OIA) and the TSA Office of Chief Counsel (OCC) for review. TSA OIA reviews the proposed unclassified summary and analyzes it in light of relevant information available to TSA, whether provided directly by TSC or available to TSA OIA in the performance of its intelligence and analysis function, and TSA OCC conducts a legal review. DHS TRIP confers with TSA OIA and TSA OCC regarding the proposed unclassified summary.
7. In addition, DHS TRIP notifies the relevant agencies that a second letter is being prepared. DHS TRIP may engage in interagency consultations to the extent it wishes to discuss whether the information authorized to be disclosed to the person offers the person a meaningful opportunity to respond to the basis for his or her No Fly status, and whether any changes may be warranted.
8. After DHS TRIP receives the unclassified summary from TSC and confers with TSA OIA and TSA OCC, and after any interagency consultations and any resulting changes, DHS TRIP will

provide the person with the second letter referenced in paragraph 13 of my declaration of May 27, 2015.

Consideration of the TSC Recommendation by TSA

9. If a United States person timely responds to the second letter, the steps described in paragraph 14 of my declaration of May 27, 2015 are taken. Upon receipt of the TSC Principal Deputy Director's recommendation to the TSA Administrator as to whether a United States person should be removed from or remain on the No Fly List and the reasons for the recommendation, as referenced in paragraph 14 of my May 27, 2015 declaration, DHS TRIP provides the recommendation to TSA OIA.

10. TSA OIA reviews the recommendation and any other relevant available information, and consults with TSA OCC. TSA OIA may request that TSC clarify or supplement information contained in TSC's recommendation. If TSC provides clarifying or supplemental information, it will draft a revised recommendation or a supplement to the recommendation. TSA and TSC may engage in this iterative process to the extent TSA believes it is necessary. TSA OIA then makes an assessment as to whether the recommendation supports placement on the No Fly List and whether it concurs with the recommendation.

11. In addition, the TSA Office of Civil Rights & Liberties, Ombudsman and Traveler Engagement (TSA CRL-OTE) and TSA OCC review the final recommendation from the TSC Principal Deputy Director and any supplement TSC provides.

12. DHS TRIP writes a recommendation memorandum to the TSA Administrator, which is routed through TSA CRL-OTE. The memorandum describes the procedural background of the DHS TRIP case, indicates whether or not TSA OIA concurs with the TSC Principal Deputy Director's recommendation, indicates whether TSA OCC has any legal objection to the recommendation

and provides a recommendation to the TSA Administrator as to whether he should remand the case back to TSC with a request for additional information or clarification or issue a final order removing the person from the No Fly List or maintaining the person on the List.

13. DHS TRIP provides this memorandum to the TSA Administrator for his consideration along with the other materials described in paragraph 15 of my declaration of May 27, 2015. The TSA Administrator reviews these materials and either remands the case back to TSC with a request for additional information or clarification or issues a final order removing the United States person from the No Fly List or maintaining him on the List.

DATED: January 17, 2017
Arlington, VA

Deborah O. Moore

DEBORAH O. MOORE
Director, DHS TRIP &
Branch Manager
Transportation Security Redress Branch
Office of Civil Rights & Liberties, Ombudsman &
Traveler Engagement
Transportation Security Administration

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **JOINT STIPULATIONS REGARDING JURISDICTION**

For purposes of the Court's consideration of its jurisdiction to consider Plaintiffs' substantive claims, the parties hereby stipulate to the following:

Process in general:

1. The Terrorist Screening Center (TSC) maintains the government's consolidated and integrated terrorist watchlist, known as the Terrorist Screening Database (TSDB), of which the No Fly List is a subset.

2. TSA implements the No Fly List by directing aircraft operators to deny individuals on the List boarding on aircraft flying to, from, or over the United States.

3. The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) provides a single point of contact for complaints and inquiries regarding travel difficulties, including situations in which:

    a. travelers believe their travel difficulties may be the result of a watchlist misidentification;

    b. travelers have been denied entry at a port of entry;

c. travelers believe they have been unfairly or incorrectly delayed, denied airline boarding, or identified for additional screening or inspection at transportation hubs as a result of being incorrectly placed on a watchlist.

4. A traveler who experiences difficulties may submit a Traveler Inquiry Form to DHS TRIP. Upon receipt of a Traveler Inquiry Form, DHS TRIP reviews the information submitted by the traveler and evaluates each inquiry to determine with which DHS components or other governmental agencies it must coordinate to address the issues underlying the claimed travel difficulties.

5. In the cases in which DHS TRIP determines that a traveler is an exact or possible match to an identity in the TSDB, DHS TRIP refers the matter to the TSC.

6. When a traveler's redress inquiry is referred to the TSC, the TSC reviews the traveler's record in consultation with the agency or agencies that control the relevant information. Upon the conclusion of that review, the TSC notifies DHS TRIP of the outcome of the review.

7. Once all relevant agencies have reviewed a traveler's redress inquiry and record and reached a determination regarding the traveler's appropriate status with respect to the TSDB and any other travel issue that was identified by the traveler, DHS TRIP issues a determination letter to the traveler. Throughout this administrative process, DHS TRIP maintains a record of the steps it has taken in each individual's case.

8. The DHS TRIP process can result in removal of a traveler from the No Fly List.

9. Pursuant to prior government policy, DHS TRIP determination letters did not disclose whether or not the traveler who sought redress was included on the No Fly List.

10. The government has revised the DHS TRIP procedures for citizens and lawful permanent residents of the United States (together, U.S. persons) who make redress inquiries following the denial of commercial aircraft boarding as a result of being placed on the No Fly List.

11. The government's public descriptions of the current DHS TRIP redress process are found in declarations filed in lawsuits, including *Latif v. Lynch*. The current DHS TRIP redress process described in those declarations has not been subject to a rule-making process and is not published in the Federal Register or the Code of Federal Regulations.

12. The procedures governing decision-making and information-sharing responsibilities and authorities between the TSC and TSA in the current DHS TRIP redress process are memorialized in public court filings and inter-agency memoranda that are not public. To the extent that *ex parte* court filings address the procedures governing decision-making and information-sharing responsibilities and authorities between the TSC and TSA, the information in those filings is not publicly available.

13. The new redress procedures now provide that a United States person who (a) purchases an airline ticket for a flight to, from, or over the United States; (b) is denied boarding onto that flight due to being on the No Fly List; (c) subsequently files a redress inquiry regarding the denial of boarding with DHS TRIP; (d) provides all information and documentation required by DHS TRIP; and (e) is determined to be appropriately on the No Fly List at the conclusion of the TSC's review of the redress inquiry, will receive a letter stating that "you are on the

No Fly List" and providing the option to request additional information and specific instructions for doing so.

14. If, at the conclusion of the TSC's review, the TSC determines that the individual is not currently on the No Fly List, it notifies DHS TRIP that the requester is not on the No Fly List. DHS TRIP will then advise the individual that the U.S. government knows of no reason that the individual should be unable to fly.

15. If an individual who receives a letter stating that he or she is on the No Fly List timely requests additional information, DHS TRIP will respond with a second letter that identifies the specific criterion or criteria under which the individual was placed on the No Fly List and any unclassified summary of reasons.

16. The second DHS TRIP letter states that the individual may seek additional review of his or her placement on the No Fly List and may submit any information he or she believes may be relevant to determining whether continued placement on the List is appropriate.

[The parties were not able to agree on stipulations concerning the TSC's role and responsibilities, including its role in determining or providing the criteria for an individual's placement on the No Fly List. The parties also were not able to agree on stipulations concerning the nature and extent of any consultations between DHS TRIP and other agencies at this stage of the redress process, and specifically regarding interagency consultation to determine what information an individual who receives a letter stating that he or she is on the No Fly List should receive.]

17. If an individual timely responds to the second letter and requests additional review, DHS TRIP forwards the response and any enclosed information to the TSC for consideration. Upon completion of the TSC's review of the materials submitted to DHS TRIP, the TSC provides a written recommendation to the TSA Administrator as to whether the individual should be removed from or remain on the No Fly List, and the reasons for that recommendation.

18. The information the TSC provides to the TSA administrator may be a summary of the information TSC relied on to make its determination regarding whether the individual should remain on the No Fly List, and does not necessarily include all underlying documentation. The TSC's recommendation to the TSA Administrator may contain classified and/or law enforcement sensitive information.

    [The parties were not able to agree on stipulations concerning the extent to which the TSC determines what information is included in the recommendation to the TSA Administrator, the TSC's consultations with other agencies in determining what information to include in the recommendation to the TSA Administrator, and whether the TSA Administrator receives—or can access upon request—all information that the TSC considered in making its recommendation.]

19. The TSA Administrator may request additional information or consult with the TSC and/or other relevant agencies, including any nominating agency, regarding any concerns that may arise from the recommendation or the record before the Administrator.

20. After DHS TRIP receives the recommendation from TSC, it provides the recommendation to the TSA Administrator, along with the requester's complete DHS TRIP file (including all information submitted by the requester).

21. If the TSA Administrator issues a final order maintaining an individual on the No Fly List, the order will state the basis for the decision to the extent possible without compromising national security or law enforcement interests.

[The parties were not able to agree on stipulations concerning the process by which the TSC and/or any other agencies determine what information can be disclosed in TSA's final order.]

22. The TSA Administrator may determine, after review of the record before the Administrator and any appropriate interagency consultation, that the individual should not be on the No Fly List, notwithstanding the TSC's recommendation that the individual remain on the No Fly List. In such a case, the Administrator may issue an order determining that the individual should not be on the No Fly List.

23. Upon issuance of an order by the TSA Administrator, DHS TRIP will provide the TSC and the individual with a copy of the final order.

Procedures applied to the Plaintiffs in this litigation:

[The parties were not able to agree on stipulations concerning the nature and extent of the TSC's role in determining that certain Plaintiffs were or were not on the No Fly List, the nature and extent of any interagency consultation regarding that determination, or the determination as to what information would be provided to individual Plaintiffs on the No Fly List.]

24. DHS TRIP sent each of the six Plaintiffs a single letter informing him of his status on the No Fly List, identifying the specific criterion or criteria under which he was placed on the List, and providing an unclassified summary of reasons for his continued placement on the No Fly List. The letters also informed each of these six Plaintiffs of the opportunity to respond and seek additional review.

25. All six of the Plaintiffs who were informed that they were on the No Fly List responded seeking additional review. Upon DHS TRIP's receipt of those responses, DHS TRIP forwarded the responses to the TSC. The TSC and DHS TRIP then followed the revised DHS TRIP procedures described above. Pursuant to this process, TSC provided the TSA Administrator with a written recommendation that each remaining Plaintiff should remain on the No Fly List.

26. The TSA Administrator concurred with the TSC's recommendation as to each of the six remaining Plaintiffs and issued orders to five of the Plaintiffs on January 21, 2015, and to the remaining Plaintiff on January 28, 2015.

Dated: December 20, 2016

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

s/ Brigham J. Bowen
Brigham J. Bowen

From: info@ord.uscourts.gov
To: nobody@ord.uscourts.gov
Subject: Activity in Case 3:10-cv-00750-BR Latif et al v. United States Department of Justice et al Order on motion for extension of time
Date: Wednesday, August 03, 2016 10:59:05 AM

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U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 8/3/2016 at 7:58 AM PDT and filed on 8/3/2016
Case Name: Latif et al v. United States Department of Justice et al
Case Number: 3:10-cv-00750-BR
Filer:
Document Number: 334(No document attached)

Docket Text:
ORDER by Judge Anna J. Brown. Notwithstanding Plaintiffs' Opposition [333], which the Court has fully considered, the Court GRANTS Defendants' Motion [331] for Extension of Time to File Supplemental Materials. Defendants' supplemental memorandum is due no later than August 29, 2016. The Court is unable to provide any additional explanation on the record. (bb)

3:10-cv-00750-BR Notice has been electronically mailed to:

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA LYNCH, et al., *Defendants*.	**DEFENDANTS' NOTICE OF LODGING *EX PARTE*, *IN CAMERA* MATERIALS**

In conjunction with Defendants' Second Supplemental Memorandum in Support of Their Motion for Summary Judgment, and in accordance with the Court's March 28, 2016 Opinion and Order, Dkt. No. 321 at 61, Defendants, through undersigned counsel, hereby provide notice that they are lodging with the Department of Justice's Classified Information Security Officer ("CISO") the classified declaration of Michael Steinbach, solely for the Court's *in camera*, *ex parte* review, together with the accompanying *in camera*, *ex parte* exhibits. These materials

have been lodged for secure storage and transmission to the Court. The CISO will make the materials available for *ex parte*, *in camera* review at the convenience of the Court and will contact chambers to facilitate that review.

Dated: May 5, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AYMAN LATIF, *et al.* Plaintiffs, v. LORETTA LYNCH, *et al.*, Defendants.	Case No. 3:10-cv-00750-BR

DECLARATION OF MICHAEL STEINBACH

I, Michael Steinbach, do hereby state and declare as follows:

1. (U) I am the Executive Assistant Director of the National Security Branch of the Federal Bureau of Investigation ("FBI"), United States Department of Justice. Prior to my appointment as the Executive Assistant Director of the FBI's National Security Branch, I served as the Assistant Director of the FBI's Counterterrorism Division from September 2014 through February 2016.

2. (U) As the Executive Assistant Director of the FBI's National Security Branch, I am responsible for, among other things, overseeing the national security operations of the FBI's Counterintelligence Division, Counterterrorism Division, High-Value Detainee Interrogation Group, Terrorist Screening Center ("TSC"), and Weapons of Mass Destruction Directorate. The FBI's National Security Branch is also accountable for the functions carried out by other FBI divisions that support the FBI's national security mission, such as training, human resources, security countermeasures and technology. In my role as Executive Assistant Director, I have official supervision over all of the FBI's investigations to deter, detect, and disrupt national

security threats to the United States and its interests as well as to protect against foreign clandestine intelligence activities.

3. (U) As the Executive Assistant Director, I also have official supervision and control over the files and records of the National Security Branch and have been delegated original classification authority by the Attorney General. See Executive Order 13,526, Section 1.3(c). As a result, and pursuant to all applicable Executive Orders, I am responsible for the protection of classified national security information within the National Security Branch of the FBI, including the sources and methods used by the FBI in the collection of such information. In my oversight capacity over TSC, I also am responsible for the protection of classified national security information within TSC, including information received from other agencies and otherwise in TSC's possession.

4. (U) The matters stated in this declaration are based on my personal knowledge, my background, training, and experience relating to counterterrorism, my consideration of the information provided to me in my official capacity, and my evaluation of that information. My conclusions have been reached in accordance therewith.

5. (U) Through the exercise of my official duties, I have become familiar with this civil action in which the Plaintiffs challenge their placement on the Government's No Fly List and allege, among other things, the denial of procedural due process, based on an alleged failure to provide them with a meaningful opportunity to challenge their placement on the No Fly List. I understand that the United States Government has revised the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Program ("TRIP") procedures and has applied those revised procedures to the Plaintiffs. I further understand that, in a March 28, 2016 order, the Court directed the Defendants to submit to the Court as to each Plaintiff: "(1) a summary of

any material information (including material exculpatory or inculpatory information) that the Defendants withheld from the notice letters sent to each Plaintiff and (2) an explanation of the justification for withholding that information, including why Defendants could not make additional disclosures." March 28 Order at 60. I submit this declaration in response to that order and pursuant to my oversight role on behalf of the TSC. I also have submitted an *in camera, ex parte* declaration that provides sensitive national security and law enforcement information in further response to the Court's March 28 order. If disclosed, that information would, *inter alia*, risk serious damage to the national security.

6. (U) The Government, as part of its revised DHS TRIP procedures, has provided Plaintiffs with notice of their status on the No Fly List and, to the extent feasible and consistent with the national security and law enforcement interests at stake, with an unclassified explanation of the reasons for their inclusion on the No Fly List. The Government has also provided Plaintiffs with the opportunity to respond, and I understand that each Plaintiff did submit a response to DHS. Following additional review, the TSA Administrator issued final orders. As requested by the Court, I discuss below the information underlying each Plaintiff's inclusion on the No Fly List, including that which was not disclosed to Plaintiffs and the reasons why such information cannot be disclosed.

7. (U) In this declaration, for background purposes, I will first briefly summarize the FBI's authorities and responsibilities regarding the Terrorist Screening Database and its subsets, including the No Fly List, and application of the revised redress process to Plaintiffs. I will then describe, in unclassified terms and without reference to any particular Plaintiff, various categories of national security or law enforcement information that could underlie a No Fly determination and the harm to national security and law enforcement interests if such

information were disclosed. I will then provide an unclassified summary of the categories of information that were withheld from the Plaintiffs in this case concerning their No Fly status and also address why neither Plaintiffs nor their counsel have been provided access to classified national security information concerning their No Fly status. I then will address, solely for the Court's *ex parte*, *in camera* review, the particular information withheld with respect to each individual Plaintiff and why disclosure of that information would harm the national security and law enforcement interests of the United States. In the course of this discussion, I will also address the Court's inquiry concerning the disclosure of exculpatory information.

8. (U) Each paragraph in this declaration begins with letter markings within parentheses, called portion markings, indicating the level of classification and restrictions on dissemination applicable to that paragraph. Paragraphs portion-marked with a "U" are unclassified.

(U) THE FBI'S AUTHORITIES AND RESPONSIBILITIES REGARDING THE TERRORIST SCREENING DATABASE AND ITS EXPORT LISTS

9. (U) As discussed at length in my previous declaration,[1] the FBI and other federal agencies use the TSC's Terrorist Screening Database ("TSDB") and its subsets, the No Fly and Selectee Lists, as preventative measures to protect against terrorist threats. These preventative measures differ in fundamental respects from the FBI's role in the criminal process, because the overriding goal in using the TSDB, and in maintaining the No Fly List, is to protect the United States from harm, not to collect evidence of a crime already committed for purposes of prosecution.

10. (U) As one of numerous members of the watchlisting community, the FBI nominates known or suspected terrorists for inclusion in the TSDB. FBI nominations of

[1] (U) Declaration of Michael Steinbach, May 28, 2015, [Dkt. No. 254].

international terrorists are submitted for inclusion in the Terrorist Identities Datamart Environment ("TIDE"), and are processed through the National Counterterrorism Center ("NCTC"). Since the FBI is also responsible for the nomination of purely domestic terrorists, TSDB nominations are submitted directly to the TSC, via the Terrorist Records Examination Unit ("TREX"). TREX also coordinates the transmission of international terrorist nominations from the FBI to NCTC for inclusion in TIDE.

11. (U) As a nominating agency, the FBI can recommend that an individual be included on one of the subset lists within the TSDB, such as the No Fly List, when additional heightened derogatory criteria exist to meet one of the four criterions for inclusion. The TSC reviews all nominations, and determines whether an individual meets the derogatory criteria for placement.

12. (U) As discussed further below, in cases where the FBI is the nominator,[2] the underlying derogatory information supporting its nominations is typically derived from classified national security investigative case material, which often consists of sensitive sources and methods. This includes material such as undercover employee and confidential human source information, foreign government information, information gathered by other members of the Intelligence Community, and information from sensitive collection methods. The dynamic nature of investigations and the continuously-developing information that support nominations often affect placement determinations; therefore, new or updated information must be continuously submitted for consideration.

[2] (U) Nothing in this declaration is intended to confirm or deny whether the FBI was the nominating agency in any particular Plaintiff's determination.

(U) APPLICATION OF REVISED DHS TRIP PROCESS TO PLAINTIFFS

13. (U) As the Court is aware, the Government recently revised the redress procedures for U.S. Persons. Under the new redress procedures, a U.S. Person who (a) purchases an airline ticket for a flight to, from, or over the United States; (b) is denied boarding on that flight; (c) subsequently applies for redress through DHS TRIP about the denial of boarding; (d) provides all information and documentation required by DHS TRIP; and (e) is determined to be appropriately included on the No Fly List following a review of the redress inquiry, may receive information concerning his or her status on the No Fly List, including, to the extent possible when considering the national security and law enforcement interests at stake, an unclassified summary of information supporting the individual's No Fly List status, if they are on the List. The amount and type of information provided, however, will vary on a case-by-case basis depending on the facts and circumstances of any national security and law enforcement interests. In some circumstances, an unclassified summary may not be provided when the national security and law enforcement interests at stake are taken into account.

14. (U) As the Court also is aware, the revised redress procedures were applied, as described, to Plaintiffs in this case. Each Plaintiff received notification of his status and an accompanying summary of unclassified information. Each Plaintiff responded with written submissions. TSA, after considering Plaintiffs' submissions, as well as the information provided through TSC to TSA and other available information, made a final determination that each of the Plaintiffs should remain on the No Fly List. Plaintiffs were informed, through the initial letters and through TSA's final determination, that additional information was withheld for national security and law enforcement reasons, as well as for privacy reasons.

(U) HARMS TO NATIONAL SECURITY FROM DISLCOSURE OF NATIONAL SECURITY AND LAW ENFORCEMENT PRIVILEGED INFORMATION REGARDING AN INDIVIDUAL'S INCLUSION ON THE NO FLY LIST

15. (U) In this section, I discuss, in general unclassified terms, the harms to national security that reasonably could be expected to flow if the DHS TRIP procedures required the disclosure of national security or law enforcement information about why a person is included on the No Fly List. I previously provided a declaration discussing these matters, dated May 28, 2015, but for the convenience of the Court address them again here.

16. (U) As noted above, inclusion on the No Fly List is often based on highly sensitive national security and law enforcement information that is properly protected from disclosure under law, including: (i) information that could tend to reveal whether an individual is or has been the subject of an FBI counterterrorism investigation or of other intelligence interest, including the basis, status, or results of the investigation or interest, and the content of any relevant investigative or intelligence files; and (ii) information that could tend to reveal whether particular sources and methods were used by the Government in a counterterrorism investigation or intelligence activity related to the individual on the No Fly List or his associates. As explained below, disclosure of this information would provide adversaries with valuable insight into the specific ways in which the Government goes about detecting and preventing terrorist attacks, with potentially grave consequences for the national security.

(U) Subject Identification and Reasons for Investigations and/or Intelligence Activities

17. (U) Requiring nominating agencies to disclose all of the reasons for including individuals on the No Fly List would cause significant harm to ongoing counterterrorism investigative or intelligence activities. In many cases, such disclosures would reveal information that would tend to confirm or deny whether a particular individual is the subject of an

investigation or intelligence operation, as well as the reasons for such investigation or operation. For example, in the case of FBI activities, disclosure of the existence of an FBI record about an individual, whether contained in the TIDE database or any other FBI counterterrorism investigative files, could alert the individual to the Government's investigative or intelligence interest in him and cause him to take counter-measures to evade detection. The risk of harm to national security would be amplified were such disclosure to include the contents of an FBI counterterrorism investigative or operational file, thereby revealing to the individual what the FBI knows about his plans. This might include information that could tend to reveal the reason for initiating the investigation or intelligence activity, the status of the investigation or operation, or other sensitive information that the investigation had brought to light.

18. (U) Disclosures of this nature would be particularly damaging where subjects or former subjects have associates whom the Government may still be investigating for potential ties to terrorist activity. Information regarding one subject may reflect investigative interest in other subjects, with the result that releasing such information reasonably could be expected to alert the other subjects that they are of interest to the Government. This, in turn, could cause the other subjects to flee, destroy evidence, or take steps to alter their conduct or communications so as to avoid detection of future activities. In these circumstances, law enforcement and intelligence officers would be significantly hindered in gathering further information on the activities of the other subjects or in determining their whereabouts. In addition, an individual's knowledge that he is under investigation might enable him to anticipate law enforcement actions by, for example, conducting counter-surveillance, which could place federal agents at higher risk of harm.

(U) Sources and Methods

19. (U) The disclosure of national security information, if required in the course of the No Fly redress process, could also reveal sensitive, classified, or previously undisclosed sources and methods used in counterterrorism investigations and intelligence activities, as well as the type of information derived from such techniques.[3]

20. (U) In particular, such disclosures could reveal the specific investigative methods used with respect to a certain individual target, such as court-ordered searches or surveillance, confidential human sources, undercover operations, or various forms of national security process. This, in turn, could further reveal the reasons for initiating an investigation, the steps taken in the investigation, the reasons certain methods or sources were used, the status of the use of such methods or sources, and any results derived from those techniques. To the extent the FBI is involved in a nomination, the disclosure of sensitive and classified techniques and methods would provide a roadmap to adversaries as to how the FBI goes about the vital task of detecting and preventing terrorist attacks and would allow them to engage in countermeasures to escape detection and frustrate the FBI's ongoing counterterrorism mission.

21. (U) Additionally, and again using the FBI as an example, although the FBI's general use of certain methods, such as physical surveillance, are known to the public, the release of information derived from such a method in a particular matter could, in some circumstances, jeopardize the success of investigations. For example, where surveillance is being conducted of a group of associates, providing one of the targets with information sufficient to identify where and when the surveillance took place, and even which agency was responsible for the

[3] (U) Again, nothing in this declaration is meant to confirm or deny that the FBI was the nominating agency as to any Plaintiff or that any of these types of sources or methods were used with regard to the determination to include any Plaintiff on the No Fly List.

surveillance, could lead a single target to warn his associates. That, in turn, would eliminate the effectiveness of the continued use of the surveillance with regard to the other associates.

22. (U) In addition, the Government has a compelling interest in protecting the secrecy of the use of particular national security legal process, such as National Security Letters ("NSLs"), Foreign Intelligence Surveillance Act ("FISA") surveillance, or other judicial process.[4] To the extent that the reasons for inclusion on the No Fly List are based, even in part, on information obtained through such legal process, disclosure of that fact, or of the information derived from those methods, would pose serious risks to national security and law enforcement interests, including jeopardizing further surveillance activity and putting the success of the entire investigation or intelligence operation at risk. Moreover, revealing the use of legal process with regard to a particular subject could tip off that subject's associates that the Government may be aware of communication between the subject and his associates.

23. (U) The disclosure of information concerning the basis for an individual's placement on the No Fly List could also reveal the identity of confidential human sources ("CHSs"), where such sources are used as part of an investigation. At the very least, such a disclosure could reveal information that a subject or his associates could use to determine that a CHS has been used and to discover the identity of that CHS. The risks posed by the discovery of a CHS's identity are twofold. First, when the identity of a CHS is disclosed, the CHS's usefulness to the ongoing investigation is greatly diminished, if not eliminated altogether. More importantly, however, the CHS's safety, and possibly the safety of his family, may be put at risk.

[4] (U) For example, when used, NSLs can be important in the early phases of national security investigations, by providing subscriber telephone numbers and other non-content information, which can assist investigators in developing leads to determine, among other things, investigative subjects' true identities, actions, intent, associates, and financial transactions. Just as critically, the Government uses NSLs to remove individuals from suspicion.

Where the disclosure of information regarding one subject leads to additional subjects learning that they too are of interest to the Government, such disclosure could enable subjects to ascertain the identities of additional confidential informants or other sources of intelligence, putting those sources at risk as well.

24. (U) In addition, where foreign government information has been used in an investigation, revealing such information could compromise the confidentiality of an agreement with a foreign government. This reasonably could be expected to strain relations between the United States and the foreign government, disrupting the free flow of vital information to United States intelligence and law enforcement agencies. Information about the FBI's relationships with certain foreign government entities, for example, is subject to constraints on disclosure. Some national security and law enforcement information shared by a foreign government is classified by the foreign government, while the U.S. Government may classify or assert the law-enforcement privilege over other sensitive foreign government information. The FBI's ability to carry out its responsibilities to conduct counterterrorism investigations often depends on the cooperation of certain foreign government officials, foreign intelligence services, or foreign security services. Maintaining the confidentiality of foreign government information is critical to the maintenance of ongoing productive cooperation with friendly foreign nations in the field of counterterrorism. The free exchange of information among United States intelligence and law enforcement services and their foreign counterparts is predicated upon the understanding that, not only must the information exchanged be kept in confidence, but that the relationships themselves likewise be kept confidential. Indeed, in many instances, information received from a foreign government remains the property of that government and is provided under the express

condition that it may not be released outside the agency to which it is disclosed or used in legal proceedings without that government's express permission.

(U) Law Enforcement Privilege

25. (U) In addition to reliance on national security information, inclusion on the No Fly List can also be based on sensitive law enforcement information, including information that pertains to law enforcement techniques and procedures, information that could undermine the confidentiality of sources, information that could endanger witness and law enforcement personnel, information that could undermine the privacy of individuals involved in an investigation, or information that could seriously impair the ability of a law enforcement agency to conduct future investigations. Revealing such information, beyond the types already contemplated in the revised TRIP procedures, would risk the revelation of law enforcement privileged information. In the case of the FBI, such information could include, among other things, information about individuals contained in FBI files, the identities of FBI agents and TSC personnel, and policies and procedures relating to the watchlisting process.

* * *

26. (U) Finally, the disclosure of national security and law enforcement information, if required in the course of the No Fly redress process, would have a potentially dangerous chilling effect on the use of such information in the nomination process, which in turn could undermine the effectiveness of the No Fly List. If the Government were required to provide full notice of its reasons for placing an individual on the No Fly List and to turn over all evidence considered in making the No Fly determination, the No Fly redress process would place highly sensitive national security information directly in the hands of individuals subject to counter-terrorism investigative or intelligence interest, and risk disclosure to foreign terrorist

organizations and other adversaries. This in turn would create an incentive for adversaries to manipulate the DHS TRIP redress procedures in order to allow individuals or organizations to discover whether they or their members are subject to investigation or intelligence operations, what sources and methods the Government employs to obtain information, or what type of intelligence information is sufficient to trigger an investigation in the first place. For these reasons, if nominating agencies had reason to believe that national security information used to support their No Fly nominations would be disclosed, there would be a strong reluctance to share such information in the nomination process and, potentially in some cases, to forego a nomination entirely. The No Fly listing process would become self-defeating if, in order to protect against terrorist threats to aviation and national security, the Government were required to disclose classified national security information or law enforcement information about a particular known or suspected terrorist included on the List. In my judgment, agencies that use intelligence or investigative information to nominate a person to the No Fly List to help prevent a terrorist attack, should not then be forced to disclose such information, which reasonably could be expected to compromise an investigation, expose a source, or reveal sensitive surveillance techniques.

(U) UNCLASSIFIED DESCRIPTION OF THE REASONS WHY ADDITIONAL INFORMATION WAS WITHHELD FROM PLAINTIFFS

27. (U) In my capacity as an original classification authority with oversight responsibilities for TSC, I provide a classified summary that discusses the information withheld from Plaintiffs, including both material inculpatory and exculpatory information, if any. In unclassified terms that I am able to present on the public record, the Government withheld from Plaintiffs: (a) the identities of subjects of investigation or intelligence interest; (b) sources and methods information; and (c) law enforcement information. These withholdings were made

because their disclosure reasonably would be expected to cause serious damage to the national security, and/or because disclosure would harm important law enforcement interests and impede law enforcement activities. In addition, certain privacy information relating to third parties was withheld from Plaintiffs. In the case of classified information, I have determined, as an original classification authority with oversight responsibilities for the TSC, that the withheld national security information is currently and properly classified.

28. (U) In this same capacity as an original classification authority with responsibility for TSC, I have likewise determined that, in accordance with Executive Order 13,526, Plaintiffs' counsel should not be granted access to such information.[5] As I explained in my May 28, 2015 declaration, the release of national security information even to cleared counsel would present significant risks to investigative or intelligence activities and would create a severe disincentive to use such information to nominate individuals to the No Fly List. It must be stressed that No Fly determinations are made in the midst of ongoing investigative or intelligence activities, not during a post-investigation criminal proceeding, and that these activities are directed at the most significant of interests — detecting and preventing terrorist attacks. In these circumstances, the need to protect investigative or intelligence information and the sources and methods used to obtain it is at its zenith. Any disclosure in the administrative process, whether intentional or inadvertent, risks compromising an ongoing counterterrorism activity and the corresponding risk to national security — no matter what kind of protective

[5] (U) Under E.O. 13,526, individuals may not access classified national security information unless, among other things, two requirements are met. First, a favorable determination of eligibility for access must be made; and second, the person has a need-to-know the information. E.O. 13,526 Sec. 4.1. A need-to-know is defined as "a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." E.O. 13,526 Sec. 6.1(dd).

procedures might be adopted. Any such efforts at a secure process would only give rise to the added risk of public disclosure. In my informed judgment, disclosure of information to counsel for suspected terrorists on the No Fly List, in general, raises significant risks of harm to national security. By contrast, it is my judgment that the development of unclassified summaries to eligible requesters whose status would be revealed, paired with the disclosure of applicable No Fly List criteria – itself disclosures that present some risk of harm to national security – establishes a balanced process that provides notice to an individual and an opportunity to respond to the concerns identified. For these reasons, I have determined that disclosure of the withheld classified information should not be made to Plaintiffs' counsel.

29. (U) Finally, and to address the requirements of the Court's order concerning "exculpatory" information, I have reviewed both the material information disclosed to Plaintiffs and withheld from Plaintiffs for purposes of assessing whether any additional exculpatory information could have and should have been provided to Plaintiffs. Apart from that information already disclosed to Plaintiffs, some of which could be considered exculpatory, additional material exculpatory information, to the extent any such information exists, was properly withheld and cannot be disclosed to Plaintiffs without risking significant harm to the national security and/or to law enforcement activities and interests.

(U) CONCLUSION

30. (U) Based on my consideration of this matter, and in my capacity as an original classification authority with supervisory responsibilities for the TSC, I have concluded that the disclosure of the classified national security and law enforcement privileged information that was withheld from the five Plaintiffs in this case reasonably could be expected to cause serious damage to the national security of the United States. I have also concluded that Plaintiffs' counsel do not have a need to know withheld classified national security information and that disclosure to them would likewise risk serious damage to the national security. Finally, I have concluded that additional material exculpatory information, to the extent any such information exists, was properly withheld and cannot be disclosed to Plaintiffs without risking significant harm to the national security and/or to law enforcement activities and interests.

31. (U) I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5 day of May, 2016.

MB Steinbach

Michael Steinbach
Executive Assistant Director
National Security Branch
Federal Bureau of Investigation
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Eric H. Holder, Jr., Attorney General, et al., Defendants.	Case No. CV-10-750-BR December 9, 2015 Portland, Oregon

TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

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aspects, unless you have questions --

THE COURT: No, I don't, in the sense of asking you to continue. I clearly have many questions. But I want to hear the counterpoint while I still have your -- your points in mind.

Mr. Bowen.

MR. BOWEN: Thank you, your Honor.

THE COURT: Could I ask you one question before you go forward, and that is this idea about whether for procedural process -- for the procedural due process analysis, that's required in these cross combined motions, whether you believe I should not have -- I should or shouldn't have available ex parte and under seal the Government's undisclosed information on which it relied.

MR. BOWEN: The position of our motion, your Honor, is that the record before the Court wholly demonstrates the propriety of the process. And the Court can look at the record and look at the policy, which requires that we disclose to the maximum extent possible, without compromising national security on classified information that can be provided. So the short answer is we think this record supports judgment for the defendants on that basis.

THE COURT: On process only. And that's any review by the Court, even in an ex parte scenario, has to be reserved for the substantive evaluation?

MR. BOWEN: That's correct, your Honor. But let me caveat it in a couple of ways.

One is we really don't have a precedent in the context of an ordinary civil proceeding for the -- the Court to take submissions ex parte and in camera. It has been disfavored by some courts. There's a case in the D.C. Circuit called **Abarast** (phonetic), that suggests that to take care of that itself is a due process problem. But that's all to say we don't necessarily have a position on whether -- if the Court felt that that was necessary in order to satisfy the process --

THE COURT: Here's the problem I'm concerned with, Mr. Bowen.

You've asserted -- and Counsel's repeatedly noted -- that with respect to each of the six plaintiffs there is information withheld on which your clients relied in the process of reconsidering their status on the No Fly List.

You're also asserting that I should be able to conclude as a matter of law, by looking at what you did disclose, that the process is inherently fair. I'm having trouble with those notions in concert.

MR. BOWEN: So the first thing I would point to is the question of whether or not the Government has been fair. The determination about what information falls over that line and properly needs to be protected is a determination to which --

THE COURT: But how do I know that the Government has disclosed all that fairly should be disclosed, even under your policy, if you haven't made any showing, at least by declaration or otherwise, that there are other reasons? They're not disclosed. They are in fact on the sworn statement of a person with actual knowledge, the kind of information that -- that does cross the line, as you're using that term. How do I know that?

MR. BOWEN: Right. So we think that our submissions demonstrate that all of these matters were taken into consideration. The question of whether the information crossed the line has been made. And, again, we think the record --

THE COURT: How do I know who did that? How do I know that person's level of responsibility? How do I know what that person did to cull that which was disclosed from that which is known to defendants, and played a part in the decision but was not disclosed? How do I know that, on this record?

MR. BOWEN: Well, those particulars, your Honor, are not in this record. And if the Court is of the mind that it needs those particulars in order to make that assessment, we will take the Court's determination in that respect under advisement. Again, our position is that it's not necessary.

But to the question of whether the Court could review that information, I think our fundamental position is that that ultimately really goes to the substance that -- that there is

some process for review, and we really don't know what that looks like. It could include those --

THE COURT: Counsel, the test isn't some process. It's procedurally due process. And for me to be able to grant defendants' motion, I would have to be able to say the process that was chosen by your clients following the June 2014 order is procedurally fair process, due process.

How can I know that on the record you've given me? How can I know that?

MR. BOWEN: Again, we think the record -- again, so if the Court is saying --

THE COURT: No. I'm asking you, as the proponent of the motion --

MR. BOWEN: Right.

THE COURT: -- on whom the obligation rests, to show defendants are entitled to judgment as a matter of law. How can one look at this record and conclude it is procedurally due process that has in fact occurred when it's not even disclosed to the Court in camera that that which was a material part, evidently, of the defendants' determination has not, (A), been disclosed, so the Court has no way of knowing whether it's important or not? There isn't any way to determine, even by declaration here by a person of authority that there was information, it was reviewed, it was evaluated.

This is a very summary, very -- very high level,

conclusory sort of record. I'm having a hard time seeing how one could say, as a matter of law, this is procedural due process.

MR. BOWEN: I understand the Court's frustration with that. And, unfortunately, I'm not in a position to provide clear answers, in part because we don't have a settled position within the Government as to what to do when -- when the Court is dissatisfied with the record we have submitted --

THE COURT: Okay.

MR. BOWEN: -- and the Court feels the compulsion or the need to ask the very question you're asking.

THE COURT: So I deny defendants' motion, potentially, on the basis that the record does not reflect as a matter of undisputed fact and law that the process is due process from a procedural perspective. And I deny the plaintiffs' motion on --

MR. BOWEN: Well, that's my --

THE COURT: -- due process grounds because what the plaintiffs are asserting is entirely not precedented in terms of that which is required.

And what does that gain us?

MR. BOWEN: Well, it gains us further proceedings, your Honor. I mean, I think --

THE COURT: Well, I think we're guaranteed those one way or the other, but a lifetime appointment may not be enough

here.

MR. BOWEN: I understand the frustration, your Honor. And, unfortunately, I am sorry to be in the position of not being able to answer that particular question.

THE COURT: So your position today, however, as your client's advocate, is that the record does in fact sufficiently reflect a process the Court ought to endorse as commensurate with constitutional requirements and procedural due process?

MR. BOWEN: Right. And there are two particular aspects to that that we think are important.

One is that the law instructs that when you are assessing a process you are actually looking at the generality of cases. You're asking whether the process on the whole is fair. And the deep dive that asks whether in this particular instance a person received every single bit of information they could have had is not necessarily part of that analysis. It tends to creep into the analysis, frankly, because courts -- they just tend to lean that way. But, as a technical matter of law, it's not part of the process. The question is whether they received a process --

THE COURT: So why is it fair? Why is this procedurally fair, this conclusory, incomplete process that doesn't even allow the reviewer of the procedural fairness to know what in fact the Government relied upon to reach -- why is that -- should I conclude that is legally fair?

MR. BOWEN: So one component we've not really discussed is that we agree -- and we all agree, and this is part of the Court's prior order, is that there is judicial review. There is back-end judicial review.

THE COURT: Am I the judicial review or is it the Ninth Circuit?

MR. BOWEN: Well, again -- again, I'm in the unfortunate position of not being able to necessarily answer that question because we haven't fully briefed it. There are very difficult questions about jurisdiction, about the handling of classified information in civil cases, which generally doesn't happen because --

THE COURT: But can you at least tell me your client's position as to whether the record is complete and now ready for judicial review on this procedural due process question?

MR. BOWEN: Whether the record is complete.

THE COURT: Are you ready to rest upon that which you've given in support of your motion, your cross-motion, as the full record that is to be subject to the judicial review to which you refer, even though you're not able to tell me where that judicial review is supposed to happen?

