

## The Thirty-eighth Annual Charles Henry Hackley Distinguished Lecture in the Humanities

“Round Up the Usual Suspects: Terrorist Watchlists and Civil Liberties.”

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Thank you very much for that warm introduction. And many thanks to the Boards and committees of Hackley Library, the Friends of Hackley Library, and to Carol Ann Balcom, Joe Zappacosta, Camille Gabris, and Kimberly Dershem for making tonight possible. I especially appreciate this beautiful booklet, although I have to warn you about the last sentence in my bio. As it turns out, [www.watchlistlaw.com](http://www.watchlistlaw.com) was recently hacked. It is hard to know who is behind it; attacks seem to come from Russia, China, and various parts of the US. Until I can be sure it's free of malware, I am in the odd position of urging you to please not visit my website!

I am glad to be home and in the company of friends of Hackley Library. More than a few summer hours have been spent working at the library, a place that I've known since I learned how to read. As a small expression of thanks, I have donated to the Library a copy of the book I want to share with you tonight. My book takes as its title and its foil a mid-century civil servant named Ruth Shipley, a real person. But let's start tonight with Louis Renault, her fictional counterpart in the 1942 film, *Casablanca*.

One of the most memorable lines from that film comes at the very end. I now give a spoiler alert to the one person in this audience who hasn't seen the movie. As police rush into the final scene, police captain Renault tells his men: “Major Strasser's been shot. Round up the usual suspects.”

Now, just a few moments before this happens, Captain Renault saw our hero, Rick Blaine, shoot Major Strasser before his very eyes. So this order is both a little ironic and more than a little subversive. But it resonates with us because it sounds so routine. It makes sense that, *of course*, there is a list of usual suspects. Good police work means keeping track of the bad characters in the neighborhood.

So this line from *Casablanca* reminds us that watchlists – lists of people worth watching – have been with us for a very long time. But a few things have changed since those days.

First, what happens when the police officer draws not on a list formed in his or her mind, but via a laptop link to a list composed by some anonymous official sitting outside Washington D.C.?

Second, what happens when that list covers not just a few bad apples in town, but grows to hundreds of thousands, maybe a million identities around the world?

Third, what happens when that list connects to other lists, as well as to new technologies like facial recognition software, universal cameras, and artificial intelligence?

Finally, what happens when falling under suspicion results not in an arrest, or even further investigation, but in a secret decision to restrict selected rights and freedoms and label you a threat?

Should that careful, but suspicious, police officer have the power – on his or her own, mind you, not by authority of any judge – to limit how freely you may travel? What work you may pursue? Should that officer be empowered to label you, track you, and share those suspicions with others, wherever you may go? And should that be done in secret, without ever confronting this official, or getting a chance to respond?

If you are getting the feeling that somewhere along the way that crosses a line, then you already share my view. For it is not our tradition to give one person so much power. We expect that any police officer who wishes to “round up the usual suspects,” must soon thereafter seek the confirming judgment of a court. That has several good effects. Police tend to do better work when courts supervise them. Prejudices, stereotypes, fears and hunches are all put through the wringer of careful, probative assessment of hard evidence by someone outside the police chain of command. One line a police officer dare not cross is to take the law into his own hands – to be police, prosecutor, judge, and jury all in one.

That line that we draw protects our liberty by separating these different roles. And here’s the thing: it protects us not just from unscrupulous or power-hungry officials. As Supreme Court Justice Louis Brandeis famously observed, “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>1</sup>

Terrorist watchlists are on the wrong side of that line. Tonight I’ll explore with you how these watchlists started, how they work, and what the future holds. Several of the slides that I will show you were given to me by one of the creators of this system, a longtime FBI agent tasked to run our watchlisting operations. (These slides are recognized by the blue border and red “unclassified” label at top and bottom.) So you can see how these systems were imagined by the people who first invented and operated them. I’ll also introduce you to Mrs. Shipley, her own watchlisting system, and how it was eventually undone. If you take away one idea from our conversation, I hope that it is the dangerous fact that watchlists reject a fundamental organizing principle of our society, one that protects your liberty more than any clause or amendment to our Constitution: the separation of powers.

