IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Anas ELHADY, et al.,	
Plaintiffs,	
v.	**Case No. 1:16-cv-375 (AJT/JFA)**
CHARLES H. KABLE, et al.,	
Defendants.	

DEFENDANTS' MEMORANDUM OF LAW REGARDING REMEDIES

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INTRODUCTION

Defendants respectfully maintain that Plaintiffs have not demonstrated entitlement to any relief in this matter because they have not shown that they are being harmed by the Terrorist Screening Database ("TSDB"), or that they are being deprived of a liberty interest protected by the Due Process Clause. Nonetheless, because the Court has determined that there has been a procedural due process violation and solicited the parties' views on appropriate remedies, Defendants submit that the Court should simply enter a declaratory judgment regarding the violation found, and that any injunction entered should, at most, simply order the Defendants to develop additional procedures to be provided to appropriate Plaintiffs, commensurate with their particular circumstances. The Court also should enter a final, appealable judgment at this stage so that the Defendants may consider appellate options.

The Court otherwise lacks the authority to re-write agency policy in order to provide a remedy here. The Court is not in a position to balance the competing interests involved in an interagency redress process or to reallocate agency resources as a general matter. Moreover, the Court should not order application here of the revised redress process that was specifically designed and implemented for the consideration of redress inquiries by U.S. persons who are on the No Fly List and have been denied boarding. Any redress process that would be applied to individuals like Plaintiffs – who only claim to have been required to undergo enhanced security procedures on at least one or more occasions – involves different policy decisions about resource allocation, the relative harms involved and the appropriate decision-makers. Application of the redress process for persons on the No Fly List to those who alleged they were required to undergo enhanced screening due to alleged inclusion in the TSDB would be both unworkable and unwise. Finally, the Court lacks authority to order individualized relief for those Plaintiffs who have not demonstrated an ongoing injury, or to order additional relief beyond the Plaintiffs.

BACKGROUND

The remaining Plaintiffs in this case are 23 U.S. citizens who claim that they may have been placed on the TSDB as a result of experiences with screening at the airport or inspections at the border. The Court dismissed all of their claims except the procedural due process claim. ECF No. 47. Following extensive discovery, the Court entered summary judgment for the Plaintiffs and denied the Government's motion for summary judgment. *See generally* Memorandum Opinion and Order, ECF No. 323 (Sept. 4, 2019) ("Op.").[1] The Court found that Plaintiffs' claims are justiciable because at least some Plaintiffs have demonstrated standing, Op. at 14-17, that inclusion on the TSDB deprives individuals of a liberty interest, *id.* 17-24, and that "DHS TRIP, as it currently applies to an inquiry or challenge concerning inclusion in the TSDB, does not provide to a United States citizen a constitutionally adequate remedy." *id.* at 30. The Court directed the parties to file supplemental briefing as to "the appropriate remedy, including whether the post-*Latif* changes to DHS TRIP should apply, including those procedures the Court has outlined for assessing the adequacy of that revised DHS TRIP process in a particular case; and if not, why not." *Id.* at 31. The Court also directed the parties to address "whether Plaintiffs are entitled to any other remedies with regard to their APA claim, which the parties have represented is coextensive with the procedural due process claim." *Id.*

[1] The Court's statement of undisputed facts relies mostly on Plaintiffs' statement of facts, which was in significant part disputed, clarified or placed in context in Defendants' opposition. *See* Defs.' Opp'n at 1-19, ECF No. 311. It does not contain material undisputed facts set forth in Defendants' motion. *See* Defs.' MSJ at 3-34, ECF No. 299. As such, the Opinion does not accurately reflect the undisputed facts, particularly given the requirement to construe all facts in the favor of the adverse party at summary judgment. Defendants will nonetheless assume those facts are undisputed only for the purposes of this memorandum.

ARGUMENT

I. The Court Should Reduce its Summary Judgment Decision to a Final, Appealable Declaratory Judgment and At Most Enter Injunctive Relief that Leaves to the Defendants How To Remedy the Procedural Deficiencies Found by the Court, in Light of Each Plaintiff's Circumstances.

The Court should now enter a final declaratory judgment, with respect to the procedural due process violation found by the Court, and limit any injunction entered to, at most, additional process to address the Plaintiffs' particular circumstances.

Here, the Court has found that, given the potential scope of the deprivation and the risk of error, DHS TRIP is not a constitutionally adequate remedy for U.S. citizens who are required to undergo enhanced screening during travel due to purported inclusion on the TSDB. The Court should enter a final, appealable declaratory judgment describing the violation found here. The Declaratory Judgment Act provides that federal courts "may declare the rights and other legal relations of any interested party," 28 U.S.C. § 2201; *Davison v. Plowman*, 247 F. Supp. 3d 767, 781–82 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298 (4th Cir. 2018), and a declaratory judgment may provide an appropriate remedy here for describing the particular constitutional violations, at least with respect to those Plaintiffs with standing.

With respect to injunctive relief, if the Court enters any injunction, it must leave the Government room to devise new procedures that address the Court's concerns with respect to the overall policy instead of ordering specific revisions to the existing policy. The Court is not empowered to re-write watchlisting policy itself; instead it should describe the procedural violation it has found and at most direct the agencies to fix the error. "An injunction is an equitable remedy that 'does not follow from success on the merits as a matter of course.'" *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017) (citation omitted), *cert. denied*, 139 S. Ct. 67 (2018). Rather, Plaintiffs must show that: (1) they have suffered irreparable injury; (2) remedies available at law are inadequate; (3) a remedy in equity is warranted considering the balance of hardships; and (4) the public interest would not be disserved by a permanent injunction. *Id*; *Bethesda Softworks, LLC v.*

Interplay Entm't Corp., 452 F. App'x 351, 354 (4th Cir. 2011). When the government is a party, the factors regarding equities and public interest tend to "merge." *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Accordingly, when applying these principles regarding injunctive relief in the due process context, courts have generally refrained from vacating the underlying decision. *See, e.g., United States v. Timms*, 664 F.3d 436, 455 n.19 (4th Cir. 2012) ("even if Timms' case constituted a due process violation, the proper remedy would not be release, but to conduct the hearing"); *Doe v. Alger*, No. 5:15-CV-00035, 2017 WL 1483577, at *2 (W.D. Va. Apr. 25, 2017) ("the standard remedy in similar cases is a new hearing that comports with due process."). In *Nat'l Council of Resistance of Iran v. Dep't of State* ("*NCRI*"), for example, the D.C. Circuit found that the State Department had provided inadequate notice with respect to designation of foreign terrorist organizations and remanded the designations. Recognizing "the realities of the foreign policy and national security concerns asserted by the Secretary in support of those designations," the circuit court refused to vacate the designations and remanded with directions to provide particular additional process. *See NCRI v. Dep't of State*, 251 F.3d 201, 209 (D.C. Cir. 2001) (instructing that the petitioners "be afforded the opportunity to file responses to the nonclassified evidence against them, to file evidence in support of their allegations that they are not terrorist organizations, and that they be afforded an opportunity to be meaningfully heard by the Secretary upon the relevant findings." *Id.*, at 209. For similar reasons, contrary to the request in Plaintiffs' complaint, this Court should not vacate any underlying watchlisting determinations, an extraordinarily dangerous proposition.

