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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. ERIC H. HOLDER, JR., et al., *Defendants*.	Case 3:10-cv-00750-BR **DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

Pursuant to Rule 56, Defendants move for summary judgment on Plaintiffs' procedural due process and Administrative Procedure Act claims. The revised DHS TRIP process provided

CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
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DEFENDANTS' CONSOLIDATED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Congress and the President have charged federal agencies with taking steps to secure the nation and its airways from the grave threat of terrorism. Few interests could be more compelling. The Government carries out this mandate by making predictive judgments, based on sensitive intelligence reporting and investigative information, as to whether certain individuals present too great a risk to be allowed to board commercial aircraft. In making these determinations, the Government has taken concrete steps to balance the liberty interests of travelers with the serious national security concerns addressed by the No Fly List — and, through revised redress procedures, has specifically taken into account the Court's finding that U.S. persons denied boarding because of their status on the No Fly List should have a meaningful way to contest their listing. As set forth herein, Plaintiffs' renewed procedural due process challenge to the Government's procedures lacks merit.

As with any procedural due process challenge, the Court is called upon to determine (i) what process is constitutionally required under the circumstances, (ii) whether the challenged

status on the No Fly List and, to the extent consistent with national security, notice of the reasons for the individual's placement on the List. In particular, the Court recognized that determinations about what information can be provided must be made on a case-by-case basis, and that, in some cases, certain information underlying the No Fly List determination may not be able to be disclosed without compromising national security.

With these principles in mind, the resolution of the second question is straightforward. The revised redress procedures incorporate all the key features of a constitutionally adequate process described in the Court's order. For U.S. persons denied boarding on flights, the redress process now provides notice of an individual's status on the No Fly List and the basis for the listing, and the Government makes every effort to provide such individuals with information addressing the reasons for their placement. Whether and to what extent such information can be disclosed depends on the nature of the information at issue and the constraints on disclosure required by the Government's interest in protecting that information. But while the outcome of the redress process may vary from case to case, the underlying process and procedures remain the same. In all cases, the placement decision undergoes several independent layers of review to ensure that the requisite criteria are met and the underlying information is reliable. And during the redress process, multiple federal agencies review the available information with an eye towards disclosing as much information as possible without compromising national security or law enforcement interests. This flexible, case-by-case review strikes an appropriate balance between the Plaintiffs'[1] interest in receiving information relating to their inclusion on the No Fly List and the Government's interest in securing the nation from terrorist threats and protecting

[1] Defendants use "Plaintiffs" throughout to refer to those plaintiffs who have active claims because they remain on the No Fly List after the conclusion of the revised DHS TRIP process they received in late 2014 and early 2015.

sensitive information from disclosure. It also falls squarely within the parameters of the Court's due process analysis.

Once the Court concludes that the process surrounding placement on the No Fly List is fair, the only remaining question is whether Plaintiffs received the benefit of that process when they sought redress with the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP). As we exm 0 TDSnt Slvae. a07 a6n

requires no more. The Court should grant Defendants' motion for summary judgment and deny Plaintiffs' motions.[2]

By its very nature, identifying individuals who "may be a threat to civil aviation or national security" is a predictive judgment intended to prevent future acts of terrorism in an uncertain context. *See* Declaration of FBI Assistant Direct of Counterterrorism Michael Steinbach, May 28, 2015 (Steinbach Decl.) ¶ 7. Such assessments differ significantly in their nature and purpose from the filing of criminal charges and the development of evidence to obtain a conviction. *Id*. For No Fly determinations, the Executive Branch assesses the threat a person poses to commit an act of terrorism based on information available, for the purposes of protecting a commercial civilian aircraft and its passengers from harm and protecting the national security. *Id*.; 49 U.S.C. §§ 114(h)(3), 44903(j)(2)(A). Such assessments are made in the midst of a fluid environment of gathering intelligence, investigating potential terrorist threats, and seeking to stop attacks before they happen. Steinbach Decl. ¶¶ 7, 37. Of necessity, such information-gathering activities rely heavily on highly sensitive intelligence and investigative sources and methods for identifying terrorist threats and activities that must be protected from disclosure. *Id*. ¶ 23.

It follows from the nature of the No Fly List inquiry that much of the information bearing on a No Fly List determination is sensitive national security information — information the Executive Branch has constitutional authority to protect. *Id*.; *see also* U.S. Const. art. II, § 2, cl. 1; *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The Executive's] authority to classify and control access to information bearing on national security … flows primarily from this constitutional investment of power in the President"). Such information may reside in counterterrorism investigative files, and will often identify various intelligence sources and methods, including confidential human sources, information obtained from partners, and

information about other sources and methods that must be protected from disclosure to prevent significant harm to national security. *See* Steinbach Decl. ¶¶ 23-33.

