1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 AYMAN LATIF, et al.,)	
)	Case No. CV-10-750-BR
4 Plaintiffs,)	
)	
5 v.)	December 9, 2015
)	
6 UNITED STATES DEPARTMENT OF)	
JUSTICE, Eric H. Holder, Jr.,)	
7 Attorney General, et al.,)	
)	
8 Defendants.)	
)	Portland, Oregon

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10 TRANSCRIPT OF PROCEEDINGS

11 (Oral Argument)

12

13 BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

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23 COURT REPORTER: AMANDA M. LeGORE, RDR, CRR, FCRR, CE
U.S. COURTHOUSE
24 1000 SW Third Avenue Suite 301
Portland, OR 97204
25 (503)326-8184

1 APPEARANCES:

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

6

7 STEVEN WILKER
Tonkon, Torp, LLP
8 888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
9 (503)802-2050

10

AHILAN ARULANANTHAM
11 ACLU Foundation of Southern California
1313 West 8th Street
12 Los Angeles, CA 90017
(213)977-5211
13

14

FOR US Department of
15 Justice: BRIGHAM J. BOWEN
Department of Justice
16 Civil Division
Federal Programs
17 PO Box 883
Washington, DC 20044
18 (202)514-6289

19 AMY POWELL
US Department of Justice
20 Civil Division
20 Massachusettes Avenue, NW
21 Suite 5377
Washington, DC 20010
22 (202)514-9836

23

24

25

1 (Wednesday, December 9, 2015; 9:06 a.m.)
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3 P R O C E E D I N G S
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5 THE COURT: Good morning, everyone. Please be
6 seated.
7 We are here for oral argument on many pending motions
8 in the matter known as Latif against the United States
9 Department of Justice. This is Civil No. 10-750.
10 In June of 2014 I granted in part plaintiffs' motion
11 for summary judgment, focused only on the procedural due
12 process and APA claims plaintiffs then had pending. And, in
13 particular, I concluded that there was not an adequate process
14 then in place for the plaintiffs to seek meaningful redress of
15 their challenges to the defendants' inclusion of the plaintiffs
16 on the so-called No Fly List.
17 Following that order, the defendants, at the Court's
18 direction and with the standards I concluded were required as a
19 minimum, undertook a review of the status of each of the
20 plaintiffs who were then in the case. And, in that process,
21 initiated a new set of procedures for redress.
22 As a result of that effort, many plaintiffs of the
23 original group were notified by the defendants that they are --
24 were or are, as of the date of that notice, not on the No Fly
25 List and they are are no longer litigating that issue in this

1 case.

2 The remaining plaintiffs were notified by defendants
3 that they remain on the list. And the remaining plaintiffs
4 then were engaged with defendants in a process that plaintiffs
5 did not approve but defendants asserted was compliant with
6 procedural due process standards required by the United States
7 Constitution. And, in any event, compliant with the underlying
8 legislative authority by which the No Fly List process was
9 initiated following the terrorist attacks in 2001.

10 I want to commend the parties for all of the work
11 that has been done since that June 2014 order. And I don't
12 have any doubt that the defendants have tried in good faith to
13 respond meaningfully to the Court's articulation of the
14 standards I determined were minimally necessary and to try to
15 meet them.

16 And I want to commend the parties for working
17 together on these very important and complicated issues where,
18 despite your significant briefing, no one has been able to give
19 me any particularly controlling precedent because this hasn't
20 been done before.

21 If ever I needed oral argument on a matter, this is
22 the case. And I'm here to listen to you as advocates for the
23 positions you're taking.

24 With respect to seven sets of motions, one combined
25 set of motions for partial summary judgment where all

1 plaintiffs have moved against the process that the defendants
2 undertook after June of 2014, asserting that process is
3 inadequate to meet procedural due process standards and
4 violates the APA; and defendants, in turn, cross-move to say it
5 is too sufficient. And then in addition to that comprehensive
6 combined set of cross-motions, for each of the six remaining
7 plaintiffs there is an individualized motion for summary
8 judgment and a cross-motion for summary judgment.

9 And finally, after those motions were fully briefed,
10 plaintiffs filed, last week, a motion for partial closure of
11 oral argument -- of the hearing -- this hearing on oral
12 argument on the motions.

13 And as I understand the plaintiffs' position, they're
14 concerned that there be a public discussion of the matters that
15 were disclosed to plaintiff -- each of the plaintiffs by the
16 defendants as part of this new process. And, in turn, the
17 plaintiffs' responses to those specific issues.

18 As I understand it, plaintiffs wish in part to close
19 these proceedings, to the extent it is necessary to argue
20 particulars with respect to each of the individual plaintiffs.
21 Defendant opposes that motion.

22 And I notified counsel that I would deal with this
23 first because I think it's an important matter that ought to be
24 addressed before we begin.

25 And I want to also just acknowledge that I don't have

1 any idea how long it is going to take to give you all a fair
2 opportunity to argue today. I am fully resigned to spending
3 the entire day with you, if that's what it takes. We'll take
4 reasonable recesses along the way.
5 If any of you who have traveled from away have
6 already made plans to leave, that you need me to know about, I
7 would like to know now. But I would really rather not worry
8 about the clock. I would rather us do what we need to do to
9 get you to a place where you can tell me what I need to hear.
10 Does anybody have any time concerns I need to be
11 notified about?
12 Okay. And for those of you who are out of town,
13 really, this is not typical weather.
14 (Laughter.)
15 THE COURT: It really is not. We're all suffering
16 from some unusual changes here.
17 With respect then to this motion to close, this is a
18 public proceeding, this is a public court, and I am loathe to
19 close it. I think there are steps that can be taken to avoid
20 closure.
21 To the extent any plaintiff or defendant wishes to
22 make reference to any particular fact that is presently in the
23 record under seal, I think you can speak about it in a
24 circumspect fashion. You can point to it by page and line, and
25 then can I be sure I know what you mean. But I certainly don't

1 want, in the context of this important matter, to begin by
2 closing the court.
3 If at any point along the way somebody believes we
4 are at a point where there is an issue being discussed that is
5 not to be referred to in an open and public record -- and here
6 I'm looking, Mr. Bowen, primarily to you to help guide me.
7 Certainly it is not my intention to make any reference to
8 classified information or to other information that is
9 protected from public disclosure. But I really can't see why
10 we can't argue the issues -- the legal issues here openly and
11 publicly.
12 Am I missing something, from plaintiffs' perspective?
13 MR. HANDEYSIDE: Your Honor, I'm prepared to -- Hugh
14 Handeyside for the plaintiff.
15 I'm prepared to address any further questions you may
16 have. We agree we filed this motion --
17 THE COURT: Protectively.
18 MR. HANDEYSIDE: -- publicly. We do feel that the
19 proceeding can go forward fully and openly without referring
20 specifically to the allegations.
21 Our clients do have some very serious, weighty
22 concerns, particularly -- particularly in this -- this
23 environment, after the events in Paris and San Bernardino; and
24 given the climate of fear and the threats of violence that have
25 been directed at Muslim Americans, none -- many of whom -- all

1 of whom have not been, at this point, labeled as suspected
2 terrorists. So we do feel that the personal consequences of
3 disclosure for our clients are particularly dire in this
4 environment.
5 We agree, we think the hearing can proceed fully and
6 openly without reference to that information, but we do -- we
7 would appreciate an opportunity to argue the issue further,
8 should there be a real dispute about whether or not those
9 allegations have to come out.
10 THE COURT: All right. Ms. Powell? Mr. Bowen?
11 MS. POWELL: Yes. We do think it's important for us
12 to at least try to describe for the Court why we think the
13 standard for notice is met. And the easiest way to do that is
14 to walk through at least a few of the illustrative examples of
15 why this notice satisfies the standard for due process.
16 We're willing to proceed however the Court orders.
17 We can try to avoid the information being disclosed on the
18 public record if the Court so orders. But we don't think
19 there's any basis for withholding that information from the
20 public at this point, which is why we opposed the closure. And
21 we do think it's useful to be able to talk about -- openly --
22 how specifically the standards were met in particular
23 instances.
24 THE COURT: All right. Well, I think what we'll do
25 is proceed openly.

1 To the extent any party is about to address a
2 specific factual matter that is presently under seal, I want
3 notice of it in advance. I want someone to say that they're
4 about to do it. And then I want a lawyer from each side to
5 talk to each other about what you propose to say and if there
6 is a way to say it without my having to close the courtroom,
7 and then we'll deal with it as we go.
8 Yes, Ms. Powell.
9 MS. POWELL: Just one quick point. With the Court's
10 permission, we would like to split up the argument between
11 Mr. Bowen and I. He'll handle the general arguments about due
12 process. And then to the extent we get into the individual
13 records, I will address that. And that should separate out
14 those issues --
15 THE COURT: I'm fine with, you know, eight of you
16 multi-teaming me however you're going to do it.
17 MS. POWELL: Just for the Court's notice, I'll handle
18 the individuals and the vagueness arguments, to the extent we
19 reach those.
20 THE COURT: All right. So I will hopefully remember,
21 at the end of the day, to make a formal ruling on the motion to
22 close. But, for now, I'm requiring the proceedings to remain
23 fully open.
24 Where to begin? It will be helpful to me as you go
25 forward today, regardless of what particular issue you're

1 arguing, to assure me you are keeping in mind the standard for
2 summary judgment. To the extent any party is relying on a
3 factual assertion that is material to a legal ruling on summary
4 judgment, I want you to assure me, by example, that there is
5 not any issue of disputed fact around any such fact that is
6 necessary for a ruling on summary judgment.
7 This is procedurally a very odd set of motions. It's
8 not the usual summary judgment motion. This is not a criminal
9 proceeding where the Court is making preliminary findings of
10 fact based on a contested record potentially, which findings
11 which then would result in a -- an order suppressing evidence
12 or an order admitting evidence. This isn't a Rule 104 hearing
13 where I'm presently being asked to vet the expert presentations
14 with respect to their reliability or their competence.
15 In particular, with respect to the expert
16 presentations, I'll be interested in your input as to the
17 extent to which these presentations are as to material facts
18 that the Court must find to be undisputed in order to resolve
19 any particular part or the totality of a motion. Or whether
20 this issue of predictive judgments is more along the lines of
21 something analogous to a circumstance in the totality of
22 circumstances that the Government might take into account in
23 determining whether a person meets the criterion and ends up
24 being one who may -- in quotes, may be placed on the No Fly
25 List, as contemplated by the original statutory authorizations.

1 In the end, I think the -- really, what I will want
2 is an argument of the **Mathews** factors, but I cannot permit you
3 to argue all of them on one side only and then -- and then, and
4 only then, have the opposition. I really do want a
5 point-by-point counterpart on issues. And even sub-issues,
6 probably.
7 So, as we go forward, I'm thinking perhaps each side
8 might like to make a general opening presentation, or not. If
9 not, we can go directly to the -- the primary **Mathews** factors.
10 Because that, for me, is the road map of how to look at
11 procedural process and to identify what particular interests
12 are at stake, how they're to be valued.
13 I need you to give me your best case, your best
14 precedent on every point you make. Because, again, what you've
15 given me, of course, is by analogy. And I want to know how --
16 how much weight I can place on cases decided in different
17 contexts. So that -- that's about all I can say with respect
18 to how I'm approaching these matters.
19 I wish I could have given you a list of issues and
20 questions. There is just too much for me to be able to reduce
21 it to some concise list. So I'll be interrupting you as I need
22 clarification.
23 Would you find it helpful to make some kind of
24 opening points? Or do you want to just right -- go right to,
25 say, the private interest factors -- factor of the **Mathews**

1 test?

2 MS. SHAMSI: Your Honor, it would be helpful to make
3 some opening points, and then perhaps to frame for you -- I
4 should apologize. Hina Shamsi for plaintiffs, your Honor.

5 THE COURT: You're all over the media now. If I ever
6 forgot your name, all I have to do is turn on the radio. On
7 the way to work this morning, even.

8 On other matter, of course.

9 MS. SHAMSI: On another matter, again.

10 So to frame these issues and then propose or to give
11 you sort of a walk-through of how we plan to address all of
12 them, to -- to provide a little bit of a road map; recognizing,
13 your Honor, the number of issues that are before you. That's
14 how we would propose to proceed.

15 THE COURT: Does that work for you, Mr. Bowen?

16 MR. BOWEN: That's acceptable, your Honor.

17 THE COURT: And so for every one of those issues,
18 we'll take a pause, once you're finished on an issue. Then
19 we'll hear the counterpoint, and we'll do this back and forth.

20 And when they're all finished with their issues, if
21 there are more issues that haven't been addressed, then you'll
22 have the opportunity to identify those. And we'll do this
23 until we're finished with the combined motions and the issues
24 raised there. Okay?

25 All right. You may proceed.

1 MS. SHAMSI: Thank you, your Honor.
2 And, your Honor, I just want to be very clear for the
3 record. I will begin by framing the case and do so on behalf
4 of all of the plaintiffs.
5 You know, I think, your Honor, that Mr. Steven
6 Persaud is not represented by the ACLU or Tonkon Torp. And he
7 has separate counsel, Mr. Genego, who is --
8 THE COURT: You're welcome to come closer, if you
9 would like.
10 MR. GENEGO: I think I'm fine, your Honor.
11 THE COURT: All right. Very good.
12 MS. SHAMSI: -- who will address issues specific to
13 him. I just wanted to be very clear --
14 THE COURT: I'm having a little trouble hearing you,
15 and I know you've got papers near.
16 Can you pull the microphone a little closer.
17 MS. SHAMSI: Is this better?
18 THE COURT: Not much.
19 Just a moment. Maybe Ms. Boyer can adjust the
20 volume.
21 MS. SHAMSI: Is it better now?
22 THE COURT: A little. Go ahead.
23 MS. SHAMSI: So, as I said, what we propose to do is
24 I -- I'd like to begin preliminarily just framing the case. I
25 would like then to address the defendants' arguments with

1 respect to secrecy, followed by the arguments with respect to
2 plaintiffs' entitlement to notice. I then want to move on to
3 the parties' arguments with respect to error, which we think is
4 the major **Mathews** act -- factor which is before you today, and
5 address the plaintiffs' experts in that context.
6 Mr. Arulananthan will address plaintiffs' entitlement
7 to a hearing. And, in that context, the burden of proof issues
8 that have been raised, followed by the vagueness of the
9 criteria.
10 That's how we propose to proceed, your Honor; just as
11 we thought the issues might map out. We're happy to go in any
12 other order that makes sense to you, and obviously answer any
13 questions that come along the way.
14 THE COURT: No. That's as good as order as any.
15 There are many issues. We could push here, it would pop up
16 there. Let's just start.
17 MS. SHAMSI: Okay. Great.
18 THE COURT: And so you're going to make a brief
19 opening statement.
20 MS. SHAMSI: Absolutely.
21 THE COURT: And then Mr. Bowen.
22 Very fine. Go ahead.
23 MS. SHAMSI: So, your Honor, as we begin today, we
24 are mindful of the recent tragic attacks in Paris, the Planned
25 Parenthood shooting in Colorado, and the attacks in -- in San

1 Bernardino and the national debate over responses to violence,
2 including mass shootings and political violence, terrorism.
3 These are very serious issues, as is -- as
4 Mr. Handeyside talked about -- the backlash against American
5 Muslims and people perceived to be Muslim. And even as we are
6 mindful of these current events, I think it's important to
7 emphasize that you and the parties have focused in this case on
8 the claims of these specific plaintiffs.
9 Each of the plaintiffs in this case has filed a
10 declaration before the Court, swearing that he does not pose a
11 threat to civil aviation or national security. None of the
12 plaintiffs -- and we think this is very significant, obviously.
13 None of the plaintiffs has ever been charged, let alone
14 convicted of a violent crime. And for five years now -- over
15 five years, actually, each has sought to prove that he should
16 not be blacklisted, stigmatized, and banned from flying.
17 Your Honor, you've previously recognized the
18 importance of the Government's interest at stake, as well as
19 the importance of the plaintiffs' liberty interests at stake.
20 And we don't propose to belabor each one of those points
21 because we don't see a need to reraise issues that you have
22 already decided. We're happy to address any questions, but we
23 don't think that those issues need to be dwelled on before we
24 move on to the **Mathews** factor with respect to erroneous
25 deprivation and the procedural safeguards that guard against

1 it.

2 I do want to say so -- though, that the harms that

3 plaintiffs have suffered continue. And we have for you -- or

4 you have before you the declaration of Mr. Meshal, one of the

5 plaintiffs -- as you know -- in this action; who explains that

6 he has been unable to obtain employment. He has been

7 repeatedly hounded by the media. And that he and his wife and

8 their baby have been subjected to a pretextual unlawful traffic

9 stop by state police that was occasioned by his placement on

10 the No Fly List. And that left Mr. and Mrs. Meshal scared and

11 humiliated.

12 Your Honor, this is a day and age, as you know, in

13 which the terrorism threat label is a very, very serious one.

14 And it is perhaps the most stigmatizing one that the Government

15 can impose on a person, and our clients are still asking for a

16 meaningful process to recover their constitutional protective

17 liberty interests in their reputations and their right to

18 travel.

19 In response to your order requiring that process, the

20 Government has created what we think of as an anomalous and

21 unprecedented one. Here, I think the record is clear that the

22 Government is making predictions about future dangerousness.

23 Now, among the things that I would like to talk to

24 you about -- once we're done with the opening, I just want to

25 provide you with a little bit of a road map here -- is that

1 there are a number of contexts in the case law in which
2 predictions are made and upheld by the courts.
3 There's pretrial detention. There's civil
4 commitment. There's the sentencing context. There's the
5 classification of segregation in prisons. In virtually every
6 context, the determination is made in connection with a
7 criminal charge or conviction to support the finding. And even
8 then, there is process to safeguard against the likelihood of
9 error inherent in any future dangerousness assessments.
10 And it doesn't matter so much. I think it ends up
11 being an issue of semantics about whether you're talking about
12 a prediction of future dangerousness that someone presents as a
13 threat today or at some point in the future. That's a
14 distinction without a real difference. It's the kinds of
15 things that courts do in the future dangerousness context,
16 assessing present and future threat. And -- but there are
17 benchmarks that the Supreme Court and the Ninth Circuit have
18 provided along the way about what kinds of process is due in
19 that context, and those are the kind of things that I'm going
20 to address more specifically.
21 It is true, your Honor, that both parties are arguing
22 by analogy, and the reason for that is because this is such an
23 anomalous process. But I think there are analogous and
24 directly on-point national security cases, as well as
25 nonnational security cases that all fundamentally say the same

1 thing. That when a significant liberty or even property
2 interest is at stake, individuals must have notice of all the
3 reasons that the Government relies on; the bases for those
4 reasons, and a hearing -- bases for those reasons; exculpatory
5 information; and a hearing at which credibility can be tested,
6 including of the Government's witnesses, and where hearsay can
7 be subject to review and testing as well. These -- and an
8 appropriate standard applied on review.
9 The requirements that we're asking for, your Honor,
10 the analogies that we draw, these are all bedrock requirements
11 under the due process clause. And courts have routinely
12 applied them, including in the national security context, as
13 well as outside of the context. Courts have applied them in
14 contexts in which there are greater and lesser liberty
15 interests. And they have set a constitutional floor through
16 the property cases that we've referred you to, which is a floor
17 but not the right standard. Because as the Supreme Court has
18 recognized and as the Ninth Circuit also recently recognized,
19 there is a higher liberty interest at stake when you're
20 talking -- there's a higher interest at stake when you're
21 talking about liberty, as opposed to property.
22 Those are just some general points, your Honor. And
23 I would like to be able to address, when I come back, the
24 specifics with respect to the analogous context, notice, and
25 error.

1 THE COURT: Thank you.
2 Good morning, Mr. Bowen.
3 MR. BOWEN: Good morning, your Honor.
4 To begin, I want to go back to the Court's prior
5 decision, in which the Court had opportunities to analogize the
6 various contexts, and selected what -- as a guiding principle,
7 effectively -- what is perhaps the most analogous context in a
8 civil context for when the Government takes an action that is
9 rooted in national security concerns against an individual and
10 that person comes or organization comes and challenges those
11 determinations on the basis of due process. And the Court's
12 order, followed in -- in fairly significant ways, the decisions
13 that had come earlier in those cases. And I'm speaking
14 particularly of the terrorism sanctions cases. And, most
15 notably, the **Al-Haramain** case of the Ninth Circuit.
16 It is no accident that the parameters that the court
17 outlined in its June 2014 order look very similar to the -- the
18 context of the parameters of due process that were identified
19 by the court in **Al-Haramain**. And it is, again, no accident
20 that the -- that the process that the Government has provided
21 follows those contours fairly precisely.
22 My primary response to Ms. Shamsi's argument and to
23 the plaintiffs' briefs in general is that the plaintiffs are
24 coming up with bedrock where there is none. And they are
25 ignoring bedrock where it is exists and is contrary to their

1 interests, in demanding additional process.
2 The most notable bedrock, we think, that is critical
3 to the Court's determination here -- which has been repeated
4 both by this Court and by similar cases -- is that the
5 Government is not required, in the name of due process, in the
6 context of some civil action outside the context of -- of
7 actually putting someone away and incarcerating someone, to put
8 its national security information at jeopardy or at risk in the
9 name of due process. That is the clear holding of cases like
10 **Jifry**, of cases like **NCRI**, of **Ralls**, and **Al-Haramain**, and
11 **Reynolds**, and all down the line.
12 So plaintiffs are fabricating a bedrock that simply
13 does not exist, when in fact the bedrock favors the Government
14 in this case. And the Court has recognized our compelling
15 interest in protecting this type of information from
16 disclosure.
17 And, therefore, when you take the plaintiffs'
18 interests and weigh it in the balance against that compelling
19 interest of the Government, the plaintiffs' interests
20 necessarily must give way.
21 And the Government has taken extraordinary steps, we
22 believe, to accommodate the plaintiffs' interests by designing
23 a process that can give them the information, to the extent
24 we're able to do so without compromising the national security.
25 I want to point the Court to one particular and very

1 important line in the **Al-Haramain** case that talks about what
2 due process contours are in this kind of a context. And the
3 **Al-Haramain** case describes the issue that was resolved there as
4 plaintiffs were asking for accommodations from the Government
5 that do not implicate national security and impose only a
6 minimal burden on the Government. And so we think that is
7 where the bedrock is to be found.
8 And when you recognize that bedrock, when you
9 recognize, in fact, that ceiling on the information that the
10 Government, in an administrative process, can fairly be
11 required to give to individuals in this context, the -- the
12 flimsiness of the plaintiffs' arguments all become apparent.
13 And you can walk through each of those -- and we will do so
14 today -- to demonstrate why the plaintiffs are wrong. And I
15 will give you only a brief preview of this.
16 Ms. Shamsi refers to her No. 1 item on her list is
17 that the plaintiffs are entitled to, quote, all the reasons for
18 a Government action. This is clearly not a correct proposition
19 of law. And the **Ralls** case states this expressly, as does the
20 **Al-Haramain** case.
21 In the administrative context, the Government is not
22 required to disclose its national security information and put
23 it at risk; even when it is relevant, and even when it is not
24 disclosed to the individuals.
25 The Court recognized that same principle in its June

1 2014 order when it recognized that in fact in some cases no
2 information may be provided at all, and that could in fact
3 satisfy due process.
4 Related to that is the second category that
5 plaintiffs refer to, which is the bases for the reasons. Well,
6 that's the same issue and the same problem.
7 Third, the plaintiffs have talked about exculpatory
8 evidence. Again, by using very inept analogies -- primarily
9 for analogizing to **Brady** in the criminal context, the
10 plaintiffs are demanding that we must turn over all of our
11 exculpatory information. We have much more to say about that,
12 but in the context where there is, in theory, exculpatory
13 information, that is protected information and it need not be
14 disclosed. It would be against the constitutional bedrock
15 principles that inform the need to protect that information to
16 require us to disclose that.
17 And, finally, the notion that individuals are
18 entitled to a hearing in every case as a matter of bedrock is
19 simply not true. It is in fact settled case law that that is
20 not the case. That ultimately, as the core of the **Mathews**
21 decision, is that the notification of due process is flexible
22 and is not informed by the concept of bedrock so much as it is
23 by flexibility.
24 More to the point, we have pointed the Court to
25 numerous cases, including the **ASSE** case, which just recently

1 decided that paper hearings can be sufficient in various
2 contexts. And we'll talk about that more as we go along.
3 At bottom, plaintiffs are demanding far more than
4 what the case law demands. And their method of doing that is
5 by poor analogies to inapt circumstances, under the auspices of
6 an imagined bedrock principle.
7 We can talk also -- and we will -- about the
8 plaintiffs' putative experts. We think the experts can be done
9 away with relative ease, primarily because the experts are not
10 even asking the correct question. They are fabricating a
11 fanciful and incorrect question about what the task is that the
12 Government is undertaking when it identifies threats; threats
13 of violence that warrant a placement of an individual on the No
14 Fly List. And they can be dismissed out-of-hand. And to the
15 extent the Court believes there is some value in consulting
16 that information, we think the Government, at a minimum, is
17 entitled to subject them to the scrutiny of the **Daubert**
18 principles.
19 I'll reserve most of my other arguments for the --
20 for the individual components.
21 THE COURT: Mr. Bowen, there was one other point that
22 occurred to me, in reading all of the briefing, that I failed
23 to just note in -- as a general issue; a question I'm curious
24 about. And that is the extent to which the information on
25 which the Government's relying needs to be not stale

1 information.

2 And I borrow this from the context of criminal law.

3 The analogy of reasonable suspicion and probable cause

4 typically are based on information that is not stale. A judge

5 cannot issue a warrant based on old information, except when

6 there are reasons to believe it's still valid.

7 And so as we proceed today, and we get to the

8 sufficiency of the process in general and then in particular as

9 it respects -- Ms. Powell's got the individuals.

10 MS. POWELL: (Nods head.)

11 THE COURT: The individual plaintiffs, I would

12 appreciate your perspectives -- everyone's -- on the extent to

13 which the information that I've been told about in these

14 secure -- in these sealed filings has to meet some kind of

15 currency standard.

16 Currently -- currency in terms of time. Not --

17 not -- so please include that as we go forward. All right?

18 MR. BOWEN: Absolutely.

19 THE COURT: All right. Thank you.

20 All right. Counsel.

21 MS. SHAMSI: Thank you, your Honor.

22 So let me -- let me start by addressing -- or start

23 again by addressing some or all of the Government's secrecy

24 arguments.

25 Your Honor, in your June 2014 decision you quoted

1 **Al-Haramain**, quoting the **American Arab Anti-discrimination**
2 **Committee** case. Specifically stating, with respect to
3 classified information, without disclosure, one would be
4 hard-pressed to design a procedure more likely to result in
5 erroneous deprivation. And the same thing, I think, holds true
6 today.
7 In **Al-Haramain**, the Court specifically found, with
8 respect to reasons -- just to address quickly a point that
9 Mr. Bowen made -- that when the Government provided only one of
10 three reasons it relied on to designate the corporate entity,
11 it had violated due process.
12 It is undisputed that every single one of the
13 plaintiffs has not been provided all of the reasons that the
14 Government has relied on in order to place them on the No Fly
15 List. It is undisputed that the Government hasn't provided the
16 evidentiary basis or all of the evidentiary basis for those
17 reasons. It is undisputed that the Government has not admitted
18 or provided information that, in the language the parties
19 negotiated for the joint statement of stipulated facts,
20 information that contravenes the Government's basis for placing
21 them on the No Fly List. We used the term "exculpatory" for
22 that. And it is undisputed that none of our client had a
23 hearing, a live hearing.
24 But let's talk about some of the Government's secrecy
25 arguments.

