

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AYMAN LATIF, et al., )  
 ) Case No. CV-10-750-BR  
Plaintiffs, )  
 )  
v. ) October 3, 2014  
 )  
UNITED STATES DEPARTMENT OF )  
JUSTICE, Eric H. Holder, Jr., )  
Attorney General, et al., )  
 )  
Defendants. )  
 )  
 ) Portland, Oregon

---

---

TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER: AMANDA M. LeGORE, RDR, CRR, FCRR, CE  
U.S. COURTHOUSE  
1000 SW Third Avenue Suite 301  
Portland, OR 97204  
(503)326-8184

1 APPEARANCES:

2 FOR THE PLAINTIFFS: HINA SHAMSI  
3 HUGH HANDEYSIDE  
4 American Civil Liberties Union  
5 Foundation  
6 125 Broad Street, 18th Floor  
7 New York, NY 10004  
8 (212) 519-7876

9 STEVEN WILKER  
10 Tonkon, Torp, LLP  
11 888 SW Fifth Avenue, Suite 1600  
12 Portland, OR 97204  
13 (503) 802-2050

14 FOR THE DEFENDANTS: DIANE KELLEHER  
15 Department of Justice  
16 Civil Division  
17 Federal Programs  
18 PO Box 884  
19 Washington, DC 20044  
20 (202) 514-4775  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMAL TARHUNI, )  
 ) Case No. 3:13-CV-00001-BR  
Plaintiff, )  
 )  
v. ) October 3, 2014  
 )  
ERIC HOLDER, Attorney General of )  
the United States (Sued only in )  
his official capacity), et al., )  
 )  
Defendants. )  
 )  
 ) Portland, Oregon

---

TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER: AMANDA M. LeGORE, RDR, CRR, FCRR, CE  
U.S. COURTHOUSE  
1000 SW Third Avenue, Suite 301  
Portland, OR 97204  
(503)326-8184

1 APPEARANCES:

2 FOR THE PLAINTIFF: STEVEN GOLDBERG  
205 SE Spokane Street, Suite 300  
3 Portland, OR 97202  
(503)445-4622  
4

5 THOMAS NELSON  
Thomas Nelson, & Associates  
6 PO Box 1211  
Welches, OR 97067  
7 (503)622-3262

8 FOR DEFENDANT ERIC  
9 HOLDER, ET AL.: BRIGHAM BOWEN  
DIANE KELLEHER  
10 U.S. Department of Justice  
Civil Division  
11 Federal Programs Branch  
PO Box 883  
12 Washington, D.C. 20044  
(202)514-6289  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 (Friday, October 3, 2014; 9:00 a.m.)

2  
3 P R O C E E D I N G S

4  
5 THE COURT: Good morning, everyone. Please be  
6 seated.

7 We are gathered for case management conferences in  
8 two cases. Latif against the Department of Justice, which is  
9 Civil No. 10-750. And Tarhuni against Holder and others, Civil  
10 No. 13-00001.

11 We also, I think, are going to be discussing some  
12 general issues that may pertain, Mr. Nelson, to Mr. Fikre's  
13 case, which is Civil No. 13-899, to the extent there may be  
14 some common management issues.

15 Before we get to the merits of case management for  
16 the two primary cases I called, I wanted to note for the record  
17 that I'd sent counsel an e-mail yesterday, alerting you that we  
18 would have present today, for a little while at least, Scooter  
19 Slade, who is a classified information security officer with  
20 the Department of Justice.

21 Some of you may already know him, some may not. His  
22 role will be -- to the extent it does become necessary for the  
23 Court in any case to consider classified evidence that's being  
24 offered by any party, he is the mechanism through which that  
25 evidence is managed and handled. And I just wanted to first

1 ensure you all knew of him. He's right here (indicating). And  
2 if any of you need his contact information and don't have it,  
3 Ms. Boyer can provide it to you.

4 I think I copied him on the e-mail, so you should  
5 have his e-mail address as well.

6 The cases that we have, including Mr. Fikre's case,  
7 are civil cases, and they're not, per se, as I understand the  
8 application of the Classified Information Procedures Act, the  
9 CIPA -- as I understand it, that that statute does not  
10 explicitly apply to civil matters. It applies to criminal  
11 matters.

12 Nonetheless, I certainly have authority under Rule 16  
13 to make whatever orders are necessary for the fair and  
14 efficient resolution of civil litigation. So I want you to  
15 know that I'm going to rely heavily on the standards set in  
16 CIPA and cases construing it, if ever there becomes a time  
17 where I'm going to have to rely on evidence that would  
18 otherwise come within the scope of the act. It's an existing  
19 set of standards. There have been cases helping judges to  
20 interpret it. And it is, I think, a starting point, if ever we  
21 need to deal with that. So I wanted you to know that.

22 Under CIPA, documents are not filed in the court  
23 record, in the CM/ECF court record. They are lodged with a  
24 classified information security officer like Officer Slade.  
25 And that creates an initial significant problem, I think, with

1 respect to making clear and transparent whatever the record is  
2 underlying whatever rulings the Court ultimately makes.

3           So I'm simply observing that in the criminal matters  
4 where CIPA issues arise, there are -- various processes have  
5 been adopted in various courts about how to handle a matter  
6 lodged with a classified information security officer.

7           I am firmly committed to ensure we have as public a  
8 record as possible. I certainly cannot forecast whether a time  
9 will come that I must consider material that is not only ex  
10 parte but not on the public record in some sealed manner.

11           I'm going to do my very best to ensure that whenever  
12 there is any suggestion that I consider such a matter, there is  
13 a parallel reference in the public record to the fact of a  
14 request for such a consideration, so that there will be an  
15 opportunity for those who may not be included in the offer of  
16 that review, to know that it's happening and to have an  
17 opportunity to challenge it.

18           So, for example, in the Tarhuni case, there is  
19 pending a motion to compel. And the defendants did lodge with  
20 Officer Slade two declarations. He happens to be here. Not at  
21 my invitation, but he's here for other work on another matter.  
22 And he notified me that he was going to be here and that I  
23 would have an opportunity to see that which defendants in  
24 Tarhuni lodged with him but not in the public record in the  
25 Tarhuni case.

1           And I told him, when I met with him yesterday, that  
2 there were objections to my viewing that material that  
3 Tarhuni's counsel had filed. And I wanted to be sure those  
4 were heard and resolved before I undertook that.

5           So he retains the materials that were lodged with him  
6 by the defendants in the Tarhuni case, just so you know.

7           Officer Slade will be the classified information  
8 security officer who will work with all three of these cases,  
9 to the extent there is a need to deal with classified  
10 information going forward.

11           So he is the person who should be contacted by any of  
12 you, should there be some concern about that. And I'm saying  
13 all of this just because we have the happenstance of his  
14 presence here in the building today, while you're all here. So  
15 I wanted you to know of him. There he is.