The Government has established numerous safeguards and policies to ensure that No Fly List determinations are responsive to emerging threats and based on information that is reliable and up to date. As established by the Grigg Declaration, the TSDB and the No Fly List are subject to "rigorous and ongoing quality control." Grigg Decl. ¶ 22. Prior to placement, nominations are reviewed both at the nominating agency and by subject matter experts at TSC in coordination with the nominating agency and the National Counterterrorism Center ("NCTC") to ensure that the information is reliable and satisfies the standard for inclusion. *Id*. ¶ 19. After placement, regular reviews and audits include but are not limited to: "(a) at least a biannual review for all U.S. Person records in the TSDB; (b) at least a biannual review for all U.S. Persons on the Selectee List or No Fly List by a [subject matter expert]; (c) a review of the available derogatory and biographic information for subjects in TSDB following a screening encounter to ensure appropriate watchlisting as well as an appropriate encounter response when applicable; and (d) regula

for individuals who have inquiries or seek resolution regarding travel-related difficulties such as denied or delayed airline boarding, denied entry into the United States, or repeated referral for additional (secondary) screening. *See* DHS TRIP Website, http://www.dhs.gov/dhs-trip.

II. Prior Proceedings: The Court's June 24, 2014 Order

Under prior DHS TRIP procedures in place when this lawsuit commenced, an individual on the No Fly List would not receive confirmation of his or her status on the list, nor notice of the criteria pursuant to which he or she was listed, nor additional information concerning the basis for his or her placement. This Court determined that this prior redress process did not satisfy the requirements of due process. Dkt. No. 136. Although the Court found that the Government's interests in protecting aviation and national security and preventing the disclosure of sensitive information were "particularly compelling," *id.* at 42, the Court found that nondisclosure of any information concerning an individual's status on the No Fly List was insufficient, *id.* at 11, 13, 59. The Court analyzed other cases in involving national security matters in which individuals were provided with some (but not all) information concerning the reasons for their purported liberty or property deprivations (including *Jifry v. FAA*, 370 F.3d 1174 (D.C. Cir. 2004), *Al Haramain Islamic Found. Inc. v. Dep't of Treasury*, 686 F.3d 965 (9th Cir. 2012) ("*AHIF II*"), and *KindHearts for Charitable and Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857 (N.D. Ohio 2009)), and observed that, in contrast to those cases, DHS TRIP did not provide "any notice" of the reasons for placement on the List. Dkt. No. 136 at 59. The Court concluded that "the absence of any meaningful procedures to afford Plaintiffs the opportunity to contest their placement" violated due process. *Id.* at 60. The Court further held that the Government must devise new procedures "with the requisite due process described herein without jeopardizing national security." *Id.* at 61. The Court noted that such procedures

person timely requests additional information, DHS TRIP will respond with a second letter that

enforcement interests at stake a

missions, military installations, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government." *See* Dkt. No. 175 ¶ 4.

In addition, each Plaintiff was provided with an individualized, unclassified statement of reasons supporting his inclusion on the No Fly List, where feasible and consistent with national security and law enforcement interests. *See* Dkt. Nos. 175–180 ¶¶ 5. Each letter further notified each Plaintiff that the Government was "unable to provide additional disclosures" due to the nature of that information, including because of national security concerns. *See* Notification Ltrs.[5]

After the six Plaintiffs were notified that they were on the No Fly List, each Plaintiff submitted a response to the notification letter he had received. The Government then assessed each of their responses and the Acting TSA Administrator made a final determination that each of them should remain on the No Fly List. *See*

parameters set forth in the case law governing the meaning and scope of due process in the national security context, including this Court's prior opinion. First, it is beyond reasonable dispute that the Government must assess sensitive national security and law enforcement information in order to effectively guard against threats to aviation or national security posed by potential terrorists. Dkt. No. 136 at 41–42; *Haig v. Agee*, 453 U.S. 280, 306–307 (1981). Second, No Fly List determinations are predictive assessments about potential threats based on national security and law enforcement information developed from multiple sources in the midst of ongoing counterterrorism activities by the Government. *See* 49 U.S.C. § 114(h)(3); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("[N]ational security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."). Third, information relevant to making such predictive judgments necessarily consists of national security information that the Executive Branch has the authority (and, indeed, an obligation) to protect. Fourth, many courts, including this one, have recognized the compelling interest in protecting national security information from disclosure. Dkt. No. 136 at 42 (collecting cases). Fifth, in light of the compelling interests at stake, considerations of due process should not require the Government to compromise national security by risking or requiring the disclosure of such information. Indeed, circumstances may require that national security information be "withheld altogether." Dkt. No. 136; *see also Ibrahim v. DHS*, -- F. Supp. 2d --, 2014 WL 6609111, at *18 note.