MR. BOWEN: I'm sorry. No, we're not ready to rest on that record.

If the -- I want to make sure that I'm understanding

the Court's question.

THE COURT: You've moved for summary judgment --

MR. BOWEN: Right.

THE COURT: -- on the basis that the process instituted by your clients following June 2014 provides sufficient procedural due process --

MR. BOWEN: Okay.

THE COURT: -- to satisfy constitutional requirements. Right?

MR. BOWEN: Correct.

THE COURT: And to be entitled to that judgment, you have to show both that the material facts are undisputed and that you're entitled to judgment as a matter of law.

MR. BOWEN: Right.

THE COURT: And my question to you is how could possibly any judicial officer reach that conclusion when the record given is, by definition, incomplete in terms of the reasons relied upon for the placement and not even subject to an in camera review to verify that the source of information and the bases on which the defendants made their decision have -- are grounded in anything that one fairly would conclude is reliable?

MR. BOWEN: The reason is because the Court can presume -- because it's true -- that there is some form of judicial review. And the courts, being courts, are -- are

seasoned and good at providing the process that -- that is fair and equitable in the context of judicial review.

That we don't know the mechanism or we may not even know the -- the jurisdictional forum for that -- for where that exists, the fact of judicial review itself provides the bulwark, I believe, that the Court is looking for. There is judicial review; depending on where it is, depending on what the law requires for how that substance --

THE COURT: You know, Mr. Bowen, you're going to have to take a position in this case for these six plaintiffs as to where you contend that judicial review should be. I'm not asking you to speak for the United States in every case possible. But you are the lawyer for the defendants in this case, and you simply must take a position.

MR. BOWEN: I can't take a position today from this podium, your Honor. If the answer to that is we would absolutely be more than happy to take supplemental briefing and provide the Government's view of how that process -- what that process would look like, where it would occur, and how the handling of that information would occur, I'm simply not authorized to -- to essentially speculate on that question. And I apologize that -- that is frustrating, and that is something the Court may have been anticipating. But I am not -- I don't have that authorization.

THE COURT: Well, tell me please, then, why it is

that your clients contend they're entitled to summary judgment? That the process they have afforded each of plaintiffs is constitutionally sufficient from a procedural due process -- not the substantive outcome with which reasonable minds might differ; and, indeed, a reviewing court might differ. But why is the process sufficient to allow and indeed require this Court to grant judgment in your client's favor?

MR. BOWEN: Because -- because it directly answers the contours that the Court identified in its prior order. The vision of unclassified summaries, without breaching the wall of classified information in the context of the administrative phase, to the extent possible, without implicating national security.

And that information ultimately will be -- agreed, will be reviewed by an appropriate court. The fact that we don't know what that appropriate court is doesn't change the fact that the administrative process provided the information that is able to be provided and doesn't go over that wall that's been identified repeatedly by the courts. And I'm speaking particularly of the D.C. Circuit, talking about how -- the courts can't compel a breach of the security that the executive branch is charged with protecting. And we can't turn over that -- that information. And the court -- and the cases support that -- that conclusion. And so --

THE COURT: Mr. Bowen, I don't know how a court can

determine a process is sufficient for judicial review without knowing the information that's going to be reviewed. It's as if you're saying any process would be sufficient because, in the end, there will be some judicial review by some judicial authority at some undisclosed time and place. But the determination of what's sufficient has to be measured against something. And the record you've given is something. And, I -- again, I commend the defendants for doing something. But I -- I'm trying hard to understand how the Court can grant your motion on this record about a sufficient procedural process if the Court can't even tell what was considered.

MR. BOWEN: Well, again, we -- it's not that the Court can't. It's just that we don't know what that looks like. And we are more than prepared to brief that question and provide the United States' position.

THE COURT: You don't get to continue to brief and brief and brief. When one moves for summary judgment, one has the obligation to provide the authority to support the judgment. You either have it or you don't. They either have it or they don't.

MR. BOWEN: But, again, the best I can do for your Honor is the fact that we know the judicial review will occur.

If the Court is dissatisfied with that, the Court is correct that the answer is to deny both parties' motions and require us to come up with and settle on the question of what

that ultimate judicial review -- substantive judicial review looks like.

THE COURT: I'm not making myself clear. I'm not saying the determination of whether any of the parties are entitled to partial summary judgment depends upon what the judicial review is.

What I am questioning is whether defendants have shown, as a matter of law, the process actually used since June of 2014 is the -- the minimum procedural due process required. And how can a judge -- specifically this one -- reach such a decision when the process disclosed to the Court is only, We relied on a lot of information we haven't even told you? I'm trying to understand how that leads to the argument that this Court must grant summary judgment to defendants.

MR. BOWEN: Again, the reason is, is because the law is clear that that information that's beyond that wall needs to stay there. It stays there in the administrative process. If there is some litigation down the line where that's tested or privileges are asserted, that's fine. But the question is, what process is due at the administrative phase?

And **Ralls**, **NCRI**, **Al-Haramain** and this Court have all said, You don't need to breach that wall. And the question about where that wall lies generally is due deference because the Government had the obligation to make that determination.

If that's unsatisfactory, the unfortunate reality is

that further litigation must take place. But it's our position we calibrated this precisely to where those contours were aligned in those cases. And because we complied with law, we're entitled to judgment as a matter of law.

THE COURT: Okay. Now, go ahead with what you wanted to say in response to counsel's previous points.

I apologize for getting you off track. Take the time you need, and let's get back to the --

MR. BOWEN: Could I have one colloquy with one of my colleagues real quick?

THE COURT: Yes. Yes. Yes.

MR. BOWEN: So I wanted to go back to the assertion that Ms. -- that plaintiffs have asserted that they're entitled, under **Al-Haramain**, to all of the information. This is, again, I think a baseless interpretation of what the **Al-Haramain** court said. It's not -- and, of course, it entirely ignores the other authorities we cited to you for the proposition that in the national security context, in -- where civil actions are taken that relate to terrorism, that they get all of the information regardless of the impact of that information on national security when it comes to disclosure. That's simply not true.

And you can look to the **Al-Haramain** case, where the **Al-Haramain** didn't talk about disclosing every reason in every case. The **Al-Haramain** court said there are these reasons that

they could disclose without harming -- indeed, without implicating national security by taking these mitigation measures.

So the notion that this is a -- some sort of a floor, that every reason needs to be provided, is belied by the case law and by common sense.

I would point the Court to the **Jifry** decision in the D.C. Circuit, where an individual was denied his airman certificate. Was assumed to have all the rights of a United States citizen for the purposes of that decision, and was given zero substantive information about the reasons for why the certificate was revoked.

The only information substantively that was disclosed was that there are national security concerns. And in that case the court said that he received all of the due process to which he was entitled, even though no substantive reasons were given.

The same is true in **Ralls**. The identification in **Ralls** was that there was some unclassified information that had not been disclosed, and that there was an obligation to disclose the unclassified information. But not that you needed to open up the books and declassify all of the reasons for the Government's action in that case, but only that the -- the Court erred in not requiring the disclosure of unclassified; which is already part of our process.

And I want to go to --

THE COURT: Can I -- can I ask a question to clarify. Are -- am I to understand that the summaries provided to the plaintiff are in fact summaries of all the -- all of the information that does not implicate national security on which defendants rely in retaining each of the plaintiffs on the No Fly List?

Is there in the record a declaration to that effect? Is there some assertion that all of the nonclassified or nonsecurity information has been disclosed?

MR. BOWEN: Yes. I would point the Court to the -- to the Steinbach declaration, to the Giacalone declaration for the authority that the Government, in consulting that information, intended to maximize the unclassified information that it provided.

Now, there's -- there's sort of an inherent intention that in theory there could be other innocuous or perhaps irrelevant information that the Court -- that the Government had in its possession that it didn't disclose. But that gets to the problem of being accurate and pointing the individual to the right -- the right circumstances.

This is not the best example, but it is the best one I could come up with. You know, the letters didn't state to the individual where they lived. They didn't state, you know, that they had been married for a certain number of times and

had a stable family relationship, or that they had stayed gainfully employed for periods of time.

And so if the request is every single bit of unclassified information, was it disclosed in the summaries, the answer is probably no.

THE COURT: I meant, in my question on classified information that was material to the decision to retain them on the list.

MR. BOWEN: Yes. The Court can conclude from the record that that information was disclosed pursuant to the policy.

Oh, I'm sorry. Ms. Powell is pointing out that there's an important thing. That this was unclassified, nonprivileged information. I would point out the Government not only invoked the fact that if certain information was classified, that certain information was also law enforcement protected.

And, again, that cycles us back to the question of whether the Government should be required in an administrative process to waive its privileges up front rather than having those privileges tested in appropriate judicial proceeding at the back end.

But I want to go back to the terrorism sanctions cases and talk about why, notwithstanding the fact that the Government has had some objections to the fact that the Court,

in the first place, has analogized to those cases for why they are an appropriate analog for what we're dealing with here, when you consider the -- the impact of a foreign terrorism designation, the stigmatizing aspects are significant. And it's not just corporations, but it also -- well, not for foreign terrorist organizations, but individuals can also be specially designated global terrorists. And the stigmatizing effects of those designations are very, very significant and much more significant than you have here. They are publicly announced. They are announced to the specially designated global terrorists.

By contrast, individuals on the No Fly List, nothing is said publicly about them. They are not announced in the federal register. They simply experience, as a private matter, the inconvenience that arises from the designation, and they engage in a private colloquy with the Government in their -- in the exchange of letters that happens in DHS trip. And they are designated as a person who may pose a threat to national security and as opposed to being a specially designated global terrorist.

And, in addition, I would point out again, while the **Al-Haramain** entity was a corporate entity, it wasn't just that they -- their assets were frozen, but they couldn't pay the bills. They couldn't turn on the lights. It's a very, very significant intrusion on their ability to function or -- or,

as -- as a person to deal with their -- the United States assets. And so we think that it is at least some measure highly analogous.

By contrast, plaintiffs place a lot of emphasis on -- on various contexts that we think are obviously dissimilar. The plaintiffs have emphasized deportation proceedings, as one example. Aliens who are subject to deportation are presumed to have a number of a full panoply of rights of U.S. citizens in that process of -- of removal, in particular. And the consequence of removal is not the inability to take a particular form of travel to travel internationally, but they are deprived of all of the benefits of citizenship in the United States. They must leave the country.

We think those -- those are extraordinarily significant consequences that demonstrate how poor the analogy is to this particular context. The individuals are able to pursue employment. They're able to stay with their families. They're able to live in their homes. They're able to be in the United States. They're able to travel in the United States. So we think that that analogy is poor.

Secondly, the plaintiffs have cited to extradition cases. It's the same principle. One great example of -- I'm skipping a little bit ahead, your Honor. And my apologies to the **Brady** discussion. But the leading case for the proposition that you can incorporate **Brady** outside of the criminal context

is the case in which the Sixth Circuit assessed an individual who was subject to extradition on Nazi war crimes and was potentially subject to the death penalty on his arrival, once the extradition was -- was -- was undertaken.

Again, a radically different deprivation that goes right -- straight to the kinds of deprivations that we contemplate in the criminal process. The same is true of the Guantanamo cases with indefinite detention. The same is true of general habeas cases. The same is true of the commitment and parole revocation. All of these talk about liberty in the classic sense. Deprivation of liberty in the classic sense, in which someone is incarcerated or detained and unable to leave a prison cell or another cell. That is not the same as an individual who cannot board international flights for travel.

THE COURT: So is the plaintiffs' interest here more like the property interests of **Al-Haramain** than the -- the classic liberty interests you're referring to about avoiding detention?

MR. BOWEN: It is. It is. It's the closest analogue out of the analogues that have been presented to the Court. I at least agree with that point.

But the fact that the -- that the plaintiffs are going to these examples to find their analogues demonstrates, I think, that they are -- they are -- they are trying to ignore away the cases that best identify these issues, which are

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA LYNCH, et al., *Defendants*.	Declaration of John Giacalone

DECLARATION OF JOHN GIACALONE

I, John Giacalone, hereby declare the following:

1. I am the Executive Assistant Director ("EAD") of the National Security Branch of the Federal Bureau of Investigation ("FBI") and I have held this position since September 2014.
2. I entered on duty with the FBI, as a Special Agent, in 1991 and have served in numerous operational and management positions during my career, including overseas posts, related to national security. I served as the Special Agent in Charge of Counterterrorism in the New York Field Office from 2011 to 2013. In 2013, I was appointed Deputy Assistant Director of the Counterterrorism Division ("CTD") at FBI Headquarters and was promoted to Assistant Director of CTD in January 2014. In September 2014, I was appointed Executive Assistant Director of the FBI's National Security Branch.
3. As the Executive Assistant Director of the FBI's National Security Branch, I am responsible for, among other things, overseeing the national security operations of the FBI's Counterintelligence Division, Counterterrorism Division, High-Value Detainee

Interrogation Group, Terrorist Screening Center ("TSC"), and Weapons of Mass Destruction Directorate. The FBI's National Security Branch is also accountable for the functions carried out by other FBI divisions that support the FBI's national security mission, such as training, human resources, security countermeasures and technology. In my role as Executive Assistant Director, I have official supervision over all of the FBI's investigations to deter, detect, and disrupt national security threats to the United States and its interests as well as to protect against foreign clandestine intelligence activities.

4. I make this declaration in support of the motion for summary judgment filed by the government in this case. The matters stated herein are based on my personal knowledge and my review and consideration of information available to me in my official capacity, including information furnished by FBI and TSC personnel as well as other government agency employees acting in the course of their official duties. In particular, I am familiar with the Declarations of Marc Sageman and James Austin and address below some of the points they raise.

THE PURPOSE OF THE NO FLY LIST AND THE NATURE OF THE JUDGMENTS UNDERLYING NO FLY LIST DETERMINATIONS

5. In the wake of the terrorist attacks of September 11, 2001, the federal government fundamentally changed the way it approached the task of ensuring the safety and security of civil aviation. In particular, Congress directed the Executive Branch to identify individuals who may pose a threat to civil aviation or national security and prevent such individuals from boarding aircraft. The No Fly List, a subset of the Terrorist Screening Database ("TSDB"), is among the security measures that grew out of this mandate. Individuals on the No Fly List are prohibited from boarding a U.S. commercial aircraft or

from flying into, out of, or over United States airspace. Congress deferred to the Executive Branch to determine, as a matter of national security, when a traveler may be a threat to civil aviation or national security. The Executive Branch has developed criteria to determine whether an individual should be placed on the No Fly List; specifically, a person is appropriately placed on the No Fly List when credible information demonstrates that the individual poses a threat of committing a violent act of terrorism with respect to civil aviation, the homeland, the United States' interests located abroad, or because the person is operationally capable of engaging in or conducting a violent act of terrorism. The criteria developed by the Executive Branch to evaluate such risk are the product of many years of interagency review, and have been carefully calibrated to cover a range of dynamic threats to civil aviation and national security domestically and internationally.

6. Pursuant to statute, the No Fly List prohibits those persons who represent a threat to civil aviation or national security from boarding a commercial aircraft which then prevents them from engaging in a violent act of terrorism. As a result, whether the Government can predict future acts of terrorism without a high rate of error has no bearing on the reliability of the No Fly List, which is designed to identify individuals who may pose a threat of committing a violent act of terrorism rather than predict the chance of future events.

THE RELIABILITY OF THE GOVERNMENT'S WATCHLISTING DETERMINATIONS DOES NOT DEPEND ON A SCIENTIFICALLY VALIDATED MODEL FOR MAKING PREDICTIONS

7. Analysts or agents who make No Fly List determinations decide whether, based on investigative and intelligence information detailing past and present conduct and capabilities, the individual in question poses a threat to civil aviation and national security.

8. Based on the FBI's experience in the counterterrorism field, relying on a statistical model to make No Fly List decisions would be fraught with uncertainty and considerable risk. The Government has developed a watchlisting system that combines intelligence analysis with policy-based criteria for denying boarding to those who may represent a threat to civil aviation or national security. This system relies on informed judgments by experienced analysts and agents who evaluate watchlist nominations based on individual circumstances, taking into account the particular intelligence that distinguishes the individual under review. In this setting, attempting to incorporate and rely on a predictive model about how likely a person is to commit a terrorist attack would present significant challenges. Finding reliable data on the risk of terrorism is frustrated by the fact that the people who plan to commit terrorist attacks take every precaution to hide and obscure information about their activities. In addition, the Government does not begin its analysis with information regarding the general population in making nominations to the No Fly List, but rather focuses on those individuals who are identified as known or suspected terrorists based on their individualized activities and conduct – a much narrower subgroup of people – to determine if they meet the higher threshold for inclusion on the No Fly List. Also, a predictive model about the likelihood of a person

committing a terrorist attack would not account for the likelihood that the No Fly List itself deters and prevents terrorist attacks that would have been carried out in its absence.

9. Quite apart from these challenges, it is hard to imagine a scenario where the results of a statistical analysis would improve the reliability or alter a No Fly List determination about a particular person. Analysts and agents may conclude that an individual may pose a threat to civil aviation or national security after a thorough review of the intelligence relating to a particular known or suspected terrorist—including analysis of his travel and his past and present participation in terrorist group activity. That No Fly List decision may not be improved by statistical data. In the fluid, fact specific, and intelligence-driven environment in which watchlisting decisions are made, statistical data could not substitute for the informed judgment of a trained and experienced analyst or agent about the threat posed by a particular individual based on a rigorous analysis of the available investigative and intelligence information particular to that individual.

10. Ultimately, the Government is left with the question of whether a *particular person* represents a potential or actual threat of engaging in a violent act of terrorism and therefore should be prohibited from boarding on flights to, from, or over U.S. airspace. In making that decision, the Government does not have the option of avoiding difficult No Fly List decisions, simply because such decisions may not conform to a statistical model. The Government has an obligation to detect and prevent terrorist threats and to identify the particular individuals who might carry out such actions. Meeting that obligation means making difficult judgments about events with potentially catastrophic impacts. For this reason, an effective watchlisting system cannot turn on predictive models for ascertaining whether a combination of variables correlates statistically with

violent behavior. It is precisely because terrorism is context-specific that the analysis underlying No Fly List determinations must be carried out by those with the training and experience to assess the available intelligence and make the complex, case-by-case analytic judgments about how various and possibly conflicting facts relate to one another. The type of analysis that analysts and agents undertake, and the rigorous, multi-layered process under which they work, is described below.

NO FLY LIST DETERMINATIONS ARE EFFECTIVE AND VALUABLE

11. Analytical judgments about potential threats are the stock-in-trade of the intelligence community, and the FBI is no exception. As I explain below, No Fly List decisions are closely related to, and often correspond with, the FBI's broader analytical and investigative process to determine the type and extent of harm a person may pose.

12. Analysis for the purpose of making a No Fly List determination is a critical feature of the intelligence-gathering and investigative functions of the FBI. FBI analysts and agents routinely research and analyze source intelligence on terrorist activities and terrorist threats to identify individuals or groups who pose potential threats and to make judgments about the type and degree of risk posed.

13. In carrying out analysis for the purposes of making a No Fly List determination, analysts and agents draw from a body of source material and have a variety of investigative and intelligence-gathering tools at their disposal to inform their judgment. Analysts and agents also make use of subject-matter experts from throughout the intelligence community. Drawing on years of experience and training, these experts provide invaluable insight and context for agents and analysts seeking to develop, clarify, or reconcile source material. Such intelligence expertise can fill knowledge gaps and

identify certain patterns of behaviors or overarching trends that can help analysts and agents gauge the credibility and seriousness of a threat. For example, if a reported threat involves a foreign-based extremist group, an agent or analyst may consult with subject matter experts on the group or the relevant region to learn more about the group's operations, capabilities, plans, and activities.

14. Making a No Fly List determination is a professional discipline that combines substantive expertise and analytical thinking. Personnel are guided by intelligence-community-wide analytic standards designed to ensure quality and integrity in intelligence analysis which require analysts to perform their functions with objectivity, apply logic to make the most accurate judgments possible, properly express uncertainties associated with major analytic judgments, and properly distinguish between underlying intelligence and assumptions and judgments. These standards are implemented throughout the intelligence community and serve as a platform upon which each intelligence community agency builds its own policies and procedures. FBI personnel, for example, are required to be mindful of their own assumptions and alert to the influence of prevailing judgments. They must use reasoning techniques that mitigate bias and consider alternative perspectives and contrary information. They must also base their judgments on all available information, taking appropriate measures to inform their assessment.

15. These standards are designed to give structure to analysts' and agents' discretion and promote diligence, scrutiny, and professionalism in their work. Accuracy and integrity are recurring themes, and analysts and agents are called upon to use various techniques and methods to ensure they reach the best assessment based on available intelligence. There are no incentives that encourage the one-sided reporting of threats, or that

discourage the reporting of information inconsistent with reported threats. False or exaggerated No Fly List determinations waste resources and divert personnel from more serious operations.

16. The FBI's intelligence-driven, threat-focused approach to terrorism deterrence, detection, and disruption is effective in making No Fly List determinations. The terrorist identity information that is added to and removed from the No Fly List is done so through an ongoing nomination and review process. No Fly List nominations are made in the midst of a dynamic environment of intelligence gathering and investigation, and emerging threat streams. Inclusion on the No Fly List is not a determination that someone has committed a crime; rather, it is an analytical judgment based on available intelligence and investigative information that the person meets the applicable criteria for inclusion on the No Fly List. Interagency-approved policies and procedures are used to conduct these reviews, which are based on fact-intensive and context-specific analysis of intelligence reporting.

17. There are numerous procedures and safeguards in place to ensure that No Fly nominations, including those made by the FBI, are based on the most current, accurate, and thorough information available to ensure that only those who may represent a threat of committing a violent act of terrorism are placed on the No Fly List. These safeguards also act as persistent quality control measures, so that the reliability of the underlying intelligence is assessed and expertise is brought to bear at every stage of the watchlisting process. This includes: (1) the decision by the nominating agency to recommend an individual for placement on the No Fly List, (2) the determination by TSC that placement is appropriate (or not), (3) regular post-placement reviews and audits of No Fly List

determinations by various components of the federal government, including more frequent reviews of records involving U.S. persons (*i.e.*, U.S. citizens and lawful permanent residents), and (4) redress through the Department of Homeland Security's Traveler Redress Inquiry Program, which may result in a final review by the Administrator of the Transportation Security Administration.

18. At the nomination level, nominating departments and agencies are responsible for reviewing nominations prior to submission to ensure they satisfy the applicable criteria. Departments and agencies have put internal procedures in place to ensure that the nomination process is carried out properly and to facilitate the prevention and correction of any errors in information shared in the course of the watchlisting process. These procedures include the review of previous nominations to update or remove information that has changed. For the FBI in particular, the TSC performs equivalent nomination review and quality control and auditing processes to help maintain the currency, accuracy and thoroughness of TSDB nominations submitted by the FBI.

19. Nominations by the FBI are made by analysts and agents with the training and experience to identify potential threats and to bring relevant expertise and intelligence to bear in assessing such threats. Analysts and agents are trained to follow policies and procedures that were developed to refine the process for each specific nominating agency, such as the duty to review and reassess watchlisting judgments beyond the original nomination, and regularly revisiting previous nominations in the course of periodic reviews or, in response to new information, to update the watchlisting record as appropriate. These collective policies and procedures provide analysts and agents with specific operational and technical guidance for use in the nomination, review, and redress processes.

20. Upon receiving a No Fly List nomination, the TSC analyzes the identifying information and the underlying intelligence and determines whether a nominated individual meets the established criteria for inclusion on the watchlist, and, if sufficient information exists regarding the individual posing a threat of committing a violent act of terrorism, the No Fly List. Every nomination to the No Fly List is reviewed by a separate TSC team of specially trained No-Fly-Selectee subject matter experts, who must undergo additional, dedicated training and coursework before being qualified. TSC's review process is multi-faceted, involving coordination with the National Counterterrorism Center ("NCTC") and the nominating agency, as necessary, to ensure that the nomination is warranted.

21. Another level of review encompasses a range of quality control measures designed to carry out mandate in Homeland Security Presidential Directive ("HSPD")-6 to maintain "thorough, accurate and current" information within the TSDB. These measures include regular post-placement reviews and audits conducted by the nominating agencies, NCTC, and TSC, to confirm that nominations continue to satisfy the criteria for inclusion, and that the information offered to support the nomination remains reliable and current. Moreover, nominating agencies are required to conduct periodic reviews of U.S. Person nominations to the TSDB, and to have in place internal procedures to prevent errors and to identify and correct information shared during the watchlisting process. The TSC also plays a role at this level of review by conducting biannual reviews of U.S. Person records, as well as the additional review of an individual's record each time a department or agency interacts with him or her during a screening event or provides new information about that individual.

22. Lastly, under DHS TRIP, when a U.S. Person who is denied boarding as a result of being included on the No Fly List files an inquiry to seek redress, DHS TRIP forwards the inquiry to the TSC's Redress Office. The TSC Redress Office reviews the inquiry to determine whether the individual continues to warrant inclusion on the No Fly List. If, at the conclusion of the review, the U.S. Person is found to continue to meet the No Fly List criteria, TSC notifies DHS TRIP of that finding and DHS TRIP sends that person a letter informing him or her that he or she is on the No Fly List, and provides the option to request additional information and specific instructions for doing so. If such an applicant requests additional information, DHS TRIP provides a second, more detailed response, identifying the specific criterion or criteria under which the person has been placed on the No Fly List and, to the extent feasible, consistent with the national security and law enforcement interests at stake, an unclassified summary of information supporting the individual's No Fly List status. The second letter also provides the person an opportunity to be heard further concerning their status through the submission of written responses, exhibits, or other materials the individual deems relevant. If the person makes such a submission, DHS TRIP forwards the response and accompanying information to the TSC Redress Office for careful consideration. Upon completion of the TSC's comprehensive review of the most current information available, including the person's submission, the TSC Principal Deputy Director provides DHS TRIP with a recommendation to the TSA Administrator as to whether the person should be removed from or remain on the No Fly List and the reasons for that recommendation. The TSA Administrator or a designee will review the TSC recommendation, as well as any material submitted by the redress applicant. The TSA Administrator will either remand the case back to the TSC with a

request for additional information or clarification or issue a final order removing the U.S. Person from the No Fly List or maintaining him on the List. If the TSA Administrator issues a final order maintaining a U.S. Person on the No Fly List, the order will state the basis for the decision to the extent possible without compromising national security or law enforcement interests and will inform the U.S. Person that judicial review of the order may be sought under 49 U.S.C. § 46110 or as otherwise provided by law.

23. At each of these stages, the Government is, to one degree or another, utilizing the analytic process that first gave rise to the nomination: analyzing historic and current intelligence, assessing reliability, and bringing expertise to bear to make judgments about whether an individual represents a threat sufficient to meet the criteria for placement on the No Fly List.

* * *

In sum, statistical analysis has minimal application in the case-by-case determinations that form the basis for watchlisting decisions. A No Fly List determination is not a prediction about the likelihood of an individual committing an act of terrorism in the future, but rather a judgment, based on available intelligence, that the individual currently poses a threat of engaging in a violent act of terrorism sufficient to warrant denying the individual boarding on aircraft. Using statistical models to test or countermand expert judgment in this context would present numerous challenges and considerable risk.

Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of October, 2015 in Washington, D.C.

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **DECLARATION OF AMIR MESHAL IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

I, Amir Meshal, hereby declare and state as follows:

1. I am a plaintiff in the above-captioned case. I make this declaration in support of Plaintiffs' Opposition to Defendants' Cross-Motion for Partial Summary Judgment.

2. In late January 2007, while fleeing Somalia with other civilians after violence had erupted there, I was apprehended by Kenyan troops near the Somalia-Kenya border. Over the course of the following four months, at the direction or behest of the United States, I was imprisoned in Kenya, Somalia, and Ethiopia without access to a lawyer, without ever being presented before a judge or magistrate, and without ever being charged with a crime.

3. While I was detained, I was interrogated more than thirty times by U.S. officials, including two FBI agents. During the interrogations, the U.S. officials repeatedly threatened me with torture, forced disappearance, and other serious harm to try to get me to confess to things I didn't do and to associations I didn't have. The US officials, including the FBI agents, also repeatedly told me to sign forms that they said notified me I could refuse to answer questions without a lawyer present. I repeatedly asked those officials for access to a lawyer, and they denied those requests every time, saying I could not make any phone calls. I did not want to sign the forms. But alone and at the mercy of these officials, I had no choice but to sign the forms.

4. I was finally allowed to return home on May 27, 2007, after more than four months of detention.

5. The government is now trying to use statements that I supposedly made to U.S. officials during those interrogations, while I was terrified, abused, desperate, and cut off from lawyers and the courts, in order to keep me on the No Fly List. Those alleged statements—which the government has not provided to me—were coerced.

6. I repeat what I have said ever since I was able to return home to the United States and freed of government coercion—and what I have previously sworn to in this case—that I do not pose a threat to civil aviation or national security.

7. I also have not been able to secure or retain employment because of the stigma resulting from my placement on the No Fly List. For example, I got a job with the Minnesota Department of Transportation (MNDOT) in November 2014, but I was dismissed less than three weeks later. I lost my job after some of the other employees complained about working with someone on the No Fly List, and a local TV news affiliate aired a story about my having the job, and describing me as a suspected terrorist because of my placement on the No Fly List.

8. Since my return to the United States, I have repeatedly been stopped by police officers while driving, despite having done nothing wrong. That happened most recently on the evening of Wednesday, May 27, 2015, while I was driving back with my wife and seven-month-old baby boy to Minnesota from my brother's wedding in New Jersey. We were unable to fly to and from the wedding because the government has barred me from flying.

9. We were driving west on Interstate 80 in Pennsylvania when I saw an unmarked gray Ford Explorer parked on the left shoulder of the highway. I checked my speed, which was

65 miles per hour—the posted speed limit. I passed the Ford Explorer, which did not move from its location at that point.

10. About ten minutes later, the Ford Explorer sped up behind me with its lights flashing. I checked my speed, which was just under 70 miles per hour in a 65-mile zone. I was driving at the speed of other traffic on the road. Our baby had finally just fallen asleep in the back seat, after crying for a while as babies do. I pulled over, and an officer came up to the passenger side of my car. Where I include statements in quotations below, those statements are my best recollection of what the officers said, or how I responded.

11. The officer identified himself as a Pennsylvania state police officer. He asked me if I knew why he had pulled me over, and I told him I didn't know. He said, "You were driving in the left lane and going a little fast, but don't worry, I'm probably not going to give you a ticket. I just want to ask you some questions." He let me know that the stop was being recorded.

12. The officer asked for my license, which I gave him, and he asked whether I owned the car. I told him that the car was a rental, and he asked who rented it. I told him that my father rented the car. The officer then asked if my father included me on the rental agreement as an additional driver, and I said yes. The officer asked where my father was, and I told him my father was in Maryland. The officer asked how my father rented the car, and I told him that my father had come to Minnesota to rent the car and help me drive it to Maryland. The officer asked where we were coming from, and I told him we were coming from New Jersey. The officer asked what we were doing in New Jersey, and I told him we had been at my brother's wedding the previous evening. He asked where the wedding had taken place, and I told him the specific location. The officer then said, "Okay, hold tight—it's going to be a while."

13. About twenty minutes later, the officer returned and asked me to step out of the car. I asked him why, and he told me that he wanted to talk to me outside. I told my wife to be prepared to call my father if the police took me into custody. Fearful because of my previous terrible experiences in law enforcement custody, I also told her to pray for us.

14. I went to the back of the rental car, and the officer patted me down. He then said something like, "I'm sorry, but it looks like you're not going to make it to Minnesota on time." I asked him why, and he said that in that part of the country, people tended to get involved in illegal activities, like transporting drugs. He asked if I had any explosives or illegal fireworks in the car, and I said I didn't. He asked if I had any drugs—marijuana, meth, cocaine, heroin—and I said, "No, definitely not."

15. The officer then asked if I would give him permission to search the car. I said, "Officer, my wife and son are in the car." He said they would have to come out. I told him, "My son was crying for almost an hour and a half and finally fell asleep about ten minutes before you pulled me over. I don't want to disturb him, so I'm going to politely decline to give you permission." The officer said, "Okay, here's the drill. Since you won't give me permission to search your car, we're going to have to bring a canine unit out here to sniff around the vehicle. If he gives me a signal then I will have probable cause, and then I'll have to have your wife and son come out, and I'll have to search the vehicle." I said that there would be no reason for the dog to signal anything, and that I didn't want my wife and son disturbed. I asked how long it would take for the dog to arrive, and he said that it would be about twenty minutes. I asked if I could get my phone from the car, and he said, "We can't let you do that for safety reasons." I was not able to get my phone to call my family or my lawyers.

16. That officer returned returned to the gray Explorer and got on the phone. He remained on the phone for much of the time while the second, younger officer then talked to me.

17. The younger officer and I had a conversation—about sports, food, the weather—while we were waiting for the canine unit to arrive. We also talked about how difficult it is to take a long road trip with a baby. The officer said, referring to my wife and son, "Was flying not an option for them, either?" I had said nothing to any of the officers before that about being on the No Fly List, so this officer's question made it clear to me that I had been stopped because I am on the List.

18. About fifteen minutes later, another Ford Explorer, marked as a police vehicle, pulled up. Two new officers came out of that car and talked to the older officer in the original unmarked Explorer. The older officer came to me and explained that the dog was going to sniff the car. He said he would ask my wife to leave the vehicle with the baby. I said to him, "Didn't you say that if you brought the canine unit out here, my wife and son wouldn't have to leave the car?" Before that older officer could respond, one of the new officers, with the dog, said, in a tone I found aggressive, "Look, I don't know you, and I don't know your wife. She could pull a gun and shoot me in the face when I get close to the car. I'm going home tonight, so she's got to come out." I said that my baby was also in the car, and the officer with the dog said that they both had to come out.

19. The first, older officer then went to the car and spoke to my wife, telling her that she and the baby would have to come out of the car. She took our baby out and came to stand with me on the shoulder of the road.

20. The older officer came to where we were standing and said that he would have to pat down my wife. My wife was immediately concerned, and she said, "Do you have a woman

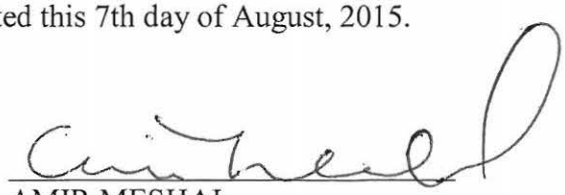
who can do that?" Like me, my wife is a practicing Muslim. In accordance with her beliefs and faith, she would never let a man who is not family touch her body, though she would submit to a legitimate security search by another woman. In response to her question, the officer simply said, "No, we do not." Standing at the side of the road with our baby and no choice, my wife submitted to the search by a male officer. I was powerless to help my wife in any way and held the baby while a male officer patted her down.

21. The officer with the dog brought it out of the marked Explorer and walked the dog around in the trees for a short time. He then returned to the car, walked the dog around the car three times, and then returned the dog to the marked Explorer. The officer then spoke to the older officer in the unmarked Explorer for some time. The older officer left the unmarked Explorer and told me that the dog didn't find anything and that we were free to go. I helped my wife and baby into our car, and we left. The entire ordeal lasted over an hour.

22. It was obvious to me, based on the officer's question about flying not being "an option" for my wife and son, that the officers knew that I am on the No Fly List. It was also obvious that they had no valid reason to stop me, to force my wife and baby to leave the vehicle and stand on the shoulder of the freeway, and to bring in a canine unit to conduct a dog search. The entire experience left us scared and humiliated. I felt powerless to protect my wife and child and to shield them from the effects of my placement on the No Fly List. Both my wife and I are also very upset that a male officer violated my wife's strongly-held religious beliefs by conducting a physical search of her person.

23. I declare and state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 7th day of August, 2015.



AMIR MESHAL

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing declaration of Amir Meshal in opposition to Defendants' cross-motion for summary judgment was delivered to all counsel of record via the Court's ECF notification system.

s/ Hina Shamsi
Hina Shamsi

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **DECLARATION OF JAMES AUSTIN IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

I, James Austin, hereby declare and state as follows:

1. I am over the age of 18 years, have personal knowledge of the facts contained herein, and am otherwise competent to make this declaration.

2. I am an expert in the field of corrections, risk assessment, and program evaluations and have been qualified to serve as an expert, and have testified as such, on several occasions, mostly in federal courts. I began my career as a correctional sociologist in 1970 at the maximum security prisons of Statesville and Joliet, operated by the Illinois Department of Corrections. I received my B.S. in Sociology from Wheaton College in 1970, my M.A. in Sociology from DePaul University in 1975, and my Ph.D. from the University of California, at Davis in 1980.

3. I have been involved in correctional planning and research for more than 30 years. From 1970 to 1974, I worked as a correctional sociologist in the Illinois Department of Corrections. From 1974 to 1982, I was a Research Associate at the National Council on Crime and Delinquency in San Francisco. Beginning in 1982, I became the Executive Vice President of the National Council on Crime and Delinquency and continued in that post until 1998. Between 1999 and 2003, I was a research Professor in the Department of Sociology at the George Washington University in Washington, D.C., where I was also the Director of the Institute for

Crime, Justice and Corrections. During that period I served as Chair of the National Policy Committee for the American Society of Criminology.

4. In 1991, I was named by the American Correctional Association as the recipient of the Peter P. Lejin's Research Award for my research contributions to the field of corrections. In 1999, I received the Western Society of Criminology Paul Tappin award for outstanding contributions in the field of criminology.

5. I founded the JFA Institute in 2003 and have served as its President since then. The JFA Institute is a non-profit corrections consulting firm that works in partnership with federal, state, and local government agencies to implement more effective criminal justice policies. My complete academic and professional experience is set forth more fully in my Curriculum Vitae, which is attached as **Exhibit A.**

6. In my current position, I and my staff evaluate criminal justice practices and design research-based policy solutions in a variety of areas, including prison population simulation modeling and projections, offender risk assessment and classification systems, parole and probation guidelines, and special needs programs evaluation, including mental health programs.

7. In making this assessment I reviewed the following documents that were provided to me:

Third Amended and Supplemental Complaint for Injunctive and Declaratory Relief, Case No. 10-cv-750 (BR), U.S. District Court for the District of Oregon;

Memorandum of Points and Authorities in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment;

Defendants' Cross-Motion for Summary Judgment;

Declaration of Deborah O. Moore;

Declaration of G. Clayton Grigg; and

Declaration of Michael Steinbach.

Risk Assessment in the Corrections and Criminal Justice Context

8. I have developed and designed numerous risk assessment systems for adult and juvenile correctional systems. These risk assessment systems have been used by state parole boards, pretrial service agencies, probation and parole systems, and state prison systems to predict individual prisoners' risk of recidivism, prison sexual assault, prison conduct and pretrial release behavior.

9. In all of the contexts for which I have designed risk assessment systems, the individuals being assessed have either been convicted of a crime or have been charged with a crime and ordered detained pending trial through the judicial process. I am not aware of attempts to develop risk assessment tools on individuals who have not been charged with or convicted of crimes, and I am skeptical that any such tools could be developed, for reasons I explain below.

10. In adult and juvenile correctional systems, risk assessments are completed on people who have been charged and/or convicted of specific criminal acts. Such assessments typically attempt to predict "general recidivism" as measured by re-arrest, re-conviction and/or re-incarceration. Risk assessments are most accurate when developed based on conduct that has been independently established, not just alleged, such as when an individual has been convicted by a judge or jury of a specific criminal act. In the case of people charged with crimes but not convicted, there has at least been an independent review by a court to establish probable cause to believe that a crime has been committed.

11. To the best of my knowledge, there have been few attempts to develop risk assessment models to predict violent behavior (re-arrest for robbery, assault, murder and rape) in the absence of a prior similar act. For reasons that are listed below, such conduct is extremely difficult, if not impossible, to predict with an acceptable rate of error.

12. The risk models that I develop employ actuarial research methods, professional judgment, and self-correcting algorithms and processes to adjust for errors made by the initial

risk assessment systems. By "actuarial," I mean the use of a statistical model to assess the likelihood of an event's occurrence based on predictive variables. Professional judgment is an empirically guided approach to gathering, weighing, and combining information according to the evaluator's judgment in order to improve the consistency of risk assessments. Used in conjunction with actuarial methods, professional judgment improves the accuracy of a risk assessment tool.