Terrorist watchlists emerged out of the terrorist attacks on our country on September 11th. The 9/11 Commission convened to report on America’s vulnerability found that the government agencies charged with national security and intelligence gathering were extremely bad at sharing information with each other. One agency did not know what the other agency was doing because they selfishly hoarded their intelligence. On September 11th itself, there was a meager watchlist,

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<sup>1</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

but it contained only about sixteen names, none belonging to the perpetrators, and most members of our national security apparatus knew nothing about it.<sup>2</sup>

The so-called War on Terror changed all that. George W. Bush issued a presidential directive to consolidate and build watchlisting under a new, centralized entity: the Terrorist Screening Center.<sup>3</sup> The TSC is a unit housed in the FBI. When officials ranging from local law enforcement to military, FBI, CIA or other officers gather terrorist information, it is now centrally catalogued here at the TSC. Access to intelligence about domestic and international terrorism would all now be found in one place, in what the Terrorist Screening Center called the Terrorist Screening Database.

From that giant database connecting intelligence from all sources, the TSC created smaller, more targeted watchlists for the needs of government agencies old and new. For the TSA, a No-Fly List and a lesser "Selectee" List. (If you've ever noticed four capital S's on your boarding pass – you will have enjoyed the special pleasure of an extended security check at the airport because you are either a permanent or a temporary addition to the selectee list.) For the State Department, lists for passports and visas. For border patrol and customs, other watchlists. Even watchlists to share with our foreign partners.

Once you are in this big database, information about you gets caught in this network. Removing a name from one list doesn't clear it from another. It took one woman nine years to fight for her day in court to clear her name from this sticky web, which the presiding judge compared to "a bad credit report that will never go away."<sup>4</sup>

Actually, it is much worse than that. You can send away for a copy of your credit report. But adding your name to a watchlist requires no notice, no hearing, no chance to respond to, or even to see, the claims made against you. All this is done completely out of sight by well-meaning and zealous officials deciding your fate.

The result of their decisions is severe. Take the No-Fly List, for example, one of those watchlists built from the larger Terrorist Screening Database. When you purchase airplane tickets, the airlines ask you to enter your gender and date of birth along with your full name. The airlines don't care what sex or age you are. They send this information to the federal government, which checks it against the No-Fly List. Your boarding pass will not be issued until your name clears the list. In other words, you are seeking permission from the state to board a plane and only if the federal government consents to your travel will you depart. There is no time limit on this travel ban. No automatic appeal or even notice. Again, this happens behind the scenes, with no need for any process or even a public accusation. Does that sound like a free society to you?

So, how did you get stuck on this Terrorist Screening Database? And how do you get off it?

Analysts at the Terrorist Screening Center decide who to include on the watchlist using an extremely low standard that, for a long time, they kept secret. But once civil rights litigation prised

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<sup>2</sup> Memorandum from Claudio Manno, Acting Associate Under Secretary for Transportation Security Intelligence, to Associate Under Secretary for Security Regulation and Policy (Oct. 16, 2002) (on file with the author).

<sup>3</sup> Homeland Security Presidential Directive 6 (HSPD-6), Sept. 16, 2003.

<sup>4</sup> *Ibrahim v. DHS*, 62 F.Supp.3d 909, 928 (N.D. Cal. 2014).

it out of the tight grip of officials we learned that George Orwell could have written the test, for it is no test at all. Here it is: a person may be watchlisted if there is “a reasonable suspicion that the individual is known or suspected to be” engaged in bad conduct. Listen closely to that phrase again: “a reasonable suspicion” that the individual is “suspected to be” a terrorist. As another federal judge put it, “In other words, an American citizen can find himself labeled a suspected terrorist because of a “reasonable suspicion” based on a “reasonable suspicion”.”<sup>5</sup>

When the standards are this low it is easy to see how watchlists rapidly expand to enormous sizes. Looking for a terrorist is like looking for a needle in a haystack – I’ll be the first to acknowledge how hard it is. But if you want to find the needle using *this* method, you have to make sure you have the whole haystack. There is no incentive for an FBI Agent *not* to nominate someone to a watchlist – no downside, no sanction, not even a lot of paperwork – and very little incentive for an analyst at the Terrorist Screening Center to reject a nomination. In one five year period, the watchlist nearly doubled in size to almost 469,000 nominations, while at the same time the rejection rate rose from 1/5 of one percent to just over one percent.<sup>6</sup> The Terrorist Screening Database may now have more than 1 million identities on it – precise numbers are a closely guarded secret.