1 In important ways, the arguments are similar to the
2 ones the Government made before; before you issued your June
3 2014 decision. Before the Government -- if you'll recall --
4 argued that it could provide no notice at all, no reasons
5 because of security and national security consequences. It was
6 essentially an argument that the sky would fall. And you
7 ordered more public information to be provided to our clients,
8 including to the seven clients who were notified that they were
9 able to fly. And they've been moving on with their lives. The
10 sky did not fall.
11 There's similar categorical arguments being made here
12 concerning secrecy, harms, and chilling effect. And we think
13 that the defendants overstate the harms that full notice would
14 entail. Because if you look at their declarations in their
15 briefing, they assume that notice would mean full and public
16 disclosure of classified information. And we don't think that
17 that assumption is merited. We think that in fact it is false.
18 And that defendants' interests in protecting legitimately
19 secret and classified information can still be preserved and
20 need not be compromised through a protective order process,
21 such as Congress anticipated in deportation cases and through
22 the CIPA-like process that the Ninth Circuit anticipated in
23 this particular case, knowing full well that it is a civil case
24 and -- and not a criminal one.
25 Before I get to the specifics of case law, I just

1 want to address a couple of practical and pragmatic issues.
2 Defendants' arguments with respect to categorical
3 secrecy might have some more weight if we were asking for
4 pre-deprivation notice. We're not. We're asking for
5 post-deprivation notice.
6 And people, therefore -- to the extent that the
7 Government is concerned, we understand the concern about
8 tipping off people who are subjects of investigation. Look --
9 look at the process the Government has now put in place.
10 People know that they are on the No Fly List when
11 they are banned from flying, and often told that they are on
12 the No Fly List. This is no different from the issues that you
13 saw before, your Honor. They know that they are or likely are
14 the subjects of investigation.
15 And the steps in the redress process that the
16 Government has established mitigate, one would think, their
17 concerns. Because through this redress process, a person who
18 is on the No Fly List must contact the Government three times
19 and provide information about themselves virtually every time,
20 including the Government -- including Government-issued ID,
21 contact information, why they think the Government might have
22 put them on the No Fly List. And when they get notification
23 through this redress process that they are in fact on the No
24 Fly List list, again, providing this kind of information.
25 So to the extent anyone might be chilled from knowing

1 that they are a suspect, it seems rather absurd to imagine that
2 someone who is willing to go through this process, contact the
3 Government, provide information over and over again, would not
4 think that they are being investigated by the Government.
5 These are steps in a process that require people to contact the
6 Government repeatedly, and therefore people know that they're
7 going to be inviting Government scrutiny.
8 But it's still not a process in which people are
9 provided -- and I'm now going to talk about our specific
10 clients and the specific process.
11 THE COURT: Before you do --
12 MS. SHAMSI: Yeah.
13 THE COURT: -- I thought you were heading to make the
14 point that the Government's justification for previously
15 asserting it should have to provide no information because it
16 wanted to avoid tipping off a person that they were being
17 suspected and, thus, permitting that person to alert others and
18 the like, that that wasn't a risk here. Now. Now that your
19 clients know they are on the list, not just by suspicion but
20 affirmative statement.
21 I'm still not clear how the Government's interest is
22 rendered irrelevant or their argument is rendered irrelevant.
23 Because even though your clients clearly know they've been
24 designated by the Government, why does the fact that they have
25 engaged in this process somehow mitigate a risk that assuming

1 the Government is correct, that there is a justified basis to
2 suspect your clients, why is -- why is the fact that they've
3 been identified mitigating the risk that there is other
4 information collateral to them particularly that would be at
5 risk? I completely agree with you -- and I have all along --
6 that once a person is denied boarding, there isn't any value in
7 arguing that person somehow shouldn't be told the truth, that
8 he or she is on the list.
9 But part of the concern here about revealing sources
10 and methods and people with whom the networks may deal are far
11 beyond the individual. So I don't think the point that your
12 clients know they're on the list is really the point at all,
13 when it comes to protecting -- or this risk of exposing sources
14 and secrets that seems to be at the heart of the Government's
15 concern about protecting their ability to protect us.
16 MS. SHAMSI: Right.
17 THE COURT: So what am I missing here?
18 MS. SHAMSI: You're not. And I was just getting
19 there, your Honor.
20 THE COURT: Oh, sorry.
21 MS. SHAMSI: Not at all. And I'm just going to
22 address that, and then go back to a couple of other issues.
23 THE COURT: Okay.
24 MS. SHAMSI: Which is that it may be the case that
25 there is information that legitimately goes to sources and

1 methods.
2 We actually don't know that. And, more importantly,
3 you don't know that because the Government hasn't specifically
4 invoked any privilege. And it would be -- and that's part of
5 what I was talking about, when talking about the categorical
6 nature of the Government's secrecy assertions at this stage.
7 So there are a number of things that could happen.
8 And putting aside right now for the purposes of responding to
9 your question, your Honor, putting aside all of the other kinds
10 of information that hasn't been provided, and really focusing
11 on what happens if their sourcing method, certain
12 information -- that's certainly part of the -- the balancing
13 test and to be taken into account. But it is not the case that
14 that is a categorical basis for denying the additional process
15 that we think our clients are -- are due.
16 The Government has multiple ways in protecting that
17 interest that it has. First, it can specifically invoke the
18 privileges. And, as would happen in any context, when
19 privileges are actually invoked, we get a chance to respond and
20 you adjudicate -- the neutral fact-finder, decision maker
21 adjudicates whether the implication of the privilege is
22 legitimate.
23 Say you determine that the invocation of the
24 privilege is legitimate. You could still use CIPA-like
25 procedures, as we have urged, and that would not mean ordering

1 the Government to turn over all classified information to the
2 plaintiffs. Rather, it would mean using time-tested mechanisms
3 for managing access to classified information. We're just now
4 talking about classified information; not other kinds of
5 information, not at that level of secrecy, because I'm taking
6 that extreme example.
7 The Government could provide meaningful summaries
8 that are actually consistent with due process. And CIPA --
9 CIPA regulates the kinds of disclosures that are necessary for
10 a fair process through protective orders.
11 Defendants could seek to replace disclosures about
12 specific source or method information with factual stipulations
13 in lieu of evidence, as long as there's no -- as long as the
14 plaintiffs have substantially the same ability to respond as
15 with disclosure of specific information. And that's not so
16 anomalous, your Honor. I understand that it may be rare, but
17 it's not the case that this has never happened.
18 Take, for example, **In Re Sealed** case. This is 494
19 F.3d 139. It's a D.C. Circuit case from 2007.
20 In that case, a DEA agent named Horn got into a
21 dispute with a man named Huddle, who was a State Department
22 employee, over policy goals that each of their respective
23 agencies wanted to pursue.
24 And Horn, in a **Bivens** civil action, alleged that
25 Huddle had engaged in electronic eavesdropping, in violation of

1 the Fourth Amendment. So it was against Huddle, of the State
2 Department, as well as an apparent C.I.A. employee. And in
3 that case the Government invoked the state's secrets privilege,
4 and over portions of an internal investigative -- two internal
5 investigative reports.
6 And the D.C. Circuit said nothing in their opinion,
7 quote:
8 Forecloses a determination by the district court
9 that some of the protective measures in CIPA would
10 be appropriate, so that the case may proceed.
11 And that was the order of the D.C. Circuit.
12 The case went back down to the district court, and it
13 was then called **Horn versus Huddle.** It's at 647 F.Supp 2d 55.
14 And there, the district court judge determined that CIPA-like
15 proceedings were important.
16 Now, there's some differences between our case and
17 that one, in that the plaintiff's attorneys already knew the
18 information; the defense attorneys did not.
19 But there, the case -- the court said when parties
20 have security clearances and when the court has to fashion a
21 way for the case to go forward -- especially when it involves
22 this kind of information -- then CIPA-like procedures are
23 appropriate. And --
24 THE COURT: Well, let me just talk about one of
25 those --

1 MS. SHAMSI: Sure, yes.
2 THE COURT: -- hypotheticals.
3 Protective orders, in the context of a case involving
4 classified information, where only lawyers who receive a proper
5 clearance receive the noted information, how can a lawyer
6 meaningfully assert a response to the opposing party when the
7 lawyer's precluded by the protective order and a clearance from
8 conveying that information to the -- the client?
9 This whole process, that is a variance from the
10 adversary procedure our system is based upon, creates
11 difficulties. And I will say from experience that when I'm
12 required to see only an ex parte, in camera submission and the
13 circumstances prevent the disclosure to the opposing party of
14 anything about what I am to see --
15 MS. SHAMSI: Right.
16 THE COURT: -- it is extraordinarily difficult to
17 assess what the other side of the story might be. What the
18 opposing parties' advocacy might be.
19 And I cannot imagine it's any easier for the lawyer,
20 subject to a protective order -- well, maybe it's a bit easier
21 because the lawyer knows about the client's interests and the
22 case.
23 But the -- the notion that somehow this protective
24 order is a substitute concerns me. I think it's a false --
25 false protection in the sense that if the -- if the point is

1 that there ought to be a meaningful opportunity to respond to
2 the substance of the criticism, somehow the lawyer who's gagged
3 by a protective order can do that. I don't see that as
4 meaningful at all. If the information is really that critical,
5 potentially the outcome is that it cannot be disclosed.
6 Potentially to the judge it can be disclosed, who has the
7 clearance and who can look at it, in theory, anticipating
8 what -- what an adversary might say. But I question the
9 protective order process is anything other than a small token
10 of opening the window. Because the lawyer is still bound, not
11 just by just an order, but potentially by criminal penalty to
12 not disclose.
13 I saw in the record one reference. And I saw the
14 Government point to one example where it was known that a
15 lawyer defied the order and made a disclosure. I don't know if
16 there are other examples of that. But I -- I wonder just how
17 serious the plaintiffs are about arguing this protective order
18 process as some kind of meaningful step, when the client's
19 deprived of actually knowing what -- what the issue is.
20 MS. SHAMSI: So you're raising, I think, at least
21 three points that I want to respond to because -- which are
22 embedded, I think, in your question.
23 One is that I think we're still talking about a
24 quantum of information we don't yet know --
25 THE COURT: Yes.

1 MS. SHAMSI: -- because the Government hasn't
2 invoked -- described how much of it is classified, versus not.
3 And then even with respect to that quantum -- unknown
4 quantum of information, which may be small in some cases,
5 nonexistent in other cases, maybe greater in yet other cases,
6 there are at least a couple of answers.
7 CIPA provides one, which is that it doesn't alter the
8 principle that the Government must disclose information both to
9 the plaintiffs and their counsel. And this goes to your
10 concern, your Honor, of what does a fair process look like.
11 And -- but it does regulate the kind of disclosures
12 so that counsel are able to be able to adequately represent
13 their -- their clients.
14 And with respect to the question about protective
15 orders and -- sorry. Let me back up. Regulate those
16 disclosures. It can do it through summaries. It can do it
17 through provisions of other kinds of information. But, again,
18 let's talk about the more extreme context.
19 Protective orders are used all the time with counsel
20 who have security clearance, whose security clearance depends
21 on their ability to be able to maintain these secrets. And
22 they are a way of guarding against the kinds of unfairness the
23 Ninth Circuit recognized in **Al-Haramain** and American Arab --
24 **Arab American Discrimination Committee** that you recognized. It
25 may not be perfect, but it's better than not providing that

1 information at all, which is, I think, what was animating the
2 D.C. Circuit's concern in **In Re Sealed** case; and, I believe,
3 Judge Lambert's concern when that case went back down to him as
4 **Horn v. Huddle**, on remand.
5 THE COURT: All right.
6 MS. SHAMSI: It is true that the Government -- and I
7 think I'm on the second or third thing that your question
8 raised, which is how do we ensure that information won't become
9 public?
10 Again, sticking with protective orders, protective
11 orders prevent the information from being public with respect
12 to the world at large; tipping off people who may be engaged in
13 wrongdoing. People who, as you said earlier when we started
14 this colloquy, are not our clients but might be other subjects
15 of investigation. That's what protective orders do. They
16 impose a barrier between what is known by counsel and the
17 parties and the rest of the world.
18 I think the Government has hinted -- perhaps more
19 than hinted in their briefing about not being able to guard
20 against violations of protective orders. And there is no basis
21 in the record for the Court to make a determination that
22 counsel with appropriate security clearances might violate a
23 strict order of the Court. It seems unseemly, is the best word
24 that is coming to mind at this point.
25 And I would also say, your Honor, that this is the

1 kind of information that the D.C. Circuit -- the district
2 courts in the D.C. Circuit are used to seeing and determined
3 had to be provided in the **Bismullah** case.
4 And **Bismullah** is somewhat analogous here as well
5 because that involved the courts trying to make a determination
6 of how they would fairly adjudicate whether a combatant status
7 review tribunal proceeding had made fair determination. Now,
8 it is true, in that context, judicial review is mandated by
9 statute; the Detainee Treatment Act. And there were stringent
10 standards put in place here, which we think should analogously
11 apply, as you've seen from our briefs.
12 But there, also, the Court had the same concerns that
13 you have here. Which is what is the fairness of a process when
14 counsel do not have what -- defendants' counsel or counsel for
15 the detainees in that context did not have access to
16 information? Because it has ramifications both to the rights
17 of individuals and it has ramifications for the ability of the
18 Court to conduct meaningful judicial review. And that's why
19 the Court in **Bismullah** said that counsel had to have access to
20 all of the Government's information in that particular context.
21 And, again, that context is with alleged combatants,
22 not citizens.
23 THE COURT: But, again, as you've noted, that arises
24 in the context of a very particular and different statutory
25 scheme.

1 MS. SHAMSI: That is true, your Honor, but --
2 THE COURT: I am not a legislator. This judicial
3 officer can only do so much. And that -- if the process is
4 inadequate, then it is inadequate. But it's not, I believe,
5 the function of the judicial branch to create the system. If
6 it is failing in one or more significant ways, then our
7 congressional partners have to address that. But I really am
8 concerned about the notion that you're expecting this trial
9 Court to create a process that was not addressed by Congress,
10 was not anticipated in the legislation that gives rise to us
11 all being here. And I'm concerned about the lack of precedent
12 for that, too.
13 MS. SHAMSI: Your Honor, we're asking you to do
14 what -- what we think that the Constitution asks Article III
15 judges to do.
16 THE COURT: I'm not unwilling to uphold the
17 Constitution.
18 MS. SHAMSI: I know you're not. But if I may -- and
19 I know you have endeavored throughout to be able to fashion a
20 path forward, and that's what we're really talking about here.
21 And that's what the D.C. Circuit and **In Re Sealed**
22 case and **Horn versus Huddle** was talking about as well, which is
23 what is the path forward when the Government says that that
24 classified information is -- is at issue in a particular case?
25 And here it is true that there is no regulatory

1 framework. It may very well be true that it would be better
2 for Congress to provide that framework. When and if that
3 happens, I don't think any of us know. Meanwhile, you have our
4 client's cases before you, and they've been on this list for
5 over five years. And that's part of -- I understand that it is
6 challenging. And we certainly all -- as you've seen through
7 the briefs -- tried to propose how to fashion a path forward.
8 But I think as a fundamental matter -- as a
9 fundamental matter, classification is an executive branch
10 function. We understand, certainly, that courts give deference
11 to those determinations. But that deference cannot and does
12 not override the requirements of due process.
13 And it is also true that in a variety of contexts
14 courts look with deep skepticism at the use of classified
15 information to determine outcomes. That was true -- I've
16 already cited these cases. But that was true in **Al-Haramain.**
17 It was true in **Arab American Anti-Discrimination Committee.**
18 You've recognized that, also, yourself your Honor.
19 But I do think it is also important to take into
20 account that the fact that information may be privileged or
21 classified, and the Government says that it is, is not
22 determinative of the outcome. Nor is it determinative of the
23 role the judiciary will play.
24 If you recall in the **Ibrahim** case, the no fly case,
25 the Government sought to invoke state secrets to dismiss the

1 case entirely. And the judge in that case said that the
2 invocation was overbroad. That, in fact, it needed to be
3 invoked with specific pieces of evidence; some of which were
4 upheld and some of which were not.
5 The same thing happened in the **Gulet Mohamed** case,
6 which is also a case involving the No Fly List. The Government
7 invoked both the state secret privilege and the SSI sensitive
8 information -- sensitive security information. And Judge
9 Trenga, in that case, questioned the invocation at two points.
10 First, he questioned it on a motion to dismiss, at
11 which point he reviewed the information over which the
12 Government had invoked both state secrets privilege and law
13 enforcement privilege. And he concluded that they weren't so
14 related to the claims before him that the case could not go
15 forward, and he denied the Government's motion to dismiss. He
16 reviewed again, at the summary judgment stage --
17 THE COURT: He viewed it ex parte and in camera.
18 MS. SHAMSI: He did. But, again, he determined that
19 some aspects were protected by the privilege and other aspects
20 weren't.
21 And I say this for two points. One is that at this
22 point the categorical specter of invocation may not determine
23 the fairness of the process that is due. And that there are
24 ways in which, if the Government makes an invocation of the
25 privilege and if you adjudicate it and it is legitimate -- and

1 those are big ifs, and we would -- obviously I'm not conceding
2 anything. Then you still have the CIPA-like process that other
3 courts at least have followed.
4 And if I may, I would like to just -- unless you have
5 other questions in that context, I want to talk --
6 THE COURT: (Shakes head.)
7 MS. SHAMSI: -- talk a little bit about the other
8 kinds of -- sort of notice interests that are at stake here.
9 MR. BOWEN: Your Honor, I prefer to be heard before
10 we get too far into the weeds.
11 THE COURT: Well, why don't we do that. Why don't we
12 give Mr. Bowen a brief opportunity to address this one point at
13 a high level. We'll then take the morning recess, and then
14 we'll come back to you.
15 Yes, Counsel.
16 MR. BOWEN: Thank you, your Honor.
17 Ms. Shamsi's arguments are deeply, deeply confused
18 about what we are actually assessing here.
19 Ms. Shamsi's arguments go immediately to questions
20 about what sort of remedies might, in theory, be created at a
21 judicial review phase of a litigation challenge to a
22 substantive determination.
23 What we are reviewing now, what is before the Court
24 is an administrative process. And the weakness of the
25 plaintiffs' arguments can be made bare when you consider what

1 it is that it appears to be that they are trying to require the
2 Government to do. They're saying your administrative process,
3 the exchange of letters that you've designed, that happens all
4 in theory -- in most cases, before you have entered the
5 courtroom and have those determinations challenged -- are
6 unfair and are wrong because you have failed to assert the
7 state secrets privilege. That, your Honor, is an absurdity.
8 We do not assert the state secret's privilege in a letter to a
9 private individual who's engaging in an administrative process.
10 That privilege, while -- while the plaintiffs are
11 correct to draw a distinction between the fact of an
12 information being classified pursuant to the executive order
13 and the question of whether or not privilege is rightly
14 asserted and what the consequence of that assertion in a
15 judicial process should be, those are -- those are -- those are
16 enormously separate questions.
17 And, essentially, what they are effectively asking
18 the Government to do is, in order to satisfy the demands of due
19 process, we have to waive our privileges at the administrative
20 phase.
21 There is a judicial review phase. This is an
22 important aspect of the Court's order. And we haven't actually
23 briefed what exactly that phase would ultimately look like.
24 What we are talking about now is the administrative phase,
25 where it would be absurd to require the Government to -- to

1 enter into a protective order signed by what judge? Right?
2 Presumptively in the administrative process.
3 The question is, is the administrative process fair?
4 The secondary question --
5 THE COURT: Let me just observe one point because I
6 believe it bears refreshing everyone.
7 There -- this Court's authority in this case has to
8 do with six individuals. This is not a class action. This is
9 not an undertaking intended to change the entire system. That
10 the defendants chose to change broadly was their choice.
11 I was focused on the six claimants and I continue so.
12 So I want to be clear that I need you to keep your arguments
13 focused on this case, not the larger set of problems that could
14 be raised in a variety of fora.
15 MR. BOWEN: I agree, your Honor, but I still don't
16 think that changes the point.
17 THE COURT: No.
18 MR. BOWEN: The question is --
19 THE COURT: I'm wanting -- I'm wanting to be clear
20 that there's not any implication that the point of this lawsuit
21 is to change the entire process. That's not before me.
22 MR. BOWEN: I completely agree, your Honor.
23 THE COURT: Go ahead.
24 MR. BOWEN: But the bottom line is that to the extent
25 a privilege is required to be asserted at the point where a

1 determination is subject to ultimate judicial review, this is a
2 separate question of whether or not the Government should be
3 presumptively required to turn over its sensitive records.
4 And that, your Honor, we -- that -- that question, we
5 think, is clearly answered by the core cases that have given
6 rise to the process that the Court contemplated.
7 I -- I heard Ms. Shamsi say that the Court is -- the
8 Government is routinely required to turn over its classifieds.
9 Well, it was not required to do so in **Al-Haramain**. **Al-Haramain**
10 said that it was in the interests of due process to consider
11 mitigation measures to include unclassified settlements and the
12 possibility of their consulting, but not to turn over its
13 classified information. And this Court also recognized that
14 that information needs to be protected.
15 I also heard Ms. Shamsi argue that we should turn
16 this information over to the plaintiffs themselves. That,
17 again, demonstrates just how far afield the plaintiffs are in
18 making these demands.
19 The notion that the Government would turn over
20 classified information to individuals the Government has
21 determined pose a threat of terrorism is absurd.
22 But I want to speak shortly about the -- the
23 **Bismullah** case. Again, the Guantanamo case, as the Court
24 pointed out, is not only a creature of statute, but in those
25 cases -- because it so directly mirrors incarceration and a

1 criminal process -- the Government agreed to submit to a
2 process by which information was shared.
3 This is a very different case, and we think the
4 answer to the question of whether CIPA can be applied -- let me
5 back up and make sure I'm -- make sure I'm clear on what I'm
6 talking about. Again, this gets to the question of what
7 judicial process would be due at the back end, but we think the
8 question of whether that should be applied is answered by a
9 number of cases, most notably the **Reynolds** case, which draws
10 the distinction between a criminal case -- which is what CIPA
11 was designed for -- and a civil case when the Government
12 doesn't have the luxury of withdrawing an Indictment, being the
13 instigator of the underlying case. The Government is on the
14 defensive in a civil case. It doesn't have that luxury.
15 And the settled law about how to handle national
16 security information in civil cases is not some made-up process
17 that the -- that the plaintiffs demand but is actually governed
18 predominantly by the fact that there is the state secrets
19 privilege.
20 And, again, of course we have not asserted state
21 secrets privilege because we are trying to litigate these cases
22 in a way that is -- that allows us to answer this due process
23 question, to vindicate the process that we've created without
24 having to go down that road. But we think that is a question
25 for later.

1 So, essentially, all of the plaintiffs' arguments are
2 effectively premature. They are arguing about what process the
3 Court should design for itself in -- in addressing the
4 substantive challenge at the back end, when the real question,
5 we think, before the Court is was the administrative process
6 provided to the plaintiffs fair and in -- and did it comport
7 with due process as contemplated by the case law?
8 And, again, I will note that the **Al-Haramain** decision
9 doesn't talk about state secrets information. It talks about
10 classified information. The same is true of the **Ralls** case and
11 the same is true of this Court's opinion. All of those cases
12 reflect the recognition that there is a distinction between
13 classified and state secrets.
14 And classification is the rule that governs when
15 you're in the administrative phase. And it's only when you're
16 at the back end, the judicial review phase, do you test the
17 question of whether privileges are appropriately asserted, et
18 cetera.
19 I think the reliance on the **In Re Sealed** case is
20 deeply flawed. And, of course, the Government has never agreed
21 that the ultimate determination by Judge Lamberth on remand was
22 correct; that he could sort of simply invoke CIPA in a **Bivens**
23 action. And, in fact, Judge Lamberth's decision was ultimately
24 vacated on the motion of the Government. And I think it stands
25 for zero proposition, other than the fact that it took place.

1 Give me one second. I want to make sure I've talked
2 about everything else.
3 Again, so -- and then we can go not only to CIPA but
4 to the sort of overall question of whether you can enter a
5 protective order.
6 In theory, through the -- the tug and push and pull
7 of a litigation process, it may ultimately be the case that a
8 judge reviewing a substantive challenge to some sort of claim
9 implicating an interest may enter a protective order over
10 appropriate information. We strongly disagree with the notion
11 that that -- such a protective order could be entered over
12 classified or over information that's subject to the state
13 secrets privilege. It was not ordered in **Al-Haramain**, it was
14 not ordered in **Ralls**, and it should not be ordered here.
15 I'll cede the podium for the moment.
16 MS. SHAMSI: May I just respond before we take a
17 break?
18 THE COURT: Yes, you may.
19 MS. SHAMSI: So a couple of points.
20 One is that in **Al-Haramain** the court made a merits
21 determination and didn't have to rely on classified information
22 to do that. And there the Court had both merits issues and
23 procedural due process issues before it at the same time. And,
24 again, made the merits determination without needing to rely on
25 classified information. And -- and yet still found that the

1 nonprovision of all of the reasons was a violation of due
2 process. And I'm -- hopefully, after the break, we'll get back
3 to, I think, more concrete ways in which all of this plays out.
4 But one other thing I think is important with respect
5 to **Al-Haramain** and also with respect to **KindHearts**, both of
6 which are property cases, when the Government is making
7 determinations about designating corporate entities, I think
8 it's probably a different context than when it is making
9 assessments about the threat capability of human beings, where
10 it is more likely that it might be relying on information that
11 it is going to argue is protected under a different number of
12 privileges. But that's where we get back to the a -- anomalous
13 point that I was talking about earlier, which is, in this
14 context, the Government is seeking to limit a constitutionally
15 protected liberty interest about threat information while
16 saying that it cannot provide all of the reasons or the bases
17 for that information. And that is a very perilous undertaking.
18 It is also rare that this kind of determination would be made
19 through a purely administrative process. And that's why it's
20 important, your Honor, to look to the deportation context in
21 which -- in an area of the law in which courts give unique
22 deference to the political branches.
23 And that's part of why we're bringing this up, right?
24 Because the Government is arguing for deference. And even in
25 this area of the law, where courts give unique deference to the

1 political branches, courts have said that you may not deprive
2 people of their liberty interest based on secret evidence.
3 One quick final point here, which is that Judge
4 Lamberth's decision was vacated. That is correct. But that
5 was as part of a settlement reached between the parties and I
6 think that that would be important to take into account.
7 THE COURT: With that, we'll take a 15-minute break.
8 Thank you.
9 (Recess taken.)
10 THE COURT: Thank you. Please be seated.
11 Ms. Shamsi, before you continue, Mr. Bowen's last
12 point leads me to asking you to clarify plaintiffs' position as
13 to the following:
14 To what extent does plaintiff -- do plaintiffs
15 contend at least the Court must review the information withheld
16 from the plaintiffs in this new process in determining not a
17 substantive due process challenge which is yet to come but the
18 procedural issues on which we're focused?
19 Is there a way the procedural process can -- the
20 procedural issues between the parties can be resolved without
21 at least the Court reviewing in camera and ex parte the
22 nondisclosed information?
23 MS. SHAMSI: Your Honor, may I have just a minute?
24 THE COURT: Yes.
25 (Pause, conferring.)

1 THE COURT: From your perspective.
2 (Pause, conferring.)
3 MS. SHAMSI: So -- thank you, your Honor.
4 Let me begin by responding to that question.
5 We think that it is both premature and unnecessary
6 for you to review information that has been withheld from the
7 plaintiffs. We think that you could find, as a matter of law,
8 that -- whether or not the process has been adequate or not.
9 And we think that --
10 THE COURT: How could I do that, if I don't know what
11 was withheld?
12 MS. SHAMSI: Because I think it would be -- it would
13 be making a merits determination at a procedural due process
14 stage. And I don't think we're there, and that's not what the
15 record is before you.
16 I think another way of putting this is -- it's
17 similar, in some ways, to the posture we were in before -- with
18 you before, which is that the agency is refusing to provide
19 information to our clients. They're telling you that they
20 don't have to do it. We're -- we're saying, therefore, that we
21 don't have a fair process. So the question is, as a matter of
22 law -- both under precedent and given the specific facts of
23 this case -- is that specific facts of what is provided and
24 what is not provided, is that true? And the issue is that we
25 don't think that you really have a meaningful record before you

1 to make a merits determination in similar ways to the way that
2 in June 2014 you thought that a record that went up for 46.110
3 review was overly one-sided.
4 And so it is true, to some extent, what Mr. Bowen was
5 talking about. That in our colloquy, we have gone almost
6 immediately to the remedy issue, and I just want to round that
7 out a little bit before stepping back, if I may, to talk about
8 the case law with respect to the kinds of notice that we are
9 asking for because we've sort of skipped over that. And I want
10 to make sure that I touch on --
11 THE COURT: I didn't realize we had skipped over
12 anything. I thought we were still talking about your general
13 introductory point on secrecy and your notion there.
14 MS. SHAMSI: I guess when I was talking about how to
15 conceptualize it, which is remedied after what -- the
16 process --
17 THE COURT: Well, it is clearly appropriate for
18 Mr. Bowen to remind all of us about the administrative focus of
19 the current motions, and I do not want to be heard as going
20 beyond that.
21 Nevertheless, if the Government's position -- if the
22 defendants' position is that which we have given the plaintiffs
23 is sufficient for a procedural due process purpose, and the
24 plaintiffs' position is it is not, not only because that which
25 we gave -- they gave us, we've denied; but because they say

1 there's more, and we've never had a chance to see it.
2 MS. SHAMSI: Right.
3 THE COURT: Those are interesting and narrow
4 positions for cross-movements on the summary judgment, is all
5 I'm saying.
6 MS. SHAMSI: They are. And perhaps it's sort of -- I
7 think it goes to something of the unusual nature of where we
8 find ourselves.
9 THE COURT: Sure.
10 MS. SHAMSI: Because you didn't remand this back to
11 the agency, and this is still a process that is under your
12 jurisdiction because that -- as all of the litigants -- as --
13 as we have proceeded and you have proceeded, that is how
14 we're -- we've been approaching this case.
15 And I think when the Government says that during the
16 quasi-administrative phase of this process we're going to take
17 what I've been talking about as a categorical approach, which
18 is this much and no more -- and just as a reminder, your Honor,
19 as soon as we saw that we said we need more. And we were -- we
20 would like to jointly ask the Court for an extension, so that
21 you can provide the more that will allow our clients to be able
22 to respond in a meaningful way. And it's been sort of a
23 one-way train ride until we get here to you today. And so the
24 posture that we're in now is an agency determination in a very
25 unusual circumstance where we don't have a full record to

1 respond to and you don't --
2 THE COURT: Well, you have more of a record than you
3 had --
4 MS. SHAMSI: I absolutely understand.
5 THE COURT: You have more of a record than you had
6 before I said the district court didn't have jurisdiction. You
7 have a record.
8 And a question, frankly, before me is whether the
9 matter now should go to the Ninth Circuit because there is a
10 determination on a record that should jurisdictionally be
11 before the appellate court.
12 MS. SHAMSI: So a couple of responses because I think
13 there's Ninth Circuit case law that you could apply now as a
14 matter of law to find that this is inadequate, one.
15 THE COURT: Okay.
16 MS. SHAMSI: And, two, that you have the authority,
17 under Article III, to be able to fashion a remedy that is
18 specific to our clients.
19 And so I'm jumping ahead again, for which -- I'll ask
20 you to just give me this bracketed period to jump ahead. But
21 the remedy that you could order, and we would ask you to do it,
22 is that this process does not meet the requirements of due
23 process. And the Government has to provide all of the reasons
24 and information that it is relying on to place plaintiffs on
25 the No Fly List to us.

1 And to the extent -- as well as, you know,
2 exculpatory information that contravenes the basis for -- for
3 its placement of plaintiffs on the list. And to the extent
4 that the Government seeks to invoke any privileges, it should
5 do so, and it should do so with a privilege log itemizing the
6 specific information with enough detail that allows us to be
7 able to decide whether we want to contest that privilege for
8 you to be able to adjudicate it going forward.
9 And so that -- that is a very specific way in which
10 you have the ability and the authority to make the
11 determination. But I'd like to talk about, if I may, why we
12 think the process has not been adequate before --
13 THE COURT: That would be good, since that's the
14 premise of your motion.
15 MS. SHAMSI: Exactly.
16 And so with respect -- one -- one very quick thing,
17 your Honor, because I don't think I was crisp enough about it
18 before, and I don't want to confuse the record. I want to just
19 very clearly lay out our view on analogous cases.
20 One is that the property cases we cite, including
21 **Al-Haramain** and **KindHearts** -- both in the national security
22 context -- establish a procedural floor. Because, as the
23 Supreme Court has indicated, courts generally regard property
24 interests as less weighty than liberty interests. And the
25 Ninth Circuit has similarly said that in a recent **Rodriguez**

1 case -- and I'll give you the cite. That there's a heightened
2 burden in civil proceedings, in which the individual interests
3 are both particularly important and more substantial than mere
4 loss of money. That's why -- and this is in the deportation
5 context. There are two reasons why we think deportation cases
6 are analogous.
7 One, because those cases don't involve incarceration,
8 but they do separate -- they do have the consequences that are
9 directly like the consequences for people, for our clients,
10 which is that they separate family members. They preclude
11 participation in life events. They interfere with employment.
12 They limit access to medical care and education, and limit the
13 ability to carry out religious obligations.
14 The second reason that the deportation context is
15 analogous is because the immigration context is one in which
16 courts give unique deference to the political branches and
17 still require more process.
18 The liberty cases that we rely on, your Honor, are
19 both in the national security context as well as in the
20 criminal context, where courts find that the Government has a
21 compelling interest in security and protection of the
22 community. And those include the future dangerousness cases of
23 **Salerno**, **Foucha**, as well as **Hendricks**.
24 **Salerno** involving pretrial detention, **Hendricks**
25 involving prediction in the sexually violent predator context,

1 and **Foucha** involving civil commitment.
2 Finally, we're not asking for all of the indicia of
3 criminal cases. But we are saying that there are fundamental
4 fairness guarantees derived from the criminal context in cases
5 that have been applied in a civil context. So I just wanted to
6 put that out there, and let me very quickly go through reasons.
7 With respect to due process entitlement to all of the
8 reasons, again, I think **Al-Haramain** is very clear.
9 Constitutionally adequate notice involves all reasons.
10 There is no dispute that the Government did not
11 provide all of the reasons to any of the plaintiffs for putting
12 them on the No Fly List. Nor is there any dispute that the
13 Government didn't provide reasons for rejecting our
14 explanations, which limits what goes forward up to you for
15 review.
16 And, again, I'm talking about reasons the Government
17 relied on. Not all of the reasons that could exist out there
18 in the world, but reasons that the Government relied on.
19 And the issues here are the same as the ones that
20 troubled the Ninth Circuit in **Al-Haramain**. Individuals can't
21 respond to what hasn't been alleged, and the Court can't
22 meaningfully adjudicate it.
23 And, inevitably, when there is an inability to
24 respond to all of the reasons, there is a heightened risk of
25 error.