16           I wanted you to know that I appreciate CIPA doesn't  
17 explicitly apply to civil cases, but it's the place I will  
18 start, to the extent we have to deal with classified material  
19 at any point. And I'll be open to any other reasonable  
20 arguments, of course, about what to do with those kinds of  
21 issues.

22           We have inherently conflicting interests at the heart  
23 of all three of these cases that may inevitably trigger  
24 consideration of classified information, but may not, depending  
25 on the course of developments going forward.



1           The -- in Latif, I have already expressly held that  
2 the existing process is constitutionally insufficient. I  
3 believe the parties are accepting of that analysis for purposes  
4 of the Tarhuni case and in terms of not requiring similar  
5 motion and briefing. I would appreciate being told if somebody  
6 thinks otherwise. And my guess is the same would be true in  
7 the Fikre case, to the extent we talk about a procedural due  
8 process matter.

9           So we're at a place where, as I've been discussing  
10 through status reports with the parties in Latif, primarily,  
11 where plans need to be made about how we're going to use  
12 everyone's resources to get to some resolution.

13           The Latif case has been pending for four years, and  
14 it needs the most attention, I think, in terms of timely focus  
15 for some kind of resolution. But Mr. Tarhuni's case isn't far  
16 behind. It was filed, I think -- wait a minute. What did I  
17 say? Oh, no. It was only filed in '13, and Mr. -- no.

18           MR. GOLDBERG: In January, January 1st.

19           THE COURT: All right. You're almost up to two  
20 years.

21           But my point is this: We've done a lot of work, all  
22 of us, to get to a place. And right now the Government, the  
23 defendants in the Latif case have indicated there is not any  
24 intention to appeal in any -- in an interlocutory way the  
25 rulings so far.

1           And we've got the suggestion that the Court should  
2 stay everything in the Latif matter so that the Government can  
3 spend six months uniting a variety of agencies around new  
4 processes. Before I get any further on our status issues, I  
5 wanted to ask Officer Slade whether there's anything he wanted  
6 to simply note for this record or for the parties with  
7 represent to contact to him, or going forward.

8           CISO SLADE: Just -- just one correction, your Honor.

9           Regarding the filed versus lodged, in criminal cases  
10 classified information is filed under CIPA. It's in civil  
11 cases that things are lodged with the Court.

12          THE COURT: And that's simply because that's the  
13 position litigants have taken over time?

14          CISO SLADE: CIPA, as a law, kind of deals with  
15 criminal case discovery. And then there's usually a protective  
16 order that outlines filing procedures. So that's why.

17          So just that one correction. I'm sorry.

18          THE COURT: Okay. Counsel, do any of you have  
19 anything you would like to raise with respect to Officer Slade,  
20 while he's here? He does have other work, and he's going to  
21 excuse himself when he's ready.

22          MR. GOLDBERG: I do have one.

23          THE COURT: Yes, Counsel.

24          MR. GOLDBERG: Where -- can I ask where the documents  
25 are actually being lodged?

1 THE COURT: That's a good question. With respect to  
2 the two documents in the Tarhuni case that the officer has,  
3 where are they?

4 CISO SLADE: The Government lodged them with me in  
5 Washington, and they'll be kept at a secure location here in  
6 Portland until the judge is ready.

7 MR. GOLDBERG: So I was going to mention that in  
8 the -- one of the earlier cases, the **Al Haramain** case, we were  
9 able to view classified documents at that point. It was  
10 related to the appeal. And we -- those -- the documents were  
11 kept in what was called a SCIF, a sensitive compartment --

12 THE COURT: We don't have a SCIF setting yet. SCIF  
13 being a secured classified -- secured compartmentalized  
14 information --

15 CISO SLADE: Sensitive.

16 THE COURT: Whatever it is, it's protected.  
17 Compartmentalized information facility.

18 Where -- are you able to tell us where --

19 CISO SLADE: So I don't think it's appropriate on a  
20 record to necessarily denote where or how the documents are  
21 going to be stored, but they will be kept per Government  
22 regulations in an appropriate facility --

23 THE COURT: And if the time comes that there will be  
24 access to the documents by one or more of you, there will be a  
25 process discussed with you about how to do that without undue

1 expense.

2 MR. GOLDBERG: The -- just two points, and then I'll  
3 be quiet.

4 THE COURT: You don't need to be quiet, Mr. Goldberg.  
5 I invited questions. So go ahead.

6 MR. GOLDBERG: The only -- the concern that was  
7 raised back in the **Al-Haramain** case was that there was one SCIF  
8 facility, I think, in Oregon, but I think the F.B.I. had  
9 control over it.

10 And the issue in that case, which is a similar issue  
11 in the Tarhuni case, is that the F.B.I., of course, is a  
12 defendant in the case. So that's why I raise that issue.

13 The second question that I have is in terms of not  
14 classified but sensitive security information, SSI information,  
15 is that also going to be lodged in the secure --

16 THE COURT: I think these are questions that are  
17 premature, Mr. Goldberg. Because, as you probably all denoted  
18 from the proposal that I sent to you by e-mail, I'm more  
19 interested in getting some basic issues resolved. And surely,  
20 if we get to a place when it's necessary for information that  
21 is not on the public record or that is not accessible to every  
22 lawyer, if that eventuality arises, we'll have a process to  
23 discuss what, where, when, and how; so that we get there  
24 eventually.

25 I'm trying simply to assure all of you I'm very

1 sensitive to the need for a public record. I'm also obliged to  
2 follow the law to the extent certain materials cannot be part  
3 of the record. We're just going to work through this as we  
4 need to. But I don't see any value in us hypothesizing about  
5 what might or might not happen, and we'll deal with it when the  
6 time comes.

7 Anything else for Officer Slade, while he's here?  
8 Anybody?

9 All right. You're free to go, you're free to stay.  
10 Thank you for letting us know you were here.

11 CISO SLADE: Thank you, your Honor.

12 THE COURT: All right. And we may be in touch.

13 CISO SLADE: All right.

14 THE COURT: Okay. Oh, hold on. Do you have a -- all  
15 right.

16 See, he's so secure, he even has a security pass for  
17 our doors. There you go. Maybe. There you go.

18 (CISO Slade exits.)

19 THE COURT: All right. So, let's get to the business  
20 of case management.

21 The record should also reflect that with respect to  
22 the Latif case in particular, I invited, over the last several  
23 weeks, a number of proposals from counsel that have been  
24 submitted by way of joint reports.

25 And in response to those, I sent to counsel a

1 tentative case management order that was my way of  
2 communicating to you what I thought should happen next.

3           Everyone's had that, the benefit of that approach.  
4 And so what I would like to do first is to hear the parties'  
5 concerns about the approach that I've laid out in the Latif  
6 case.

7           And then once that occurs, the hope is that a similar  
8 approach, whatever I settle with for case management purposes  
9 in Latif, can also be of used in the Tarhuni matter and maybe  
10 the Fikre matter; although that matter still has a pending  
11 motion to dismiss.