Instead, the proper remedy is to order the responsible agency to provide additional process, without specifically fashioning what that process should be. *See, e.g., Latif v. Holder*, 28 F. Supp. 3d 1134, 1161–62 (D. Or. 2014) ("Although the Court holds Defendants must provide a new process that satisfies the constitutional requirements for due process, the Court concludes Defendants (and not the Court) must fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security."); *see also Wards Corner Beauty Acad. v. Nat'l Accrediting Comm'n of Career Arts & Scis.*, No. 2:16-CV-639, 2017 WL 5712120, at *6 (E.D. Va. Nov. 24, 2017) ("remand is the only available remedy should Plaintiff demonstrate a procedural due process violation at trial."); *Shlikas v. Dep't of Educ.,* No. CIV. WDQ-09-2806, 2012 WL 1999302, at *4 (D. Md. June 1, 2012) ("the remedy for a procedural due process violation is a 'constitutionally correct ... procedure.'").

Where courts have found the procedures applied to a national security decision to be deficient, they have been particularly reluctant to order more specific remedies. For example, in *Latif v. Holder*, when the district court found unconstitutional the prior version of DHS TRIP as applied to U.S. persons on the No Fly List, the court concluded that "Defendants (and not the Court) must fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security." 28 F. Supp. 3d at 1161–62. The court provided general principles to be applied on remand, *see, e.g., id.* at 1162 ("notice must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List"), but left all specific determinations to the Government defendants, *see, e.g., id.*, (holding that Defendants "may choose" to provide unclassified summaries, to provide access to information to cleared counsel, or may in some instances be unable to provide additional information). After remand, the revised procedures were upheld by both the district court and the Ninth Circuit as applied to the plaintiffs. *See Kashem v. Barr*, No. 17-35634, 2019 WL 5303288, at *18 (9th Cir. Oct. 21, 2019).

This decision is consistent with the more general principle that policy-making in the national security realm is not the role of the courts. As the Supreme Court recognized, "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." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). 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.* (internal quotation marks and citation omitted). Similarly, in *Rahman v. Chertoff*, the Seventh Circuit explained that border security measures are at least in significant part policy issues, requiring resolution by "political actors." In that case, a group of U.S. citizens attempted to bring a class action based on their treatment at the border and their purported TSDB status. *See* 530 F.3d 622 (7th Cir. 2008). The Seventh Circuit rejected the attempt to certify a class, and warned against tipping the scales too far to avoid incorrect watchlist placement:

> Congress and the President worry at least as much about false negatives–that is, people who should be on a watch list but aren't–as about false positives (people who are on the list but shouldn't be, and people who aren't on the list but are mistaken for someone who is). Judges are good at dealing with false positives, because the victims come to court and narrate their grievances, but bad at dealing with false negatives, which are invisible. Any change that reduces the number of false positives on a terrorist watch list may well increase the number of false negatives. Political rather than judicial actors should determine the terms of trade between false positives and false negatives.

Id. at 627. Although the Seventh Circuit was examining a Fourth Amendment claim, the same reasoning applies here – Plaintiffs' demand to tip the scales by either mandating particular new procedures or disclosures during the redress process (or to abolish the TSDB altogether) implicates the need to balance competing policy interests, including future threats. These determinations are not within the expertise or the authority of the judiciary, and any revisions to the redress process for Plaintiffs should be left to the responsible agency.

The Court also inquired as to whether the APA would provide any different remedy. The Court need not and should not consider separate APA remedies as it has repeatedly held that here the APA claim is co-extensive with the procedural due process claim. Plaintiffs' APA claim limits, rather than expands, the relief available to them. *Latif v. Holder*, 28 F. Supp. 3d at 1163 ("the substitute procedures that Defendants select to remedy the violations of Plaintiffs' due-process rights, if sufficient, will also remedy the violations of Plaintiffs' rights under the APA.").

In any event, to the extent an APA remedy is considered, the Court's role under the APA is highly limited. A district court reviewing a final agency action under the APA "'does not perform its normal role' but instead 'sits as an appellate tribunal.'" *Palisades Gen'l Hosp. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005). "Thus, under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the correct legal standards." *Id. See also Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) ("courts lack authority to impose upon [an] agency its own notion of which procedures are best or most likely to further some vague, undefined public good" because to "do otherwise would violate the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.") (internal citation omitted). Such a disposition of an APA claim would, upon the entry of final judgment, be final and appealable to the extent the agency disagrees with the findings and conclusions. *Sierra Club v. U.S. Dep't of Agric.*, 716 F.3d 653, 656 (D.C. Cir. 2013) (explaining that a government agency may appeal a remand order under these circumstances); *W.V. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 244 (4th Cir. 2003) ("Where a district court order would be

effectively unreviewable by an agency on remand, 'the order is a final decision' for purposes of § 1291."). The Court should not retain jurisdiction in this circumstance to superintend the Agency's remand proceedings: "Not only was it unnecessary for the court to retain jurisdiction to devise a specific remedy for the Secretary to follow, but it was error to do so." *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).