Defendants' revised DHS TRIP procedures adhere to these principles. DHS TRIP provides for a meaningful opportunity for U.S. persons denied boarding due to their status on the No Fly List to learn of their status on the List; to learn (in every case) the applicable basis for

their listing; to learn (to the extent possible without compromising national security or law enforcement interests) additional information elucidating the reasons for their inclusion; and to respond through the submission of any information they deem relevant to their determination. *See* Moore Decl. ¶¶ 12–14. The determination is then placed before the TSA Administrator for a final determination, taking into account both the information on which the Government has relied to support inclusion on the list and the requester's response. *Id*. ¶ 15. These changes to the redress process are responsive to the flaws the Court identified in its previous order and are consistent with the law governing due process in the national security context.

Plaintiffs, however, continue to insist that more is required. Primarily through analogies to cases in inapposite contexts, Plaintiffs demand a wide range of procedures and disclosures of information, none of which are called for by the requirements of due process in this setting, and all of which would significantly threaten the very national security interests the No Fly List is designed to protect. The kind of procedures Plaintiffs demand, including (among other things) adversarial hearings and access to witnesses and all information pertinent to a No Fly List determination (including classified national security and privileged law enforcement information), are not applicable to No Fly List determinations and, indeed, disregard well-founded protections for the kind of national security information needed maintain the No Fly List. Plaintiffs' demands also pay little heed to the parameters set out in the Court's June 2014 opinion. For these reasons, Plaintiffs' summary judgment motion should be rejected and

ordered searches or surveillance, confidential human sources, undercover operations, or various forms of national security process. *Id*. ¶ 27. This, in turn, would "provide a roadmap to adversaries" as to how the FBI goes about detecting and preventing terrorist attacks, allowing them to take countermeasures to avoid detection and undermine the FBI's counterterrorism mission. *Id*.

Moreover, a rule requiring disclosure of this kind of information in the course of the No Fly List redress process would "have a dangerous chilling effect on the use of such information in the nomination process" and thereby undermine the effectiveness of the No Fly List. *Id*. ¶ 34. Indeed, the No Fly List would "become self-defeating if, in order to protect against terrorist threats to aviation and national security, the Government were required to disclose classified national security information about a particular known or suspected terrorist on the List." *Id*. In Assistant Director Steinbach's judgment, "there would be a strong reluctance to share such information in the nomination process" and, in some cases, and incentive to "forego a nomination entirely." There is no basis to conclude that placing nominators on the horns of such a dilemma is required by the Constitution.[7]

[7] The obligation to determine what national security information to protect, how to protect it, and to whom and how much to disclose, falls to the Executive. U.S. Const. art. II, § 2, cl. 1; *Egan*, 484 U.S. at 527. As the D.C. Circuit explained in *NCRI*, disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." 251 F.3d at 208–209; *see also* Dkt. No. 136 at 42 ("Obviously, the Court cannot and will not order Defendants to disclose classified information to Plaintiffs."). In balancing the private interest in obtaining information against the Government's interest in protecting it, Courts are obligated to defer to the Executive's determinations in this regard. *native,8o5.9TD.000jl requO OF DEFS.' CONSOLIDAna2.00Mn5(TJ3 0 TS1.1*

C. Compelling Interests In Protecting National Security Information Limit The Scope Of Information That Can Be Disclosed Through DHS TRIP.

In light of the compelling interests at stake, due process considerations should not risk, much less require, the disclosure of sensitive national security information. Dkt. No. 136 at 41–42; *NCRI*, 251 F.3d at 208–209. Whatever other information can be provided through an administrative process, its scope will necessarily be limited, and, in some cases (as the Court recognized), may be "withheld altogether." Dkt. No. 136; *see also AHIF II*, 686 F.3d at 980; *Ibrahim*, 2014 WL 6609111, at *18 note.

In this respect, both *Al Haramain* and *Jifry* are particularly instructive. In both cases the courts weighed the private interest in obtaining national security information underlying an administrative action against the Government's interest in protecting it, and in both cases the courts struck the balance in favor of the Government. *Al Haramain*, which the Court relied upon extensively in imposing the parameters here, arose in the context of targeted international sanctions against a designated terrorist organization. In that context, courts have upheld redress processes even though the administrative procedures are informal and the petitioners are not provided with classified information. *See, e.g.*, *AHIF II*, 686 F.3d at 980–82 (collecting cases).[8]

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should defer to decisions of the Executive Branch that relate to national security."); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("The assessment of harm to intelligence sources,

When considering the deprivation occasioned by designation as an SDGT, the Ninth Circuit required only that the Government consider whether it is possible to provide unclassified summaries or to clear counsel. *See* 686 F.3d at 984. Further, the Ninth Circuit signaled the

that the present case involves a "substantially greater" deprivation than that at issue in *Jifry*, *see* Dkt. No. 136 at 57, the Government respectfully disagrees with that assessment. Indeed, *Jifry*

II. Plaintiffs' Interests Are Limited.

Another factor that the Court must consider and balance under *Mathews* concerns both the nature of the liberty interest at stake and the degree of the deprivation alleged. Although the Court previously found that placement on the No Fly List amounts to "a significant deprivation of their liberty interests in international travel," Dkt. No. 136 at 30,[11] the first inquiry must precisely identify the nature and weight of the liberty interest at stake before addressing the degree of deprivation. When a less weighty liberty interest is at stake, the process due is more limited.