12           I want to address, just for the benefit of those who  
13 did not see my e-mail -- if you weren't counsel to the case or  
14 a client, you haven't. And, therefore, you haven't seen my  
15 proposed tentative order.

16           That my -- my view of the Government's suggestion,  
17 the defendants' suggestion in Latif, that this case should be  
18 stayed for six months while a process is undertaken that  
19 apparently will be a system-wide effort to revise the redress  
20 procedures, it's my view that it's not necessary in the Latif  
21 case to stay this matter at all.

22           I start from the perspective that the Latif case is  
23 not a class action. It is the case of 13 individuals who have  
24 claims that have been adjudicated to have merit and need to be  
25 resolved.

1 I applaud the defendants and their willingness to  
2 reformulate procedures, evidently system-wide. But this case  
3 is not a vehicle for the Court or the litigants to be concerned  
4 with system-wide changes.

5 Hopefully they'll happen and hopefully additional  
6 litigation will be avoided for other plaintiffs. But my  
7 primary concern, especially in light of the age of the Latif  
8 case, is that each of the 13 Latif plaintiffs gets a  
9 reconsidered redress process as soon as practicable.

10 And that in that process I'm certainly leaving open  
11 the possibility that one or more of the Latif plaintiffs may  
12 get redress and may get to a place where they're permitted to  
13 fly over U.S. airspace without a restriction of the type  
14 they've alleged in their complaint.

15 So I am not presently of the mind that the Court  
16 should stay Latif, or any other matter. I am much more of the  
17 view that we ought to figure out what defendants can accomplish  
18 with respect to each of the 13 plaintiffs, in terms of a  
19 current reconsideration of each plaintiff, so that defendants  
20 can tell me and the plaintiffs whether any of them now, based  
21 on a review and a re -- considered redress process, consistent  
22 with the constitutional standards I've already articulated,  
23 whether any of them can be assured that going forward they'll  
24 be permitted to -- to fly.

25 So my focus, as you hopefully deduced from the

1 proposed order I sent you, was to not stay the matter but to  
2 focus on a relatively short-term process for each plaintiff to  
3 be reconsidered.

4 I also am not in agreement with plaintiffs'  
5 perspective that we ought to be spending time and resources  
6 litigating now -- today -- what that process is, for two  
7 reasons.

8 First, I think, being the optimist that I am, that  
9 some plaintiffs are going to be more quickly identified and put  
10 in a position where they may fly, and it's not reasonable to  
11 delay that process while we litigate how the defendants may  
12 choose to reframe the processes in a system-wide basis.

13 Again, I get back to the notion that this is not a  
14 class action, and I'm concerned with the individual claims of  
15 each of the 13 plaintiffs.

16 So, to me, if a process defendants undertake ends up  
17 providing relief to even some of the plaintiffs in the near  
18 term, we've accomplished something without the expense and  
19 conflict of litigating hypothetical procedures.

20 So I'm very much in nature favor of a -- of giving  
21 defendants direction to reconsider each plaintiff, and stage  
22 the responses they can provide us in a way that clears --  
23 clears obstacles for those whom the obstacles can be cleared  
24 sooner, rather than later.

25 And then we narrow whatever the remaining disputes



1 are, as to whatever remaining universe the plaintiffs would  
2 have, for whom defendants might continue to contend that  
3 their -- they should not be permitted to fly over United States  
4 airspace. I'm respectful of the positions defendants have  
5 taken so far, that they don't admit there isn't a No-Fly List.  
6 They don't admit any plaintiff is on one. But we're past that  
7 with respect to the allegations in this action for these  
8 plaintiffs.

9           And I want -- I want to adopt a case management plan  
10 today that gets something done, that's substantive in the  
11 nearer term for the 13; and then for Tarhuni, and then  
12 potentially for Mr. Fikre. So that's a long way of saying I am  
13 not in favor of remanding the matter, and I'm also not in favor  
14 of litigating procedures in advance because I think defendants  
15 understand the standards the Court has articulated must be met.  
16 They should be given an opportunity to interact with all of the  
17 agencies involved, some of whom are not parties here. And we  
18 ought to be able to find out in the relatively near future  
19 whether some plaintiffs may get relief and others may need to  
20 go through a particularized process sort of like what I  
21 understand happened in the **Ibrahim** case.

22           The other advantage of pushing a reconsideration for  
23 each plaintiff now is that in the **Ibrahim** case -- at least  
24 that -- the first part of it that was tried, errors were found.  
25 And it may that a reconsideration under the standards I've

1 described might pick those things up, might lead defendants to  
2 conclude the information, whatever it was, might not be timely  
3 anymore. There -- there could be a number of reasons why  
4 defendants might simply say the universe of 13 plaintiffs can  
5 be narrowed.

6           So -- so I'm -- I'm pretty firm on those two primary  
7 conclusions: That the case shouldn't be stayed, and we  
8 shouldn't be litigating procedure ahead of giving the  
9 defendants a chance to just see what can be done for each of  
10 the 13 plaintiffs.

11           But that said, I also told you in your -- in my  
12 message that I am open to argument. And that's what we're here  
13 for.

14           So I would like -- I would like plaintiffs' counsel,  
15 first, to address concerns about the approach I've articulated  
16 in the case management order. And then we'll hear from  
17 defendants. And then we'll slip to the Tarhuni perspectives,  
18 to the extent they -- they may relate on that.

19           Counsel, good morning.

20           MS. SHAMSI: Good morning, your Honor.

21           Hina Shamsi of the American Civil Liberties Union for  
22 the plaintiffs in Latif versus Holder.

23           Your Honor, you haven't met Hugh Handeyside, who is  
24 new to the case. He's also with the ACLU. And you know  
25 Mr. Wilker from Tonkon Torp.

1 THE COURT: Yes, thank you.

2 MS. SHAMSI: So, your Honor, we actually -- we really  
3 appreciate the thought that went into the Court's proposed case  
4 management order. And I think, from our perspective, we -- we  
5 appreciate that the proceedings will not be stayed. We -- it  
6 is very significant to us that the Court's proposal will  
7 provide at least something to us, we hope, with certainty about  
8 whether they are or are no longer on the No-Fly List.

9 And we also appreciated the Court's recognition of  
10 the significant burden that being on the list has played and --  
11 in our clients' lives and the need for a speedy resolution to  
12 the limbo that they've been in. So our general response is  
13 that we would be willing to live with the Court's order, with a  
14 couple of thoughts and suggestions to address our concern that  
15 our clients who may remain on the No-Fly List not be subjected  
16 to a procedure that might not be compliant. We share and hope  
17 that there will be a compliant procedure, but we need to ensure  
18 that if there isn't, we have some recourse.

