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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRENNAN CENTER FOR JUSTICE AT
NEW YORK UNIVERSITY SCHOOL OF
LAW, et al.,

Plaintiffs,

vs.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action
No. 1:18-cv-1860

Washington, DC
July 23, 2021

10:03 a.m.

TRANSCRIPT OF VIDEO STATUS CONFERENCE
BEFORE THE HONORABLE RANDOLPH D. MOSS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

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P R O C E E D I N G S

1
2 **DEPUTY CLERK:** This is civil action 18-1860,
3 Brennan Center for Justice at New York University School of
4 Law, et al., versus United States Department of Justice.
5 Appearing by video for plaintiffs, Jonathan Moses and Tamara
6 Livshiz; and for defendant by video, Brenda
7 Gonzalez-Horowitz.

8 **THE COURT:** All right, thank you. Thank you all
9 for convening. Before we get started, I want to remind
10 everybody that under the Chief Judge's standing order, it's
11 not permissible to record or to rebroadcast these
12 proceedings, and I'll order that nobody do so.

13 I have reviewed the parties' joint status report,
14 and I'm happy to hear from you today and provide whatever
15 guidance I can to hopefully bring this matter as quickly as
16 we can to a conclusion. I think probably it makes sense to
17 start with of the Government and hear from the Government
18 first, because it's a question of what the Government thinks
19 it can do or should do under the circumstances, and then
20 plaintiffs can respond.

21 So Ms. Gonzalez-Horowitz.

22 **MS. GONZALEZ-HOROWITZ:** Yes, good morning, your
23 Honor. This is Assistant U.S. Attorney Brenda
24 Gonzalez-Horowitz on behalf of the department. I just want
25 to start by saying it's clear from the parties' positions

1 that we are taking pretty diametrically opposed positions as
2 to the Court's request that the department identify statutes
3 that bear a self-evident link to domestic terrorism. And I
4 think, as the Court noted in its memorandum opinion on
5 footnote two, that the Government's position has been that
6 there are no statutes that bear a, quote, self-evident link
7 to domestic terrorism. And so that is our position today,
8 that there are no such statutes that bear a self-evident
9 link such that the department would be able to go into LIONS
10 and review all of the convictions that we've identified and
11 the potentially relevant list that we identified in our
12 joint status report, and produce those convictions to the
13 plaintiffs without conducting a manual review.

14 So frankly, the position that plaintiffs are
15 taking is completely overbroad and frankly pretty untenable.
16 Because what they're asking is for the department to just
17 blindly produce all of this information without doing a
18 manual review to ensure that the department has made a
19 public connection for each conviction that it's releasing to
20 terrorism.

21 **THE COURT:** Can I ask you a question about this,
22 Ms. Gonzalez-Horowitz. I think what actually I said in the
23 footnote was just that you had not identified any statutes,
24 that the Government hadn't identified any statutes. But I
25 was contrasting that with what the Government had done with

1 respect to international terrorism. This is what led me to
2 believe that the Government could identify some statutes
3 that have a self-evident link to domestic terrorism, because
4 the Government identified, I don't know, 25, 30 statutes
5 that bear a self-evident link to international terrorism.
6 Not all those statutes use the word terrorism in those
7 statutes. Some of them are analogous to domestic statutes,
8 and some of them are ones that actually apply domestically.

9 So it may be that the Government can't do this or
10 doesn't want to do it, but it's taking very different
11 positions with respect to international terrorism and
12 domestic terrorism.

13 **MS. GONZALEZ-HOROWITZ:** And I understand that,
14 your Honor. I understand that they are different positions,
15 but I don't think it's inconsistent with what the
16 department's position has been all along; and that is that
17 the international terrorism context is different. The
18 National Security Division, you know, prosecutes
19 international terrorism under a wide range of statutes.
20 That's well known. NSD, they release those statutes, they
21 release those convictions for international terrorism. The
22 department, you know, speaks about which statutes it's using
23 to prosecute international terrorism. But when you contrast
24 that with the domestic context, there are no such statutes
25 that the department says these are the statutes that we

1 routinely prosecute for domestic terrorism.

2 And so I think it is true that in the
3 international context, we were able to provide several
4 statutes that we said a conviction under this statute would
5 necessarily bear a link to international terrorism, and
6 produced those convictions without conducting a manual
7 review. That's true, and we did that. But I think the
8 problem here is that there's just no such statutes.