13. All risk assessment systems must pass the dual tests of reliability and validity. Reliability has to do with consistency in assessments by those trained in completing them. Reliability is further separated into concepts of intra- and inter-reliability. The former means consistency by the assessor over time (hour by hour, day by day, week by week), while the latter means consistency between different assessors using the same system. Intra-reliability fails when one assessor changes his or her criteria or process for making risk assessments, for example due to fatigue, high workloads, or external events; inter-reliability fails when multiple assessors reach different conclusions regarding the same people. Risk assessment procedures that do not rely upon people to conduct the assessments (computer-generated assessments) may be less prone to reliability errors. But since even computer-generated risk assessment systems use data that has been generated by people, even these systems need to be tested for reliability. Lack of reliability (intra- or inter-) will render a risk assessment system invalid.

14. Validity has to do with the ability of the risk assessment system to accurately predict the behavior that is in question. The so-called "risk factors" are the "predictors," or independent variables, while the dependent variable is the behavior or outcome that is being evaluated. In criminal justice, one is often asked to develop a risk assessment model that predicts recidivism, often defined as re-arrest (the dependent variable). The predictors, or independent variables, may include age at first arrests, current age, gender, and education levels. Using these variables, it is possible to assess the risk of recidivism with an estimated rate of error.

15. Any risk assessment system is subject to a number of limitations in terms of its ability to predict behavior. One limitation that has already been mentioned is the reliability of the analysis of the independent variables used to make the assessments. At a minimum, each risk factor used must have a very high level of inter-reliability (95% agreement among assessors or higher). Unless inter-reliability has been tested, it may well be that some or several risk factors used to make an assessment are not accurate.

16. An unreliable risk assessment system has too much "noise" being entered into the assessment for the results to be valid. For example, if two assessors routinely reach different conclusions for the same individuals, then the level of validity in the process is severely compromised. Similarly, if the risk factors used to make an assessment are not accurate, the resulting assessment will not be valid.

17. Another challenge that can limit the validity of a risk assessment tool is a high number of "false positives," which means that the risk assessment process is "over-predicting" the number of high-risk people, and labeling some people high-risk who are actually not. This problem can be caused by a lack of reliability, as explained above, or by a lack of statistical association between the risk factors and the behavior being predicted. Where the risk factors used to predict a certain behavior are not actually associated with that behavior, individuals identified as high-risk based on that behavior will likely be false positives.

18. The other major reason for a high level of false positives is a low "base rate." This refers to the level of variance in the dependent variable. For example, it is far more difficult to predict relatively rare events like murder, rape, or suicide than more commonly occurring behaviors like overall re-arrest or re-conviction among released prisoners. Where the base rate for the dependent variable—the event to be predicted—is low, the likelihood of generating false positives, and therefore the rate of error, is high.

Procedural Safeguards Against Erroneous Predictions in the Corrections and Criminal Justice Context

19. In the risk assessment field, it is commonly accepted that administrative safeguards must be used to mitigate the predictive problems that arise for low base rate events. These safeguards are implemented as part of the initial assessment process and in subsequent reviews (re-assessment or reclassification). In the initial process, it is important to provide transparency to the person being assessed, in terms of the purpose of the assessment and how it is being conducted. There is also an independent review by supervisory staff to ensure the assessment process has been properly completed. This helps to test the initial assessment.

20. Additionally, knowing that it is very difficult to predict a rare event, and given the much higher level of false positives associated with such an effort, there must be a structured effort to correct for false positives, with a follow-up period that entails further monitoring and re-assessment. Such a re-assessment process allows for discovery of any false prediction that has occurred and helps to minimize its negative effects on people.

21. For these reasons, one needs to distinguish between prediction of risk and management of risk. The former assumes one has the ability to actually forecast future behavior or events based on past conduct. The latter assumes that accurate prediction is not feasible but that steps and actions can be taken to better manage that risk. In the corrections field, risk management measures based on past conduct are usually limited to continued monitoring, rather than imposition of restrictions.

22. In the area of inmate classification, all of the numerous inmate classification systems have a re-classification period of 3-12 months, during which the inmate's behavior is monitored, and the initial risk assessment adjusted, based on actual behavior. For the state of Maryland I developed a risk assessment process for parolees and probationers who were assessed to be at high risk of killing someone or being killed themselves. The re-assessment process is conducted within 6 months of the initial assessment and can result in parolees and probationers

being removed from the list. A similar re-assessment process is being installed for the state of Georgia's Department of Corrections for its Prison Rape Elimination Act (PREA) risk assessment system. In that process, inmates who are initially classified as "potential" victims or predators are re-assessed within a year to determine if the label is still valid based on conduct and behavioral observations.

23. An example of when accurate prediction is not feasible involves prisoners assessed as being "potential" sexual predators who have not been convicted of sexual violence. The self-reported incidence of sexual assault in prisons is extremely low (under 3%), posing a high likelihood that predictions of sexual assault will generate a significant number of false positives. Potential predators and potential victims are assessed for risk using factors known to be associated with prison rape (either as a victim or predator), but, in light of the significant risk of error, there is no attempt to make actual predictions and impose restrictions on individuals as a result. Rather, the risk assessment is used to "manage" the risk. For example, the identities of potential victims and predators are communicated to security staff and case managers, who may increase surveillance of those two populations. Housing assignments are made to facilitate observation of the inmates and separate placement in two-person cells. Still, being identified as a potential victim or predator does not result in denial of any privilege, participation in programs, eligibility for work assignments, or other aspects of prison movement and activities. To impose such restrictions or limitations based on a risk assessment with a high likelihood of error would inevitably punish inmates who are not, and will not become, sexual predators.

Risk Assessment in the No Fly List Context

24. Based on my experience in risk assessment in the corrections and criminal justice contexts, it is readily apparent that any attempt to predict who will engage in violent acts of terrorism will be subject to severe limitations. Indeed, any such effort would not be feasible or productive. First, there is the obvious problem that violent acts of terrorism have an extremely low base rate. In the aviation context, only a handful of such events have occurred despite the

millions of flights that occur each year. Statistically speaking, the chance that an act of aviation terrorism will occur is virtually non-existent. Even outside the aviation context, terrorist attacks are far rarer than homicides or suicides, which themselves are so rare as to pose significant predictive challenges. With so few terrorist events, there is simply little variance and, unavoidably, an extremely high rate of false positives—no methodological system can meaningfully predict such behavior.

25. Further, a person's decision to attempt an act of terrorism is not solely predicated on individual attributes. Such a decision or behavior, like any other example of human behavior, is influenced by factors that are best described as situational or dynamic. Usually there are other interactions with other people as well as environmental factors (e.g., security environment) that factor into the ability to commit an extreme behavioral act like terrorism. Unless these other external factors can be captured and measured, the ability to predict behavior is further degraded.

26. A more subtle and yet significant problem with the predictions that lead to placement on the No Fly List arises with regard to reliability. As explained above, any predictive tool that cannot be assured of a high degree of intra- and inter-reliability cannot be reliable, and therefore cannot be considered valid, because assessors interpret factors differently and adopt varied standards of assessment. The government's process for nominating individuals to the No Fly List appears to ensure a low degree of reliability in the assessments that lead to placement on the list. I reviewed the declaration of Michael Steinbach, who states that "[e]ach nominating agency is responsible for ensuring that its watchlist nominations satisfy the applicable criteria for inclusion, and that it has established internal procedures to confirm that the nominations process is properly performed." (Steinbach Declaration para. 12.) Because the nominating process is diffuse in this way, with each nominating agency responsible for applying the criteria, inter-reliability in No Fly List assessments is bound to be low.

Conclusions

27. In summary, I am not aware of any scientifically accepted methods available to

accurately predict or identify people who have not committed an act of terrorism, but are likely to commit one, much less an act of aviation terrorism specifically. I have no reason to believe that any effort to identify people who will commit such acts could do so accurately, and any effort to do so would inevitably produce a large number of false positives.

28. I declare under penalty of perjury that the foregoing is a true and correct statement of my opinions and the supporting facts.

Executed this 7th day of August, 2015.

JAMES AUSTIN

James Austin

MAJOR POSITIONS HELD

2003 – Present	*President, The JFA Institute*, Washington, D.C.
1999 -2003	*Research Professor and Director, Institute for Crime, Justice, and Corrections*, Department of Sociology, The George Washington University, Washington, D.C.
1982 - 1998	*Executive Vice President* National Council on Crime and Delinquency San Francisco and Washington, D.C.
1974 - 1982	*Research Associate* National Council on Crime and Delinquency San Francisco
1970 - 1974	*Correctional Sociologist* Illinois Department of Corrections Joliet, Illinois

EDUCATION

B.A.	1970, Wheaton College, Wheaton, Illinois, Sociology
M.A.	1975, De Paul University, Chicago, Illinois, Sociology
Ph.D.	1980, University of California, Davis, California, Sociology

RELEVANT PROFESSIONAL EXPERIENCE

2014 - present	Master Jail Plan, Sonoma County.
2012 - present	Orleans Parish Prison Population Projections and Jail Reduction Strategic Pla.

2014 - present	Validation study of the San Francisco Adult Probation Risk and Needs Assessment System (COMPAS), San Francisco County.
2011 – present	Monitor, Consent Decree, Walnut Group Correctional Facility, Mississippi Department of Corrections (adult and juvenile populations)
2010 – 2014	Consultant. Technical Assistance on Solitary Confinement in Maryland, New Mexico, and Illinois. Vera Institute.
2011 – 2015	Director, Los Angeles County Sheriff Jail Population Projections and Impact of AB 109. Funded by Public Welfare Foundation.
2005 – 2014	Director, Design and Evaluation of the Maryland Department of Public Safety and Corrections (MDPSC) Risk and Case Management System (Parole, Probation and Prison). MDPSC and Open Society Foundation.
2013-2014	Evaluation of the Contra Costa Probation Department's Response to AB 109- Realignment.
2012-2013	Evaluation of Alternatives to Incarceration, San Diego County.
2012 – 2013	Evaluation of the Short-Term Technical Violation Pilot Study. U.S. Parole Commission.
2012	Co-Director. Evaluation of the Oklahoma Administrative Segregation System. Oklahoma Department of Corrections.
2011 - 2012	Consultant. Study of Colorado Administrative Segregation System. Colorado Department of Corrections and National Institute of Corrections, U.S. Department of Justice.
2010 – 2011	Co-Director, Revalidation of the Texas Pardon and Parole Board System. Texas Pardon and Parole Board.
2009 – 2012	Director, Prison Population-Justice Re-investment Initiative. Pew Charitable Trusts.

2010 – 2011	Special Consultant, Jail Population Projection Study, US Department of Justice and Orleans Paris.
2008 – 2009	Special Consultant, Administrative Segregation/Super Max Parchment Study. Mississippi Department of Corrections and ACLU
1998 – 2011	*Director,* Correctional Options Program (Bureau of Justice Assistance, U.S. Department of Justice)
2007 – 2008	Director, Harris County Pretrial Services Re-Validation Risk Assessment Study. (Harris County, Texas).
2005 – 2008	Director, Montgomery Pretrial Services Risk Assessment Validation Study. (Bureau of Justice Assistance, U.S. Department of Justice).
2003 – 2006	*Director*, Assessment of Sexual Assault in the Texas Prison System. (National Institute of Justice).
2002 – 2006	*Director,* Parole Guidelines System Project, Maryland Parole Commission. (Baltimore Open Society Institute).
2003 – 2006	*Director*, Validation Study of the Alameda County Juvenile Detention Risk Assessment System (Alameda County, California).
2002—2006	*Independent Expert,* Office of Youth Development, Louisiana Department of Public Safety and Corrections, Jointly Appointed by State of Louisiana and U.S. Department of Justice, Civil Rights Division
2003-2004	*Director,* Evaluation And Redesign Of Systems For Berks County Pretrial And Sentenced Populations. (Berks County, PA).
2002 – 2003	*Director*, Validation of the Pennsylvania Parole Guidelines. Pennsylvania Board of Probation and Parole. (Pennsylvania Commission on Crime and Delinquency).

2001 – 2003	*Director,* Development of the Kentucky Parole Risk Assessment System. Kentucky Parole and Pardon Board.
1998 – 2004	*Monitor*, Georgia Juvenile Justice Corrections System, Jointly Appointed by State of Georgia and U.S. Department of Justice, Civil Rights Division.
1997 - 2002	*Director*, National Technical Assistance Program for External Prison Classification Systems (Oregon, Wisconsin, Virginia, Tennessee, Texas, Oklahoma, and Montana) (National Institute of Corrections)
1996 - 2002	*Director,* National Technical Assistance Program for Internal Prison Classification Systems (Washington State, Oregon, Missouri, South Dakota, Connecticut, Colorado, and Florida)
1996 - 1999	*Director*, National Survey of Juveniles in Adult Correctional Facilities (Bureau of Justice Assistance), GWU.
1996 - 1999	*Director,* National Multi-Site Boot Camp Evaluation (Adult and Juvenile) (National Institute of Justice), GWU.
1995 - 1999	*Director*, Evaluation of “Three Strikes and You're Out” Laws in California and Nationally, (National Institute of Justice), NCCD
1996 - 1999	*Director*, National Survey of Privatization in Corrections (adult and juvenile facilities) (Bureau of Justice Assistance), NCCD.
1992 - 1997	*Director*, Correctional Options Evaluation (National Institute of Justice and Bureau of Justice Assistance), NCCD
1997	*Director*, Congressionally mandated evaluation of the D.C. Department of Youth Services Agency (YSA) operations, classification system, staffing levels, physical plant, mental health, information services and program services, (National Institute of Corrections, Bureau of Prisons), NCCD

1992 - 1997	*Director*, National Structured Sentencing Evaluation (Bureau of Justice Assistance), NCCD
1995 - 1997	*Director*, Congressionally mandated evaluation of the D.C. Department of Corrections operations, classification system, staffing levels, and physical plant, including, comprehensive cost analysis of long-term options for the Lorton Complex, (National Institute of Corrections, Bureau of Prisons), NCCD
1991 - 1997	*Director*, Design and Implementation of the New York City Department of Corrections Objective Jail Classification System (Consent Decree, New York City Department of Corrections), NCCD
1991 - 1995	*Director*, Philadelphia Prison System Classification and Population Projections Project (Consent Decree, City of Philadelphia), NCCD
1991 - 1994	*Director*, Evaluation of Jail Drug Treatment Programs (National Institute of Justice), NCCD
1990 - 1993	*Director*, Evaluation of the Los Angeles Sheriff's Boot Camp Program (National Institute of Justice), NCCD
1991 - 1993	*Director*, Design and Implementation of the Cook County Objective Jail Classification System (Cook County Sheriff's Department), NCCD
1990 - 1991	*Director*, California Assessment of the Overrepresentation of Minority Youth in Juvenile Justice (Office of Criminal Justice Planning), NCCD
1988 - 1992	*Director*, Experimental Test of Electronic Monitoring Program, Oklahoma Department of Corrections (National Institute of Justice), NCCD
1987 - 1992	*Director*, Experimental Test of the Prison Management Classification System (National Institute of Corrections and Washington Department of Corrections), NCCD
1986 - 1990	*Director*, National Jail Classification Project (NIC), NCCD

1985 - 1987	*Co-Director*, California Youth Authority Parole Risk Study (Packard Foundation and CYA), NCCD
1984 - 1986	*Co-Director*, Study of Institutional Violence at San Quentin (Consent Decree, California Department of Corrections, NCCD
1982 - 1987	*Co-Director*, Experimental Study of Juvenile Court Probation Services, Salt Lake City, Utah (OJJDP), NCCD
1983 - 1985	*Co-Director*, Illinois Department of Corrections Early Release Evaluation (NIJ), NCCD
1980 - 1984	*Co-Director*, Supervised Pretrial Release Test Program (NIJ/LEAA), NCCD
1981 - 1983	*Co-Director*, Evaluation of California AB2 Bail Reform Act (OCJP), NCCD
1980	*Senior Research Associate*, California Alternatives to Incarceration Study (State Legislature), NCCD

SPECIAL APPOINTMENTS

2006 – 2007	Expert Panel on Adult Offender and Recidivism Reduction Programming, California Department of Corrections and Rehabilitation
2003	Advisory Committee, The Little Hoover Commission Report on California Prison System
1999- 2003	Chair, National Policy Committee, American Society of Criminology
1987 - 1994	Trustee, Robert Presley Institute of Corrections Research and Training
1991	Governor's Task Force on Prison Crowding, State of Nevada
1988	Governor's Task Force on Corrections, State of Oregon
1981, 1986	National Academy of Sciences, National Panels on Sentencing and Prison Overcrowding

EXPERT WITNESS/LITIGATION

1987 - 1989	Office of the Special Masters, Ruiz v. Lynaugh, Evaluation of the TDC Classification System and Inmate Violence Appointed by Court to produce evaluation report of classification system to determine if inmate violence had been reduced.
1989 - 1991	U.S. Department of Justice, Civil Rights Division, U.S. v. State of Florida: Florida Department of Corrections, et al., Case No. TCA 86-7330 (N.D. Fla) Expert Witness Retained by Plaintiffs to determine whether women should be excluded from certain post positions in the DOC.
1990 - 1991	King County (Seattle, Washington) District Attorney's Office, Hammer v. King County Expert Witness Retained by Defendants to determine if minority staff was being discriminated against.
1990 - 1991	Office of the Attorney General, State of Texas, Lamar v. Collins Expert Witness Retained by Defendants to determine if use of local incarceration rates by selected counties was appropriate.
1991	Office of the Attorney General, State of Texas, Alberti v. Sheriff of Harris County, et al., No. CA-H-72-1094 Expert Witness Retained by Defendants to determine if use of local incarceration rates by selected counties was appropriate.
1991 - 1992	U.S. Department of Justice, Civil Rights Division, U.S. v. The Parish of Orleans Criminal Sheriff's Office Expert Witness Retained by Plaintiffs to determine the appropriateness of excluding females from certain post positions within the jail.

1991 - 1994	Calvin R. vs. Illinois Department of Corrections. Consent Decree. Appointed by Court to produce evaluation of classification system and to implement internal classification system to reduce inmate violence.
1995	International Fidelity Insurance Co. et al. v. Charles Nobel et al: In the United States District Court of the Southern District of Texas, Houston Division. Expert Witness Retained by Defendants to determine the Failure to Appear rates for defendants released on surety bond versus O.R.
1995	Sandra Herrera, et al., v Pierce County, et al. Retained by Plaintiffs to evaluate whether inmates were being properly classified and housed in the local jail.
1995 - 1996	Montoya v. Gunter, et al. Retained by Defendants to determine whether inmate who was killed while incarcerated had been properly classified and housed.
1995 - 1997	Inmates A,B,C and D v. Illinois Department of Corrections Consent Decree Appointed by Court to produce evaluation of the level of control of housing and job assignments by gangs.
1995 - 2002	USA v. Michigan and Cain v. Michigan Consent Decrees Expert witness retained by Defendants to help Department of Corrections reach compliance with court order regarding classification system.
1996	Rentschler v. Carnahan et al.

	Retained by Defendants to evaluate the impact of crowding at the Colorado maximum security prison.
1997	Carlos Morales Feliciano v. Pedro Rossello Gonzales Consent Decree Retained by Special Master to conduct a comprehensive assessment of the inmate classification system that was designed and partially implemented by the Administration of Corrections.
1998 - 1999	Southern Ohio Correctional Facility (Civil Action No. C-1-93-436). Retained by the Ohio Department of Rehabilitation and Correction to serve as an expert witness on classification issues as they pertain to the Lucasville riot.
1998 - 1999	Busey et al. v. Corrections Corporation of America Retained by CCA to develop an objective classification system for the Youngstown facility and have all inmate's properly classified according to the classification criteria. No expert report, deposition or court testimony.
1998 - 2000	Holloway, et al., v. King County Retained by plaintiff's counsel to examine the validity of client's claims that sexual harassment of female correctional officers by male inmates was being encouraged by male correctional officers and departmental policy. Declaration and deposition.
2001	Gartrell et al., v. Ashcroft et al. Retained by plaintiffs to examine if BOP inmates placed in Virginia Department of Corrections are unnecessarily having their expression of religious freedoms unnecessarily restricted? Report submitted but no deposition or court testimony.
2001 - 2005	Austin, et al., v. Wilkinson, et al.

	Retained by defendants to examine the classification process used to assign inmates to the Ohio State Penitentiary – a high maximum security prison. Expert report but no deposition or testimony.
2008- present	Plato and Coleman v. Schwarzenegger. Retained by plaintiffs to develop plan to depopulate the California Prison Population. Reports submitted and deposed by defendants, two expert reports submitted and court testimony.
2013 - 2014	Coleman v. Brown Expert declaration, deposition and court testimony in support of plaintiff's motion regarding mentally ill inmates in segregation.

MAJOR PUBLICATIONS

Books

2011	It's About Time: America's Imprisonment Binge (with John Irwin), 4th Edition, Cengage, Publishing.
1993	Reinventing Juvenile Justice (with Barry Krisberg), Beverly Hills, CA: Sage Publications.
1978	The Children of Ishmael: Critical Perspectives on Juvenile Justice (with Barry Krisberg),

Articles

2010	"Reducing America's Correctional Populations", 2001. Justice Research and Policy, Vol, 12, No. 1, pp,1-32.
2009	"Prisons and the Fear of Terrorism." August 2009. Criminology and Public Policy. Vol., Issue 3: 641-649.
2009	"Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs." 2009. Criminal Justice and Behavior. Vol. 36, No. 10: 1025-1037.

2006	"How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections." 2006. Federal Probation. Vol. 70, No. 2: 58-63.
2004	Richards, Stephen C., James Austin, and Richard S. Jones. 2004. "Thinking About Prison Release and Budget Crisis in the Blue Grass State." Critical Criminology: An International Journal, Vol. 12, No.3: 243-263.
2004	Richards, Stephen C., James Austin, and Richard S. Jones. 2004. "Kentucky's Perpetual Prisoner Machine: It's All about Money." Review of Policy Research, Vol. 24, No. 1 (at press).
2003	"Why Criminology Is Irrelevant", Criminology and Public Policy, Vol. 2, No.3: 557-564
2003	"Three Strikes Laws", in Current Controversies in Criminology, Ronald Weitzer, ed., Prentice Hall: Upper Saddle River, NJ.
2003	"The Use of Science to Justify The Imprisonment Binge", Convict Criminology, Jeffrey Ian Ross and Stephen C. Richards, eds., Wadsworth: Belmont, CA.
2003	"Its About Time: America's Imprisonment Binge", Punishment and Social Control, Aldine De Gruyter: New York, NY.
1999	"Are We Better Off?: Comparing Private and Public Prisons in the United States", Current Issues in Criminal Justice. Vol. 11 (2): 177-201.
1999	"The Impact of 'Three Strikes and You're Out'", Punishment and Society, Vol 1(2): 131-162.
1998	"The Limits of Prison Drug Treatment", Corrections Management Quarterly, Vol. 2, Issue 4, Fall 1998, pp. 66-74.
1996	"The Effect of 'Three Strikes and You're Out' on Corrections" in Three Strikes and You're Out: Vengance as Public Policy, David Shichor and Dale

	K. Sechrest, eds., Sage Publications: Thousand Oaks, CA.
1996	"Are Prisons A Bargain?: The Case of Voodoo Economics", Spectrum, Spring 1996, pp. 6-24.
1995	"The Overrepresentation of Minority Youths in the California Juvenile Justice System: Perceptions and Realities" in Minorities in Juvenile Justice, Kimberly Kempf Leonard, Carle E. Pope, and William H. Fyerherm, eds., Sage Publications: Thousand Oaks, CA.
1994	"Three Strikes and You're Out: The Likely Consequences". St. Louis University Public Law Review, 14, 1, pp. 239-258.
1993	"Classification for Internal Purposes: The Washington Experience" (with Chris Baird, and Deborah Nuenfeldt), Classification: A Tool for Managing Today's Offenders, Laurel, MD: American Correctional Association.
1993	"Objective Prison Classification Systems: A Review", Classification: A Tool for Managing Today's Offenders, Laurel, MD: American Correctional Association.
1986	"Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy," Crime and Delinquency (October):404-501
1986	"Evaluating How Well Your Classification System Is Operating," Crime and Delinquency (July):302-321
1985	"Incarceration in the United States: The Extent and Future of the Problem," The Annals (March):15-30
1983	"Assessing the New Generation of Prison Classification Models," Crime and Delinquency (October):561-576
1982	"Do We Really Want to Get 'Tough on Crime'?" Corrections Today, Vol. 44, No. 6:50-52

1982	"Bail Reform in California: The Passage of AB2" (with E. Lemert), Pretrial Services Annual Journal, 1982, Vol V:4-23
1982	"Review of Fatal Remedies: The Ironies of Social Intervention" (Sam D. Seiber) in Crime and Delinquency, Vol. 20, No. 4:639-641
1982	"The Unmet Promise of Alternatives to Incarceration" (with B. Krisberg), Crime and Delinquency, Vol. 28, No. 3:374-409
1982	"Promises and Realities of Jail Classification," Federal Probation, Vol. 46, No. 1:58-67
1981	"Wider, stronger, and different nets: the dialectics of criminal justice reform" (with B. A. Krisberg), Journal of Research in Crime and Delinquency, Vol. 18, No. 1:165-196
1980	Instead of Justice: Diversion, Ph.D. Dissertation, University of California, Davis

AWARDS

2009	Recipient of the Marguerite Q. Warren and Ted B. Palmer Differential Intervention Award, American Society of Criminology, Corrections and Sentencing Division
1999	Recipient of the Paul Tappin award for outstanding contributions in the field of criminology, Western Society of Criminology
1991	Recipient of the Peter P. Lejins Research Award, American Correctional Association

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing declaration of James Austin in opposition to Defendants' cross-motion for summary judgment was delivered to all counsel of record via the Court's ECF notification system.

s/ Hina Shamsi
Hina Shamsi

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **DECLARATION OF MARC SAGEMAN IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

I, Marc Sageman, hereby declare and state as follows:

1. I graduated from Harvard University in 1973 with an A.B. in social relations, and I then attended New York University, where I earned M.A. and Ph.D. degrees in political sociology in 1977 and 1982, respectively, and an M.D. degree in 1979. After serving as a flight surgeon in the U.S. Navy, I joined the Central Intelligence Agency as a case officer in 1984. Nearly three years of my seven-year career there was devoted to helping run an insurgency against the Soviet occupation of Afghanistan and its Communist government—an insurgency involving individuals that the Soviets and the Afghan government would have called terrorists. In 1991, I returned to medicine. I hold an active license to practice medicine in Maryland, and have maintained a private practice in forensic psychiatry to the present.

2. I have taught law and psychiatry, as well as the social psychology of political conflict focusing on genocide and terrorism, at the University of Pennsylvania. I have written two books, *Understanding Terror Networks* (2004) and *Leaderless Jihad* (2008), both published by the University of Pennsylvania Press. I am also on the editorial boards of two journals in the

terrorism research field, *Terrorism and Political Violence* and *Dynamics of Asymmetrical Conflict*, and regularly peer review submissions to them.

3. In 2006-2007, I worked as a consultant for the U.S. Secret Service, where I tracked the terrorist threat to the United States based on daily threat assessments. I spent the following year as the scholar in residence at the New York Police Department, providing my scientific expertise to them. During that year, I also taught a graduate seminar on terrorism at Columbia University.

4. Starting in 2006, I worked on a four-year project on violent terrorism for the U.S. Air Force Research Laboratory. I presented my findings from this research to the faculty of the FBI Academy in Quantico, VA in April 2010. I also spent three and a half years as a special advisor to the U.S. Army Deputy Chief of Staff (Intelligence) for the Insider Threat. In that role, I reviewed all cases of suspected terrorists and spies in the U.S. Army since World War II. In conjunction with the FBI, I investigated and interviewed several of the suspects during my tenure. During that time, I was also dispatched to Kabul as the Political Officer for the International Security Assistance Forces to help mitigate the "green on blue" violence—the killing of coalition troops by Afghan forces—that was threatening to split up the coalition.

5. I have been qualified as an expert witness on terrorism for both the prosecution and defense in criminal cases, and the defense in civil cases. I have interviewed about 30 convicted terrorists, mostly in prison, and numerous other individuals suspected or accused of terrorism in various countries, including the United States, in connection with my work as an expert or in support of my research.

6. I make this declaration in support of the plaintiffs' responses in opposition to the defendants' cross-motions for summary judgment in this case. As this case concerns the rights of U.S. persons, I focus on U.S. persons in this declaration.

Review of Government Procedures and Bases for Nomination to the No Fly List

7. I have reviewed the defendants' two submitted declarations, one by Mr. Michael Steinbach, Assistant Director of the FBI's Counterterrorism Division (the "Steinbach Declaration"), and the other by Mr. Clayton Grigg, Deputy Director for Operations of the Terrorist Screening Center ("TSC") (the "Grigg Declaration"), which describe the No Fly List nomination process. I also reviewed testimony by Mr. Christopher Piehota, the TSC director, in before the House Subcommittee on Transportation Security on September 18, 2014 (available on the FBI website at https://www.fbi.gov/news/testimony/tscs-role-in-the-interagency-watchlisting-and-screening-process). Finally, I reviewed the National Counterterrorism Center's (NCTC) March 2013 *Watchlisting Guidance* (the "*Guidance*"), a manual for the inclusion of individuals on various watch lists, including the No Fly List, which has been submitted into the record in this case.[1]

8. Based on my review of these documents, I understand that nomination to the Terrorist Screening Database ("TSDB"), which is maintained by the Terrorist Screening Center, requires reasonable suspicion that an individual is a known or suspected terrorist. (Grigg Declaration ¶ 15.) Reasonable suspicion, according to the documents, means "'articulable' intelligence or information which, based on the totality of the circumstances and taken together with rational inferences from those facts, creates reasonable suspicion that an individual is

[1] Multiple passages in the *Guidance* and the declarations of Messrs. Steinbach and Grigg, as well as Mr. Piehota's testimony, are very similar and indicate that the *Guidance* is an official government document. *See* Steinbach Decl. ¶¶ 9, 13; Grigg Decl. ¶¶ 17, 25; *Guidance* at 11-12, 20, 52, 83; *see generally* Piehota testimony.

known or suspected to be or has been knowingly engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities." (*Id.*, Steinbach Declaration ¶ 9.)

9. I also understand that the "derogatory information" that supports inclusion in the TSDB can also be used to nominate an individual for inclusion on the No Fly List if that information "establishes a reasonable suspicion that the individual meets additional heightened derogatory criteria that goes above and beyond the criteria required for inclusion in the broader TSDB." (Grigg Declaration ¶ 16.) Based on my review of the criteria for inclusion on the No Fly List, the common thread in the criteria is an apparent threat of a violent act of terrorism.

10. Mr. Steinbach states that the TSDB and the No Fly List are "preventive measures" that "differ in fundamental respects from the FBI's role in the criminal process, because the overriding goal in using the TSDB is to protect the United States from harm, not to collect evidence of a crime already committed for purposes of prosecution." (Steinbach Declaration, ¶ 7.) The government describes the assessments that underlie inclusion on the No Fly List as "predictive judgments" or "predictive assessments" about potential threats to national security. (*See, e.g.*, Defendants' Consolidated Memorandum at 1, 6, 15, 17.)[2]

[2] Based on a search of publicly available sources, it appears that the purpose of the No Fly List has evolved over time. A Congressional Research Service report on Air Passenger Prescreening and Counterterrorism reported that the FBI administered a "no fly" watchlist prior to September 11, 2001 and until November 2001 that included individuals who were considered a direct "known threat" to U.S. civil aviation. Bart Elias, William Krouse & Ed Rappaport, 2005, *Homeland Security: Air Passenger Prescreening and Counterterrorism*, Washington, D.C.: Congressional Research Center Report for Congress, March 4, 2005: 1. In a December 2002 PowerPoint, the Transportation Security Intelligence Service stated that on the eve of September 11, 2001, there were only sixteen individuals identified as "no transport." TSA Watch Lists, December 2002, a PPT presentation by the Transportation Security Intelligence Service, U.S. Department of Transportation, entered as Attachment A, Part 1, Gordon v. FBI, 2003 available athttps://www.aclunc.org/sites/default/files/asset_upload_file371_3549.pdf. (The government documents available in this file show that the problem of "false positives" from the list, which I discuss below, was already plaguing TSA by the fall of 2002.) That original purpose of the No Fly List is memorialized in the first criterion for inclusion in the present No Fly List. *Guidance*, page 51. Since then, the No Fly List has expanded as noted in the second criterion for inclusion: "Any person, regardless of citizenship, who represents a threat of committing an act of "domestic terrorism" with

11. The declarations of Messrs. Grigg and Steinbach and the *Guidance* describe a process for periodically reviewing the accuracy of the "derogatory information" that led to an individual's placement on the No Fly List. (*See* Grigg Declaration, ¶¶ 19, 28; Steinbach Declaration, ¶¶ 12-13.) However, they do not address the threshold issue of how nominators make these "predictive judgments," on what basis, and whether such predictive judgments can be made validly and reliably according to accepted scientific principles of conditional probability.

12. The *Guidance* defines a "known terrorist" as "an individual whom the U.S. Government knows is engaged, has been engaged, or who intends to engage in terrorism and/or terrorist activity," including those charged or convicted of a terrorism-related crime, or "identified as a terrorist or member of a designated foreign terrorist organization pursuant to" specified authorities. (*Guidance*, p. 35.) It defines a "suspected terrorist" as "an individual who is reasonably suspected to be, or has been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities based on an articulable and reasonable suspicion." (*Guidance*, p. 37.)[3]

13. My analysis below assumes that if the U.S. government knows that a U.S. person has been or is engaged in terrorism or terrorist activities, that individual generally either has been charged with or convicted of a terrorism-related crime, or is closely monitored prior to arrest, or abroad beyond the reach of the law. I make that assumption because in my experience, the U.S. government would aggressively react to such information about a person. In all my years of

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respect to the homeland." *Id.* The No Fly List was further extended to include any "threat of committing an act of international terrorism against any U.S. Government facility abroad and any associated or supporting personnel" (third criterion) and finally "any threat of engaging in or conducting a violent act of terrorism" by someone who is "operationally capable" (fourth criterion). *Id.*

[3] The *Guidance* further defines other terms, including "reasonable suspicion," "derogatory information," "terrorism and/or terrorist activities," and elaborates on the process for nomination to various databases and related watchlists. (*Guidance,* p. 33, paragraph C Appendix 1, 35). I do not reproduce the definitions or other details of the process here.

experience, I do not recall the federal government ever having allowed an individual to remain at large within the United States for any significant length of time once the government possessed probable cause that the individual had engaged or was engaged in terrorist activity. For these categories of people, the criminal justice system normally serves as the basis to assess the validity of the government's judgment and evidence. In my analysis, I focus on the government's use of "predictive judgments" with respect to individuals for whom the government does not have probable cause to believe they have engaged in or are engaging in terrorist activity, and for that reason cannot be described as "known terrorists." Instead, I focus on individuals whom the government suspects may someday engage in or support terrorist activities, and any scientific basis for those predictions.

Lack of Reliable Indicators that an Individual Will Engage in Political Violence

14. Through my experience in government, academia, and as a consultant in various capacities, I have become very familiar with the terrorism research field. Nearly all terrorism researchers agree that acts of terrorism are fundamentally individual acts of political violence.[4] Despite decades of research, however, we still do not know what leads people to engage in political violence. Attempts to discern a terrorist "profile" or to model terrorist behavior have failed to yield lasting insights, in part because of the lack of quality empirical data that could be used to test the validity of such a model.

[4] As the *Guidance* points out, under federal law, there are numerous definitions of "terrorism" and "terrorist activities." *Guidance* at Y, Appendix 1. There are also numerous definitions of terrorism in international law and treaties, and no single agreed-upon, definition. Solely for the purposes of this declaration, I do not take issue with the definitions of terrorism under 18 U.S.C. § 2331, or the Guidance's definition of terrorism or terrorist activity, all of which incorporate references to violent acts intended to intimidate or coerce a civilian population or influence the policy of a government, and therefore at least arguably include violence that is political.

15. Because of my security clearances and contract work in government agencies, I am one of the few people who has experience in both the academic and intelligence communities, and I have observed a stagnation in terrorism research resulting from a structural gap imposed by the government. (*See* Marc Sageman, 2014, "The Stagnation in Terrorism Research," *Terrorism and Political Violence*, 26: 565 – 580.) On one hand, there are people in the academic community with the methodological sophistication to generate new conceptual and empirical breakthroughs in terrorism research, but they lack the data to do so because the government has withheld it through over-classification. As a result, there is wild speculation and major disagreement within the academic community as to the nature of the process of turning politically violent. On the other hand, there is the intelligence community, which has data but lacks the methodological sophistication to understand and analyze it fully and meaningfully in accordance with scientific standards in the context of rigorous peer review.

16. Thus, the insularity of the intelligence community, and the fact that it has failed to incorporate scientific methods and expertise from the academic community (discussed below), undermine the accuracy of the assessments the intelligence community makes.

17. The little we currently know makes clear that a decision to engage in political violence is context-specific and particular to any given individual, which makes it very difficult to identify indicators that could be used to predict whether an individual will actually commit an act of political violence. I have sought through my own work for government agencies, in particular the Air Force Research Laboratory, to identify factors that might lead a person to turn to political violence, as well as any behavioral indicators of that process that are specific enough to help in the effective detection and prevention of terrorist threats. In that exploratory study, I looked at over 300 subjects who had carried out political violence in France and England from

1994 to 2006, using trial transcripts as my main source of information about them (this amounted to almost 20 trials in both countries). My research compared these individuals ("terrorists" in the *Guidance* terminology) with a meaningful control group, namely their peers, who were suspected of becoming politically violent but did not, in fact, do so. My research concluded that aside from a narrow band of behaviors in the immediate day or two before a violent act is committed—acquisition of explosives, for instance—behavioral indicators cannot reliably be used to predict whether an individual will carry out an act of terrorism.

18. Ultimately, to my knowledge, no one inside or outside the government has yet devised a "profile" or model that can, with any accuracy and reliability, predict the likelihood that a given individual will commit an act of terrorism.

Relevant Methodology and Likelihood of Error

Methodological biases and heuristics

19. Messrs. Grigg and Steinbach, and the *Guidance*, describe generally the process for reviewing nominations to the TSDB or the No Fly List, but they gloss over the actual decision-making process that leads to the nominations themselves. That process is internal to the nominating agencies and, according to Mr. Grigg, consists of "an assessment based on analysis of available intelligence and investigative information that the person meets the applicable criteria for inclusion." (Grigg Declaration, ¶ 15.) These assessments—what Mr. Steinbach calls "preventive measures" and the government in its briefing calls "predictive judgments"—are predictions "about conduct that may or may not occur in the future." (Defendants' Consolidated Memorandum at 47.)

20. While predicting human behavior is never an exact exercise, scientists and practitioners from numerous disciplines have devised methods that, depending on their rigor,

allow for prediction *with an estimated rate of error*. Such a rate of error is important to calculate because it constitutes a rough indicator of the validity and reliability of the predictive tool and enables better decision making about the appropriate consequences of the predictions. However, there is no indication that the government has assessed the scientific validity and reliability of its predictive judgments or the information that leads to those judgments, nor has it used a scientifically valid model for predicting, and accounting for, the rate of error that might arise from those predictive judgments. Due to these failures alone, the government's predictive judgments cannot be considered reliable. Absent a scientifically validated process for attempting to make predictive judgments, those judgments amount to little more than the "guesses" or "hunches" that Mr. Grigg says are not sufficient to meet the criteria. (*See* Grigg Declaration, ¶ 15.)

21. I have observed a repeated failure within the government to employ basic scientific principles, such as the use of a control group, to test the specificity and validity of terrorism-related measures. In the No Fly List prediction context, any attempt to assess the validity of indicators or factors that might lead an individual to commit political violence would require a study including both (a) individuals who actually carried out acts of political violence, and (b) individuals (the control group) who are similar to the first set in all respects except that they did not engage in violence. Use of a control group is critically important because it is only by a comparison with this control group, in which the indicator of actual violence is *absent*, that one can make the argument that other indicators specific to the subject group are valid. In short, a control group helps to lower the probability of generating a false positive, that is, falsely identifying someone as a future terrorist when he is not. To my knowledge, the intelligence community has not used control groups in making predictive judgments about a propensity (or

lack thereof) to commit political violence. There is no indication that the government has included control groups in making predictions about individuals placed on the No Fly List.

22. More fundamentally, the government's predictive judgments are necessarily unreliable, and the risk of error associated with them is extremely high, because the events they attempt to predict—violent acts of terrorism—are exceedingly rare. To explain why this is important, we must turn to basic methods for assessing conditional probability. Bayes' Theorem (named for the eighteenth-century English statistician Thomas Bayes) is one of the most commonly used such methods. In short, Bayes' Theorem describes the probability of an event based on conditions that might be related to the event. For example, if we establish that rain and humidity are related, the theorem could be used to calculate the likelihood of rain given a particular level of humidity.