19 And so what we would propose is that in order for us  
20 to know what information -- as the Court has said in her prior  
21 order -- to intelligently submit to contest the reasons for  
22 placement on hearing, that the defendants actually provide to  
23 us the rules that they are using and applying for  
24 reconsideration so that we are able to, in essence, prepare to  
25 respond and to provide the information that the Court has now

1 ruled we're constitutionally entitled to provide.

2 And what we would propose --

3 THE COURT: So if I might interrupt, I did propose  
4 that, as part of the approach I outlined, defendants would be  
5 completing a final substantive reconsideration of plaintiffs'  
6 by January 16. They would be filing a report of that date, and  
7 would detail the procedures and standards they use.

8 So doesn't that address exactly what you're talking  
9 about?

10 MS. SHAMSI: Well, I guess that's where we then need  
11 clarification, your Honor. And perhaps I had read -- we had  
12 read your order a little bit differently.

13 THE COURT: All right.

14 MS. SHAMSI: Because for the final substantive  
15 reconsideration, it seems to us that the defendants would need  
16 evidence from plaintiffs about why they should not be on the  
17 list.

18 THE COURT: Well, I don't suggest this is the final  
19 final.

20 This is the defendants' best efforts to comply with  
21 the Court order and give each of the plaintiffs fair  
22 consideration. And if somebody ends up still not being able to  
23 fly at that list, then we have to figure out a new plan from  
24 there.

25 So you would clearly have an opportunity to argue

1 that you need to know why they are not being permitted to fly  
2 as of that day. And an opportunity to make a record and  
3 provide information.

4 MS. SHAMSI: So, again, may I just ask again for a  
5 clarification?

6 THE COURT: Yes. Yes.

7 MS. SHAMSI: Because what we had understood was that  
8 in order to be substantively compliant with the Court's  
9 procedural due process ruling before January 16th, the  
10 defendants would provide those plaintiffs who may remain on the  
11 No-Fly List with a notice statement of reasons. Like things  
12 that they were found in compliance with.

13 THE COURT: No. No, no. I'm not making myself  
14 clear.

15 I think the defendants know well what the standards  
16 are. The order so states. They know they have 13 people that  
17 I'm going to direct them to reconsider now.

18 I didn't step into the schedule I set interaction  
19 with your clients because I believe there is a good chance that  
20 some plaintiffs on defendants' own reconsideration, without  
21 them providing anything else, may end up with the relief  
22 they're seeking without us litigating what procedure they used  
23 and whether it was sufficient. And then a universe is created  
24 of plaintiffs who may not be so lucky, in which case we need a  
25 process for them to challenge a continued inclusion,

1 meaningfully.

2           And that's where we get into this notion of  
3 potentially having to provide classified information. We may  
4 have to litigate privileges that the defendants will want to  
5 assert, and so forth.

6           So I was not at all -- all I was trying to do,  
7 between now and January, was set up a definite schedule where  
8 each defendant would be reviewed by defendants on its own good  
9 faith effort -- on their own good faith effort to comply with  
10 the analysis I've already written out, and get -- get some  
11 people moving on with their lives; and others we would need to  
12 do more. So I was not going to require them to explain  
13 anything other than you're in or you're out by January 16.

14           And then in January, we would go forward with your  
15 suggestions about what -- what is needed for those remaining  
16 people to meaningfully challenge whatever defendants say their  
17 status is, assuming we can get to an agreement or a court order  
18 about disclosing that -- that status, without people having to  
19 pay money to buy a ticket and walk up to a TSA agent.

20           Am I being clear now?

21           MS. SHAMSI: Yes, I think I now --

22           THE COURT: I'm sorry if I wasn't clear.

23           MS. SHAMSI: I now understand better, your Honor.

24           But if I can, I would just like to explain why we, (A), were  
25 unsure; and (B), are worried that that might not be adequate,

1 if I may.

2 THE COURT: Sure.

3 MS. SHAMSI: And the reason for that is that we had  
4 understood -- and I put aside -- but the steps that we thought  
5 the Court was laying out, which we thought were sound, was that  
6 by October 10th plaintiffs would know who is currently no  
7 longer -- receive notice of who is able to fly.

8 Then when we had understood the Court's reference to  
9 constitutionally sufficient procedures being applied on an  
10 interim basis by November 14th, what we had understood that to  
11 mean was constitutionally sufficient procedures that the Court  
12 found were missing under the Court's June order. And that, to  
13 us, was notice in the statement of reasons because --

14 THE COURT: Okay. I see why you're saying that. And  
15 all I'm trying to do -- really, all I'm trying to do is to  
16 require defendants to apply the standards I've noted are  
17 lacking. And to see if in the near term we can narrow the  
18 field of your clients to those as to whom there may be a need  
19 to litigate through the nature of the process, the content of  
20 the information, and all of that, from those who haven't.

21 It seemed to me that we could do it on a schedule  
22 indicated without slowing down those who might be able to float  
23 to the top and move on.

24 MS. SHAMSI: And I understand that.

25 THE COURT: If the defendants want to give notice and

1 engage you, that's fine.

2 I was trying to figure out a process that would get  
3 us to a more defined process, a more defined set of issues  
4 without having to litigate the nature of the process  
5 prematurely and unnecessarily for those for whom it won't make  
6 a difference.

7 MS. SHAMSI: And, again, I understand that, your  
8 Honor. But with respect to individuals who may still remain on  
9 the No-Fly List --

10 THE COURT: Clearly we will need to do something.

11 MS. SHAMSI: We will need to do something. But those  
12 individuals will have had no change in their status. As I  
13 understand what the Court's saying now, will have no change  
14 because --

15 THE COURT: You know, Counsel, they may never have a  
16 change in their status.

17 MS. SHAMSI: Because they've not been able, still, to  
18 provide information to the Government about why they may not --

19 THE COURT: The -- let me be clear. The order I have  
20 set out is for a near term. It is not intended to prevent  
21 plaintiffs in any way from providing information or to allow  
22 for such a process after we get through this near-term step.  
23 It's not intended to be the end of anything. It's intended to  
24 reset the stage because four years have passed. And, in my  
25 mind, things can change. Information can be dated.



1           For whatever reason, all of the plaintiffs have  
2 alleged that four years ago, and longer, they've been deprived  
3 the right to fly over United States airspace. I want an  
4 updating of that so that, if we litigate and when we litigate,  
5 it's on current information and a current process.

6           MS. SHAMSI: And --

7           THE COURT: So if defendants say to you, Plaintiffs 1  
8 through 8, we're -- we're not offering any assurance that they  
9 can fly, and we need a process, then I expect you and  
10 defendants' counsel to lay out for me a proposal for these --  
11 these plaintiffs. Not the world, not the system. These  
12 plaintiffs meaningfully to challenge the information on which  
13 they're being deprived the right to fly. And we'll do that.