II. The Court Should Not Order the Application of Revised DHS TRIP Procedures for U.S. Persons on the No Fly List.

The Court also asked specifically "whether the post-*Latif* changes to DHS TRIP should apply, including those procedures the Court has outlined for assessing the adequacy of that revised DHS TRIP process in a particular case; and if not, why not." Op. at 31. As a matter of fact and law, the exact same procedures cannot be required for both types of alleged deprivations. This Court held that a No Fly List placement was tantamount to a total ban on international travel. *Id.* at 20. Although the Government disagrees with that assessment, the prohibition on travel by commercial airplane plainly is a more significant deprivation than placement on the TSDB, particularly given that all Plaintiffs have been able to travel by air and *most* of the Plaintiffs have done so extensively, including after their alleged screening experiences. *See* Defs.' MSJ at 17-34 (describing Plaintiffs' travel).[2] Even assuming the Court's holding is correct, Plaintiffs cannot seriously maintain that any additional screening occasioned by placement in the TSDB would constitute the same or as serious a purported deprivation of a liberty interest as placement on the No Fly List, involving the same considerations, and thus requiring the same redress process. The

[2] In its September 4, 2019 opinion, this Court indicated that inclusion in the TSDB may result in denials of boarding on international flights. Op. at 7, 18 ("Plaintiffs assert that their inclusion in the TSDB has had the practical effect of preventing them from exercising their right to travel internationally, in some instances by denying them boarding on international flights . . ."; "Individuals who are included in the TSDB, or who are misidentified as or near matches to TSDB listees, may . . . [be] denied boarding on international flights."). There is no evidence in the record that any plaintiff was denied boarding due to mere inclusion in the TSDB and this Court correctly recognized that "an individual's listing in the TSDB, without more, does not prevent them from boarding flights." Op. at 2.

requirements of due process are supposed to be sensitive to the context of the proceedings and the particular type of injury alleged. *See Jones v. Flowers*, 547 U.S. 220, 229 (2006) ("[A]ssessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against 'the individual interest sought to be protected.'"); *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("Due process is flexible and calls for such procedural protections as the particular situation demands.").

Second, as the *Latif* district court recognized, the policy-making decision regarding whether and how to provide adequate notice and an opportunity to be heard lies with the agency in the first instance. Defendants have explained at length the harms that would follow from the disclosures sought by Plaintiffs in this case, with TSA, CBP, FBI and TSC each explaining the harms unique to their particular equities in TSDB information. For example, TSA explains that disclosure of watchlist status with respect to the TSA subsets of the TSDB (No Fly List, Selectee List, Expanded Selectee List) would provide valuable information to terrorists seeking to evade security measures. Armed with the knowledge of who is and is not on these lists, known terrorists could gather information about security responses, attempt to evade enhanced screening and other TSA security measures, or focus their efforts on recruiting unknown individuals or insider threats. *See generally* Froemling Decl. ¶¶ 52-60, ECF No. 299-2. FBI explains that the procedures sought would provide terrorists valuable insight into FBI investigations, would discourage cooperation from sensitive sources, would discourage agencies from making otherwise appropriate nominations to the TSDB, and would divert significant intelligence and investigative resources which otherwise would be spent detecting and preventing terrorist attacks. 1st Orlando Decl. ¶¶ 19-36, ECF No. 299-3; *see also* Second Decl. of Michael J Orlando ("2d Orlando Decl."), Acting Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, attached hereto. Mr. Orlando notes that the current revised redress process for No Fly individuals already presents some risk of harm to national security; expanding it to the much larger group of TSDB listees who might qualify would be exponentially more harmful, and "would have a devastating effect on the usefulness of the TSDB

and a potentially calamitous effect on the national security." 1st Orlando Decl. ¶ 36; *see also* Groh Decl. ¶¶ 64-67, ECF No. 299-4; Howe Decl. ¶ 20, ECF No. 301-3. Simply put, if notice of TSDB status were required for persons subjected to enhanced screening based on alleged watchlisting, the process would serve as a means and incentive for terrorist adversaries to learn their status, with potentially devastating results.

The Court's Opinion does not grapple with these rationales, which are distinct from some of the policy concerns underlying the revised No Fly List process. For example, in the TSA context, unlike individuals on the No Fly List, people on the TSDB still have access to the sterile area of the airport, giving them the ability to test security measures, conduct social engineering in the airport, and recruit insiders. Froemling Decl. ¶ 55. Moreover, people eligible for the No Fly List process have already been denied boarding on a flight, a stronger indicator of their possible watchlist status than, for example, a border inspection (which can occur for many, many reasons) or enhanced screening (which can also occur for a variety of reasons, *see* Froemling Decl. ¶ 10 (noting that the majority of passengers designated for enhanced screening are so designated for reasons other than TSDB status)).[3] And the No Fly List, as a subset of the TSDB, involves fewer persons – expanding the *Latif* procedure to all U.S. persons who seek redress based on alleged inclusion in the TSDB would greatly increase the potential harms of disclosure. 1st Orlando Decl. ¶ 19-36; 2d Orlando Decl. ¶ 5-11. Ultimately, the type of notice provided in the No Fly List context is not appropriate here; Plaintiffs who have been screened have different private interests at stake, and the Government has different security concerns.

The administrative and practical burden is significant as well. Moore Decl. ¶¶ 18-20; 2d Orlando Decl. ¶ 5-11. Expanding the revised redress procedures available to U.S. persons who are

[3] *See also Scherfen v. DHS*, No. 3:CV-08-1554, 2010 WL 456784, at *7 (M.D. Pa. Feb. 2, 2010) ("Heightened screening at airports and border-crossing points does not necessarily signify inclusion" on a watchlist, as "[t]ravelers may be pulled out of line, searched, and questioned for a variety of reasons, unrelated to watchlists."); 73 Fed. Reg. 64,018, 64,026 (Oct. 8, 2008) ("[Passengers who are not on the Selectee List] will not always avoid enhanced screening.").

denied boarding to U.S. persons who experience enhanced screening as a result of inclusion on the TSDB would pose an extraordinary burden on the involved agencies. As described in the Second Orlando Declaration, when the FBI is the nominating agency, the enhanced redress procedures available to U.S. citizens on the No Fly List require a detailed review conducted by the FBI case agent, and Supervisory Special Agent (SSA), to conduct an initial review and draft of the required unclassified summaries. 2d Orlando Decl. ¶ 7. These individuals are required to determine whether there is releasable unclassified information and whether information may be declassified for this purpose—a "painstaking and time-consuming" process, which may require the review of "hundreds or even thousands of documents, and much discussion and coordination inside and outside the FBI." *Id.* ¶ 8. In undertaking this review, involved personnel both within and outside the FBI must determine not only whether the release of information would impact an investigation relating directly to the DHS TRIP applicant, but also the impact on other investigations and the national security of the United States as a whole. *See id.* Moreover, time spent on these tasks would take away from the primary investigative and operation duties of the case agent and SSA; accordingly, expanding the enhanced process available to U.S. citizens on the No Fly List to every U.S. citizen who seeks redress after enhanced screening based on alleged placement on the TSDB would "increase the burden on the system as well as the risks to the national security." *Id.* ¶ 11.