And yet, it is striking who has *not* been stopped by watchlists, including the No-Fly List. Richard Reid, the infamous “shoe bomber” was subdued by passengers on an American Airlines flight that he was free to board. Umar Farouk Abdulmutallab was the “underwear” bomber on a Christmas 2009 flight to Detroit. In those cases, the passengers themselves prevented catastrophe – neither man was on a watchlist. Since then, the country has been plagued by acts of terrorism, mostly by our fellow citizens. But no one was saved from their monstrous acts by any of the TSC’s many watchlists.

Well, who *is or has been* on a watchlist? Senator Ted Kennedy, for one. He seems to have shared a name with an IRA terrorist. It took a long time to remove his name from the No Fly List, even leveraging his friendship with the Secretary of Homeland Security. Cat Stevens, creator of Moon Shadow and Peace Train, did not have a personal friendship with high officials. He was caught in the watchlist web for donating money to an Islamic charity. Erich Scherfen, a combat veteran from the Gulf War and a commercial air pilot, found himself on the watchlist – an uncomfortable problem to have if you are employed by an airline.

Dr. Rahinah Ibrahim, a Stanford Ph.D. in architecture and mother of four, fought for her day in court for nine years after she was arrested at the San Francisco airport while in a wheelchair and in front of her 9-year-old daughter. It took eight of those years to discover why: she had been put on the No-Fly List by mistake, because an FBI agent filled out his form backwards after failing to understand its instructions. Since there was no outside review – no separation of powers – even this FBI agent was surprised when his gross negligence was discovered during a deposition, a deposition that the government fought hard to prevent from ever taking place. The judge in her trial – and, full disclosure, I testified as an expert in that case – found that she was never, *ever* a

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<sup>5</sup> *Mohamed v. Holder*, 995 F.Supp.2d 520, 531-32 (E.D. Va. 2014).

<sup>6</sup> Jeffrey Kahn, “Terrorist Watchlists,” in *The Cambridge Handbook of Surveillance Law* 85 (Gray & Henderson, eds., Cambridge University Press, 2017).

threat to national security. But she could not shake that sticky list. Nor has the U.S. Government given up its relentless drive to protect its watchlists from scrutiny. Last week, the Department of Justice filed for review in the U.S. Supreme Court, almost fifteen years after the government's egregious conduct started this case.<sup>7</sup>

And then there is Ayman Latif and several other U.S. Citizens, including some veterans of our armed forces, who are still fighting for their day in court, alleging that they were no-flies as retaliation for refusing FBI agents who asked them to become informants against their religious communities.

Their claims – and they are similar to claims made by other plaintiffs around the country – may be true or may be false. But one thing is very clear. Counterterrorism is really hard to do. Mistakes happen, either from ignorance or overzealousness. Still the watchlisters fight hard against any judicial oversight. For years, the most that the watchlisters were willing to do if you persistently complained was to send you a letter. But if the test for including a name on the watchlist was devised by George Orwell, the letter must have been written by Franz Kafka. Here is the letter sent to one family of five, split up in Hong Kong while traveling back home to California – it took five months and a public media campaign before the father and son were allowed to return home, effectively exiled from their own country. But just take a look at the first paragraph and see if you can figure out what, if anything, has happened:

“We have conducted a review of any applicable records ...” – *Were* there “any applicable records” to review? What counts as applicable is left unsaid.

“... in consultation with other federal agencies, as appropriate.” – *Was* it appropriate to consult other agencies?

“Where it has been determined that a correction to records is warranted ...” – *Was* it determined?

“... these records have been modified to address any delay or denial of boarding ...” – *How* were they modified? Does this mean the record was deleted? Augmented? Are you on, or off, a watchlist? Which watchlist?