23. Critical to Bayes' Theorem and any exercise in conditional prediction—and to the errors that predictions often entail—is the base rate of the phenomenon in question: in essence, the relative frequency of some event or outcome in some general population of events. If one out of every 100 people in the United States is a student, the base rate for students is one percent. Establishing the base rate of a phenomenon is critical to any attempt to predict whether the phenomenon will occur.

24. Even though it is critically important to establish a base rate for any predictive model, it is very common for people not trained in scientific methods to disregard the base rate, resulting in judgment errors. That is because in the ordinary course of making lay judgments about likely or unlikely events, it is counter-intuitive for lay people to start with a base rate. To ignore the base rate is a common flaw in reasoning known as "base rate neglect." An example of the importance of the base rate in making an assessment—and why establishing a base rate can

be counter-intuitive—is illustrated in a classic problem posed by Daniel Kahneman and Amos Tversky, psychologists who specialized in prediction and probability judgment, and whose work won a Nobel Prize. "A cab was involved in a hit and run accident at night. Two cab companies, the Green and the Blue, operate in the city… 85% of the cabs in the city are Green and 15% are Blue. A witness identified the cab as Blue. The court tested the reliability of the witness under the same circumstances that existed on the night of the accident and concluded that the witness correctly identified each one of the two colors 80 percent of the time and failed 20 percent of the time. What is the probability that the cab involved in the accident was Blue rather than Green?" Most people to whom Kahneman and Tversky posed this problem answered 80 percent, which was the tested accuracy of the witness. However, the correct answer is actually 41 percent. This can be determined by a simple calculation using Bayes' Theorem: what is the probability that a cab is actually Blue given the condition that the witness said it was Blue? Given the witness's 80 percent accuracy rate, he would correctly identify 12 of the Blue cabs (out of 15) and 68 of the Green cabs (out of 85), but he would misidentify 17 (85 – 68) Green cabs as Blue. So, the probability that a cab involved in the accident was Blue rather than Green is the proportion the witness correctly identified as Blue (12) over the total number he identified as Blue (12 + 17 or 29), which is only 12/29 or about 41 percent—the correct answer. T hus, taking into account the different base rates of the cabs is critical to determining that the hit-and-run cab is more likely to be Green than Blue despite the witness's generally accurate identification of the colors, because the base rate of Green cabs (85 percent) is greater than the witness's accuracy (80 percent). (*See* Kahneman, Slovic & Tversky, 1982: Judgment under Uncertainty: Heuristics and Biases, 156-57.)

25. This is one example of what Kahneman and Tversky call "heuristics [cognitive shortcuts] and biases," which lead people to make predictable errors when assessing the likelihood of future events based on current information. Developments in cognitive science have revealed that such biases and heuristics underlie many seemingly intuitive, but nevertheless logically flawed, thought processes.[5] The assessments of nominators and TSC subject matter experts involved in nominating and reviewing nominations to the No Fly List are likely to be full of such heuristics and biases, given that there is no indication in the declarations of Messrs. Grigg and Steinbach, or the *Guidance*, that they are taken into account, or that the relevant personnel are even aware of them.

26. Also important to the validity of a conditional prediction are the sensitivity and specificity of the indicators used to make the prediction. I will discuss these concepts by using a medical example because such indicators or tests are easily understood when we think about physicians making diagnoses. The *sensitivity* of an indicator is the ratio of the number of true positives (for instance, people who are actually sick and are correctly diagnosed as sick) over the number of true positives plus the number of false negatives (or, the total number of actually sick people, correctly diagnosed or not). The *specificity* of an indicator is the ratio of the number of true negatives (people who are actually healthy and are correctly identified as healthy) over the number of true negatives plus the number of false positives (or, the total number of healthy individuals, correctly diagnosed or not). A predictive tool that is highly sensitive—i.e., one that

[5] See the Nobel Prize winning work done by Daniel Kahneman and Amos Tversky. See Daniel Kahneman, Paul Slovic & Amos Tversky, eds., 1982, Judgment under Uncertainty: Heuristics and biases, Cambridge: Cambridge University Press; Daniel Kahneman & Amos Tversky, 2000, *Choices, Values and Frames*, Cambridge: Cambridge University Press; Thomas Gilovich, Dale Griffin & Daniel Kahneman, 2002, *Heuristics and Biases: The Psychology of Intuitive Judgment*, Cambridge: Cambridge University Press. See also Daniel Kahneman's best seller, 2011, *Thinking, Fast and Slow*, New York: Farrar, Straus and Giroux.

is highly accurate in identifying people who are actually sick—may nonetheless be of little value if it also has low specificity—i.e., it also identifies many healthy people as sick, resulting in numerous false positives.

27. Now, to illustrate how these concepts work together, and how base rate neglect can easily skew predictions, let's imagine that the government has developed a tool to identify potential terrorists based on "derogatory information." Let's further imagine that the particular derogatory information is 100 percent sensitive, meaning it is associated with, and can be used to catch, all potential terrorists who will actually carry out violent acts. However, let's also imagine that the tool is only near-perfect in terms of specificity, 99 percent perfect, meaning it would lead to one error—i.e., one false positive—in 100 predictions (to be clear, such near-perfect accuracy is basically unheard of in the social sciences).

28. Given such a hypothetical, near-perfect tool to assess the probability of a person committing a violent terrorist act, what is the rate of error of this instrument? The actual rate of error depends on the base rate of terrorists in the population. Let's assume a total population of a million people, in which there are 100 terrorists (for a base rate of 1/10,000). The predictive tool would identify all 100 terrorists, for 100 percent sensitivity. However, because it is only 99 percent specific, it would make one error in every one hundred evaluations and falsely identify another 10,000 people as terrorists. Despite the fact that this instrument is near "perfect," the probability that a person is a terrorist, given that she has been identified as such by this instrument, is less than 1 percent. (100 correctly identified terrorists divided by the total population identified as terrorists by this instrument [100 + 10,000 or 10,100], or 100 divided by 10,100, which is a little less than 1 percent.)

29. What this example illustrates is that the lower the base rate of actual terrorists, the greater the error—or, in other words, the rate of error is inversely proportional to the base rate. For instance, if we modify this hypothetical so that there is only 1 terrorist in one million people, the probability that a person identified as a terrorist using this tool is actually a terrorist decreases to about 0.01 percent. (The lone terrorist is correctly identified by the instrument which also incorrectly identifies 10,000 as terrorists. The probability of a person on the list being a terrorist is therefore 1 divided by 10,001 or about 0.01 percent.)

30. The reason that the tool is so misleading, despite the fact that it is near-"perfect," is because there are so many more non-terrorists than terrorists in the population. In this way, base rate neglect—not taking the base rate of a phenomenon in a general population into account—can lead to an enormous number of false positives for rare events.

Validity of No Fly List predictive judgments

31. The foregoing discussion makes clear the overriding importance of taking into account the base rate of a phenomenon, and the sensitivity and specificity of indicators used to predict that phenomenon, when attempting to make predictions based on current information. However, I am not aware of anyone within the government who has applied these principles in terrorism-related assessments, and there is no indication that the government has attempted to apply them to the predictive judgments underlying placement on the No Fly List. As explained above, that failure alone renders the government's predictive judgments unreliable.

32. It is nonetheless possible to arrive at some additional, general conclusions about the validity of No Fly List assessments based on available information. The relevant base rate for the purposes of the No Fly List is the base rate of the events that the government is trying to predict under the No Fly List criteria: future acts of violent terrorism.

33. By any measure, the base rate of violent terrorist attacks is extremely low. Unfortunately, databases that purport to compile data on terrorist threats to the United States are unreliable and flawed because most include incidents involving sting operations, where, but for the intervention of the FBI, there was no real threat to the United States because the suspect lacked the capability to carry out a terrorist act. The databases therefore greatly overinflate the actual threat. For the sole purpose of illustrating my point, however, I will use one of the most popular of these flawed databases, the Global Terrorism Database, which lists 120 terrorism-related incidents in the United States for the entire ten-year period from 2004 through 2014.[6] That figure includes numerous anti-government, racist, and anti-immigrant attacks. It is unclear whether the No Fly List includes people known or suspected of engaging in of all of these kinds of political violence, or whether it focuses more or less on particular kinds of political violence or terrorism (which would impact the base rate). I note that all the plaintiffs in this case appear to be Muslims. It is worth noting that the number of Muslim neo-jihadi[7] extremist attacks carried out by U.S. persons during that ten-year period was far lower than the number of other kinds of politically-motivated attacks, so the base rate for Muslim neo-jihadi violence is far lower than the rate for all terrorism-related incidents, and the number of attacks involving aircraft or airports was lower still—the database lists just three such incidents.

34. Nevertheless, even if we use this inflated number of terrorism-related incidents, it yields a base rate of 120 terrorists in 10 years in a country of about 330 million people, which

[6] http://www.start.umd.edu/gtd/search/. The 120 terrorism-related incidents figure is based on the following search terms: under the "when" tab, I inputted the dates January 1, 2004 to December 31, 2014, under the "Country" tab I selected the United States, and Under the "Terrorism Criteria" tab, I checked "Yes, Require Criterion 1 to be met," "Exclude Ambiguous Cases," and "Include Unsuccessful Attacks."
[7] This is my terminology to denote violent acts conducted by the perpetrators against Western targets out of a sense of religious obligation in the name of jihad. I call it neo-jihad because the vast majority of Muslims all over the world would reject this fight as a jihad under Islam.

amounts to 1 terrorist per 27.5 million people per year, or in a more standard rate, 0.0036 per 100,000 per year.[8] With such a low base rate, a tool used to predict who will commit acts of terrorism would have to be extremely accurate, especially in terms of specificity, for the government agencies not to be flooded with false positives or false alarms in attempting to identify terrorists.

35. I can say with confidence that the No Fly List assessments are not remotely accurate enough to guard against an extremely high risk of error. Regarding the sensitivity of the No Fly List assessments—the percentage of true terrorists they identify (or the degree of "false negatives")—it's safe to say that the No Fly List does not achieve anything close to the 100 percent sensitivity in the example above. Available information about the very few individuals who attempted to, or in fact did, carry out terrorist attacks indicates that they had not previously been placed on the No Fly List. Those include Umar Farouk Abdulmutallab, the December 2010 "underwear bomber," despite the fact that his father denounced him to U.S. authorities, and more recently Tamerlan Tsarnaev, the senior Boston Marathon bomber, who flew back to the United States despite having been interviewed as a terrorist suspect by the FBI prior to his trip.

36. As for the specificity of the assessments leading to inclusion on the No Fly List—the correct identification of non-terrorists, or, conversely, the number of "false positives"—we can again say with confidence that the List cannot achieve anything close to the kind of near-perfect specificity that would be required in order to minimize the number of false positives. As

[8] To appreciate how low this base rate of terrorists is, compare it to the corresponding U.S. rates for homicides and suicides, which themselves are exceedingly rare events. The 2013 U.S. homicide rate was 4.5 per 100,000 while the 2013 suicide rate was 12.6 per 100,000. *Crime in the United States 2013*, FBI. https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/murder-topic-page/murdermain_final; Centers for Disease Control and Prevention, *QuickStats: Age-Adjusted Rates for Suicide, by Urbanization of County of Residence — United States, 2004 and 2013*, Morbidity and Mortality Weekly Report (MMWR), (April 17, 2015), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a9.htm. In other words, the homicide rate is about 1,250 times greater and the suicide rate is 3,500 times greater than the terrorism base rate in the United States.

explained above, no valid profile exists for predicting who will engage in political violence, so any purported "indicators," alone or in combination, of future terrorist violence even about a week prior to a terrorist attack will necessarily lack specificity. It is a bit like the weather: scientists are better at accurately predicting the weather the closer the prediction is to the event. Moreover, in order to evaluate the specificity of an indicator, one needs to compile a control group—such as a database of individuals who are not terrorists but who nonetheless share the indicators, or "derogatory information," that the government associates with terrorists. That is because specificity measures the proportion of non-terrorists who are correctly identified as such. To my knowledge, except for my own work for the Air Force mentioned above, the government has never done this. In other words, the government has not tested the validity of any of its indicators, or derogatory information, and does not know the rate of error resulting from them.

37. Another reason for the low specificity of No Fly List assessments is that, as Mr. Grigg states, the standard for inclusion on the No Fly List is "reasonable suspicion" (Grigg Declaration ¶ 16), a low threshold that, under the government's definition, requires that nominators have an articulable, objective reason to suspect that a person meets the No Fly List criteria. The "reasonable suspicion" standard does not even require the nominator (or the reviewer) to assess that it is more probable than not that the individual meets the criteria. That means individuals can be placed on the No Fly List if nominators think they *might* meet the criteria, even if the nominators think they *probably do not*. If nominators are adhering to the "reasonable suspicion" standard—and I have no reason to believe that they do not—it virtually guarantees that the specificity of No Fly List assessments will be quite low, and that numerous false positives will result.

38. In arriving at my conclusions, I have taken into account that the government's predictions nominating individuals to the No Fly List are based on "available intelligence and investigative information" and "additional heightened derogatory requirements." (*See* Grigg Declaration, ¶ 15, 18; Steinbach Declaration, ¶¶ 9, 11.) I have further taken into account that government experts undergo training and course work before their designation as subject matter experts to review nomination for inclusion on the No Fly List. (*See* Grigg Declaration, ¶ 19). To my knowledge, nominators' determinations and their training do not include critically important instruction in conditional probability analysis and science-based safeguards against error. The inevitable result is base rate neglect in their assessments and a high number of false positives.

39. Ultimately, because of the lack of a control group for valid prediction, the extremely low base rate of violent terrorist acts, and the lack of specificity for indicators of political violence, the rate of error for inclusion on the No Fly List will necessarily be very high.

Cognitive Errors and Structural Problems Within the Intelligence Community

40. Another problem with "predictive judgments" that lead to placement on the No Fly List is one I call "categorization cognitive errors."

41. As I discussed above, it is now widely accepted in the field of terrorism research that becoming a terrorist at a given time is a process, and that most people could engage in political violence if driven to do so. One's potential to become politically violent is contextual and not dependent on personal predisposition (or personal indicators of violence). There is a window of circumstances and opportunities during which someone will engage in what are called acts of terrorism and a much larger period of time when he or she will not. The desire to commit terrorist acts is therefore dependent on a fluid mixture of personal experiences and environmental factors, which are constantly changing.

42. Similarly, my experience within the government and in the terrorism research community has led me to conclude that labeling an individual as a terrorist takes on a kind of cognitive inertia. Psychological research shows that once we label a person in a particular way, and others accept the label, it acquires a power of its own and frames the way we think about that person. Removing that label becomes difficult; it requires much effort because it becomes the default conception about the person. Applied in the No Fly List context, this inertia would only exacerbate the failure to appreciate changing contextual circumstances.

43. I also have observed firsthand how incentives affecting individuals in the intelligence community—of which I was part and whose individual good intentions I do not doubt— encourage the reporting of threats but discourage the reporting of information inconsistent with those threats. Politicians and policy makers—and indeed all of us—understandably want to prevent violence and protect the American population. But in pursuing this understandable goal, they have created an environment that demands near-total elimination of the threat of terrorism.[9] The difficulty with this understandable political goal is that it is an impossible scientific or law enforcement standard to achieve and results in a system of incentives that encourages the generation of false positives.

44. In my half-dozen years monitoring the daily threat traffic in various capacities within the government, I noted that derogatory information usually flooded the threat matrix, while retraction or correction of such derogatory information was relatively rare by comparison. Indeed, the imperatives working within the intelligence system encourage reporting derogatory information on U.S. persons but discourage reporting disconfirming information. Searching for disconfirming evidence—trying to prove oneself wrong and, failing that, temporarily adopting a

[9] This is reminiscent of the "tough on crime" policies for the past forty years, which nearly all agree have resulted in mass incarceration.

given hypothesis—is the essence of the scientific process, but I have seen few indications that intelligence analysts consistently search for disconfirming evidence.

45. In my experience, these incentive structures operated with respect to the FBI. FBI special agents are promoted and rewarded—even with monetary bonuses—based on providing derogatory information on U.S. persons, while admission of error or new information that exonerates someone from suspicion tends not to be rewarded.[10] In other words, the incentive in the system is to report suspicious activity but not correct the information when it turns out to have been a false alarm. My experience with the FBI in the investigation of terrorist suspects in the United States is that the FBI is very reluctant to close a case. In effect, it employs a low threshold for opening a preliminary field investigation but employs a high standard for closing a case or recommending deletion from a watchlist. Again, these impulses and incentives may be understandable, but the result is that many false positives are never corrected, which, combined with the presumption of static predisposition to violence, contributes to a high error rate when attempting to predict political violence.

Conclusions

46. The "assessments" or "predictive judgments" by intelligence community analysts or subject matter experts that lead to inclusion on the No Fly List are judgments as to whether someone has a high probability of turning to political violence. There is no indication, however, that the government has incorporated conditional probability principles and analysis into No Fly List assessments—a failure that dramatically undermines the validity and potential accuracy of those assessments. Nor is there any indication that the government has tested the validity of any of its indicators, or derogatory information, and the government therefore does not know the rate

[10] From the *Guidance*, it is clear that the provision of information that could result in the removal of a U.S. person erroneously put on the No Fly rests on the originator, usually an FBI special agent.

of error resulting from their use. In other words, the government does not know the validity, sensitivity, specificity, and base rates of various purported behavioral indicators that people will engage in political violence.

47. To my knowledge, there is no model in or outside of government that predicts political violence with any reasonable degree of sensitivity (that is, without producing a high rate of "false negatives"). I did not see any such model during my time working in the intelligence community. The fact that the very few individuals who attempted to, or in fact did, engage in political violence in the last several years were not placed by the government on the No Fly List further supports my conclusion that no such model exists.

48. Government analysis suffers from the problem of low base rate neglect, which leads it to overestimate the probability of terrorism and terrorists and underestimate the number of false positives. Given the extremely low base rate of violent terrorist attacks, the phenomenon of base rate neglect, and the lack of specificity for indicators of a turn to political violence, the process of nomination to the No Fly List is inherently error prone, entailing an extremely high risk of error.

49. Cognitive and structural errors within the intelligence community further render the process of placing an individual on the No Fly List even more error-prone. The government's approach fails to account adequately for the contextual nature of political violence and the inertia associated with labeling an individual as a terrorist. An alarmist bias may be understandable at a human level in our current policy and media environment, but the reality is that when this bias is coupled with strong incentives within the intelligence and law enforcement community to provide "derogatory information"—but not to challenge it or search for disconfirming evidence—it is even harder for government officials to challenge a nomination.

This further increases the already high likelihood of error in the government's No Fly List assessments.

50. I declare under penalty of perjury that the foregoing is a true and correct statement of my opinions and the supporting facts.

Executed this 7th day of August, 2015.

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Consultant
2003-present Principal and founder, Sageman Consulting, LLC
Consulting with various U.S. government agencies, including the National Security Council, DHS, FBI, Department of Justice, Department of State, many branches of Department of Defense and

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U.S. Army	
2010-2013	Special Adviser to the Deputy Chief of Staff of the Army (Intelligence) on the Insider Threat
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2008-9	Scholar-in-Residence
RTI International	
2007-9	Consultant on political violence
ARTIS Research and Risk Modeling	
2006-13	Director of Research
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Private practice of psychiatry	
1994-present	Forensic psychiatry, including trial expert testimony (about 30)
Hospital of the University of Pennsylvania	
1992-95	Residency in Psychiatry
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United States Navy (retired as Commander)	
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Central Intelligence Agency	
1984-91	Case Officer, with tours in Washington, DC; Afghan Task force; Islamabad, Pakistan; and New Delhi, India

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Columbia University, School of International and Public Affairs, New York, New York	
2008-2009	Adjunct Associate Professor
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1991-1995	Clinical assistant
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1979-1981	Clinical assistant

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1972 Research Assistant in Biochemistry
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1971-1973 Teaching Assistant in Physics

Semester long courses

Forensic Psychiatry (year long graduate seminar for senior resident physicians)
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Social Psychology of Terrorism
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Invited lectures on terrorism delivered at Harvard University, University of Chicago, University of Maryland, University of Michigan, University of Pennsylvania, Syracuse University, University of California at Berkeley, Northwestern University, University of Arizona, Principia College, U.S. Naval Academy, Johns Hopkins University, George Washington University, American University, Massachusetts Institute of Technology, University of Southern California, National Defense University, Naval Postgraduate School at Monterey and various universities in Germany, England, Canada, Netherlands, France, Italy, Singapore, Belgium, Turkey, Denmark, Switzerland, Austria, Malta, Ireland, Saudi Arabia, Spain, Russia, Israel, Iraq and Australia
Invited presentations at numerous professional meetings
Testimony before the 9/11 Commission, Washington, D.C., 2003
Testimony before the Beslan Commission, Moscow, Russia, 2005

HONORS:

1970-73	Harvard National Scholar
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2002	Councilor, The Historical Society of Pennsylvania
2003	Fellow, the American Psychiatric Association
2004	Senior Fellow, Foreign Policy Research Institute
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Expert Witness/ Litigation

2011	Expert testimony for the defense in U.S. v. Mehanna, Case No. 1:09-cr-10017-GAO-1, Federal District Court for the District of Massachusetts
2013	Expert testimony for the defense in U.S. v. Mohamud, Case No. 3:10-cr-00475-KI-1, Federal District Court for the District of Oregon
2013	Expert written testimony for the defense in U.S. v. Bary, Case No. 1:98-cr-01023-LAK-17, Federal District Court for the Southern District of New York
2014	Expert written testimony for the defense in U.S. v. Ahmad, Case No. 3:04-cr-00301-JCH-1, Federal District Court for the District of Connecticut
2014	Expert testimony for the defense in U.S. v. Kabir, Case No. 5:12-cr-00092-VAP, Federal District Court for the Central District of California
2015	Expert testimony for the defense in U.S. v. Kurbanov, Case No. 1:13-cr-00120-EJL-1, Federal District Court for the District of Idaho
2015	Expert testimony for the defense in U.S. v. Hamidullin, Case No. 3:14-cr-00140-HEH-1, Federal District Court for the Eastern District of Virginia

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing declaration of Marc Sageman in opposition to Defendants' cross-motion for summary judgment was delivered to all counsel of record via the Court's ECF notification system.

s/ Hina Shamsi
Hina Shamsi

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AYMAN LATIF, *et al.* Plaintiffs, v. ERIC H. HOLDER, JR., *et al.*, Defendants.	Case No. 3:10-cv-00750-BR

DECLARATION OF MICHAEL STEINBACH

I, Michael Steinbach, hereby declare the following:

1. (U) I am the Assistant Director of the Counterterrorism Division, Federal Bureau of Investigation ("FBI"), United States Department of Justice. As Assistant Director, I am the chief supervisory official of the counterterrorism investigative activities of the FBI, including any role the Counterterrorism Division plays in the nomination of individuals to the No Fly List. I also have official supervision and control over the files and records of the Counterterrorism Division of the FBI. These files and records include national security information that is classified or in some instances sensitive but unclassified. I am also responsible for the protection of national security information within the Counterterrorism Division, including the sources, methods, and techniques used by the FBI in the collection of national security information. Thus, I have been authorized by the Director of the FBI to execute declarations and affidavits in order to protect such information. The matters stated in this declaration are based on my personal knowledge, my background, training, and experience relating to counterterrorism, my

consideration of information provided to me in my official capacity, and my evaluation of that information.[1] My conclusions have been reached in accordance therewith.

2. (U) Through the exercise of my official duties, I have become familiar with this civil action in which the Plaintiffs challenge their placement on the Government's No Fly List and allege, among other things, the denial of procedural due process, based on an alleged failure to provide them with a meaningful opportunity to challenge their placement on the No Fly List. I understand that the United States Government has revised the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Process ("TRIP") procedures and has applied those revised procedures to the Plaintiffs. I further understand that Plaintiffs have recently filed a Motion for Summary Judgment, asserting that those revised procedures do not satisfy procedural due process. I submit this declaration in support of the Defendants' Memorandum in Support of its Cross-Motion for Summary Judgment on the issue of procedural due process, and also in support of the Defendants' Opposition to the Plaintiffs' Motion for Summary Judgment on the same issue.

3. (U) The purpose of this declaration is to set forth the views, experience and perspective of the FBI as one of the agencies who can nominate to the TSDB and the No Fly List. The information provided herein is illustrative as a general matter, and in providing this information, I do not confirm or deny whether the FBI was or was not the nominating agency for any of the plaintiffs in this lawsuit. To confirm or deny such a fact would risk significant harm to the Government's intelligence and counterterrorism activities, including by revealing information about which agency or agencies may possess (or not possess) information

[1] (U) The information in this declaration is unclassified. Accordingly, the paragraphs in this declaration are marked with a "U".

concerning the individual plaintiffs. In addition, because many of the topics discussed herein implicate national security and law enforcement investigative information, this declaration does not disclose all pertinent details about matters discussed herein, but only information that can be disclosed publicly.

4. (U) The Government, as part of its revised DHS TRIP procedures, has provided Plaintiffs with notice of their status on the No Fly List and, to the extent feasible and consistent with the national security and law enforcement interests at stake, with an unclassified explanation of the reasons for their inclusion on the No Fly List. I discuss below some of the types of information the FBI, as a nominating agency, relies upon in making nominations to the No Fly List, the mechanisms in place to ensure such nominations are accurate and efficacious, the redress process as viewed from the perspective of a nominating agency, the processes established to assess the scope of information that can be disclosed to an individual through DHS TRIP in unclassified summaries, and other pertinent information. As explained more fully below, any requirement that the Government on the whole, and the FBI as a nominating agency, provide additional information beyond that contemplated by the Government's revised procedures (and made available here to plaintiffs) would risk significant harm to ongoing counterterrorism investigative or intelligence activities, to the sources and methods used in those activities, and to the overall national security interests of the United States. In particular, the use of surveillance, confidential human sources, national security process, and other sensitive sources may be compromised if additional information regarding the reasons for a person's No Fly status must be disclosed.

(U) THE FBI'S AUTHORITIES AND RESPONSIBILITIES

5. (U) The FBI's mission is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners. In order to defend the country from a range of national security and major crime threats, the FBI uses an intelligence-driven and threat-focused approach, combining its investigative and intelligence operations to be more predictive and preventative, more aware of emerging threats, and better able to stop them before they turn into crimes or acts of terrorism.

6. (U) The FBI's top priority is protecting the United States from terrorist attacks. Working closely with its partners, the FBI uses its investigative and intelligence capabilities to neutralize terrorist cells and operatives in the United States, to help dismantle extremist networks worldwide, and to cut off financing and other forms of support provided by terrorist sympathizers. In carrying out the FBI's paramount mission of securing the nation from terrorism, criminal prosecution is only one of several means that the FBI uses to protect national security.

7. (U) The FBI and other federal agencies also use the Terrorist Screening Center's ("TSC") Terrorist Screening Database ("TSDB") and its subsets, the No Fly and Selectee Lists, as preventative measures to protect against terrorist threats. These preventative measures differ in fundamental respects from the FBI's role in the criminal process, because the overriding goal in using the TSDB is to protect the United States from harm, not to collect evidence of a crime already committed for purposes of prosecution. Inclusion in the TSDB is based on an assessment of the threat of terrorist activity posed by a particular individual to a commercial

aircraft or national security. TSDB determinations are made in a fluid, intelligence-driven environment based on the most current information.

8. (U) As with any other aspect of the FBI's investigative or intelligence-gathering operations, nominations to the TSDB must conform to FBI policies and procedures. This includes the requirement, set forth in both the Attorney General's Guidelines for Domestic FBI Operations and the FBI's Domestic Investigations and Operations Guide, that FBI agents consider and, if reasonable based on the circumstances of the investigation, use the least intrusive means or method to obtain intelligence or evidence and to protect national security. In addition, a fundamental principle of the Attorney General's Guidelines, and of the FBI's investigations and operations, is that investigative activity may not be based solely on the exercise of rights guaranteed by the First Amendment to the United States Constitution. Investigative activity for the sole purpose of monitoring the exercise of First Amendment rights is prohibited.

(U) THE TSDB NOMINATION PROCESS

9. (U) The TSDB is updated continuously through the addition or removal of information to ensure that the database reflects the most recent information for use in terrorism screening. As one of numerous members of the watchlisting community, the FBI nominates known or suspected terrorists for inclusion in the TSDB. Nominations to the TSDB must satisfy minimum identifying criteria to allow screening agencies to be able to discern a match, and include sufficient substantive derogatory criteria to establish reasonable suspicion that the individual is a known or suspected terrorist. To meet this standard, a nominator such as the FBI must rely upon objective "articulable" intelligence or other information which, based on the totality of the circumstances and taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is known or suspected to be or has been knowingly

engaged in conduct constituting, in preparation of, in aid of, or related to terrorism and/or terrorist activities.[2] Mere guesses or "hunches," or the reporting of suspicious activity alone, are not sufficient to establish reasonable suspicion. As with the Attorney General Guidelines previously discussed, TSDB nominations must not be based solely on race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment, such as free speech, the exercise of religion, freedom of the press, freedom of peaceful assembly, and petitioning the government for redress of grievances.

10. (U) Nominations of international terrorists are submitted by federal departments and agencies (including the FBI) for inclusion in the Terrorist Identities Datamart Environment ("TIDE"), and are processed through the National Counterterrorism Center ("NCTC"). Since the FBI is responsible for the nominations of purely domestic terrorists, TSDB nominations by the FBI are submitted directly to the TSC, via the Terrorist Records Examination Unit ("TREX"). TREX coordinates the transmission of domestic terrorist nominations to the TSDB and international terrorist nominations to NCTC for inclusion in TIDE.

11. (U) Additionally, as a nominating agency, the FBI can recommend that an individual be included on one of the subset lists within the TSDB, such as the No Fly List, if additional heightened derogatory criteria required for inclusion are met. The TSC reviews all No Fly List nominations and determines if an individual meets these heightened derogatory criteria

[2] (U) I understand that there are limited exceptions to the reasonable suspicion requirement, which exist solely to support immigration and border screening processes by the Department of State and the Department of Homeland Security.

for inclusion.[3]

12. (U) Each nominating agency is responsible for ensuring that its watchlist nominations satisfy the applicable criteria for inclusion, and that it has established internal procedures to confirm that the nominations process is properly performed. In addition to those safeguards, nominating agencies are required by interagency-approved policies and procedures ("the Watchlisting Guidance") to conduct periodic reviews of nominations of U.S. citizens and lawful permanent residents (collectively "U.S. Persons") to the TSDB and to have internal procedures that facilitate the prevention, identification, and correction of any errors in information that are shared as part of the watchlisting process. These procedures include the review of retractions or corrections of information that may have been used to support a nomination.

13. (U) When a retraction or new information becomes available, the nominating agency, such as the FBI, is required to promptly send a TSDB modification or deletion request, as appropriate. In cases where modification or deletion of a record relating to international terrorism is required, notice of any errors or outdated information must be provided to NCTC, unless there is an articulated reason why such notification could not be made immediately. NCTC processes and transmits such corrections to TSC for appropriate action. TREX performs all review and quality control functions for the FBI to help maintain the currency, accuracy and thoroughness of the TSDB nominations that are submitted.

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[3] (U) The identity of persons in the TSDB is treated as unclassified "For Official Use Only" so that the database can be shared with screening and law enforcement officers throughout the Federal Government who may lack the necessary clearance for access to classified information. The TSDB nonetheless contains sensitive national security and law enforcement information concerning the identity of known or suspected terrorists. The TIDE database contains classified investigative or intelligence information about particular individuals, including those on the TSDB.

(U) FBI'S INVOLVEMENT IN THE REVISED DHS TRIP PROCESS

14. (U) As part of the watchlist enterprise, all nominators will cooperate with the redress procedures as provided in the *Memorandum of Understanding on Terrorist Watchlist Redress Procedures* (Exhibit A), which was executed in September 2007 by the Secretaries of State, Treasury, Defense, and Homeland Security, the Attorney General, and the Directors of the FBI, NCTC, Central Intelligence Agency, Office of the Director of National Intelligence, and TSC.

15. (U) I understand from the MOU and the FBI's general role in the process that the DHS Traveler Redress Inquiry Program ("TRIP") provides the public with a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during travel screening at transportation hubs (such as airports and train stations) or during their inspection at a U.S. port of entry. DHS TRIP provides a means of seeking redress for travelers who have, for example, been delayed or denied airline boarding, delayed or denied entry into or exit from the United States at a port of entry, or have been repeatedly referred for additional (secondary) screening at an airport. As part of the redress process, DHS TRIP invites the traveler to submit any information that may be relevant to the travel difficulties experienced. Since there are many reasons why a traveler may seek redress, DHS TRIP works with DHS component agencies, such as CBP, TSA and U.S. Immigration and Customs Enforcement, in addition to other government agencies such as the Department of State, the FBI, and the TSC (which is administered by the FBI), as appropriate, to make an accurate determination about the traveler's redress matter.

16. (U) In particular, the TSC supports DHS TRIP by helping to resolve inquiries that appear to be related to data in the TSDB. In cases where the traveler is an exact match to an

identity in the TSDB, the TSC's Redress Office will contact NCTC and the nominating agency, such as the FBI, to assist in the resolution of the inquiry and to provide the information submitted by the traveler, along with any other relevant information. The Redress Office will then work with the FBI to determine whether the traveler should continue to remain in the TSDB by asking for updated intelligence, information, or analysis, and a recommendation about maintaining the individual in the TSDB or on the No Fly or Selectee List, if applicable.

17. (U) After reviewing the available derogatory information and considering any recommendation from the nominating agency, the TSC's Redress Office will determine whether the traveler's record should remain in the TSDB, or be modified or removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. In such cases, the Redress Office will prepare a recommendation for the decision-making agency and will implement any determination once made. When changes to a record's status are warranted, the Redress Office will seek to ensure such corrections are made, and verify that such modifications or removals were carried over to the various screening systems that receive TSDB data (*e.g.*, TSA's Secure Flight program, which implements the Selectee and No Fly Lists). After the TSC's Redress Office completes its review of the matter, it notifies DHS TRIP of the outcome of its review. Under the U.S. Government's prior redress procedures, DHS TRIP determination letters sent to a U.S. Person who remained on the No Fly List following review by the TSC Redress Office did not disclose whether or not he or she was included on the No Fly List.

18. (U) In order to improve the DHS TRIP redress process for individuals seeking resolution of claims involving denials of aircraft boarding, the Government has revised the redress procedures for U.S. Persons. Under the new redress procedures, a U.S. Person who

(a) purchases an airline ticket for a flight to, from, or over the United States; (b) is denied boarding on that flight; (c) subsequently files a redress inquiry regarding the denial of boarding with DHS TRIP; (d) provides all information and documentation required by DHS TRIP; and (e) is determined to be appropriately included on the No Fly List following the TSC Redress Office's review of the redress inquiry, will receive a letter stating that he or she is on the No Fly List and providing the option to receive and submit additional information.

19. (U) If such a person timely requests additional information, DHS TRIP will respond with a second letter that identifies the specific criteria or criterion under which the person is included on the No Fly List. The second letter will also include an unclassified summary of information supporting the individual's No Fly List status. The amount and type of information provided, however, will vary on a case-by-case basis depending on the facts and circumstances of any national security and law enforcement interests. In some circumstances, an unclassified summary may not be provided when the national security and law enforcement interests at stake are taken into account.

20. (U) As a nominating agency, the FBI is keenly aware of the critical role it plays at this stage of the redress process. In particular, the nominating agency endeavors to create, based on the totality of the information available, an unclassified statement of reasons that includes as much information as possible and is reasonably calculated to permit the individual to craft a meaningful response. Because the information used to determine whether an individual should be included on the No Fly List may be based on classified national security information or otherwise privileged law enforcement information, determining the nature and amount of unclassified information that can be provided to the listed individual requires a careful review of the circumstances of the case and the nominating agency's interest in protecting the information.

At the FBI, this review process will generally involve multiple levels of review, including by operational personnel with substantive expertise concerning the listed individual, operational initiatives and intelligence activities implicated by the information pertinent to the No Fly listing, as well as by legal counsel and others. This multi-layered review seeks to both maximize disclosures and minimize the risk that such disclosures pose to national security and law enforcement interests.

21. (U) Pursuant to the revised redress procedures, and regardless of the amount and nature of information provided to the applicant, the nominating agency must in all cases provide to the TSC Redress Office the reasons that can be relied upon to support inclusion on the No Fly List and the reasons why it is in the interest of national security or law enforcement that no further information be disclosed in the second letter to the applicant. TSC will provide DHS TRIP with the specific criterion or criteria under which the U.S. Person is included on the No Fly List, and, if applicable, an unclassified summary of information supporting that placement provided by the nominating agency and approved for disclosure to the person. DHS TRIP will include this information in the second response letter to the person. The letter will invite the applicant to furnish any additional information he wishes the Government to consider in connection with any further administrative appeal.

22. (U) If the applicant timely responds to the second letter, DHS TRIP will forward the response to the TSC Redress Office for additional review. The Redress Office will follow the procedures described above and again request the nominating agency's review of the applicant's submission and all other available information. Once this additional review is complete, TSC will provide DHS TRIP with a recommendation memorandum to the TSA Administrator as to whether the individual should be removed from or maintained on the No Fly

List and the reasons for that recommendation. This memorandum to TSA will reflect the derogatory information supporting TSC's recommendation, which may include classified or law enforcement sensitive information.

(U) HARM TO NATIONAL SECURITY FROM DISLCOSURE OF NATIONAL SECURITY AND LAW ENFORCEMENT PRIVILEGED INFORMATION REGARDING AN INDIVIDUAL'S INCLUSION ON THE NO FLY LIST

23. (U) As noted, inclusion on the No Fly List is often based on highly sensitive national security and law enforcement information that is properly protected from disclosure under law, including: (i) information that could tend to reveal whether an individual has been the subject of an FBI counterterrorism investigation, including the basis, status, or results of the investigation, and the content of any relevant investigative files; and (ii) information that could tend to reveal whether particular sources and methods were used by the FBI in a counterterrorism investigation or intelligence activity related to the individual on the No Fly List or his associates. As explained below, disclosure of this information would provide adversaries with valuable insight into the specific ways in which the Government goes about detecting and preventing terrorist attacks, with potentially grave consequences for the national security.

(U) Subject Identification And Ongoing Investigations

24. (U) Requiring nominating agencies to disclose the reasons, beyond the type of information contemplated by the Government's revised TRIP procedures, for including individuals on the No Fly List could jeopardize the integrity and secrecy of ongoing counterterrorism investigative or intelligence activities. In many cases, such disclosures would contain information that could tend to confirm or deny whether a particular individual is the subject of an FBI investigation or intelligence operation. For example, the existence of an FBI record about an individual, whether contained in the TIDE database or any other FBI

counterterrorism investigative files, could alert the individual to the Government's investigative or intelligence interest in him and cause him to take counter-measures to evade detection. The risk of harm to national security would be amplified were such disclosure to include the *contents* of an FBI counterterrorism investigative or operational file, thereby revealing to the individual what the FBI knows about his plans. This might include information that could tend to reveal the reason for initiating the investigation or intelligence activity, the status of the investigation or operation, or other sensitive information that the investigation had brought to light.

25. (U) Disclosures of this nature would be particularly damaging where FBI subjects or former subjects have associates whom the FBI may still be investigating for potential ties to terrorist activity. Information regarding one subject may reflect law enforcement interest in other subjects, with the result that releasing such information could reasonably be expected to alert the other subjects that they are of interest to law enforcement. This, in turn, could cause the other subjects to flee, destroy evidence, or take steps to alter their conduct or communications so as to avoid detection of future activities. In these circumstances, law enforcement and intelligence officers would be significantly hindered in gathering further information on the activities of the other subjects or in determining their whereabouts. In addition, an individual's knowledge that he is under investigation might enable him to anticipate law enforcement actions by, for example, conducting counter-surveillance, which could place federal agents at higher risk of harm.

(U) Sources and Methods

26. (U) The disclosure of national security information in the course of the No Fly redress process could also reveal sensitive, classified, or previously undisclosed FBI sources and

methods used in counterterrorism investigations and intelligence activities, as well as the type of information derived from such techniques.[4]

27. (U) In particular, such disclosures could reveal the specific investigative methods used with respect to a certain individual target, such as court-ordered searches or surveillance, confidential human sources, undercover operations, or various forms of national security process. This, in turn, could further reveal the reasons for initiating an investigation, the steps taken in an investigation, the reasons certain methods or sources were used, the status of the use of such methods or sources, and any results derived from those techniques. Detecting and preventing terrorist attacks is the paramount objective of the FBI, and the disclosure of sensitive and classified techniques and methods would provide a roadmap to adversaries as to how the FBI goes about this vital task, allowing them to engage in countermeasures to escape detection and frustrate the FBI's ongoing counterterrorism mission.