Moreover, travelers are required to undergo additional screening or inspection for a wide variety of reasons having nothing to do with the TSDB. *See* Froemling Decl. ¶ 32. And if the revised redress process for U.S. persons on the No Fly List were applied to U.S. persons who receive enhanced screening as a result of TSDB status, DHS TRIP estimates that its workload for revised redress cases would increase by more than 1400 percent. Moore Decl. ¶ 20. This would lead to an impact in DHS TRIP's ability to provide a fair and timely redress process for all applicants, including the 98 percent of applicants who are cleared of any connection to the TSDB. *Id.* Additional challenges are posed by the fact that status in certain TSDB subsets constitutes SSI.

Froemling Decl. ¶ 52 & Ex. A; Moore Decl. ¶ 14; *see also Proctor v. DHS*, 2019 WL 4413273, at *1 (9th Cir. 2019) (recognizing "the statutory prohibition against disclosure of sensitive security information," and that DHS TRIP "reasonably crafted its letter" in response to a traveler's inquiry about enhanced screening to comply with that prohibition). Defendants believe the Court did not account for these burdens in determining that there was a due process violation. But at a minimum, the Court should not attempt to allocate these extraordinary resource burdens by fashioning a particular remedy.

Finally, assuming the Court ordered the Government to revise the redress process for the Plaintiffs (and the Government did not appeal), the agencies should have the flexibility to consider procedural options that are not the same as the revised DHS TRIP procedures, including different assignment of decision-making authority, and variations based on the particular alleged deprivation at issue. For example, Defendants could plausibly decide that some disclosure pertaining to status would be warranted only in response to particular allegations of injury.[4] In short, Plaintiffs have not made a showing that the No Fly List procedures in particular are required here, and the Court should leave to Defendants to consider the harms to national security that may result from application of particular procedures. In the meantime, Defendants seek an appealable order now, so that they may consider their appellate options, rather than attempting to revise a policy process that Defendants maintain is constitutionally adequate. But in the event that the Government did not appeal, these policy judgments would belong in the first instance to the agencies.

[4] Not all of the Plaintiffs have necessarily even demonstrated a due process violation. The Court has already held that no one is entitled to pre-deprivation notice, Op. at 28-29, which means that not just anyone can demand to know whether or not they are on the TSDB, regardless of whether or not they have any relevant screening experiences; the question remains who has demonstrated a right to post-deprivation notice based on their screening experiences. Defendants submitted extensive, undisputed evidence that disclosure of TSDB status in general is harmful to national security and law enforcement interests, *see infra*. If the Court's finding means that this compelling governmental interest is necessarily outweighed by the need for additional process, the question of what kind of deprivation triggers that need for additional process requires additional balancing of policy factors involved, and that decision should be left to the agencies in the first instance.

III. The Remedy Must Be Limited to Plaintiffs Who Have Demonstrated A Certainly Impending Future Injury.

Additionally, any remedy must be limited to those Plaintiffs who have demonstrated an impending future injury in order to have standing for prospective relief. *See generally Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). The Supreme Court has repeatedly held that "standing is not dispensed in gross" and that "a plaintiff must demonstrate standing for each claim he seeks to press and *for each form of relief that is sought*." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (emphasis added)); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). Accordingly, this Court's jurisdiction to provide a remedy is limited to the actual impending future injuries proven here.

The Court explained that a case is justiciable as long as at least one plaintiff has demonstrated standing, Op. at 14 (citing *Bostic v. Schaefer*, 760 F.3d 352, 370-71 (4th Cir. 2014)), and described the injuries of several Plaintiffs as concrete and at least potentially ongoing, Op. at 16 (mentioning injuries of Amri, John Doe 3, Elhuzayel, El-Shwehdi, Frljuckic, Coleman, Khan, Shahir Anwar, Kadura, Baby Doe 2). In *Bostic*, the plaintiffs sought a declaration that a prohibition on same sex marriage was unconstitutional. 760 F.3d 352. Thus, the relief sought was only that the statute was unconstitutional, and both the remedy (and the reasoning therefore) were identical as to all plaintiffs, even if only one of them had standing, and the appellate court could adjudicate the bare legal question pending before it. The same is not true here now that the Court has reached the question of remedy, where Plaintiffs have widely varying claims regarding their injuries and seek relief that would vary by Plaintiff, including individualized notice of the basis for alleged placement in the TSDB, and removal from the TSDB. Am. Compl., ECF No. 22, Prayer for Relief.

Of the ten Plaintiffs mentioned in the court's standing section, only five of them testified that they received enhanced screening at airports in their most recent travels: Amri, John Doe 3, Elhuzayel, El-Shwehdi, and Frljuckic – and even those five have very different claims of alleged

injury. Amri, for example, disclaimed any claims based on his international travel, has been permitted to fly since his denial of boarding, and describes enhanced screening on only one domestic trip, which does not seem sufficient to demonstrate a "certainly impending" future injury regarding enhanced screening. Defs.' MSJ, Statement of Material Facts ("Defs.' SMF") ¶¶ 47-48; Defs.' Opp'n at 10, 27-28. And Elhuzayel has also been able to fly since the time he was denied boarding; although he has experienced enhanced screening on two domestic flights, he testified that he has not avoided travel as a result. Defs.' SMF ¶¶ 75-76. Frljuckic was screened at airports and inspected at the border on several occasions over several years, but claims not to have travelled since May 2016, and it is difficult to infer anything about future travels. *Id.* ¶¶ 83-86. Although the Opinion lists five other Plaintiffs who claimed to have restricted their own travel in past as a result of their complaints about security, in fact, most of them do not plausibly claim a currently ongoing injury related to the TSDB. For example, Coleman stated his belief that he was no longer on the watchlist, *id.* ¶¶ 59-62, Defs.' MSJ Reply at 12; Baby Doe 2 – a child – has obviously not refrained from travel as a result of his single screening experience, Defs.' SMF ¶ 63; and Kadura has had "zero" travel related issues in recent years, *id.* ¶¶ 89-93. Elhady has had issues with land border crossings on several occasions, but has flown repeatedly without incident, never alleging that he experienced enhanced screening on a flight. *Id.* ¶¶ 71-74. Khan has sometimes experienced enhanced screening and sometimes not, and despite his claim that he restricts travel, has in fact regularly travelled repeatedly. *Id.* ¶¶ 94-97, Defs.' MSJ Reply at 17.

