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*.	JOINT STATUS REPORT

In its Case Management Order dated October 3, 2014, the Court directed Defendants to reconsider the DHS TRIP petitions of Plaintiffs who remain on the No Fly List using procedures that are "fully compliant with the Court's June 24, 2014 Opinion and Order." Dkt. No. 152.[1] The Court also ordered Defendants to submit interim status reports, and for the parties to submit a joint status report at the conclusion of Defendants' new redress process. *Id.*; Dkt. No. 164. Defendants' application of their new redress process to Plaintiffs is now complete, and the parties have conferred regarding their proposals for the adjudication of remaining issues and claims.

The parties agree that a fundamental dispute exists concerning the constitutional adequacy of Defendants' new redress process. They also agree that the most appropriate mechanism for the Court to adjudicate this dispute would be after renewed cross-motions for summary judgment. The parties jointly propose the following briefing schedule:

March 13, 2015:	Plaintiffs' motion for summary judgment due
April 13, 2015:	Defendants' opposition and cross-motion for summary judgment due

[1] Six Plaintiffs remain on the No Fly List: Faisal Kashem, Mohamed Sheikh Abdirahman Kariye, Raymond Knaeble, Amir Meshal, Stephen Persaud, and Steven Washburn. Unless otherwise specified, references in this joint status report to "Plaintiffs" are to these individuals.

May 4, 2015: Plaintiffs' reply and opposition due.

May 26, 2015: Defendants' cross-reply due

The parties submit below their separate positions on the scope of those motions and the issues to be addressed by the Court.

I. PLAINTIFFS' POSITION

A. Proposal with respect to Plaintiffs still on the No Fly List.

As to the Plaintiffs whom Defendants have not removed from the No Fly List, Plaintiffs' position is that Defendants' revised redress procedures do not comply with the Court's June 24, 2014 Opinion and Order, are constitutionally inadequate, and must be remedied. Defendants still have not provided to Plaintiffs a meaningful statement of reasons for their placement on the No Fly List, a meaningful opportunity to clear their names, or any hearing. As a result, Plaintiffs are still left to guess at the reasons for their placement on the List. Without a constitutionally-compliant administrative process—and the full record that should come before this Court after such a process—Plaintiffs respectfully submit that it is not possible for the Court to proceed with a substantive determination of the merits of Plaintiffs' inclusion on the No Fly List. Plaintiffs therefore propose that the parties submit briefing that would allow the Court to adjudicate the specific process Plaintiffs are due and the constitutionality of the criteria used by Defendants to include them on the No Fly List.

As stated in Defendants' status report of January 22, 2015, Defendants provided DHS TRIP notification letters to Plaintiffs during the week of November 24, 2014. Dkt. No. 165 at 2. The letters contained unclassified summaries of Defendants' reasons allegedly supporting the continued inclusion of Plaintiffs on the No Fly List, together with the substantive criteria Defendants used to place each Plaintiff on the List. *Id.* Defendants' January 22 status report

also described the procedures Defendants used to consider responsive submissions from the Plaintiffs and the final results of the process: none of the Plaintiffs were removed from the No Fly List after administrative reconsideration on the record before Defendants. *Id.* at 3.

As detailed in a December 5, 2014 letter from Plaintiffs' counsel to Defendants' counsel attached as Plaintiffs' Exhibit A, the DHS TRIP notification letters provided to Plaintiffs were fundamentally flawed in crucial respects, including:

- The letters were incomplete because they did not contain full statements of reasons.[2] Each DHS TRIP letter specifically stated that "additional disclosures" had been withheld, citing a variety of reasons. As this Court has emphasized, Plaintiffs cannot respond to allegations and evidence that have been withheld from them. *See* Dkt. No. 136 at 61. Incomplete statements prevent the Plaintiffs from submitting "evidence relevant to the reasons for their respective inclusions on the No-Fly List." *See id.*

- The DHS TRIP process fails to provide the full statements—including those allegedly made by the Plaintiffs themselves or by other witnesses—on which the Defendants are relying as a basis for placing Plaintiffs on the No Fly List.

- The DHS TRIP process fails to provide exculpatory information that may be in the government's possession, including Plaintiffs' prior statements and statements of witnesses, as well as impeachment evidence such as any promises to witnesses who provided information used by Defendants to place Plaintiffs on the No Fly List.

- Defendants failed to provide notice of the surveillance techniques used to procure information that may be a basis for inclusion of some or all Plaintiffs on the List, including notice that would allow Plaintiffs to seek judicial review of the lawfulness of that surveillance.