1 We're also asking for the evidence that the
2 Government relied on. We're asking very specifically for
3 statements by the plaintiffs themselves.
4 The Government's notifications quote in some
5 instances selectively from alleged statements by plaintiffs,
6 but they don't provide the full statements by plaintiffs.
7 They appear to rely on information from third
8 parties, as well as informants, as well as Government agents.
9 Any of whom could have particular biases one way or the other.
10 And to the extent that the defendants -- the Government is
11 relying on that information -- it doesn't have to. But to the
12 extent it is relying on that information, we believe we're
13 entitled to it. And, again, it is undisputed that the DHS trip
14 process didn't disclose any of the Government's evidence, and
15 the notification letters make very clear that it is being
16 relied on.
17 And I just want to be very clear here, also, your
18 Honor, about what we're talking about when we're talking about
19 evidence.
20 What we were provided is indented information which
21 hasn't been authenticated, hasn't been signed by anyone. It's
22 not clear where it's coming from. There's a very limited
23 ability -- hobbled, I think is how we referred to it before --
24 to rebut misperception, error, lies, or potential biases.
25 And we have a number of cases, your Honor, that

1 support this. The **Ralls** case, in which a designated foreign
2 terrorist organization's bank account was at stake.
3 The Government's -- the Court required an evidentiary
4 basis. The **Bismullah** case, which I already talked about
5 before. **KindHearts.** And the Court said that a party must be
6 able to know the conduct on which the Government bases its
7 actions, so it can explain its conduct or otherwise respond.
8 And there, I think one of the things that the Court
9 found troubling was that one of the allegations against
10 **KindHearts** was that funds were provided to Hamas. The Court
11 said, Well, the Government hasn't actually said -- it hasn't
12 estimated the amounts that were provided to Hamas. It hasn't
13 said how much was, so that the entity cannot rebut whether
14 amounts that it was disbursing as a charity were related to
15 this or not.
16 The other case that we think applies here is **Dent;**
17 the Ninth Circuit case in the deportation context at 627 F.3d
18 365. We think it's important that in that deportation context,
19 by regulation, Congress has said that the Government may not be
20 able to rely on secret evidence for people who assert a right
21 to remain in the United States. So that's for people who are
22 not, unlike our clients, citizens.
23 I think the other cases you could -- that we urge you
24 to look at is **Kiareldeen.** Again, a national security case.
25 There, the issue was the Government's classified information

1 with regard to the allegation that the -- the person who was
2 about to be -- who was subject to bond and removal proceedings
3 was a member of a terrorist organization and a threat to
4 national security.
5 And the Court said that it violated due process for
6 there to be secret evidence that the decision maker relied on
7 from the F.B.I. joint terrorism task force, even where
8 unclassified summaries were provided.
9 Similar concerns in the D.C. Circuit's decision --
10 sorry. Similar concerns in the **Rafeedie** case, where the Court
11 found that secret evidence used against a legal permanent
12 resident in exclusion proceedings violated due process. And
13 all of those cases, your Honor, rely on basic principles of
14 fairness, such as in **Greene versus McElroy**, which is that the
15 due process requires the opportunity to rebut testimony and the
16 case against you.
17 Two -- two concrete examples from our clients about
18 the prejudice that arises in this context. Mr. Knaeble was
19 provided the reason of concern about his travel to a particular
20 country in a particular year.
21 He responded with the reasons for his travel to that
22 country, all of which were innocuous. There was nothing
23 remotely unlawful either about the Government's reason or his
24 basis for going there.
25 And he also said, By the way, I didn't go in the year

1 that you alleged. I went in a different year, the previous
2 year. And he provided that information.
3 It is clear that the Government is relying on
4 information that is either disclosed -- undisclosed or other
5 reasons. If you look at the statements of undisputed facts in
6 both -- both -- with respect to all plaintiffs, as well as with
7 respect to him specifically, it's clear that the information
8 that the Government is relying on has not been provided. He
9 does not know what to respond to, and he's left virtually in no
10 different a place. And with all respect and recognition of
11 what you -- you, your Honor, ordered in -- before, in June
12 2014, he's in virtually the same place. He knows he's on the
13 No Fly List, but the information that he's been provided does
14 not allow him to meaningfully contest his -- his placement.
15 We think it's very important, your Honor, that the --
16 that the Government disclose material information that
17 contravenes its basis for putting people on the No Fly List.
18 It is apparent from a number of our clients' cases
19 that the Government has that information, but it doesn't -- it
20 hasn't provided it. And it is fundamental that due process
21 rights are either in jeopardy or violated when procedures don't
22 allow for the presentation of potentially exculpatory
23 information, including that in the Government's possession.
24 It is true that **Brady** is in the criminal context. It
25 is equally true that we have cited to you cases that apply the

1 principles of Brady in civil contexts, including in civil
2 administrative enforcement actions and penalty proceedings, in
3 deportation context, in naturalization context, and extradition
4 cases. Again, I would refer you to **Dent** and **Bostick**, as well
5 as the habeas cases.
6 And here, your Honor, another concrete example, which
7 is the case of Mr. Meshal, who, from the face of the
8 notification that was provided to him, it would not be clear
9 that the information the Government is apparently relying on
10 was all derived from a four-month-long period in which he was
11 subjected to over 30 integrations by F.B.I. agents while he was
12 unlawfully detained in the Horn of Africa and threatened with
13 torture, death, and disappearance if he did not confess. That
14 is core exculpatory **Brady** information. And regardless of his
15 ability to provide that in the record, it is information that a
16 decision maker needs to know.
17 Mr. Meshal was also pressured to become an informant,
18 and told he would be helped if he became one. The ineluctable
19 conclusion is that there must be exculpatory information in the
20 Government's files. He has never been charged with a crime.
21 And the decision maker should know and he should be able to
22 respond to the information that the Government has, including
23 from the F.B.I. officials who told him repeatedly to sign a
24 waiver of rights form when he asked for a lawyer.
25 I think that is all I have, your Honor, on the notice

1 aspects, unless you have questions --
2 THE COURT: No, I don't, in the sense of asking you
3 to continue. I clearly have many questions. But I want to
4 hear the counterpoint while I still have your -- your points in
5 mind.
6 Mr. Bowen.
7 MR. BOWEN: Thank you, your Honor.
8 THE COURT: Could I ask you one question before you
9 go forward, and that is this idea about whether for procedural
10 process -- for the procedural due process analysis, that's
11 required in these cross combined motions, whether you believe I
12 should not have -- I should or shouldn't have available ex
13 parte and under seal the Government's undisclosed information
14 on which it relied.
15 MR. BOWEN: The position of our motion, your Honor,
16 is that the record before the Court wholly demonstrates the
17 propriety of the process. And the Court can look at the record
18 and look at the policy, which requires that we disclose to the
19 maximum extent possible, without compromising national security
20 on classified information that can be provided. So the short
21 answer is we think this record supports judgment for the
22 defendants on that basis.
23 THE COURT: On process only. And that's any review
24 by the Court, even in an ex parte scenario, has to be reserved
25 for the substantive evaluation?

1 MR. BOWEN: That's correct, your Honor. But let me
2 caveat it in a couple of ways.
3 One is we really don't have a precedent in the
4 context of an ordinary civil proceeding for the -- the Court to
5 take submissions ex parte and in camera. It has been
6 disfavored by some courts. There's a case in the D.C. Circuit
7 called **Abarast** (phonetic), that suggests that to take care of
8 that itself is a due process problem. But that's all to say we
9 don't necessarily have a position on whether -- if the Court
10 felt that that was necessary in order to satisfy the process --
11 THE COURT: Here's the problem I'm concerned with,
12 Mr. Bowen.
13 You've asserted -- and Counsel's repeatedly noted --
14 that with respect to each of the six plaintiffs there is
15 information withheld on which your clients relied in the
16 process of reconsidering their status on the No Fly List.
17 You're also asserting that I should be able to
18 conclude as a matter of law, by looking at what you did
19 disclose, that the process is inherently fair. I'm having
20 trouble with those notions in concert.
21 MR. BOWEN: So the first thing I would point to is
22 the question of whether or not the Government has been fair.
23 The determination about what information falls over that line
24 and properly needs to be protected is a determination to
25 which --

1 THE COURT: But how do I know that the Government has
2 disclosed all that fairly should be disclosed, even under your
3 policy, if you haven't made any showing, at least by
4 declaration or otherwise, that there are other reasons?
5 They're not disclosed. They are in fact on the sworn statement
6 of a person with actual knowledge, the kind of information
7 that -- that does cross the line, as you're using that term.
8 How do I know that?
9 MR. BOWEN: Right. So we think that our submissions
10 demonstrate that all of these matters were taken into
11 consideration. The question of whether the information crossed
12 the line has been made. And, again, we think the record --
13 THE COURT: How do I know who did that? How do I
14 know that person's level of responsibility? How do I know what
15 that person did to cull that which was disclosed from that
16 which is known to defendants, and played a part in the decision
17 but was not disclosed? How do I know that, on this record?
18 MR. BOWEN: Well, those particulars, your Honor, are
19 not in this record. And if the Court is of the mind that it
20 needs those particulars in order to make that assessment, we
21 will take the Court's determination in that respect under
22 advisement. Again, our position is that it's not necessary.
23 But to the question of whether the Court could review
24 that information, I think our fundamental position is that that
25 ultimately really goes to the substance that -- that there is

1 some process for review, and we really don't know what that
2 looks like. It could include those --
3 THE COURT: Counsel, the test isn't some process.
4 It's procedurally due process. And for me to be able to grant
5 defendants' motion, I would have to be able to say the process
6 that was chosen by your clients following the June 2014 order
7 is procedurally fair process, due process.
8 How can I know that on the record you've given me?
9 How can I know that?
10 MR. BOWEN: Again, we think the record -- again, so
11 if the Court is saying --
12 THE COURT: No. I'm asking you, as the proponent of
13 the motion --
14 MR. BOWEN: Right.
15 THE COURT: -- on whom the obligation rests, to show
16 defendants are entitled to judgment as a matter of law. How
17 can one look at this record and conclude it is procedurally due
18 process that has in fact occurred when it's not even disclosed
19 to the Court in camera that that which was a material part,
20 evidently, of the defendants' determination has not, (A), been
21 disclosed, so the Court has no way of knowing whether it's
22 important or not? There isn't any way to determine, even by
23 declaration here by a person of authority that there was
24 information, it was reviewed, it was evaluated.
25 This is a very summary, very -- very high level,

1 conclusory sort of record. I'm having a hard time seeing how
2 one could say, as a matter of law, this is procedural due
3 process.
4 MR. BOWEN: I understand the Court's frustration with
5 that. And, unfortunately, I'm not in a position to provide
6 clear answers, in part because we don't have a settled position
7 within the Government as to what to do when -- when the Court
8 is dissatisfied with the record we have submitted --
9 THE COURT: Okay.
10 MR. BOWEN: -- and the Court feels the compulsion or
11 the need to ask the very question you're asking.
12 THE COURT: So I deny defendants' motion,
13 potentially, on the basis that the record does not reflect as a
14 matter of undisputed fact and law that the process is due
15 process from a procedural perspective. And I deny the
16 plaintiffs' motion on --
17 MR. BOWEN: Well, that's my --
18 THE COURT: -- due process grounds because what the
19 plaintiffs are asserting is entirely not precedented in terms
20 of that which is required.
21 And what does that gain us?
22 MR. BOWEN: Well, it gains us further proceedings,
23 your Honor. I mean, I think --
24 THE COURT: Well, I think we're guaranteed those one
25 way or the other, but a lifetime appointment may not be enough

1 here.

2 MR. BOWEN: I understand the frustration, your Honor.

3 And, unfortunately, I am sorry to be in the position of not

4 being able to answer that particular question.

5 THE COURT: So your position today, however, as your

6 client's advocate, is that the record does in fact sufficiently

7 reflect a process the Court ought to endorse as commensurate

8 with constitutional requirements and procedural due process?

9 MR. BOWEN: Right. And there are two particular

10 aspects to that that we think are important.

11 One is that the law instructs that when you are

12 assessing a process you are actually looking at the generality

13 of cases. You're asking whether the process on the whole is

14 fair. And the deep dive that asks whether in this particular

15 instance a person received every single bit of information they

16 could have had is not necessarily part of that analysis. It

17 tends to creep into the analysis, frankly, because courts --

18 they just tend to lean that way. But, as a technical matter of

19 law, it's not part of the process. The question is whether

20 they received a process --

21 THE COURT: So why is it fair? Why is this

22 procedurally fair, this conclusory, incomplete process that

23 doesn't even allow the reviewer of the procedural fairness to

24 know what in fact the Government relied upon to reach -- why is

25 that -- should I conclude that is legally fair?

1 MR. BOWEN: So one component we've not really
2 discussed is that we agree -- and we all agree, and this is
3 part of the Court's prior order, is that there is judicial
4 review. There is back-end judicial review.
5 THE COURT: Am I the judicial review or is it the
6 Ninth Circuit?
7 MR. BOWEN: Well, again -- again, I'm in the
8 unfortunate position of not being able to necessarily answer
9 that question because we haven't fully briefed it. There are
10 very difficult questions about jurisdiction, about the handling
11 of classified information in civil cases, which generally
12 doesn't happen because --
13 THE COURT: But can you at least tell me your
14 client's position as to whether the record is complete and now
15 ready for judicial review on this procedural due process
16 question?
17 MR. BOWEN: Whether the record is complete.
18 THE COURT: Are you ready to rest upon that which
19 you've given in support of your motion, your cross-motion, as
20 the full record that is to be subject to the judicial review to
21 which you refer, even though you're not able to tell me where
22 that judicial review is supposed to happen?
23 MR. BOWEN: I'm sorry. No, we're not ready to rest
24 on that record.
25 If the -- I want to make sure that I'm understanding

1 the Court's question.
2 THE COURT: You've moved for summary judgment --
3 MR. BOWEN: Right.
4 THE COURT: -- on the basis that the process
5 instituted by your clients following June 2014 provides
6 sufficient procedural due process --
7 MR. BOWEN: Okay.
8 THE COURT: -- to satisfy constitutional
9 requirements. Right?
10 MR. BOWEN: Correct.
11 THE COURT: And to be entitled to that judgment, you
12 have to show both that the material facts are undisputed and
13 that you're entitled to judgment as a matter of law.
14 MR. BOWEN: Right.
15 THE COURT: And my question to you is how could
16 possibly any judicial officer reach that conclusion when the
17 record given is, by definition, incomplete in terms of the
18 reasons relied upon for the placement and not even subject to
19 an in camera review to verify that the source of information
20 and the bases on which the defendants made their decision
21 have -- are grounded in anything that one fairly would conclude
22 is reliable?
23 MR. BOWEN: The reason is because the Court can
24 presume -- because it's true -- that there is some form of
25 judicial review. And the courts, being courts, are -- are

1 seasoned and good at providing the process that -- that is fair
2 and equitable in the context of judicial review.
3 That we don't know the mechanism or we may not even
4 know the -- the jurisdictional forum for that -- for where that
5 exists, the fact of judicial review itself provides the
6 bulwark, I believe, that the Court is looking for. There is
7 judicial review; depending on where it is, depending on what
8 the law requires for how that substance --
9 THE COURT: You know, Mr. Bowen, you're going to have
10 to take a position in this case for these six plaintiffs as to
11 where you contend that judicial review should be. I'm not
12 asking you to speak for the United States in every case
13 possible. But you are the lawyer for the defendants in this
14 case, and you simply must take a position.
15 MR. BOWEN: I can't take a position today from this
16 podium, your Honor. If the answer to that is we would
17 absolutely be more than happy to take supplemental briefing and
18 provide the Government's view of how that process -- what that
19 process would look like, where it would occur, and how the
20 handling of that information would occur, I'm simply not
21 authorized to -- to essentially speculate on that question.
22 And I apologize that -- that is frustrating, and that is
23 something the Court may have been anticipating. But I am
24 not -- I don't have that authorization.
25 THE COURT: Well, tell me please, then, why it is

1 that your clients contend they're entitled to summary judgment?
2 That the process they have afforded each of plaintiffs is
3 constitutionally sufficient from a procedural due process --
4 not the substantive outcome with which reasonable minds might
5 differ; and, indeed, a reviewing court might differ. But why
6 is the process sufficient to allow and indeed require this
7 Court to grant judgment in your client's favor?
8 MR. BOWEN: Because -- because it directly answers
9 the contours that the Court identified in its prior order. The
10 vision of unclassified summaries, without breaching the wall of
11 classified information in the context of the administrative
12 phase, to the extent possible, without implicating national
13 security.
14 And that information ultimately will be -- agreed,
15 will be reviewed by an appropriate court. The fact that we
16 don't know what that appropriate court is doesn't change the
17 fact that the administrative process provided the information
18 that is able to be provided and doesn't go over that wall
19 that's been identified repeatedly by the courts. And I'm
20 speaking particularly of the D.C. Circuit, talking about how --
21 the courts can't compel a breach of the security that the
22 executive branch is charged with protecting. And we can't turn
23 over that -- that information. And the court -- and the cases
24 support that -- that conclusion. And so --
25 THE COURT: Mr. Bowen, I don't know how a court can

1 determine a process is sufficient for judicial review without
2 knowing the information that's going to be reviewed. It's as
3 if you're saying any process would be sufficient because, in
4 the end, there will be some judicial review by some judicial
5 authority at some undisclosed time and place. But the
6 determination of what's sufficient has to be measured against
7 something. And the record you've given is something. And,
8 I -- again, I commend the defendants for doing something. But
9 I -- I'm trying hard to understand how the Court can grant your
10 motion on this record about a sufficient procedural process if
11 the Court can't even tell what was considered.
12 MR. BOWEN: Well, again, we -- it's not that the
13 Court can't. It's just that we don't know what that looks
14 like. And we are more than prepared to brief that question and
15 provide the United States' position.
16 THE COURT: You don't get to continue to brief and
17 brief and brief. When one moves for summary judgment, one has
18 the obligation to provide the authority to support the
19 judgment. You either have it or you don't. They either have
20 it or they don't.
21 MR. BOWEN: But, again, the best I can do for your
22 Honor is the fact that we know the judicial review will occur.
23 If the Court is dissatisfied with that, the Court is
24 correct that the answer is to deny both parties' motions and
25 require us to come up with and settle on the question of what

1 that ultimate judicial review -- substantive judicial review
2 looks like.
3 THE COURT: I'm not making myself clear. I'm not
4 saying the determination of whether any of the parties are
5 entitled to partial summary judgment depends upon what the
6 judicial review is.
7 What I am questioning is whether defendants have
8 shown, as a matter of law, the process actually used since June
9 of 2014 is the -- the minimum procedural due process required.
10 And how can a judge -- specifically this one -- reach such a
11 decision when the process disclosed to the Court is only, We
12 relied on a lot of information we haven't even told you? I'm
13 trying to understand how that leads to the argument that this
14 Court must grant summary judgment to defendants.
15 MR. BOWEN: Again, the reason is, is because the law
16 is clear that that information that's beyond that wall needs to
17 stay there. It stays there in the administrative process. If
18 there is some litigation down the line where that's tested or
19 privileges are asserted, that's fine. But the question is,
20 what process is due at the administrative phase?
21 And **Ralls**, **NCRI**, **Al-Haramain** and this Court have all
22 said, You don't need to breach that wall. And the question
23 about where that wall lies generally is due deference because
24 the Government had the obligation to make that determination.
25 If that's unsatisfactory, the unfortunate reality is

1 that further litigation must take place. But it's our position
2 we calibrated this precisely to where those contours were
3 aligned in those cases. And because we complied with law,
4 we're entitled to judgment as a matter of law.
5 THE COURT: Okay. Now, go ahead with what you wanted
6 to say in response to counsel's previous points.
7 I apologize for getting you off track. Take the time
8 you need, and let's get back to the --
9 MR. BOWEN: Could I have one colloquy with one of my
10 colleagues real quick?
11 THE COURT: Yes. Yes. Yes.
12 MR. BOWEN: So I wanted to go back to the assertion
13 that Ms. -- that plaintiffs have asserted that they're
14 entitled, under **Al-Haramain**, to all of the information. This
15 is, again, I think a baseless interpretation of what the
16 **Al-Haramain** court said. It's not -- and, of course, it
17 entirely ignores the other authorities we cited to you for the
18 proposition that in the national security context, in -- where
19 civil actions are taken that relate to terrorism, that they get
20 all of the information regardless of the impact of that
21 information on national security when it comes to disclosure.
22 That's simply not true.
23 And you can look to the **Al-Haramain** case, where the
24 **Al-Haramain** didn't talk about disclosing every reason in every
25 case. The **Al-Haramain** court said there are these reasons that

1 they could disclose without harming -- indeed, without
2 implicating national security by taking these mitigation
3 measures.
4 So the notion that this is a -- some sort of a floor,
5 that every reason needs to be provided, is belied by the case
6 law and by common sense.
7 I would point the Court to the **Jifry** decision in the
8 D.C. Circuit, where an individual was denied his airman
9 certificate. Was assumed to have all the rights of a United
10 States citizen for the purposes of that decision, and was given
11 zero substantive information about the reasons for why the
12 certificate was revoked.
13 The only information substantively that was disclosed
14 was that there are national security concerns. And in that
15 case the court said that he received all of the due process to
16 which he was entitled, even though no substantive reasons were
17 given.
18 The same is true in **Ralls**. The identification in
19 **Ralls** was that there was some unclassified information that had
20 not been disclosed, and that there was an obligation to
21 disclose the unclassified information. But not that you needed
22 to open up the books and declassify all of the reasons for the
23 Government's action in that case, but only that the -- the
24 Court erred in not requiring the disclosure of unclassified;
25 which is already part of our process.

1 And I want to go to --
2 THE COURT: Can I -- can I ask a question to clarify.
3 Are -- am I to understand that the summaries provided to the
4 plaintiff are in fact summaries of all the -- all of the
5 information that does not implicate national security on which
6 defendants rely in retaining each of the plaintiffs on the No
7 Fly List?
8 Is there in the record a declaration to that effect?
9 Is there some assertion that all of the nonclassified or
10 nonsecurity information has been disclosed?
11 MR. BOWEN: Yes. I would point the Court to the --
12 to the Steinbach declaration, to the Giacalone declaration for
13 the authority that the Government, in consulting that
14 information, intended to maximize the unclassified information
15 that it provided.
16 Now, there's -- there's sort of an inherent intention
17 that in theory there could be other innocuous or perhaps
18 irrelevant information that the Court -- that the Government
19 had in its possession that it didn't disclose. But that gets
20 to the problem of being accurate and pointing the individual to
21 the right -- the right circumstances.
22 This is not the best example, but it is the best one
23 I could come up with. You know, the letters didn't state to
24 the individual where they lived. They didn't state, you know,
25 that they had been married for a certain number of times and

1 had a stable family relationship, or that they had stayed
2 gainfully employed for periods of time.
3 And so if the request is every single bit of
4 unclassified information, was it disclosed in the summaries,
5 the answer is probably no.
6 THE COURT: I meant, in my question on classified
7 information that was material to the decision to retain them on
8 the list.
9 MR. BOWEN: Yes. The Court can conclude from the
10 record that that information was disclosed pursuant to the
11 policy.
12 Oh, I'm sorry. Ms. Powell is pointing out that
13 there's an important thing. That this was unclassified,
14 nonprivileged information. I would point out the Government
15 not only invoked the fact that if certain information was
16 classified, that certain information was also law enforcement
17 protected.
18 And, again, that cycles us back to the question of
19 whether the Government should be required in an administrative
20 process to waive its privileges up front rather than having
21 those privileges tested in appropriate judicial proceeding at
22 the back end.
23 But I want to go back to the terrorism sanctions
24 cases and talk about why, notwithstanding the fact that the
25 Government has had some objections to the fact that the Court,

1 in the first place, has analogized to those cases for why they
2 are an appropriate analog for what we're dealing with here,
3 when you consider the -- the impact of a foreign terrorism
4 designation, the stigmatizing aspects are significant. And
5 it's not just corporations, but it also -- well, not for
6 foreign terrorist organizations, but individuals can also be
7 specially designated global terrorists. And the stigmatizing
8 effects of those designations are very, very significant and
9 much more significant than you have here. They are publicly
10 announced. They are announced to the specially designated
11 global terrorists.

12 By contrast, individuals on the No Fly List, nothing
13 is said publicly about them. They are not announced in the
14 federal register. They simply experience, as a private matter,
15 the inconvenience that arises from the designation, and they
16 engage in a private colloquy with the Government in their -- in
17 the exchange of letters that happens in DHS trip. And they are
18 designated as a person who may pose a threat to national
19 security and as opposed to being a specially designated global
20 terrorist.

21 And, in addition, I would point out again, while the
22 **Al-Haramain** entity was a corporate entity, it wasn't just that
23 they -- their assets were frozen, but they couldn't pay the
24 bills. They couldn't turn on the lights. It's a very, very
25 significant intrusion on their ability to function or -- or,

1 as -- as a person to deal with their -- the United States
2 assets. And so we think that it is at least some measure
3 highly analogous.
4 By contrast, plaintiffs place a lot of emphasis on --
5 on various contexts that we think are obviously dissimilar.
6 The plaintiffs have emphasized deportation proceedings, as one
7 example. Aliens who are subject to deportation are presumed to
8 have a number of a full panoply of rights of U.S. citizens in
9 that process of -- of removal, in particular. And the
10 consequence of removal is not the inability to take a
11 particular form of travel to travel internationally, but they
12 are deprived of all of the benefits of citizenship in the
13 United States. They must leave the country.
14 We think those -- those are extraordinarily
15 significant consequences that demonstrate how poor the analogy
16 is to this particular context. The individuals are able to
17 pursue employment. They're able to stay with their families.
18 They're able to live in their homes. They're able to be in the
19 United States. They're able to travel in the United States.
20 So we think that that analogy is poor.
21 Secondly, the plaintiffs have cited to extradition
22 cases. It's the same principle. One great example of -- I'm
23 skipping a little bit ahead, your Honor. And my apologies to
24 the **Brady** discussion. But the leading case for the proposition
25 that you can incorporate **Brady** outside of the criminal context

1 is the case in which the Sixth Circuit assessed an individual
2 who was subject to extradition on Nazi war crimes and was
3 potentially subject to the death penalty on his arrival, once
4 the extradition was -- was -- was undertaken.
5 Again, a radically different deprivation that goes
6 right -- straight to the kinds of deprivations that we
7 contemplate in the criminal process. The same is true of the
8 Guantanamo cases with indefinite detention. The same is true
9 of general habeas cases. The same is true of the commitment
10 and parole revocation. All of these talk about liberty in the
11 classic sense. Deprivation of liberty in the classic sense, in
12 which someone is incarcerated or detained and unable to leave a
13 prison cell or another cell. That is not the same as an
14 individual who cannot board international flights for travel.
15 THE COURT: So is the plaintiffs' interest here more
16 like the property interests of **Al-Haramain** than the -- the
17 classic liberty interests you're referring to about avoiding
18 detention?
19 MR. BOWEN: It is. It is. It's the closest analogue
20 out of the analogues that have been presented to the Court. I
21 at least agree with that point.
22 But the fact that the -- that the plaintiffs are
23 going to these examples to find their analogues demonstrates, I
24 think, that they are -- they are -- they are trying to ignore
25 away the cases that best identify these issues, which are

1 national security cases that talk about the -- the enormous
2 importance of the Government protecting that information. And
3 let's think about what that information is and what the
4 consequences would be if that information was disclosed.
5 We are talking about often, in some cases, active
6 investigations of ongoing terrorist organ --
7 THE COURT: But I wouldn't know that on this record
8 because there's not any indication of the nature of that which
9 was withheld. There's not any indication except in fact that
10 the Government and the defendants here are relying on very
11 dated information; and, in some cases, singular information.
12 At least that's what's provided here as the foundation for
13 procedural process.
14 MR. BOWEN: I wouldn't agree with you, your Honor. I
15 think if you -- if you look at the declarations that were
16 submitted, in particular from -- from the terrorist screening
17 center -- from Mr. Grigg, from Mr. Steinbach, and
18 Mr. Giacalone -- they talk about in general terms -- admittedly
19 not in specific terms but in general terms about the kinds of
20 harms -- the kinds of information that are threatened with the
21 notion that you should turn over classified information, and
22 the kind of harms that would flow from that. And the
23 consideration the Government undertook in formulating that
24 policy and assessing those harms.
25 So I think the record is there. We couldn't say this

1 particular kind of information is embedded in the -- in the
2 body of classified information that was relied on for
3 individual X, for obvious reasons. Because putting that
4 information out would -- would harm the security that we're
5 trying to protect.
6 So I do think the record is there, without tying it
7 to particular people in a way that would be damaging to the
8 kind of security that we're trying to protect in the first
9 instance.
10 And so when plaintiffs speak of a floor, we actually
11 think that there is is a ceiling. There is a ceiling to the
12 kind of information that the Government can be required to
13 disclose in a civil case where national security concerns
14 are -- are animating a -- a civil action that implicates this
15 limited liberty interest. And that is clearly spelled out in
16 the cases that the plaintiffs are more than happy to generally
17 ignore in favor of these other nonanalogous cases.
18 I want to talk a little bit more about -- I'm going
19 to hold discussion of particular individuals for Ms. Powell.
20 And unless the Court has particular questions about those
21 individuals right now, we're going to reserve that for a later
22 point in our presentation.
23 I want to talk about the **Brady** context a little bit
24 more.
25 There are -- I would point the Court to the **Brodie**

1 decision of the DC district court that talks about the
2 extraordinarily limited context in which **Brady** -- the notion
3 that there's a mandatory requirement to divulge exculpatory
4 evidence has been used in civil context. And it -- and it
5 talks about how it is primarily the lead case from the Sixth
6 Circuit that had to do with Nazi war crimes. There's a
7 secondary case where a person was subject to civil commitment
8 in North Carolina, and it was analogized in that way. And
9 there's also a case in the Southern District of New York,
10 where there was a joint criminal prosecution of an individual
11 and separate SEC -- SEC proceeding. And the question was
12 whether certain information that emanated from the SEC
13 proceeding needed to be turned over for purposes of core
14 criminal **Brady**.
15 And the Court made that analysis for purpose of
16 turning over information from the prosecution side. And the
17 question of the SEC proceeding was handled under the normal
18 rules of civil evidence. So we think that they are stretching
19 the notion of some mandatory exculpatory disclosure far beyond
20 the breaking point.
21 And, again, there is no mention of exculpatory in the
22 primary sanctions cases that we talked about, for the precise
23 reasons that those cases recognize that if there is,
24 quote/unquote, exculpatory information -- and that's an if --
25 in the record that is classified, that is not required to be

1 disclosed. And no court has ordered that to happen. In fact,
2 they've -- they've toed that line in terms of protecting
3 classified information.
4 I'll rest for now.
5 THE COURT: Ms. Shamsi.
6 MS. SHAMSI: Your Honor --
7 THE COURT: Please speak up.
8 MS. SHAMSI: Sorry. My microphone wasn't on, either.
9 A couple of points to address that arise out of your
10 discussion --
11 THE COURT: Yes. Yes.
12 MS. SHAMSI: -- with Mr. Bowen.
13 One is the -- the joint stipulation -- the joint
14 combined statement of agreed facts between the parties, which
15 is Docket Entry 173, specifically says, in paragraph 18:
16 November 2014, D.H.S. notification trip letters
17 did not disclose all of the reasons or information
18 that the Government relied upon in determining
19 that the six plaintiffs should remain on the No
20 Fly List.
21 THE COURT: Right.
22 MS. SHAMSI: That is carried over in each of the
23 facts with respect to each plaintiff. It's reflected in the
24 documents itself. And I -- I'm left a little bit confused --
25 THE COURT: Well, what I thought I was asking counsel

1 was whether I could rely on the conclusion that that which was
2 disclosed was all of the material nonclassified information on
3 which defendants rely. And I think Mr. Bowen told me that the
4 declarations he cited make that point.
5 Now, is that not a fair conclusion here?
6 MS. SHAMSI: The --
7 THE COURT: On the record?
8 MS. SHAMSI: The material nonclassified
9 information --
10 THE COURT: Right. Has been disclosed. That's his
11 position.
12 Right?
13 MR. BOWEN: Unclassified, nonprivileged.
14 THE COURT: Sorry. Nonclassified and nonprivileged.
15 Relying on the fact that they could withhold, they say, not
16 just classified information but privileged information. Law
17 enforcement privilege is what he asserted.
18 They haven't asserted a privilege affirmatively. But
19 what they've said is they've drawn a line. And that which is
20 disclosed is all that is material that is neither classified
21 nor privileged.
22 MS. SHAMSI: So that is inconsistent, then, at a
23 fundamental level with what I understood to have been happening
24 here, which is summaries of information -- so there's not even
25 a summary of the classified or law enforcement sensitive

1 information unless I'm misunderstanding.
2 Is that correct?
3 MR. BOWEN: We've not summarized classified
4 information.
5 THE COURT: Right. Only nonclassified information
6 has been made known to me and to you. Only nonprivileged
7 information, in summary form. Not in its evidentiary form but
8 in summary form, has been made known to me or to you.
9 Correct?
10 MR. BOWEN: That's correct.
11 I mean -- may I?
12 THE COURT: Yes.
13 MR. BOWEN: The endeavor seeks to -- the endeavor of
14 developing the summary seeks to maximize the information that
15 is disclosed, and so it is possible -- and we can't cite to
16 specific instances, for obvious reasons, that information that
17 resides in classified environments can be distilled in a way
18 that allows certain information to be disclosed in an
19 unclassified fashion.
20 I don't think there's a record that says we took
21 every stick of information and did in fact make an unclassified
22 summary of classified information because that is something
23 that we can't promise and, in many cases, are unable to do. In
24 many, many cases the information can't be declassified --
25 THE COURT: Okay. What I need you to do then,

1 Mr. Bowen, is -- not in my words or in counsel's words, I need
2 you to articulate what I can conclude is the nature of the
3 material that has been disclosed, and is it all of the material
4 that was material -- is it all of the information that was
5 material to defendants in retaining the plaintiffs on the list
6 that is neither classified nor privileged? I need to know
7 that.
8 MR. BOWEN: The answer is yes, and that's reflected
9 in our submissions.
10 THE COURT: All right. So, Ms. Shamsi, do you have
11 further questions on that clarification?
12 MS. SHAMSI: I don't have further questions, your
13 Honor, but I think I do have a couple of points in response to
14 that.
15 THE COURT: Go ahead.
16 MS. SHAMSI: We're still in the same position,
17 therefore, with respect to the due process analysis, which is
18 that the Government hasn't disclosed either openly or in a
19 forum that allows for a fair process, the reasons and the
20 evidence that it is relying on.
21 For that reason, your Honor -- and I will say that
22 it's not -- that there are different gradations of national
23 security information. There's information, I agree, with which
24 the Government might seek to invoke the state secrets
25 privilege. That still has to be -- the propriety of that would

1 still have to be adjudicated.