“... that you may have experienced as a result of the watch list screening process.” – Notice that the letter does not even acknowledge that a delay or denial *did* occur – it *may* have occurred. And the modification would only address *that* episode, no other.

So when the current director of the TSA says that “Passengers have a right to fly,” he doesn’t use the word “right” as you might understand it, to mean something that cannot be taken away from you without due process of law. He means not right, but privilege, a privilege that, “if we ever thought the risk reached the point where the passenger shouldn’t fly, then we have the authority to deny flight for that particular passenger.” That’s just not what a right is. Can you imagine a

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<sup>7</sup> Dep’t of Homeland Security v. Ibrahimi, Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 18A954 (Sup. Ct. May 2019).

government agency that presumed to declare that you have a right to speak, but that if *they* ever thought the risk reached the point where you should be silenced, they could summarily strip you of your right to free speech?

We have been down this road before. Let me pause here to take you on a journey into that past. Captain Renault was a powerful man in Casablanca, but he would have been no match for the indomitable Ruth Shipley in Washington D.C. From 1928 to 1955, Mrs. Shipley ran the State Department's Passport Office. Her files were larger than those of J. Edgar Hoover, and her opinions harder to change. Back then, you received a passport for each foreign trip and returned it to Washington when your travel was complete. Mrs. Shipley decided whether you got your passport – in other words, whether you could leave the country.

If she thought – in the language of her day – that your travel was not in the interest of the United States, you did not travel. Here she is receiving a medal from John Foster Dulles, the Secretary of State. By the way, she was on record as denying a passport to Mr. Dulles's sister when she wanted to travel to Austria after WWII. The problem was that Mrs. Dulles wanted to take her children. Mrs. Shipley thought that post-war Austria was no place for children. "I'm not going without my children," Eleanor Dulles said. "Then you are not going," said Mrs. Shipley.

It took three months of pressure by the powerful Dulles clan (which included Allen Dulles, director of the CIA), and the personal offers of both the British and Swiss ambassadors to provide visas on their official stationary (Mrs. Shipley had confiscated Mrs. Dulles's passport), before Mrs. Shipley accepted the inevitable. This was the only instance of successful opposition to Mrs. Shipley that I could find.<sup>8</sup>

But there were some big differences between Mrs. Shipley and our watchlisting system today.

For one thing, there was only one Mrs. Shipley. The buck stopped with her. You will have noticed that the letter we just deciphered came from the Transportation Security Administration – TSA, the agency that uses the watchlist – not the Terrorist Screening Center, the agency that composes the list. This division of authority is quite deliberate. It makes it easy to pass the buck. Complain to the TSA and you will hear that they are only following the instructions of the TSC. Complain to the TSC and you will hear that they do not actually operate the list. That's the TSA. Orwell? Kafka? Joseph Heller?

Of course, you have to *find* the TSC before you can complain to them. The TSC has no public complaints office. You could argue with Mrs. Shipley because you could find her. She worked here, in this building across the street from the White House. Today, you can pinpoint on Google Maps where the White House is located, the Pentagon, even the CIA. But where is the Terrorist Screening Center located where these lists are made?

Funnily enough, we only know the location of the TSC because of the large air conditioning units on the top of the building that are used to cool the massive computer banks inside that run these watchlists. The AC droned on 24/7 and so loud that neighbors made noise complaints to the local

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<sup>8</sup> Jeffrey Kahn, *Mrs. Shipley's Ghost: Terrorist Watchlists and the Right to Travel* 110 (University of Michigan Press, 2013).

zoning authority about this mysterious building with no sign in front. That forced out into the open who was renting out this space.

Incidentally, look too at this strange sculpture at the entry to the building. It is a remnant of the twisted outer shell of one of the World Trade Center towers. Inside the building, the main hallway exhibits remnants and artefacts of other terrorist attacks. Every morning, the well-meaning officials, full of zeal but without understanding, walk past these artefacts, deliberately placed in their path to remind them of the importance of their work. It is undoubtedly important, but do you think this gives any incentive for them to question, closely, the one-sided intelligence they evaluate, to slow down and ask probing questions, as a judge might, or to take any risk in choosing *not* to put a name on the watchlist? Those symbols of tragedy – not scales of justice – are placed there for a reason.