14           MS. SHAMSI: And, again, let me just try and  
15 articulate what I think the fundamental concern is. That with  
16 respect to individuals who may be still on the No-Fly list, as  
17 I understand it, the Government would not be considering --  
18 because it would not have provided notice and a statement of  
19 reasons -- information that would, as you have said, your  
20 Honor, bring things up to a current state. That's -- that's  
21 really the issue. Because with respect to those people -- what  
22 I had understood, what we had understood, is that we would have  
23 an opportunity before January 16th -- between November 14th and  
24 January 16th to receive notice and a statement of reasons and  
25 to be able to submit information, finally, to the Government

1 that actually takes into account what the Government's  
2 information and concerns might be. And then if people still  
3 remain on the list under a process that meets the fundamental  
4 standards that your Honor set out, then we would be back in  
5 court after January 16th in order for --

6 THE COURT: So what you're saying is you want to be  
7 sure that by January 16, the date I have picked for them to  
8 have completed a substantive reconsideration, that at least by  
9 that date, anyone remaining -- anyone who hasn't been assured  
10 that he or she is able to fly would have affirmative notice of  
11 that and a statement of reasons?

12 MS. SHAMSI: And an opportunity to respond. Yes.  
13 That's what I had understood --

14 THE COURT: Well, I don't think we can get all of  
15 that done by January 16. I just don't think there's enough  
16 time for that. But at least the decision, you're saying --  
17 that benchmark that I set, January 16, should have provided you  
18 with the -- the basis or some mechanism to provide information  
19 that's meaningful?

20 MS. SHAMSI: I -- that's right, your Honor. And I  
21 think that's something that we could live with. But we --

22 THE COURT: Well, I'm not negotiating with you. But  
23 I understand why you saw that part confusing of the proposed  
24 order, and I see the concern.

25 Okay. What else did you have?

1 MS. SHAMSI: Actually, your Honor, we had -- we  
2 thought everything else was fair.

3 The one other concern that we had was in paragraph 2  
4 of the order. There's language that talks about plaintiffs who  
5 may not be on the No-Fly List or get notice that they're not on  
6 the list may no longer have justiciable claims. And that seems  
7 to make a set of assumptions, and we would just ask the Court  
8 to change that to read, "may have no other justiciable claims."  
9 Because we've -- you know, for those -- those individuals who  
10 may no longer be on the list, they've been through this entire  
11 process. They've received kind of notice. And so that --

12 THE COURT: Okay. I appreciate the interpretive  
13 concern there.

14 All right. Anything else?

15 MS. SHAMSI: No, your Honor.

16 THE COURT: All right. Thank you.

17 Well, Counsel, good morning.

18 MR. BOWEN: Good morning, your Honor. Brigham Bowen  
19 for the United States. With me is Diane Kelleher. This is the  
20 branch director of the federal programs branch.

21 THE COURT: Yes.

22 MR. BOWEN: I think largely our perspective is to  
23 echo the plaintiffs' perspective, that we appreciate the care  
24 and consideration that went into the Court's order. We think  
25 this is an order that we can comply with, in the main, and we

1 intend to meet the deadlines that are set forth by the Court.

2 So that's our primary response --

3 THE COURT: How were you interpreting this January 16  
4 benchmark, in light of counsel's comments?

5 MR. BOWEN: We actually interpreted it the same way  
6 the plaintiffs did. We had interpreted the Court's  
7 contemplation to be that at some point between now -- or -- or  
8 August 4 and January, that the Government would in fact provide  
9 some sort of a statement and give the plaintiffs an opportunity  
10 to respond to that statement with whatever submissions they  
11 felt were appropriate.

12 THE COURT: Well, I can certainly be more specific in  
13 that respect, since you were reading it that way. Okay.

14 MR. BOWEN: We certainly were.

15 And -- and I would state that I think the Government  
16 appreciates that if we can do it, we are willing to do it. And  
17 we think that advances the ball. It does give the plaintiffs  
18 more of the redress that they're more concerned about and may  
19 in fact obviate the need for further litigation.

20 And if the Court's inclined to keep it as it is and  
21 not require it, that's acceptable to the Government as well.  
22 But as long as -- you know, if we can get it done, I think it's  
23 in everyone's interest to do that.

24 The only other caveats we -- we wanted to make for  
25 the Court is because we contemplated that there would be this

1 back and forth, we had some concern that if that back and forth  
2 turned into something of relative substance, where the parties  
3 in fact intended to continue to have those conversations and  
4 they ran up against that January deadline, that in those  
5 exceptional cases we would hope that there would be some wiggle  
6 room for the parties to continue to engage in those  
7 conversations as needed in order to resolve process. Not from  
8 any lagging on the Government's part but simply because that  
9 back and forth required a little bit of breathing room.

10 THE COURT: What I'm trying to convey and -- is what  
11 I think you're hearing, that the time's come. These 13  
12 plaintiffs need to have a reconsideration of their status under  
13 constitutionally permissible procedures.

14 And I just feel very confident that a current  
15 reconsideration may produce relief for some at least, and that  
16 this is relatively urgent. It's a four-year-old case, and we  
17 need to get decisions made for each of the individuals.

18 Of course, whenever litigants, acting in good faith  
19 and not delaying, have run out of time and they've made very  
20 good use of the time, it is not at all uncommon to ask for more  
21 time. If that's justified, then it will be granted. Nothing  
22 is carved in stone.

23 But, on the other hand, I was trying, with the  
24 prospective language of references to firm deadlines, to make  
25 the point that I've tried to make several ways this morning:

1 Four years is long enough. We need to get to some decisions  
2 about each of the 13 plaintiffs, so that to the extent any of  
3 them remain in a status where the Government contends there are  
4 justified reasons for the positions taken, that that can be  
5 reviewed by an appellate court on an adequately developed  
6 record, without undue delay.

7 MR. BOWEN: Thank you, your Honor. We appreciate  
8 that. And for that reason, we hadn't intended to ask for  
9 additional or changed language. We just wanted to note that  
10 for the record.

11 The only other statement we wanted to make -- and  
12 this is really more of a preview of potential for your other  
13 statement, but we wanted the Government's position to be clear  
14 on this. Is with reference to the paragraph that deals with  
15 interim orders, considering interim travel, the only point we  
16 wanted to make on that is that the policy that the Government  
17 has developed with respect to facilitating travel on occasion  
18 for people who may otherwise be unable to do so has -- was  
19 developed in the context of providing means for U.S. persons to  
20 find their way home from overseas, and was not actually  
21 designed to target other kinds of travel, particularly outbound  
22 travel. And so we just wanted to note that.

23 We don't know that the Court's order contemplates  
24 that there would be further submissions. And we just didn't  
25 want there to be any confusion about what the Government's

1 position may be in that instance, after there's been a  
2 back-and-forth with --

3 THE COURT: The reference there was intended, again,  
4 to reinforce what I want to make very clear: That time is of  
5 the essence. And to the extent people are ultimately going to  
6 be able to fly, that needs to happen sooner rather than later.