2 It might seek to withhold classified information.

3 Whether that comports with due process would still need to be

4 adjudicated.

5 It might seek to withhold law enforcement privilege

6 information which is subject to a balancing test, which would

7 also seek -- which would also need to be adjudicated.

8 And so it seems to us, your Honor, that on the record

9 that you have before you, which is with respect to whether this

10 process complied with the requirements of procedural due

11 process, we don't think that you can grant summary judgment to

12 the defendants.

13 There is no way, under this procedure, that -- again,

14 we have been provided the notice or a hearing, which

15 Mr. Arulananthan will talk about. But there's also no adequate

16 record to be reviewed, which is the same problem that you

17 addressed before when you were talking about whether judicial

18 review under 46.110 would be adequate.

19 It is not a fully one-sided record, anymore. We

20 agree. We understand that. But it is still not an adequate

21 record to which there has been an adequate response.

22 And I'm not going to get into the back and forth

23 again about cases. You've got **Al-Haramain** before you. You

24 can, you know, read that. That -- that's -- that is what it

25 is. But as a matter of law, there's no procedurally adequate,

1 constitutionally adequate procedural process here.
2 Given that, your Honor, the remaining issue that I
3 was going to address was error and experts. And I wanted to
4 address that because it seemed to us that the briefing, by the
5 end of it, left muddied what error was and the extent to which
6 we -- and the reasons that we were proffering our experts.
7 So if you are inclined to deny --
8 THE COURT: I'm not inclined to anything yet.
9 MS. SHAMSI: Okay. Then --
10 THE COURT: Except to listen. Keeping going.
11 MS. SHAMSI: Then I'm afraid that I will have to talk
12 to you about the error issues.
13 THE COURT: Please.
14 MS. SHAMSI: And I think -- here's -- here's a couple
15 of things that I think were left muddied by the briefing,
16 towards the end, which is what do the parties -- what is the
17 purpose for which plaintiffs offer their experts? And what are
18 the parties' conceptual approaches to what error is? And I
19 just want to address both of those.
20 I want to be very clear that plaintiffs are not
21 arguing that the Government -- plaintiffs are not arguing here
22 that the Government cannot use prediction of future or current
23 dangerousness to put people on the No Fly List.
24 Our experts' testimony and arguments are -- on error
25 are offered in opposition to the Government's motion for

1 summary judgment. What they go to is that the risk of
2 erroneous placement on the list is high because the Government
3 is putting people on the No Fly List who will never engage in
4 an act of terrorism.
5 And in the last round of briefing, the Government
6 essentially conceded that, did not dispute it as a factual
7 matter.
8 Our experts reinforce our original arguments with
9 respect to error, and we think that they preclude summary
10 judgment on the defendants' motion. We are not relying on our
11 experts in support of our own motion.
12 THE COURT: I appreciate that clarification. Thank
13 you.
14 MS. SHAMSI: But then we get to the issue of what are
15 the theories of error? What are we actually talking about with
16 respect to error? And that, I also think, merits
17 classification.
18 We use error in the classic due process doctrine
19 sense, which is when the risk of erroneous deprivation is high,
20 the Court must determine if additional safeguards would
21 mitigate that risk.
22 Again, we're not saying that the high risk of error
23 means you can't put people on the No Fly List, but we are
24 saying that additional safeguards are necessary.
25 Defendants are using error in a novel sense. They

1 concede that people will be put on the No Fly List who will
2 never commit an act of terrorism, and they argue that it is
3 only error if the Government puts people on the list when it
4 doesn't meet the criteria it has established or followed its
5 internal process for placement.
6 And we think, here, what you have is a factual
7 dispute between the parties as well as a legal dispute.
8 Here's -- here's what I mean by the factual dispute.
9 Which is, let's assume the validity of the Government's
10 reasonable suspicion standard, and let's assume that the
11 criteria that they are using on the No Fly -- to put people on
12 the No Fly List are not unconstitutionally vague.
13 As you know, we have concerns about those. But just
14 for the purpose of my argument here, let's assume that those
15 are not problematic.
16 Our argument is that, even applying those standards,
17 the Government generates false positives. It says that our
18 clients pose a threat, and our clients say they do not. And
19 there has to be a meaningful process, when the number of false
20 positives is so high, for people -- people like our clients, to
21 be able to show that the Government's placement of them on the
22 list is erroneous.
23 THE COURT: Why doesn't that come in the substantive
24 review on the merits, as opposed to as a procedural matter?
25 MS. SHAMSI: Because we're using our experts solely

1 in the way that -- solely in the way, your Honor, that you
2 looked at the high risk of error when you arrived at your
3 determinations below, which is what is the evidence in the
4 record that shows the risk of error is high, so that more
5 process is required? Not that the risk of error is high so
6 there mustn't be a No Fly List. That would be a different
7 argument, and that's the argument that we're not making.
8 But in its response to that argument the Government
9 appears to define error out of existence in the **Mathews versus**
10 **Eldridge** context. And what I mean by that is the fact that
11 someone who has never committed a violent act and will never
12 commit a violent act can be blacklisted and banned from flying
13 indefinitely is for the Government not an error.
14 Under the Government's view -- again, so long as it
15 is applying its own criteria and its own procedures -- it can
16 never be wrong because it's making present and future threat
17 and prevention assessments so no additional process is due,
18 given the Government's view with respect to secrecy.
19 But that notion of error, in which the Government
20 can't be wrong unless it's -- unless it's not complying with
21 its own criterion, its own standards, is utterly belied by all
22 of the case law in the future dangerousness context in which --
23 in virtually all of those contexts, courts are concerned about
24 mitigating error that is inherent to future dangerousness
25 assessments, even with respect to people who have been charged

1 with a crime.

2 So as the Supreme Court said in **Salerno**, for example,

3 upholding the Bail Reform Act, there might be nothing

4 inherently unattainable about a prediction of future criminal

5 conduct, but the procedures by which -- now, I'm quoting.

6 The procedures by which a judicial officer

7 evaluates the likelihood of future dangerousness

8 are specifically designed to further the accuracy

9 of that determination.

10 That is classic due process, risk of error analysis

11 under **Mathews**. And that's the sense in which we think that the

12 Court should be assessing our plaintiffs' testimony with

13 respect to the high risk of error.

14 I just talked about the factual dispute about the

15 ways in which we see error. There's a legal dispute which Mr.

16 Arulananthan is going to address. And this goes both to the

17 reasonable suspicion standard, which we think increases the

18 risk of error as you recognized in your June 2014 decision, as

19 well as the vagueness of the criteria.

20 But the point is that even if the Government is right

21 with respect to the legal issues -- and we'll explain why it is

22 not. But even if it is right, then our experts show that the

23 procedures the Government seeks to uphold are inadequate.

24 And very quickly, your Honor, with respect to our

25 experts, they're not saying -- and we aren't saying -- that the

1 Government has to incorporate any particular statistical model.
2 Rather, this all goes to the perspective of how high the risk
3 of error is in any attempt to assess the likelihood that
4 someone will commit an act that is extremely rare. And that's
5 a point that defendants, in their briefing, appear to concede
6 as inarguable.
7 I am happy to answer any questions about our experts,
8 but the -- those are the main points I wanted to -- I wanted to
9 make in that context.
10 THE COURT: All right. I would like defendants'
11 response to those points. Then we'll take the noon recess, and
12 then we'll go from there.
13 Counsel.
14 MR. BOWEN: Thank you, your Honor.
15 The presumption of plaintiffs' argument is that they
16 have somehow, by using their experts, established a high rate
17 of error in the Government's ability to identify individuals
18 who pose a threat under our very specific criteria that require
19 reasonable suspicion that's tied to particular threats of
20 violence. We think that is fundamentally wrong, and we think
21 the plaintiffs are asking the wrong question in coming at the
22 notion there's a high rate of error.
23 Because all you have to look at is to look at the
24 plaintiffs' experts, themselves, to demonstrate how poor that
25 analysis is and how it is not shown that -- the high risk of

1 error that they rely on has not been shown to exist at all.
2 They -- on the one hand -- tell us that we should
3 be -- in order to assess our high rate of error, we need to be
4 conducting actuarial or statistical analysis, notwithstanding
5 the representations of counsel, I think it is clear that that
6 is the import of what the experts are saying, is that you have
7 to do actuarial analysis with control groups and with other
8 baselines. And in the same breath, their own experts tell us
9 that that can't be done. That that is in fact an unknowable.
10 We agree with the notion that an actuarial approach
11 to assessing future dangerousness is problematic, and that's
12 not the task that we're in fact undertaking. And, again, this
13 gets us to the fact -- sort of gets to the point that the
14 plaintiffs are asking the wrong question.
15 The question is not the Government going out to
16 identify individuals who will commit certain acts of terrorism
17 in the future. The Government is identifying and assessing
18 individuals who pose threats of violence. And the threat is
19 the thing that we are attempting to identify, not the
20 prediction.
21 It's inherently predictive in the sense that some
22 individuals have not actually gone and done the heinous things
23 that we are most concerned about them doing. But that doesn't
24 take away from the fact that we are identifying threats based
25 on particularized information that ties the individuals to

1 threats of violence.
2 And so the -- they've not established error, not
3 because we have used the wrong standard but because they in
4 fact have used the wrong standard to come up with the notion of
5 a high rate of error.
6 The question is, under the standard that's provided,
7 what is the likelihood of a high rate of error. And that is,
8 how often is the Government going to misidentify an individual
9 as someone who may pose a threat, who in fact does not pose a
10 threat?
11 That is the baseline that's required by the statute.
12 That is the baseline that's required by the criteria. The net
13 is cast broadly enough to identify individuals who may be a
14 threat; not who are conclusively determined to be a threat, not
15 who have committed particular crimes and are subject to
16 Indictment, not to -- for individuals who have been indicted.
17 But for individuals where there is enough information --
18 credible information to create a reasonable suspicion of a
19 threat of violence to -- in particular categories. And the
20 question is, how often is the Government going to get that
21 assessment wrong? And that assessment --
22 THE COURT: That assessment being placing someone on
23 the list who in fact doesn't bare any threat of --
24 MR. BOWEN: So the best way is to frame it as a
25 negative. To place somebody on the list as someone who may

1 pose a threat when in fact it is not true, based on the
2 information that we have, that they may pose a threat. We have
3 wrongly assessed them to be over the line of possibility.
4 THE COURT: And what -- what's the risk of that
5 error, is what you're saying. And you're saying plaintiffs'
6 experts don't address that risk of error.
7 MR. BOWEN: That's correct. They address the risk of
8 identifying people who will never go on to commit a terrorist
9 act or -- in the sense that we are trying -- the one phrase
10 that stands out to me, from the expert testimony, is -- or the
11 putative expert testimony, is that -- that it is true
12 terrorists that we should be concerned about. As -- as -- as
13 if there is a notion that there are not true terrorists in our
14 midst who are -- because they're not true terroristis, somehow
15 don't -- aren't a subject of concern.
16 The reality is that Congress has decided -- and I
17 think appropriately -- to cast the net to include individuals
18 who may pose a threat. And you -- and when they do, the
19 appropriate act is to prevent them access to airplanes, pending
20 further information. And this gets -- comes back to the
21 staleness point that the Court raised at the beginning.
22 I point the Court to all of the -- the evidence,
23 which is, of course, unrebutted, about the many, many reviews
24 and audits and procedures that exist to make sure that we are
25 updating, reassessing our assessments in this regard; to make

1 sure that they are not stale, that they are not unwarranted,
2 and that -- and that we are -- we have not made those
3 determinations in error.
4 That is a very important part of the process for us,
5 for two reasons. One, to make sure that we're doing the right
6 thing, and we've identified the right people.
7 Two, it -- it -- again, identified in our
8 submissions, it's a resource issue. We want to focus our
9 energies and attention where they need to be focused: On
10 individuals who warrant that kind of attention.
11 And the plaintiffs have submitted argument for the
12 notion that we have all of the incentives to place people and
13 keep people on the list, and we think the evidence is to the
14 contrary. We have numerous incentives to clear out -- to sort
15 of clear out the decks of individuals, to make sure that we are
16 focusing on the right people. And that's what all of those
17 processes are designed to do, to make sure that we are -- we
18 are focusing on the right individuals and -- and directing our
19 attention in that direction.
20 So our position is that because the plaintiffs'
21 experts don't establish this notion of a high rate of error and
22 because the notion of high rate of error is based on a -- an
23 incorrect assessment of what the task is, what we are in fact
24 doing, it should be given no weight by the Court.
25 And we think the fact that we have developed this new

1 process that allows them to respond where -- where it's
2 possible and where appropriate, and the fact that there is
3 judicial review, demonstrates that the additional procedures
4 that they -- that they demand -- which is what the ultimate
5 question must go to -- do the additional procedures -- are they
6 necessary to counteract that high rate of error?
7 And we don't think that they do. We think that they
8 are -- the vast majority of things that the plaintiffs are
9 demanding are clearly denied by law to them and -- and don't
10 help that process in that way.
11 And I point out that the experts don't make that tie
12 at all. All they say is here's a bunch of reasons why we think
13 the Government is bad at predicting individuals as true
14 terrorists. Or they don't make any connection in any
15 scientific way that could possibly be helpful to the Court as
16 to why the particular remedies that the plaintiffs are seeking
17 would solve that particular problem that they purport to have
18 established.
19 We think that the Court can dismiss the error
20 argument -- especially as it pertains to the experts -- and
21 rule for the Government on that basis.
22 If the Court is inclined to think that the experts
23 have something to say at all, then -- then at a minimum the
24 expert is not summary judgment for the plaintiffs but the --
25 the opportunity for the Government to subject those individuals

1 to --

2 THE COURT: No. When a party makes an assertion,

3 supported by affidavits in support of a contention on summary

4 judgment, the opposing party who contends that's factually

5 wrong has the opportunity and the duty to submit that in

6 opposition. The failure to do so shows the fact is not

7 disputed.

8 So we're past that point now. This record is what it

9 is, is what it is.

10 MR. BOWEN: I respectfully disagree, your Honor.

11 THE COURT: It is, indeed. No. We're not going to

12 continue this process to supplement the record on factual

13 material.

14 If the plaintiffs created an issue of fact by

15 submitting an expert and you didn't respond, then you didn't

16 respond. The consequence is what it is.

17 MR. BOWEN: I appreciate that, your Honor. The only

18 thing I would point out is that we objected to the submission

19 of materials precisely because they weren't subjected to

20 **Daubert**.

21 THE COURT: Right. And you had the opportunity to

22 submit opposing material. Rule 56 is not something I made up.

23 It is what controls our proceeding.

24 MR. BOWEN: I understand that. Our position has

25 been -- and we made these points in our -- in our documents --

1 that if the Court was going to admit the testimony, we needed
2 the opportunity to subject them to **Daubert**, and we have been
3 deprived of that. And we don't think that the short window of
4 time in which we were preparing our briefs was an adequate time
5 for us to engage in expert discovery. Which, by the way, had
6 not been opened at all, so we actually didn't have
7 authorization to --
8 THE COURT: Well, Counsel, your point would have been
9 if you thought their expert was wrong, was to create an issue
10 of fact with their own experts that contest competently the
11 material at issue. That's the point I'm addressing. I am not
12 reopening this record to add more evidentiary material to that
13 which has taken months to develop.
14 MR. BOWEN: I understand, your Honor.
15 THE COURT: The record is what it is.
16 MR. BOWEN: So let me simply state for the record
17 that we object to a proceeding in the way that would deprive
18 the Government of a fair discovery process that results in the
19 submission of purported expert testimony without expert
20 discovery, without expert disclosures, without expert
21 depositions, and without the **Daubert** process.
22 We -- our position is that we were deprived of that
23 process, and it is improper under the rules.
24 THE COURT: And I'm only noting -- and the only
25 reason on which I comment again, is that the defendants were

1 not deprived of the opportunity to submit their own record as a
2 matter of expert evidence in opposition to the extent they
3 contested the -- the premises made. That's simply my
4 observation.
5 It's noon. We're going to recess, unless there's
6 something that must be said before we recess.
7 MS. SHAMSI: Just one --
8 THE COURT: Although it's dangerous to say something
9 when a judge is hungry.
10 MS. SHAMSI: Then I'm going to sit down, and we can
11 talk about it after recess.
12 (Laughter.)
13 THE COURT: Good. 1:30, folks. We'll see you at
14 1:30.
15 (Recess taken.)
16 THE COURT: Thank you, everyone. Please be seated.
17 Before we continue, Mr. Bowen, I had a question I
18 wanted to be sure I understood your position on.
19 Somewhere, either in the procedural evaluation of
20 these designations and review or in the substantive evaluation
21 on the merits, I want to be sure you agree that a court must be
22 in a position to determine or to review the decision by your
23 clients as to where the line was drawn. What was classified,
24 and what wasn't. What was privileged and what wasn't. So that
25 there is a way, procedurally or substantively, to verify that

1 that which you assert is a sufficient process was actually
2 performed here.
3 Have I made my -- does my question make sense to you?
4 MR. BOWEN: May I have a minute to consult? Yes, it
5 does.
6 THE COURT: Okay.
7 (Pause, conferring.)
8 MR. BOWEN: I go back to that prior unsatisfactory
9 answer that I gave before, that we don't exactly know what that
10 process is.
11 We agree that there should be review of the ultimate
12 substantive question.
13 I would point the Court to the possibility that there
14 could be, as the Court suggested, an ex parte record, an ex
15 parte review where the Court looks at the information and does
16 its own evaluation. So that's one possibility.
17 I would point the Court back to our existing
18 attestations that we've submitted about the fact that the
19 Government has in fact maximized those disclosures. And
20 particularly in the Grigg declaration of page 46, in the Moore
21 declaration at paragraph 18, and the Steinbach declaration at
22 paragraph 21.
23 So, again, we don't know exactly what that process
24 is, but we agree that there should be review that needs to be
25 fully settled and vetted by all of the parties through

1 submissions.

2 I would point out that in the event, as plaintiffs

3 said sort of pre-stage and we talked about as a possibility,

4 that privileges are ultimately asserted. Those privileges,

5 when they are asserted, are subject to the review of the Court

6 and are typically but not always involve ex parte review of the

7 information supporting the privilege through declaration

8 evidence.

9 And so while we don't know the particulars, we agree

10 that there should be an assessment by the Court. And that's --

11 and that that's inherent to our process and our defense of the

12 process, is that there is judicial review.

13 THE COURT: I'm not sure that answers my question,

14 but I think we needn't spend more time on it right now because

15 there is indeed a beginning, a middle and an end of the day.

16 And I want to be sure people have a chance to make the points

17 you feel you need to make before we do adjourn. And we will

18 adjourn no later than five o'clock today.

19 I also already know I'm going to direct supplemental

20 submissions from both sides on the following questions. And

21 they will be simultaneous, without rebuttal presentations. The

22 idea being I just want to be sure I understand your position on

23 the following:

24 If the Court grants in whole or in part your combined

25 motion or your opponent's combined motion, what are the next

1 steps in this forum, in this district court?

2 Secondly, if the Court grants in whole or in part a

3 combined motion -- actually, I don't need you to address this

4 question in the submission.

5 What I want to know this afternoon is the extent to

6 which there is a need to argue, beyond the record already made,

7 on the individual cross-motions. Because the individual

8 cross-motions, I believe, are really subsets of the larger

9 issues. To the extent plaintiffs contend the process isn't

10 sufficient, it's in the nature of a facial challenge to the

11 process. And specifically it's, I suppose, an as-applied

12 challenge it's even more insufficient in terms of plaintiff X

13 because of this or not.

14 And I know you're prepared to do that, and I'm happy

15 to listen to it. But it occurs to me that I'm not sure there's

16 a path to disparate rulings. That the motion's granted for one

17 party and then a different outcome as to an individual, you

18 see. I'm -- I'm just wanting to be sure we make good use of

19 your time today. So as to that latter comment from me, just

20 keep it in mind as you go forward. I know we have more to talk

21 about on the combined motions, and then we'll go forward on the

22 other.

23 But I do want very specifically, from both sides, an

24 articulation of what you contend the consequences are vis-a-vis

25 the case that is here, in this district court, of my granting

1 either parties' combined motion in whole or in part. And
2 specifically to the extent the defendants contend many of the
3 plaintiffs' arguments are premature because they're truly not
4 in the nature of a procedural issue but are more appropriately
5 addressed in the context of substantive review, I need the
6 defendants' position as to what judicial officer is making that
7 review in this case. The defendants cannot continue to just
8 point to theory. This is a real case and a real controversy.
9 And if the defendants assert the plaintiffs' arguments are
10 premature because a judge will take care of it at some point, I
11 want to know who that judge is. Is it here? Is it the
12 appellate court? Is there some administrative law judge who
13 defendants conceive are -- is supposed to be making the record
14 here, like in a social security case or -- or an immigration
15 case?
16 You need to -- both sides need to tell me
17 specifically what they believe comes next, once we cross this
18 procedural due process threshold on the motions. And we will,
19 you will get a ruling on these motions and we will move on. I
20 just want to know what you think that looks like before I
21 conclude ultimately how those should be addressed.
22 So -- and I know it's a busy time of year. And I
23 know you all have lives and things to do. And just give some
24 thought to between now and the end of today how much time you
25 think you need to do this without giving undue burden to your

1 personal lives or those to your colleagues. But I'm hoping you
2 would be filing this very early in January. So I'm not
3 insisting on a turnaround overnight but something soon. That's
4 what I'm thinking.
5 Now, when we adjourned, Mr. Bowen, I think you were
6 speaking. Was there anything else you wanted to say on the
7 points before lunch? Otherwise, we'll go back to plaintiff.
8 MR. BOWEN: Yes, your Honor. There's actually just
9 one thing I wanted to cycle back on. And I may have -- in the
10 volume of my objections to the procedure having to do with the
11 plaintiffs' experts -- sort of underemphasized the fact that
12 the Government didn't simply roll over and provide procedural
13 objections to the submissions, but we submitted a voluminous
14 declaration from the executive assistant director of the F.B.I.
15 that we think demonstrates as a matter of fact and law how far
16 afield plaintiffs' supposed experts were on the question of
17 error and what is necessary and what is required in the context
18 of making the kinds of assessments and identifications of
19 threats that are -- that are at issue.
20 THE COURT: Thank you. I've noted that.
21 Counsel.
22 MS. SHAMSI: Yes, your Honor.
23 I'm not going to belabor anything with respect to the
24 experts. I think we've covered everything, unless you have any
25 questions about them. My two brief points are that even if you

1 were to accept the Government's argument or account for the
2 Government's theory --
3 THE COURT: Speak a little louder, please.
4 MS. SHAMSI: Even if you were to accept the
5 Government's arguments or account for the Government's theory
6 that what they're seeking to do is solely to determine or
7 predict who poses a threat, which is -- there still has to
8 be --
9 THE COURT: I think they're seeking to determine
10 whether a person may be.
11 MS. SHAMSI: A person may be a threat.
12 I would point you first of all to our explanation of
13 the statutes and what the statutes of Congress has -- has said
14 with respect to the No Fly List actually go to -- the "may be"
15 language comes from statutory provision directed at what
16 carriers need to do and how the Government needs to work with
17 carriers in order to prevent boarding.
18 Congress hasn't actually spoken more substantively to
19 this issue beyond, say, that the Government needs to provide a
20 fair process to challenge.
21 The -- regardless of that, though, the process still
22 has to account for the Government committing error in its
23 determination that someone poses a threat, and that's part of
24 what our experts go to as well. That is part of the question
25 that our experts seek to answer. What the Government seemed to

1 be saying before we broke was that you can have a list that is
2 divorced from the purpose of preventing an attack and identify
3 people who merely pose a threat. But preventing an attack is
4 the element that keeps this list from being an entirely
5 untethered to any valid purpose blacklist. And that, I think,
6 goes to the Government's interests.
7 That if this -- if the purpose of this list is not to
8 prevent an attack, then it becomes free-floating. And the
9 Government's arguments prove entirely too much, in that the
10 Government is seeking deference to put people on a list who
11 might pose a threat, and entirely discounting the due process
12 rights of those who are put on a free-floating list that does
13 not have a connection to a legitimate purpose of preventing an
14 attack.
15 Does that make sense?
16 THE COURT: But part and parcel in that effort is an
17 assessment of threat in the first place.
18 MS. SHAMSI: Absolutely. And we understand that.
19 But that -- two points with respect to that. Which is this is
20 not a new concept in the courts or in the law.
21 THE COURT: Right.
22 MS. SHAMSI: And when the Government seeks to make a
23 threat assessment in a variety of contexts, the Supreme Court
24 and the Ninth Circuit have said repeatedly that it is an
25 inherently uncertain endeavor. And in order to account for

1 that inherently uncertain endeavor, you need back-end
2 procedural safeguards which are virtually all of the safeguards
3 that we are asking the Court to find are missing here. And we
4 put forward for you why, so that as a matter of law, this
5 process is deficient because it does not provide the safeguards
6 that courts require when the Government makes a threat
7 assessment.
8 THE COURT: Well, I -- I find it hard to accept the
9 conclusion you're making in the context of agreeing that all of
10 these safeguards are necessarily required in the context of the
11 procedural assessment.
12 For example, by analogy, again, we have a procedure
13 by which persons are accused of a crime. A case is brought to
14 a grand jury. The threshold is low. It's a probable cause
15 standard. There's no cross-examination. Hearsay evidence is
16 admitted. There are all kinds of generic arguments made and an
17 Indictment enters.
18 That process is the process, yet all of the
19 procedural safeguards for the accused come after the charge is
20 made; after the placement on the list, so to speak.
21 Now we have a post-deprivation challenge here. If
22 there is a procedure that is inherently fair or at least
23 minimally constitutionally fair, that does not include the
24 procedural safeguards you're describing. But the substantive
25 review of the actual decision to place does account for those

1 in a way that recognizes the compelling interest of the
2 Government in national security.
3 Why does the box have to be expanded at the
4 procedural end if in the substantive analysis the issues you
5 address are accounted for? Because there isn't any certain way
6 to address the competing interests here. All I can foresee is
7 eventually there will be a neutral review, and that reviewer
8 hopefully will have all of the necessary information to make a
9 decision. And perhaps that reviewer will be in a situation
10 where he or she won't have the benefit of full advocacy but
11 will have a basis to determine whether the factual information
12 asserted is at least more probably true than not, or probably
13 true than not, or reasonably suspected to be true. We haven't
14 talked about burdens of proof.
15 But what I'm -- I guess what I'm struggling with here
16 is the insistence plaintiffs place on putting all of the
17 safeguards in the initial process, which I don't find authority
18 to warrant at the moment.
19 MS. SHAMSI: Your Honor, I do think there is
20 authority for that. And I think that the way to go about
21 thinking about it is, if you are going to start with -- let's
22 start with the analogy that you've posited, which is --
23 THE COURT: An Indictment.
24 MS. SHAMSI: -- a grand jury and an Indictment.
25 Right? So you have the grand jury, you have the Indictment,

1 you have whatever standard -- you have the standard that the
2 grand jury applies. That's what happened when our clients were
3 placed on the No Fly List.
4 Then the D.H.S. trip process, which is -- you know,
5 sort of the -- the process that they went back through after
6 your -- after the June 14 -- the June 2014 decision. Said to
7 the Government, what's -- here's the process, post-deprivation,
8 that you're going to provide in order for them to be able to
9 challenge their placement on the list.
10 Right?
11 And so that analogously is what comes after. And so
12 in that process, it's very little different from what the court
13 said in **Salerno**, what happened in **Foucha**, what happened in --
14 in **Hendricks**, which is that you're reviewing an assertion by
15 the Government that someone poses a threat. And when you are
16 making that review, then you have to do so by providing that
17 person with the Government's reasons and basis for making that
18 threat assessment, in order for them to be able to challenge.
19 So --
20 THE COURT: In the context of a national security
21 environment, where there is a -- an additional -- compelling
22 interests that have to be taken into account. The kind of
23 proceeding when a court determines to detain civilly a mentally
24 incompetent person. There the interests are squarely those of
25 the individual, and the freedom and liberty interests of that

1 individual as they're curtailed, and the -- just the common
2 welfare sort of protection. Not national security of the
3 entire country being placed -- there is a different value here.
4 It is not -- it is not enough simply to rely on these
5 individual cases because they don't frame the issue of the
6 Government's security interests here in -- in the same context.
7 And I agree -- I'm -- you can't -- you can't cite to
8 that which isn't there, but you also can't expect the Court to
9 adopt a wholesale -- an analysis that arose outside of a
10 national security threat context.
11 MS. SHAMSI: If I could break that down into just two
12 responses, your Honor.
13 If you look at the Supreme Court's language in
14 **Salerno** --
15 THE COURT: Yes.
16 MS. SHAMSI: -- and if you look at the Ninth
17 Circuit's decision -- I believe it is in **Rodriguez**. I'll
18 correct myself if it is not.
19 But also in the Court's decisions in **Foucha** and --
20 and **Hendricks**, referring back to **Salerno**. They all talk about
21 the fact that in **Salerno**, Congress had sought to address a very
22 serious problem that raised compelling interest on the part of
23 the Government with high crime. And very serious crimes,
24 including murder, including other crimes that took life, risked
25 liberty, property, and crimes of the highest order.