These incomplete, one-sided disclosures severely impair Plaintiffs' ability to respond to Defendants' allegations and underscore that Defendants' new process is fundamentally unfair.

The disclosure to Plaintiff Amir Meshal exemplifies this unfairness—and its consequences.[3] The reasons the government provided Mr. Meshal for his inclusion on the No

[2] The letters to the Plaintiffs were of varying length and specificity. One of the letters included only a single cryptic sentence about alleged travel to a foreign country.

[3] As Plaintiffs' counsel informed Defendants' counsel in the December 5, 2014 letter, because the DHS TRIP letters contain inflammatory and piecemeal allegations that stigmatize Plaintiffs and impact their

Fly List all appear to derive from statements he allegedly made while he was unlawfully detained and abused by FBI agents in Kenya and Ethiopia. Nowhere in the DHS TRIP letter is there any acknowledgement of the fact that Mr. Meshal was coerced and mistreated by the FBI agents who caused and controlled his detention, interrogated him, denied his repeated requests for access to counsel, threatened him several times with torture and death if he refused to cooperate, and obtained information from him through coercion.[4] Including only summaries of Mr. Meshal's alleged statements but not the full statements themselves, the details of his interrogation, the threats made against him, or his multiple requests for counsel demonstrates the inadequacy of Defendants' revised process.

Defendants' revised procedures are deficient in other key ways. Despite requesting a hearing, Plaintiffs were never allowed to provide live testimony, nor did they have an opportunity to cross-examine witnesses who provided information or made allegations against them. Such live testimony is critical where credibility is central to any assessment of whether Plaintiffs may be deprived of their constitutionally-protected liberty interest in travel, with the severe consequences that result from the deprivation. *Cf. Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir. 2003) (credibility determinations in deportation cases require a hearing

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privacy rights while impairing their ability to respond to those allegations, Plaintiffs seek to enter into a stipulation and protective order to prevent public disclosure of those letters and other sensitive information in this matter. The parties are currently negotiating such a stipulation. Plaintiffs provide this example without prejudice to their privacy rights or invocation of confidentiality once the stipulation and protective order is finalized and entered.

[4] Mr. Meshal filed a civil action in November 2009 against the FBI agents who interrogated him. On June 13, 2014, the district judge in that case found that Mr. Meshal had plausibly alleged violations of his Fourth and Fifth Amendment rights, and described his treatment at the hands of U.S. officials as "appalling" and "embarrassing." *See* Memorandum Opinion, *Meshal v. Higgenbotham*, No. 1:09-cv-02178-EGS (D.D.C. June 13, 2014). Nonetheless, the district court held that according to its reading of the law, judicial precedent barred the court from allowing Mr. Meshal to move forward with his constitutional claims. The matter is currently on appeal to the U.S. Court of Appeals for the District of Columbia Circuit. *See Meshal v. Higgenbotham*, No. 14-5194 (D.C. Cir. 2014). Certain ACLU counsel in this matter also represent Mr. Meshal in the action against the FBI agents.

because "[a]ll aspects of the witness's demeanor . . . may convince the observing trial judge that the witness is testifying truthfully or falsely").

Defendants also applied unconstitutionally vague and overbroad criteria in determining that the Plaintiffs should remain on the No Fly List. *See* Dkt. No. 165 at 2.[5] Those criteria lack any standard of proof, let alone one commensurate with the grave consequences that result from placement on the No Fly List. They also fail to require Defendants to utilize the least restrictive means to mitigate the "threat" to which they are addressed. *See id.* Moreover, none of the disclosures to the Plaintiffs included an explanation of *how* the allegations supposedly satisfied the criteria for inclusion. Absent some understanding of the Government's application of fact to the legal standard, it is impossible for Plaintiffs to meaningfully defend themselves.

Plaintiffs asked Defendants to remedy each of these deficiencies, and others, by (1) providing additional procedural protections and information necessary to vindicate Plaintiffs' due process rights, and (2) crafting, applying, and disclosing to Plaintiffs a constitutionally-compliant substantive standard for inclusion on the No Fly List. *See* Ex. A at 8. Plaintiffs also offered to jointly propose an extension of the Court's deadlines in order for Defendants to apply constitutionally-adequate procedures and criteria. *Id.* Defendants' counsel responded by stating that they disagreed with Plaintiffs' counsel's contentions, adding that "[w]e view the matters raised in your letter as appropriate for the Court's consideration through briefing at the conclusion of the reopened redress process." *See* Letter, attached as Plaintiffs' Exhibit B.