Given these widely varying alleged injuries, Plaintiffs have not demonstrated standing "for each form of relief that is sought." *Town of Chester*, 137 S. Ct. at 1650. That is, not all 23 Plaintiffs have demonstrated a concrete, particularized, certainly impending future injury, and that the injury is caused by the TSDB and redressable by additional procedures related to the TSDB. *See generally Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). Defendants' summary judgment briefs highlighted particular Plaintiffs who have not demonstrated a certainly impending future injury traceable to the

TSDB, Defs.' MSJ 36-37, Defs.' MSJ Reply 18-23, and the Court has not held to the contrary. Although Defendants maintain that none of the Plaintiffs has demonstrated a certainly impending future injury that could justify such a remedy, at a minimum, the Court should make findings as to who has demonstrated such an injury before ordering relief. Defendants cannot provide a remedy to a person who has no injury, and should take into account any injuries that this Court deems to have been established before attempting to tailor any revised redress process.

IV. A Universal or Nationwide Injunction is Inappropriate and Unwarranted.

Finally, for many of the same reasons that remedies should be restricted to those Plaintiffs with a demonstrated ongoing injury, the remedy certainly cannot reach beyond the Plaintiffs. For the first time in Plaintiffs' summary judgment opposition, Plaintiffs claimed to seek a broad, preposterous "injunction prohibiting Defendants from placing innocent Americans—those who have not been arrested, charged, or convicted of a terrorism-related offense—on Defendants' lists." No Plaintiff has standing to seek such relief for the alleged procedural due process violation, because the requested injunction seeks relief far beyond "the inadequacy that produced the [claimed] injury in fact." *See Lewis v. Casey*, 518 U.S. 343, 357 (1996); *see also Gill*, 138 S. Ct. at 1934 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *Trump* v. *Hawaii,* 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) ("[U]niversal injunctions are legally and historically dubious."). And the requested relief is inconsistent with ordinary equitable principles as well. *See also, e.g.*, *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994) ("injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."); *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring) (explaining that universal injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch."). Rather, as explained above, the remedy for procedural violations is ordinarily

additional procedures, and the Plaintiffs have not established standing for the extraordinary remedy of a nationwide injunction.

CONCLUSION

For the foregoing reasons, although Defendants disagree that Plaintiffs are entitled to any relief at all, the Court should enter a final appealable judgment limited to providing declaratory relief for the procedural due process violation found and at most directing the agencies to provide additional process consistent with its findings.

Dated: October 25, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ANAS ELHADY, *et al.* Plaintiffs, v. CHARLES H. KABLE, *et al.*, Defendants.	Case No. 1:16-CV-375

SUPPLEMENTAL DECLARATION OF MICHAEL J. ORLANDO

I, Michael J. Orlando, hereby declare the following:

1. (U) I am the Acting Assistant Director of the Counterterrorism Division, Federal Bureau of Investigation ("FBI"), United States Department of Justice.

2. (U) As Acting Assistant Director, I am the chief supervisory official of the counterterrorism investigative activities of the FBI, including any role the Counterterrorism Division plays in the nomination of individuals to the Terrorist Screening Center's (TSC's) Terrorist Screening Database (TSDB). I am also responsible for the protection of national security information within the Counterterrorism Division, including the sources, methods, and techniques used by the FBI in the collection of national security information. Thus, I have been authorized by the Director of the FBI to execute declarations and affidavits in order to protect such information. The matters stated in this declaration are based on my personal knowledge, my background, training, and experience relating to counterterrorism, my consideration of

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

3. (U) I am aware that in a Memorandum Opinion and Order dated September 4, 2019, the Court granted the Plaintiffs' motion for summary judgment and denied the Government's motion for summary judgment in this case. I am also aware that the Court ordered the parties to submit additional briefing regarding the appropriate remedy in this case, including whether the process available under the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) to U.S. persons on the No Fly List should be extended to apply to U.S. citizens who seek redress based on alleged inclusion in the TSDB.

4. (U) In support of the Government's motion for summary judgment, I executed an unclassified declaration on March 8, 2019, addressing the FBI's authorities and responsibilities in combating terrorist threats, including the role in this effort played by the TSDB; nominations to the TSDB; and the FBI's use and dissemination of TSDB information. I also addressed the harms to national security that would result if the process available under DHS TRIP to U.S. persons on the No Fly list were made applicable to all persons who seek redress based on alleged inclusion in the TSDB. I explained why, in my informed judgment, requiring the Government to disclose TSDB status and the reasons for any inclusion in the TSDB to all persons who have been subjected to enhanced screening in travel and seek redress claiming alleged inclusion in the TSDB would have a devastating effect on the usefulness of the TSDB and a potentially calamitous effect on the national security. *See* March 8, 2019 Declaration of Michael J. Orlando at ¶¶ 19-36.

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

5. (U) My March 8, 2019, declaration focused on the harms to ongoing counterterrorism investigations and intelligence activities, sensitive sources and methods, and foreign relations that would directly result from disclosure of TSDB status and reasons for inclusion in the TSDB to those persons who seek redress after enhanced screening, and the chilling effect that such disclosures would have on participation and exchange of information in the nomination process. I am submitting this supplemental declaration to address a separate reason why the redress process for U.S. persons on the No Fly list should not be extended, pursuant to the Court's order, to U.S. citizens who allege they have been placed on the TSDB – specifically, the administrative and practical difficulties which would result if the Government were required to disclose TSDB status and reasons for inclusion in the TSDB to U.S. citizens who seek redress after enhanced screening. As explained further below, the administrative and practical difficulties of such a process would have a significant detrimental impact on the FBI's ability to carry out its counterterrorism responsibilities.

6. (U) After the decision in *Latif*[2], the Government adopted new internal procedures to implement enhanced redress procedures for U.S. persons on the No Fly List. These procedures allow for the DHS TRIP applicant who has been advised that he or she is on the No Fly List to request additional information. When the DHS TRIP applicant then makes that request, government policy requires the agency which nominated the applicant to:

> ***[M]ake every effort*** to craft an unclassified or declassified summary based on ***the totality of the information available***, which shall include ***as much information as***

[2] (U) *Latif v. Holder*, 28 F.Supp. 3d 1134 (D. Or. 2014).

possible and be reasonably calculated to permit the individual to respond, taking into account the national security and law enforcement interests at stake.