Here, the interest identified by Plaintiffs — the ability to travel by airplane — is only a limited aspect of an individual's liberty interest in international travel. The Supreme Court has held that "the freedom to travel outside the United States must be distinguished from the right to travel within the United States." *Haig*, 453 U.S. at 306; *see also Califano v. Aznavorian*, 439 U.S. 170, 176–77 (1978) (governmental action "which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of

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sensitive matters relating to national security."). The Steinbach Declaration establishes that disclosure of such information would harm law enforcement interests by, for example, revealing information relating to sensitive law enforcement techniques, or information that would undermine the confidentiality of sources or endanger law enforcement personnel. *Id.* ¶ 32. In any event, because Plaintiffs otherwise have access to adequate notice of the basis for their listing, law enforcement information was appropriately withheld.

[11] Defendants respectfully note their co

interstate travel").[12]

constitute a constitutionally arbitrary deprivation of [] life apply *a fortiori* to the less significant liberty interest[.]") (internal citation omitted).

III. Revised DHS TRIP Provides Individuals With Meaningful Opportunities To Be Heard Without Compromising The Government's Compelling National Security Interests.

The revised DHS TRIP procedures applied to Plaintiffs are tailored specifically to the task of providing a meaningful opportunity to respond, appropriately calibrated to this national security context. In addition to the individual's status on the No Fly List and the applicable criteria or criterion under which the individual was placed on the No Fly List, the individual will receive, where possible and consistent with the national security and law enforcement interests at stake, an unclassified summary of information supporting the individual's placement on the No Fly List — something each Plaintiff received here. Moore Decl. ¶¶ 13, 18–19. As noted, the revised process requires that the nominating agency or agencies attempt to provide as much information as possible without disclosing protected information, and multiple agencies, including the nominating agency and TSC, participate in the process of developing that information and making the disclosure assessment. Grigg Decl. ¶¶ 41--42; Steinbach Decl. ¶¶ 20–21. As summaries — a possibility permitted by the Court's opinion and squarely commensurate with the kinds of disclosures contemplated in other cases — the notice letters do not include every fact or detail considered by the Government in determining whether the individual poses a threat to civil aviation or national security. Defendants have considered the notice provided to each Plaintiff on a case-by-case basis, taking into account the individual threat posed by particular pieces of information and determining whether it is possible to create an

unclassified version of each fact or unclassified versions thereof.[14] *See id*. ¶¶ 46–47. Accordingly, the level of detail provided to each Plaintiff varies, in some cases significantly.

But the fact that some individuals may be provided with more information by way of an additional unclassified statement does not undermine the propriety of the revised process. As this and other courts have recognized, the need to protect of national security may render it impossible to provide any information in some cases, beyond the applicable criteria that was provided here. *Id.* at 62; *Ibrahim v. DHS*, -- F. Supp. 2d --, 2014 WL 6609111, at *18 note

about such threats. Such a choice would compromise the very security the No Fly List is designed to protect.

In sum, and with due consideration to the Court's orders and the competing interests in disclosure and secrecy, the Government has revised DHS TRIP to permit U.S. persons who are on the No Fly List such as Plaintiffs an opportunity to (1) know they are on the No Fly List; (2) be advised of the basis for their inclusion (including as much as can be provided without compromising the national security, including, at a minimum, the applicable criteria); (3) be heard by way of a written response before a final redress determination is made; and (4) seek judicial review of TSA's final determination. This balanced approach satisfies the requirements of due process by providing a meaningful opportunity to be heard without compromising the Government's compelling interests in protecting the national security.

IV. Current Procedures Minimize the Risk of Error.

Crucial to the *Mathews* inquiry is "the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. As the evidence shows, the current procedures surrounding the No Fly List — incl

overarching legal and factual basis for the listing, and it permits the listee to respond and provide relevant information. In each instance relevant here, the Government has gone beyond a statement of the applicable criteria and provided at least some of the additional factual information underlying the application of the criterion at issue. Each plaintiff here received an unclassified summary of the factual basis for his listing. This statement of the basis is more than adequate to permit each plaintiff to understand the general concerns and to provide some information in response. In short, the Government has made a "case-by-case" determination of what information supporting a listing can be released and has provided all information underlying each listing that it can without damaging national security or law enforcement investigations.