1 And in those contexts -- and the language is very,
2 very similar to what is being argued here. And in those
3 contexts, when threat is determined, the Court found that
4 there's nothing inherently unattainable about it, but you still
5 have to provide the procedures that include criteria grounded
6 in variable scientific facts and notice. The kinds of notice
7 that we're talking about here. And a hearing, as you'll hear
8 about very shortly.
9 So part of what I think we're struggling with is
10 that -- of course this is the national security context. We
11 all understand that. But there are other national security
12 contexts that are very important where process is required.
13 And what this isn't is so anomalous a context that individuals
14 may be deprived of a liberty interest without any
15 fundamental -- without -- and respectfully, your Honor, I
16 understand there is more process that's being provided here.
17 But at least in some cases -- and in virtually all with respect
18 to our clients -- it is very little different from what we had
19 before. And so what you have is a context in which people are
20 being deprived of the liberty interest based on a threat
21 assessment without fundamental fairness safeguards.
22 THE COURT: So which of the cases apply**ing Mathews** do
23 you think your clients' interests/alliance is with most
24 closely?
25 MS. SHAMSI: Again, I think we would start with

1 **Al-Haramain** and **KindHearts** as a floor. But I think you would
2 also look at the **Mathews** analysis in the due process -- or the
3 due process analysis and the future dangerousness cases. I
4 think you would look at the due process analysis in the
5 deportation cases where **Mathews** is also applied there. And
6 it's -- it's just not the case that this can be so anomalous
7 that nothing that is a guarantor of fundamental fairness in
8 virtually every other context that exists does not apply here.
9 It's simply not the case. That's --
10 THE COURT: Well, I'm not suggesting that it doesn't
11 apply --
12 MS. SHAMSI: Sure.
13 THE COURT: -- here in the big "here."
14 MS. SHAMSI: In total, yeah.
15 THE COURT: What I'm hearing the defendants argue is
16 that at a minimum it doesn't apply to the procedural challenge.
17 That it is part and parcel -- to whatever extent it may be
18 permitted and must be permitted and is required, it is part of
19 the fundamental review of the fairness of the substantive
20 decision.
21 MS. SHAMSI: And what I am trying to get at -- and
22 let me just sort of state this perhaps in a different way -- is
23 that defendants are incorrect that by virtue of the fact that
24 this was an administrative proceeding, you cannot have
25 fundamental fairness safeguards. They're provided in a variety

1 of administrative proceedings.
2 THE COURT: I don't think they're saying you cannot.
3 They're just saying they didn't need to.
4 MS. SHAMSI: They didn't need to. And that's what we
5 disagree with. We say, as a matter of law, here's all of the
6 contexts in which those safeguards are provided, and they're
7 missing here. And that's why this is constitutionally
8 deficient.
9 I will just end by emphasizing one thing that I made
10 a point about before but I do think it's very important, which
11 is that the categorical tail of classification should not wag
12 the procedural due process dog. I may have messed that up very
13 much, so let me just say that again. Which is you don't have
14 before you a record that shows how much classified information
15 is at stake, and there are -- virtually all of the other
16 privileges have to be balanced and adjudicated, and that's why
17 you don't have the record -- nor did we have the record -- to
18 be able to respond --
19 THE COURT: Well, do you think this matter should be
20 remanded?
21 You made the point this morning that it hasn't been.
22 Do you think there should be administrative work done before
23 this Court tries to ultimately comply with the mandate from the
24 Ninth Circuit, in a jurisdictional minefield where Congress has
25 said the review should be in an appellate court, and yet we're

1 here and still here and likely to be here for a while?
2 It's not that I don't welcome you all, but if you
3 contend that this should be at an administrative level,
4 developed in a different way, I would like to know that
5 specifically.
6 MS. SHAMSI: Your Honor, I think our thinking -- and
7 I actually want to consult with my co-counsel a bit more. But
8 I think our thinking, especially as we came in here today, was
9 you gave defendants a shot at this, and you did that starting
10 back in October of 2014. We're now in December of 2015.
11 This is our second round of briefing on procedural
12 due process, and we think that what should happen at this stage
13 is we would ask the Court to enter judgment and opinion finding
14 the existing process inadequate and to move forward by ordering
15 information to be provided. And to the extent that it's going
16 to be withheld, for the defendants to specifically seek to
17 justify and identify their withholdings with a privilege log
18 with enough information that we can contest and you can
19 adjudicate. And for you to -- my -- my colleague is going to
20 discuss vagueness. This will fit into the remedy. I'm going
21 to let him address those aspects. But you could set forth, you
22 know, guidance on what is necessary at the next stage, and then
23 we would ask you to provide the hearing.
24 THE COURT: When you were just referring to the
25 future dangerousness cases, are you talking about the civil

1 commitment, pretrial detention, those kinds of future dangerous
2 exercises? Or what else?
3 MS. SHAMSI: I'm talking about those, yes, your
4 Honor. But we're also talking about the cases in which the
5 courts assess future dangerousness or threat in the immigration
6 context as well. Yes.
7 THE COURT: What -- I have a recollection, in this
8 community here in Oregon and in other comments many years ago,
9 there was litigation over so-called gang lists, gang listings,
10 where local law enforcement developed lists of suspected gang
11 members. They were placed on a list. They were then excluded
12 from certain geographical areas. And that if they were there,
13 they were charged criminally with trespass crimes, and the
14 like. And then there were other consequences.
15 There was much push-back to those listings and the
16 manner in which people were placed there. And then the process
17 sometimes -- somehow went away. And I was wondering -- at
18 least in this community. I mean, there was a process
19 tightened. And it -- there are still lists, and there are
20 still people who are viewed by law enforcement in certain
21 contexts when they're encountered, that they're on -- they're
22 listed as not just having a conviction for this or that, but
23 they're associates of the Crips or the Bloods or whatever.
24 I'm wondering if in that context there is any help to
25 be found for this sort of analysis by analogy, which is, I

1 guess, where we end up in any event.
2 MS. SHAMSI: I'm afraid I don't -- I'm not familiar
3 enough with --
4 THE COURT: Looks like he wants to jump in, and
5 you're welcome to.
6 MR. ARULANANTHAN: Sure. Your Honor, it's **Vasquez v.**
7 **Rackaukas**. It's the Ninth Circuit decision about it.
8 And I think it is certainly analogous, in a number of
9 respects, because you have a situation there where people are
10 having significant deprivations of their liberty. I think less
11 significant than the deprivations here, but they are
12 significant deprivations of liberty. And the -- **Vasquez** holds
13 that the due process clause covers that. It holds that there
14 is a right to a hearing in that context. And the facts of that
15 particular case are quite extreme. The -- the denial of due
16 process there is -- for reasons that I think are not worth
17 getting into right now, are sort of fact specific in a way that
18 the decision doesn't resolve all of the questions of what due
19 process demands in that situation. But I think that is
20 relevant guidance from the Ninth Circuit.
21 The things I wanted to talk about -- first talk about
22 was the right to a hearing, and then the burden of proof.
23 THE COURT: Before you do, I just want to be sure
24 your colleague has finished her remarks and there's nothing
25 else in response to her remarks and then we'll get to you.

1 MS. SHAMSI: And we will move on. I have finished,
2 your Honor. Thank you very much.
3 THE COURT: All right. Thank you.
4 Counsel.
5 MR. BOWEN: Thank you, your Honor.
6 One thing that I think is frequently confused in
7 plaintiffs' briefing and their presentation here is on the one
8 hand they tell you, you know, we don't dispute that the
9 Government can make these -- can make these judgments, and we
10 don't dispute that the list is valid.
11 But, on the other hand, we get arguments that appear
12 to me to be challenges to the substance, challenges to the
13 undertaking as -- as an initial matter. That -- that we're not
14 complying with the statute and -- or that we're improperly
15 calibrating our determinations. I don't think those are
16 process questions. I think those are substance questions. I
17 think they're invalid. I think they're incorrect. I think the
18 statute is clear.
19 For one thing, the argument that the statute only has
20 to do with air carriers, I think, misses the mark. The statute
21 recognizes it is an embodiment of Congress' recognition that
22 the list exists and should exist and is appropriately
23 calibrated in the way that the statute contemplates. That that
24 is the air carriers should check against the list of
25 individuals who should be denied boarding an aircraft because

1 they may pose a threat to aviation and national security. I
2 think that's a clear mandate. It happens to be one the
3 executive branch agrees with. And we think that our standards
4 and our criteria are exactly and properly calculated to that
5 standard, and the notion that you can sort of use the fact that
6 air carriers are folded into it as a procedural mechanism to
7 suggest that the -- that the standard is somehow improper is
8 wrong.
9 I also dispute the notion that the No Fly List is
10 somehow divorced from its purpose, which is something that
11 Ms. Shamsi suggested. That is incorrect.
12 The plaintiffs would have you believe that the No Fly
13 List purpose is to predict terrorist events. That is not the
14 case. It is to prevent them. And so -- and when there are
15 individuals who are on the list who have not then gone on to
16 commit heinous acts on airplanes, that in fact may be a
17 function of the efficacy of the list, rather than some sort of
18 signal that we have miscalibrated it.
19 And, again, I think the plaintiffs are also
20 repeatedly confusing the question of when and in what context
21 procedural safeguards should emerge.
22 Almost all of the cases that they cite to are
23 judicial proceedings. They are back-end judicial proceedings
24 that happen when someone is civilly committed and it's reviewed
25 by an Article III judge. The one exception, sort of, is the

1 immigration context, where things are heard before an ALJ,
2 which is a creature -- which is an entire system which is
3 quasi-judicial and mirrors the judicial process in many, many,
4 many respects. And I think, for purposes of this analysis,
5 should be considered in that vein. In other words, that there
6 is a judicial processes. That's not what we're dealing with
7 here. We're dealing with an administrative process for which
8 there is back-end judicial review.
9 And, again, with apologies for the Court's
10 frustration, the question of what that ultimately looks like is
11 something that was not joined in our prior briefing. And we
12 will gladly address that and try to clarify the Government's
13 position on the supplemental briefing that the Court has
14 ordered.
15 THE COURT: I should say I'm going to limit your
16 paging on those.
17 (Laughter.)
18 THE COURT: I am. I don't mean to be humorous. I
19 want very specific information in five pages or less, not
20 including the full page it takes to list the name of counsel.
21 So you just need to tell me what your point is on what happens,
22 what are the next steps; to the extent one motion or the other
23 is granted in whole or in part.
24 MR. BOWEN: And, again, we yet again hear a list of
25 cases from Ms. Shamsi that she contends are analogous. Notably

1 absent from the list is the **Al-Haramain**, is the **Jifry** case, is
2 the **Ralls** case. All of which make it very clear that as a
3 matter of structure, constitutional structure, the Government
4 is not required to disclose in the name of due process its
5 classified evidence. Not its state secrets privileged evidence
6 but its classified evidence, in the due process. Even to the
7 extent that the classified evidence leaves the individual
8 otherwise entitled to due process protections, with no
9 substantive information to challenge.
10 And, finally, we fundamentally disagree with the
11 notion that the new process supposes -- presents little
12 difference to what the individuals have before. We think that
13 is a grossly unfair characterization of the robust letters that
14 the individuals provided, the highly specific evidence and
15 information they were provided, and the opportunity to be heard
16 on those topics that plaintiffs were afforded but almost --
17 almost entirely refused to engage in.
18 Finally, I have no comment on the **Vasquez** case. And
19 we can take a look at it. If the Court would like to look at
20 that, the Court can. Except I would point out that nowhere in
21 the -- in statute -- in federal statutes or perhaps in local
22 statutes, that I'm aware of, was there a mandate that the local
23 police authorities identified members of gangs and prohibit
24 them from entering personal -- particular spaces and
25 neighborhoods. By contrast, there is a national security

1 imperative that we do so in order to prevent the heinous acts
2 that occur when those sorts of individuals -- individuals have
3 access to airports.
4 Finally, I do want to point the Court to the **Hallie**
5 (phonetic) case, which is cited in our briefs, which discusses
6 the way the procedures need to be calibrated, and the value of
7 additional procedures, need to be calibrated to what the
8 procedures are.
9 And, in that case, the Court talked about grand jury
10 proceedings when the individual challenged what was afforded in
11 a grand jury proceeding, suggesting that there needed to be
12 additional safeguards in the grand jury. And the answer was
13 no, the grand jury proceeding is appropriately calibrated to
14 the level of proof for grand jury. That is reasonable
15 suspicion that supports an Indictment. The level of proof
16 here, again, is appropriately calibrated to the task. To not
17 only go after previously indicted or convicted individuals, or
18 individuals that had already committed terrorist attacks, or
19 individuals we know have particular concrete plans to engage in
20 particular terrorists attacks, but to individuals who may pose
21 a threat to aviation or national security.
22 THE COURT: All right. Plaintiffs' next point.
23 Counsel.
24 MR. ARULANANTHAN: Yes, your Honor. I'll be
25 discussing the right to a hearing, the burden of proof, and

1 vagueness.
2 And I want to start with the right to a hearing, your
3 Honor.
4 And I am cognizant of the fact that the June 2014
5 order did not decide this question, although we had presented
6 it. So I recognize that it is something that you had reserved.
7 I think, though, very significant from the June 2014
8 order, your Honor did decide that there is a significant
9 deprivation of a liberty interest created by the No Fly List.
10 That should be beyond dispute by now. And that really is
11 the -- the only central question for purposes of deciding
12 whether or not there has to be a live adversarial hearing.
13 Because what we said two years ago and we said again in the
14 briefing now is that there is not a context, your Honor. There
15 is not a context in the American legal system where you have a
16 significant deprivation of liberty without a live adversarial
17 hearing.
18 And if you look at even the most extreme cases that
19 the Government relies on -- look, for example, at **Ludeke v.**
20 **Watkins**, which is a case they cite, which is about the
21 internment of German noncitizens during World War II. It's a
22 case that the Ninth Circuit recently cited right next to
23 **Korematsu**, in talking about the -- the most extreme views about
24 detention.
25 There is a hearing in World War II, in front of an

1 alien enemy hearing board; which you can see if you read the
2 case. Even then they gave hearings to people in this context.
3 They also cite **Carlson v. Landon**, which is a case
4 from the height of the red scare. It's about deporting
5 Communists. And there too, if you read the case, both in front
6 of the Attorney General and in front of courts on habeas, you
7 get a hearing on whether you are actually kind of committed to
8 the violent ideology of the Communist party.
9 So, you know, those cases, I think, really underscore
10 how dramatic and how extreme the Government's position is; that
11 there cannot be a live adversarial hearing in a context where
12 you have a significant deprivation of liberty. You know, it
13 just simply does not happen in our legal system.
14 You know, we -- we cite, obviously, a lot of
15 deportation cases. And, you know, that's because it's been the
16 rule for a hundred years. Actually, since 1903, it's been the
17 law that you can't deport somebody who's already here in the
18 United States without giving them a hearing.
19 And, you know, I've heard Mr. Bowen today say, Well,
20 those are really, really different, for a variety of reasons.
21 THE COURT: Well, they are different. Moving someone
22 out of the United States permanently is a much more significant
23 interference with liberty than preventing a flight. They are
24 fundamentally different. And to argue they're the same really
25 is a nonstarter.

1 The value that is protected here, the personal
2 interest at stake here is different and less than in a
3 full-scale deportation or the full-scale -- I've lost the verb.
4 The -- the passport cases, the revocation of a passport. Those
5 are on a continuum of a kind.
6 But we have to be realistic here, the deprivation of
7 the right to fly internationally does interfere with a liberty
8 interest, but not in the same way as a person who's forever
9 deported from this country; forever removed from his family,
10 his livelihood, or her -- her reasons for being here.
11 It just -- it just is not persuasive at all to align
12 the No Fly listees in the same cabin because they're different
13 interferences. And to call one significant really doesn't help
14 because it is a continuum. But I don't think it's helpful
15 to -- to say that because a person who gets deported gets a
16 hearing, a person who can't fly absolutely has to have a
17 hearing; that -- that doesn't follow.
18 MR. ARULANANTHAN: Let me just say a few things about
19 that, your Honor.
20 First, the reason why we are looking to that as an
21 analogy is because it is a situation where an administrative
22 decision maker, in the first instance, is deciding on the
23 deprivation of liberty of -- of some person. And in that
24 way -- and we're not talking about the review process. Of
25 course, there is judicial review also constitutionally required

1 in deportation cases. But the administrative process is a
2 process to decide on a deprivation of liberty. And in that
3 way -- that's sort of -- you know, that is also true here,
4 under their view. Right? That the administrative decision
5 maker here gets to decide whether or not you're on the No Fly
6 List. There aren't a lot of analogies. Because in most of the
7 other situations where liberty is at stake, it runs through the
8 courts in the first instance, not just as a matter of review.
9 But even as an initial matter: Civil commitments, you know,
10 and all those sex offenders, pretrial detentions --
11 THE COURT: Well, it is the nature of the beast here.
12 It is a very different kind of deprivation, a very different
13 kind of risk that the Government seeks to protect against -- in
14 balance with the individual liberty here.
15 All I'm saying is that there's more to trying to
16 resolve this very serious dispute among the parties than
17 relying on a case where the liberty interest is significantly
18 higher, the deprivation is significantly more substantive than
19 being prevented to fly.
20 MR. ARULANANTHAN: Let me just say two other things
21 on that subject, and then I'll leave it -- on -- on the
22 deportation analogy. And then I'll leave it, your Honor.
23 The rule -- the rule that you get a hearing, it's not
24 only true in cases where you are deported for -- for your whole
25 life. It's not only true in cases where you've lived here for

1 30 years and you have a lot of family and all of those things.
2 It is true in any case where a person is physically present in
3 the United States, even if you've been here for a short period
4 of time. Right? So --
5 THE COURT: Yes. But the point is -- I'm trying to
6 make is the same, Counsel.
7 Being removed from the United States is a more
8 significant substantive deprivation than being told you cannot
9 get on an airplane to fly across the United States space
10 voluntarily.
11 MR. ARULANANTHAN: Very well, your Honor.
12 THE COURT: It's just different and lesser than the
13 interests you're seeking to protect. It doesn't mean it's not
14 entitled to great care in this process but they're not the
15 same. And when -- because they're not the same, there has to
16 be an acknowledgment about where on the sliding scale these
17 processes must align in order that there is a -- the minimum
18 necessary. In a contest we look at what's the minimum, not the
19 ceiling but, as your colleague calls it, the floor.
20 What's the minimum that must occur to satisfy
21 constitutional procedural due process?
22 MR. ARULANANTHAN: Right. And I think we would just
23 say, your Honor, that if the floor is set by the charitable
24 organization designation cases, which are national security
25 cases but involve property -- and, you know, as my colleague

1 said, so many -- repeatedly, the Supreme Court says, you know,
2 they -- liberty is different than property. And then at least
3 one relevant place, acknowledge your Honor's view that -- that
4 it is different.
5 But if you want an administrative process where
6 there's a deprivation of liberty, then that's one place to
7 look.
8 And the other thing -- the last thing -- actually
9 there were three things. The last thing is we have already in
10 this record -- and we can, you know, put more; at whatever the
11 appropriate stage is, if there is any left, you know. But our
12 clients have had their marriages destroyed. Our clients have
13 had their economic opportunities completely decimated.
14 Our clients -- we actually talked about this two
15 years ago, your Honor. You and I did. You know, the
16 possibility of being unable to go to your mother's funeral.
17 To, you know -- so the notion that --
18 THE COURT: We've been there. I have recognized an
19 interest.
20 But here's my question for you and me. Again,
21 repeated analogy to the property interest case. Are -- is it
22 correct to say that all property interests are lesser than any
23 liberty interest?
24 In **Al-Haramain**, they effectively shut down the entire
25 operation. And when one compares that to the -- the No Fly

1 List function -- that is to say, you can't fly. You can't go
2 to the funeral, to attend a wedding. You can't enjoy these
3 events effectively in this modern world. It is more than just
4 the boarding of a plane. But it has a different consequence,
5 and probably of a different degree, depending on what the
6 purpose of the trip might --
7 MR. ARULANANTHAN: Yes, your Honor. Absolutely. I
8 think it is different. And we would not argue that literally
9 every deprivation of liberty -- for example, a **Terry** stop is a
10 deprivation of liberty; an arrest that would be justified by
11 probable cause, but only for the length of time until you're
12 held over to trial, subject to the Speedy Trial Act and with a
13 bail hearing, and all of that. We're not arguing that those
14 are necessarily, by definition, greater interests than, you
15 know, the most severe deprivation of property.
16 But clearly, you know -- it looks like you can't put
17 this in the record. You know, it looks like this (indicating
18 with hands). You know, there might be a little bit of overlap.
19 But there's a lot of liberty interests that are stronger than
20 the overwhelming majority of property interests.
21 And for the reasons I've said and that your Honor has
22 acknowledged, this is a significant deprivation of liberty. So
23 it's not the same as being stopped on the side of the road for
24 30 minutes. And particularly in a situation where it is
25 broadcast to Governments around the world, causing you

1 problems. It follows you everywhere you go, all around the
2 world. Even if you're not flying over U.S. air space, that
3 Government may know something about you and subject you to some
4 interrogation. This happened repeatedly to our clients, all
5 over. In Latin America, and all over the world. So it is
6 not -- it is a very significant deprivation of liberty.
7 Granted what you said at the outset, your Honor, there's no
8 perfect analogy.
9 But we are not aware -- we are not aware of a case
10 where a court says it is a significant deprivation of liberty
11 and does not provide a hearing. And we have said this for two
12 years.
13 THE COURT: A live hearing, you're saying.
14 MR. ARULANANTHAN: A live, adversarial hearing.
15 We've said it for two years. They've never given a
16 counter-example. And the cases they cite, as I said -- even
17 from the height of the most sort of draconian periods of, you
18 know, the United States history, also provided hearings to
19 people when they deprived them of their liberty. So it truly
20 is -- it would be a first. It's certainly, under modern
21 jurisprudence, to -- to go that route. And that's the reason
22 why we feel very strongly about it, your Honor.
23 If -- if you -- if you take the -- the idea that
24 there is -- there should be a hearing here, a lot of the
25 problems that the Government describes -- you know, we can use

1 that analogy. They are dealt with in other hearing contexts.
2 And, you know, I -- I am not saying this to suggest
3 that they are the same. Because I've -- I've heard you loud
4 and clear, your Honor; your view that they are different. But
5 just on the question of can you have -- deal with secrecy and
6 national security issues and classified information in
7 administrative hearing processes? And the answer is, in the
8 deportation context, yes, you can.
9 **Rafeedie v. INS** is from the D.C. circuit.
10 **Kiareldeen**, which my colleague discussed earlier, these are
11 cases where the cases say you cannot use secret evidence.
12 There is a regulation in the immigration hold which allows for
13 the use of protective orders. And there is all administrative.
14 This is not judicial process. The fact finder here is an
15 administrative decision maker.
16 And so I think it's relevant to these questions
17 about, you know, how much does the fact that there's secrecy or
18 national security here really affect -- affect the process that
19 is due.
20 Now, your Honor, obviously you are clearly inclined
21 to look at the charity designation cases. I want to talk about
22 those for a minute.
23 THE COURT: I'm inclined to look at all of the cases
24 you're citing, and then some; on both sides. I want to get
25 this right. But, yes.

1 MR. ARULANANTHAN: Yes, your Honor.

2 So the Government seems to pre-suppose that those
3 cases have held that there is no right to a live adversarial
4 hearing. And, you know, we -- I very, very carefully read all
5 of them. And I can assure your Honor that that is not the
6 case. There is not one of the charitable designation cases
7 actually holds -- and I'll talk about them each individually --
8 that there is no right to a live adversarial hearing.

9 Obviously **Al-Haramain** is the most interesting one
10 because that's the Ninth Circuit. The word "hearing" does not
11 appear in the opinion. They are talking about other process.
12 And there's a back and forth about the statements of reasons,
13 and all of that. There's no discussion of a live adversarial
14 hearing.

15 You know, I wasn't counsel. I don't know everything
16 about it. But at least the way the Ninth Circuit opinion was
17 written, it looks like nobody made that argument. At least in
18 the Ninth Circuit.

19 It wouldn't surprise me, in a sense, if they hadn't
20 because the charity cases -- the real focus is you have a -- a
21 set of documents about an organization and you're trying to
22 figure out what it did, what it funded in other parts of the
23 world. Usually, right? And so that's going to be a
24 paper-driven process. And what you're interested in is all of
25 the documents about this organization.

1 Our case is -- as the Government says, they're trying
2 to make a future prediction about the extent to which our
3 clients are dangerous. And obviously their histories are
4 relevant to that. But a huge amount of it turns on
5 credibility.
6 As like our clients say we didn't do these things, or
7 we aren't these things. And it would be very odd if the due
8 process clause treated those two contexts exactly the same.
9 Like one which is primarily a paper thing about what an
10 organization did and how it spends its money, with, on the
11 other hand, a very personal judgment about a person's character
12 and, you know, predisposition to violence. And obviously the
13 Ninth Circuit has repeatedly stated what is sort of obvious
14 from common sense. You would use a hearing process and hear
15 from the person and hear their testimony to judge their
16 credibility.
17 **KindHearts** is another one of the cases. A property
18 designation case. It's actually my co-counsel who litigated
19 it.
20 **KindHearts** held that OFAC failed to provide a
21 meaningful hearing, and found that to be a due process
22 violation. And it's only a district court decision, obviously,
23 but that was the holding there.
24 The other two cases that we have talked about a lot,
25 **Global Relief Foundation** is the Seventh Circuit. They find no

1 right to a pre-deprivation hearing. That is that initial
2 freeze of the assets, there's no requirement for hearing there.
3 That's analogous to initially being placed on the No Fly List.
4 And as we have said, we are making no challenge. We have not
5 ever challenged the pre-deprivation process. So that doesn't
6 tell you anything about the right to a hearing, you know, on
7 the post-deprivation side.
8 And then the other one, your Honor, this is the
9 closest they get in their favor, I think. **National Council of**
10 **Resistance of Iran**, **NCRI**, from the D.C. Circuit, it says you
11 have to have at least a written opportunity to contest.
12 So, you know, it doesn't decide the question of
13 whether more than that is required. It's finding that the
14 Government system has not met due process standards, and
15 then -- and then doesn't say whether a live hearing would have
16 been required.
17 So on -- and it's the D.C. Circuit, you know. So,
18 you know, it's not as though there's binding authority which
19 says that in the charity context you're not entitled to a
20 hearing. There's one case that squarely addresses the
21 question, and it's **KindHearts**, and it said there was a right to
22 a hearing. So I think when we're talking about what is the
23 floor on the subject of the hearing, that's relevant.
24 And then, you know, this -- the last thing I guess I
25 wanted to say on hearing specifically is if you look at some of

1 the kinds of evidence that we have gotten in our particular
2 cases, I think it can be very helpful to talk about why a
3 hearing is important.
4 And I can talk about one entirely on the public
5 record, which is Mr. Kariye's case. And it's an interesting
6 one because, you know, Mr. Steinbach's declaration said that
7 there was not any more information, no -- any additional
8 disclosure would risk significant harm to national security.
9 And then the Government charged him with a
10 denaturalization proceeding. And, lo and behold, there is all
11 of this new information that it turns out; allegations against
12 Mr. Kariye.
13 And the striking thing about it is, you know, those
14 are only available to us because we have a regular civil
15 proceeding in front of your Honor where they actually have to,
16 you know, particularly state the reasons for why they are
17 trying to, you know, take away his citizenship. And obviously
18 there's incredible amount of overlap between the claims there
19 and the claims in this case, except with much more detail.
20 And, you know, it's striking because now there are
21 all kinds of things -- I don't know if your Honor has had a
22 chance to review the answer in Mr. Kariye's case. But there's
23 all kinds of things that we now can deny because we actually
24 know what they're talking about.
25 So, you know, they -- you know, one of the things

1 they've said is -- and this is actually -- it's almost like a
2 comedy of errors. You know, that they -- they say that some
3 person said to some other person, in a recording which they
4 have -- this person, who was actually a criminal defendant,
5 Mr. Battle -- now he's been convicted -- told a cooperating
6 witness that Mr. Kariye had said that he had fought in
7 Afghanistan during the Soviet occupation.
8 And we said -- actually, he didn't go to Pakistan
9 until the 1990s. Then they say in their paper process, Oh,
10 Mr. Kariye has never denied fighting the Russians in
11 Afghanistan. But he did deny it. He said he didn't go to
12 Pakistan until the 1990s. Right? And this is -- this is just
13 a purely kind of -- the kind of thing you could clarify in five
14 minutes. Right? Like we say, Yes, he did deny it. He's
15 saying -- because the Russians left Afghanistan before the
16 '90s. And so, you know, we're saying he never fought the
17 Russians in Afghanistan.
18 But nobody can know that unless you actually have a
19 hearing where you can resolve this kind of difference. And
20 they interpret his answer, the thing that we wrote, to mean
21 that he doesn't deny it. And then they build this whole thing
22 about that: He has fighting experience, and so he -- you know,
23 he's capable of training people about violence because he's
24 fought the Russians. And he's denied it. And they don't know
25 that he's denied it because all we've had is a paper back and

1 forth.

2 You know, another example I'll give you -- it's so
3 striking to me, your Honor. In an unrecorded conversation with
4 a cooperating witness -- another witness who's not named.
5 Whether that person is confidential or not, I have no idea.
6 And Battle -- that's the person who's been convicted. Battle
7 told the cooperating witness that Kariye had provided to Al
8 Saoub -- a different person who is now dead -- an amount of
9 money sufficient to give $2,000 to each of the travelers to
10 Afghanistan.

11 You know, I count -- we deny this. Okay? I -- and
12 it's denied in the denats complaint.

13 I count four levels of hearsay here. There's --
14 the -- this is -- this is an indent in the letter, like my
15 counsel was talking about. So I don't know who the author of
16 this is, and I don't know if that person is the same person who
17 signed the -- the letter that the Government provided to us. I
18 also don't know -- you know, is this an unrecorded
19 conversation? I don't know if the person who's recounting this
20 had personal knowledge, you know, of what Mr. Battle said.
21 Okay?