28. (U) Although the FBI's general use of certain methods, such as physical surveillance, are known to the public, the release of information derived from such a method in a particular matter could, in some circumstances, risk the success of investigations. For example, where surveillance is being conducted of a group of associates, providing one of the targets with information sufficient to identify where and when the surveillance took place, and even which agency was responsible for the surveillance, could lead a single target to warn his associates. That, in turn, would eliminate the effectiveness of the continued use of the surveillance with regard to the other associates.

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[4] (U) Nothing in the following discussion is meant to suggest that any of these types of sources or methods were used with regard to the determination to include any plaintiff on the No Fly List.

29. (U) In addition to traditional surveillance, the Government has a compelling interest in protecting the secrecy of national security process, such as National Security Letters ("NSLs"), and Foreign Intelligence Surveillance Act ("FISA") surveillance. When used, NSLs can be important in the early phases of national security investigations, by providing subscriber telephone numbers and other non-content information, which can assist investigators in developing leads to determine, among other things, investigative subjects' true identities, actions, intent, associates, and financial transactions. Just as critically, the FBI uses NSLs to remove individuals from suspicion. To the extent that the reasons for inclusion on the No Fly List are based, even in part, on information obtained through NSLs or FISA court orders or court warrants, disclosure of that fact, or of the information derived from those methods, would pose serious risks, including jeopardizing further surveillance activity and putting the success of the entire investigation or intelligence operation at risk. Moreover, revealing the use of an NSL or FISA order or warrant with regard to a particular subject could tip off that subject's associates that the Government may be aware of communication between the subject and his associates.

30. (U) The disclosure of information concerning the basis for an individual's placement on the No Fly List could also reveal the identity of confidential human sources ("CHSs"), where such sources are used as part of an investigation. At the very least, such a disclosure could reveal information that a subject or his associates could use to determine that a CHS is being used and to discover the identity of that CHS. The risks posed by the discovery of a CHS's identity are twofold. First, when a target identifies a CHS, the CHS's usefulness to the ongoing investigation is greatly diminished, if not eliminated altogether. More importantly, however, the CHS's safety, and possibly the safety of his family, is put at risk. Where the disclosure of information regarding one subject leads to additional subjects learning that they too

are of interest to the FBI, such disclosure could enable subjects to ascertain the identities of additional confidential informants or other sources of intelligence, putting those sources at risk as well.

31. (U) In addition, where foreign law enforcement information has been used in an investigation, revealing such information could compromise the confidentiality agreements with foreign government(s) and thereby reasonably could be expected to strain relations between the United States and the foreign government(s) and disrupt the free flow of vital information to United States intelligence and law enforcement agencies. Information about the FBI's relationships with certain foreign government entities is subject to constraints on disclosure. Some foreign government information is classified, while other foreign government information is subject to the law-enforcement privilege. The FBI's ability to carry out its responsibilities to conduct counterterrorism investigations often depends on the cooperation of certain foreign government officials, foreign intelligence services, or foreign security services. Maintaining the confidentiality of foreign government information is critical to the maintenance of ongoing productive cooperation with friendly foreign nations in the field of counterterrorism. The free exchange of information among United States intelligence and law enforcement services and their foreign counterparts is predicated upon the understanding that, not only must the information exchanged be kept in confidence, but that the relationships themselves likewise be kept confidential. Indeed, in many instances, information received from a foreign government remains the property of that government and is provided under the express caveat that it may not be released outside the FBI without that government's express permission.

(U) Law Enforcement Privilege

32. (U) In addition to reliance on national security information, inclusion on the No Fly List is sometimes based on sensitive law enforcement information, including information that pertains to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel, information that would undermine the privacy of individuals involved in the investigation, or information that would seriously impair the ability of a law enforcement agency to conduct future investigations.

33. (U) Revealing additional information, beyond the types already contemplated in the revised TRIP procedures, would risk the revelation of law enforcement privileged information including, among other things, information about individuals contained in FBI files, the identities of FBI agents and TSC personnel, and policies and procedures relating to the watchlisting process. In particular, the Watchlisting Guidance, approved by the National Security Council Deputies Committee, details the current policies and procedures governing the process for identifying and placing individuals on terrorism screening watchlists. The guidance is disseminated solely within the watchlisting community. Official disclosure or confirmation of the contents of the guidance and related materials would provide certainty to terrorist adversaries as to how the watchlisting process works and assist those adversaries in their effort to circumvent that process.[5]

[5] (U) Indeed, in related No Fly litigation, the United States has asserted the states secrets privilege in response to discovery demands seeking disclosure of watchlisting guidance materials. Defendants' Memorandum in Support of Their Motion to Dismiss Plaintiff's Complaint as a Result of the Assertion of the State Secrets Privilege, Dkt. No. 105, *Mohamed v. Holder*, No. 1:11-cv-0050 (E.D. Va. 2014).

(U) ADDITIONAL HARMS TO NATIONAL SECURITY FROM PLAINTIFFS' PROPOSED PROCEDURES

34. (U) In addition to the concerns described above, a requirement that national security and law enforcement privileged information be disclosed in the course of the No Fly redress process would have a potentially dangerous chilling effect on the use of such information in the nomination process, which in turn could undermine the effectiveness of the No Fly List. If nominating agencies had reason to believe that national security information used to support their No Fly nominations would be disclosed, there would be a strong reluctance to share such information in the nomination process and, potentially in some cases, to forego a nomination entirely. The No Fly listing process would become self-defeating if, in order to protect against terrorist threats to aviation and national security, the Government were required to disclose classified national security information or law enforcement information about a particular known or suspected terrorist included on the List. In my judgment, nominating agencies such as the FBI should not be forced to choose between, on the one hand, disclosing information that could reasonably be expected to compromise an investigation, expose a source, or reveal sensitive surveillance techniques, and, on the other, withholding information that could be used to identify and prevent a terrorist attack.

35. (U) The national security considerations described above apply with equal force to the broad procedures I am advised that Plaintiffs have asked the Court to impose on the redress process for U.S. persons challenging their placement on the No Fly List. For example, if the Government were required to provide full notice of its reasons for placing an individual on the No Fly List and to turn over all evidence (both incriminating and exculpatory) supporting the No Fly determination, the No Fly redress process would place highly sensitive national security

information directly in the hands of terrorist organizations and other adversaries, who would have every incentive to manipulate the DHS TRIP redress procedures in order to discover whether they or their members are subject to investigation or intelligence operations, what sources and methods the Government employs to obtain information, or what type of intelligence information is sufficient to trigger an investigation in the first place.

36. (U) Moreover, an adversarial hearing that calls for the cross-examination of Government witnesses would expose the identity of any confidential sources at issue in particular No Fly determinations, which would not only end their cooperation but endanger their lives and jeopardize the success of the investigation. Similarly, foreign governments likely would no longer assist in providing information relevant to No Fly nominations. An adversarial hearing would also require the devotion of significant intelligence and investigative resources, with the burden of preparation placed on some of the very officials charged with detecting and preventing terrorist attacks and undertaking counterterrorism investigations. This would provide further disincentive for agents to participate in the nomination process.

37. (U) Likewise, the release of national security information even to cleared counsel would present significant risks to FBI investigative or intelligence activities and would create a severe disincentive to use such information to nominate individuals to the No Fly List. It must be stressed that No Fly determinations are made in the midst of ongoing investigative or intelligence activities, not during a post-investigation criminal proceeding, and that these activities are directed at the most significant of interests – detecting and preventing terrorist attacks. In these circumstances, the need to protect investigative or intelligence information and the sources and methods used to obtain it is at its zenith. Any disclosure in the administrative process, whether intentional or inadvertent, risks compromising an ongoing counterterrorism

activity and the corresponding risk to national security – no matter what kind of protective procedures might be adopted. Any such efforts at a secure process would only give rise to the added risk of public disclosure. In my informed judgment, disclosure of information to counsel for suspected terrorists on the No Fly List raises significant risks of harm to national security. By contrast, the development of unclassified summaries to eligible requesters whose status would be revealed, paired with the disclosure of applicable No Fly List criteria – itself disclosures that present some risk of harm to national security – establishes a balanced process that provides notice to an individual and an opportunity to respond to the concerns identified.

(U) CONCLUSION

38. (U) Based on my consideration of this matter, I have concluded that the disclosure of underlying classified national security and law enforcement privileged information that typically supports a No Fly listing risks significant harm to the FBI's counterterrorism investigative and intelligence activities and thus to the national security of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28 day of May, 2015.

MB Steinbach

Michael Steinbach
Assistant Director
Counterterrorism Division
Federal Bureau of Investigation
Washington, D.C.

UNCLASSIFIED

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., *Defendants*.	Declaration of G. Clayton Grigg

DECLARATION OF G. CLAYTON GRIGG

I, G. Clayton Grigg, hereby declare the following:

1. (U) I am the Deputy Director for Operations of the Terrorist Screening Center ("TSC"). I became the Deputy Director for Operations at TSC in September 2013. I have been a Special Agent with the Federal Bureau of Investigation ("FBI") since 1997 and have served in a variety of criminal investigative, counterterrorism, and senior management positions.

2. (U) The TSC is a multi-agency center that was created by the Attorney General pursuant to Homeland Security Presidential Directive ("HSPD")-6 on September 16, 2003. The TSC is administered by the FBI and receives support from, *inter alia*, the U.S. Department of Homeland Security ("DHS"), the Department of State ("DOS"), the Department of Justice, and the Office of the Director of National Intelligence. TSC is staffed by officials from multiple agencies, including FBI, DHS, DOS, Transportation Security Administration ("TSA"), and U.S. Customs and Border Protection ("CBP").

3. (U) Each paragraph in this declaration is marked with a "U" because the information is unclassified.

4. (U) I make this declaration in support of the dispositive motions filed by the government in this case. The matters stated herein are based on my personal knowledge and my review and consideration of information available to me in my official capacity, including information furnished by TSC personnel, including FBI Special Agents, as well as other government agency employees or contract employees acting in the course of their official duties.

(U) OVERVIEW OF U.S. TERROR WATCHLISTS

5. (U) Following the attacks of September 11, 2001, Congress and the President mandated that federal executive departments and agencies share terrorism information with those in the counterterrorism community responsible for protecting the homeland, such as CBP officers who conduct inspections at U.S. ports of entry, TSA personnel responsible for aviation security, and domestic law enforcement officers.

6. (U) Prior to the attacks of September 11, 2001, nine U.S. Government agencies maintained twelve different watchlists intended to accomplish a variety of purposes.[1] Two of those original lists, the No Fly and Selectee Lists, are used by the TSA to secure commercial air travel against the threat of terrorism.[2] Individuals on the No Fly List are prohibited from boarding a U.S. commercial aircraft or from flying into, out of, or over

[1] (U) *See,* Government Accountability Office, *Terrorist Watch Lists Should Be Consolidated to Promote Better Integration and Sharing*, GAO-03-322, April 2003.
[2] (U) 49 U.S.C. § 114(h)(3). *See also* 49 U.S.C. § 44903(j)(2)(A) (requiring TSA to use a sanctioned screening system to "evaluate all passengers before they board an aircraft" and to ensure that "individuals selected by the system and their carry-on and checked baggage are adequately screened.").

United States airspace.[3] Individuals on the Selectee List must undergo enhanced security screening before entering the secure area of an airport or boarding an aircraft.[4]

7. (U) The Terrorist Screening Database ("TSDB") was created by the TSC pursuant to HSPD-6 to consolidate the U.S. Government's terrorist watchlists into a single database, and to provide for the appropriate and lawful use of terrorist information in screening processes. To accomplish this, the TSDB contains no substantive derogatory intelligence information or classified national security information. Instead, it generally contains only sensitive but unclassified terrorist identity information consisting of biographic identifying information such as name or date of birth, or biometric information such as photographs, iris scans, and fingerprints. The identity of persons in the TSDB is treated as unclassified "For Official Use Only" so that the database can be shared with screening and law enforcement officers throughout the Federal Government who may lack the necessary clearance for access to classified information. The TSDB nonetheless contains sensitive national security and law enforcement information concerning the identity of known or suspected terrorists. The National Counterterrorism Center ("NCTC")'s Terrorist Identities Datamart Environment ("TIDE") database contains classified national security information about particular individuals, including those in the TSDB.[5]

8. (U) The TSDB is continuously updated and receives terrorist identity information for possible inclusion from two sources: (1) the NCTC, which provides information about known and suspected international terrorists; and (2) the FBI, which provides information about known and suspected purely domestic terrorists.

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[3] (U) *See* 49 C.F.R. § 1560.105.
[4] (U) *See Id.*
[5] (U) As a general matter, identity information on the No Fly and Selectee Lists, along with the watchlist status of an individual on either list, is treated as Sensitive Security Information (SSI). *See* 49 CFR 1520.5(b)(9)(ii).

9. (U) The NCTC maintains substantive derogatory or intelligence information concerning international terrorists in TIDE. Pursuant to Section 1021 of the Intelligence Reform and Terrorism Prevention Act of 2004, the NCTC serves as the primary organization in the U.S. Government for analyzing and integrating all intelligence possessed or acquired by the U.S. Government pertaining to terrorism and counterterrorism, excepting purely domestic counterterrorism information.[6] The NCTC also ensures that appropriate agencies have access to and receive intelligence needed to accomplish their assigned missions and serves as the central and shared knowledge bank on known and suspected terrorists and international terror groups, as well as their goals, strategies, capabilities, and networks of contacts and support. Because NCTC's mission focuses on international counterterrorism information, the FBI maintains the substantive derogatory information related to known and suspected purely domestic terrorists included in the TSDB.

10. (U) The TSC, through the TSDB, provides terrorist identity information to various law enforcement and screening agencies and entities through the regular export of updated subsets of data in accordance with each receiving agency's authorities and regulations. For example, the No Fly and Selectee Lists are maintained as subsets within the TSDB, and are provided to TSA for aviation security screening purposes.

11. (U) The TSDB is supported by a 24 hours a day/7 days a week/365 days a year operations center and is continuously updated with information provided from nominating agencies, as well as screeners following an encounter with a known or suspected terrorist.

[6] (U) Because of the codification of NCTC in the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, Executive Order 13354, which originally created NCTC, was revoked by amendments to Executive Order 12333 in July 2008.

(U) NOMINATIONS TO AND INCLUSION IN THE TSDB AND NO FLY AND SELECTEE LISTS SUBSETS

12. (U) Terrorist identity information is added to and removed from the TSDB (and the subset No Fly and Selectee Lists) through an ongoing nomination and review process. As previously stated, the TSDB contains both international and domestic terrorist identity information. In general, nominations of known and suspected international terrorists are submitted by federal departments and agencies (including the FBI) for inclusion in TIDE, and are processed through NCTC. Since the FBI is responsible for the nominations of known and suspected purely domestic terrorists, those nominations are submitted directly to the TSC.

13. (U) The FBI submits its TSDB nominations through the Terrorist Records Examination Unit ("TREX") within the TSC. TREX coordinates the transmission of domestic terrorist nominations to the TSDB and international terrorist nominations to NCTC for inclusion in TIDE.

14. (U) Nominations to the TSDB are accomplished by completing the relevant electronic forms that provide a summary of the underlying substantive information that demonstrates that a person, regardless of citizenship, meets the criteria and standard for inclusion in the TSDB. TSC refers to this underlying substantive information as "derogatory information." As part of a TSDB nomination, departments and agencies can recommend that an individual be added to the No Fly or Selectee Lists, so long as there is sufficient derogatory information provided to satisfy the heightened requirements for inclusion.

15. (U) Inclusion in the TSDB is not a determination that someone has committed a crime. Rather, it is an assessment based on analysis of available intelligence and investigative information that the person meets the applicable criteria for inclusion. Interagency-approved policies and procedures (the "Watchlisting Guidance"),[7] are used to conduct this assessment. With limited exceptions,[8] nominations to the TSDB must satisfy minimum identifying criteria to allow screeners to be able to discern a match, and minimum substantive derogatory criteria to establish a reasonable suspicion that the individual is a known[9] or suspected[10] terrorist. To meet this standard, the nominator must rely upon "articulable" intelligence or information which, based on the totality of the circumstances and taken together with rational inferences from those facts, creates a reasonable suspicion that the individual is known or suspected to be or has been knowingly engaged in conduct constituting, in preparation of, in aid of, or related to terrorism and/or terrorist activities. Mere guesses or "hunches," or the reporting of suspicious activity alone, are not sufficient to establish reasonable suspicion. Additionally, nominations must not be based solely on the individual's race, ethnicity, national origin, religious affiliation, or activities protected by the First Amendment, such

[7] (U) The Watchlisting Guidance reflects an extensive and comprehensive effort by the watchlisting and screening community to establish and describe a standardized process by clarifying and elaborating on the substantive criteria utilized and providing analysts with specific operational and technical guidance for use in the nomination, review, and redress process.
[8] (U) Limited exceptions to the reasonable suspicion requirement exist for the sole purpose of supporting immigration and border screening processes by the Department of State and the Department of Homeland Security.
[9] (U) A known terrorist is an individual whom the U.S. Government knows is engaged, has been engaged, or who intends to engage in terrorism and/or terrorist activity, including an individual (a) who has been charged, arrested, indicted, or convicted of a crime related to terrorism by U.S. Government or foreign authorities; or (b) identified as a terrorist or member of a designated foreign terrorist organization pursuant to statute, Executive Order or international legal obligation pursuant to a United Nations Security Council Resolution.
[10] (U) A suspected terrorist is an individual who is reasonably suspected to be, or have been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and/or terrorist activities based on an articulable and reasonable suspicion.

as free speech, the exercise of religion, freedom of the press, freedom of peaceful assembly, and petitioning the government for redress of grievances.

16. (U) Nominations that recommend an individual also be included on either the No Fly or Selectee List are evaluated by the TSC to determine if the derogatory information provided by the nominating agency establishes a reasonable suspicion that the individual meets additional heightened derogatory criteria that goes above and beyond the criteria required for inclusion in the broader TSDB.

17. (U) Any individual, regardless of citizenship, may be included on the No Fly List when the TSC determines the individual meets at least one of the following criteria: the individual poses (1) a threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a threat of piracy, or a threat to airline, passenger, or civil aviation security); (2) a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland; (3) a threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. 2801(c)(4)), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or, (4) a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

18. (U) Upon receiving a TSDB nomination, TSC personnel review it to determine: (a) whether the biographic information associated with the nomination is sufficient to support the screening processes of the receiving screening entities (*e.g.*, TSA, CBP), that

use the data to match to or distinguish an individual being screened from a known or suspected terrorist in the TSDB; and (b) whether the nomination is supported by derogatory information that meets the criteria for inclusion in the TSDB, as well as any additional heightened derogatory requirements for nominations to the No Fly or Selectee Lists.

19. (U) Before accepting a new nomination into the TSDB, TSC personnel use a multi-faceted review process that involves coordination with NCTC and the nominating agency, as necessary, to verify that the nomination meets the criteria for inclusion and is not based on impermissible grounds. No Fly-Selectee ("NFS") subject matter experts ("SMEs") at the TSC are used to review nominations for possible inclusion on the No Fly or Selectee Lists. Employees assigned to the TSC from TSA, FBI, and DHS serve as NFS SMEs, and are required to undergo specific trainings and coursework, and demonstrate proficiency before being designated as No Fly-Selectee subject matter experts.

20. (U) At the conclusion of the TSC's review, TSC personnel will either accept or reject the nomination for inclusion into the TSDB and, if appropriate, inclusion on either the Selectee List or No Fly List. If a nomination is accepted, the TSC will create a TSDB record including only the "terrorist identifiers" (*i.e.*, name, date of birth, etc.) and mark it for export to the appropriate screening agency data systems. As mentioned above, because the TSDB is a sensitive but unclassified system, it does not contain the substantive derogatory information or classified national security information used to nominate the person. Maintaining the TSDB as a sensitive but unclassified system allows for law enforcement screening officers, such as CBP officers at ports of entry and state

and local law enforcement, to use the identifying information from the TSDB even though they may not possess Secret or Top Secret security clearances.

21. (U) Although an effect of being included on the No Fly List is denial of boarding on a commercial aircraft, the List serves security objectives beyond safeguarding civil aviation. In keeping with Congress's mandate to identify travelers who may pose "a threat to civil aviation or national security," 49 U.S.C. § 114(h)(1), the No Fly List criteria focus on the threat of committing violent acts of terrorism not only to commercial aircraft, but also to potential targets within and outside of the United States. A known or suspected terrorist may be a danger to national security even if he has no intention of detonating a bomb on or hijacking a plane. By extending the No Fly criteria to known or suspected terrorists who pose a threat of committing a violent act of terrorism with respect to the homeland or with respect to U.S. facilities or personnel overseas, the Government can deny boarding to travelers who pose threats to key national security interests outside the civil aviation sector. Similarly, by extending the criteria to known or suspected terrorists who are "operationally capable" of engaging in a violent act of terrorism, the U.S. Government can ensure that known or suspected terrorists who pose a threat of committing a violent act of terrorism are not permitted to fly simply by virtue the absence of information linking them to a particular target.

(U) REVIEWS AND AUDITS

22. (U) To carry out the Presidential directive to maintain "thorough, accurate and current" information within the TSDB, *see* HSPD-6, the database is subjected to rigorous and ongoing quality control measures to seek to ensure not only that nominations continue to

satisfy the applicable criteria for inclusion, but also that the derogatory information offered in support of the nomination is accurate, reliable, and up-to-date. This guarantees that the appropriate procedures are followed in the course of evaluating, processing and maintaining the information maintained in the TSDB. These quality control measures, as required by the interagency-approved Watchlisting Guidance policies and procedures, include regular reviews and audits by both the nominating agency, NCTC, and TSC to verify that each nomination meets the appropriate criteria for inclusion in the TSDB and any appropriate subset list and to provide a means to identify any changes to the information over time that could affect inclusion.

23. (U) As previously discussed, under interagency approved Watchlisting Guidance policies and procedures, a nominating agency is responsible for verifying that its watchlist nominations satisfy the applicable criteria for inclusion, and that it has established internal procedures to confirm that the nominations process is properly performed. In addition to those safeguards, nominating agencies are required by the Watchlisting Guidance to conduct periodic reviews of nominations of U.S. Persons[11] to the TSDB and to have internal procedures that facilitate the prevention, identification, and correction of any errors in information that is shared as part of the watchlisting process. These procedures include the review of retractions or corrections of information that may have been used to support a nomination.

24. (U) When retractions or new information becomes available, the nominating agency is required promptly to send a TSDB modification or deletion request, as appropriate. In cases where modification or deletion of a record relating to international terrorism is

[11] (U) "U.S. Persons" here refers to a U.S. citizen or Lawful Permanent Resident (LPR).

required, the nominating agency must promptly provide notice of any errors or outdated information to NCTC, unless there is an articulated reason why such notification could not be made immediately. NCTC processes and transmits such corrections to TSC for appropriate action. For actions relating to domestic terrorism, the FBI is also required to request that a FBI-nominated TSDB record be modified or deleted.

25. (U) Upon receipt of records relating to international terrorism, NCTC completes an additional level of review, as required by interagency approved Watchlisting Guidance policies and procedures, by employing its own quality control processes to verify that all standards and appropriate procedures have been employed, the data is accurate, and the presentation of the material is clear, concise, and complies with established definitions and conventions. NCTC also confirms that the information is accurately documented in TIDE and provided to the TSC. Lastly, NCTC established a process for the review and/or auditing of TIDE records.

26. (U) Similarly, TREX performs equivalent review and quality control and auditing processes to help maintain the currency, accuracy and thoroughness of TSDB nominations submitted by the FBI.

27. (U) For all nominations, the final level of review is conducted by the TSC, which has a critical role in providing quality control of TSDB data. TSC personnel, including the NFS SMEs, review nominations, evaluate whether the nominations meet all applicable standards, and conduct, as appropriate, a review of underlying derogatory information before accepting or rejecting a nomination or exporting a record to the various screening systems. Analysts are trained to use the operational and technical instructions provided in the Watchlisting Guidance in considering and applying the No Fly criteria to the

specific circumstances that do or do not support a No Fly determination in a particular case. The focus at all times is on information that reasonably demonstrates that the particular criterion for the No Fly List is met in each case.

28. (U) In addition to reviewing nominations as they are submitted to the TSDB, the TSC also performs proactive and reactive quality assurance audits to confirm the data in the TSDB is thorough, accurate, and current. Examples of these quality assurance checks include, but are not limited to: (a) at least a biannual review of all U.S. Person records in the TSDB; (b) at least a biannual review of all U.S. Person records on the Selectee List or No Fly List by a NFS SME; (c) a review of the available derogatory and biographic information for subjects in TSDB following a screening encounter to verify the records still meet standards for inclusion and to determine an appropriate encounter response, when applicable; and (d) regular audits of individual analyst work to confirm appropriate procedures and practices are being executed during the review of TSDB records.

29. (U) The multiple independent reviews conducted by the nominating agencies, NCTC, and TSC described above seek to ensure the thoroughness, accuracy, and currency of the terrorist identity and derogatory information used to support the law enforcement and screening functions by the various agencies that receive such data. The regular assessments and audits of records in the TSDB and its export lists, such as the No Fly and Selectee Lists, further confirm that all appropriate modifications and removals are promptly reported to and implemented by the TSC.

(U) REDRESS PROCESS

30. (U) The DHS Traveler Redress Inquiry Program ("DHS TRIP") provides the public with a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during travel screening at transportation hubs (such as airports and train stations) or during their inspection at a U.S. port of entry. DHS TRIP provides a means of seeking redress for travelers who have, for example, been delayed or denied airline boarding, delayed or denied entry into or exit from the United States at a port of entry, or have been repeatedly referred for additional (secondary) screening at an airport. As part of the redress process, DHS TRIP invites the traveler to submit any information that may be relevant to the travel difficulties experienced.

31. (U) Since there are many reasons why a traveler may seek redress, DHS TRIP works with DHS component agencies, such as CBP, TSA, and U.S. Immigration and Customs Enforcement, in addition to other government agencies such as the Department of State, FBI, and the TSC, as appropriate, to make an accurate determination about the traveler's redress matter.

32. (U) The TSC supports DHS TRIP at this stage by helping to resolve inquiries that appear to be related to data in the TSDB. This interagency redress process is described in the *Memorandum of Understanding on Terrorist Watchlist Redress Procedures* (Exhibit A), which was executed in September 2007, by the Secretaries of State, Treasury, Defense and Homeland Security, the Attorney General, the Director of the FBI, the Director of NCTC, the Director of the Central Intelligence Agency, the Director of National Intelligence, and the Director of the TSC.

33. (U) Even though approximately 98% of DHS TRIP inquiries do not relate to the TSDB, when a traveler's inquiry may appear to concern data in the TSDB, DHS TRIP refers the matter to the TSC's Redress Office, a separate component within the TSC that processes inquiries related to the use of TSDB data by screening agencies.[12] Upon receipt of a DHS TRIP inquiry, the Redress Office assigns the matter to a Redress Analyst to research and review the available information about the traveler, including the information and documentation provided by the traveler, to determine: (1) whether the traveler is an exact match to an identity in the TSDB; and, if an exact match exists, and (2) whether the identity in the TSDB continues to satisfy the criteria for inclusion or should be removed, or whether any modification of the identity's record should occur (for example, whether the identity should be removed from No Fly List and placed instead on the Selectee List).

34. (U) In cases in which a traveler seeking redress through DHS TRIP is an exact match to an identity in the TSDB, the TSC's Redress Office will contact NCTC and the nominating agency to assist in the resolution of the complaint and provide the information submitted by the traveler, along with any other relevant information. The Redress Office will then work with the nominating agency and NCTC to determine whether the traveler should continue to remain in the TSDB by asking for updated intelligence, information or analysis, and a recommendation about maintaining the traveler in the TSDB or on the No Fly or Selectee List, if applicable.

[12] (U) The TSC does not accept redress inquiries directly from the public, nor does it respond directly to redress inquiries.

35. (U) After reviewing the available derogatory information and considering any recommendation from the nominating agency, the TSC's Redress Office will determine whether the traveler's record should remain in the TSDB, or be modified or removed, unless the legal authority to make such a determination resides, in whole or in part, with another government agency. In such cases, the Redress Office will only prepare a recommendation for the decision-making agency and will implement any determination once made. When changes to a record's status are warranted, the Redress Office will ensure such corrections are made, and verify that such modifications or removals were carried over to the various screening systems that receive TSDB data (*e.g.*, TSA's Secure Flight program, which implements the Selectee and No Fly Lists). After the TSC's Redress Office completes its review of the matter, it notifies DHS TRIP of the outcome of its review.

(U) REDRESS PROCEDURES FOR U.S. PERSONS DENIED BOARDING BECAUSE THEY WERE ON THE NO FLY LIST

36. (U) Pursuant to prior U.S. Government policy, DHS TRIP determination letters sent to a U.S. Person who remained on the No Fly List following review by the TSC Redress Office would not disclose to the traveler whether or not he or she was included on the No Fly List. In order to improve the redress process, the U.S. Government has revised the DHS TRIP procedures for U.S. Persons who make redress inquiries regarding denials of aircraft boarding.

37. (U) Under the new redress procedures, a U.S. Person who (a) purchases an airline ticket for a flight to, from, or over the United States; (b) is denied boarding on that flight; (c) subsequently applies for redress through DHS TRIP about the denial of boarding; (d)

provides all information and documentation required by DHS TRIP; and (e) is determined to be appropriately included on the No Fly List following the TSC Redress Office's review of the redress inquiry, will receive a letter stating that he or she is on the No Fly List and providing the option to receive or submit additional information.

38. (U) If a U.S. Person who received a letter stating that he or she is on the No Fly List requests additional information, DHS TRIP will provide a second, more detailed response. This second letter will identify the specific criteria or criterion under which the individual has been placed on the No Fly List and, consistent with the Court's June 24, 2014 decision in *Latif v. Holder*, No. 10-750 (D. Or.), will include an unclassified summary of information supporting the individual's No Fly List status. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. In some circumstances, an unclassified summary may not be provided when the national security and law enforcement interests at stake are taken into account.

39. (U) This second letter provides the option to seek additional review of status on the No Fly List and invites the submission of any information believed to be relevant to determining whether continued status on the List is appropriate. Upon DHS TRIP's receipt of a U.S. Person's timely response to the second letter, DHS TRIP forwards the response and any enclosed information to the TSC Redress Office. As discussed further below, after reviewing the materials forwarded by DHS TRIP and other available information, TSC provides DHS TRIP with a recommendation to the TSA Administrator as to whether the person should remain on the No Fly List and the reasons for that recommendation. The TSA Administrator will then review the recommendation from

TSC and will either issue a final order maintaining the person on the No Fly List or removing the person from the List, or remand the case back to TSC with a request for additional information or clarification. If a final order is issued, it will state the basis for the TSA Administrator's decision (to the extent feasible in light of the national security and law enforcement interests at stake) and will notify the person of the ability to seek judicial review under 49 U.S.C. § 46110 or as otherwise provided by law.

40. (U) As the foregoing shows, the TSA Administrator makes the final decision as to whether a U.S. Person who has filed a DHS TRIP redress inquiry will be maintained on the No Fly List, and TSC remains involved at each stage of the new redress process. Once DHS TRIP receives a request for additional information from a U.S. Person who has been notified of his or her inclusion on the No Fly List, DHS TRIP informs TSC's Redress Office, which in turn advises NCTC and the relevant nominating agencies that a redress applicant has requested additional information concerning his or her inclusion on the No Fly List. The Redress Office will request that the nominating agency prepare an unclassified summary of information supporting the person's inclusion on the No Fly List, to the extent providing such a summary is consistent with national security and law enforcement interests.

41. (U) As noted, the amount and type of information that can be provided will vary from case to case. Where possible, the nominating agency will prepare an unclassified summary of information supporting the person's No Fly List status. In other cases, it may not be possible to provide an unclassified summary without compromising national security or law enforcement interests. In all cases, however, the nominating agency must convey to the Redress Office the reasons that can be relied upon to support inclusion on

the No Fly List. The nominating agency also must provide the Redress Office with the national security and law enforcement reasons for its determination regarding the extent to which information supporting the No Fly List listing can be disclosed.

42. (U) The TSC Redress Office will provide DHS TRIP with the specific criterion or criteria under which the U.S. Person is included on the No Fly List, and, if applicable, the unclassified summary of information supporting the inclusion provided by the nominating agency and approved for disclosure to the person. DHS TRIP will include this information in the second response letter to the person. The letter will invite the applicant to submit additional information he or she wishes the Government to consider in connection with any further administrative appeal.

43. (U) Upon receipt of an individual's timely response to the second letter, DHS TRIP will forward the response to the TSC Redress Office for additional review. The TSC Redress Office will follow the procedures outlined above to again request that the nominating agency conduct a review of an applicant's submission and all other available information. Following completion of this additional review, the TSC Principal Deputy Director ("PDD") will provide DHS TRIP with a recommendation memorandum to the TSA Administrator as to whether the individual should be removed from or maintained on the No Fly List and the reasons for that recommendation. The memorandum provided to the TSA Administrator will include the derogatory information supporting the PDD's recommendation, which may include classified information or law enforcement sensitive information.

44. (U) The TSA Administrator will review the PDD's recommendation memorandum and any other relevant information and will either issue a final order, pursuant to 49 U.S.C. §

46110, maintaining the U.S. Person on the No Fly List or removing him or her from the No Fly List, or remand the case back to the TSC with a request for additional information or clarification.

45. (U) Upon issuance of a final order by the TSA Administrator, DHS TRIP will provide TSC and the U.S. Person with a copy of the order. The final order will state whether or not the U.S. Person has been maintained on or removed from the No Fly List. If the final order removes the person from the No Fly List, the TSC Redress Office will ensure that all necessary updates to the TSDB are made, and that those updates are carried over to the various screening systems that receive TSDB data. If the final order maintains the person on the No Fly List, the order will inform the person that he or she may seek judicial review pursuant to 49 U.S.C. § 46110 or as otherwise provided by law.

46. (U) The Plaintiffs in this case who remained on the No Fly List as of November 2014 were provided with the substance of the revised DHS TRIP procedures during late 2014 and early 2015. The exact procedures applied to Plaintiffs differed from what is described above in one respect. To expeditiously comply with this Court's order, DHS TRIP combined the first and second letters referenced above into one letter that informed each Plaintiff of his status on the No Fly List, the specific criterion under which he was placed, and, to the extent possible, the unclassified reasons for his inclusion on the List. The letter also informed each Plaintiff of his opportunity to respond and seek additional review. Each Plaintiff then submitted a response providing the reasons supporting his belief that his inclusion on the No Fly List was in error.

47. (U) Upon receipt of these response letters from DHS TRIP, the TSC Redress Office reviewed the submissions as well as other available information and considered the

reasons offered by each Plaintiff in support of his belief that his inclusion on the No Fly List was in error. After careful consideration, and in coordination with relevant federal agencies, the TSC Redress Office determined that each Plaintiff should remain on the No Fly List and provided DHS TRIP with recommendation memoranda from the PDD to the TSA Administrator. Upon reviewing these recommendations, the TSA Administrator determined in each case that maintaining the Plaintiffs on the No Fly List was appropriate. The TSA Administrator accordingly issued final orders stating that each Plaintiff remained on the No Fly List.

Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of May, 2015 in Washington, D.C.

G. CLAYTON GRIGG
Deputy Director for Operations
Terrorist Screening Center

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., *Defendants*.	**DECLARATION OF DEBORAH O. MOORE**

I, **DEBORAH O. MOORE**, hereby declare as follows pursuant to 28 U.S.C. § 1746:

1. I am the Branch Manager of the Transportation Security Redress Branch in the Office of Civil Rights & Civil Liberties, Ombudsman and Traveler Engagement at the Transportation Security Administration (TSA) of the Department of Homeland Security (DHS). I have held this position since June 16, 2013. As part of my official duties as Branch Manager, I serve as the Director of the DHS Traveler Redress Inquiry Program (DHS TRIP) and am responsible for its management. The statements made within this Declaration are based upon my personal knowledge and information made available to me in my official capacity.

A. DHS TRIP

2. Congress directed the Secretary of Homeland Security (Secretary) to establish a timely and fair redress process for travelers who believe they have been delayed or prohibited from boarding a commercial aircraft because they have been wrongly identified as a threat under the regimes utilized by the TSA, U.S. Customs and Border Protection (CBP), or any other office or component of DHS. *See* 49 U.S.C. § 44926(a). Congress further directed the Secretary to establish an "Office of Appeals and Redress" to implement, coordinate, and execute the redress process. *Id.* § 44926(b). This office is required to include representatives

from TSA, CBP, and such offices and components of DHS as the Secretary determines appropriate. *Id.* Additionally, Congress directed the Administrator of TSA to create a process to enable airline passengers who are delayed or prohibited from boarding a flight because TSA's "passenger prescreening system determined that they might pose a security threat to appeal such determination and correct information contained in the system" as necessary. *Id.* § 44903(j)(2)(C)(iii)(I). Congress further directed that as part of the appeal process, the TSA Administrator must maintain a record of air passengers who have been misidentified as possibly posing a security threat in order to prevent repeated delays of such passengers. *Id.* § 44903(j)(2)(G).

3. In February 2007, DHS TRIP was officially launched as the central processing point for redress inquiries. On December 10, 2007, the Secretary designated the TSA Office of Transportation Security and Redress, currently known as the Transportation Security Redress Branch, as both the lead agent to manage DHS TRIP and the statutorily-required "Office of Appeals and Redress."

4. Multiple federal agencies play a role in the regimes utilized by DHS components to identify possible threats to transportation and national security. DHS TRIP serves an important function by providing a single point of contact for a wide variety of complaints and inquiries regarding travel difficulties, such as the following: delayed or denied airline boarding; denial of entry into the United States at a port of entry; or being told that personal information on travel documents was incomplete or inaccurate. Travelers who believe that they experienced such problems because they were wrongly identified as a threat may submit a Traveler Inquiry Form to DHS TRIP. The Traveler Inquiry Form prompts travelers to describe their particular experience, produce documentation related to the subject inquiry as

necessary, provide at least one piece of government-issued photo identification documentation, and provide a contact to which a response may be directed.

5. When a traveler files an inquiry with DHS TRIP online, the system automatically provides the traveler a Redress Control Number (RCN) to help monitor the progress of the inquiry. The RCN matches the individual to the results of his or her redress case within DHS TRIP. An additional feature of the RCN is that once a traveler's case is closed, he or she may use the RCN when making future air travel reservations. In conjunction with TSA's Secure Flight Program, airlines have modified their reservation systems to allow an individual with a RCN to enter it into the reservation system to prevent the individual from being misidentified.

6. Upon receipt of a Traveler Inquiry Form, DHS TRIP reviews the information submitted by the traveler and evaluates each inquiry to determine with which DHS components or other governmental agencies it must coordinate to address the issues underlying the claimed travel difficulties. If a traveler experienced problems because he or she was "misidentified" – *i.e.*, the traveler's name is the same as or similar to the name of a different individual who is included in the government's consolidated and integrated terrorist watchlist, known as the Terrorist Screening Database (TSDB) – then DHS TRIP, in coordination with all relevant government agencies, attempts to prevent future misidentification by updating or correcting information in the traveler's record, or taking other action as warranted. Approximately 98% of travelers who make redress inquires with DHS TRIP experienced difficulties as a result of misidentification and are not in fact in the TSDB.

7. In the small fraction of cases in which DHS TRIP determines that a traveler is an exact or possible match to an identity in the TSDB, DHS TRIP refers the matter to the Redress Unit at the Terrorist Screening Center (TSC). The TSC maintains the TSDB, of which the No Fly List and Selectee List are subsets. TSA implements the No Fly List by preventing individuals on the List from boarding aircraft flying to, from, or over the United States. TSA implements the Selectee List by requiring individuals on the List to undergo enhanced security screening before boarding an aircraft flying to, from, or over the United States. When a traveler's redress inquiry is referred to the TSC Redress Unit, the Unit reviews the traveler's record in consultation with other agencies, as appropriate. Upon the conclusion of that review, the TSC Redress Unit notifies DHS TRIP of the outcome of the review.

8. Once all relevant agencies have reviewed a traveler's redress inquiry and record and reached a determination regarding the traveler's appropriate status with respect to the TSDB and any other travel issue that was identified by the traveler, DHS TRIP issues a determination letter to the traveler. Throughout this administrative process, DHS TRIP maintains a record of the steps it has taken in each individual's case.

9. When appropriate, the DHS TRIP redress process can result in removal of a traveler from the No Fly List, the Selectee List, or the TSDB.