See U.S. Government Redress Implementation Plan for USPER No Fly Individuals, dated April 9, 2015, section 2.1.4.1. (emphasis added).[3]

7. (U) In cases where the FBI is the nominating agency, the Redress Implementation Plan imposes significant demands on the FBI and on other agencies that would be impacted by the release of information to the DHS TRIP applicant. Because the policy requires a detailed understanding of the "totality of the information available", the release of "as much information as possible" under the circumstances, and an understanding of whether, and how, release of a particular piece of information may impact the national security and law enforcement interests at stake, the initial assessment as to whether an unclassified or declassified summary can be released, and what that summary would say, must be done by the personnel who are most intimately familiar with the investigation. These are the case agent[4] and the Supervisory Special Agent (SSA) at FBI Headquarters, Counterterrorism Division, who is responsible for overseeing and managing the investigation[5], and the SSA's support staff, along with attorneys from the FBI Office of the General Counsel. Whoever does the initial review and drafting of an unclassified summary, all personnel involved need to review and consult with one

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[3] (U) A partially redacted copy of the U.S. Government Redress Implementation Plan for USPER No Fly Individuals, dated April 9, 2015 (hereinafter the "Redress Implementation Plan") was produced to Plaintiffs during discovery, and is attached hereto as Exhibit "A".

[4] (U) The "case agent" is the FBI Special Agent with primary responsibility over the conduct of the investigation. Generally, each counterterrorism investigation is assigned a single case agent, although in certain cases a second Special Agent is assigned as a co-case agent.

[5] (U) The SSA in the Counterterrorism Division, referred to as the Program Manager, is responsible for overseeing and managing numerous counterterrorism investigations for one or more designated field offices.

another. In addition, before any proposed unclassified summary is released outside the FBI, approval must be obtained at higher levels in both the field office and FBI Headquarters.

8. (U) This process is painstaking and time-consuming as already applied to U.S. persons on the No Fly List. It requires a review of the file, which may contain hundreds, or even thousands, of documents, and much discussion and coordination inside and outside the FBI. By its very nature, a counterterrorism file will contain classified national security information, and thus the case agent, SSA and other FBI personnel conducting the initial review must determine whether information remains properly classified, or should be proposed for declassification.[6] The review of internal memoranda often requires research into the original sources of information contained in the document in order to determine whether release is permissible under law and policy, whether authority for release needs to be sought from another government agency or foreign government, and whether release might compromise sensitive sources and methods. In undertaking this review, the involved personnel must consider not only whether release of information could interfere with the investigation relating directly to the DHS TRIP applicant, but whether it could interfere with other current and future FBI investigations or investigations by other agencies, as well as its impact on the national security of the United States. This may require consultation with subject matter experts in other FBI field offices, other offices within the Counterterrorism Division at FBI Headquarters, or other members of the Intelligence Community. Even as to information which is unclassified or is subject to

[6] (U) Classified national security information can only be declassified by an FBI official who is an Original Classification Authority or Original Declassification Authority. *See* Executive Order 13526 (December 29, 2009), § 3.1. Case agents and management in FBI field offices do not have such authority, and only a very limited number of FBI personnel at FBI Headquarters have such authority. Thus, coordination with select officials at FBI Headquarters is required to declassify information.

declassification, the case agent, SSA and other personnel must determine whether disclosure of the information would nevertheless cause harm to an investigation or impair the effectiveness of an investigative technique or method.

9. (U) Furthermore, as the investigations at issue are often still pending and fluid, new developments in the case or in a related investigation may impact the sensitivity of information and require a re-review of documents, further consultation within the field office, between different field offices, between the field office and FBI Headquarters, or between the FBI and other government agencies or foreign governments, and a revision of any proposed summary. For example, the decision by a formerly recalcitrant witness to cooperate in an investigation may shed new light on old information which was not previously considered to be relevant or sensitive. A planned proffer by the subject of a related investigation may impact the decision as to whether certain unclassified information can be disclosed at that time or released only after the related investigation is resolved.

10. (U) Critically, however, the primary duty of case agents and the SSA in the Counterterrorism Division, is, and must be, investigative and operational, to address new and evolving threats to national security and the American people. A distraction from that primary duty which, for example, delays a critical interview or causes an agent to fail to "connect the dots" can, in the field of counterterrorism, be a matter of life and death. As a result, the preparation of an unclassified or declassified summary as required under the enhanced DHS TRIP process for U.S. persons on the No Fly List can only be accomplished when there are no other more pressing matters, making this complex, time-consuming process even more difficult to complete in a timely fashion.

11. (U) I am advised that in support of the Government's motion for summary judgment, Deborah O. Moore of the Transportation Security Administration (TSA) submitted a declaration stating that "if the enhanced redress process for U.S. persons on the No Fly list were applied to U.S. persons who received enhanced screening as a result of TSDB status, DHS TRIP estimates its workload for enhanced redress cases would dramatically increase by more than 1,400 percent." Declaration of Deborah O. Moore dated March 1, 2019, ¶ 20. In light of this estimate, applying the enhanced process available to U.S. citizens on the No Fly List to every U.S. citizen who seeks redress after enhanced screening based on alleged placement in the TSDB will increase the burden on the system as well as the risks to the national security described above. Apart from the harms that will result from the disclosure of watch list status itself, in my judgment, any attempt to provide unclassified summaries of the reasons a U.S. citizen is on the TSDB, if required, will significantly increase the amount of time that FBI personnel will have to spend reviewing files and preparing summaries, without relieving them of their primary duty to prevent terrorist attacks. Moreover, a significant increase in the number of requests for unclassified summaries, as will very likely result from applying the Redress Implementation Plan to those U.S. citizens who seek redress after enhanced screening based on alleged inclusion on

the TSDB, will inevitably cause delay in the implementation of the enhanced process for U.S. persons on the No Fly List.

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

Executed this 23 day of October, 2019.

Michael J. Orlando
Acting Assistant Director
Counterterrorism Division
Federal Bureau of Investigation
Washington, D.C.