22 Then we don't know what Mr. Battle's motives are.
23 He's a criminal defendant -- or, you know, I think he was under
24 federal investigation at the time this may have happened; what
25 his motives are. Don't know if the cooperating witness is paid

1 or, you know, subject to some kind of criminal liability. And
2 the most important, your Honor, we don't know if any of these
3 people are available. Like do -- we don't know if any of these
4 people -- we don't know if they have personal knowledge. We
5 don't know if they could have actually made their own
6 statements. So it's like the game of telephone. It's four
7 levels, four chains of a game of telephone. Whether any of
8 these people actually -- the Government could have provided
9 them. All right.
10 And this is the kind of thing you could figure out at
11 a hearing. We're not saying that it has to accord with, you
12 know, **Crawford** and in the confrontation clause. We're just
13 saying it has to be fundamentally fair. Meaning if the witness
14 is available, then the person should actually testify and
15 somebody should be able to cross-examine them. But that's
16 complete impossible on a paper system. You literally cannot do
17 it because there's no way to trace the origins of the
18 statements.
19 And, obviously, it's particularly troubling in a
20 situation where the Government is relying on witnesses whose
21 credibility might be seriously -- might be seriously
22 compromised. Their answer is: We take it into account. We
23 know who the people are. We know. And so we've discounted,
24 already, for all of the unreliability of our own evidence.
25 I'll stop there on -- I think it's probably easier --

1 on the burden of proof, I'll do after Mr. Bowen or co-counsel
2 gets to respond.
3 Is that the Court's preference?
4 THE COURT: Just a moment. (Pause.)
5 That's fine. Thank you, Counsel.
6 Go ahead.
7 MR. BOWEN: Hearing counsel's effort to distinguish
8 the -- the terrorism -- finance, terrorism designation cases,
9 to be really grasping at straws to go about and find the most
10 narrow construction of a holding possible to suggest that -- to
11 find that somehow in proving a negative that there is no
12 authority for the proposition that -- that the Government, in
13 making national security determinations and in setting up a
14 redress system can't decline to provide a full-blown hearing
15 about a national security matter for a suspected -- or a
16 potential threat, a person who presents a potential threat, to
17 test at the margins and test witnesses concerning their
18 designation. I think it is not an accident that in
19 **Al-Haramain** -- which was challenging a due process of an entity
20 that was entirely shut down by a designation -- that, in
21 assessing the fairness that should be provided by due process,
22 made mention of the possibility of certain remedial measures
23 but not others. Among them, unclassified summaries that go to
24 the, quote, subject matter of the agency's concerns.
25 And I think the panel in **Al-Haramain** was thinking

1 very carefully about what would be the appropriate scope of --
2 of due process in the administrative context, where these
3 concerns are -- are animated.
4 And it talks about -- again, it characterized the
5 holding as what **Al-Haramain** was asking for, or concessions that
6 imposed a minimal burden and did not implicate national
7 security.
8 And we presented evidence to this Court, which is
9 unrebutted, that the Government has considered all of those
10 aspects of the potential ways to provide redress and has
11 rejected them for reasons that should be quite obvious.
12 That it is a -- a -- an obvious and clear threat to
13 the information that we need to protect to place people in a
14 room before an officer in an administrative context; to test
15 and probe and go at witnesses or potential officials of the
16 Government, all when we know at the back end that the type
17 of -- that those types of hearings happen typically in a
18 judicial forum.
19 And, again, I'm not going to belabor the points that
20 the Court made with regard to the deportation context. But I
21 will note that, in addition to the differences and interests
22 that the Court noted, that those proceedings are actually
23 creatures of statute in many cases. They're in the INA. And
24 the hearings that have been developed through a very rigorous
25 process, both from Congress and in the executive branch,

1 because of the nature of the interests.
2 And I will point the Court also to the ASSE decision
3 which made it very clear, not only that paper processes can be
4 appropriate -- and, again, that was a property -- property
5 case. But the paper hearings -- paper processes can be
6 appropriate. But also that the -- the agency has discretion to
7 design the process.
8 And that's an important distinction here, where we
9 have been given and granted the discretion to design the
10 process, rather than mandated a quasi-judicial environment like
11 the one that you see in -- in the deportation context.
12 I would also point out that we weren't able to go
13 through all of these authorities in our brief. But there are a
14 number of -- there are a number of provisions scattered
15 throughout what is a very complicated system of procedures
16 in -- in the administrative context that actually make it clear
17 that, generally speaking, that the Government is not required
18 to disclose classified evidence to aliens or their counsel and
19 to provide those if it's necessary.
20 But I point, as one example, the ATRA, the Alien
21 Terrorist Removal Act, which makes that point express. That if
22 someone is being deported under the ATRA that they do not have
23 access to classified information if it is in fact used. And
24 there are also other regulations on point that make this
25 similar point. I would point to 8 CFR 124033, 124049, all of

1 these -- all of these authorities. And also there's -- there's
2 a -- an EOI or operating policies and procedures manual that
3 talks about, generally speaking, in -- how to handle classified
4 immigration proceedings, that doesn't contemplate a mandatory
5 disclosure of information.
6 And, of course, we point to the fact that there is no
7 authority for the proposition that the Government has to turn
8 over sensitive or classified information to an alien or to his
9 counsel because it simply doesn't exist. And so to analogize
10 them in that way, I think -- I think really doesn't do the
11 trick for the plaintiffs.
12 I think -- but, again, there's an attempt to confuse
13 the issues, in -- in bringing in what is this sort of parade of
14 horribles about various alleged wrongs that plaintiffs have
15 experienced. One is there's not a record on that before the
16 Court on summary judgment. Secondly, is they've not tied it
17 expressly in any meaningful way to the mere fact that an
18 individual is on the list. And I don't think that's -- it's --
19 it's a large stretch to deem all of those different experiences
20 to be a necessary consequence of a person -- of an individual's
21 status on the No Fly List.
22 It just simply could be that if -- if other -- some
23 other foreign authority, somewhere, has information and acts
24 upon that information, that they just have the information.
25 They actually have the substantive information pursuant to some

1 sort of agreement or because, in fact, it was their information
2 in the first place; we don't know.
3 But the notion that -- that the Court should just
4 take a series of allegations from counsel that are unproven and
5 have not been tied in any way to the No Fly List, and sort of
6 import that to sort of elevate the -- the level of the interest
7 and the level of the alleged harms that emerge from the No Fly
8 List, we think is without foundation.
9 I'll largely let Ms. Powell deal with the question of
10 the individuals.
11 But, finally, I think it's interesting that counsel,
12 you know, made references to **Terry** and other circumstances that
13 deal with what to do when there are exigent circumstances in
14 making determinations about threats. And in those cases,
15 there's not a hearing. There's only a hearing at the judicial
16 phase.
17 And, again, we don't know what the judicial phase of
18 the substantive challenge that would occur at the back end of a
19 No Fly List determination is, but we would provide our views on
20 that.
21 But just as they suppose that we don't have authority
22 for the express declaration that you don't -- that you don't
23 need a hearing, they also don't have authority for the mandate
24 that a hearing was required in this context, and that is also
25 no accident.

1 It would be a very, very strange thing for Congress,
2 recognizing that the executive branch has this deeply important
3 obligation to protect the national security and should be
4 maintaining lists of individuals who should be denied access to
5 aircraft, that Congress, in recognizing that we should set up a
6 process -- that the executive branch should set up a fair
7 process -- that's really all it says, is a fair process. That,
8 by accident, Congress mandated that the -- that the executive
9 branch hold administrative hearings to make those
10 determinations.
11 To the contrary, how to do it was left silent. The
12 case law makes it clear that we have the discretion to do it.
13 And we've exercised that discretion in a reasonable way because
14 holding hearings, providing that kind of access that they
15 are -- that they are demanding is not compatible with the case
16 law on national security in the civil context and presents
17 manifest and clear risks that are intolerable for purposes of
18 protecting the very national security that the list and the
19 information that often informs the determinations about the
20 list all go to protect.
21 MR. ARULANANTHAN: Your Honor, just a couple of quick
22 points, and then maybe I can move to burden of proof.
23 THE COURT: I just didn't know Ms. -- if Ms. Powell
24 had something to say in response to the individual arguments
25 you made.

1 Did you want to add anything? You don't need to. I
2 just wanted to --
3 MS. POWELL: I do want to address at least a few of
4 the individuals, but that can wait until we will finish the
5 broader evidence, if you would like.
6 THE COURT: That's all right.
7 Go ahead, Counsel. Thank you.
8 MR. ARULANANTHAN: I just note again, he had several
9 minutes; not a case involving significant deprivation of
10 liberty where there's been found to be no hearing.
11 The cases that they cite in their briefs, they're
12 things about -- like body armor certifications and
13 hydroelectric power licenses, and things like that. And I
14 think it just goes to show you how far you have to go before
15 you find an approval of a process where there's no hearing.
16 I mean, you can't cut off the public utilities people
17 without giving them a hearing, under **Memphis Light**. You can't
18 take away their driver's license, things like that.
19 So the -- the one other thing -- or two other things
20 I wanted to say. He -- Mr. Bowen cited the alien terrorist
21 removal court provision. And this is apropos of what we were
22 saying this morning, your Honor. That process -- it's never
23 been invoked, actually. That statute has never been used. But
24 the statute itself, it provides for clear counsel. I mean, so
25 it goes to something that Ms. Shamsi was saying earlier. To

1 the extent we're interested in analogies there, it's a very
2 elaborate process, but it allows for clear counsel to then see
3 information. It is 8 USC 1532, to the extent that we're
4 looking for analogies.
5 And then the last thing I'll say on the question of
6 whether there's a record of liberty interests, there's the
7 declarations from three years ago, obviously, which are, I
8 assume, incorporated into this. And then there's Mr. Meshal's
9 declaration, which your Honor heard described this morning.
10 On the burden of proof, this is an issue where I
11 think, unlike some of the others, I thought the June 2014 order
12 had -- if not completely resolved the question, at least had
13 spoken to it in a very -- you know, unlike the hearing
14 question, which was left, you know, quite open in the sense
15 that the Court said that it was a fundamental deficiency in the
16 process and that contributed significantly to the risk of
17 error, that the reasonable suspicion threshold was very low.
18 And obviously that is still the threshold that the
19 Government is using. To be clear, our challenge to this, your
20 Honor, is in the D.H.S. trip redress process.
21 We are not challenging -- we have no position in this
22 litigation on what the proof standard should be to initially
23 get put on the list. But when we're going through the process
24 that our clients just went through, if your Honor were -- is
25 asking the question, did that process that we just went through

1 satisfy due process, our argument is it did not, in part
2 because the standard of proof there was reasonable suspicion,
3 rather than clear and convincing evidence. And --
4 THE COURT: Why do you leap to clear and convincing
5 evidence if mere -- if mere reasonable suspicion isn't enough,
6 why isn't probable cause your focus?
7 MR. ARULANANTHAN: Because, your Honor, under -- it's
8 the **V. Singh**, a case from the Ninth Circuit. And this is
9 reiterated in **Rodriguez**. These are cases about detention.
10 They're about detention in the immigration context. But what
11 the statement is is that it is normal. That's the word they
12 use. It is the normal burden of proof when -- whenever
13 interests more than mere money are involved. And they're
14 citing not just to immigration cases but also to, for example,
15 **Cooper v. Oklahoma**, which is a Supreme Court case about
16 competency to stand trial.
17 This is also the standard of proof in parental
18 terminations and in a number of other contexts. It's the
19 standard -- I know, you're -- you're not going to be
20 exceedingly persuaded by this. But it's the standard in civil
21 commitments. It is the standard in deportation cases. It is
22 the standard in denaturalization cases.
23 THE COURT: Well, I totally understand that's the
24 standard there.
25 I -- if I civilly commit an individual, I have

1 removed that person from his or her home, put them in a
2 facility, required that they take medication, potentially.
3 That's much different than saying they can't get on an airport.
4 So what -- what is the reasoning that leads to your
5 argument that there must be not just evidence that something is
6 more probably true than not but clear and convincing evidence?
7 Evidence that makes the truth of the assertion highly probable.
8 That's just shy of proof beyond any reasonable doubt.
9 MR. ARULANANTHAN: Well, your Honor, I think more
10 probably -- excuse me, probable cause means it could actually
11 be more likely that the person is not a threat --
12 THE COURT: Probable cause is enough to authorize a
13 law enforcement officer to break down the door of my home and
14 search my most private possessions. Probable cause is enough
15 to take a citizen off the street and put them into custody.
16 MR. ARULANANTHAN: Yes, your Honor.
17 THE COURT: That is no small standard.
18 MR. ARULANANTHAN: Absolutely, your Honor. But those
19 are extremely temporally bound. And so that arrest --
20 THE COURT: So is an air flight. You know. It's you
21 don't get on a flight, then you engage in a process, and
22 hopefully --
23 MR. ARULANANTHAN: But you're unable to fly for the
24 rest of -- or indefinitely. Right? There is no --
25 THE COURT: You are unable to fly until the

1 constitutional process either rectifies an erroneous listing or
2 you're unable to fly indefinitely.
3 MR. ARULANANTHAN: Yes, your Honor. So that --
4 that -- I want to be clear here that all of the arguments that
5 we have made in our brief are on the assumption that the sum
6 total of process that we are saying -- that was to be provided
7 and that we said was inadequate is the process provided in the
8 administrative standing, with the only exception that there has
9 to be judicial review on a, you know -- a standard of -- you
10 know, some review standard, but not on the assumption that
11 there's new facts. And so that the hearing is actually like
12 split in half; where half the facts are done in the
13 administrative, and half is here.
14 We have always --
15 THE COURT: The burden of proof you're talking about
16 now is the burden to sustain the placement on the No Fly List
17 as part of the procedural D.H.S. --
18 MR. ARULANANTHAN: Exactly, your Honor.
19 THE COURT: -- review after a challenge?
20 MR. ARULANANTHAN: Exactly, your Honor.
21 So, for example, if there were hearings held here,
22 which is what we think should happen, you know, because of our
23 right to a hearing claim -- and let me -- let me step back,
24 actually.
25 The Constitution does not require that the

1 fact-finder here be a judicial one. All right. So you could
2 have an administrative hearing --
3 THE COURT: So do you want to have a remand? I keep
4 asking the question, in light of --
5 MR. ARULANANTHAN: But -- no. My answer is the same
6 as my colleagues, your Honor, which is it has been five years.
7 So, you know, even though as a general matter -- you know,
8 we're interested in our six clients. Right? As a general
9 matter, you know, we -- briefing questions of law, does the
10 Constitution require a judicial -- a hearing before your Honor?
11 No. You could satisfy the Constitution's commands with a
12 hearing before a neutral administrative decision maker.
13 In this case, where there's been five years of
14 deprivation, you know, far longer than on any probable cause,
15 or anything like that, now what -- what does -- you know, your
16 Honor has the power to remedy the due process violation, which
17 has happened. And what, you know, is one way of remedying
18 that?
19 And we believe the appropriate way -- given the need
20 for exigency because of how long it's been -- to have your
21 Honor hold the hearing, yes, absolutely. Your Honor can hold
22 the hearing. That is what we want.
23 Because we think that if you send back again -- you
24 just write an order and send back again, then we'll be back
25 here in another some months or -- you know, this was 18 months,

1 or something. You know, arguing about whether the revised --
2 you know, second revised process satisfies due process.
3 Whereas your Honor could hold the hearings. And then
4 the arguments that we're making here then go to the standard of
5 proof that your Honor would apply in an evidentiary hearing in
6 order to provide the due process needed to allow someone to
7 challenge the No Fly List.
8 And so the clear and convincing argument that we're
9 making and the reason why we're saying probable cause is
10 insufficient is because that would be the standard that whoever
11 the ultimate fact-finder is, that fact-finder, that person,
12 they should be applying a heightened standard.
13 And the problem with that person, whether it be a
14 judicial officer or an administrative officer, the problem with
15 that person providing a probable cause standard, your Honor, is
16 just that -- you know, that does mean that it can be more
17 likely than not that the person is not a threat. We're just
18 talking about --
19 THE COURT: The statute speaks in terms of the word
20 "may." Not "is," not "is more probably true than," but "may."
21 Which is, in linguistic terms, a pretty low threshold.
22 MR. ARULANANTHAN: It is, your Honor. But that --
23 we -- respectfully, your Honor, their reference to that statute
24 is really apples and oranges. That's the imposition on the
25 airline as to what they have to do when a person who is

1 properly listed is walking through the airport. And when a
2 person -- when they think that a person is not allowed to fly,
3 then if they -- as long as they think the person may be, you
4 know, not allowed to fly -- so the analogy there is if there's
5 a name mistake -- you know, I show up at the airport and
6 there's a list and they haven't spelled my name right -- you
7 know, no one ever spells my name right, your Honor. You know,
8 and that then should be a low standard. Because if I might be
9 the person on the list and I'm properly listed, then as long as
10 I may be the person on the list, don't put me on the plane. It
11 completely is absolutely irrelevant to the question whether
12 that is the standard when you're actually going through a
13 redress challenge.
14 And then the second point I would make, your Honor --
15 THE COURT: So you -- you say the redress challenge
16 must, in order to comport with procedural due process, carry
17 this high standard of proof, clear and convincing evidence;
18 that which highly probably is true?
19 MR. ARULANANTHAN: Yes, your Honor. That's our
20 position.
21 And the other thing, if your Honor is -- you don't
22 sound especially persuaded by that. I would just say there's a
23 long gap between clear and convincing and probable cause. In
24 the civil cases -- regular civil cases standard is
25 preponderance of the evidence. Even that at least means it's

1 more likely than not that the criteria are met.

2 THE COURT: Preponderance of the evidence is pretty

3 close to probable cause. Probable cause is a fair probability

4 that something is true. That a crime was committed, that the

5 person to be charged is the one.

6 Preponderance of the evidence, what's more probably

7 true than not. To me, those sound pretty much alike.

8 Are you really saying there -- that somehow

9 preponderance of the evidence is more or less than probable

10 cause?

11 MR. ARULANANTHAN: I only mean it in the technical

12 legal sense, when if you look at the cases -- like **Addington**

13 talks about burdens of proof and they draw them on a continuum.

14 That's how they draw them, your Honor. And I have to say,

15 unlike in the right to --

16 THE COURT: But in terms of burdens of proof, when

17 one speaks of reasonable suspicion, one doesn't speak in terms

18 of litigation burdens; when an officer is authorized to stop

19 and inquire when there is reasonable suspicion that there is

20 criminal activity afoot. And the courts have stayed away from

21 clear and convincing evidence and --

22 MR. ARULANANTHAN: Absolutely, your Honor. And I'm

23 not aware of probable cause being used in a hearing context of

24 any kind. It seems like that's, you know, grand jury. But

25 it's entirely ex parte. And as you said, your Honor, you know,

1 when -- if a court does a -- a probable cause hearing, a
2 **Gerstein** hearing, you know, again it's -- it's only for
3 purposes of that person's deprivation of liberty to be held
4 over for trial. So -- but the other thing I would say on this
5 subject, your Honor --
6 THE COURT: So before you leave that, then, are you
7 saying that if it's not clear and convincing evidence, if
8 there's not authority that constitutionally compels that,
9 reasonable suspicion is still too minimal a standard? And, at
10 a minimum, should be preponderance of the evidence, what is
11 more probably true than not, drawing all reasonable inferences.
12 MR. ARULANANTHAN: Yes, your Honor. Reasonable
13 suspicion, both as a legal and as a factual matter, in light of
14 what your Honor had -- had, you know, held -- had held earlier
15 is -- is -- is an extremely -- is a far too low a standard.
16 And the other thing I would say, your Honor, on this
17 subject is -- remember the listing -- the prior -- the June
18 2014 order says this as well. The listing can be indefinite.
19 They are not -- they have never said, Oh, we have
20 a -- an actual -- we're going to go through the process, you
21 know, periodically like you do in civil commitments, and things
22 like that. And there's no reason to believe they will change
23 their mind. So it is a process that is going to be an
24 indefinite and potentially permanent deprivation of liberty.
25 And, again, I'm not aware of -- of a standard as low

1 as probable cause, let alone reasonable suspicion, as being
2 used for a long-term deprivation of liberty. Those are cut off
3 by the trial -- you know, the -- the trial process.
4 THE COURT: So just for me to clarify, the burden of
5 proof standard you're focusing on now applies to the review of
6 the initial placement, the D.H.S. redress process?
7 MR. ARULANANTHAN: Yes, your Honor.
8 THE COURT: You're saying when a person seeks
9 redress, they should be maintained on the list only if there is
10 clear and convincing evidence that --
11 MR. ARULANANTHAN: Exactly, your Honor.
12 THE COURT: -- they may be a terrorist?
13 MR. ARULANANTHAN: Well, the -- the -- that -- what
14 comes after the "that," we have bracketed repeatedly because
15 we've bracketed the substantive due process question. We
16 haven't moved on Count 2 for summary judgment, and we haven't
17 litigated it. So once you go to complete that sentence, we
18 don't know yet.
19 But the burden of proof, where we're talking about,
20 yes, your Honor, is with the D.H.S. redress --
21 THE COURT: All right. Go on with your next point,
22 please.
23 MR. ARULANANTHAN: I think perhaps I should let our
24 friends speak on the burden of proof, unless --
25 THE COURT: They are friends.

1 Go ahead, yes. Burden of proof, Counsel.
2 MR. BOWEN: I want to go back to the statute.
3 I think counsel is effectively committing linguistic
4 mayhem on the statute. The mandate --
5 THE COURT: I just said you were his friend.
6 (Laughter.)
7 MR. BOWEN: That's fair enough. I will say he is
8 twisting the statute.
9 THE COURT: Go ahead.
10 (Laughter.)
11 MR. BOWEN: The mandate is for air carriers to check
12 their lists of passengers against the Government's list of
13 individuals who may be a threat to national security. It is
14 not for the air carrier to make a national security assessment
15 based on the person sitting in front of them, or the likelihood
16 that they may or may not be the particular individual. That is
17 not their call. And it is clear in the statute that the
18 determination about who may pose a threat does not fall to an
19 air carrier. It falls to the Government. So I think that's
20 clearly wrong.
21 Second, again, we have counsel telling the Court to
22 analogize to judicial determinations that are set up in a --
23 either a judicial review phase or -- or a -- a judicial proof
24 phase to -- to deprive somebody of significant liberties. Much
25 more significant than the ones we area talking about here. Or

1 quasi-judicial creatures of statute like the deportation
2 context. This is a different kind of an assessment, and it's a
3 different kind of process.
4 But let's also talk about what the law actually says
5 about burdens of proof in the administrative process.
6 I'll direct the Court right back to **Al-Haramain**,
7 which tells also -- it speaks to the -- the level of judicial
8 review, the standard of proof for judicial review, which is
9 effectively -- which is effectively an arbitrary and capricious
10 standard of review for the APA, and the review for evidence is
11 a substantial evidence standard.
12 I would also point out that in the APA itself, when
13 there is a hearing -- and we don't think a hearing is required
14 or should be required here -- that the standard of proof for
15 the officer in the administrative context is substantial
16 evidence. Not clear and convincing, not preponderance.
17 Substantial evidence.
18 THE COURT: And what does that mean?
19 MR. BOWEN: It means that when assessing facts, that
20 there should be substantial evidence; which is a relatively low
21 threshold to determine whether or not the facts are true or
22 not. Either way, I think it rebounds back to the original
23 question.
24 The mandate is to determine to the satisfaction of
25 the Government that the person named was a threat. I don't

1 think you can elevate the standard at the internal
2 administrative judicial review phase to require us to twist --
3 not torture -- that same standard; to elevate it; to make us
4 prove to a higher degree of certainty than what the standard is
5 supposed to be.
6 If the person, at the beginning, is determined to
7 make that -- to -- may pose a threat to the national security,
8 that same standard should apply at the administrative review
9 phase because we are -- that is the person who should be kept
10 off of an airplane. That should -- the standard should apply
11 throughout.
12 The burden of proof at the judicial phase is a
13 different thing entirely. But we submit that those burdens
14 would depend on the claims brought. That they too would be
15 fairly deferential, and they certainly -- I don't think --
16 would come to the point of clear and convincing evidence that
17 the person is a threat.
18 I would point the court to the Court's own
19 determination in the **Tarhuni** matter, when the Court talked
20 about that there is some level of scrutiny of international
21 travel claims, a substantive due process in international
22 travel claims. But that is a little bit undetermined, and it
23 is not clear how much deference or how that is lowered in the
24 context of the Court's obligation to defer to the Government's
25 national security determinations. Which is yet again another

1 piece of this that hasn't really come into play.
2 So there is the may question that's -- that's in the
3 statute and I think is clear, but there's also the -- the
4 importance to defer to the experts within the Government.
5 And -- and in our context, that means coming to a settled
6 determination based on the statutory standard, which should not
7 be altered artificially in the administrative process.
8 MR. ARULANANTHAN: Just a couple of things on that,
9 and then I could go to vagueness. Or we could take a break, if
10 you would want --
11 THE COURT: No, I would rather be vague before a
12 break.
13 MR. ARULANANTHAN: Okay. No problem.
14 I thought we had cleared this up, and now it seems
15 like -- confusing a little bit.
16 Substantial evidence is the standard after you have
17 an administrative process that complies with procedural due
18 process requirements.
19 And so if that's all your Honor is going to be doing,
20 then the clear and convincing evidence standard has to be
21 imposed at the administrative level.
22 If instead what your Honor is doing is providing the
23 procedural due process in question, then you're not doing
24 substantial evidence review. You are conducting the
25 fact-finding hearing and your Honor has to provide -- has --

1 has to apply to the clear and convincing standard.
2 And then just a couple of other things. We're not
3 talking about judicial -- you know, obviously deportation is
4 not judicial. And some of the other examples I gave also --
5 the detentions are in the administrative context. And it's not
6 a creature of statute either. The Constitution requires --
7 under **Woodby v. INS**, the Constitution requires it. And the
8 same with all of the other things I said about a right to a
9 hearing. It's not -- it's now a creature of statute but I
10 think as the --
11 THE COURT: Well, you know, let me just say, I can
12 only listen so fast. You really are, both of you, talking very
13 quickly. It would help a lot if you would slow down.
14 MR. ARULANANTHAN: Okay. I will try in that --
15 THE COURT: Let's not try. Just slow down.
16 MR. ARULANANTHAN: Yes, your Honor.
17 And the -- at the deportation, the requirement is a
18 product of the due process clause, which was then implemented
19 by statute.
20 And then the last thing I'll say on burden of proof,
21 your Honor, is just that, you know, Congress's judgment doesn't
22 change the fact that burdens of proof are ultimately decisions
23 for courts to make. Because it is courts that allocate the
24 risk of error. And particularly that's true when it is a due
25 process issue. But as a general matter, you know, all of the

1 cases we're talking about are judicial decisions, determining
2 how to allocate the risk of error in any given proceeding.
3 MR. BOWEN: Your Honor, could I make one point before
4 we move on?
5 THE COURT: Yes.
6 MR. BOWEN: I just want to point the court to **Vance**
7 **v. Terrazas**, which is 444 US 252, where the Supreme Court
8 expressly said that the clear and convincing standard in the
9 immigration context is not a constitutional basis.
10 THE COURT: Go on, Counsel.
11 MR. ARULANANTHAN: Your Honor, I would now like to
12 turn to vagueness.
13 And the criteria that we are interested in discussing
14 is in the Handeyside declaration, which is Docket 2081. And
15 it's page 51 of that -- it's in the exhibits of that
16 declaration.
17 And Ms. Shamsi is telling me that it's also -- oh,
18 right, of course. It's in the -- in the combined joint
19 statement of facts at Docket 173, in paragraph 5. And the --
20 the constraint here is also grounded in one -- in
21 considerations of notice.
22 And the Supreme Court has said very clearly, and the
23 question really is, what conduct would a person of -- you know,
24 a reasonable ordinary person know? If they avoid that conduct,
25 then they can avoid the deprivation of liberty at issue.

1 So here, really, the question is if somebody wanted
2 to avoid being placed on the No Fly List, what are the things
3 that they should know? If I just don't do these things, I can
4 avoid being at a -- placed on the list.
5 And the Government says, essentially, well, don't
6 pose a threat to commit an act of violent terrorism. But, you
7 know, as we said in the briefing, there's not even probable
8 cause -- at least the Government hasn't argued that, that
9 there's even probable cause that any plaintiff has committed or
10 is about to commit an act of violent terrorism. And that's not
11 what their fact-finders found. So obviously just that fact
12 alone is not good enough. That's not going to save you from
13 being put on the list.
14 And then the other thing the Government says is,
15 Well, even if we don't know like the outer margins of the
16 conduct that could cause you to be placed on the list, it's not
17 vague as applied, you know, because these people are clearly --
18 you know, belong on the list. And that argument -- you know,
19 we obviously disagree on the facts, which maybe we'll get into
20 at some point later. But the Supreme Court foreclosed that in
21 **Johnson.**
22 And the Supreme Court said, if we hold the statute to
23 be vague, it is vague in all of its applications. And the
24 example that they gave is actually the unreasonable rates case.
25 It's a case that -- **Cohen Grocery**, where the Court said a

1 statute that barred companies from charging unreasonable rates
2 was vague. And what Justice Scalia said was, Well, probably
3 there are some rates which are obviously unreasonable if
4 they're extremely, extremely high. But that didn't say the
5 statute because there's many rates where you can't tell whether
6 it's reasonable or not, and therefore the entire statute has to
7 go because it's void for vagueness.
8 And then the other argument that the Government made
9 was that the word "threat" in the criteria is just like the
10 words "substantial risk," in 18 USC 16(b), which is the crime
11 of violence definition in the federal criminal code.
12 And then, you know, shortly after -- I think it was
13 the day that they made that argument, you know, the Ninth
14 Circuit struck that down under **Johnson** in **Dimaya**.
15 And so, you know, our -- our basic approach here is
16 that it's not clear either what a threat is -- like what is it
17 that you -- you know, is there a set of elements, or anything,
18 that makes something a threat? Something that you do?
19 Something that you are?
20 And then, second, how much of a threat do you have to
21 be to end up being on the No Fly List?
22 And then the -- well, I guess if -- if you indulge
23 me, I'll want to delve a little bit into the actual language of
24 the criteria themselves, your Honor.
25 The first one, 4.5.1, that's -- it goes to the threat

1 of committing an international -- an act of international
2 terrorism with respect to aircraft. And that actually is not
3 alleged as to any of the six plaintiffs who are in the case
4 now. So if you read their letters, they don't cite that one as
5 the triggering provision for any of the six. Instead, they
6 cite the -- the ones below that, which are not about aviation
7 security.
8 So I'll skip that one for now, except with the caveat
9 that this isn't relevant to the due process -- the substantive
10 due process question that we have kicked down the road. You
11 know, that is whether if you're not putting them on the list
12 because they're a threat to aviation security, whether there's
13 a due process problem with that and whether in light of that
14 you should allow them to do what they did at the time we filed
15 the preliminary injunction motion and, you know, let the people
16 apply subjects to safeguards.
17 And so then the next three, a threat of committing an
18 act of domestic terrorism and also a threat of committing an
19 act of international terrorism, the next one, as to U.S.
20 embassies and missions abroad, those both rely on a definition
21 which is in the criminal code. And at first blush it might
22 make you think it's a criminal statute, but it is not. You
23 know, it's 18 USC 23311, that provision.
24 And that provision describes -- it gives definitions
25 of terrorism that are not for use in any criminal statute.