B. Redress Procedures for United States Citizens and Lawful Permanent Residents Denied Boarding Because They Were on the No Fly List

10. Pursuant to prior government policy, DHS TRIP determination letters did not disclose whether or not the traveler who sought redress was included on the No Fly List. This fact was not disclosed because the underlying information used to determine whether an

individual should be placed on the No Fly List is usually based on classified and sensitive law enforcement and intelligence information.

11. In order to improve the redress process and increase transparency, the government has revised the DHS TRIP procedures for citizens and lawful permanent residents of the United States (collectively known as United States persons) who make redress inquiries regarding the denial of aircraft boarding.

12. The new redress procedures now provide that a United States person who (a) purchases an airline ticket for a flight to, from, or over the United States; (b) is denied boarding that flight; (c) subsequently files a redress inquiry regarding the denial of boarding with DHS TRIP; (d) provides all information and documentation required by DHS TRIP; and (e) is determined to be appropriately on the No Fly List at the conclusion of the TSC Redress Unit's review of the redress inquiry, will receive a letter stating that "you are on the No Fly List" and providing the option to request additional information and specific instructions for doing so.

13. If a United States person who receives a letter stating that he or she is on the No Fly List properly and timely requests additional information, DHS TRIP will respond with a second letter that identifies the specific criterion or criteria under which the individual was placed on the No Fly List. To the extent feasible, consistent with the national security and law enforcement interests at stake, the second letter will also include an unclassified summary of information supporting the individual's placement on the No Fly List. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. In some circumstances, DHS TRIP may not be able to provide any unclassified summary without compromising national security or law enforcement interests.

The second letter provides the option to seek additional review of status on the No Fly List and invites the submission of any information believed to be relevant to determining whether continued status on the List is appropriate.

14. If a United States person timely responds to the second letter and requests additional review, DHS TRIP forwards the response and any enclosed information to the TSC Redress Unit for careful consideration. Upon completion of TSC's comprehensive review of everything submitted to DHS TRIP and other available information, the TSC Principal Deputy Director provides DHS TRIP with a recommendation to the TSA Administrator as to whether the person should be removed from or remain on the No Fly List and the reasons for that recommendation. The TSC Principal Deputy Director's recommendation may contain classified information and/or law enforcement sensitive information. If the recommendation does contain classified and/or law enforcement sensitive information, it will also contain a determination regarding whether and to what extent DHS TRIP is authorized to disclose such information when providing a final redress response.

15. After DHS TRIP receives the recommendation from TSC, it provides the recommendation to the TSA Administrator along with the United States person's complete DHS TRIP file (including all information submitted by the person). The TSA Administrator will review these materials and will either remand the case back to TSC with a request for additional information or clarification or issue a final order removing the United States person from the No Fly List or maintaining him on the List.

16. If the TSA Administrator issues a final order maintaining a United States person on the No Fly List, the order will state the basis for the decision to the extent possible without compromising national security or law enforcement interests.

17. Upon issuance of a final order by the TSA Administrator, DHS TRIP will provide TSC and the United States person with a copy of the order. DHS TRIP will also inform a United States person who remains on the No Fly List pursuant to the TSA Administrator's final order that he may seek judicial review of the final order pursuant to 49 U.S.C. § 46110 or as otherwise provided by law.

C. Redress Procedures Applied to Six Plaintiffs

18. During the course of this litigation, DHS TRIP applied the substance of the above-described procedures to the six Plaintiffs in this matter who were on the No Fly List as of November 14, 2014. *See* Dkt. No. 165 (Defendants' Status Report of January 22, 2015). However, due to litigation deadlines, DHS TRIP combined the first and second letters referenced in paragraphs 12 and 13 of this Declaration into one letter informing each of these six Plaintiffs of his status on the No Fly List, the specific criterion or criteria under which he was placed on the List, and, to the extent possible without compromising national security or law enforcement interests, the unclassified reasons that the applicable criterion or criteria were satisfied. The letters also informed each of these six Plaintiffs of the opportunity to respond and seek additional review.

19. All six of the Plaintiffs who were informed that they were on the No Fly List responded seeking additional review. Upon DHS TRIP's receipt of these responses, DHS TRIP forwarded the responses to the TSC Redress Unit. The procedures described above in paragraphs 14 through 17 were then followed to reach a final order of the TSA Administrator regarding the status of each of these six Plaintiffs with respect to the No Fly List. The TSA Administrator issued final orders to five of these Plaintiffs on January 21, 2015, and to the

remaining one of these Plaintiffs on January 28, 2015. *See* Dkt. No. 165; Dkt. No. 167 (Joint Status Report of February 6, 2015).

I declare under penalty of perjury that the forgoing information is true and correct to the best of my knowledge and belief.

DATED: May 27, 2015
Arlington, VA

Deborah O. Moore

DEBORAH O. MOORE
Director, DHS TRIP &
Branch Manager
Transportation Security Redress Branch
Office of Civil Rights & Liberties,
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. ERIC H. HOLDER, JR., et al., *Defendants*.	**NOTICE REGARDING REVISIONS TO DHS TRIP PROCEDURES**

As reflected in prior filings in this case, the Government has been in the process of revising its redress procedures for claims involving denials of boarding on covered aircraft, *see* 49 C.F.R. § 1560.3, submitted through the Department of Homeland Security Traveler Redress Inquiry Program (known as DHS TRIP). This revision process has been directed at improving

the redress procedures, including by increasing transparency relating to the No Fly List. In connection with this effort, while the Government's revision process was ongoing, certain individual DHS TRIP inquiries — such as those submitted by plaintiffs in the *Latif*, *Tarhuni*, and *Fikre* cases — have been reopened and reevaluated under revised procedures. The Government now reports that the revised procedures will be made available to similarly situated U.S. persons.

Under the previous redress procedures, individuals who had submitted inquiries to DHS TRIP generally received a letter responding to their inquiry that neither confirmed nor denied their No Fly status. Under the newly revised procedures, a U.S. person who purchases a ticket, is denied boarding at the airport, subsequently applies for redress through DHS TRIP about the denial of boarding, and is on the No Fly List after a redress review, will now receive a letter providing his or her status on the No Fly List and the option to receive and/or submit additional information. If such an individual opts to receive and/or submit further information after receiving this initial response, DHS TRIP will provide a second, more detailed response. This second letter will identify the specific criterion under which the individual has been placed on the No Fly List and, consistent with the Court's June 24, 2014 decision, will include an unclassified summary of information supporting the individual's No Fly List status, to the extent feasible, consistent with the national security and law enforcement interests at stake. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. In some circumstances, an unclassified summary may not be able to be provided when the national security and law enforcement interests at stake are taken into account.

This second letter will also provide the requester an opportunity to be heard further concerning their status. Written responses from such individuals may be submitted and may

include exhibits or other materials the individual deems relevant. Upon DHS TRIP's receipt of an individual's submission in response to the second letter, the matter will be reviewed by the Administrator of the Transportation Security Administration (TSA) or his/her designee in coordination with other relevant agencies, who will review the submission, as well as the unclassified and classified information that is being relied upon to support the No Fly listing, and will issue a final determination. TSA will provide the individual with a final written determination, providing the basis for the decision (to the extent feasible in light of the national security and law enforcement interests at stake) and will notify the individual of the ability to seek further judicial review under 49 U.S.C. § 46110.

The Government will be closely monitoring the initial implementation of these newly revised procedures on an interagency basis, and will, as circumstances warrant, consider whether further revisions to the process are necessary. The revised procedures will be discussed in more depth in Defendants' upcoming summary judgment briefing.

Dated: April 13, 2015

Respectfully Submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Branch Director
Federal Programs Branch

s/ Brigham J. Bowen
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Attorneys for Defendants

CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
BRIGHAM J. BOWEN

EXHIBIT A

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

November 26, 2014

Mr. Mohamed Sheikh Abdirahman Kariye
c/o Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Redress Control Number: 2097225

Dear Mr. Kariye:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.

> The placement of Mohamed Sheikh Abdirahman Kariye on the No Fly List was based upon, among other things, his prior history as a mujahedeen fighter in Afghanistan against the Russians and interactions with and financial support of others who have engaged in supporting or committing acts of terror. Specifically, Kariye's association with multiple individuals who have been prosecuted for terrorism related activities provides a basis for concern that Kariye may pose a threat to civil aviation and/or national security. For instance, on May 2, 2003, a federal grand jury in the U.S. District Court of Oregon returned a superseding indictment charging Jeffrey Leon Battle, Patrice Lumumba Ford, Ahmed Abrahim Bilal, Muhammad Ibrahim Bilal, Habis Abdullah Al Saoub, October Martinique Lewis, and Maher Mofeid Hawash, otherwise known as the "Portland Seven," with Conspiracy to Levy War Against the United States in violation of

18 U.S.C. § 2384; Conspiracy to Provide Material Support and Resources to Al-Qaida in violation of 18 U.S.C. § 2339B; Conspiracy to Contribute Services to Al-Qaida and the Taliban in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. §§ 545.204, 545.206(b) and 595.205; Conspiracy to Possess and Discharge Firearms in Furtherance of Crimes of Violence in violation of 18 U.S.C. § 924(c) and (o) (defendants Lewis and Hawash were not charged in this count); Possessing Firearms in Furtherance of Crimes of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (defendants Lewis and Hawash were not charged in this count); and defendants Lewis and Ford were charged with Money Laundering in violation of 18 U.S.C. § 1956(a)(2) (A). All but Habis Abdullah Al Saoub, who was killed in Pakistan in 2003, pled guilty to various counts from the indictment in 2003, and were subsequently sentenced.

Mohamed Sheikh Abdirahman Kariye, Imam of Portland's Masjid As Sabr Mosque, was associated with the "Portland Seven." The investigation revealed that Kariye expressed support for violent jihad and that Kariye had provided financial support to defendants to travel to Afghanistan to fight against American troops. During the investigation, law enforcement recorded numerous conversations between a cooperating witness ("CW") and Battle and Ford, in which they discussed details of the defendants' travel to Western China in an attempt to enter Pakistan and Afghanisan to fight against U.S. forces. In a consensually recorded conversation with the CW on May 9, 2002, Battle told the CW that the Imam (referring to Kariye) had prepared others to fight in the jihad against Russia. In a consensually recorded conversation with the CW on July 24, 2002, Battle told the CW that the Imam (referring to Kariye) was a Mujahadeen and had fought in the war (in Afghanistan during Soviet occupation) and was subsequently imprisoned in Pakistan. In a consensually recorded conversation with the CW on September 26, 2002, Ford told the CW that the Imam (Kariye) had spoken out very strongly for jihad.

In a consensually recorded conversation with the CW on October 1, 2002, Battle told the CW that the Masjid As Sabr Mosque was the only mosque to teach about jihad. When asked by the CW if Kariye told his followers that Muslims should fight with fellow Muslim brothers of Afghanistan against Americans, Battle replied, "Yes." In an unrecorded conversation with the CW, another witness, and Battle on October 4, 2002, Battle told the CW that after the attacks on September 11, 2001, Al Saoub approached Kariye regarding financing for the trip by the jihadists (through Western China to Pakistan and Afghanistan). Battle stated he did not know how much money Kariye had raised, but indicated Kariye had provided to Al Saoub an amount of money sufficient to give $2000 to each of the travelers to Afghanistan. Battle stated Kariye had acquired the money from members of the Masjid As Sabr Mosque. Battle stated that he and the other jihadists attended the last prayer of the evening prior to departure and that Kariye was present.

In his post-arrest interview on October 4, 2002, Battle stated he was given $2000 for the trip to Afghanistan by Al Saoub. Battle stated he had talked to Kariye about jihad. Kariye was also identified as a member of the Board of Directors of Global Relief Foundation (GRF) in 1992, according to its Articles of Incorporation. In October 2002, GRF was listed by the U.S. Department of Treasury, Office of Foreign Assets Control, as a Specially Designated Global Terrorist.

We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation with court-imposed deadlines, such information should be submitted by December 16, 2014. Information you submit will be considered before a final determination is made. The final determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Paul Mey on behalf of

Deborah O. Moore
Director, DHS TRIP

EXHIBIT B

NATIONAL SECURITY PROJECT

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

December 16, 2014

VIA MAIL

Deborah O. Moore
U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Re: Mohamed Sheikh Abdirahman Kariye
Redress Control Number 2097225

Dear Ms. Moore:

On behalf of Imam Mohamed Sheikh Abdirahman Kariye, we submit this response to your letter dated November 26, 2014, in which you provided "an unclassified summary that includes reasons" for Imam Kariye's placement on the No Fly List. DHS TRIP Letter, attached as Exhibit 1. Because the court in *Latif v. Holder*, Case No. 10-Civ-750-BR (D. Or.), has mandated that the Government conduct an administrative review of the inclusion on the No Fly List of the plaintiffs in that case "as soon as practicable," Dkt. No. 152 at 2, we are submitting this response by December 16, as requested in your letter.

Nonetheless, the Government's revised No Fly List administrative redress system remains inadequate, and your letter lacks information that is critical to Imam Kariye's ability to respond meaningfully to the allegations in it. The court in *Latif* has emphasized that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests" and imposes a "major burden" on those interests. Dkt. No. 136 at 30. The court ordered the Government to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61. The Government's revised system does not provide Imam Kariye the process he is due under the Constitution or the court's order, nor does it comply with the requirements of the Administrative Procedure Act. Among other defects, the substantive criteria cited for Imam Kariye's inclusion on the No Fly List are overbroad and unconstitutionally vague, and the redress process fails to offer procedural protections that are necessary to vindicate Imam Kariye's due process rights.

On December 5, 2014, we requested that counsel for the defendants in *Latif* provide essential procedural protections, additional information, and a constitutionally compliant substantive standard for the revised redress process. See Letter of December 5, 2014, attached as Exhibit 2. We have received no response to that letter.

Thus, Imam Kariye has not been given a "meaningful opportunity to respond" to the reasons for his inclusion on the No Fly List. See *Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); see also *Latif*, Dkt. 136 at 62 (citing *Al Haramain*). Absent such a meaningful opportunity, Imam Kariye is hobbled in his ability to rebut the allegations, and any response from him is necessarily incomplete. We submit this response only subject to the objections and requests for further information set forth below, as well as those set forth in Exhibit 2, and reserve the right to supplement any record being created by the Government with such additional information that the Government provides in response to the requests in our letter of December 5, 2014, or to discovery requests or an order of the court in *Latif*, or that we discover through our own investigation.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

I. The Redress System Remains Inadequate.

The Government's revised No Fly List redress system does not comply with the Constitution or the court's order for two primary reasons: it utilizes a substantive standard that is vague and overbroad, and it lacks necessary procedural protections, absent which Imam Kariye's core due process rights cannot be upheld.

The DHS TRIP letter to Imam Kariye states:

> It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.

Ex. 1 at 1.

This standard is overbroad, in that it does not require any nexus to aviation security, lacks a meaningful temporal limitation, and is also

unconstitutionally vague, both on its face and as applied to Imam Kariye. *See* Ex. 2 at 6–7.

As applied to Imam Kariye, application of the standard also violates the First Amendment. *Id.* at 7. Indeed, the DHS TRIP letter to Imam Kariye includes allegations related to his speech or other expressive activity, religious practice, and associations, making it clear that the criteria impermissibly impinge on First Amendment-protected conduct. *See* Ex. 1 at 1–2 (placement on No Fly List was in part based on "Kariye's association with multiple individuals" who pled guilty to various offenses, despite the fact that he was not charged or convicted of those offenses); id. (placement based in part on alleged fact that he "had spoken out very strongly for jihad," including in his religious teachings).

Additionally, the standard fails to utilize the least restrictive means to mitigate the "threat" to which it is addressed. *See* Ex. 2 at 7–8. For example, nothing in the letter shows, or even attempts to show, that utilization of the procedures the Government employed to avoid litigation of the preliminary injunction motion filed by Imam Kariye and others in *Latif*—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

These defects render the substantive standard used to place Imam Kariye on the No Fly List unconstitutional. No one—Imam Kariye included—can meaningfully respond to allegations purporting to justify placement on the No Fly List when the standard for that placement is ambiguous and overbroad.

The second major defect in the revised redress system is that it lacks necessary procedural protections, absent which Imam Kariye's due process rights cannot be upheld. The court in *Latif* ordered the Government to revise the redress system in large part because "the DHS TRIP process . . . contains a high risk of erroneous deprivation of Plaintiffs' constitutionally-protected interests." *See* Dkt. No. 136 at 39. That risk remains high under the revised system that the Government has applied to Imam Kariye.

First, the process does not provide for a hearing at which live witness testimony may be presented and tested under cross-examination. At any hearing, Imam Kariye would credibly testify that he presents no threat to aviation security and respond to any specific allegations made against him. However, without a hearing, Imam Kariye will have no ability either to establish his own credibility through live testimony or to challenge the testimony of the Government's witnesses through cross-examination. *See* Ex. 2 at 3.

Second, the disclosure to Imam Kariye is incomplete. The DHS TRIP letter states that it "includes reasons supporting" his placement on the No Fly List, and that the Government is "unable to provide additional disclosures" beyond those in the letter.[1] Ex. 1 at 1–2. An incomplete statement makes it impossible for Imam Kariye to refute all of the Government's bases for placing him on the List. Without a complete statement of reasons and a detailed statement of withheld evidence, Imam Kariye cannot meaningfully respond to the allegations in the letter. Nor can he take steps, such as the retention of counsel with security clearance, to deal with information withheld as classified because he does not know whether such withholdings have occurred. *See* Ex. 2 at 2–3 (citing Dkt. 136 at 61-62).

Third, the DHS TRIP letter contains no indication of what, if any, evidentiary standard the Government used to place Imam Kariye on the No Fly List, or to review that placement. As we have explained, the Constitution requires a "clear and convincing evidence" standard in this context. Ex. 2 at 3–4.

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Fourth, the DHS TRIP letter fails to explain how the allegations in it satisfy appropriately narrow criteria for inclusion on the No Fly List. For example, it relies substantially on conduct Mr. Kariye allegedly engaged in during a war in Afghanistan that took place over twenty years ago, including the allegation that Kariye fought against "the Russians" in Afghanistan. It also relies heavily on the allegation that he associated with individuals who were themselves prosecuted for terrorism-related activities (Ex. 1 at 1). However, the letter fails to explain how, even if these contested allegations were true, they would suffice to explain how such conduct renders him a "threat" worthy of inclusion on the List today, particularly given that the United States provided extensive support for individuals fighting against the Soviet-supported communist regime in Afghanistan, and has never charged him with any crime. Moreover, even if every factual allegation in the DHS TRIP letter about his prior associations and conduct were true (which, again, Imam Kariye does not concede), those facts would still fail to justify barring him from boarding an airplane after booking in advance on U.S. carriers and submitting to heightened airport security measures.

As with the substantive standard, these procedural defects preclude Imam Kariye from meaningfully responding to the DHS TRIP letter, and they

[1] The letter also fails to notify Imam Kariye of the entity responsible for determining that he meets the standard for inclusion on the No Fly List. *See* Ex. 1 at 1 ("*it has been determined* that you represent a threat . . .") (emphasis added). Imam Kariye therefore cannot assess the institutional competence of the deciding entity or identify specific policies, regulations, and statutes that may govern such a determination.

further underscore that the Government's revised redress system remains constitutionally deficient.

II. Imam Kariye Cannot Respond Meaningfully Without Further Information.

The allegations in the DHS TRIP letter reveal specific categories of information that the Government must provide to Imam Kariye in order to satisfy due process.

1. Witness information and statements. The DHS TRIP letter indicates that the Government is relying on the statements of several witnesses to support Imam Kariye's inclusion on the No Fly List, including statements from government agents, a cooperating witness (the "CW"), some of the criminal defendants identified as the "Portland Seven," and perhaps others. Ex. 1 at 2; *see also id.* (referring to "another witness"). The Government must therefore provide the names and contact information for any such witnesses; all reports relating to Imam Kariye prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating Imam Kariye, the CW, and the "Portland Seven"); the statements of unidentified third parties such as the CW; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath. See Ex. 2 at 5–6.

2. Promises to witnesses. The Government must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for Imam Kariye's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local), including but not limited to any benefit offered to the CW. See *id.* at 6.

3. Exculpatory evidence. The Government must provide all evidence, including any statements by any person, tending to: contradict the evidence and allegations advanced in support of Imam Kariye's inclusion on the No Fly List; show that Imam Kariye does not meet the appropriate criteria for inclusion on the List; or otherwise establish that Imam Kariye does not merit inclusion on the List. See *id.*

4. Imam Kariye's prior statements. To the extent that the Government is relying on Imam Kariye's alleged statements in order to justify his inclusion on the No Fly List, he must be provided with all of his written or recorded statements, made to any persons at any time and place, and the

substance of any oral statements, if not embodied in a writing. If any statements are recorded, he should be given a transcript or audible copy of each recording. See Ex. 2 at 4.

5. Notice of surveillance techniques. To the extent that any information obtained or derived from surveillance activities forms any basis for Imam Kariye's inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceedings, Imam Kariye is entitled to notice of the surveillance and the information obtained or derived from it. He is also entitled to notice of information or evidence that is the product of unlawful surveillance. *See id.* at 4–5.

6. Additionally, to the extent that the Government is relying on any information, whether or not disclosed in the DHS TRIP letter, that does not fall under any of the preceding categories, such information must also be provided to Imam Kariye. For example, if the Government is relying on documents from the Global Relief Foundation files that mention Imam Kariye, it should disclose those pursuant to this paragraph.

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The failure to provide this information unfairly prejudices Imam Kariye's due process right to challenge his placement on the No Fly List.

III. The Allegations Against Imam Kariye Do Not Justify His Continued Inclusion On The No Fly List.

For the foregoing reasons, the revised system the Government is using to review Imam Kariye's inclusion on the No Fly List is constitutionally inadequate. Nonetheless, because the court in *Latif* has directed the Government to complete its administrative review of the plaintiffs' DHS TRIP redress inquiries before the court considers substantive motions on the merits, we submit this disclosure of Imam Kariye's expected testimony on his behalf. We do so without waiving any of the objections to the legality or constitutionality of the revised redress process, and without conceding the adequacy of the notice and process afforded to Imam Kariye.

If called to testify at an evidentiary hearing regarding his placement on the No Fly List, we expect that Imam Kariye would state as follows:

1. Imam Kariye is not now, and has never been, a threat to U.S. Government facilities, personnel, or aviation security, within the borders of the U.S. or abroad. He has no intention of engaging in or providing support for any violence against the United States or any U.S. personnel anywhere in the world.

2. Imam Kariye is an important source of spiritual and moral leadership in his community. In addition to serving as imam of his mosque, he has provided counseling for members of his community for approximately twenty years, including for youth, for women who are victims of domestic violence, for married couples, and for the bereaved.

3. Imam Kariye traveled to Pakistan in the early 1990s for the purpose of performing relief work. During his time in Pakistan, Imam Kariye occasionally traveled to Afghanistan. At no time did he engage in hostile action against U.S. personnel or facilities while he was in Pakistan or Afghanistan. He was held in Pakistan because his visa had apparently expired.

4. Imam Kariye was one of the founders of the Global Relief Foundation and involved in it until at least 1993. His understanding of that organization is that it supported relief work and was not a terrorist organization. He would not have supported the Global Relief Foundation or been involved with it in any way if he thought it contributed to activities that undermined the security of the United States.

5. Imam Kariye is imam at the Islamic Center of Portland, or the Masjed As Sabr mosque. He leads congregants in prayers, discussions, and lectures on many aspects of the Muslim faith, including "jihad," which is understood broadly to refer to any struggle for justice. He has also expressed views on U.S. foreign policy. However, all of the statements that he has made in this context are protected by the First Amendment.

6. Imam Kariye was acquainted with the "Portland Seven" defendants. For example, Patrice Lumumba Ford and Jeffrey Battle have prayed at the Masjed As Sabr mosque. Imam Kariye does not recall ever discussing with any of the "Portland Seven" defendants the fighting in Afghanistan or Pakistan—whether against the U.S. or the communist regime in Afghanistan. Nor does he recall ever discussing those individuals' criminal plans. He never advocated that any of them engage in criminal activity.

7. Imam Kariye has never knowingly raised money, given money, or provided any other financial support to any of the "Portland Seven" defendants or anyone else for criminal activities. He has never knowingly been involved in, planned to become involved in, or carried out any violent criminal activity of any kind.

8. The individual sources described (in the DHS TRIP Letter) as having made statements against Imam Kariye are not credible for a number of reasons. The CW may be an individual who faced pressure from the U.S. Government, including but not limited to pressure to provide information against Imam Kariye. To the extent Mr. Battle made the statements attributed

to him, it appears from the context that he at least knew he was under federal investigation at the time and, with respect to some of the statements, knew that he was facing serious criminal charges.

Imam Kariye reserves the right to provide additional information upon receipt of further information as to the nature of the allegations against him, the sources of evidence on which the government has relied, and other information specified above. He also reserves the right to present evidence of his good moral character and opposition to violence through statements from his congregants and other witnesses, at the appropriate time.

For the foregoing reasons, Imam Kariye's placement on the No Fly List was in error, and he should promptly be removed from the No Fly List.

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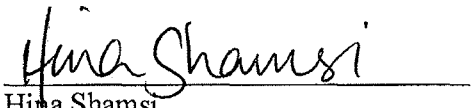
Sincerely yours,



Hina Shamsi
Hugh Handeyside

Ahilan Arulanantham
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017

Steven Wilker
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204

Exhibit 1

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

November 26, 2014

Mr. Mohamed Sheikh Abdirahman Kariye
c/o Ben Wizner
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Redress Control Number: 2097225

Dear Mr. Kariye:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.

> The placement of Mohamed Sheikh Abdirahman Kariye on the No Fly List was based upon, among other things, his prior history as a mujahedeen fighter in Afghanistan against the Russians and interactions with and financial support of others who have engaged in supporting or committing acts of terror. Specifically, Kariye's association with multiple individuals who have been prosecuted for terrorism related activities provides a basis for concern that Kariye may pose a threat to civil aviation and/or national security. For instance, on May 2, 2003, a federal grand jury in the U.S. District Court of Oregon returned a superseding indictment charging Jeffrey Leon Battle, Patrice Lumumba Ford, Ahmed Abrahim Bilal, Muhammad Ibrahim Bilal, Habis Abdullah Al Saoub, October Martinique Lewis, and Maher Mofeid Hawash, otherwise known as the "Portland Seven," with Conspiracy to Levy War Against the United States in violation of

18 U.S.C. § 2384; Conspiracy to Provide Material Support and Resources to Al-Qaida in violation of 18 U.S.C. § 2339B; Conspiracy to Contribute Services to Al-Qaida and the Taliban in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. §§ 545.204, 545.206(b) and 595.205; Conspiracy to Possess and Discharge Firearms in Furtherance of Crimes of Violence in violation of 18 U.S.C. § 924(c) and (o) (defendants Lewis and Hawash were not charged in this count); Possessing Firearms in Furtherance of Crimes of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (defendants Lewis and Hawash were not charged in this count); and defendants Lewis and Ford were charged with Money Laundering in violation of 18 U.S.C. § 1956(a)(2) (A). All but Habis Abdullah Al Saoub, who was killed in Pakistan in 2003, pled guilty to various counts from the indictment in 2003, and were subsequently sentenced.

Mohamed Sheikh Abdirahman Kariye, Imam of Portland's Masjid As Sabr Mosque, was associated with the "Portland Seven." The investigation revealed that Kariye expressed support for violent jihad and that Kariye had provided financial support to defendants to travel to Afghanistan to fight against American troops. During the investigation, law enforcement recorded numerous conversations between a cooperating witness ("CW") and Battle and Ford, in which they discussed details of the defendants' travel to Western China in an attempt to enter Pakistan and Afghanisan to fight against U.S. forces. In a consensually recorded conversation with the CW on May 9, 2002, Battle told the CW that the Imam (referring to Kariye) had prepared others to fight in the jihad against Russia. In a consensually recorded conversation with the CW on July 24, 2002, Battle told the CW that the Imam (referring to Kariye) was a Mujahadeen and had fought in the war (in Afghanistan during Soviet occupation) and was subsequently imprisoned in Pakistan. In a consensually recorded conversation with the CW on September 26, 2002, Ford told the CW that the Imam (Kariye) had spoken out very strongly for jihad.

In a consensually recorded conversation with the CW on October 1, 2002, Battle told the CW that the Masjid As Sabr Mosque was the only mosque to teach about jihad. When asked by the CW if Kariye told his followers that Muslims should fight with fellow Muslim brothers of Afghanistan against Americans, Battle replied, "Yes." In an unrecorded conversation with the CW, another witness, and Battle on October 4, 2002, Battle told the CW that after the attacks on September 11, 2001, Al Saoub approached Kariye regarding financing for the trip by the jihadists (through Western China to Pakistan and Afghanistan). Battle stated he did not know how much money Kariye had raised, but indicated Kariye had provided to Al Saoub an amount of money sufficient to give $2000 to each of the travelers to Afghanistan. Battle stated Kariye had acquired the money from members of the Masjid As Sabr Mosque. Battle stated that he and the other jihadists attended the last prayer of the evening prior to departure and that Kariye was present.

In his post-arrest interview on October 4, 2002, Battle stated he was given $2000 for the trip to Afghanistan by Al Saoub. Battle stated he had talked to Kariye about jihad. Kariye was also identified as a member of the Board of Directors of Global Relief Foundation (GRF) in 1992, according to its Articles of Incorporation. In October 2002, GRF was listed by the U.S. Department of Treasury, Office of Foreign Assets Control, as a Specially Designated Global Terrorist.

We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation with court-imposed deadlines, such information should be submitted by December 16, 2014. Information you submit will be considered before a final determination is made. The final determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Paul Moy on behalf of

Deborah O. Moore
Director, DHS TRIP

Exhibit 2

NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

December 5, 2014

VIA EMAIL

Amy Powell
Brigham J. Bowen
Adam D. Kirschner
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Re: *Latif v. Holder*, Case No. 10-Civ.-750-BR

Dear Counsel:

After reviewing the DHS TRIP letters sent to the Plaintiffs in this case who remain on the No Fly List, we write to make three requests regarding the administrative process Defendants are using for these Plaintiffs.[1] First, we request that Defendants provide certain necessary procedural protections as part of the administrative process. Second and relatedly, we request that Defendants provide additional information related to the basis or bases for Plaintiffs' inclusion on the No Fly List. Third, we request that Defendants craft, apply, and disclose to Plaintiffs a constitutionally-compliant substantive standard for inclusion on the No Fly List. Such a standard must be narrower and more specific than the vague and over-broad standard that Defendants appear to be employing here.

In addition, as we discussed with Amy and Brigham before we received the DHS TRIP letters, we seek to enter into a stipulation and protective order to prevent public disclosure of the DHS TRIP letters and the additional information we are requesting. The need we anticipated for such a stipulation and protective order is confirmed by the inflammatory, piecemeal allegations in the letters. We will follow up with a call to discuss the content of the stipulation and protective order.

[1] It is our understanding that those Plaintiffs are Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble, Amir Meshal, Stephen Persaud, and Steven Washburn, because those are the only Plaintiffs for whom Defendants have provided DHS TRIP letters. If our understanding is incorrect, please inform us of that fact immediately.

As Defendants will recall, the Court's order of June 24, 2014 (Dkt. 136) reiterated that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests," *id.* at 30; held that inclusion on the No Fly List imposes a "major burden" on those interests, *id.*; and required Defendants to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61. The DHS TRIP letters sent to Plaintiffs, to which Defendants have asked Plaintiffs to respond by December 15 or 16, 2014, do not constitute process sufficient to satisfy due process and APA requirements under the Court's order. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976); 5 U.S.C. §§ 555, 556 (governing procedures and production of evidence in administrative proceedings). In particular, the information Defendants have provided does not suffice to permit any of the six Plaintiffs a "meaningful opportunity to respond" to the reasons for their inclusion on the No Fly List. *Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); *Kindhearts v. Geithner*, 647 F. Supp. 2d 857, 906 (N.D. Ohio 2009) (requiring "meaningful opportunity to be heard" by provision of a "post-deprivation hearing"); *see also* Dkt. 136 at 62 (citing *Al Haramain*).

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For that reason, we request the following additional procedures and categories of information (if in the possession of any branch of the federal government), each of which is necessary to comply with the Court's order:

I. Additional Procedural Protections

Compliance with the Court's order requires Defendants to provide the following procedural protections:

1. A *complete* statement of reasons. The DHS TRIP letters suggest that there may be reasons other than those Defendants have provided on which they are relying to justify Plaintiffs' inclusion on the No Fly List. The Court's order plainly requires the provision of "*the* reasons for" Plaintiffs' inclusion, Dkt. 136 at 61 (emphasis added), and an incomplete statement makes it impossible for Plaintiffs to refute all of Defendants' bases for placing Plaintiffs on the List.

2. A *complete* statement regarding withheld evidence and the basis for withholding any such evidence. The DHS TRIP letters suggest that there *may* be both undisclosed evidence on which the Government has relied to justify Plaintiffs' inclusion on the No Fly List and undisclosed claims of privilege used to justify the withholding of that evidence. However, the Court's order indicates that Plaintiffs must know when evidence has been withheld and on what grounds so that they may meaningfully respond, including by requesting "disclos[ure] [of] the classified reasons to properly-cleared counsel," Dkt. 136 at 61, and whether to seek judicial review of any privilege assertion. *Id.* at 62.

Obviously, Plaintiffs cannot take those steps without knowing at least in summary form what evidence Defendants have chosen to rely upon without disclosing it, and the reasons for any such withholding.

3. An explanation of how Defendants' allegations satisfy appropriately narrow criteria for inclusion on the No Fly List. The DHS TRIP letters fail to explain if and how the allegations made in them relate to the substantive criteria for inclusion on the No Fly List. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 230 (D.C. Cir. 2010) (requiring the Secretary of State to explain how information relied upon for designation as a terrorist organization related to specific portion of governing statute). Without such an explanation, Plaintiffs are left to guess as to how their alleged conduct satisfies the substantive standards for inclusion on the list.

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4. A hearing at which live witness testimony may be presented and tested under cross-examination. Due process requires hearings in contexts in which far less is at stake than inclusion on the No Fly List. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 697, 99 S. Ct. 2545 (1979) (in social security context, paper review failed to satisfy due process because determination at issue "usually requires an assessment of the recipient's credibility"). Without a hearing, Plaintiffs have no ability either to establish their own credibility through live testimony or to challenge the testimony of Defendants' witnesses through cross-examination. Such live testimony is critical in situations, such as these, where credibility is central to any assessment of whether Plaintiffs may be deprived of their constitutionally protected liberty interest through inclusion on the No Fly List. *Cf. Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (holding that credibility determinations in deportation cases require a hearing because "[a]ll aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.").

5. Application of a "clear and convincing" standard of proof where Defendants bear the burden of establishing that inclusion on the No Fly List is warranted. The DHS TRIP letters contain no articulation of any standard or burden of proof. The "clear and convincing evidence" standard is "the normal burden of proof . . . in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *V. Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (internal quotations omitted). As the Ninth Circuit has recognized, courts have applied the "clear and convincing" standard in a variety of contexts involving significant deprivations of liberty. *See id.* (collecting cases involving

competency to proceed, deportation, denaturalization, and civil commitment). *See also Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (holding in civil commitment context that "[i]t is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation."). Given the comparably "significant deprivation of liberty" at stake here, Defendants must prove with clear and convincing evidence that Plaintiffs' placement on the on the No Fly List is warranted.

II. Additional Information

Compliance with the Court's order also requires Defendants to provide the following additional information in order to satisfy due process:

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1. Plaintiffs' prior statements. The DHS TRIP letters make clear that Defendants are relying upon some Plaintiffs' alleged statements in order to justify their inclusion on the No Fly List. Defendants must provide all written or recorded statements of each Plaintiff, made to any persons at any time and place, and the substance of any oral statements, if not embodied in a writing. If any statements are recorded, please provide a transcript or audible copy of each recording. *See Dhiab v. Bush*, 2008 WL 4905489 at *2 (D.D.C. Nov. 17, 2008) (ordering, in habeas corpus proceeding brought by individual detained as alleged enemy combatants, disclosure of all statements made or adopted by the petitioner relating to the factual bases for his detention, as well as information regarding the circumstances of such statements) (citing *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) ("we presume counsel . . . has a 'need to know' all Government Information concerning his [or her] client . . .")).

2. Notice of surveillance techniques. The DHS TRIP letters suggest that some or all of the Plaintiffs were placed on the No Fly List based on information obtained or derived from surveillance activities. To the extent that any such information forms any basis for Plaintiffs' inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceeding, Plaintiffs are entitled to notice of the surveillance and the information obtained or derived from it. *See, e.g.*, 50 U.S.C. § 1806(c) (FISA electronic surveillance); 50 U.S.C. § 1825(d) (FISA physical search); 50 U.S.C. § 1842(c) (FISA pen register); 18 U.S.C. § 2518(8)(d) (Title III). Due process also requires that the Plaintiffs be given notice of the surveillance techniques (including, but not limited to, surveillance under Executive Order 12,333) that led to their placement on the No Fly List so that they may seek review of the lawfulness of that surveillance and determine whether Defendants' alleged basis or bases for including them on the No Fly List are derived from it. *See United States v. U.S. District Court (Keith)*, 407 U.S. 297, 92 S. Ct. 2125 (1972). To that end, each Plaintiff hereby asserts his right to notice of information or evidence that

forms any basis for his inclusion on the No Fly List that is the product of unlawful surveillance or was obtained by the exploitation of any unlawful surveillance. *See* 18 U.S.C. § 3504(a). Defendants must therefore "affirm or deny the occurrence of" such surveillance. *See id.*

3. Witness information and statements. The DHS TRIP letters make clear that Defendants are relying on the statements of witnesses to support Plaintiffs' inclusion on the No Fly List. Defendants must therefore provide the names, last known addresses, and telephone numbers of witnesses upon whose statements Defendants are relying. This witness information includes: government agents whose statements the letters describe as fact; all reports relating to Plaintiffs prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating any Plaintiff); the statements of unidentified third parties; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath.

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Individuals facing government sanctions in comparable civil proceedings have a right to such evidence. *See, e.g.*, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963) (holding in bar license revocation context that "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood"); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 611 (N.D. Cal. 1992) (same for revocation of alcohol label certificate). Moreover, such information could prove critical in determining whether any of these witnesses have a history of providing inaccurate or contradictory testimony, or a motive to provide biased or misleading information to law enforcement. It is also necessary both to allow Plaintiffs' counsel to contact such witnesses (in order to independently investigate their claims) and for counsel to determine whether the use of their hearsay statements would be fundamentally fair. *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980) (to constitute substantial evidence to support administrative determination, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility, must have probative value and bear indicia of reliability; factors to be considered include independence or possible bias of declarant, type of hearsay materials submitted, whether statements are signed and sworn to, whether statements are contradicted by direct testimony, availability of declarant, credibility of declarant, and whether hearsay is corroborated); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681-82 (9th Cir. 2005) (holding, in deportation context, that "the government's choice whether to produce a witness or to use a hearsay statement [is not] wholly unfettered" and requiring showing that "despite reasonable efforts, [the government] was unable to secure the presence of the witness at the hearing" prior to use of hearsay evidence); *see*

also Dhiab, 2008 WL 4905489 at *4 (requiring consideration of "whether provision of nonhearsay evidence would unduly burden the movant or interfere with the Government's efforts to protect national security").

4. Promises to witnesses. Defendants must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for any Plaintiff's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *Cf. Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (reaffirming that the failure to disclose evidence favorable to an accused upon request violates due process, and holding that this requirement extends to all witness impeachment evidence); *United Sates v. Shaffer*, 789 F.2d 682 (9th Cir. 1986) (affirming reversal of conviction where prosecution failed to disclose that witness received benefits in exchange for cooperation with government).

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5. Exculpatory evidence. Defendants must provide all evidence, including any statements by any person, tending to: contradict Defendants' evidence in support of their inclusion of Plaintiffs on the No Fly List; show that Plaintiffs do not meet the appropriate criteria for inclusion on the No Fly List; or otherwise establish that Plaintiffs do not merit inclusion on the No Fly List. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (holding in deportation context that failure to disclose exculpatory documents in government file violated due process); *Dhiab*, 2008 WL 4905489 at *1 (ordering, in habeas corpus proceeding brought by alleged enemy combatant, that the government must "disclose to Petitioner all reasonably available evidence in its possession or that the Government can obtain through reasonable diligence that tends materially to undermine the information presented to support the Government's justification").