EXHIBIT A

U.S. Government Redress Implementation Plan for USPER No Fly Individuals

April 9, 2015

WARNING: *This document is FOR OFFICIAL USE ONLY (FOUO). It contains information that may be exempt from public release under the Freedom of Information Act (5 U.S.C. § 552). It is to be controlled, stored, handled, transmitted, distributed, and disposed of in accordance with DHS policy relating to FOUO information and is not to be released to the public or other personnel who do not have a valid "need-to-know" without prior written approval of an authorized DHS Official.*

Introduction

This implementation plan is designed to guide the U.S. Government's (USG) process for responding to U.S. Person (USPER) No Fly individuals who seek redress through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) as a result of denial of boarding.[1]

The steps outlined below include revisions to the current redress process to provide greater transparency and more robust review procedures. Most notably, the revisions enhance the USG's response to certain DHS TRIP redress applicants by providing them information not previously disclosed, to include confirmation of a "No Fly" watchlist status and, where possible, the reasons for that status. This additional information is intended to provide these redress applicants with the opportunity to submit to DHS TRIP evidence that may support removal from the No Fly List or otherwise lead to the correction of errors.

These revised redress procedures apply to USPERs who remain on the No Fly List after they have purchased a ticket, have been denied boarding as a result of their inclusion on the No Fly List, and have sought redress through DHS TRIP. The first stage of these revised procedures involves sending a DHS TRIP letter confirming the USPER's placement on the No Fly List and giving the individual 30 calendar days to request further information regarding their inclusion on the No Fly List.[2]

Following receipt of a first stage response, a USPER requesting additional information will receive one of two second stage redress responses. The preferred response would be to provide the applicant with as much information as possible, taking into account the national security and law enforcement interests at stake. Specifically, the preferred response would include applicable No Fly criteria supporting the applicant's placement on the No Fly List and, where possible, an unclassified or declassified summary of information supporting the subject's No Fly status. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances of each case and the national security and law enforcement interests involved. For cases where the originating[3] agency, in coordination with the Department of Justice (DOJ), and, as appropriate, the Office of the Director of National Intelligence (ODNI), determines that the release of an unclassified or declassified summary of the classified or sensitive information would harm national security or law enforcement interests, the alternate response would at least state the pertinent No Fly criteria but offer no further information. At the conclusion of the second stage, the applicant will be advised of his ability to seek further administrative review of the USG decision. The existing process for further administrative appeal will remain in place and will not change until such time as the Department of Homeland Security (DHS), DOJ, and the Terrorist Screening Center (TSC) agree upon revisions.[4]

REVISED NO FLY REDRESS DETERMINATION PROCESS

[1] USPER refers to a United States Citizen or a lawful permanent resident (LPR) of the United States.
[2] At the applicant's request, TSA may grant an additional 30-day extension.
[3] *See* 2013 Watchlisting Guidance, Appendix 1, for definitions of nominators and originators.
[4] Revisions to the existing process for further administrative appeal are outside the scope of this implementation plan.

Criteria for the revised process:

- Applicant
  - Is a USPER;
  - Was denied boarding due to the applicant's presence on the No Fly List when holding a valid airline ticket;
  - Properly submitted a DHS TRIP inquiry; and
  - Remains on the No Fly List following the USG review in Stage One (described below).

1. STAGE ONE (Initial Redress Application)

1.1. Applicant completes a redress inquiry online or via U.S. mail; when an application is submitted online, the DHS TRIP system automatically generates a redress control number (RCN) for the applicant.

1.2. DHS TRIP sends a letter to the applicant to acknowledge receipt of a complete DHS TRIP application, which confirms the applicant's RCN.[5]

1.3. DHS TRIP reviews the individual's redress case.

1.3.1. If the applicant appears to be a match to a name in the Terrorist Screening Database, ***go to step 1.4.***

1.3.2. If the applicant does not appear to be a match to a name in the Terrorist Screening Database, DHS TRIP personnel will process the inquiry in accordance with existing policy and procedures. ***End process.***

1.4. DHS TRIP refers case to the TSC.

1.4.1. TSC requests that the National Counterterrorism Center (NCTC) and nominator(s)/originator(s) review the case to assess the derogatory information and determine if any change in status is necessary.

1.4.1.1. If no change is warranted, the person remains on the No Fly List. ***Go to step 1.4.2.***

1.4.1.2. If a change in status is warranted:

1.4.1.2.1. TSC, after coordination with the nominator(s)/originator(s) and taking into account the national security and law enforcement interests at stake, shall advise DHS TRIP of the change in status.

1.4.1.2.2. (SSI), (G), (H)

1.4.1.2.3. (G), (H)

1.4.2. If no change in status is warranted and the applicant is a USPER, TSC/NCTC notifies the affected nominator(s)/originator(s) that an unclassified or declassified summary/tear-line ***may be required*** if the USPER in question requests additional information. ***Go to Step 1.5.***

[5] This procedure is currently used by DHS TRIP to acknowledge receipt of the application request.

1.5. Stage One Response – DHS TRIP will send a Stage One letter informing the USPER DHS TRIP applicant that he or she is on the No Fly List and advise the applicant that he or she may request additional information within 30 days or, when the applicant requests and DHS TRIP grants a 30-day extension, 60 days.[6]

1.5.1. Applicant requests further information through DHS TRIP. ***Time Frame: 30 calendar days. Go to 2, Stage Two.***

1.5.2. If DHS TRIP does not receive a request for additional information or for an extension within 30 calendar days, ***End Process.***

2. <u>STAGE TWO (USG Response to USPER No Fly Applicant's Request for Additional Information).</u>

2.1. DHS TRIP receives an applicant's request for additional information, following a Stage One response, and informs TSC. DHS TRIP will forward TSC any additional information provided by the applicant.

2.2. TSC will notify the NCTC and the nominator(s)/originator(s) that the USPER redress applicant has requested additional information, following a Stage One letter, and TSC requests creation of an unclassified or declassified summary/tear line.

2.3. Nominator(s)/originator(s) will review: original derogatory information, any new information (including any other information relevant to the continued No Fly status), and any information provided by the applicant. DOJ will be notified if information obtained or derived from orders issued pursuant to the Foreign Intelligence Surveillance Act, as amended, will be relied upon to support the No Fly decision.

2.4. As set forth below, and based on the totality of the information, nominator(s) /originator(s) will initiate the most appropriate response.