that the Government's predictive judgments are entitled to substantial deference in this national security context, involving substantive predictions based on limited intelligence. *See, e.g.*, *AHIF II*, 686 F.3d at 979 (acknowledging "extremely deferential" review in the national security and intelligence area). Here, the Government is not simply finding facts regarding past conduct; it is assessing the likelihood of future threats to national security based on limited intelligence from a variety of sensitive sources and methods. As the Supreme Court recognized in the foreign terrorism context, "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." *Humanitarian Law Project*, 561 U.S. at 34–35. The Court concluded that although such concerns "do not warrant abdication of the judicial role," when "it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Id*. at 34 (internal quotation marks and citation omitted). Because the implementation of the No Fly List involves similar threat assessment, the additional process Plaintiffs demand would not provide probative value or serve to increase fairness. *Cf. Pinnacle Armor*, 749 F.3d at 717 ("Such evidence lends itself to the kind of paper review a district court might engage in on a motion for summary judgment and does not require a full [administrative] trial."). Additional procedures, such as additional opportunity for plaintiffs to assess information themselves, would not substantially improve the exercise of the Government's expertise in intelligence analysis and threat assessment.

V. The Additional Formal, Adversarial Procedures Demanded By Plaintiffs Are Not Required Under The Due Process Clause.

Plaintiffs argue for additional, novel procedures required neither by this Court's order nor by any relevant case law. In so doing, Plaintiffs rely on inapposite analogies and demand

inappropriate procedures that would seriously compromise the Government's interests in counterterrorism investigative and intelligence-gathering activities, and in preventing harm to national security. Plaintiffs' demands for extraordinary procedures, including those afforded to criminal defendants, are inconsistent with the Court's order, the law, and common sense. While the denial of a means of transportation is not insignificant, it does not constitute the kind of deprivation, such as detention, confinement, or taking property, that has been held to require greater procedural protections — particularly given the national security interests at stake in detecting and preventing terrorism.

A. Plaintiffs' Analogies To The Process Due In Plainly Distinct Settings Are Misplaced.

Rather than decisions arising in the national security context, Plaintiffs would have the Court rely on case law from a host of unrelated contexts which they claim are relevant to the due process issues in this case. Pls.' Mem. at 9–14. But none of these circumstances are present here nor demonstrate the need for additional process for No Fly List determinations.

Detention and Criminal Cases: Plaintiffs cite cases involving actual physical detention, including civil commitment, immigration, Guantanamo and criminal cases. *See* Pls.' Mem. at 10–14; *see, e.g.*, *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation); *Dennis v. United States*, 384 U.S. 855 (1966) (criminal case). It should be plain that actual detention is a substantially more severe deprivation than the inability to fly aboard a commercial aircraft. An interest in air travel is not comparable to indefinite military detention at Guantanamo, imprisonment for criminal offenses or the death penalty. A person on the No Fly List may live in his home, may pursue employment, take holidays, and is otherwise entirely at liberty, apart from his access to airplanes for the purpose of travel. A confined person is, by definition, not at liberty. Accordingly, while

it is true that both Congress and the courts have enforced more demanding procedural protections for such cases, those protections are not reasonably applicable to No Fly List determinations intended to prevent immediate acts of terrorism and are not required by any relevant law.

Deportation Procedures: Likewise, Plaintiffs' reliance on procedures available in immigration and deportation cases related to terrorism is misplaced. For example, while the Ninth Circuit disfavored the use of classified evidence in that context on both constitutional and statutory grounds, *see Am. Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1067–70 (9th Cir. 1995) ("*ADC*"), the Ninth Circuit has also expressed doubts as to the application of *ADC* in the variety of contexts in which federal courts make use of classified information, *see AHIF II*, 686 F.3d at 982, n.8 (collecting cases). Indeed, *AHIF II* appears to limit *ADC* to its particular situation in which the Court did not believe that the withheld information implicated national security. *Id*. at n.9 (expressing "hesitation about the continuing vitality of *ADC*"). Also, the *AHIF II* Court found the declaration of emergency (precedent to designations under Executive Order 13224 in that case) sufficiently pressing to overcome any presumption in favor of disclosure. *Id*. at 982. The No Fly List is similarly designed to prevent ongoing terrorist threats to civil aviation and national security. *See* Steinbach Decl. ¶ 7; 49 U.S.C. § 114(h).[17] And even more significantly, Plaintiffs' interest in travel by a particular mode is certainly less

[17] The other immigration cases Plaintiffs cite are even less analogous to the case at bar. *See, e.g.*, *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992) (finding due process violation where permanent resident alien who had lived in the U.S. for nearly 20 years was summarily excluded from the U.S. without provision of any unclassified statement of reasons until after decision was made); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999) (holding that government could not withhold all evidence used to justify indefinite bodily detention of alien in deportation proceedings). Plaintiffs' reading of *Bridges v. Wixon*, 326 U.S. 135 (1945), is even more strained; Plaintiffs claim in a footnote that the Supreme Court "suggest[s]" that due process does not allow use of "secret" evidence against permanent residents facing deportation, but in fact the court just found impermissible use of hearsay in a case not involving classified information. *Compare id*. at 152–57 *with* Pls.' Mem. at 18.

weighty than that of individuals seeking to remain in the United States and enjoy its protections and privileges.