III. Application of Appropriate Substantive Standard

Finally, the substantive standard that Defendants appear to be using to assess whether each Plaintiff's inclusion on the No Fly List is warranted does not satisfy constitutional requirements, for the reasons set forth below:

1. The criteria cited in the DHS TRIP letters are overbroad. As a threshold matter, they do not require any nexus to aviation security. *See, e.g., Aptheker v. Sec'y of State*, 378 U.S. 500, 517, 84 S. Ct. 1659, 12 L.Ed.2d 992 (1964) (law imposing complete travel ban for members of communist organizations was overbroad and unconstitutional on its face). Because of that, the criteria "sweep[] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and are "not . . . narrowly drawn to prevent the supposed evil." *See id.* at 514. They mandate a significant penalty—inability to travel by air—that is untethered from the (undefined)

"threat" included in the criteria. Similarly, the criteria lack a meaningful temporal limitation. They fail to specify whether and to what extent past conduct can continue to satisfy the standard—whatever that may be—for placement on the No Fly List. They also lack any means for determining at what point, absent new information, an individual ceases to satisfy the criteria.

2. The criteria are unconstitutionally vague on their face and as applied to Plaintiffs. *See United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (statute must be "sufficiently clear so as not to cause persons 'of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application'") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). In particular, terms such as "threat," "represent," and "pose" are undefined and vague, opening the door to subjective, arbitrary, and discriminatory interpretation of the criteria. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). Such ambiguous terms easily encompass conduct that individuals could not have known would lead to their placement on the No Fly List. *See id.* (noting that the void-for-vagueness doctrine exists in part "to avoid punishing people for behavior that they could not have known was illegal").

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Greater certainty as to the meaning of such terms is especially necessary when, as here, a statute "might induce individuals to forego their rights of speech, press, and association" to avoid the risk of penalty. *Scull v. Com. of Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959). Indeed, most of the DHS TRIP letters include allegations related to Plaintiffs' speech or other expressive activity and associations, making it clear that the criteria impermissibly impinge on First Amendment-protected conduct. Defendants may not sanction Plaintiffs for engaging in activity that is itself constitutionally protected, whether by the First Amendment or any other constitutional provision. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982) (government may not penalize someone on the basis of association alone).

3. The criteria fail to utilize the least restrictive means to mitigate the "threat" to which they are addressed. No standard imposing an outright ban on air travel can comply with the Constitution if it is not the least restrictive means available to protect the Government's interest in preventing threats to "civil aviation or national security" that could arise from permitting plaintiffs to fly. *See, e.g.*, *Mohamed v. Holder*, 995 F. Supp. 2d 520, 530 (E.D. Va. 2014) (in a No Fly List case, citing *Aptheker* in refusing to conclude on record before the court that "there are no means less restrictive than an unqualified flight ban to adequately assure flight security"); *Jones v. Blanas*, 393 F.3d, 918, 932 (9th Cir. 2004) (striking down measures to incarcerate civil detainees because government's procedures "[we]re employed to achieve objectives that could be accomplished in so many alternative and less harsh methods"). At a minimum, the Government must show why the utilization of the procedures it

employed to avoid litigation of Plaintiffs' preliminary injunction motion—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

Plaintiffs request that Defendants craft new criteria that remedy these constitutional deficiencies, disclose those criteria to Plaintiffs, and apply those criteria to Defendants' factual allegations using a clear and convincing evidentiary standard.

****

Because Defendants have asked Plaintiffs to provide their responses to the DHS TRIP letters by December 15 or 16, 2014, the additional procedures and information we request should be provided to Plaintiffs no later than December 11, 2014. If Defendants agree to comply with the foregoing requests, Plaintiffs are willing to consider seeking a joint month-long extension of the January 16, 2015 deadline in the court's case management order, Dkt. No. 154 at 2, to accommodate hearings.

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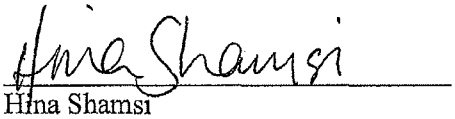
Sincerely yours,



Hina Shamsi
Hugh Handeyside

Ahilan Arulanantham
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017

Steven Wilker
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204

DEPARTMENT OF HOMELAND SECURITY

AUTHORIZATION TO RELEASE INFORMATION TO ANOTHER PERSON

Please complete this form to authorize the Department of Homeland Security (DHS) or its designated DHS Component element to disclose your personal information to another person. You are asked to provide your information only to facilitate the identification and processing of your request. Without your information DHS or its designated DHS Component element may be unable to process your request.

SECTION I. Personal Information

Name Mohamed Sheikh Abdirahman Kariye		
Address See Representative's Address, below		
City	State	Zip Code
Country USA	Telephone Number(s) +1 (212) 549-2500	
Date of Birth 12/01/1961	Place of Birth (city, state, country) Somalia	

SECTION II. Representative Information

Name Hugh Handeyside, Staff Attorney, American Civil Liberties Union Foundation		
Address 125 Broad Street, 18th Floor		
City New York	State NY	Zip Code 10004
Country United States of America	Telephone Number(s) +1 (212) 549-2500	

Pursuant to the Privacy Act of 1974 (5 U.S.C. §552a(b)), I authorize DHS and/or its DHS Component elements to release any and all information relating to my redress request to my representative .

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above in Section I. I understand that falsification of this statement is punishable under the provisions of 18 U.S.C. §1001 by a fine of not more than $10,000 or by imprisonment of not more than five years, or both.

Signature _____ Date 12/13/2014

PRIVACY ACT STATEMENT:

AUTHORITY: Title IV of the Intelligence Reform and Terrorism Prevention Act of 2004 authorizes DHS to take security measures to protect travel, and under Subtitle B, Section 4012(1)(G), the Act directs DHS to provide appeal and correction opportunities for travelers whose information may be incorrect.

PRINCIPAL PURPOSE(S): DHS will use this information in order to assist you with seeking redress in connection with travel.

ROUTINE USE(S): DHS will use and disclose this information to appropriate governmental agencies to verify your identity, distinguish your identity from that of another individual, such as someone included on a watch list, and/or address your redress request. Additionally, limited information may be shared with non-governmental entities, such as air carriers, where necessary for the sole purpose of carrying out your redress request.

DISCLOSURE: Furnishing this information is voluntary; however DHS may not be able to process your redress request without the information requested.

EXHIBIT C

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 22202-4220

Homeland Security

January 21, 2015

Mr. Hugh Handeyside
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

RE: Mohamed Sheikh Abdirahman Kariye
Redress Control Number: 2097225

Dear Mr. Handeyside:

The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) received your response of December 16, 2014, providing the reasons supporting your client's belief that his placement on the No Fly List was in error. DHS TRIP provided your submission to the Transportation Security Administration (TSA) for review. Attached, please find a TSA determination regarding your client's redress inquiry.

Sincerely,

Deborah O. Moore

Deborah Moore
Director, DHS Traveler Redress Inquiry Program

Office of the Administrator
U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20598-6001

Transportation Security Administration

DECISION AND ORDER

On December 16, 2014, Mohamed Sheikh Abdirahman Kariye, through his counsel, submitted a response to the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) providing reasons why he believed his placement on the No Fly List was in error and requesting his removal from that List. For the reasons set forth below, I determine that Mr. Kariye should remain on the No Fly List.

On May 5, 2010, Mr. Kariye submitted a redress inquiry to DHS TRIP describing his travel difficulties. On August 18, 2010, DHS TRIP informed Mr. Kariye it had conducted a review of his records and determined that no changes were warranted at that time. On November 26, 2014, DHS TRIP informed Mr. Kariye that it was reevaluating his redress inquiry. DHS TRIP further informed Mr. Kariye that he was on the No Fly List because he had been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it had been determined that Mr. Kariye represented a threat of committing an act of international terrorism against a U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.

In addition, DHS TRIP provided Mr. Kariye with a summary of the unclassified facts available for release that supported his placement on the No Fly List and encouraged him to respond with relevant information if he believed the determination was in error or if he felt the information provided to him was inaccurate. DHS TRIP withheld certain information because additional disclosure would risk harm to national security and jeopardize law enforcement activities. On December 16, 2014, Mr. Kariye, through his counsel, responded that he believed his placement on the No Fly List was not warranted and provided representations he believed to be relevant to DHS TRIP's determination. Mr. Kariye did not submit any evidence in support of any of these representations.

Upon review of all of the information Mr. Kariye has submitted to DHS TRIP, as well as other information available related to Mr. Kariye's placement on the No Fly List, I find that Mr. Kariye may be a threat to civil aviation or national security; in particular, I find that he represents a threat of committing an act of international terrorism against a U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government. I therefore conclude that Mr. Kariye is properly placed on the No Fly List and no change in status is warranted.

Consistent with the protection of national security and law enforcement activities, I can provide the following explanation of my decision:

1. I have considered Mr. Kariye's contention that he "is not now, and has never been, a threat to U.S. Government facilities, personnel, or aviation security, within the borders of the U.S. or abroad." I conclude, however, that the information available supports Mr. Kariye's placement on the No Fly List.

2. I have also considered: (i) Mr. Kariye's contention that he did not engage in hostile action against U.S. personnel or facilities while he was in Pakistan or Afghanistan, (ii) his contention concerning his associations with the Global Relief Foundation, (iii) his contention that he does not recall ever discussing criminal activity with the "Portland Seven" defendants, (iv) his contention that he never knowingly provided financial support to anyone for criminal activities, and (v) his contention that the statements made by others against him are not credible. I conclude, however, that the information available supports Mr. Kariye's placement on the No Fly List.

These conclusions do not constitute the entire basis of my decision, but I am unable to provide additional information. Without specifying all possible grounds for withholding information in this case, information has been withheld for the following particular reasons:

- additional disclosure would risk harm to national security; and
- additional disclosure would jeopardize law enforcement activities.

No Fly List determinations, including this one, are not based solely on the exercise of Constitutionally protected activities, such as the exercise of protected First Amendment activity.

This determination constitutes a final order and is reviewable in a United States Court of Appeals pursuant to 49 U.S.C. § 46110 or as otherwise appropriate by law. A petition for review must be filed within 60 days of issuance of this order.

1 - 21 - 2015
DATED

Melvin J. Carraway
Acting Administrator
Transportation Security Administration

Exhibit A

(Redacted Version)

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

November 24, 2014

Mr. Stephen Durga Persaud
c/o Nusrat Jahan Choudhury
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

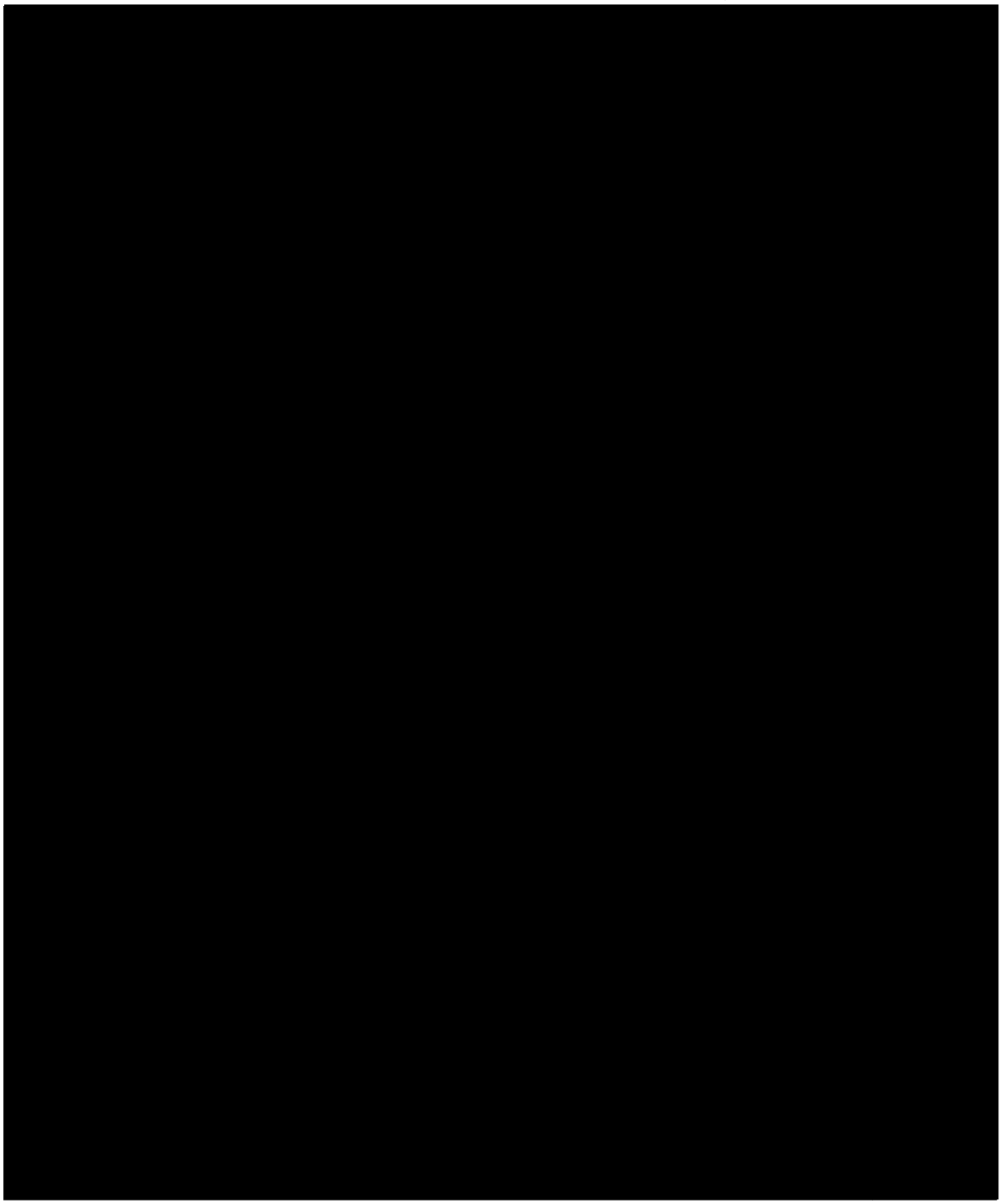
Redress Control Number: 2102070

Dear Mr. Persaud:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.

[redacted]



We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation with court-imposed deadlines, such information should be submitted by December 15, 2014. Information you submit will be considered before a final determination is made. The final

determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Deborah O. Moore
Director, DHS TRIP

Exhibit B

(Redacted Version)

LAW OFFICE OF WILLIAM GENEGO

MAIN STREET LAW BUILDING

2115 MAIN STREET

SANTA MONICA, CALIFORNIA 90405

William J. Genego
bill@genegolaw.com

Telephone 310-399-3259
Facsimile 310-392-9029

January 5, 2015

VIA FED EX

Deborah O. Moore, Director, DHS TRIP
U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Re: Stephen Persaud, Redress Control Number 2102070

Dear Ms. Moore:

I am writing as counsel for Stephen Persaud to respond to your November 24, 2014 letter to him, care of his former counsel, in which you provided "an unclassified summary that includes reasons" for his placement on the No Fly List. DHS TRIP Letter, attached as Exhibit 1. Because I just recently became Mr. Persaud's counsel, I was not able to respond by the December 15, 2015 date requested by your letter. [1]

I am submitting this response in light of the Court's order in *Latif v. Holder*, Case No. 10-Civ-750-BR (D. Or.) directing that the Government conduct an administrative review "as soon as practicable," of Mr. Persaud's (and the other plaintiffs'), inclusion on the No Fly List. Dkt. 152 at 2.

In doing so, however, I note that your letter lacks information that is critical to Mr. Persaud's ability to respond meaningfully to the allegations in it, and that the Government's revised No Fly List administrative redress system remains inadequate. The Court in *Latif* recognized that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests" and imposes a

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[1] Included with this letter is a DHS Form 590 authorizing release of information regarding Mr. Persaud to me.

"major burden" on those interests. Dkt. No. 136 at 30. The Court ordered the Government to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61.

The Government's revised system does not provide Mr. Persaud the process he is due under the Constitution or the Court's order, nor does it comply with the requirements of the Administrative Procedure Act. Among other defects, the substantive criteria cited for Mr. Persaud's inclusion on the No Fly List are overbroad and unconstitutionally vague, and the redress process fails to offer procedural protections that are necessary to vindicate Mr. Persaud's due process rights.

On December 5, 2014, Mr. Persaud requested through counsel that the Defendants in *Latif* provide essential procedural protections, additional information, and a constitutionally compliant substantive standard for the revised redress process. Letter, attached as Exhibit 2. On December 17, the Government responded to that letter but did not provide the requested additional information or procedural protections.

Thus, Mr. Persaud has not been given a "meaningful opportunity to respond" to the reasons for his inclusion on the No Fly List. *See Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); *see also Latif*, Dkt. 136 at 62 (citing *Al Haramain*). Absent such a meaningful opportunity, Mr. Persaud's ability to rebut the allegations is critically impaired, and any response from him is necessarily incomplete. This response is thus submitted subject to the objections and requests for further information set forth below, as well as those set forth in Exhibit 2. Mr. Persaud also reserves the right to supplement any record being created by the Government with such additional information that the Government provides in response to the requests in Exhibit 2, or to discovery requests or an order of the Court in *Latif*, or that we discover through our own investigation.

I. The Redress System Remains Inadequate.

The Government's revised No Fly List redress system does not comply with the Constitution or the *Latif* Court's order for two primary reasons.

First, it utilizes a substantive standard that is overbroad and vague. The DHS TRIP letter to Mr. Persaud states:

> It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Ex. 1 at 1. The letter contains no further explanation of the standard or its terms.

This standard is overbroad, in that it does not require any nexus to aviation security and lacks a meaningful temporal limitation, and is also unconstitutionally vague on its face. *See* Ex. 2 at 6-7.

Additionally, the standard fails to utilize the least restrictive means to mitigate the "threat" to which it is addressed. *See* Ex. 2 at 7-8. Nothing in the letter shows, or even attempts to show, that utilization of the procedures the Government employed to avoid litigation of the preliminary injunction motion filed by Mr. Persaud and others in *Latif* – including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures – would not suffice to satisfy its interests in aviation security.

These defects render the substantive standard used to place Mr. Persaud on the No Fly List unconstitutional. Mr. Persaud cannot meaningfully respond to allegations purporting to justify placement on the No Fly List when the standard for that placement is ambiguous, overbroad, and open-ended.

The second major defect in the revised redress system is that it lacks necessary procedural protections, necessary to secure Mr. Persaud's core due process rights. The Court in *Latif* ordered the Government to revise the redress system in large part because "the DHS TRIP process . . . contains a high risk of erroneous deprivation of Plaintiffs' constitutionally-protected interests." *See* Dkt. 136 at 39. That risk remains high under the revised system that the Government has applied to Mr. Persaud for a number of reasons.

First, the process does not provide for a hearing at which live witness testimony may be presented and tested under cross-examination. At any hearing, Mr. Persaud would credibly testify that he presents no threat to aviation security and respond to any specific allegations made against him. However, without a hearing, Mr. Persaud will have no ability either to establish his own credibility through live testimony or to challenge the testimony of the Government's witnesses through cross-examination. *See* Ex. 2 at 3.

Second, the disclosure to Mr. Persaud is incomplete. The DHS TRIP letter states that it "includes reasons supporting" his placement on the No Fly List, and that the Government is "unable to provide additional disclosures" beyond those in the letter.[2] Ex. 1 at 1, 2. An incomplete statement makes it impossible for Mr. Persaud to refute all of the Government's bases for placing him on the List. Without a complete statement of reasons and a detailed statement of withheld evidence, Mr. Persaud cannot meaningfully respond to the allegations in the letter. Nor can he take steps, such as the retention of counsel with a security clearance, to deal with information withheld as classified where he does not know whether such withholdings have occurred. *See* Ex. 2 at 2-3 (citing Dkt. 136 at 61-62).

Third, the DHS TRIP letter contains no indication what, if any, evidentiary standard the Government used to place Mr. Persaud on the No Fly List, or to review that placement. As explained in Exhibit 2, the Constitution requires that the Government use a "clear and convincing evidence" standard in this context. Ex. 2 at 3-4.

Fourth, the DHS TRIP letter fails to explain how the allegations in it satisfy appropriately narrow criteria for inclusion on the No Fly List.

As with the substantive standard, these procedural defects preclude Mr. Persaud from responding to the DHS TRIP letter meaningfully and drive home that the Government's revised redress system remains constitutionally deficient.

II. Mr. Persaud Cannot Respond Meaningfully Without Further Information.

The allegations in the DHS TRIP letter reveal specific categories of information that the Government must provide to Mr. Persaud in order to satisfy due process:

1. Mr. Persaud's prior statements. The Government is relying on Mr. Persaud's alleged statements, each of which was purportedly made years ago, in order to justify his inclusion on the No Fly List. *See* Ex. 1 at p. 2. Mr. Persaud must be provided with all of his written or recorded statements, made to any persons at

---

[2] The letter also fails to notify Mr. Persaud of the entity responsible for determining that he meets the standard for inclusion on the No Fly List. *See* Ex. 1 at 1 ("*it has been determined* that you are an individual who represents a threat...") (emphasis added). Mr. Persaud therefore cannot assess the institutional competence of the deciding entity or identify specific policies, regulations, and statutes that may govern such a determination.

any time and place, and the substance of any oral statements, if not embodied in a writing. If any statements are recorded, he should be given a transcript or audible copy of each recording. *See* Ex. 2 at 4.

2. Witness information and statements. The DHS TRIP letter indicates that the Government is relying on the statements of a witness or witnesses to support Mr. Persaud's inclusion on the No Fly List. Ex. 1 at 1-2. The Government must therefore provide the names and contact information for any such witnesses, including government agents whose statements the letters describe as fact; all reports relating to Mr. Persaud prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating Mr. Persaud); the statements of unidentified third parties; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath, and the conditions and circumstances under which the statement was made or obtained. *See* Ex. 2 at 5-6.

3. Promises to witnesses. The Government must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for Mr. Persaud's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *See id.* at 6.

4. Exculpatory evidence. The Government must provide all evidence, including any statements by any person, tending to: contradict the evidence and allegations advanced in support of Mr. Persaud's inclusion on the No Fly List; show that Mr. Persaud does not meet the appropriate criteria for inclusion on the List; or otherwise establish that Mr. Persaud does not merit inclusion on the List. *See id.*

5. Notice of surveillance techniques. To the extent that any information obtained or derived from surveillance activities forms any basis for Mr. Persaud's inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceeding, Mr. Persaud is entitled to notice of the surveillance and the information obtained or derived from it. He is also entitled to notice of information or evidence that is the product of unlawful surveillance. *See id.* at 4-5.

6. Additionally, to the extent that the Government is relying on any information, whether or not disclosed in the DHS TRIP letter, which does not fall

under any of the preceding categories, such information must also be provided to Mr. Persaud.

The failure to provide this information unfairly prejudices Mr. Persaud's due process right to challenge his placement on the No Fly List.

III. The Allegations Against Mr. Persaud Do Not Justify His Continued Inclusion On The No Fly List.

For the foregoing reasons, the revised system the Government is using to review Mr. Persaud's inclusion on the No Fly List is constitutionally inadequate. Mr. Persaud cannot respond to the allegations in the DHS TRIP letter effectively, and he will not receive the process he is due, unless the Government remedies the deficiencies set forth above.

Nonetheless, because the Court in *Latif* has directed the Government to complete its administrative review of the plaintiffs' DHS TRIP redress inquiries before the Court considers substantive motions on the merits, I submit this disclosure of Mr. Persaud's expected testimony on his behalf. I do so without waiving any of the objections to the legality or constitutionality of the revised redress process, and without conceding the adequacy of the notice and process afforded to Mr. Persaud.

If called to testify at an evidentiary hearing regarding his placement on the No Fly List, it is expected that Mr. Persaud's testimony would include the following:

1. He does not pose, and has never posed, a threat of engaging in an unlawful violent act of terrorism.
2. He does not advocate violence.
3. He has no intention of engaging in, or providing support for, violent unlawful activity anywhere in the world.

[redacted]

5. He does not knowingly have ties to terrorist organizations or individual terrorists.

Mr. Persaud reserves the right to provide additional information upon receipt of further information as to the nature of the allegations against him, the sources of evidence on which the government has relied, and other information specified above. He also reserves the right to present evidence of his good moral character and opposition to violence through statements from other witnesses at the appropriate time.

For the foregoing reasons, Mr. Persaud's placement on the No Fly List was in error, and he should promptly be removed from the No Fly List.

Very truly yours,

WILLIAM J. GENEGO

WJG/
Attachments:
DHS Form 590
Exhibit 1 (November 24, 2014 DHS letter)
Exhibit 2 (December 5, 2014 letter of Plaintiffs' counsel)

DEPARTMENT OF HOMELAND SECURITY

AUTHORIZATION TO RELEASE INFORMATION TO ANOTHER PERSON

Please complete this form to authorize the Department of Homeland Security (DHS) or its designated DHS Component element to disclose your personal information to another person. You are asked to provide your information only to facilitate the identification and processing of your request. Without your information DHS or its designated DHS Component element may be unable to process your request.

SECTION I. Personal Information

Name: Stephen Persaud		
Address: c/o William Genego, Attorney; Law Office of William Genego		
City: Santa Monica	State: CA	Zip Code: 90405
Country: United States	Telephone Number(s): +1 (310) 399-3259	
Date of Birth: 11/02/1980	Place of Birth (city, state, country): New York, New York	

SECTION II. Representative Information

Name: William Genego, Attorney - Law Office of William Genego		
Address: 2115 Main Street		
City: Santa Monica	State: CA	Zip Code: 90405
Country: United States	Telephone Number(s): +1 (310) 399-3259	

Pursuant to the Privacy Act of 1974 (5 U.S.C. §552a(b)), I authorize DHS and/or its DHS Component elements to release any and all information relating to my redress request to my representative .

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above in Section I. I understand that falsification of this statement is punishable under the provisions of 18 U.S.C. §1001 by a fine of not more than $10,000 or by imprisonment of not more than five years, or both.

Signature Stephen Persaud Date 12/27/14

PRIVACY ACT STATEMENT:

AUTHORITY: Title IV of the Intelligence Reform and Terrorism Prevention Act of 2004 authorizes DHS to take security measures to protect travel, and under Subtitle B, Section 4012(1)(G), the Act directs DHS to provide appeal and correction opportunities for travelers whose information may be incorrect.

PRINCIPAL PURPOSE(S): DHS will use this information in order to assist you with seeking redress in connection with travel.

ROUTINE USE(S): DHS will use and disclose this information to appropriate governmental agencies to verify your identity, distinguish your identity from that of another individual, such as someone included on a watch list, and/or address your redress request. Additionally, limited information may be shared with non-governmental entities, such as air carriers, where necessary for the sole purpose of carrying out your redress request.

DISCLOSURE: Furnishing this information is voluntary; however DHS may not be able to process your redress request without the information requested.

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

November 24, 2014

Mr. Stephen Durga Persaud
c/o Nusrat Jahan Choudhury
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Redress Control Number: 2102070

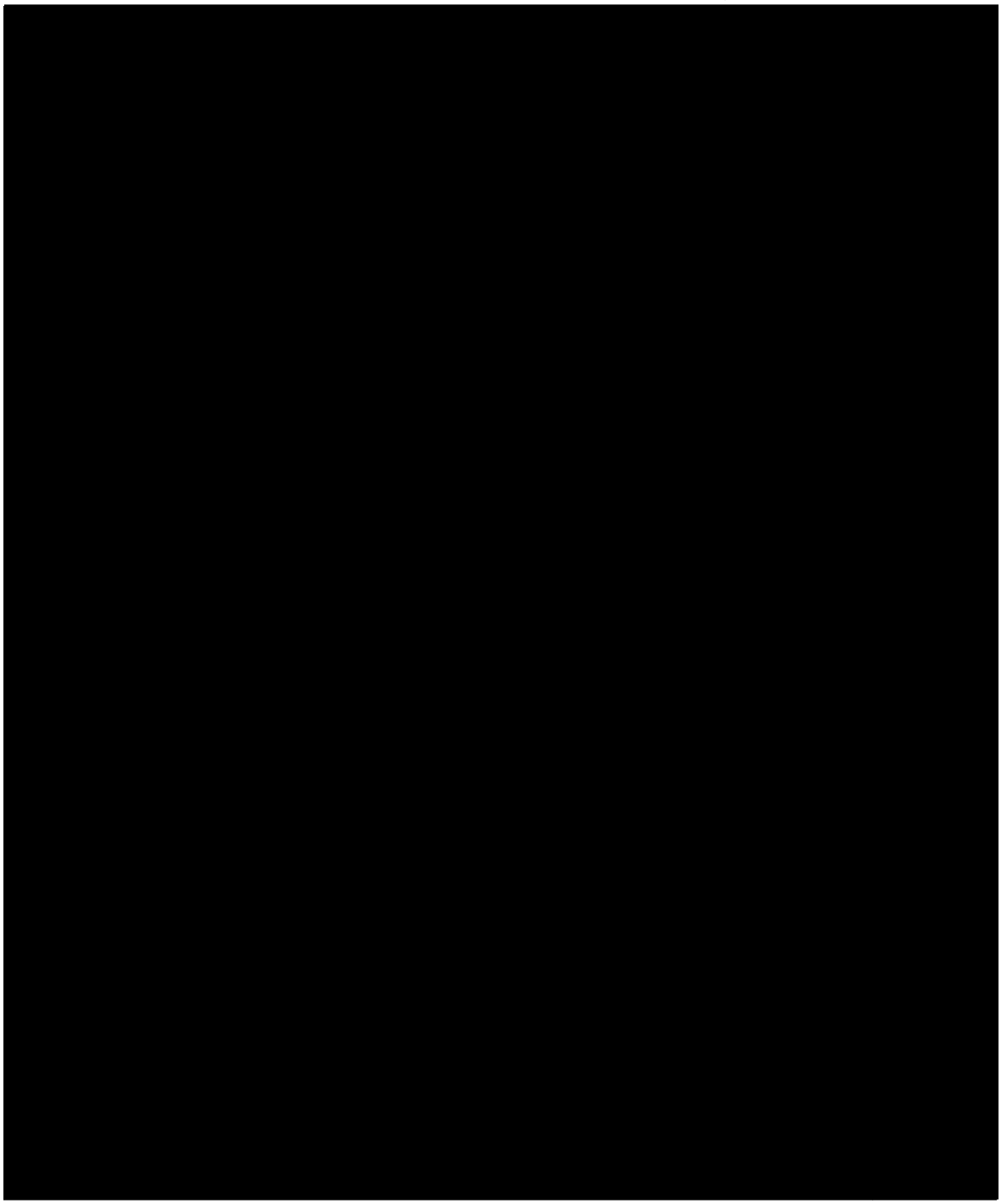
Dear Mr. Persaud:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.

[redacted]

Exhibit 1



We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation with court-imposed deadlines, such information should be submitted by December 15, 2014. Information you submit will be considered before a final determination is made. The final

determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Deborah O. Moore
Director, DHS TRIP

NATIONAL SECURITY PROJECT

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

December 5, 2014

VIA EMAIL

Amy Powell
Brigham J. Bowen
Adam D. Kirschner
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Re: *Latif v. Holder*, Case No. 10-Civ.-750-BR

Dear Counsel:

After reviewing the DHS TRIP letters sent to the Plaintiffs in this case who remain on the No Fly List, we write to make three requests regarding the administrative process Defendants are using for these Plaintiffs.[1] First, we request that Defendants provide certain necessary procedural protections as part of the administrative process. Second and relatedly, we request that Defendants provide additional information related to the basis or bases for Plaintiffs' inclusion on the No Fly List. Third, we request that Defendants craft, apply, and disclose to Plaintiffs a constitutionally-compliant substantive standard for inclusion on the No Fly List. Such a standard must be narrower and more specific than the vague and over-broad standard that Defendants appear to be employing here.

In addition, as we discussed with Amy and Brigham before we received the DHS TRIP letters, we seek to enter into a stipulation and protective order to prevent public disclosure of the DHS TRIP letters and the additional information we are requesting. The need we anticipated for such a stipulation and protective order is confirmed by the inflammatory, piecemeal allegations in the letters. We will follow up with a call to discuss the content of the stipulation and protective order.

[1] It is our understanding that those Plaintiffs are Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble, Amir Meshal, Stephen Persaud, and Steven Washburn, because those are the only Plaintiffs for whom Defendants have provided DHS TRIP letters. If our understanding is incorrect, please inform us of that fact immediately.

As Defendants will recall, the Court's order of June 24, 2014 (Dkt. 136) reiterated that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests," *id.* at 30; held that inclusion on the No Fly List imposes a "major burden" on those interests, *id.*; and required Defendants to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61. The DHS TRIP letters sent to Plaintiffs, to which Defendants have asked Plaintiffs to respond by December 15 or 16, 2014, do not constitute process sufficient to satisfy due process and APA requirements under the Court's order. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976); 5 U.S.C. §§ 555, 556 (governing procedures and production of evidence in administrative proceedings). In particular, the information Defendants have provided does not suffice to permit any of the six Plaintiffs a "meaningful opportunity to respond" to the reasons for their inclusion on the No Fly List. *Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); *Kindhearts v. Geithner*, 647 F. Supp. 2d 857, 906 (N.D. Ohio 2009) (requiring "meaningful opportunity to be heard" by provision of a "post-deprivation hearing"); *see also* Dkt. 136 at 62 (citing *Al Haramain*).

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For that reason, we request the following additional procedures and categories of information (if in the possession of any branch of the federal government), each of which is necessary to comply with the Court's order:

I. Additional Procedural Protections

Compliance with the Court's order requires Defendants to provide the following procedural protections:

1. A *complete* statement of reasons. The DHS TRIP letters suggest that there may be reasons other than those Defendants have provided on which they are relying to justify Plaintiffs' inclusion on the No Fly List. The Court's order plainly requires the provision of "*the* reasons for" Plaintiffs' inclusion, Dkt. 136 at 61 (emphasis added), and an incomplete statement makes it impossible for Plaintiffs to refute all of Defendants' bases for placing Plaintiffs on the List.

2. A *complete* statement regarding withheld evidence and the basis for withholding any such evidence. The DHS TRIP letters suggest that there *may* be both undisclosed evidence on which the Government has relied to justify Plaintiffs' inclusion on the No Fly List and undisclosed claims of privilege used to justify the withholding of that evidence. However, the Court's order indicates that Plaintiffs must know when evidence has been withheld and on what grounds so that they may meaningfully respond, including by requesting "disclos[ure] [of] the classified reasons to properly-cleared counsel," Dkt. 136 at 61, and whether to seek judicial review of any privilege assertion. *Id.* at 62.

Obviously, Plaintiffs cannot take those steps without knowing at least in summary form what evidence Defendants have chosen to rely upon without disclosing it, and the reasons for any such withholding.

3. An explanation of how Defendants' allegations satisfy appropriately narrow criteria for inclusion on the No Fly List. The DHS TRIP letters fail to explain if and how the allegations made in them relate to the substantive criteria for inclusion on the No Fly List. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 230 (D.C. Cir. 2010) (requiring the Secretary of State to explain how information relied upon for designation as a terrorist organization related to specific portion of governing statute). Without such an explanation, Plaintiffs are left to guess as to how their alleged conduct satisfies the substantive standards for inclusion on the list.

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4. A hearing at which live witness testimony may be presented and tested under cross-examination. Due process requires hearings in contexts in which far less is at stake than inclusion on the No Fly List. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 697, 99 S. Ct. 2545 (1979) (in social security context, paper review failed to satisfy due process because determination at issue "usually requires an assessment of the recipient's credibility"). Without a hearing, Plaintiffs have no ability either to establish their own credibility through live testimony or to challenge the testimony of Defendants' witnesses through cross-examination. Such live testimony is critical in situations, such as these, where credibility is central to any assessment of whether Plaintiffs may be deprived of their constitutionally protected liberty interest through inclusion on the No Fly List. *Cf. Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (holding that credibility determinations in deportation cases require a hearing because "[a]ll aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.").

5. Application of a "clear and convincing" standard of proof where Defendants bear the burden of establishing that inclusion on the No Fly List is warranted. The DHS TRIP letters contain no articulation of any standard or burden of proof. The "clear and convincing evidence" standard is "the normal burden of proof . . . in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *V. Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (internal quotations omitted). As the Ninth Circuit has recognized, courts have applied the "clear and convincing" standard in a variety of contexts involving significant deprivations of liberty. *See id.* (collecting cases involving

competency to proceed, deportation, denaturalization, and civil commitment). *See also Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (holding in civil commitment context that "[i]t is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation."). Given the comparably "significant deprivation of liberty" at stake here, Defendants must prove with clear and convincing evidence that Plaintiffs' placement on the on the No Fly List is warranted.

II. Additional Information

Compliance with the Court's order also requires Defendants to provide the following additional information in order to satisfy due process:

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1. Plaintiffs' prior statements. The DHS TRIP letters make clear that Defendants are relying upon some Plaintiffs' alleged statements in order to justify their inclusion on the No Fly List. Defendants must provide all written or recorded statements of each Plaintiff, made to any persons at any time and place, and the substance of any oral statements, if not embodied in a writing. If any statements are recorded, please provide a transcript or audible copy of each recording. *See Dhiab v. Bush*, 2008 WL 4905489 at *2 (D.D.C. Nov. 17, 2008) (ordering, in habeas corpus proceeding brought by individual detained as alleged enemy combatants, disclosure of all statements made or adopted by the petitioner relating to the factual bases for his detention, as well as information regarding the circumstances of such statements) (citing *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) ("we presume counsel . . . has a 'need to know' all Government Information concerning his [or her] client . . . .")).

2. Notice of surveillance techniques. The DHS TRIP letters suggest that some or all of the Plaintiffs were placed on the No Fly List based on information obtained or derived from surveillance activities. To the extent that any such information forms any basis for Plaintiffs' inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceeding, Plaintiffs are entitled to notice of the surveillance and the information obtained or derived from it. *See, e.g.*, 50 U.S.C. § 1806(c) (FISA electronic surveillance); 50 U.S.C. § 1825(d) (FISA physical search); 50 U.S.C. § 1842(c) (FISA pen register); 18 U.S.C. § 2518(8)(d) (Title III). Due process also requires that the Plaintiffs be given notice of the surveillance techniques (including, but not limited to, surveillance under Executive Order 12,333) that led to their placement on the No Fly List so that they may seek review of the lawfulness of that surveillance and determine whether Defendants' alleged basis or bases for including them on the No Fly List are derived from it. *See United States v. U.S. District Court (Keith)*, 407 U.S. 297, 92 S. Ct. 2125 (1972). To that end, each Plaintiff hereby asserts his right to notice of information or evidence that

forms any basis for his inclusion on the No Fly List that is the product of unlawful surveillance or was obtained by the exploitation of any unlawful surveillance. *See* 18 U.S.C. § 3504(a). Defendants must therefore "affirm or deny the occurrence of" such surveillance. *See id.*

3. Witness information and statements. The DHS TRIP letters make clear that Defendants are relying on the statements of witnesses to support Plaintiffs' inclusion on the No Fly List. Defendants must therefore provide the names, last known addresses, and telephone numbers of witnesses upon whose statements Defendants are relying. This witness information includes: government agents whose statements the letters describe as fact; all reports relating to Plaintiffs prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating any Plaintiff); the statements of unidentified third parties; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath.

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Individuals facing government sanctions in comparable civil proceedings have a right to such evidence. *See, e.g.*, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963) (holding in bar license revocation context that "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood"); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 611 (N.D. Cal. 1992) (same for revocation of alcohol label certificate). Moreover, such information could prove critical in determining whether any of these witnesses have a history of providing inaccurate or contradictory testimony, or a motive to provide biased or misleading information to law enforcement. It is also necessary both to allow Plaintiffs' counsel to contact such witnesses (in order to independently investigate their claims) and for counsel to determine whether the use of their hearsay statements would be fundamentally fair. *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980) (to constitute substantial evidence to support administrative determination, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility, must have probative value and bear indicia of reliability; factors to be considered include independence or possible bias of declarant, type of hearsay materials submitted, whether statements are signed and sworn to, whether statements are contradicted by direct testimony, availability of declarant, credibility of declarant, and whether hearsay is corroborated); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681-82 (9th Cir. 2005) (holding, in deportation context, that "the government's choice whether to produce a witness or to use a hearsay statement [is not] wholly unfettered" and requiring showing that "despite reasonable efforts, [the government] was unable to secure the presence of the witness at the hearing" prior to use of hearsay evidence); *see*

also Dhiab, 2008 WL 4905489 at *4 (requiring consideration of "whether provision of nonhearsay evidence would unduly burden the movant or interfere with the Government's efforts to protect national security").

4. Promises to witnesses. Defendants must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for any Plaintiff's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *Cf. Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (reaffirming that the failure to disclose evidence favorable to an accused upon request violates due process, and holding that this requirement extends to all witness impeachment evidence); *United Sates v. Shaffer*, 789 F.2d 682 (9th Cir. 1986) (affirming reversal of conviction where prosecution failed to disclose that witness received benefits in exchange for cooperation with government).

