

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**

AYMAN LATIF, et al.,  <i>Plaintiffs,</i>	Case 3:10-cv-00750-BR
v.  LORETTA LYNCH, et al.,  <i>Defendants.</i>	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.

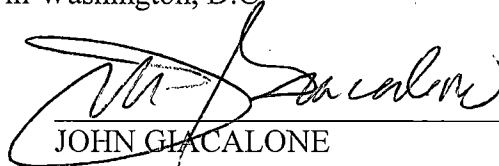
23. At each of these stages, the Government is, to one degree or another, utilizing the analytic process that first gave rise to the nomination: analyzing historic and current intelligence, assessing reliability, and bringing expertise to bear to make judgments about whether an individual represents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

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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.

A handwritten signature in black ink, appearing to read "John Giacalone", is written over a horizontal line.

JOHN GIACALONE  
Executive Assistant Director  
Federal Bureau of Investigation