Property Cases: Plaintiffs also cite property and civil forfeiture cases in which the Government provides broader procedural protections before taking private property. The difference in the balance of interests is marke

Plaintiffs cite a variety of cases for the misleading proposition that they are entitled to "full notice" of the reasons for their inclusion on the No Fly List. *See* Pls.' Mem. at 14-16. This argument ignores both the notice that they have received and this Court's order, which permits a "summary" and acknowledges that in some cases no information at all may be provided. *See* Dkt. No. 136 at 61–62. Each Plaintiff has been notified of the criterion under which he was included on the No Fly List (*i.e.*, the "reason" for his listing or the "subject matter of the agency's concerns," *see AHIF II*, 686 F.3d at 983) and at least a general summary of the underlying factual basis, including any unclassified, nonprivileged facts that have been segregated for disclosure, Grigg Decl. ¶ 46. Because No Fly List determinations are typically based on sensitive and classified information, this summary necessarily may not reflect the complete factual basis for inclusion. *See* Dkt. No. 173 ¶¶ 17–18; Grigg Decl. ¶ 46; Moore ¶¶ 18-19. Nonetheless, the Government has considered the mitigating measures available to provide notice and disclosed what information it could in order to make the notice as meaningful as possible under the circumstances. Grigg Decl. ¶ 46; Moore Decl. ¶¶ 18-19. That is all that is required by the Due Process Clause. Moreover, and in any event, Plaintiffs have been provided sufficient information to respond. Although the amount of information provided to each Plaintiff necessarily varies depending on the type of information available to the Government, each is aware of at least the applicable criterion and the nature of the Government's concerns.[18]

[18] Plaintiffs complain that Mr. Knaeble in particular was provided inadequate notice. In light of the protective order the Government will address these complaints in the individual brief filed under seal with respect to Mr. Knaeble, but can

Similarly, Plaintiffs complain that they did not receive "any evidence" supporting their inclusion on the No Fly List. *See* Pls.' Mem. at 16–19. It is, however, undisputed that the notice letters include an unclassified summary of the information relied upon. The information considered — and where possible, summarized — by the Government typically implicates classified or privileged information. To the extent possible, in the interest of maximizing disclosure, Defendants have segregated unclassified, non-privileged statements from sensitive documents and provided summaries that place the information in the overall context of the agency's reasoning. *Id*. The due process clause does not impose additional requirements for the production of original documents or other forms of evidence, especially where such forms of evidence implicate classified national security or otherwise sensitive law enforcement information concerning counterterrorism matters.[19] The question before the Court is not whether it is theoretically possible to conceive of additional disclosures but whether the notice that the Government determined it could provide — without threatening national security or law enforcement investigations — satisfies due process.[20] The notice provided in these cases is an adequate description of the basis for the decision under the circumstances.

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[19] *Ralls* clearly does not support Plaintiffs' position that they are entitled to any and all evidence. In *Ralls*, the plaintiff corporation was ordered to divest itself of four companies it owned without any statement of reasons beyond "national security." Upon finding the deprivation of a property interest, the Court found that the Government should provide unclassified information relied upon in making its determination. *See Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014). Nothing purports to suggest that the provision of unclassified information

Plaintiffs raise even more specific objections to the adequacy of notice, none of which has merit. For example, they complain that they do not know the identity of witnesses or government agents who provided information (with respect to Mr. Kariye) and do not have copies of the recorded witness statements. *See* Pls.' Mem. at 19. But neither Mr. Kariye nor anyone else is entitled to the identity of witnesses or to cross-examine them. The protection of

(1982) (dismissing due process claims where Government had deported relevant witnesses in part because defendants had not shown that the witnesses could have affected the judgment); *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (holding that *in camera* examination and redaction of purported *Brady* material by trial court was proper).[24]

Here, the Government has provided Plaintiffs an opportunity to present any evidence they deem relevant, including mitigating or exculpatory information regarding their prior statements or conduct, and indeed they have done so.[25] The due process clause imposes no additional requirement.

C. Plaintiffs Are Not Entitled To A Live Or Adversarial Hearing.

Plaintiffs demand a particular form of evidentiary hearing to rebut the Government's judgment as to the threat they pose to national security, including a live hearing with the right to cross-examine witnesses and the imposition of a high burden of proof on the Government. But such procedures are not required by the case law, would add little value to the process or reduce the risk of error, and reasonably can be expected to risk significant harm to national security.