2.4.1. The USG response shall be as follows:

2.4.1.1. <u>The unclassified or declassified summary</u>. Nominator(s)/originator(s) will make every effort to craft an unclassified or declassified summary based on the totality of the information available, which shall include as much information as possible and be reasonably calculated to permit the individual to respond, taking into account the national security and law enforcement interests at stake.[7] The amount and type of information provided may vary depending on the facts and circumstances of each case.

2.4.2. The response will be one of the following two options:

2.4.2.1. The <u>applicable No Fly criteria</u> and the <u>unclassified or declassified summary</u> described in section 2.4.1.1.

2.4.2.2. The <u>applicable No Fly criteria.</u> If only the No Fly criteria are provided, and no other information can be provided, then legal counsel for the nominating/originating agency must coordinate with DOJ and, if appropriate because a U.S. Intelligence Community agency is involved, ODNI before a response is transmitted to DHS TRIP.

2.5. Nominator(s)/originator(s) shall convey to TSC (and TSC will send to DHS TRIP) each of the following:

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[6] The timeframe of 30 calendar days is based upon the date of issuance of the letter by DHS TRIP.

[7] To the extent other agency information not originating with the nominator(s)/originator(s) is to be included in the unclassified or declassifiedsummary, nominator(s)/originator(s) should coordinate with those agencies to ensure that their sensitivity concerns are addressed and that there are no other legal barriers to disclosure.

2.5.1. Information for the DHS TRIP applicant. (G), (H)

(G), (H)

2.5.1.1. (G), (H)

2.5.1.2.

2.5.2. Information for internal review. (G), (H)

(G), (H)

2.5.2.1. (G), (H)

2.5.2.2.

2.6. As set forth below, DHS TRIP will draft a Stage Two letter to the DHS TRIP applicant using information provided by the nominator(s)/originator(s) in Step 2.5.

2.6.1. The Stage Two letter should include the applicable watchlist criteria and, where applicable, the unclassified information provided by the nominator(s)/originator(s) as approved for release to inform the individual of the reasons for his or her inclusion on the No Fly List.

2.6.1.1. DHS TRIP will not release classified information -- or other sensitive information not approved for release (such as any information conveyed internally pursuant to 2.5.1.1 and 2.5.1.2, above) -- in a response letter to the applicant.

2.6.1.2. In the event that an applicant has proactively provided information as part of the redress inquiry, the letter should also inform the applicant that the redress process included a review and consideration of that information.

2.6.2. DHS TRIP will notify departments and agencies that participate in the watchlisting, screening, or redress process[8] that a Stage Two letter is in process in order to a provide these departments and agencies with the opportunity to request

[8] In cases where Department of State (DOS) records are involved or where there are sensitive foreign policy equities, DOS should be consulted.

that an Interagency General Counsel Advisory Panel (GC Panel) be convened to provide advice and recommendations.[9].

2.7. Interagency General Counsel Advisory Panel

2.7.1. When requested by an Assistant Secretary (or equivalent) or DAS-level designee of a department or agency that participates in the watchlisting, screening, or redress process, a GC Panel shall convene to review and provide advice concerning the contents of a draft Stage Two letter.

2.7.2. Each request shall be reviewed by a GC Panel, consisting, at a minimum, of the General Counsels or their designees from each applicable nominating/originating department(s) and agency(ies); DOJ; TSC; DHS; and, for cases with a nexus to international terrorism, NCTC.[10] DHS will facilitate the work of the GC Panel.

2.7.3. The GC Panel's members shall be provided with the draft Stage Two letter (prepared in Step 2.6) and the classified memorandum (prepared in Step 2.5.2.1).

2.7.3.1. The GC Panel members may seek the views of other department and agency officials concerning the matter.

2.7.3.2. The GC Panel may request additional information from the nominator(s)/originator(s) through appropriate channels.

2.7.4. The GC Panel may advise the nominator(s)/originator(s) on legal matters that may include, as appropriate, whether the information provided in the Stage Two letter offers the applicant a meaningful opportunity to respond to the basis for the No Fly determination, or whether it raises issues implicating national security, law enforcement, privacy, or civil rights and civil liberties. The GC Panel may also provide recommendations for how the nominator(s)/originator(s) could modify the unclassified or declassified summary in order to address its advisory recommendations.[11]

2.7.5. The GC Panel's role shall be solely advisory. It shall neither direct nominator(s) /originator(s) to incorporate its advisory recommendations nor provide opinions on whether the redress applicant was appropriately placed or maintained on the No Fly List.

2.7.6. The GC Panel's advice and recommendations shall be sent to DHS TRIP.

2.8. DHS TRIP shall receive the GC Panel's advice and recommendations.

2.8.1. DHS TRIP, through the TSC, will transmit the GC Panel's advice and recommendation to the nominator(s)/originator(s).

2.8.2. The nominator(s)/originator(s) shall consider any advice and recommendations by the GC Panel, determine whether and how best to incorporate any advice and recommendations, and send any modifications to the unclassified or declassified summary, (G), (H) through the TSC to DHS TRIP.

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[9] Agencies wishing to participate in the GC Panel should provide DHS TRIP with the name and contact information for a point of contact and update DHS TRIP of any changes.

[10] Representatives from the nominating agencies and/or ODNI could include appropriate counsel representation as well as Privacy and Civil Rights/Civil Liberties personnel.

[11] This advisory mission of the GC Panel does not supplant the role of the DOJ (and, as appropriate, ODNI for U.S. Intelligence Community agencies), in conducting its own review when a nominator/originator does not include an unclassified or declassified summary in the draft response letter. That review will include a consideration of court rulings and the USG's position in pending and potential litigation.

2.8.3. Where a nominator/originator modifies the unclassified or declassified summary, any other affected nominator(s)/originator(s) will be notified of the change.

2.8.4. DHS TRIP will prepare the final draft of the Stage Two letter for signature.

2.9. DHS TRIP will send a Stage Two letter to the USPER DHS TRIP applicant. The letter will additionally inform the applicant that the applicant may seek further administrative appeal and invite the applicant to provide additional information that he or she wishes the government to consider in connection with any such further appeal. ***End Process (or move to Stage Three if applicable).***

3. **STAGE THREE: Applicant Response and Request for Further Administrative Appeal of a Stage Two Response.**

3.1 The current process for seeking further administrative appeal will remain unchanged, until such time as DHS, DOJ, and TSC agree to revisions.