7 And if a process continues because it's difficult and  
8 it takes time and a true exigency arises, these 13 plaintiffs  
9 have a pending case, and they have access to a judicial officer  
10 who ought to be able to consider a request for some emergency  
11 relief if there was truly an exigent circumstance, after  
12 conferral with the parties.

13 So I suspect that if ever that happened, the parties  
14 would be able to solve the problem primarily. There's no  
15 reason the Government can't consider such a request. There  
16 just isn't. And there certainly isn't any reason the Court  
17 can't consider it in the form of a petition.

18 There may be reasons not to grant it. There may be  
19 need for litigation around it. But my point for including that  
20 language was, again, to underscore my commitment to assure that  
21 we are going to get through a process to judgment for these 13  
22 plaintiffs, so that if there's a need for appellate review, it  
23 happens. Because certainly any number of possibilities can be  
24 the case. It may turn out that some plaintiffs will not be  
25 permitted to fly, and the Court may endorse that after a

1 process and full litigation. It may be that the Court doesn't  
2 agree with analyses, and there may be orders made that the  
3 Government or the defendants need to appeal. But we're going  
4 to get through that. And so I need to say it every way I can.

5 MR. BOWEN: We appreciate that, your Honor. And for  
6 the same reason, we weren't planning on submitting additional  
7 language or asking for changes.

8 THE COURT: That language was simply to assure the  
9 plaintiffs that I intend to take seriously the time involved  
10 and the reality of where they are.

11 And if it turns out somebody needs to make a request  
12 and -- that the -- the defendants disagree with, then we'll  
13 hear it. And it will be like any other contested matter.

14 MR. BOWEN: Understood. And the only other point we  
15 would make that there is that of course the Government would  
16 entertain those questions and engage them and take them  
17 seriously.

18 THE COURT: Which is why the proposed order referred  
19 to conferral. I'm certain you would confer. Okay.

20 MR. BOWEN: Thank you.

21 THE COURT: So, Mr. Nelson or Mr. Goldberg, do you  
22 have any thoughts on just the procedural approach from Latif as  
23 it might apply to the Tarhuni case?

24 I'll tell you, I would like to see this same kind  
25 of -- I would like to see Mr. Tarhuni included in this same



1 relative schedule. I would prefer not to litigate your motion  
2 to compel until it's done because I think something may be  
3 gained. It may narrow the focus. And avoiding spending time  
4 and resources on things that may not ultimately be necessary  
5 is, to me, common sense. But that was just how I was starting.

6 MR. GOLDBERG: We respect the Court's view of -- of  
7 how common sense should be applied to this procedure.

8 First of all, we've not seen the order.

9 THE COURT: Oh.

10 MR. GOLDBERG: So it's hard for me to be able to  
11 really respond, your Honor. But I will say this.

12 In terms of the way that Mr. Tarhuni's case is  
13 proceeding, I'm confident -- throughout this case, we've  
14 approached the Government and asked them to reconsider  
15 evidence: Isn't there any way to get -- to have the evidence  
16 looked at in terms of Mr. Tarhuni? The issues have arisen  
17 regarding family. Mr. Tarhuni's brother just died. Trying to  
18 figure out ways for him to be able to get to see his family in  
19 Libya. At that time, he had previously had an aunt die. All  
20 of this we've raised with the Government throughout the case,  
21 trying to confer, trying to resolve this case. And we've --  
22 the response has always been essentially no.

23 So we're confident -- and we know, in terms of where  
24 we would be on January 16th, is the Government will be saying,  
25 You're still on the list. And that we can't provide you -- or

1 any of the information as to why you're on the list, or we are  
2 going to assert -- or we have asserted, now, the state secrets  
3 privilege.

4 THE COURT: So you are saying nothing would be  
5 gained.

6 MR. GOLDBERG: So what I'm saying is that waiting --  
7 for us to wait until January 16th is a waste of time. That  
8 this continues to impact Mr. Tarhuni really significantly; both  
9 as we've spelled out in our prior pleadings and as I'm advising  
10 the Court now, in terms of things that have happened in terms  
11 of his family. And we are not inclined to postpone -- and,  
12 obviously, it's going to require litigation and complicated  
13 litigation on how to deal with all of these issues.

14 But waiting until January 16th, we honestly in good  
15 faith believe --

16 THE COURT: So you think the Government has  
17 already -- the defendants have already reviewed Mr. Tarhuni's  
18 status in light of the standards articulated in the Latif case  
19 and that nothing would be gained between now and January if  
20 your client was subject to the same directed review by this  
21 Court?

22 MR. GOLDBERG: Yes.

23 THE COURT: Is there any --

24 MR. GOLDBERG: And let me -- I say that based upon my  
25 communications with Mr. Bowen throughout -- as this litigation

1 has proceeded.

2 And, No. 2, because a critical part -- as we read  
3 your order of the constitutional standard -- was the importance  
4 of notice being given.

5 THE COURT: Right. Well -- so the process -- but the  
6 process, Mr. Goldberg, that was very helpfully clarified in the  
7 discussion that just happened, is that by January 16 the  
8 plaintiffs will be given, in Latif, notice and an opportunity  
9 to respond in a meaningful way. And if you say you haven't,  
10 your client hasn't, maybe he should be given that opportunity.

11 MR. GOLDBERG: We believe that, again, to the  
12 assertion of, not just the state secrets privilege but the  
13 sensitive security information privilege, and all of that, that  
14 none of that information is going to be provided -- at least  
15 voluntarily -- by the Government. And the only way it's going  
16 to happen is with involvement with the Court and resolution of  
17 the motion to compel.

18 THE COURT: All right. Thank you, Mr. Goldberg.

19 Yes, Mr. Bowen.

20 MR. BOWEN: Your Honor, we -- we emphatically  
21 disagree with plaintiffs' perspective for a handful of reasons.  
22 I'll try to be brief.

23 The main is that I think it is really wrongheaded to  
24 prejudge the process. I don't think Mr. Goldberg -- I  
25 understand the cynicism, but I don't think Mr. Goldberg knows

1 what the result will be. He does not know what information he  
2 will or will not be given. And we are assessing this process  
3 and intend to -- to make decisions in this case the same way we  
4 would in all of the others, with full and due consideration to  
5 the Court's -- to the Court's decision and to the standards  
6 that are developed in the process. So I just don't think you  
7 can prejudge.

8           And I think it's important from a perspective of  
9 making sure that there's a -- a -- a clear case and  
10 controversy, that we know what the dispute is between the  
11 parties at that point.

12           On the -- on the assertions of privilege, we asserted  
13 privilege in response to a motion to compel to exclude  
14 evidence. That doesn't preclude any new information being  
15 submitted through the new process. I think those are very,  
16 very much separate-track issues.

17           And on that point -- I don't want to jump off topic.  
18 But on that point, in the Court's prior order in the Tarhuni  
19 case, we had actually moved for a stay of discovery in the  
20 general matter. And you had raised the possibility of  
21 reraising it.