5. Exculpatory evidence. Defendants must provide all evidence, including any statements by any person, tending to: contradict Defendants' evidence in support of their inclusion of Plaintiffs on the No Fly List; show that Plaintiffs do not meet the appropriate criteria for inclusion on the No Fly List; or otherwise establish that Plaintiffs do not merit inclusion on the No Fly List. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (holding in deportation context that failure to disclose exculpatory documents in government file violated due process); *Dhiab*, 2008 WL 4905489 at *1 (ordering, in habeas corpus proceeding brought by alleged enemy combatant, that the government must "disclose to Petitioner all reasonably available evidence in its possession or that the Government can obtain through reasonable diligence that tends materially to undermine the information presented to support the Government's justification").

III. Application of Appropriate Substantive Standard

Finally, the substantive standard that Defendants appear to be using to assess whether each Plaintiff's inclusion on the No Fly List is warranted does not satisfy constitutional requirements, for the reasons set forth below:

1. The criteria cited in the DHS TRIP letters are overbroad. As a threshold matter, they do not require any nexus to aviation security. *See, e.g.*, *Aptheker v. Sec'y of State*, 378 U.S. 500, 517, 84 S. Ct. 1659, 12 L.Ed.2d 992 (1964) (law imposing complete travel ban for members of communist organizations was overbroad and unconstitutional on its face). Because of that, the criteria "sweep[] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and are "not . . . narrowly drawn to prevent the supposed evil." *See id.* at 514. They mandate a significant penalty—inability to travel by air—that is untethered from the (undefined)

"threat" included in the criteria. Similarly, the criteria lack a meaningful temporal limitation. They fail to specify whether and to what extent past conduct can continue to satisfy the standard—whatever that may be—for placement on the No Fly List. They also lack any means for determining at what point, absent new information, an individual ceases to satisfy the criteria.

2. The criteria are unconstitutionally vague on their face and as applied to Plaintiffs. *See United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (statute must be "sufficiently clear so as not to cause persons 'of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application'") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). In particular, terms such as "threat," "represent," and "pose" are undefined and vague, opening the door to subjective, arbitrary, and discriminatory interpretation of the criteria. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). Such ambiguous terms easily encompass conduct that individuals could not have known would lead to their placement on the No Fly List. *See id.* (noting that the void-for-vagueness doctrine exists in part "to avoid punishing people for behavior that they could not have known was illegal").

Greater certainty as to the meaning of such terms is especially necessary when, as here, a statute "might induce individuals to forego their rights of speech, press, and association" to avoid the risk of penalty. *Scull v. Com. of Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959). Indeed, most of the DHS TRIP letters include allegations related to Plaintiffs' speech or other expressive activity and associations, making it clear that the criteria impermissibly impinge on First Amendment-protected conduct. Defendants may not sanction Plaintiffs for engaging in activity that is itself constitutionally protected, whether by the First Amendment or any other constitutional provision. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982) (government may not penalize someone on the basis of association alone).

3. The criteria fail to utilize the least restrictive means to mitigate the "threat" to which they are addressed. No standard imposing an outright ban on air travel can comply with the Constitution if it is not the least restrictive means available to protect the Government's interest in preventing threats to "civil aviation or national security" that could arise from permitting plaintiffs to fly. *See, e.g.*, *Mohamed v. Holder*, 995 F. Supp. 2d 520, 530 (E.D. Va. 2014) (in a No Fly List case, citing *Aptheker* in refusing to conclude on record before the court that "there are no means less restrictive than an unqualified flight ban to adequately assure flight security"); *Jones v. Blanas*, 393 F.3d, 918, 932 (9th Cir. 2004) (striking down measures to incarcerate civil detainees because government's procedures "[we]re employed to achieve objectives that could be accomplished in so many alternative and less harsh methods"). At a minimum, the Government must show why the utilization of the procedures it

employed to avoid litigation of Plaintiffs' preliminary injunction motion—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

Plaintiffs request that Defendants craft new criteria that remedy these constitutional deficiencies, disclose those criteria to Plaintiffs, and apply those criteria to Defendants' factual allegations using a clear and convincing evidentiary standard.

****

Because Defendants have asked Plaintiffs to provide their responses to the DHS TRIP letters by December 15 or 16, 2014, the additional procedures and information we request should be provided to Plaintiffs no later than December 11, 2014. If Defendants agree to comply with the foregoing requests, Plaintiffs are willing to consider seeking a joint month-long extension of the January 16, 2015 deadline in the court's case management order, Dkt. No. 154 at 2, to accommodate hearings.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely yours,

Hina Shamsi
Hugh Handeyside

Ahilan Arulanantham
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017

Steven Wilker
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204

Exhibit C

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 22202-4220

Homeland Security

January 28, 2015

Mr. William J. Genego
Law Office of William Genego
2115 Main Street
Santa Monica, CA 90405

RE: Stephen Durga Persaud
Redress Control Number: 2102070

Dear Mr. Genego:

The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) received your response of January 5, 2015, providing the reasons supporting your client's belief that his placement on the No Fly List was in error. DHS TRIP provided your submission to the Transportation Security Administration (TSA) for review. Attached, please find a TSA determination regarding your client's redress inquiry.

Sincerely,

Deborah D. Moore

Deborah Moore
Director, DHS Traveler Redress Inquiry Program

Office of the Administrator
U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20598-6001

Transportation Security Administration

DECISION AND ORDER

On January 5, 2015, Stephen Durga Persaud, through his counsel, submitted a response to the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) providing reasons why he believed his placement on the No Fly List was in error and requesting his removal from that List. For the reasons set forth below, I determine that Mr. Persaud should remain on the No Fly List.

On June 14, 2010, Mr. Persaud submitted an inquiry to DHS TRIP describing his travel difficulties. On October 14, 2010, DHS TRIP informed Mr. Persaud it had conducted a review of his records and determined that no changes were warranted at that time. On November 24, 2014, DHS TRIP informed Mr. Persaud that it was reevaluating his redress inquiry. DHS TRIP informed Mr. Persaud that he was on the No Fly List because he had been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it had been determined that he was an individual who represents a threat of engaging in or conducting a violent act of terrorism and who was operationally capable of doing so.

In addition, DHS TRIP provided Mr. Persaud with a summary of the unclassified facts available for release that supported his placement on the No Fly List and encouraged him to respond with relevant information if he believed the determination was in error or if he felt the information provided to him was inaccurate. DHS TRIP withheld certain information because

additional disclosure would risk harm to national security and jeopardize law enforcement activities. On January 5, 2015, Mr. Persaud, through his counsel, responded that he believed his placement on the No Fly List was not warranted and provided representations he believed to be relevant to DHS TRIP's determination. Mr. Persaud did not submit any evidence in support of any of these representations.

Upon review of all of the information Mr. Persaud has submitted to DHS TRIP, as well as other information available to me related to Mr. Persaud's placement on the No Fly List, I find that Mr. Persaud may be a threat to civil aviation or national security; in particular, I find that he is an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so. I therefore conclude that Mr. Persaud is properly placed on the No Fly List and no change in status is warranted.

Consistent with the protection of national security and law enforcement activities, I can provide the following explanation of my decision:

1. I have considered Mr. Persaud's contention that he "does not pose, and has never posed, a threat of committing any act of violence." I conclude, however, that the information available to me, including Mr. Persaud's statements to the FBI, supports Mr. Persaud's placement on the No Fly List.
2. I have also considered Mr. Persaud's contentions that he does not advocate violence, that he did not travel to Somalia to engage in violent unlawful activity, and that he does not knowingly have ties to terrorist organizations or individual terrorists. I conclude, however, that the information available to me supports Mr. Persaud's placement on the No Fly List.

These conclusions do not constitute the entire basis of my decision, but I am unable to provide additional information. Without specifying all possible grounds for withholding information in this case, information has been withheld for the following particular reasons:

- additional disclosure would risk harm to national security;
- additional disclosure would jeopardize law enforcement activities; and
- disclosure of name(s) of individuals referred to in the letter of November 24, 2014, would implicate third-party privacy concerns.

No Fly List determinations, including this one, are not based solely on the exercise of Constitutionally protected activities, such as the exercise of protected First Amendment activity.

This determination constitutes a final order and is reviewable in a United States Court of Appeals pursuant to 49 U.S.C. § 46110 or as otherwise appropriate by law. A petition for review must be filed within 60 days of issuance of this order.

1/28/15
DATED

Melvin J. Carraway
Acting Administrator
Transportation Security Administration

Exhibit A

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

November 24, 2014

Mr. Amir M. Meshal
c/o Nusrat Jahan Choudhury
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Redress Control Number: 2061053

Dear Mr. Meshal:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.

[redacted]

[redacted]

We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation

with court-imposed deadlines, such information should be submitted by December 15, 2014. Information you submit will be considered before a final determination is made. The final determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Deborah O. Moore
Director, DHS TRIP

Exhibit B

NATIONAL SECURITY PROJECT

ACLU AMERICAN CIVIL LIBERTIES UNION FOUNDATION

December 18, 2014

VIA MAIL

Deborah O. Moore
U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Re: Amir Meshal, Redress Control Number 2061053

Dear Ms. Moore:

On behalf of Amir Meshal, we submit this response to your letter dated November 24, 2014, in which you provided "an unclassified summary that includes reasons" for Mr. Meshal's placement on the No Fly List. DHS TRIP Letter, attached as Exhibit 1. Because the court in *Latif v. Holder*, Case No. 10-Civ-750-BR (D. Or.), has mandated that the Government conduct an administrative review of the inclusion on the No Fly List of the plaintiffs in that case "as soon as practicable," Dkt. No. 152 at 2, we are submitting this response consistently with the schedule set by the court in *Latif*.[1]

Nonetheless, the Government's revised No Fly List administrative redress system remains inadequate, and your letter lacks information that is critical to Mr. Meshal's ability to respond meaningfully to the allegations in it. The court in *Latif* has emphasized that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests" and imposes a "major burden" on those interests. Dkt. No. 136 at 30. The court ordered the Government to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61. The Government's revised system does not provide Mr. Meshal the process he is due under the Constitution or the court's order, nor does it comply with the requirements of the Administrative Procedure Act. Among other defects, the substantive criteria cited for Mr. Meshal's inclusion on the No Fly List are overbroad and unconstitutionally vague, and the redress process fails to offer procedural protections that are necessary to vindicate Mr. Meshal's due process rights.

[1] An updated DHS Form 590 authorizing release of information to Mr. Meshal's current counsel will be forwarded separately.

On December 5, 2014, we requested that counsel for the defendants in *Latif* provide essential procedural protections, additional information, and a constitutionally compliant substantive standard for the revised redress process. Letter, attached as Exhibit 2. On December 17, the Government responded to that letter but did not provide any of the additional information or protections requested in it.

Thus, Mr. Meshal has not been given a "meaningful opportunity to respond" to the reasons for his inclusion on the No Fly List. *See Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); *see also Latif*, Dkt. 136 at 62 (citing *Al Haramain*). Absent such a meaningful opportunity, Mr. Meshal is hobbled in his ability to rebut the allegations, and any response from him is necessarily incomplete. We thus submit this response subject to the objections and requests for further information below, as well as those set forth in Exhibit 2. We also reserve the right to supplement any record being created by the Government with such additional information that the Government provides in response to the requests in Exhibit 2, or to discovery requests or an order of the court in *Latif*, or that we discover through our own investigation.

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I. The Redress System Remains Inadequate.

The Government's revised No Fly List redress system does not comply with the Constitution or the *Latif* court's order for two primary reasons.

First, it utilizes a substantive standard that is overbroad and vague. The DHS TRIP letter to Mr. Meshal states:

> It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Ex. 1 at 1. The letter contains no further explanation of the standard or its terms.

This standard is overbroad, in that it does not require any nexus to aviation security and lacks a meaningful temporal limitation, and is also unconstitutionally vague on its face. *See* Ex. 2 at 6-7.

Additionally, the standard fails to utilize the least restrictive means to mitigate the "threat" to which it is addressed. *See id.* at 7-8. Nothing in the

letter shows, or even attempts to show, that utilization of the procedures the Government employed to avoid litigation of the preliminary injunction motion filed by Mr. Meshal and others in *Latif*—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

These defects render the substantive standard used to place Mr. Meshal on the No Fly List unconstitutional. No one—Mr. Meshal included—can meaningfully respond to allegations purporting to justify placement on the No Fly List when the standard for that placement is ambiguous, overbroad, and open-ended.

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The second major defect in the revised redress system is that it lacks necessary procedural protections, absent which Mr. Meshal's core due process rights cannot be upheld. The court in *Latif* ordered the Government to revise the redress system in large part because "the DHS TRIP process . . . contains a high risk of erroneous deprivation of Plaintiffs' constitutionally-protected interests." *See* Dkt. No. 136 at 39. That risk remains high under the revised system that the Government has applied to Mr. Meshal.

First, the process does not provide for a hearing at which live witness testimony may be presented and tested under cross-examination. At any hearing, Mr. Meshal would credibly testify that he presents no threat to aviation security and respond to any specific allegations made against him. However, without a hearing, Mr. Meshal will have no ability either to establish his own credibility through live testimony or to challenge the testimony of the Government's witnesses through cross-examination. *See* Ex. 2 at 3.

Second, the disclosure to Mr. Meshal is incomplete. The DHS TRIP letter states that it "includes reasons supporting" his placement on the No Fly List, and that the Government is "unable to provide additional disclosures" beyond those in the letter.[2] Ex. 1 at 1, 2. An incomplete statement makes it impossible for Mr. Meshal to refute all of the Government's bases for placing him on the List. Without a complete statement of reasons and a detailed statement of withheld evidence, Mr. Meshal cannot meaningfully respond to the allegations in the letter. Nor can he take steps, such as the retention of counsel with a security clearance, to deal with information withheld as

[2] The letter also fails to notify Mr. Meshal of the entity responsible for determining that he meets the standard for inclusion on the No Fly List. *See* Ex. 1 at 1 ("*it has been determined* that you are an individual who represents a threat . . .") (emphasis added). Mr. Meshal therefore cannot assess the institutional competence of the deciding entity or identify specific policies, regulations, and statutes that may govern such a determination.

classified where he does not know whether such withholdings have occurred. *See* Ex. 2 at 2-3 (citing Dkt. No. 136 at 61-62).

Third, the DHS TRIP letter contains no indication what, if any, evidentiary standard the Government used to place Mr. Meshal on the No Fly List, or to review that placement. As explained in Exhibit 2, the Constitution requires that the Government use a "clear and convincing evidence" standard in this context. Ex. 2 at 3-4.

Fourth, the DHS TRIP letter fails to explain how the allegations in it satisfy appropriately narrow criteria for inclusion on the No Fly List. For example, [redacted] *See* Ex. 1 at 1. Even if true, those allegations would not suffice to explain how Mr. Meshal's alleged conduct renders him a "threat" worthy of inclusion on the List today. Moreover, even if every factual allegation in the DHS TRIP letter about his prior conduct were true (which, again, Mr. Meshal does not concede), those facts would still fail to justify barring him from boarding an airplane after booking in advance on U.S. carriers and submitting to heightened airport security measures.

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As with the substantive standard, these procedural defects preclude Mr. Meshal from responding to the DHS TRIP letter meaningfully and further underscore that the Government's revised redress system remains constitutionally deficient.

II. Mr. Meshal Cannot Respond Meaningfully Without Further Information.

The allegations in the DHS TRIP letter reveal specific categories of information that the Government must provide to Mr. Meshal in order to satisfy due process:

1. Mr. Meshal's prior statements. The Government is relying on Mr. Meshal's alleged statements, each of which was purportedly made years ago, in order to justify his inclusion on the No Fly List. *See* Ex. 1 at 1, 2. Mr. Meshal must be provided with all of his written or recorded statements, made to any persons at any time and place, and the substance of any oral statements, if not embodied in a writing. If any statements are recorded, he should be given a transcript or audible copy of each recording. *See* Ex. 2 at 4.

2. Witness information and statements. The DHS TRIP letter indicates that the Government is relying on the statements of witnesses to support Mr. Meshal's inclusion on the No Fly List. Ex. 1 at 1, 2. The Government must therefore provide the names and contact information for any such witnesses, including government agents whose statements the letters

describe as fact; all reports relating to Mr. Meshal prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating Mr. Meshal); the statements of unidentified third parties; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath. *See* Ex. 2 at 5-6.

3. Promises to witnesses. The Government must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for Mr. Meshal's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *See id.* at 6.

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4. Exculpatory evidence. The Government must provide all evidence, including any statements by any person, tending to: contradict the evidence and allegations advanced in support of Mr. Meshal's inclusion on the No Fly List; show that Mr. Meshal does not meet the appropriate criteria for inclusion on the List; or otherwise establish that Mr. Meshal does not merit inclusion on the List. *See id.*

5. Notice of surveillance techniques. To the extent that any information obtained or derived from surveillance activities forms any basis for Mr. Meshal's inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceedings, Mr. Meshal is entitled to notice of the surveillance and the information obtained or derived from it. He is also entitled to notice of information or evidence that is the product of unlawful surveillance. *See id.* at 4–5.

6. Additionally, to the extent that the Government is relying on any information, whether or not disclosed in the DHS TRIP letter, that does not fall under any of the preceding categories, such information must also be provided to Mr. Meshal.

The failure to provide this information unfairly prejudices Mr. Meshal's due process right to challenge his placement on the No Fly List.

III. The Allegations Against Mr. Meshal Do Not Justify His Continued Inclusion On The No Fly List.

For the foregoing reasons, the revised system the Government is using to review Mr. Meshal's inclusion on the No Fly List is constitutionally inadequate. Mr. Meshal cannot respond to the allegations in the DHS TRIP

letter effectively, and he will not receive the process he is due, unless the Government remedies the deficiencies set forth above. Nonetheless, because the court in *Latif* has directed the Government to complete its administrative review of the plaintiffs' DHS TRIP redress inquiries before the court considers substantive motions on the merits, we submit this disclosure of Mr. Meshal's expected testimony on his behalf. We do so without waiving any of the objections to the legality or constitutionality of the revised redress process, and without conceding the adequacy of the notice and process afforded to Mr. Meshal.

If called to testify at an evidentiary hearing regarding his placement on the No Fly List, we expect that Mr. Meshal's testimony would include the following:

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1. Mr. Meshal does not pose, and has never posed, a threat of engaging in a violent act of terrorism. He has no intention of engaging in, or providing support for, violent or unlawful activity anywhere in the world.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6. Mr. Meshal does not knowingly have ties to terrorist organizations or individual terrorists, and he does not advocate violence.

Mr. Meshal reserves the right to provide additional information upon receipt of further information as to the nature of the allegations against him, the sources of evidence on which the government has relied, and other information specified above. He also reserves the right to present evidence of his good moral character and opposition to violence through statements from other witnesses at the appropriate time.

For the foregoing reasons, Mr. Meshal's placement on the No Fly List was in error, and he should promptly be removed from the No Fly List.

Sincerely yours,

Hina Shamsi
Hugh Handeyside

Ahilan Arulanantham
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017

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Steven Wilker
Tonkon Torp LLP
1600 Pioneer Tower
888 SW 5th Avenue
Portland, OR 97204

Exhibit 1

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

November 24, 2014

Mr. Amir M. Meshal
c/o Nusrat Jahan Choudhury
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Redress Control Number: 2061053

Dear Mr. Meshal:

We have reevaluated the redress inquiry you filed with the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (DHS TRIP). As part of that reevaluation, we have conducted a new review of applicable records in consultation with other federal agencies, as appropriate. It has been determined that you are on the No Fly List because you have been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it has been determined that you are an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Below is an unclassified summary that includes reasons supporting your placement on the No Fly List.

[redacted]

[redacted]

We are unable to provide additional disclosures regarding your placement on the No Fly List. Factors limiting disclosure in this context may include national security concerns, privileges, and/or legal limitations such as the Privacy Act.

If you feel that this determination is in error, or you feel that the information provided to you is inaccurate, you are encouraged to respond and provide us with information you think may be relevant. Such information should be submitted to DHS TRIP at the above address. As we have been advised by the Department of Justice that your redress inquiry is the subject of litigation

with court-imposed deadlines, such information should be submitted by December 15, 2014. Information you submit will be considered before a final determination is made. The final determination will constitute a final order pursuant to 49 U.S.C. § 46110 on your redress inquiry by January 16, 2015.

If you have any further questions, please write to DHS TRIP at the address in this letterhead or via e-mail at TRIP@dhs.gov.

Sincerely,

Deborah O. Moore
Director, DHS TRIP

Exhibit 2

NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

December 5, 2014

VIA EMAIL

Amy Powell
Brigham J. Bowen
Adam D. Kirschner
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

Re: *Latif v. Holder*, Case No. 10-Civ.-750-BR

Dear Counsel:

After reviewing the DHS TRIP letters sent to the Plaintiffs in this case who remain on the No Fly List, we write to make three requests regarding the administrative process Defendants are using for these Plaintiffs.[1] First, we request that Defendants provide certain necessary procedural protections as part of the administrative process. Second and relatedly, we request that Defendants provide additional information related to the basis or bases for Plaintiffs' inclusion on the No Fly List. Third, we request that Defendants craft, apply, and disclose to Plaintiffs a constitutionally-compliant substantive standard for inclusion on the No Fly List. Such a standard must be narrower and more specific than the vague and over-broad standard that Defendants appear to be employing here.

In addition, as we discussed with Amy and Brigham before we received the DHS TRIP letters, we seek to enter into a stipulation and protective order to prevent public disclosure of the DHS TRIP letters and the additional information we are requesting. The need we anticipated for such a stipulation and protective order is confirmed by the inflammatory, piecemeal allegations in the letters. We will follow up with a call to discuss the content of the stipulation and protective order.

[1] It is our understanding that those Plaintiffs are Mohamed Sheikh Abdirahman Kariye, Faisal Kashem, Raymond Knaeble, Amir Meshal, Stephen Persaud, and Steven Washburn, because those are the only Plaintiffs for whom Defendants have provided DHS TRIP letters. If our understanding is incorrect, please inform us of that fact immediately.

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As Defendants will recall, the Court's order of June 24, 2014 (Dkt. 136) reiterated that "Plaintiffs' inclusion on the No Fly List constitutes a significant deprivation of their liberty interests," *id.* at 30; held that inclusion on the No Fly List imposes a "major burden" on those interests, *id.*; and required Defendants to provide "a new process that satisfies the constitutional requirements for due process." *Id.* at 61. The DHS TRIP letters sent to Plaintiffs, to which Defendants have asked Plaintiffs to respond by December 15 or 16, 2014, do not constitute process sufficient to satisfy due process and APA requirements under the Court's order. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976); 5 U.S.C. §§ 555, 556 (governing procedures and production of evidence in administrative proceedings). In particular, the information Defendants have provided does not suffice to permit any of the six Plaintiffs a "meaningful opportunity to respond" to the reasons for their inclusion on the No Fly List. *Al Haramain v. U.S. Dep't of Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (requiring meaningful notice and opportunity to be heard); *Kindhearts v. Geithner*, 647 F. Supp. 2d 857, 906 (N.D. Ohio 2009) (requiring "meaningful opportunity to be heard" by provision of a "post-deprivation hearing"); *see also* Dkt. 136 at 62 (citing *Al Haramain*).

For that reason, we request the following additional procedures and categories of information (if in the possession of any branch of the federal government), each of which is necessary to comply with the Court's order:

I. Additional Procedural Protections

Compliance with the Court's order requires Defendants to provide the following procedural protections:

1. A *complete* statement of reasons. The DHS TRIP letters suggest that there may be reasons other than those Defendants have provided on which they are relying to justify Plaintiffs' inclusion on the No Fly List. The Court's order plainly requires the provision of "*the* reasons for" Plaintiffs' inclusion, Dkt. 136 at 61 (emphasis added), and an incomplete statement makes it impossible for Plaintiffs to refute all of Defendants' bases for placing Plaintiffs on the List.

2. A *complete* statement regarding withheld evidence and the basis for withholding any such evidence. The DHS TRIP letters suggest that there *may* be both undisclosed evidence on which the Government has relied to justify Plaintiffs' inclusion on the No Fly List and undisclosed claims of privilege used to justify the withholding of that evidence. However, the Court's order indicates that Plaintiffs must know when evidence has been withheld and on what grounds so that they may meaningfully respond, including by requesting "disclos[ure] [of] the classified reasons to properly-cleared counsel," Dkt. 136 at 61, and whether to seek judicial review of any privilege assertion. *Id.* at 62.

Obviously, Plaintiffs cannot take those steps without knowing at least in summary form what evidence Defendants have chosen to rely upon without disclosing it, and the reasons for any such withholding.

3. An explanation of how Defendants' allegations satisfy appropriately narrow criteria for inclusion on the No Fly List. The DHS TRIP letters fail to explain if and how the allegations made in them relate to the substantive criteria for inclusion on the No Fly List. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 230 (D.C. Cir. 2010) (requiring the Secretary of State to explain how information relied upon for designation as a terrorist organization related to specific portion of governing statute). Without such an explanation, Plaintiffs are left to guess as to how their alleged conduct satisfies the substantive standards for inclusion on the list.

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4. A hearing at which live witness testimony may be presented and tested under cross-examination. Due process requires hearings in contexts in which far less is at stake than inclusion on the No Fly List. *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 697, 99 S. Ct. 2545 (1979) (in social security context, paper review failed to satisfy due process because determination at issue "usually requires an assessment of the recipient's credibility"). Without a hearing, Plaintiffs have no ability either to establish their own credibility through live testimony or to challenge the testimony of Defendants' witnesses through cross-examination. Such live testimony is critical in situations, such as these, where credibility is central to any assessment of whether Plaintiffs may be deprived of their constitutionally protected liberty interest through inclusion on the No Fly List. *Cf. Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (holding that credibility determinations in deportation cases require a hearing because "[a]ll aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely. These same very important factors, however, are entirely unavailable to a reader of the transcript.").

5. Application of a "clear and convincing" standard of proof where Defendants bear the burden of establishing that inclusion on the No Fly List is warranted. The DHS TRIP letters contain no articulation of any standard or burden of proof. The "clear and convincing evidence" standard is "the normal burden of proof . . . in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money." *V. Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011) (internal quotations omitted). As the Ninth Circuit has recognized, courts have applied the "clear and convincing" standard in a variety of contexts involving significant deprivations of liberty. *See id.* (collecting cases involving

competency to proceed, deportation, denaturalization, and civil commitment). *See also Doe v. Gallinot*, 657 F.2d 1017, 1023 (9th Cir. 1981) (holding in civil commitment context that "[i]t is the state, after all, which must ultimately justify depriving a person of a protected liberty interest by determining that good cause exists for the deprivation."). Given the comparably "significant deprivation of liberty" at stake here, Defendants must prove with clear and convincing evidence that Plaintiffs' placement on the on the No Fly List is warranted.

II. Additional Information

Compliance with the Court's order also requires Defendants to provide the following additional information in order to satisfy due process:

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1. Plaintiffs' prior statements. The DHS TRIP letters make clear that Defendants are relying upon some Plaintiffs' alleged statements in order to justify their inclusion on the No Fly List. Defendants must provide all written or recorded statements of each Plaintiff, made to any persons at any time and place, and the substance of any oral statements, if not embodied in a writing. If any statements are recorded, please provide a transcript or audible copy of each recording. *See Dhiab v. Bush*, 2008 WL 4905489 at *2 (D.D.C. Nov. 17, 2008) (ordering, in habeas corpus proceeding brought by individual detained as alleged enemy combatants, disclosure of all statements made or adopted by the petitioner relating to the factual bases for his detention, as well as information regarding the circumstances of such statements) (citing *Bismullah v. Gates*, 501 F.3d 178, 187 (D.C. Cir. 2007) ("we presume counsel . . . has a 'need to know' all Government Information concerning his [or her] client . . . .")).

2. Notice of surveillance techniques. The DHS TRIP letters suggest that some or all of the Plaintiffs were placed on the No Fly List based on information obtained or derived from surveillance activities. To the extent that any such information forms any basis for Plaintiffs' inclusion on the No Fly List, or that the government intends to use such information in these administrative or any related judicial proceeding, Plaintiffs are entitled to notice of the surveillance and the information obtained or derived from it. *See, e.g.*, 50 U.S.C. § 1806(c) (FISA electronic surveillance); 50 U.S.C. § 1825(d) (FISA physical search); 50 U.S.C. § 1842(c) (FISA pen register); 18 U.S.C. § 2518(8)(d) (Title III). Due process also requires that the Plaintiffs be given notice of the surveillance techniques (including, but not limited to, surveillance under Executive Order 12,333) that led to their placement on the No Fly List so that they may seek review of the lawfulness of that surveillance and determine whether Defendants' alleged basis or bases for including them on the No Fly List are derived from it. *See United States v. U.S. District Court (Keith)*, 407 U.S. 297, 92 S. Ct. 2125 (1972). To that end, each Plaintiff hereby asserts his right to notice of information or evidence that

forms any basis for his inclusion on the No Fly List that is the product of unlawful surveillance or was obtained by the exploitation of any unlawful surveillance. *See* 18 U.S.C. § 3504(a). Defendants must therefore "affirm or deny the occurrence of" such surveillance. *See id.*

3. Witness information and statements. The DHS TRIP letters make clear that Defendants are relying on the statements of witnesses to support Plaintiffs' inclusion on the No Fly List. Defendants must therefore provide the names, last known addresses, and telephone numbers of witnesses upon whose statements Defendants are relying. This witness information includes: government agents whose statements the letters describe as fact; all reports relating to Plaintiffs prepared by law enforcement and other government personnel (including but not limited to any FD-302 reports prepared by FBI agents investigating any Plaintiff); the statements of unidentified third parties; the prior arrest and conviction records of all such persons; all prior written, recorded, or oral statements (including agents' rough notes of such statements) of such persons; and all evidence that any such persons have ever made any false statement to law enforcement or the courts, whether or not under oath.

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Individuals facing government sanctions in comparable civil proceedings have a right to such evidence. *See, e.g.*, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103 (1963) (holding in bar license revocation context that "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood"); *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 611 (N.D. Cal. 1992) (same for revocation of alcohol label certificate). Moreover, such information could prove critical in determining whether any of these witnesses have a history of providing inaccurate or contradictory testimony, or a motive to provide biased or misleading information to law enforcement. It is also necessary both to allow Plaintiffs' counsel to contact such witnesses (in order to independently investigate their claims) and for counsel to determine whether the use of their hearsay statements would be fundamentally fair. *See Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980) (to constitute substantial evidence to support administrative determination, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility, must have probative value and bear indicia of reliability; factors to be considered include independence or possible bias of declarant, type of hearsay materials submitted, whether statements are signed and sworn to, whether statements are contradicted by direct testimony, availability of declarant, credibility of declarant, and whether hearsay is corroborated); *Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 681-82 (9th Cir. 2005) (holding, in deportation context, that "the government's choice whether to produce a witness or to use a hearsay statement [is not] wholly unfettered" and requiring showing that "despite reasonable efforts, [the government] was unable to secure the presence of the witness at the hearing" prior to use of hearsay evidence); *see*

also Dhiab, 2008 WL 4905489 at *4 (requiring consideration of "whether provision of nonhearsay evidence would unduly burden the movant or interfere with the Government's efforts to protect national security").

4. Promises to witnesses. Defendants must provide any express or implicit promise, understanding, offer of immunity, sentencing leniency, or of past, present, or future compensation, or any other kind of agreement or understanding between any witness whose statements or information form a basis for any Plaintiff's inclusion on the No Fly List and any law enforcement or prosecutorial agent or agency (federal, state, and local). *Cf. Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (reaffirming that the failure to disclose evidence favorable to an accused upon request violates due process, and holding that this requirement extends to all witness impeachment evidence); *United Sates v. Shaffer*, 789 F.2d 682 (9th Cir. 1986) (affirming reversal of conviction where prosecution failed to disclose that witness received benefits in exchange for cooperation with government).

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5. Exculpatory evidence. Defendants must provide all evidence, including any statements by any person, tending to: contradict Defendants' evidence in support of their inclusion of Plaintiffs on the No Fly List; show that Plaintiffs do not meet the appropriate criteria for inclusion on the No Fly List; or otherwise establish that Plaintiffs do not merit inclusion on the No Fly List. *See Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (holding in deportation context that failure to disclose exculpatory documents in government file violated due process); *Dhiab*, 2008 WL 4905489 at *1 (ordering, in habeas corpus proceeding brought by alleged enemy combatant, that the government must "disclose to Petitioner all reasonably available evidence in its possession or that the Government can obtain through reasonable diligence that tends materially to undermine the information presented to support the Government's justification").

III. Application of Appropriate Substantive Standard

Finally, the substantive standard that Defendants appear to be using to assess whether each Plaintiff's inclusion on the No Fly List is warranted does not satisfy constitutional requirements, for the reasons set forth below:

1. The criteria cited in the DHS TRIP letters are overbroad. As a threshold matter, they do not require any nexus to aviation security. *See, e.g., Aptheker v. Sec'y of State*, 378 U.S. 500, 517, 84 S. Ct. 1659, 12 L.Ed.2d 992 (1964) (law imposing complete travel ban for members of communist organizations was overbroad and unconstitutional on its face). Because of that, the criteria "sweep[] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and are "not . . . narrowly drawn to prevent the supposed evil." *See id.* at 514. They mandate a significant penalty—inability to travel by air—that is untethered from the (undefined)

"threat" included in the criteria. Similarly, the criteria lack a meaningful temporal limitation. They fail to specify whether and to what extent past conduct can continue to satisfy the standard—whatever that may be—for placement on the No Fly List. They also lack any means for determining at what point, absent new information, an individual ceases to satisfy the criteria.

2. The criteria are unconstitutionally vague on their face and as applied to Plaintiffs. *See United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (statute must be "sufficiently clear so as not to cause persons 'of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application'") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). In particular, terms such as "threat," "represent," and "pose" are undefined and vague, opening the door to subjective, arbitrary, and discriminatory interpretation of the criteria. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). Such ambiguous terms easily encompass conduct that individuals could not have known would lead to their placement on the No Fly List. *See id.* (noting that the void-for-vagueness doctrine exists in part "to avoid punishing people for behavior that they could not have known was illegal").

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Greater certainty as to the meaning of such terms is especially necessary when, as here, a statute "might induce individuals to forego their rights of speech, press, and association" to avoid the risk of penalty. *Scull v. Com. of Va. ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344, 353 (1959). Indeed, most of the DHS TRIP letters include allegations related to Plaintiffs' speech or other expressive activity and associations, making it clear that the criteria impermissibly impinge on First Amendment-protected conduct. Defendants may not sanction Plaintiffs for engaging in activity that is itself constitutionally protected, whether by the First Amendment or any other constitutional provision. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982) (government may not penalize someone on the basis of association alone).

3. The criteria fail to utilize the least restrictive means to mitigate the "threat" to which they are addressed. No standard imposing an outright ban on air travel can comply with the Constitution if it is not the least restrictive means available to protect the Government's interest in preventing threats to "civil aviation or national security" that could arise from permitting plaintiffs to fly. *See, e.g.*, *Mohamed v. Holder*, 995 F. Supp. 2d 520, 530 (E.D. Va. 2014) (in a No Fly List case, citing *Aptheker* in refusing to conclude on record before the court that "there are no means less restrictive than an unqualified flight ban to adequately assure flight security"); *Jones v. Blanas*, 393 F.3d, 918, 932 (9th Cir. 2004) (striking down measures to incarcerate civil detainees because government's procedures "[we]re employed to achieve objectives that could be accomplished in so many alternative and less harsh methods"). At a minimum, the Government must show why the utilization of the procedures it

employed to avoid litigation of Plaintiffs' preliminary injunction motion—including the requirement that individuals book flights in advance on U.S. carriers and submit to heightened airport security measures—would not suffice to satisfy its interests in aviation security.

Plaintiffs request that Defendants craft new criteria that remedy these constitutional deficiencies, disclose those criteria to Plaintiffs, and apply those criteria to Defendants' factual allegations using a clear and convincing evidentiary standard.

****

Because Defendants have asked Plaintiffs to provide their responses to the DHS TRIP letters by December 15 or 16, 2014, the additional procedures and information we request should be provided to Plaintiffs no later than December 11, 2014. If Defendants agree to comply with the foregoing requests, Plaintiffs are willing to consider seeking a joint month-long extension of the January 16, 2015 deadline in the court's case management order, Dkt. No. 154 at 2, to accommodate hearings.

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Sincerely yours,

Hina Shamsi

Hina Shamsi
Hugh Handeyside

Ahilan Arulanantham
ACLU Foundation of Southern California
1313 West Eighth Street
Los Angeles, CA 90017

Steven Wilker
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Exhibit C

U.S. Department of Homeland Security
DHS Traveler Redress Inquiry Program (DHS TRIP)
601 South 12th Street, TSA-901
Arlington, VA 22202-4220

Homeland Security

January 21, 2015

Nusrat Jahan Choudhury
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

RE: Amir Meshal
Redress Control Number: 2061053

Dear Mr. Choudhury:

The Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) received a response from counsel for Amir Meshal on December 18, 2014, providing the reasons supporting Mr. Meshal's belief that his placement on the No Fly List was in error. DHS TRIP provided that submission to the Transportation Security Administration (TSA) for review. Attached, please find a TSA determination regarding Mr. Meshal's redress inquiry.

Sincerely,

Deborah D. Moore

Deborah Moore
Director, DHS Traveler Redress Inquiry Program

Office of the Administrator
U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20598-6001

Transportation Security Administration

DECISION AND ORDER

On December 18, 2014, Amir Meshal, through his counsel, submitted a response to the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) providing reasons why he believed his placement on the No Fly List was in error and requesting his removal from that List. For the reasons set forth below, I determine that Mr. Meshal should remain on the No Fly List.

On June 10, 2009, Mr. Meshal submitted an inquiry to DHS TRIP describing his travel difficulties. On October 13, 2009, DHS TRIP informed Mr. Meshal it had conducted a review of his records and determined that no changes were warranted at that time. On November 24, 2014, DHS TRIP informed Mr. Meshal that it was reevaluating his redress inquiry. DHS TRIP further informed Mr. Meshal that he was on the No Fly List because he had been identified as an individual who "may be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). In particular, it had been determined that he was an individual who represents a threat of engaging in or conducting a violent act of terrorism and who was operationally capable of doing so.

In addition, DHS TRIP provided Mr. Meshal with a summary of the unclassified facts available for release that supported his placement on the No Fly List and encouraged him to respond with relevant information if he believed the determination was in error or if he felt the

information provided to him was inaccurate. DHS TRIP withheld certain information because additional disclosure would risk harm to national security and jeopardize law enforcement activities. On December 18, 2014, Mr. Meshal, through his counsel, responded that he believed his placement on the No Fly List was not warranted and provided representations he believed to be relevant to DHS TRIP's determination. Mr. Meshal did not submit any evidence in support of any of these representations.

Upon review of the information Mr. Meshal has submitted to DHS TRIP, as well as other information available related to Mr. Meshal's placement on the No Fly List, I find that Mr. Meshal may be a threat to civil aviation or national security; in particular, I find that he is an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so. I therefore conclude that Mr. Meshal is properly placed on the No Fly List and no change in status is warranted.

Consistent with the protection of national security and law enforcement activities, I can provide the following explanation of my decision:

1. I have considered Mr. Meshal's contention that he "does not pose, and has never posed, a threat of engaging in a violent act of terrorism." I conclude, however, that the information available, including Mr. Meshal's statements to the FBI, supports his placement on the No Fly List.
2. I have also considered Mr. Meshal's contention that his statements about his connections to terrorists and terrorist activities (including members of Al-Qaeda) in Somalia were the product of coercion. I conclude, however, that the information available supports Mr. Meshal's placement on the No Fly List.

These conclusions do not constitute the entire basis of my decision, but I am unable to provide additional information. Without specifying all possible grounds for withholding information in this case, information has been withheld for the following particular reasons:

- additional disclosure would risk harm to national security;
- additional disclosure would jeopardize law enforcement activities; and
- disclosure of name(s) of individuals referred to in the letter of November 24, 2014, would implicate third-party privacy concerns.

No Fly List determinations, including this one, are not based solely on the exercise of Constitutionally protected activities, such as the exercise of protected First Amendment activity.

This determination constitutes a final order and is reviewable in a United States Court of Appeals pursuant to 49 U.S.C. § 46110 or as otherwise appropriate by law. A petition for review must be filed within 60 days of issuance of this order.

1-21-2015
DATED

Melvin J. Carraway
Acting Administrator
Transportation Security Administration

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing volume of the Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: December 15, 2017

/s/ Hina Shamsi
Hina Shamsi