Mrs. Shipley's system was eventually undone by our American tradition of due process of law and the separation of powers. Even the McCarthyite Red Scare – and Mrs. Shipley was a virulent anti-Communist – could not keep judges from eventually acting on the courage of their convictions and their legal training. Secretly controlling the travel of American citizens accused of no crime – not even a thought crime – and given no access to the secret files hiding the information used to keep them at home, violated the most essential elements of due process. Courts gradually began to insist on an appeals process that challenged Mrs. Shipley's previously unchallengeable discretion. Someone else would be the final judge – a real judge – to evaluate the reasonableness of Mrs. Shipley's actions. And when that happened, the game was up, and the Passport Office folded up its operations without resulting in any of the parade of horrors this system was supposed to prevent.

Return now back to our own world. It has taken almost twenty years, but judges are gradually starting to insist on the same due process that undid Mrs. Shipley's system. But, I'm sorry to say, I have to end on a note of sad prediction, unless awareness and attitudes about watchlists change. Because unlike in Mrs. Shipley's day, when controlling international travel struck at the interests of an elite traveling class, like the Dulles family, today's travelers are not as insistent on their rights. In part, this is because the watchlisting system is so expertly hidden away. In part this is also because much of the American traveling public likes the No-Fly List. Since so much happens behind the scenes, it doesn't seem to affect most people, making it easy to give away rights that don't appear to be threatened. And few politicians have the courage to make a fuss to help people whom the system, by definition, has already branded as a suspected terrorist.

The logic of watchlists is almost impossible to resist. The No-Fly List started out as a list to prevent someone from boarding a plane who was a specific and credible threat to that aircraft. Now the purpose of the list has been expanded to prevent access by those who are threats to "civil aviation *or* national security." In other words, a person can now be put on the No-Fly List even though *not* a threat to civil aviation. And why not? Isn't the courier or accountant or go-between for terrorists as dangerous and worthy of obstruction as a bomber?

Before you knew it, watchlists were pretty popular with voters who didn't expect to be bothered by them. It was easy to purchase what seemed to be more security at the expense of someone else's liberty.

For example, 86% of Democrats and 83% of Republicans agree that there ought to be a “No-Gun List.”<sup>9</sup> This is easy to support if you aren’t worried that you might be watchlisted – only the crazies will lose their guns. And the soundbite is so tantalizingly simple. Republican Senator Susan Collins, and Democratic Senator Heidi Heitkamp, both supported their “Terrorism Firearms Prevention Act” with similar language. You only need acknowledge, said Senator Collins, “one simple principle: if you are considered to be too dangerous to fly on an airplane, you should not be able to buy a firearm.” Likewise, Senator Heitkamp: “It just makes sense – if someone is too dangerous to board an airplane, they’re too dangerous to buy a gun.” No Fly – No Buy: a perfect slogan. That’s why Pete Buttigieg,<sup>10</sup> Cory Booker,<sup>11</sup> Kirsten Gillibrand,<sup>12</sup> Elizabeth Warren,<sup>13</sup> and countless others, including the President, support this idea.

And it is dead wrong. Although I would be the last person to oppose gun control, this is not the way to do it. Remember, there is no day in court, no opportunity to confront evidence or those who label you suspicious. And, with the government’s manifold restrictions on sharing the information behind their decision, how do you prove a negative, that you are *not* a terrorist? On top of that is the struggle against that low standard of review, that the official lacks a reasonable basis to label you a *suspected* terrorist?<sup>14</sup>

But why stop with a “No Buy” list? After a series of terrorist attacks in the U.S. and Europe that weaponized trucks, one Chicago alderman proposed a “No-Rent” list. “It makes sense, does it not,” he said, “that if there is a no-fly list, there ought to be a no-rent list? ... Businesses that make available trucks for rent to the public ought to be aware of suspects or suspicious individuals that only law enforcement can make them aware of.” Alderman Burke sees no threat to liberty in merchants turning over lists of prospective customers for government approval before making a sale.