None of the case law relied on by the Court in its prior decision contemplated the kind of proceeding Plaintiffs seek, nor does the Court's decision itself. On the contrary, procedures not

[24] Plaintiffs offer no basis on which to believe that the Government would disregard exculpatory information in making a No Fly List determination. The Government seeks to ensure that individuals placed on the No Fly List meet the applicable criteria, and would examine exculpatory evidence and weigh it against evidence that supports placement on the list in the ordinary course. *See generally* Grigg Decl. ¶¶ 19–21.

[25] Plaintiffs' citation of *Meshal v. Higgenbotham*, 47 F. Supp. 3d 115 (D.D.C. 2014), is misleading. The Court did not conclude that "Mr. Meshal's treatment at the hands of the FBI [was] appalling and embarrassing," as Plaintiffs claim; the Court assumed the "appalling" allegations were true for the purposes of the motion to dismiss, which was granted. *See Meshal*, 47 F. Supp. 3d at 130. Although the district court judge expressed his reservations about the state of the case law in this area, he made no findings of fact or even intimations with respect to the truth of Mr. Meshal's allegations. And Plaintiffs have offered no admissible evidence in this record concerning them.

involving a formal hearing have been upheld in the context of SDGT designations, s*ee, e.g.*, *AHIF II*, 686 F.3d at 1001; *Holy Land Found.*, 333 F.3d at 164; *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. 2002), and have been found sufficient in other administrative contexts. *See, e.g.*, *Pinnacle Armor*, 648 F.3d at 716–18 (revocation of safety certification for body armor provided "an adequate opportunity to be heard, even if no formal administrative hearings took place"); *Buckingham v. USDA*, 603 F.3d 1073, 1083 (9th Cir. 2010) (cancelled grazing permit); *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 663 (9th Cir. 1984) (noting that a "paper hearing" provides due process).

Plaintiffs again rely heavily on deportation cases for the proposition that the right to cross-examine witnesses is an indispensable element of due process. But a wide variety of contexts establish that it is not. *See, e.g.*, *AHIF II*, 686 F.3d at 988–90 (finding only harmless notice errors with respect to SDGT proceedings); *Holy Land Found.*, 333 F.3d at 164 (upholding informal SDGT proceedings); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987); *Buckingham*, 603 F.3d at 1083. Plaintiffs should not be granted the right to cross-examine individuals, let alone any sources of intelligence or investigative information provided to the Government, in this national security context. Even in the non-analogous immigration context, the preference for a live hearing to confront witnesses may be dispensed with in appropriate cases. *See Alabed v. Crawford*, No. 1:13-cv-2006, 2015 WL 1889289 at *20 (E.D. Cal. April 24, 2015) ("Plaintiffs' interpretation … —that where important questions of fact turn on credibility, a hearing is required—is simply too broad as applied to the circumstances and facts presented in this case."); *see also Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) ("Because of its inherent differences from the judicial process, administrative proceedings in

particular must be carefully assessed to determine what process is due given the specific circumstances involved. And we must do so on a case by case basis.").

include broad discretion to determine who may have access to it.") (internal citation and punctuation omitted); *see also* Exec. Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010). This authority derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *See Egan*, 484 U.S. at 527. Under well-established separation of powers

338, 344–49 (4th Cir. 2005) (rejecting a plaintiff's request to devise "special procedures" to allow suit involving state secrets proceed).[27]

Moreover, CIPA-like procedures have no application to civil, administrative cases such as this one. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. App. 3) ("An act to provide certain pretrial, trial, and appellate procedures for criminal cases involving classified

as noted, the proper balancing of interests should not require the Government to provide access to classified information in order to defend claims challenging a No Fly List determination. In particular, a requirement that classified information be disclosed even under a purportedly secure

Despite the inapplicability of any governing law that could require disclosure of classified information, the Government has nonetheless carefully examined the information at issue in order to segregate unclassified information and has taken the extraordinary step of summarizing the underlying information for the purpose of this administrative, national security matter, aimed at preventing threats to national security. That is all that can be required.

VI. The No Fly List Criteria Are Clear And Survive Plaintiffs' Vagueness Challenge.

Plaintiffs also claim that the No Fly List criteria are imperm

Act),and conditions of supervised release, *United States v. Soltero*, 510 F.3d 858, 865–66 (9th Cir. 2007) (rejecting challenge to conditions of supervised release prohibiting plaintiff from, *inter alia*, "associate[ing]" with "criminal street gangs").

Second, the No Fly List criteria are sufficiently clear to survive scrutiny. Unconstitutional vagueness may take two forms. First, "[a] vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable;" second, "an ordinance is void for vagueness if it is an unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement." *Leonardson v. City of E. Lansing*, 896 F.2d 190, 196 (6th Cir. 1990). To satisfy this requirement, the Government need not define an offense with "mathematical certainty," *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), but must provide only "relatively clear guidelines as to prohibited conduct," *Posters N'Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994).