22           We do raise that here. We would like to make an oral  
23 motion to stay discovery, at least during the pendency of this  
24 process. We think that there are numerous commonsense reasons  
25 for that.

1 THE COURT: So, Mr. Bowen, you would advocate my  
2 adopting an interim case management order in Tarhuni similar to  
3 the concepts we've discussing in Latif?

4 MR. BOWEN: Oh, yes. I'm sorry. I should be very  
5 clear. We would --

6 THE COURT: Which would, in turn, would deny your  
7 motion to stay. Would set aside the motion to compel for the  
8 near term, and allow the same kind of process to go forward for  
9 Mr. Tarhuni as is happening for the Latif plaintiffs?

10 MR. BOWEN: So that's correct. I don't want to  
11 quibble. But my understanding would be --

12 THE COURT REPORTER: I'm sorry. I didn't hear --

13 THE COURT: I'm sorry. Yes, I misspoke.

14 MR. BOWEN: Right. So --

15 THE COURT: I interrupted him. It was a motion to  
16 remand that I would be denying.

17 MR. BOWEN: Right. And we had a separate motion to  
18 actually stay discovery. And the real concern with the  
19 discovery is that if discovery is ongoing, regardless of  
20 whether the Court assesses the motion to compel, in theory  
21 there could be depositions and interrogatories, and all of  
22 those other things that embroil people in disputes that we --

23 THE COURT: Well, let me be explicit as to something  
24 that was implicit. I thought the process I was describing for  
25 Latif would be focused on getting the plaintiffs reconsidered

1 and not diverting the litigation to normal discovery processes.

2 I just assumed we would -- you would be focusing  
3 intently on reconsidering each of the plaintiffs, so we could  
4 get that question answered.

5 And if we get to a place where the plaintiffs remain  
6 aggrieved, then everything is on the table. Every kind of  
7 discovery request would be potentially possible.

8 MR. BOWEN: That's helpful.

9 Thank you, your Honor.

10 THE COURT: All right. Mr. Nelson, I know you didn't  
11 know that I was going to be thinking about your client,  
12 Mr. Fikre, too. And there is pending a motion to dismiss in  
13 your Fikre case. But I'm wondering if you've -- as you've  
14 heard this discussion, and I know -- I apologize. I didn't  
15 send to you all the tentative outline I was laying out in the  
16 Latif case.

17 But I wonder if you have any thought, Mr. Nelson,  
18 about a similar process in -- in the Fikre case, even though  
19 your pleadings are a bit behind the others.

20 MR. NELSON: Your Honor, for purposes of case  
21 management, we would appreciate being -- having Mr. Fikre's  
22 issues resolved as soon as possible.

23 As I indicated in the filing made last week,  
24 Mr. Fikre is not in the United States. And a significant  
25 deterrent, aside from his personal safety issues, a significant

1 deterrent is coming back to the United States and being stuck  
2 here like Mr. Tarhuni is.

3           Mr. Fikre is trying to -- he is, if you will, an  
4 international person, born overseas, and he wants to do  
5 business overseas.

6           So coming -- cutting to your answer, yes, your Honor,  
7 we would appreciate Mr. Fikre's situation also being  
8 reconsidered at the earliest possible time.

9           We are dealing with a number of issues.

10           Just for the Court's information, I have informed  
11 Mr. Bowen that we will be filing an amended complaint -- a  
12 Third Amended Complaint that will raise issues --

13           THE COURT: Before I --

14           MR. NELSON: I'm sorry, your Honor.

15           THE COURT: -- resolve the motion to dismiss?

16           MR. NELSON: It raises issues that we have been  
17 referring to for quite a while involving surveillance. What we  
18 believe is illegal and unconstitutional surveillance that led  
19 to his indictment in San Diego.

20           We -- the reason we have waited until now, your  
21 Honor, is we finally got all of the information we needed to  
22 put in a claim under the federal Tort Claims Act. And as your  
23 Honor knows, there's a six-month waiting period. That  
24 six-month waiting period recently expired.

25           And so counsel for Mr. Fikre, including -- well,

1 Counsel for Mr. Fikre had been -- we had been going back and  
2 forth rapidly, trying to put together a third amended  
3 complaint. Not to raise -- not to relitigate the issues --

4 THE COURT: You know you need leave of court.

5 MR. NELSON: Pardon me?

6 THE COURT: You need leave of court to do that.

7 MR. NELSON: Yes, I know that. I'm fully aware of  
8 that.

9 THE COURT: Well, let me make an observation about  
10 the motion to dismiss, as I have been tracking what you've been  
11 filing.

12 The -- I was surprised that in the last form of  
13 amended complaint that was filed you did not include a  
14 procedural due process claim, which is sort of the fundamental  
15 approach in Latif and Tarhuni that has resulted in the ruling  
16 that I made, that has resulted in the progress.

17 I may be missing something but --

18 MR. NELSON: Your Honor, I thought we had.

19 THE COURT: Well, I didn't see it that way.

20 If you're going to file a third amended complaint,  
21 you might take care to ensure that the procedural due process  
22 claim is very explicit.

23 Now, Mr. Bowen, if he wants to file a third amended  
24 complaint, it seems to me we should figure that out right now,  
25 rather than dealing with the pending motion to dismiss on the



1 last amended complaint.

2 What are your views?

3 I know that wasn't something you might have thought  
4 you would have to address today. But can we -- can we address  
5 it?

6 MR. BOWEN: I'm not in a position to sort of prejudge  
7 the Government's position on that. It does seem to have a  
8 certain commonsense appeal, and it was a question I had  
9 intended to raise, which is, well, what do we do with the  
10 pending --

11 THE COURT: Well, one thing we could do is I could  
12 deny the motion to dismiss as moot. I could give plaintiff  
13 leave to file a third amended complaint.

14 You can raise again, in due course -- we can figure  
15 out a schedule for you to file a new motion to dismiss, if you  
16 want to. In fact we could do it into January, so that we could  
17 include Mr. Fikre in this interim review process where I really  
18 want defendants focusing their attention, as opposed to  
19 litigating pleading motions and discovery motions.

20 MR. BOWEN: Thank you, your Honor.

21 I do think, given the -- the sort of shifting sands  
22 of where we are on Fikre, I would just like maybe a little bit  
23 of time to provide a statement to the Court that maybe we would  
24 file in short order. We -- right now our reply deadline, I  
25 think, is the 14th of October. And so we intend to file

1 something before --

2 THE COURT: How about we do this. How about we do  
3 this. You file your reply -- don't file a new amended  
4 complaint until he files something; which will either be a  
5 reply or it will be a consent to withdrawing the current motion  
6 to dismiss and a consent for plaintiff to file a third amended  
7 complaint, which I will approve.

8 If he files the reply, then you can file a motion  
9 to -- for leave to file a third amended complaint and argue  
10 that the current motion should be deemed moot, and we'll figure  
11 it out. But they may be able to moot the whole thing.