For some, it is comforting to dream of a technology that protects us all, and at so little cost to those of us oddly certain we will not be wrongly suspected of anything. But there is another danger here that even Mrs. Shipley did not face. Normalizing watchlists, accepting them as part of our everyday background noise, may also mean that they leave the confines of government control, and therefore the protections against government overreach that the Constitution and the courts can provide.

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<sup>9</sup> Pew Research Center, *Gun Policy Remains Divisive, But Several Proposals Still Draw Bipartisan Support*, Oct. 18, 2018.

<sup>10</sup> Kaitlin Lange & Chris Sikich, *Where Buttigieg stands on the issues Presidential candidate for 2020 boasts bio rather than platform*, *Courier & Press* (Evansville, Ind.), May 6, 2019, at A3 (2019 WLNR 14014172).

<sup>11</sup> Jonathan D. Salant, *You need a license to drive a car. Booker says you should need a license to buy a gun as well*, *nj.com* (New Jersey), May 6, 2019 (2019 WLNR 14035679).

<sup>12</sup> Robbie Sequeira, *“Arm-Wrestling Winner” Gillibrand talks gun reform, climate change in Ames*, *Ames Tribune* (Ames, IA), Apr. 20, 2019 (2019 WLNR 12386747).

<sup>13</sup> CNN Hosts Town Hall with Sen. Elizabeth Warren (D-MA). Aired 9-10:15p ET, March 18, 2019. Transcript with Jake Tapper (2019 WLNR 8687152).

<sup>14</sup> Jeffrey Kahn, *A “No Buy” List for Guns is a Bad Idea*, *N.Y. Times*, July 1, 2016.

For example, what happens when your Ring video doorbell – operated by Google or Amazon – adopts facial recognition technology?<sup>15</sup> The patent is already pending that could link these popular devices to watchlists and databases like these. Wouldn't you like the convenience and security of knowing – before you answer the door – whether the stranger outside is on a terrorist watchlist? Subject to any outstanding warrants? What does such technology do to our communities?

And that super-secret need to deny access to the watchlists to those who contest their inclusion? It turns out none of that mattered if you are on the list of approved private businesses that the government shares its watchlists with. After years of firm denials, the government recently reluctantly revealed, again in the course of heated litigation, that as many as 1400 private entities may be given access to parts of the watchlist.<sup>16</sup> These private groups may include: railroads, private colleges, hospitals, and other private facilities.<sup>17</sup>

And why shouldn't they expand in this way? As early as 2009, this TSC PowerPoint slide, given to me by its then director, shows the future these officials dreamed of. It is one where the TSDB could be used not just for air travel, but for all travel, for borders, guns, licenses, government benefits, even sporting events. Many, but not all of these uses, are already operational.

The separation of powers, checks and balances, protect your liberty. These principles are not costless, nor do they maximize your security. But they are the strongest bulwarks yet found to maintain a free society. The logic of watchlists opposes those principles. But a people who declare themselves free, and yet do not police the conduct of their leaders, will not taste that freedom for long. Do not rely on those well-meaning and zealous officials to do that work for you. They are without understanding. Focused on the single goal of predicting danger, they see no need to limit their power and no boundary that cannot, in their discretion, be crossed in pursuit of their mission.

Or, in the words of Captain Renault, "realizing the importance of the case, my men are rounding up twice the usual number of suspects."

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<sup>15</sup> Geoffrey A. Fowler, *The doorbells have eyes: A privacy battle brews over home security cameras*, Washington Post, Feb. 3, 2019, at G03 ("Meanwhile, Ring's owner, Amazon, filed an eerily specific patent to put its Rekognition facial-identification software into doorbells. The purpose: to automatically flag "suspicious" people.").

<sup>16</sup> Michael Burke, *Federal government shares terror watchlist with over 1000 private groups: report*, The Hill, Feb. 19, 2019. See also Declaration of Timothy P. Groh, Mar. 11, 2019, filed as Document 299-4, in Elhady v. Kable, 1:16-cv-375 (E.D. Va.), at ¶ 35.

<sup>17</sup> Declaration of Scott A. Rago, Mar. 11, 2019, filed as Document 301-4 [mistitled as Declaration of Michael A. Christman], in Elhady v. Kable, 1:16-cv-375 (E.D. Va.), at ¶¶ 10-12.