1 But, instead, as I understand it, they're for use for like how
2 the F.B.I.'s jurisdiction is, to when they can investigate
3 certain kinds of conduct.
4 And those statutes say -- they basically say -- they
5 define violent or dangerous crimes that, quote/unquote, appear
6 to be intended. That's what it is. It's -- it's violent or
7 dangerous crimes -- I'm paraphrasing -- that appear to be
8 intended. That, I'm not paraphrasing. Appear to be intended
9 to intimate or coerce people or influence government policy by
10 coercion. And, you know, other very bad things.
11 And this too, your Honor, it has the same abstraction
12 problem that we see in all of these vagueness cases. You know,
13 it's just like, you know, doing -- congregating outside in a
14 way that annoys passersby. You know, that's **Grayned.** Or
15 having an ID which is credible and reliable to a police
16 officer. That's **Kolender v. Lawson.** And, here, appear to be
17 intended. That's in the eyes, I presume, of the F.B.I. or some
18 law enforcement officer that's going to then put you on the
19 list. And how can a person know what will be -- appear to be
20 intended or not?
21 You know, a lot of our clients are engaging in First
22 Amendment activity. You know, Mr. Kariye -- again, I know his
23 case passed -- he's the imam of a mosque here. And he gives
24 sermons. And some of the things -- he talks -- you know, he
25 has talked to people. And some of the conduct which the

1 Government alleges what led him, you know, to be put on the
2 list is statements that he made describing his views about
3 jihad. And we disagree about their claims about the content of
4 that. But, either way, it's obviously a discussion about, you
5 know, a religious-based topic. Where some of the other
6 clients, it's things they said on the Internet.
7 So it's basically touching on First Amendment
8 activity where heightened standards apply in the vagueness
9 context. And we still don't know, like, what is it that makes
10 somebody a threat and what is it that makes somebody appear to
11 be intended -- you know, to do something which appears to be
12 intended to intimate or coerce, or things like that?
13 So that's really the vagueness argument, at least for
14 now, your Honor.
15 THE COURT: Thank you.
16 To that? Yes, Counsel.
17 MS. POWELL: I'm going to address the vagueness
18 argument.
19 Plaintiffs prefer to challenge the criteria, and I
20 think necessarily the statute. Not because they -- they find
21 the actual terms of it vague, in terms of what constitutes
22 terrorism or even a threat, but because they think the
23 predictive task set out by Congress is somehow vague. That
24 there's no reasonable way to determine what poses a threat.
25 I think, as this Court already held in **Fikre**, the

1 vagueness doctrine does not invalidate the No Fly List
2 criteria.
3 The -- the Grigg declaration provides some additional
4 context for what we do when looking for what poses a threat and
5 how we determine what is a reasonable suspicion. The
6 Government looks for articulable intelligence about the nature
7 of the threat and the targets. Or in the absence of
8 information about particular plots, it looks for the
9 articulable intelligence that the person is also operationally
10 capable of carrying out an attack.
11 Other predictive and risk-based standards have
12 survived vagueness challenges, like the predictive standard at
13 issue in **Schall versus Martin.** It's a pretrial detention case.
14 I don't think the recent Supreme Court decision in
15 **Johnson** changes that in any way. If anything, it reinforces
16 the Government's position.
17 In **Johnson**, the court reaffirmed that risk-based
18 assessments are not generally vague when they're tied to real
19 world conduct, when one is looking at conduct and trying to
20 determine if it poses a risk of future threat. It held that
21 the statute there was vague because it was tied to an analysis
22 of a hypothetical ordinary crime and whether that ordinary
23 crime of burglary or arson posed a serious risk.
24 And it held that even though that couldn't be done,
25 it specifically rejected the argument that this would

1 invalidate other types of risk-based statutes and analyses
2 because other types of risk-based statutes and analyses are
3 tied to analysis of real-world conduct. That's exactly what we
4 have here.
5 An independent reason, I think, that the vagueness
6 doctrine cannot invalidate the No Fly List criteria or the
7 statute here is that the fly list criteria simply do not
8 regulatory conduct. The vagueness doctrine, by its terms, is
9 black letter law; applies to laws that prohibit or require
10 particular conduct.
11 The No Fly List criteria simply don't. It tries to
12 prevent conduct, conduct which is itself clearly defined.
13 Thus, plaintiffs don't take issue with the vagueness criteria
14 in any way. They take issue with the means the Government uses
15 to assess threats. That's fundamentally not a vagueness or a
16 procedural due process argument at all. That is fundamentally
17 what the Government does in the national security arena. It
18 tries to assess the threats to national security and to prevent
19 the worst outcomes.
20 With respect to the -- the facial vagueness
21 challenge, it's true that the Supreme Court upheld what appears
22 to be a facial vagueness challenge in **Johnson**, saying that the
23 vague statute is always vague.
24 **Johnson** does not purport to disturb the general
25 longstanding many-time-cited Supreme Court rule that a

1 plaintiff cannot challenge a statute or provision that's going
2 for vagueness if the plaintiff's own conduct is clearly
3 proscribed by that statute.
4 In this instance we think that, even on the current
5 public record, at least some of the plaintiffs' conduct clearly
6 falls within that category.
7 With respect to information that's not covered by the
8 protective order, for example, Mr. Kariye's conduct clearly
9 poses a threat of future terrorist activity because he has in
10 fact engaged in terrorist activity by conspiring to support the
11 Portland Seven's terrorist acts to attack Americans abroad.
12 One -- two further notes on -- one is as -- as -- as
13 the parties have stipulated to the content of the criteria --
14 that's in the parties' joint stipulation. There's certainly no
15 need for the parties or the Court with respect to the criteria
16 to rely on unauthenticated documents that the plaintiffs claim
17 are illegally leaked Government documents.
18 And, finally, I think, as a broader matter -- I
19 realize the Court is looking at these specific individuals.
20 But as a broader matter, I think the ruling that they're
21 looking for, that the Government can't determine what's a
22 threat, could potentially endanger all sorts of other
23 threat-based activities the Government engages in.
24 If we can't prevent access to a civilian aircraft
25 that can be used as a weapon of mass destruction, can we also

1 predict who such a threat can be can have their security
2 clearance revoked or denied employment or denied access to
3 weapons or any of a host other ways in which the national
4 security community engages threats?
5 I think that's what I have on vagueness.
6 THE COURT: Thank you.
7 Yes, Counsel.
8 MR. ARULANANTHAN: Just a few things, your Honor.
9 I -- I think the statement that the vagueness --
10 that -- that the list doesn't regulate conduct, when put in the
11 context of this doctrine, really make it seem as though, you
12 know -- I don't understand how, you know, it can possibly be
13 constitutional. Because if you believe that people are
14 entitled to know what conduct they can engage in to avoid being
15 on the list, then if there's no conduct that -- in particular
16 that is at issue because it's not based on that, it -- it's not
17 a conduct-driven thing, then it's impossible to know. And that
18 would make it actually, I think, more vague than any of the
19 provisions that we have set around constitutionally vague.
20 And, you know, unless your Honor is going to accept
21 our argument that the No Fly List is exempt from the vagueness
22 doctrine, despite the fact that it is a significant deprivation
23 of liberty, then I'm not sure how it could possibly survive
24 as -- as it is currently formulated by -- by the Government.
25 Just a couple of other things I want to briefly

1 mention.
2 This is not tied to our claim about the experts.
3 THE COURT: Right.
4 MR. ARULANANTHAN: Right. So our challenge is to the
5 word "threat." And then it's a challenge, obviously, to the
6 statutory references; which include that, you know, that
7 language appears to be intended. And that's what our challenge
8 is to.
9 My friend relies on the word "operationally capable."
10 I want to note that's only in the fourth criteria. It's not in
11 the second and the third. And so, for example, not in the one
12 that applies to Mr. Kariye. And that itself is quite
13 troubling. Because operationally capable, to me, means you're
14 actually capable of committing the act. Which, if that's not
15 included in the other two, then that means that you can be a
16 threat even if you're not actually capable of committing the
17 act.
18 And, you know, I don't mean to sort of be
19 tongue-in-cheek about it. I honestly don't know if it's only
20 in the -- if it's a normal statute, and you're applying normal
21 rules of statutory construction. If a provision is -- a
22 particular element is in one and not in the other, then you
23 assume that it's, you know, not meant to be included in the
24 other. And if you can be a threat to commit an act without
25 actually being operationally capable of doing it, well, then,

1 like -- you know, then what -- what is a reach then? It
2 reaches people who aren't even capable of committing acts.
3 And, you know, I thought it was interesting. In her
4 account here, she says, Mr. Kariye is -- has engaged in a
5 conspiracy with the Portland Seven. If you just had the word
6 "conspiracy," instead of "threat," at least then we would have
7 a body of law that we could apply and say, okay, you know, you
8 can be on notice: If you're engaged in conspiracy to commit
9 any of these acts, then you're on the list.
10 But threat isn't the same as conspiracy. And that's
11 not what they have charged and not what the fact-finder had to
12 find in order to put these people on the list.
13 So I think -- let me see if there's anything else I
14 wanted to tell your Honor.
15 Yeah, I think only -- only that vagueness -- she
16 suggested it's -- the facial standard doctrine is still there,
17 and it's not. You know, after **Johnson**, vagueness is like
18 overbreadth. You don't have to -- you can challenge it even
19 when you're not in the -- even if you're in the heartland of
20 the -- of the conduct. There is no such thing. A vague
21 statute is vague in all of its applications.
22 I think -- is there anything else?
23 (Pause, conferring.)
24 MR. ARULANANTHAN: Oh, yes, your Honor.
25 This point that risk-based -- there's lots of other

1 risk-based assessments that the Government makes. And that the
2 problem with **Johnson** is that it's hypothesizing to an abstract
3 concept of crime.
4 We think that's very analogous to two things here.
5 The threat, nobody knows what a threat is. So you have to --
6 have to hypothesize. It's not just how much threat. That's
7 like how much risk. But also, like, what is a threat even at
8 all? That's one -- one analogue to the -- what in **Johnson** they
9 call the abstraction of the crime.
10 And then the other one is this idea of -- of
11 appearing to be intended. You know, you have to commit an act
12 that appears to be intended to intimidate or coerce. And that
13 is, as I said earlier, like annoying passersby or being
14 reliable and credible to a police officer. Courts have struck
15 those down, where the -- the conduct that you have to avoid is
16 actually defined by some other entity. You know, it's not what
17 you think is annoying or what you think is reliable and
18 credible. It's what some other person is going to think. And
19 you don't know what they're going to think.
20 And so, in that way, it's very different from, say,
21 dangerousness determinations in, for example, pretrial. We
22 know there's hundreds of years of, you know, experience and
23 doctrine about this. Right?
24 But dangerous is you have a criminal history. Or in
25 the acts that you're being charged with, you did violent

1 things. And, you know, there -- there's a body of doctrine
2 there that judges can rely on. In contrast, this threat to
3 commit an act of national security, it's entirely ungrounded.
4 THE COURT: Do you want to respond to that, Counsel,
5 before our afternoon recess?
6 MS. POWELL: Two very quick points. I -- I think we
7 have just about finished with that.
8 With respect to the point that the No Fly List
9 criteria don't regulate conduct, I think he may be overreading
10 what I said. It's not that it's unrelated to conduct. It's
11 that the conduct is evidence of whether or not the criteria
12 isn't met. It does not itself prohibit or require conduct.
13 That doesn't mean it doesn't analyze conduct.
14 In terms of what the Supreme Court said in **Johnson**,
15 it analyzes the real-world conduct of people like the
16 plaintiffs to determine whether or not they meet the
17 threat-based criteria.
18 Second, just sort of an aside, I -- I hope this would
19 be apparent with respect to the operationally capable criteria.
20 The No Fly List criteria provide those specific things about
21 which the Government must have articulable intelligence before
22 they can place someone on the list.
23 With respect to the first three, they have to have
24 information about specific targets. In the absence of a
25 specific target, they have to have information that the person,

1 in addition to posing the threat generally, is operationally
2 capable.
3 That does not mean that if we have specific
4 information that a person is not operationally capable because
5 they're homebound and can't actually plant the bomb, that --
6 that we have heard about -- that doesn't mean that that would
7 be irrelevant, and they could still be placed on the No Fly
8 List under one of the other criteria. Because then they would
9 not pose a threat if we had specific information that they
10 weren't operationally capable. You nonetheless have to have
11 information that they are specifically operationally capable in
12 order to list them under the fourth criteria; if that makes
13 sense.
14 THE COURT: What is a threat?
15 MS. POWELL: Hmm?
16 THE COURT: What is a threat?
17 Counsel says that "a threat," the term, is so vague
18 as to make this entire process unconstitutional.
19 MS. POWELL: A threat is a specific risk
20 assessment -- that Grigg talks about -- in which we determine
21 whether this is an articulable -- articulable reasonable
22 intelligence about the targets of the -- of -- of the terrorist
23 activities. Or in the absence of targets, about the fact they
24 are operationally capable.
25 THE COURT: All right. Anything else on vagueness

1 that you want to emphasize before we take a recess and then
2 switch to another topic?
3 All right. 15 minutes, please.
4 Oh, I'm sorry. Yes, Counsel.
5 MR. ARULANANTHAN: Mr. Genego, who represents
6 Mr. Persaud, I think will have to leave -- unless your Honor
7 wants him to stay -- between now and when we would start again.
8 Actually, do you want to just --
9 MR. GENEGO: Right. I have a flight at 5:20. I
10 don't know if they're going to discuss Mr. Persaud. I think --
11 I believe, as the Court suggested before, that the individuals
12 are really a subset of the greater argument here. And I don't
13 know that anything is going to be advanced that would allow the
14 Court to distinguish between them.
15 That said, I'm happy to stay here and argue in
16 response to anything the Government might have to say about
17 Mr. Persaud. But --
18 THE COURT: Well, let's find out -- why don't -- why
19 don't you and counsel speak in the first part of this recess.
20 If there's something that's going to come up about
21 your client, we'll deal with it first after the recess, and
22 then you'll be free to go if you wish.
23 MR. GENEGO: Thank you so much.
24 THE COURT: Does that work?
25 MR. GENEGO: That's great.

1 THE COURT: All right. 15 minutes, unless we need to
2 convene earlier because of a flight.
3 MR. WILKER: Thank you, your Honor.
4 (Recess taken.)
5 THE COURT: Thank you, everyone. Please be seated.
6 Well.
7 MS. POWELL: So I have a plan for how I would like to
8 approach the individuals.
9 THE COURT: Yes.
10 MS. POWELL: That plan is I would like to present to
11 the Court three, or possibly four -- depending on -- on how
12 we're doing on time with the individuals -- as sort of
13 illustrious -- illustrative examples of how the due process
14 standards are met in this process generally and why the Court
15 can grant our motions for summary judgment.
16 Mr. Persaud was not one of those examples. I
17 understand his attorney wants to make a brief statement. I
18 will respond, if I have anything to add outside of my general
19 overview.
20 THE COURT: Thank you. That works.
21 Counsel, good afternoon.
22 MR. GENEGO: Good afternoon, your Honor. Thank you.
23 As I started to say before, I think the Court is
24 correct that the individual plaintiffs are a subset of the
25 larger case. And so, to a certain extent, whether there's any

1 basis to distinguish between them individually is a -- is a
2 question that I don't think needs to be answered now.
3 I do think, however, that Mr. Persaud's case does
4 help illustrate, in sort of a concrete way, why it is that the
5 Government's process is deficient and why we need more. And so
6 that's what I wanted to just spend a couple of minutes talking
7 about because I think it does sort of put it in a concrete
8 context.
9 And my understanding is that the process that we're
10 talking about here is the -- sort of the pre-trip notification
11 process at which there would be some record created that would
12 later be subject to review. So this is the place where we're
13 making the record, and the question is what process and
14 procedural texts my client is entitled to at that stage.
15 If you look at the submissions from Mr. Persaud --
16 and I'll make reference to them in terms of the docket numbers
17 and the information that's been subject to the protective
18 order.
19 It's our motion, Docket No. 287. It's on page 5.
20 And the Government's response -- or where it discusses the same
21 information is Docket No. 244, and it's pages 8 and 9 and
22 beyond.
23 THE COURT: Thank you.
24 MR. GENEGO: But essentially, your Honor -- and it's
25 in other various places. And I think it's in 180, which was

1 the original submission, where unredacted Exhibit B is the
2 notification letter two -- I think it's 180, Exhibit B. And
3 that's where we got the notification letter.
4 In essence, it's one reason. I mean, it's one event.
5 There's certain different facts in there, but it has
6 to do with one event. And that event was back in 2007. So
7 we're dealing with stale information to start with, but that's
8 just one reason.
9 If that's what we get at the stage where we have the
10 process, whatever it is, and we make the record and have an
11 opportunity to address everything, if we go through that
12 process -- and this has to do with whether they have to give
13 all of the reasons. All right?
14 They've given us that one unclassified, nonprivileged
15 reason so far. And apparently that's all -- from what I
16 understand from the arguments, that's the only unclassified,
17 nonprivileged reason they have.
18 And if we were to decimate that -- let's say -- in
19 the hearing context, then we move through the review process.
20 And my understanding is that they then get to say, oh, we have
21 other reasons.
22 THE COURT: Right.
23 MR. GENEGO: And that's like heads I win, tails you
24 lose. Because what's the point of having the first process
25 then? Because they can always pull something out.

1 Now, it may be that the first process -- and I think
2 the Court was suggesting this before. If there is information
3 that they don't think that they can turn over, they should at
4 least create a record for whoever that decision maker is, where
5 they get to have some opportunity to have an independent,
6 neutral decision maker review what they think they're
7 withholding. Because if there is information in there that
8 doesn't need to be withheld, that can be addressed in the
9 hearing process where we make the record.
10 So my first point is that I think that it does
11 illustrate why we need all of the reasons. Or at least there
12 has to be a record made about why we're not getting all of the
13 reasons.
14 The second point is that one of the things we asked
15 for is the evidence they rely on. And one of the items in
16 particular we asked for is -- or that I asked for, for
17 Mr. Persaud -- and I think it's for the plaintiffs generally --
18 is their statements.
19 Mr. Persaud was interviewed 12 times. Much to his
20 credit, he voluntarily submitted himself to be interviewed for
21 12 times. Not surprisingly there are inconsistencies. I mean,
22 if someone asked me about something three times, there's
23 probably going to be some inconsistencies. He's been
24 interviewed 12 times. He doesn't remember everything that he
25 said. Why can't he have his statements?

1 We should at least be able to get those statements.
2 And then they hold it against him that he hasn't responded to
3 it.
4 Quite frankly, as his lawyer, I wanted to know what
5 he said before, before I had him talk about something for a
6 13th time. What happened on the 12th time is he said he wanted
7 a lawyer. And so at that point he got a lawyer, and they
8 stopped interviewing him.
9 But -- but at least at that stage, where you're
10 having the hearing and making the record, we should and he
11 should be able to have his lawyer have his prior statements.
12 There is no interest in not giving him what he said before.
13 And certainly it's not fair to then say to him, well, you
14 didn't respond any more than you did, other than to say you're
15 not a threat.
16 Well, I don't want to put him in a position where,
17 not knowing what he might have said before because he can't
18 remember, they're now going to use that against him as another
19 reason. And, in fact, that's what they sort of did in their --
20 in their review process.
21 The final point that I wanted to make -- and this has
22 to do, again, with whether we should get the evidence and to
23 what extent should they be disclosed to give the evidence.
24 As you'll see, when you go back through the
25 submissions and the information that is submitted under seal,

1 they make a reference to a witness. And it's a witness who
2 spoke to Mr. Persaud at some point, according to the
3 information we've been given. So we have a pretty good idea
4 about who that person is. We're not certain. They haven't
5 told us. I don't see why they couldn't tell us.
6 But the point that I want to get to is we have reason
7 to believe that the information they got from that other
8 individual was the subject or the result of him going through
9 what I would call torture. That he was held for long periods
10 of time, subjected to questioning. And so it doesn't give us
11 an opportunity to, first of all, point that out. Because we're
12 not sure that it's the individual we think it is, although
13 we're pretty certain.
14 But it also -- again, if we're creating record at the
15 administrative stage, we want to have an opportunity to
16 convince the fact-finder that they shouldn't rely on this and
17 that what was said is not reliable. We need to be able to
18 point that out, and that's important for the process to be
19 fair.
20 And so I think with those few examples right there,
21 you can see why what they've given us so far is deficient and
22 what we are asking for is necessary and reasonable. And the
23 context of Mr. Persaud's case I think helps illustrate that.
24 And that's really the point I wanted to make.
25 THE COURT: Thank you, Counsel.

1 To that?

2 MS. POWELL: Very quickly. I think what I have to
3 say about Mr. Persaud is going to parallel what I have to say
4 about the individuals generally.

5 I think the notice that he was provided comports with
6 this Court's previous order about what due process requires.
7 That he was provided with the general subject matter of the
8 Government's concern and meaningful opportunity to respond.

9 That was by provisioning of things he didn't have
10 before, like his status and the statutory standard and the
11 criteria but also with provision of a summary sentence. It's
12 the first redacted sentence in his notice letter which is, I
13 believe, unredacted Exhibit A to Docket No. 180, which
14 describes the general subject matter of the Government's
15 concerns. And then the notice goes on to list a number of
16 specific examples, including describing the underlying
17 statements.

18 Now, there's a limit to what I can say on the public
19 record, given the Court's instructions about how to proceed
20 with the information that plaintiffs have designated
21 confidential. But it's -- suffice it to say that with respect
22 to the statements and the individual evidence, he denies
23 virtually none of the allegation. Not even a bare denial:
24 Here's the allegation, it's not true. He denies virtually none
25 of them, relying on general denials that he did not intend to

1 engage in violent unlawful activity.
2 We think this, taken together, demonstrates a number
3 of things. One is that he does actually understand the nature
4 of the allegations against him, but he has no response; not
5 even a denial of the specific allegations.
6 What he has said on the public record now, that the
7 notice letter includes summaries of his prior statements and a
8 witness statement, that's accurate. The Government endeavored
9 to provide all of the unclassified nonprivileged information
10 which the Government considered with respect to the No Fly List
11 determination. And we have provided him with all of that
12 information which is relevant and material, and which is
13 unclassified and nonprivileged.
14 That's not to say that there aren't other documents
15 about those interviews. We don't -- we believe them not to
16 contain either relevant information or nonclassified and
17 nonprivileged information.
18 And I think that's what I have specific to
19 Mr. Persaud. If the Court has further questions --
20 THE COURT: Counsel, do you feel a need to add
21 anything else?
22 MR. GENEGO: The only thing I would point out, your
23 Honor, is I don't think it contains a summary of all of his
24 statements. It says that he made 12 of them, and it makes some
25 assertions about collectively what he might have said.

1 And, again -- I mean, right now they're using his
2 failure to respond to these things that are very vague and
3 general as evidence that he should be on the list, and that is
4 really unfair and I think leads to erroneous results because,
5 as his lawyer, I need to have that information and his prior
6 statements in order to respond to that in a meaningful way.
7 And I think that is really -- if you want to talk about a
8 bedrock principle, that is a bedrock principle in an adversary
9 process.
10 Thank you.
11 THE COURT: Thank you, Counsel. You're free to go,
12 if you -- when you need to.
13 MR. GENEGO: (Nods head.)
14 THE COURT: All right. We've got about 45 minutes
15 left. So how do we want to use that time?
16 MS. POWELL: I would like to do some brief
17 presentation of the overview of the -- of at least three
18 individuals, if I can.
19 THE COURT: Yes.
20 MS. POWELL: To the extent the Court doesn't find
21 that useful or doesn't have questions, I will be --
22 THE COURT: Okay. And does that work for you all?
23 MS. SHAMSI: It does. We just wanted some
24 clarification about whether there will be reference to
25 confidential information or not. No?

1 THE COURT: Well, if you say you have to, then I'm
2 going to have to address the problem, but I much prefer to keep
3 the courtroom open.
4 MS. POWELL: Your Honor, I'm going to begin by doing
5 my best to address these three individuals on the public record
6 without reference to the individual -- to the information that
7 the plaintiffs claim is confidential. I think we are going to
8 quickly hit a wall, and -- and I might ask the Court for
9 permission to go into that. But --
10 THE COURT: I don't know why you can't refer to the
11 sealed record by page and line number, and tell me what it is
12 you want me to look at and then what your point is about that.
13 MS. POWELL: I can try.
14 THE COURT: But before you do that, I did want
15 counsel's point addressed. This notion of why it would be a
16 burden on the Government or otherwise beyond the Court's
17 authority in the context of this case to require the Government
18 to provide to the plaintiffs their own statements.
19 If the defendants assert that it was the statements
20 of the plaintiffs personally -- or one or more of them -- that
21 form the basis of the decision, then presumptively the
22 plaintiffs know they made these statements. There can't be
23 surprise, then, or some disadvantage to disclosing those to the
24 plaintiffs.
25 What is the defendants' view about disclosing to the

1 plaintiffs their own statements, which presumably were
2 generated with them in the first instance?
3 MS. POWELL: So we don't claim that the information
4 in the summary itself is classified or privileged, which --
5 which includes the -- the plaintiffs' statements that we
6 considered were relevant. So we don't have an objection to
7 that, to be clear.
8 What we -- what we have said is unnecessary in this
9 context is the provision of the underlying documents. Those
10 documents tend to be records of F.B.I. interview notes, and the
11 like, which contain both classified and law enforcement
12 privileged information. We -- the Government deemed it
13 appropriate under the circumstances, given -- especially given
14 the sensitive information involved in some of those --
15 THE COURT: You really must slow down, and you must
16 speak up. I -- you're speaking so fast, I'm really losing the
17 point of what you're saying.
18 MS. POWELL: Apologies. I'll move slower.
19 The Government deemed it appropriate, under the
20 circumstances, especially given the sensitive information at
21 play in many of these documents, to instead of doing a redacted
22 version of those documents, which under certain circumstances
23 in itself reveals sensitive information, to segregate out the
24 information we considered unclassified, nonprivileged, and
25 relevant. We think that's sufficient to satisfy due process,

1 and that it would be a burden to do more.
2 And that is the question before the Court, whether
3 what we have done is sufficient to satisfy due process, not
4 whether we collectively can conceive of additional disclosures.
5 THE COURT: So I'm familiar with the way F.B.I.
6 agents write interview reports. I see them all the time in the
7 context of criminal proceedings. I -- so I have in mind that
8 kind of example, where an agent provides some background
9 recitation of facts and then starts summarizing what the agent
10 says the person interviewed said.
11 Why could such a summary not be redacted to simply
12 return back to the plaintiff that which the agent says the
13 plaintiff said? Why couldn't that happen here?
14 MS. POWELL: Your Honor, I don't want to overstate my
15 claim. I think there are probably instances where it would be
16 possible to redact a document that would release all of the
17 public information and not the sensitive and classified
18 information.
19 THE COURT: But I'm talking to you about a statement
20 made by the plaintiff himself that started -- it came out of
21 the plaintiffs' mouth. How can that be a classified statement?
22 MS. POWELL: I'm not claiming it is, to be clear.
23 THE COURT: All right. Then why can't, in response
24 to counsel's point, the defendants disclose back to the
25 plaintiffs the statements on which the defendants are relying

1 to prevent them from flying?
2 MS. POWELL: There are instances where they could
3 redact the documents to provide only those statements. That
4 would be possible. We don't think it's required by the address
5 clause. We think that the Government's substitute procedure of
6 providing the unclassified, nonprivileged, and relevant
7 information is sufficient to satisfy due process.
8 THE COURT: All right. I understand that's your
9 point.
10 Okay. Go ahead. You were going to speak about three
11 of the individuals.
12 MS. POWELL: Yes. I'll begin --
13 THE COURT: Slowly and distinctly, please.
14 MS. POWELL: Yes.
15 I'll begin with Mr. Kariye, because his information
16 is not considered confidential by the plaintiffs.
17 Like the other plaintiffs, he was provided with the
18 status -- the statutory standard, the criteria he met, a
19 summary sentence which describes the --
20 THE COURT: Excuse me just a minute. I am not
21 hearing you.
22 Bonnie, can you see what you can do to get --
23 Counsel, would you move the microphone closer to you, please.
24 MS. POWELL: Is that better?
25 THE COURT: No, it's not.

1 MR. BOWEN: I'll give her mine, if that heaps.
2 THE COURT: How about we do this. Bonnie, would you
3 bring the podium over and plug it in. And it can be facing me,
4 and there's a microphone on it.
5 Stand by, please. May be the end of the day. I'm
6 just having a very hard time.
7 MS. POWELL: Would you like me to move to the podium?
8 THE COURT: It's going to be moved right here in
9 front of us here. Right here. Here, not there.
10 MS. POWELL: Okay. I'm trying to get around.
11 (Pause.)
12 THE COURT: That should be better.
13 MS. POWELL: Is that better? Can you hear me?
14 THE COURT: Much better.
15 MS. POWELL: Excellent.
16 THE COURT: Now keep it slow, and we'll be fine.
17 MS. POWELL: Okay.
18 THE COURT: Go ahead.
19 MS. POWELL: Like the other plaintiffs, we think
20 Mr. Kariye's notice more broadly -- I apologize, more
21 broadly -- I think under this Court's prior order, it is a
22 necessary consequence of the balancing involved that the --
23 that the extent of the notice will differ from case to case.
24 That the amount of the information that can be disclosed
25 without a threat to national security or to law enforcement

1 activities will differ, depending on the specific nature of the
2 evidence which is available to the Government.
3 The determinations have to be made in a fluid and
4 intelligence-driven environment, based on current --
5 THE COURT: Slow down.
6 MS. POWELL: Based on current threat reporting, as
7 well as based on ongoing intelligence and law enforcement
8 activities.
9 Mr. Kariye's notice in this respect is in many ways
10 particularly robust. Like the other plaintiffs, he received
11 his status, the statutory criteria, the no fly -- the statutory
12 standard, the No Fly List criteria, a summary sentence which
13 described the nature of the Government's concerns generally.
14 And, in this case, that was his prior history as a mujahideen
15 fighter in Afghanistan against the Russians and his
16 interactions with and financial support of others who have
17 engaged in supporting or committing acts of terror.
18 It then goes on in some detail to list the specific
19 examples and evidence -- or some specific examples and evidence
20 that the Government relied on in reaching that conclusion.
21 That includes generally his association with the Portland Seven
22 and his expression of support for violent jihad and his
23 provision of financial support to the defendants in that case,
24 in support of their criminal activities.
25 There are -- it describes recorded conversations

1 between a cooperating witness and the defendants in that case,
2 in which they discuss the detail of their planned travel to
3 Afghanistan to attack American forces and in which they
4 discussed Kariye's support for their activities.
5 That appears in the record, and you can read it for
6 yourself. But there are several specific statements which are
7 detailed there.
8 Mr. Kariye had prepared others to fight jihad. A
9 violent jihad in context there. And he told his followers that
10 Muslims should fight Afghan Muslims against Americans. He
11 raised 2,000 dollars for each of the members of the Portland
12 Seven conspiracy, and was present at their last prayer prior to
13 departure.
14 He was also a founding member of the **Global Relief**
15 **Foundation**, which -- which another federal court has previously
16 found was tied to terrorism from its inception and was founded
17 in order to support the activity of organizations like
18 al-Qaeda. Was closely tied to its leaders.
19 In the context of these specific evidence and
20 examples, it is difficult for the plaintiff to deny that he
21 does not understand the nature of the Government's concerns and
22 why he was placed on the No Fly List. He specifically engaged
23 in terrorist activity by supporting the terrorist activity of
24 the Portland Seven and has repeatedly expressed and engaged in
25 support for -- for terrorist activity over time.

1 A number of things are notable in his response.
2 First, he does not deny having fought against the Russians as a
3 mujahideen.
4 Not -- regardless of -- of counsel's statements here
5 today, there's nothing in the response that was provided to
6 D.H.S. trip in which he denies that simple statement that he
7 fought against the Russians in Afghanistan. At a bare minimum,
8 that is proof that his support for jihad includes proof --
9 support for violent activity and that he is willing and able to
10 do so.
11 THE COURT: Or was?
12 MS. POWELL: That's true. At the time, he was.
13 The Portland Seven activities, of course, are much
14 more recent.
15 THE COURT: 2006?
16 MS. POWELL: '6 or '7. I'm afraid I don't have the
17 date on here.
18 THE COURT: Nine, ten years ago?
19 MS. POWELL: With respect to this Court's prior
20 question about staleness, to the extent the Court is asking
21 whether there has to be information supporting a finding of
22 present threat, yes, there does. But the statutory standard
23 and the No Fly List criteria require a finding that the person
24 is currently a threat.
25 Now, whether that can be based on old information

1 depends on totality of the circumstances, and whether that old
2 information is contradicted by more recent information or
3 recent actions and activities of the person. That is a
4 case-by-case determination. That is precisely the lane in
5 which our intelligence experts get to make the first call about
6 what is currently considered a threat.

7 It is also, for what it's worth, I think not relevant
8 to the question currently before the Court, which is not about
9 the sufficiency of the information and whether this information
10 is too stale but is about the sufficiency of the notice
11 provided.

12 Mr. Kariye also does not deny having raised money for
13 the Portland Seven. He denies only that he did so for criminal
14 activities. It's not clear exactly what that means because he
15 does not explicitly deny what the notice says, which is that he
16 raised them for the purpose of fighting Americans in
17 Afghanistan.

18 Perhaps, like the plaintiffs argued in **Humanitarian**
19 **Law Project**, and other federal cases, he believes that the
20 providing funding to terrorist activities should in fact be
21 legal. That is not the case. But he fails to deny the central
22 factual allegation that the Government relied on in this
23 notice.