With respect to the first test, an ordinary person is likely to understand what conduct triggers placement on the No Fly List. "The test for vagueness is whether the provision fails to give a person of ordinary intelligence fair notice that it would apply to the conduct contemplated." *Johnson*, 130 F.3d at 1354 (quoting *United States v. Gallagher*, 99 F.3d 329, 334 (9th Cir. 1996) (internal quotation marks omitted). The conduct contemplated by the No Fly List is a violent act of terrorism, and the criteria provide an objective level of justification for inclusion on the List. The criteria are certainly no less restrictive than the numerous criminal prohibitions on conduct related to terrorism that have withstood challenges on vagueness grounds. *See, e.g., Humanitarian Law Project*, 561 U.S. at 21–23 (material support statute not void for vagueness); *James v. United States*, 550 U.S. 192, 210 n.6 (2007) (statutory prohibition

against "terrorist act" in Armed Career Criminal Act not impermissibly vague); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1144–45 (9th Cir. 2009) (authority to designate entities as terrorist organizations under Executive Orders issued pursuant to the International Emergency Economic Powers Act not impermissibly vague); *Khan v. Holder*, 584 F.3d 773, 785–86 (9th Cir. 2009) ("terrorist activity" as used in the Immigration and Nationality Act not impermissibly vague). If criminal provisions could withstand vagueness challenges, there can be no question that the No Fly criteria at issue here should as well. *Village of Hoffman Est.*, 455 U.S. at 498–99.

With respect to the second test, the criteria "provide explicit standards for those who apply them," *Grayned*, 408 U.S. at 108, and thereby protect against "arbitrary enforcement" of the law through "minimal guidelines to govern" its use, *see Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (internal citation and quotations omitted). The No Fly List criteria require more than a loose connection to terrorist activity; rather, there must be concrete information about the nature of the terrorist threat (*e.g.*, domestic or international) and the likely targets (*e.g.*, the homeland, aircraft, military installations), or, where there is no information about targets, information about the individual's operational capability to carry out an attack. Common to each criterion is a focus on violent acts of terrorism. The first three criteria incorporate the statutory definitions of domestic and international terrorism, which presuppose "violent acts," 18 U.S.C. § 2331(1)(A) (international terrorism), or "activities that involve acts dangerous to human life," (18 U.S.C. § 2331(5)(A) (domestic terrorism); and the fourth criterion requires presenting "a threat of engaging in or conducting a violent act of terrorism" by its own terms. In this way, the criteria strike an appropriate balance — general enough to encompass a range of terrorist activity, yet sufficiently specific to exclude individuals who are associated with

national security by preventing the Government from addressing many of the very threats and vulnerabilities Congress required the Government to address.

Nor is there any merit to Plaintiffs' contention that the No Fly criteria penalize individuals for conduct protected by the First Amendment. The No Fly criteria focus on conduct, not speech. Not only would a nomination based solely on First Amendment-protected activity run afoul of longstanding watchlisting policy, Grigg Decl. ¶ 15, but it would be exceedingly unlikely to satisfy the substantive derogatory criteria, which, as explained, require articulable intelligence about the nature of the terrorist threat and the likely targets, or, in the absence of information about targets, intelligence about the individual's operational capability to carry out an attack.[31] These features greatly reduce the likelihood that the criteria will be used to penalize First Amendment-protected activity.

VII. If Any Errors Arise From The Revised Process, They Are Harmless As Applied To These Plaintiffs.

To the extent that the Court finds any error at all in the process provided to Plaintiffs, the Plaintiffs must then show substantial prejudice as a result of the specific error found. *See AHIF II*, 686 F.3d at 988–90 (conducting a harmless-error analysis and finding that the failure to consider additional summaries or to clear counsel was harmless in that case). As demonstrated

[31] Plaintiffs' First Amendment argument is based in part on a purportedly leaked version of the Government's Watchlisting Guidance. *See* Pls.' MSJ Opp. at 24 (citing Handeyside Decl. Ex. A). The Government has neither confirmed nor denied the authenticity of the purportedly leaked document. *See Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975) (holding that purportedly leaked national security information "was not in the public domain unless there had been official disclosure of it"). Because the document relied upon by Plaintiffs has not been produced by the Government in discovery in this case, it cannot be authenticated, *see* Fed. R. Evid. 901(a), is inadmissible, and therefore may not be considered as part of the record on summary judgment, *see* Fed. R. Civ. P. 56(c)(1)(B), (c)(2). Indeed, the Government has asserted the state secrets privilege over the watchlisting guidance and related materials in other litigation involving the No Fly List. The document cited by Plaintiffs cannot be relied upon in this summary judgment proceeding.

by the *AHIF II* opinion, this is a fact-intensive inquiry that can be addressed only on the basis of the specific information at issue. To the extent possible to address these issues now on the public record, Defendants have briefly addressed them in the individual briefs. Defendants present additional arguments under seal in those briefs.[32]

VIII.

CERTIFICATE OF SERVICE

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

s/ Brigham J. Bowen
Brigham J. Bowen