Thus, Defendants conceded that the constitutional adequacy of Defendants' new procedures and the criteria for inclusion on the No Fly List can and should be adjudicated by the Court following briefing by the parties. Given that Plaintiffs have now spent nearly five years on

[5] Application of Defendants' criteria to Plaintiffs appears at least in some instances to raise First Amendment concerns, but Plaintiffs are not in a position to make that determination conclusively based on the severely limited information contained in the DHS TRIP notification letters.

the No Fly List since they filed this suit, including eight months since this Court declared the Government's prior redress procedures unconstitutional and specified the basic contours of what additional procedures should be required, Plaintiffs respectfully request the opportunity to brief—and ask the Court to now adjudicate—the specific process they are now due and the criteria for inclusion on the No Fly List.

Although Plaintiffs ask this Court to adjudicate their objections to the procedures Defendants have put in place without further delay, Plaintiffs object to Defendants' request that the Court now address Plaintiffs' substantive due process claims. Since this case returned to this Court from the Ninth Circuit, the parties have proceeded on the well-grounded assumption that this Court must determine the appropriate procedures for placement on the No Fly List *before* deciding the substantive due process claim—*i.e.*, whether someone who receives the benefit of those procedures but still remains on the list can be denied any opportunity to fly, regardless of what other measures are taken to ensure aviation security. *See* Dkt. No. 77 at 4. As a practical and conceptual matter, the substantive due process question can only be meaningfully addressed and fairly adjudicated after the Court decides what procedures must be utilized to determine whether someone can remain on the No Fly List. Therefore, Plaintiffs request that the Court limit the briefing at the next stage to whether Defendants' new procedures and the criteria for their inclusion on the No Fly List comply with the Constitution.

Moving forward with briefing on Plaintiffs' substantive claims on the inadequate record before the Court, as Defendants propose, would be erroneous for a variety of reasons. First, it would make no sense if Plaintiffs prevail on any aspect of their procedural challenges, as the correction of those errors will likely lead to additional information that is not in the inadequate record before the Court now.

Relatedly, Defendants raise the specter of privileges—including the state secrets privilege—they might be forced to invoke if the Court determines that the procedures and information Defendants have provided to Plaintiffs thus far are inadequate, either at the procedural due process stage, or on a merits determination. In essence, Defendants' proposal would have the Court reject Plaintiffs' request for constitutionally-mandated procedural protections on the grounds that such protections *may* implicate national security information. That approach not only puts the proverbial cart before the horse, but it also would amount to an end-run around how privileges—including the state secrets privilege—are properly invoked and applied (according to recognized procedural requirements and with respect to specific information).

In any event, Plaintiffs do not believe the state secrets privilege can be invoked to prevent them from receiving what due process requires in this context. *See* Order, *Mohamed v. Holder*, Case No. 1:11-cv-50 (AJT/TRJ) (E.D. Va. Oct. 30, 2014) (concluding that the assertion of the state secrets privilege should not prevent the court from considering the plaintiff's procedural due process challenge to his placement on the No Fly List, and that the privilege is "best considered within a specific context during the actual adjudication of any claims to which it may apply"). In addition, the fact that Defendants may take that position counsels strongly against attempting to resolve the substantive due process issues now, because the Court cannot resolve those questions without knowing what information it should consider as to each Plaintiff. The Court should therefore reject Defendants' proposal to adjudicate both the procedural and substantive issues in this case at the same time, as it would be premature to attempt to resolve the substantive due process issues before the procedural ones.

Plaintiffs also oppose Defendants' request that they be given additional time to consider other options if the Court is disinclined to adopt their proposal. Defendants have had months to consider their options. In light of Plaintiffs' years-long wait for a meaningful procedure to clear their names, there should be no further delay in the Court's adjudication first of Plaintiffs' procedural due process claims, and then of their substantive due process claims.

Plaintiffs therefore respectfully request that the Court order the parties to submit briefing solely on the constitutionality of Defendants' new procedures and substantive No Fly List criteria according to the schedule set forth above.[6]

B. Proposal with respect to Plaintiffs no longer on the No Fly List.

As to the Plaintiffs whom Defendants removed from the No Fly List pursuant to this Court's orders, *see* Dkt. Nos. 152, 153, the position of these Plaintiffs is that they have prevailed by obtaining the relief they sought through this litigation. *See* Third Am. Compl., Dkt. No. 83 at 28-29. At an appropriate time, Plaintiffs who are no longer on the No Fly List intend to request that the Court enter judgment in their favor.