12 MR. NELSON: (Nods head.)

13 THE COURT: I'm fine with the motion to dismiss going  
14 off the front burner, the plaintiff pleading his best claim so  
15 that we're not missing something that's going to come up later  
16 and extend anyway. Because if he's filed a tort claim notice,  
17 he has a right to file a lawsuit -- a new lawsuit. So we might  
18 as well manage it here. And then you would be relieved from  
19 answering the third amended complaint or moving against it  
20 until this January time, so that the primary focus is on this  
21 reconsideration of each of the plaintiffs in the near term.

22 I'm fine with that, if the Government wants to  
23 proceed that --

24 MR. BOWEN: We'll take all of those issues back to  
25 our clients. Thank you.

1 MR. NELSON: That's fine, your Honor. Thank you.

2 THE COURT: And take a look at that procedural due  
3 process part, please.

4 MR. NELSON: I certainly will.

5 Thank you.

6 THE COURT: So I think I will enter a case management  
7 order in Latif and in Tarhuni. I'm not going to enter any  
8 order -- well, wait a minute.

9 I'll wait in the Fikre case until I hear from the  
10 Government on how it wants to proceed on the briefings. But I  
11 think we should assume that the defendants in Fikre will also  
12 conduct a substantive reconsideration of Mr. Fikre under the  
13 standards that I've ruled apply. It just may be necessary to  
14 extend the schedule. I don't know. You should be able to do  
15 it. It's just one more person.

16 But there's a lot -- it really makes sense if we all  
17 sort of track in the same way, at least on this part, until the  
18 individualized issues necessitate individualized consideration.

19 And then I do anticipate that wherever we are in  
20 that, to the extent we have more than one person remaining as  
21 to whom the Government has issues, I think each of those  
22 individualized plaintiffs needs to have an individualized  
23 track.

24 We can't keep lumping everyone together because  
25 it's -- it's going to hurt -- the individuals need

1 individualized consideration on -- on an individualized  
2 schedule. And it may be that for each plaintiff we get a  
3 different schedule. We're moving forward after January, if  
4 that turns out to be necessary.

5 MR. BOWEN: Your Honor, I'm sorry. I just -- the  
6 only point I wanted to just make clear is that I don't know  
7 whether the Government's position is that in light of some of  
8 the jurisdictional issues in Fikre, the Government necessarily  
9 would agree to do the revised procedures in the interim. But  
10 that's all to say.

11 THE COURT: I've also said I'm not issuing such an  
12 order.

13 I am going to issue an order that explicitly directs  
14 the Government to reconsider each of the Latif plaintiffs and  
15 Mr. Tarhuni, consistent with the constitutional standards I  
16 set. I'll -- I'll be more precise in the language in the order  
17 that I tentatively gave you to make clear what the expectations  
18 are. But the goal -- but then the outcome will be by January  
19 16, unless that deadline is extended, all of the Latif  
20 plaintiffs and Mr. Tarhuni, will know what their status is and  
21 the reasons for that status in a way that they have been --  
22 they've had an opportunity to address. So we'll know where we  
23 are in January, in a substantive way.

24 MR. BOWEN: Thank you.

25 THE COURT: And I think that's helpful for everybody.

1           Anything else? Mr. Goldberg, anybody? Okay.

2           MR. GOLDBERG: So am I assuming you -- you are not  
3 going to deal with any of the objections we filed at this  
4 point?

5           THE COURT: I'm going to issue an order basically  
6 delaying the issue regarding the discovery disputes because I  
7 want to see if Mr. Tarhuni gets the benefit of something out of  
8 this process between now and the middle of January. And if he  
9 doesn't, off we go.

10          MR. GOLDBERG: (Nods head.)

11          THE COURT: Everything can be reasserted.

12          MR. GOLDBERG: (Nods head.)

13          THE COURT: Maybe -- maybe it won't be necessary.

14          MR. GOLDBERG: (Nods head.)

15          THE COURT: I appreciate it's been a -- two years  
16 almost. In January, it will be two years for him. But it's  
17 worth -- it's worth getting a better record, and the Government  
18 being sure about what it's asserting with respect to this  
19 reconsideration. So it will be up-to-date and current as of  
20 January. If it is as you say, then we'll litigate it then.

21          MR. GOLDBERG: So -- with hesitation -- there's one  
22 point I'm wondering if I can raise, and if it makes sense, to  
23 wait.

24                 In terms of the SSI clearance that we -- Mr. Nelson  
25 and I were given, it's subject to a protective order being

1 entered. And is it -- I suppose there's nothing to prevent us  
2 from -- the Government and ourselves, from trying to negotiate  
3 a protective order in case that's necessary?

4 THE COURT: I -- I am not to be heard as precluding  
5 any kind of reasonable agreement among you to do anything that  
6 moves forward. But my -- my issue is that these are public  
7 cases. And I am going to do everything I can to ensure we have  
8 a public record about decisions made and the reasons for them.

9 That's why I made the point about -- in the tentative  
10 order, of -- the reference I made to not needing a protective  
11 order is, first of all, we have 13 named people in the Latif  
12 case, and Mr. Tarhuni; all of whom have publicly declared what  
13 they believe their status is. It's just not a secret anymore  
14 that they may or may not have been on the list.

15 And so to say to one of them, for example, you could  
16 go buy a ticket and board an aircraft tomorrow should not be a  
17 secret event. Because, guess what? If they were told that  
18 under a protective order, they would go buy a ticket and be  
19 publicly observed walking through an airport and being allowed  
20 to board an aircraft.

21 So I don't see a protective order need around that  
22 kind of disclosure. But, of course, if any litigant thinks  
23 something needs to be protected, the issue will be raised, and  
24 I'll do my best to consider it fairly. But the priority is  
25 public filings, public disclosure, public reasoning because

1 it's public lawsuit. And when there are privileges asserted,  
2 we deal with them the way they've always been dealt with.  
3 They're asserted, they're evaluated, they're either  
4 acknowledged or overruled. Off we go.

5 So, yes, Mr. Goldberg, negotiate away, as best you  
6 can.

7 Anything else?

8 Okay. Thank you, everybody. We're in recess on  
9 these matters.

10 MS. SHAMSI: Thank you, your Honor.

11 (Conclusion of proceedings.)

12  
13 ---oOo---

14  
15 I certify, by signing below, that the foregoing is a correct  
16 transcript of the oral proceedings had in the above-entitled  
17 matter this 27th day of October, 2014. A transcript without an  
18 original signature or conformed signature is not certified. I  
19 further certify that the transcript fees and format comply with  
20 those prescribed by the Court and the Judicial Conference of  
21 the United States.

22 /S/ Amanda M. LeGore

23 \_\_\_\_\_  
24 AMANDA M. LeGORE, RDR, CRR, FCRR, CE

25