24 He admits having been a founding member of GRF and
25 only denies his belief that it was engaged in terrorism. We

1 don't find that credible, in light of the ample public evidence
2 about **Global Relief Foundation** and what it was up to.
3 And he denies generally engaging in or supporting
4 violent unlawful activity, which is a -- sort of an odd phrase,
5 given that he doesn't deny engaging in violent activity and he
6 does not deny engaging in unlawful activity; only violent
7 unlawful activity, while ignoring many of the specific
8 allegations in the notice letter.
9 His counsel made a couple of arguments earlier.
10 First, he objected to the use of hearsay in administrative
11 proceedings, such as that which was used here generally. I
12 think the use of hearsay is generally approved in
13 administrative proceedings. Its use often goes to whether or
14 not the evidence is sufficient if the hearsay seems unreliable.
15 I think in this context certainly Congress -- and I
16 would expect anyone -- would expect the agencies to be relying
17 on hearsay. This is an intelligence-driven assessment in which
18 the Government necessarily relies on statements related to
19 ongoing intelligence operations and law enforcement activities,
20 statements by foreign governments, statements generally about
21 the context and the -- the global threat stream in which these
22 activities are occurring and where threats currently exist.
23 I -- in light of that, I think they can certainly
24 make the argument and have made the argument that this hearsay
25 is somehow -- is somehow insufficient to meet the standard, and

1 the Government shouldn't be able to believe it's true. But
2 they cannot argue it's a violation of due process. Precisely,
3 due process is always tailored to the particular circumstances
4 of -- of -- of the inquiry involved.
5 Second, plaintiffs' counsel made -- made much of the
6 ongoing immigration proceedings and the denaturalization
7 complaint filed with respect to Mr. Kariye.
8 The proceedings are different proceedings. To a
9 significant extent, they rely on different information and
10 evidence. There's certainly some overlap in the allegations.
11 In some instances, it's because they're relying on the same
12 instant -- same evidence. And in other instances, they're
13 relying on totally different evidence, even though similar
14 conclusions were reached.
15 Where the evidence is the same, it's in the summary.
16 Where -- for example, I think -- I -- I actually don't know
17 that.
18 Where the evidence is the same, it certainly appears
19 in the sum -- summary. As with the other plaintiffs, the
20 Government has made every effort to segregate and include in
21 the summary, in the notice letter, information which is
22 unclassified and nonprivileged, including that which is being
23 used in the denaturalization complaint, where it was considered
24 in the No Fly List proceeding.
25 Do you have any questions about Mr. Kariye?

1 THE COURT: I don't, but I'm not sure, really, the
2 individual focus is getting -- is advancing the inquiry here,
3 because I have -- I have what has been submitted.
4 I -- I would find more helpful why that which has
5 been given to the plaintiffs is sufficient as a matter of law,
6 or why plaintiffs contend it isn't. And to the extent the
7 particulars are necessary there, that's fine. But it really
8 isn't helpful for me, to simply recite back what's in the
9 declarations. I've read that. I've got that.
10 MS. POWELL: Sure.
11 THE COURT: I want to know what to make of that.
12 MS. POWELL: I think the central conclusion we are
13 trying to communicate is that we think the notice letters, as
14 described, and -- and the subsequent back and forth with the
15 plaintiffs, show and demonstrate that the standard set forth in
16 this Court's June 2014 order has in fact been met. That the
17 Government has described for the plaintiffs the reason for
18 which they were listed, the subject matter of the Government's
19 concern to the extent possible with -- with national security
20 interests, and has provided a meaningful opportunity to
21 respond.
22 The fact that plaintiffs, in many instances, have not
23 provided a meaningful response just suggests that they're not
24 going to be able to, regardless of the format of the hearing;
25 whether there's a live hearing or a paper hearing or whether

1 they get additional information.
2 THE COURT: I -- I should have reread the June order
3 before today. I read it many times. But my impression was
4 that I took pains not to specify the final standard, the
5 absolute criterion by which defendants' efforts would be
6 measured. I simply noted that certain criterion had to be
7 there.
8 That the defendants' argument is we met the criterion
9 and that has to be enough because you said so, I think is a bit
10 of an overstatement. I simply noted that I wasn't going to set
11 the standard. That wasn't the Court's function. But that
12 looking at the existing precedent, there were certain things
13 that had to occur.
14 So I'm not so sure it's enough to say we did only
15 that which you said, and we did it in the most minimal way
16 possible.
17 MS. POWELL: We'll look at the responses. Certainly
18 the Court said in the June 2014 order a few specific things
19 that were required, like provision of status and -- and the
20 reasons in general. And we have attempted to do that.
21 I don't know that the Government would concede that
22 we did that and nothing more. For someone like Plaintiff
23 Kariye, we actually did a lot more, in terms of not just
24 describing, you know, the subject matter of the Government's
25 concern but providing a summary sentence, describing generally

1 what the Government's concerns are, as well as specific
2 examples and underlying evidence.
3 With respect to each of the plaintiffs, an effort was
4 made to disclose as much as possible. That varies from
5 plaintiff to plaintiff, necessarily.
6 At the -- I hesitate to describe it as -- as a
7 spectrum, but certainly very different from Mr. Kariye's notice
8 is something like Mr. Knaeble's notice, which provides
9 certainly his status on the statutory criterion and No Fly List
10 criteria. But other than that, provides only the general
11 summary sentence identifying the subject matter of the
12 Government's concern.
13 And plaintiffs have said on the public record, so I
14 think I can repeat here, that that relates to the Government's
15 concerns about his travel to a particular country at a
16 particular time.
17 There are no further details in the notice,
18 necessarily, because disclosure of such information would
19 imperil national security or law enforcement activities. He
20 was, however, able to respond, and we think meaningfully
21 respond.
22 He responded with respect to the date of his travel.
23 He described generally the purpose of his -- or his supposed
24 purpose for his travel, and made the same general denial about
25 his lack of support for -- quote -- violent, unlawful activity.

1 He provides, however, no -- not one shred of supporting
2 documentation or names or statements of witnesses, or even a
3 summary thereof, that might support his account of what exactly
4 he was doing during his travel.
5 That shows, I think, that the information that the
6 Government gave is sufficient to identify the subject matter of
7 the Government's concern and to provide him an opportunity to
8 respond and that he has no response. If he has a live hearing,
9 then everything plaintiff wants and -- but he has no
10 documentation or witnesses or statements that he can put
11 forward, the result is not going to be different.
12 In the absence of any additional information or
13 evidence or even bare statements supporting his account,
14 there's no reason to think that additional process would change
15 the result.
16 I -- I think that's as much as I can say with respect
17 to the information which is public. I could -- I -- I could
18 sort of compare and contrast his -- his denials with -- with
19 what the Government said, but I think the gist of that is in
20 the briefing.
21 Do you have any questions specifically about
22 Mr. Knaeble?
23 THE COURT: Not about him specifically. I am still
24 thinking about your point -- about a failure to respond, and it
25 instinctively raises in me the concern that it is the

1 defendants who have the burden of showing a basis for the
2 action taken.
3 You're relying on the plaintiffs' nonresponse as
4 itself evidence that the action taken is substantiated, when
5 the plaintiffs' position is they don't know enough.
6 MS. POWELL: Well, two things.
7 First, to be clear, I don't think we're relying on
8 his lack of response to substantiate what the Government had
9 concerns about in the first place. We're relying on it to show
10 that additional process would not change the result.
11 THE COURT: So a harmless error kind of approach?
12 MS. POWELL: Yes. Yes. And I think we do that --
13 make that argument explicitly in the brief. And, obviously,
14 we're not engaged in that substance -- substantive review at
15 this point. And I think that certainly, while the plaintiffs
16 say -- and they're certainly saying about him specifically,
17 that he's not able to respond in the absence of more
18 information that his general denials and accounts of his travel
19 are things that he could at least describe in more detail, not
20 have actual documentation about. He's just given no reason to
21 think that he has anything that could change the result.
22 THE COURT: Okay. I understand the point.
23 MS. POWELL: My third example was going to be the
24 assertion that, like the others, he was provided with the
25 status -- the statutory standard, the No Fly List criteria, and

1 a summary sentence, which I can not repeat here. It is the
2 first redacted sentence in Exhibit A to the Kashem
3 stipulations, which I think are at Docket No. 176.
4 And the only thing I can say about that summary
5 sentence, I think -- currently on the public record -- is that
6 plaintiffs have -- feel publicly that that summary contains his
7 prior statements. I think that is just about all they have
8 said about the somewhat extensive derogatory information.
9 In addition to the summary sentence, there is
10 specific evidence and examples for him, like there is with the
11 other. And, again, I can't describe it with reference to
12 the -- without reference to the information the plaintiffs have
13 designated as confidential. But the fourth and fifth sentences
14 describe what -- a summary of one of his statements. The sixth
15 sentence describes another, including actual quotations.
16 The second paragraph of the notice provides some
17 contextual information in which the intelligence analysts are
18 analyzing information like this at the time.
19 And the second and third sentence also provides some
20 additional contextual information about him that is useful to
21 understand the nature of the concerns.
22 On the public record, he has denied providing support
23 for violent, unlawful activity, like the others. But very
24 little response to the other allegations and his prior
25 statements which he mentioned. He has said only on the public

1 record, I think, that they are mere speech. We think that is
2 not true, especially in -- given the context in which such
3 speech occurred.
4 I think it would be -- generally, the Government
5 thinks it would be appropriate to describe some of the
6 Government's response to that with reference to the private
7 information. The Court is ordering us not to. I think that's
8 all I have to say about Mr. Kashem.
9 THE COURT: You filed written responses. There's
10 material under seal I can read and I have read. But the point
11 of oral argument is to talk about the legal analysis and the
12 like.
13 MS. POWELL: Sure.
14 THE COURT: And you've given me specific citations to
15 the sealed record. I'll go back and consider those in your
16 argument but --
17 MS. POWELL: Sure.
18 THE COURT: -- I still do not see any reason to get
19 into material at this stage -- especially while these motions
20 are pending -- over plaintiffs' objection, on the public
21 record, for the reasons they've indicated.
22 MS. POWELL: Understood. So then I think I can very
23 quickly address Mr. Meshal because I think we're going to
24 quickly --
25 THE COURT: Please slow down or don't do any more.

1 Really, this is not useful.
2 You're speaking so fast it's not intelligible to me.
3 And I'm a mere human being, but I really am trying.
4 MS. POWELL: Okay. Mr. Meshal, like the other
5 plaintiffs, was provided with the things previously described.
6 His status, the statutory standard, the No Fly List criteria,
7 and a summary sentence.
8 The first redacted sentence in his notice letter is
9 that summary sentence. It describes -- I think the only thing
10 I can say it describes, without reference to the information
11 designated as private, is -- it is his own private -- it is his
12 own prior statements. And that would be Exhibit A to Docket
13 No. 178, the unredacted version.
14 Then it goes on to list a number of specific evidence
15 and examples, which he is capable of responding to and he
16 clearly understands but has not in fact provided a substantive
17 response to. The next two full paragraphs provide the content
18 of his prior statements and detail his prior actions, which
19 satisfy the No Fly List criteria. And the final paragraph
20 provides some context for the intelligence analysis and
21 regarding what was going on at the time of his activities.
22 Mr. Meshal denies a few of these allegations but not
23 others. I think in order to see why that's so, I would have to
24 have some reference to the private information because there is
25 a great deal of disconnect between his denials and the specific

1 statements, which are in the notice letter.
2 But his denials are at Exhibit -- in Exhibit B to the
3 same docket number, the unredacted version, pages 6 through 7.
4 But in each instance, the denials he gives do not actually
5 match up with the allegations that were made. And in important
6 ways, I think.
7 Rather than denying the substance of those
8 allegations, he adds some highly caveated general denials and
9 he relies heavily on the alleged coercion by the F.B.I. of his
10 statements.
11 This suggests a number of things. First, he
12 perfectly understands the allegations but -- and is able to
13 respond.
14 Second, he doesn't actually have any response that
15 would resolve the Government's reasonable suspicion here. The
16 Government has considered and rejected his allegations of
17 coercion, certainly, which in any event do not go to the heart
18 of the Government's suspicions. At least with respect to
19 notice, even if he were coerced -- which the Government denies,
20 to be clear -- he has not denied the statements, the truth of
21 the statements that the Government relied on, suggesting that
22 he has adequate notice to understand the nature of the
23 Government's concerns.
24 And I think that is as much as I can say about
25 Mr. Meshal.

1 THE COURT: Okay.
2 MS. POWELL: Do you have further questions about him?
3 THE COURT: No.
4 MS. POWELL: Then I think I will cede the podium.
5 THE COURT: Okay. Thank you.
6 You'll have another chance when counsel's finished,
7 if there's anything in summary that you would like to add.
8 MR. ARULANANTHAN: Your Honor, I'll discuss
9 Mr. Kariye, and then Ms. Shamsi will discuss the others.
10 And I would like to use this time to use his
11 particular case to illustrate the deficiencies in the process,
12 rather than talking about whether he should or should not
13 actually be listed, if that's okay with your Honor.
14 There's a lot of --
15 THE COURT: Right. I never thought we were talking
16 about the substantive legitimacy of the listing decision. I
17 thought today was about procedural process.
18 MR. ARULANANTHAN: Okay. Because -- just to note, we
19 disagree with a lot of these things, and you would be very
20 unhappy, you know, if I didn't say that. I've said that.
21 We're not going to talk about them beyond that.
22 And Ms. Powell says the notice is robust. But is it
23 in fact all of the reasons that were given? And I think the
24 denaturalization case is a good way of framing that problem
25 because there are other different allegations there which do

1 not overlap with these, although there is a lot of overlap in
2 other ones. And we don't know whether those were relied on in
3 this process because we don't have all of the reasons.
4 The -- and the joint statement of undisputed facts
5 says that he was not given -- like every other plaintiff, he
6 was not given all of the reasons. If those are some of the
7 reasons, you know, we could answer those, too. We will be
8 answering them in the denaturalization case. But there's no
9 way to know. So I think that shows one deficiency.
10 Another deficiency is about this evidence. And I
11 won't belabor the point from what I said before. But it's just
12 an indented paragraph. She can't tell who wrote it, whether
13 that person had personal knowledge. It contains multiple
14 levels of hearsay, and all of that. So if there were evidence
15 here, then we could actually challenge the evidence by
16 challenging the competency; whether knowledge or motive,
17 hearsay, things like that, of the speaker of the statement.
18 Because we don't know who said it and it's not sworn because
19 it's not actually evidence, it's impossible for us to make a
20 lot of arguments we would otherwise be able to make.
21 And just a few small substantive things about the
22 allegations that, again, I think go to process. You know, the
23 allegation about Global Relief is that he was a member of the
24 board in 1992. And then the organization was designated in
25 2002. And those things are both true. But they obviously do

1 not, I would think, suffice to explain why someone should be on
2 a No Fly List. You know, he denies knowing that the
3 organization did anything wrong, and he stopped being involved
4 with it long before 2002.
5 So where does that leave us? You know, these
6 statements are true. But obviously there must be more that
7 they allege which is the reason why his involvement kind of is
8 sufficient, in their view, to place him on the list, and we
9 can't answer it.
10 Again, the denaturalization proceeding gives us some
11 insight into this. I won't go into the details of it now, but
12 there's much more detail about Global Relief and his -- it's
13 alleged activities, his alleged involvement in it there. And
14 we will answer those. There's already -- there's a number of
15 denials associated with that in the complaint and the -- and
16 the answer in the denats. And when we get an actual chance to
17 present evidence, we'll show you that. But I think that,
18 again, shows the deficiency of the reasons here.
19 You know, Portland Seven, your Honor -- it's just
20 2002, by the way, is the Portland Seven. And it's a
21 substantive point, but we completely agree with it. And that's
22 the most recent conduct from Mr. Kariye. Everything else about
23 Mr. Kariye is older than Portland Seven. And, you know, apart
24 from the fact that he's obviously not charged in the Portland
25 Seven criminal case.

1 But, again, a few points to show where a hearing or a
2 notice would be useful, your Honor described F.B.I. 302s. I
3 presume the 302s would have been disclosed to the defendants in
4 Portland Seven as a part of the discovery under Rule 16. So if
5 they're disclosed to those people -- if they were, and I don't
6 know. But if they were, at least could we apply that test, and
7 disclose to us what was disclosed to them?
8 Some of these statements from this -- you know, the
9 unrecorded statements, the critical one where they say he gave
10 money, which he denies, that's the day -- that statement, as I
11 understand it, is taken on the day of Mr. Battle's arrest.
12 He may have a lot of incentive on that day to
13 implicate other people, you know, even if the implication is
14 not true, and that's surely relevant to assessing the
15 credibility of this statement.
16 Oh, and then the last thing on the need for a hearing
17 arising from this is there's so many gaps between how they
18 interpreted the written statement and how we meant it. You
19 know, I gave you one earlier. You know, she again says he
20 doesn't deny fighting the Russians. He does. The Russians
21 left Afghanistan in -- in 1988, and he says he didn't go to the
22 region until the '90s. And this is just a misunderstanding
23 that is only cleared up because we have an oral hearing.
24 Similarly, he does deny, your Honor, knowing --
25 knowingly giving any money to the Portland Seven for any trip

1 to Afghanistan. You know, the only reason he doesn't make a
2 blanket denial of anything is people collect money in the
3 mosque for a lot of reasons and, you know, including to help
4 people who are in need and things like that. So he's not
5 willing to say that he's 100 percent certain that no money ever
6 went from the mosque to these people. But he absolutely denies
7 giving them money for their trip to Afghanistan, including --
8 and also denies that they were going to -- for violent
9 purposes.
10 Now, you know, we -- the point I want to make now,
11 though, about that, your Honor, is that they don't even think
12 that he has denied that. So we have -- it's not a dispute just
13 about whether it's true. We even just have like a simple
14 misunderstanding about what the nature of the denial is. And
15 that's because we're doing this on a written process, with --
16 with no notice.
17 Unless your Honor has any particular questions of
18 Mr. Kariye?
19 THE COURT: No. Go ahead.
20 MR. ARULANANTHAN: Oh, you know what? Very quickly,
21 one other thing. They say there are recordings. Right? They
22 say -- and they say some of these are recordings of his -- I
23 don't know if they're recordings of his statements. And at
24 least recordings of what the defendants said he said -- or the
25 Portland Seven defendants. We would join that request to

1 Mr. Genego's request earlier, and your Honor's question about
2 can we get statements from people that are not themselves
3 classified statements.
4 MS. SHAMSI: Your Honor, I'm going to keep this very
5 brief because I think the responses as a legal matter to each
6 of Mr. Knaeble and Mr. Kashem and Mr. Meshal are similar, and
7 I'm not going to belabor what's already in the briefs.
8 I do want to preface this by saying that I'm not,
9 with respect to each of these three clients, or any of the
10 others, going to respond to the substantive allegations that
11 are made. I think this is turning into a harmless error
12 analysis. We've briefed to you why we don't think harmless
13 error applies here. Unless you have questions about that, I'm
14 just going to go right ahead and say that.
15 Your Honor, starting with Mr. Knaeble, again,
16 briefly, the single allegation that was made against him has no
17 connection whatsoever to any kind of unwilful conduct.
18 He responded the best way that he could. It appears
19 throughout this process that he is being penalized for not
20 guessing at what else the Government might suspect him of. But
21 as the Ninth Circuit said in **Al-Haramain**, citing **Gete**, the very
22 fact that someone has to guess why the Government might suspect
23 them of something is a due process violation. And that, I
24 think, applies to Mr. Knaeble, Mr. Kashem, and Mr. Meshal,
25 because none of them had additional information.

1 With respect to -- and also there, your Honor -- this
2 is -- this is setting up a dynamic that I think is very
3 troubling from a due process perspective, which is in order to
4 try and get yourself off of a list that has significant
5 consequences for your life, think about all of the things that
6 the Government might want to know that are bad about you or
7 that the Government might think are bad about you or that you
8 think the Government might think are bad about you. And
9 that's -- that's not what due process analysis requires, and
10 that's not what the burden should be on people who are
11 responding in the face of inadequate notice.
12 With Mr. Kashem, I'm not going to repeat everything
13 that we've said in the briefs. I will say that he's denied the
14 allegations. The fact that they are general denials does not
15 mean that he hasn't denied them, but he also hasn't had
16 specific information. He doesn't have access to his own
17 alleged statements that he doesn't recall he said. Again,
18 these were years long ago.
19 And -- and there's -- there's more on Mr. Kashem that
20 we've responded to with respect to why, as a matter of law, the
21 notice was problematic and the determination was problematic.
22 I'm not going to take up your time with what's already in the
23 briefs.
24 With Mr. Meshal, the same kinds of concerns exactly
25 apply here. He was -- as he said in his response -- almost

1 everything, virtually everything that is in the notification
2 letter appears to come out of that period of what he has called
3 unwilful detention and -- of what is unwilful detention and
4 coercion. His case, your Honor, we've referred to it in the
5 briefs. It's now -- we've appealed it en banc. And I'm also
6 counsel in that case, his challenge to the torture and unwilful
7 detention. And it is certainly being taken seriously enough by
8 other courts. And I think the issue here is that this is a
9 tremendous cloud hanging over the statements, both allegedly of
10 Mr. Meshal but also apparently of the Government's own
11 witnesses that the TSA administrator is relying on. Yet the
12 Government doesn't provide information that is in its own
13 possession with respect to serious allegations of unlawful
14 detention and torture and statements made in that context.
15 Mr. Meshal's alleged statements, to the extent that
16 they were made, again, surely aren't classified; surely are not
17 subject to a law enforcement privilege. And it's very hard to
18 see why there wouldn't be a good reason to produce information
19 from the agents who interrogated him over 30 times in coercive
20 circumstances, segregated from what might be genuinely secret,
21 as opposed to what would be prejudicial and show bias in this
22 particular context.
23 And that, your Honor, is why a hearing is also very
24 necessary. Because the TSA administrator is making
25 determinations, not revealing the basis. But often what

1 appears to be happening are credibility determinations being
2 made, and there has been no live hearing at which those
3 credibility determinations could be considered.
4 Unless you have questions, your Honor, that's all I
5 have.
6 THE COURT: Thank you.
7 Ms. Powell, did you have anything you wanted to add
8 to that?
9 MS. POWELL: Not unless the Court has further
10 questions, your Honor.
11 THE COURT: Give me just a few minutes, please.
12 (Pause, referring.)
13 THE COURT: So it's clear defendants don't --
14 defendants' counsel indicate they don't have authority to
15 respond to my question about where judicial review occurs in
16 the context of these six plaintiffs' redress issues with the
17 determination that has been made.
18 Do plaintiffs have a position?
19 MS. SHAMSI: Yes, your Honor. We believe that you
20 should be making that determination.
21 THE COURT: Do you have a reason for that, other than
22 you would love the warm and welcoming atmosphere?
23 MS. SHAMSI: We do love the warm and welcoming
24 atmosphere. We especially love the weather.
25 But, no, your Honor, we do have --

1 THE COURT: A legal --
2 MS. SHAMSI: Legal principles, yes, exactly.
3 And that is, your Honor, we've gone through this
4 process now two times. And what we would really like -- and
5 just -- you know, we're happy to submit briefing to you on --
6 THE COURT: No. I just want to know what you contend
7 the process is supposed to be after I decide these motions.
8 MS. SHAMSI: We think that the process should be
9 that -- it partly depends on how you decide the motion, your
10 Honor, and what you think that the recommended is. Right? And
11 so it -- that's why we think -- we would ask -- and I'm happy
12 to lay it out now, if this is -- would be helpful to you. It
13 will take a minute. Which is that we would -- we've set forth
14 for you a number of reasons, six basic reasons for why this
15 process is unconstitutional. They're related to the notice,
16 the inadequacy of the notice, the -- with all of that -- of
17 what that constitutes, the inadequacy of a record for judicial
18 review, the lack of a hearing before a neutral decision maker,
19 the lack of exculpatory evidence, vagueness, and burden.
20 We hope you will find for us on all of those issues.
21 If you find for us on only one of them, then we still have
22 prevailed in our motion for summary judgment; one or more of
23 them.
24 We would ask you to find the current process
25 unconstitutional, to order the defendants then to provide all

1 reasons and evidence that they rely on, placing plaintiffs on
2 the list. All the exculpatory evidence, regardless of whether
3 they rely on it or not. To the extent they invoke any
4 privileges, a privilege log itemizing specific information
5 sufficient for adjudication of the privileges. We would ask
6 for you to issue a briefing schedule for defendants' arguments
7 on use standards that would comply with a vagueness order that
8 we hope you would issue. Plaintiffs' arguments on why the
9 existing process violates substantive due process, and then the
10 parties can respond to each other in that way. Burden could be
11 addressed in that context. And then we would ask you to
12 schedule a hearing on the merits for each individual plaintiff,
13 at which hearing hearsay and other evidentiary issues can be
14 addressed as applied. And that gets us, your Honor to -- past
15 the procedural hurdles.
16 There's been a process that we think is
17 unconstitutional. If we get remedy for that process, that
18 should be incorporating a hearing before you. And the reason
19 for that, your Honor, is over five years. Over five years, and
20 our clients are still waiting for the adjudication of the next
21 portion of the case.
22 Defendants have -- since this case was back before
23 you after the Ninth Circuit sent it back down on, I believe,
24 2012 and -- we've briefed this twice now. And we really think
25 that the time has come for a determination about the prior

1 process that existed, so that the record there is clear, and
2 then for us to move on to the hearing before you.
3 And to the extent, your Honor, that you want that set
4 out in a page brief, we're happy to do that, and we would be
5 prepared to do that by the end of next week.
6 THE COURT: All right. Mr. Bowen.
7 MR. BOWEN: Your Honor, on the brief, I'm going to be
8 a gadfly.
9 THE COURT: A gadfly?
10 MR. BOWEN: Yeah. I'm going to --
11 THE COURT: You'll have to define that in not vague
12 terms, please.
13 MR. BOWEN: I'm going to be potentially annoying.
14 Your Honor, we've been considering it. We've been
15 discussing the question of the supplemental brief. We think
16 the issues that need to be addressed in terms of what happens
17 next, depending on the various outcomes that could happen,
18 would be extraordinarily difficult to limit to five pages. We
19 implore the Court to give us ten pages to do that.
20 And, secondly, we do think we would like the time to
21 provide the most helpful considered response we can, and we
22 would ask for a deadline of January 8th for that filing that
23 the Court contemplated.
24 I'll hold one other comment until the Court's had an
25 opportunity to --

1 THE COURT: Go ahead.

2 MR. BOWEN: So the one point I would make is we
3 haven't spent time on harmless error, but we -- our position is
4 that harmless error is an important and central analysis to due
5 process that cannot and should not be skipped over.

6 And that while our position is that the Court can
7 find that in fact if there were any errors in the -- in the
8 process provided, that they in fact were harmless based solely
9 on the record before the Court. We can understand the
10 possibility that the Court may disagree. And, if it does,
11 there is critical information that goes to -- that goes to the
12 harmless error question that we've not been able to put before
13 the Court. So our position is that the end result is not a
14 ruling against the Government but some mechanism to -- which we
15 will opine on in the next submission to advance the question in
16 that way. But it is not a loss for the Government, without us
17 having a chance to fully address the question of harmless error
18 in that respect.

19 THE COURT: Did you want to add anything?

20 MS. SHAMSI: Just one quick point.

21 It is extremely difficult and frustrating to hear the
22 Government say that they're not prepared to take into account
23 what would happen -- they didn't come here today taking into
24 account what would happen if they either win or if they would
25 lose. And to -- unable to answer what should be very obvious

1 questions in either direction.
2 And for that reason, your Honor, you know, additional
3 briefing on harmless error analysis, anything that -- that
4 extends what should have been a completed process, that is
5 separate from the substantive due process issue as you set
6 forth in your October case management plan and then followed
7 again after that in your, I believe, February -- forgive me if
8 I'm getting that wrong. But your case management plan that
9 instructed the parties about the difference between procedural
10 and substantive due process briefing should be very, very
11 clear.
12 We would like to be able to move forward again as
13 quickly as possible. And I should have added, your Honor, as
14 legal authorities, the Ninth Circuit in **Latif** and the circuit
15 court in -- in **Ibrahim** both contemplated the district court
16 would make the adjudications and the determinations. And
17 that's exactly what we should be doing now at this --
18 THE COURT: I think that was because, at the time
19 they looked at it, there wasn't a TSA decision by an
20 administrator. There is now.
21 MS. SHAMSI: There is now, your Honor.
22 THE COURT: And the statute, I think, arguably vests
23 jurisdiction for that review not here. But we are here, and
24 this is a very unusual process.
25 I understand your point. I -- I appreciate

1 everyone's efforts today. These are -- these are very
2 difficult issues, and they come in procedurally awkward
3 contexts, without definitive precedent here.
4 I intend to do my very best to consider fairly
5 everybody's perspectives, but to resolve these motions without
6 undue delay.
7 I am directing the parties each to file no later than
8 January 8, 2016, a supplemental memorandum that is limited to
9 specifying how the parties expect a judicial review on the
10 substantive decision made by the TSA administrator to occur
11 in -- in what forum and in what context. And, secondly, I want
12 the parties to specify, to anticipate both a granting of the
13 combined motion of an opponent and what the consequences
14 procedurally would be in this forum, and a granting of the
15 parties' own motion and what the consequences would be. And by
16 that I mean what procedural path forward -- to take counsel's
17 point -- is expected.
18 I -- I'm requiring this in part because there is a
19 bit of a risk that whatever the Court's order is, it opens yet
20 another opportunity to plow the same ground. And I -- I'm
21 determined to move forward.
22 And I want to be sure I know what the parties contend
23 the consequences are of any decision I make. I may or may not
24 address those consequences in the order I enter resolving these
25 motions, but I want to know how the parties perceive the case

1 would move forward, in the event there is a granting or a
2 denial or a granting in part of these combined motions.
3 Mr. Bowen's point about five pages not being enough
4 is fair. Ten pages maximum. But -- and that doesn't count
5 your caption or your certification of service. But, please,
6 just get to the point and be as direct as you can.
7 With respect to the motion that was filed, to close
8 the proceedings, I gave the parties direction about not
9 referring to matters that are on the sealed record in any
10 explicit way. They've satisfied that in our argument today.
11 There have been references to the sealed record, which I've
12 noted and which the record reflects. That is to say,
13 Mrs. LeGore's transcribed record. So I think the object of the
14 motion was accomplished but now the motion is moot. So I'm
15 going to direct the clerk to enter an order denying it as moot
16 in light of the way the things were treated.
17 Is there anything else anyone needs to state for
18 today's record, for plaintiffs?
19 MS. SHAMSI: No, your Honor.
20 MR. ARULANANTHAN: No.
21 MS. SHAMSI: But thank you very much for the hearing
22 you've given us today.
23 THE COURT: Counsel?
24 MR. BOWEN: Nothing further, and the same thing.
25 THE COURT: Happy holidays. Safe travels. Go home.

1 MR. HANDEYSIDE: Thank you, your Honor.
2 (Conclusion of proceedings.)
3
4 --oOo--
5
6 I certify, by signing below, that the foregoing is a correct
7 stenographic transcript of the oral proceedings had in the
8 above-entitled matter this 6th day of January, 2016. A
9 transcript without an original signature or conformed signature
10 is not certified. I further certify that the transcript fees
11 and format comply with those prescribed by the Court and the
12 Judicial Conference of the United States.
13
14 /S/ Amanda M. LeGore

15 AMANDA M. LeGORE, CSR, RDR, CRR, FCRR, CE
CSR No. 15-0433 EXP: 3-31-2018
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