I. DEFENDANTS' POSITION

The Government submits that the prudent course is for the Court to consider briefing on the issues in a sequential manner that may avoid the need to address the impact of certain national security information on this case. Thus, the Government proposes that the Court should first consider summary judgment on the basis of unclassified information produced and

[6] Plaintiffs note Defendants' objection to what they characterize as the inclusion of "arguments on the merits" in Plaintiffs' portion of this Joint Status Report. Nothing in Plaintiffs' proposal is inconsistent with the Court's Case Management Order, which instructs the parties to inform the Court of their proposed process for adjudicating remaining claims. As Plaintiffs informed Defendants, there is nothing inappropriate about Plaintiffs explaining to the Court why they are seeking to proceed as they are—the inadequacy of the revised procedures is directly relevant to Plaintiffs' proposal. Plaintiffs also note that Defendants have had the opportunity to describe the procedures they have used to the Court in their January 22, 2015 status report, which reflects only Defendants' views (as ordered by the Court). Plaintiffs have had no such opportunity.

exchanged through the revised redress process as it has been applied to those Plaintiffs who remain on the No Fly List. If the claims are not disposed of on the basis of the unclassified information exchanged concerning Plaintiffs who remain on the No Fly List, the Government proposes that the Court thereafter consider the impact of any national security information on any further proceedings in this case.[7]

Through the revised redress process, Plaintiffs have been provided with their status on (or off of) the No Fly List, the (previously undisclosed) substantive No Fly List criteria used to determine their status, and, to the extent feasible without compromising national security, unclassified statements identifying reasons for their placement on the No Fly List. Plaintiffs also have been afforded an opportunity to respond to these statements through the submission of any information they believe to be relevant to determinations about their No Fly status. As a result of this process, the parties have developed an unclassified record that, in the Government's view, is amenable to an initial assessment of the merits of Plaintiffs' procedural due process claim, if not the resolution of all claims. Defendants submit that the Court carry out that initial assessment based on this unclassified information because, depending on the outcome, further litigation (if any) may be substantially complicated by the presence of sensitive national security information.

As multiple cases have demonstrated, national security information is at the heart of determinations concerning watchlisting and the No Fly List, and the presence of this information creates particular complexities in litigating these cases. Because the national security information at issue is highly sensitive, it implicates, among other privileges, the state secrets privilege. This Court has previously recognized the compelling governmental interest in the

[7] For those plaintiffs who are no longer on the No Fly List, Defendants submit that their claims should be dismissed, *inter alia*, on grounds of mootness. We expect that Plaintiffs' motion for summary judgment will and should address the disposition of these claims.

protection of national security information, that the Government enjoys a privilege in protecting such information, and that "the Court cannot and will not order Defendants to disclose classified information to Plaintiffs." June 24, 2014 Mem. Op. (ECF No. 136) at 42; *see also id*. at 62 (recognizing the possibility that national security information may need to be withheld altogether). Depending on the information at issue and how it relates to the claims and defenses, moreover, the exclusion of properly privileged information from further proceedings in some circumstances could also require dismissal. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) (*en banc*).[8]

For these reasons, Defendants propose that the Court sequence further proceedings so that this case can advance, and further litigation can occur, without requiring the Government or the Court to address the complexities that the presence of national security information underlying this case may present. Specifically, Defendants propose that the parties engage in summary judgment briefing first and solely on the basis of the unclassified information produced and exchanged through the revised redress process, and without consideration of any issue concerning national security information, which issues could implicate the need to assert the state secrets privilege and the impact of any such assertion on the case. At the conclusion of this briefing, and any decisions by the Court that follow, questions concerning how withheld national security information might remain at issue in this case can be addressed, if necessary.

[8] Defendants are aware of the Court's statements at the October status conference concerning classified information in this litigation. The parties' general agreement to proceed on the current record should obviate the need for such considerations. However, should the Court consider proceedings that do implicate sensitive governmental information, Defendants respectfully request an opportunity to present their views through further briefing. In particular, the Government notes that the Classified Information Procedures Act does not apply to civil cases, and it thus does not provide an appropriate approach for further proceedings in this matter.

To be clear, in proposing this process, Defendants do not concede that the claims necessarily would be resolved solely on the basis of unclassified information and, in particular, do not waive any argument that national security information may be at issue in any attempt to adjudicate some or all of the claims. Rather, Defendants contend that the revised No Fly List redress procedures and renewed status determinations Plaintiffs received can be sustained on the basis of information already exchanged and the records already created. However, should the Court conclude that the parties' exchanges are not sufficient, the parties and the Court likely would be faced with further questions concerning how national security information would be at issue in any further proceedings, should they be needed. By deferring such questions until the parties have endeavored to litigate on the basis of unclassified information, a meaningful assessment of Plaintiffs' claims can occur without requiring the Government and the Court to address the impact of national security information and, in particular, the need to protect against the risk of disclosure of such information.

Defendants further submit that all claims should be included in the contemplated briefing, including substantive due process claims. Such claims, which directly challenge the reasons for no Fly List determinations, may be more difficult to address and resolve without reference to sensitive national information than the procedural claims. However, Defendants are prepared to defend those claims, at least as an initial matter, on the basis of the unclassified records already generated, so long as Defendants are not prejudiced with regard to their ability to further argue, in a second stage of summary judgment briefing if necessary, how national security information would impact the outcome of those claims.

Plaintiffs' position that it somehow would be appropriate for the Court to order that Plaintiffs' substantive claims be excluded from summary judgment briefing is at odds with the

Federal Rules of Civil Procedure and prejudicial to Defendants. Plaintiffs appear to argue that it is a foregone conclusion that Defendants' revised redress process is constitutionally deficient. Defendants dispute that notion, but nevertheless, there should be no impediment to considering Plaintiffs' substantive claims. And to the extent Plaintiffs believe that additional information is required in order to resolve such claims, or that the claims are otherwise not ripe for resolution, the mechanism to raise such arguments is Rule 56 (particularly Rule 56(d)), not through a blanket prohibition against a party seeking disposition of claims through summary judgment.

Finally, Defendants object to Plaintiffs' use of this joint status report as a platform to present their arguments on the merits. Defendants strenuously disagree with Plaintiffs' merits arguments concerning the revised process. However, the appropriate vehicle for presentation of these issues is through summary judgment briefing, and Defendants urge the Court to give no consideration to arguments inappropriately presented in a status report. Defendants have requested that Plaintiffs remove their merits arguments, but Plaintiffs have declined to do so.[9]

Should the Court determine to proceed in a manner other than Defendants' proposed two-step, sequenced approach, Defendants respectfully request time to consider other options for addressing the impact of national security information on further proceedings in this case.

[9] Plaintiffs' contention that they have not had an opportunity to opine on the revised procedures, while Defendants have, is misplaced. As required by the Court, in an earlier status report, Defendants described how the new procedures were applied but did not attempt to provide a legal defense of the procedures. Defendants (properly) plan to defer such contentions for briefing.

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Plaintiffs' Exhibit A

NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

December 5, 2014

VIA EMAIL

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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,

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Plaintiffs' Exhibit B

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December 17, 2014

VIA EMAIL

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

Re: **Latif v. Holder, 3:10-cv-00750-BR (D. Oregon)**

Dear Counsel,

I write in response to your letter of December 5, 2014.

As you are aware, your clients received additional letters from DHS TRIP in late November. These letters are the result of the reopening of your clients' DHS TRIP complaints. The letters provided additional information regarding the basis of your clients' placement on the No Fly List, while balancing the interest in disclosure against the risks to national security. In our view, the letters strike that balance appropriately, and we disagree with the vast majority of the points of contention in your December 5, 2014 letter. Of note is the Court's recognition of the established need to limit disclosures that would present risks to national security. *See, e.g.*, *Latif*, June 24, 2014 Mem. Op. (ECF No. 136) at 62 (noting that although evaluation must be given on a case by case basis, "this Court cannot foreclose the possibility that in some cases such disclosures may be limited or withheld altogether because any such disclosure would create an undue risk to national security"). We view the matters raised in your letter as appropriate for the Court's consideration through briefing at the conclusion of the reopened redress process.

The contents of your December 5 letter were also included in the responses you provided to DHS TRIP on December 15, 2014. As you know, final decisions on the reopened DHS TRIP complaints are to be made by January 16, 2015 (absent extension), and review of what you have submitted is underway. The next responses may include additional information, to the extent such information is appropriate for disclosure. To the extent you allege legal infirmity in those responses, we expect that these issues will be appropriate for resolution in the Court at the conclusion of the administrative process.

On the issue of timing, we understand that various factors, including hiring of new counsel, may delay the administrative process originally contemplated by the parties and the

Court. We are available to discuss the schedule going forward and the status report due on December 19, 2014, and will plan for a telephone conference on Thursday, December 18. We are available in the morning, and possibly after 4 p.m.

Sincerely,

/s
Brigham J. Bowen