9 And I understand the Court's position, and
10 obviously plaintiffs' position, that there may be some
11 statutes that are analogous or perhaps even statutes that
12 use the word terrorism in their title. But I think what it
13 comes back to, and that the Government pointed to in the
14 joint status report, is there's a very clear definition of
15 domestic terrorism in 18 U.S.C. 2331. So when we're looking
16 as to whether a statute bears a self-evident link, what we
17 need to be sure of is that a conviction under any one of the
18 statutes that plaintiffs have proposed would necessarily
19 meet that definition. And not just would it meet that
20 definition, but the additional step, which would be
21 consistent with the Court's order, is has there been a
22 public link to terrorism for that conviction.

23 And I think just doing a manual review is going to
24 ensure that the department isn't producing information that
25 the Court has already found constitutes a very significant

1 and real privacy interest.

2 **THE COURT:** Let me ask you a question about that.
3 With respect to the manual review that you're talking about,
4 are you talking about just doing a manual review like the
5 court ordered in other respects; so just to look to see if
6 the Government at any time had publicly characterized the
7 matter as a terrorism case? Or would the manual review
8 include looking at the definition of domestic terrorism and
9 saying if in this case that statute is clearly satisfied,
10 then we're going to -- we will release that document?

11 **MS. GONZALEZ-HOROWITZ:** No, I think consistent
12 with the Court's order, we would release convictions where
13 there has been a public link or a public association to
14 domestic terrorism. I'm happy to talk about what that would
15 look like, so --

16 **THE COURT:** I'm sorry, just to understand, so
17 basically what you're saying is that you are asking me to
18 modify my opinion and strike from my prior opinion the
19 requirement that the Government do anything beyond what you
20 just described. Because I had said do that, but I had said
21 in addition to that, I said if there's a self-evident link
22 to terrorism you should disclose it. You're saying we can't
23 and shouldn't do that.

24 Is that a fair summary or description of what the
25 Government's position is?

1 **MS. GONZALEZ-HOROWITZ:** Yeah, in the domestic
2 context, our position is that there is no such statute such
3 that if we pulled all of the cases from LIONS and CaseView
4 and in the potential pool that we're looking at, that we
5 would be able to automatically release those without looking
6 at whether there's a link.

7 **THE COURT:** Right. So let me take an example --
8 and I don't know whether there's -- in the 3,500 or so
9 cases, whether this exists or not. But if you look at 18
10 U.S.C. section 115, which the plaintiffs point to, that is a
11 statute that makes it unlawful to assault, kidnap or murder
12 or attempt to -- or conspire to kidnap or murder or threaten
13 to assault, kidnap or murder a member of an immediate family
14 of a United States official, a United States judge, a
15 federal law enforcement officer or an official whose killing
16 would be a crime under section 1114 -- which is the federal
17 official murder statute, with the intent to impede,
18 intimidate or interfere with such official judge or law
19 enforcement officer while engaged in the performance of
20 official duties or with intent to retaliate against such
21 official, judge or law enforcement officer on account of the
22 performance of such duties.

23 How is that not domestic terrorism for someone to
24 do that under your definition of domestic terrorism?

25 **MS. GONZALEZ-HOROWITZ:** Well, and that's exactly

1 it. I think one could envision multiple scenarios where a
2 conviction under that statute wouldn't necessarily meet the
3 definition under 2331. So just to give you an example, if
4 there was a man who decided to blow up a government building
5 or who assaulted a federal employee or a judge because he
6 was upset that that individual broke up with them or did
7 something else --

8 **THE COURT:** No, no, no, no, that's not what the
9 statute says, though. The statute says with the intent to
10 impede, intimidate or interfere with such official, judge or
11 law enforcement officer while engaged in the performance of
12 official duty. So it's really hard for me to imagine any
13 circumstance in which someone could violate that statute in
14 which it would not be a matter of domestic terrorism. I
15 mean, it would be sort of shocking.

16 **MS. GONZALEZ-HOROWITZ:** Well, but just to bring
17 the Court back, because the definition of domestic terrorism
18 requires an individual to intimidate or coerce a civilian
19 population or influence the policy of a government by
20 intimidation or coercion or affect the conduct of government
21 by mass destruction, assassination or kidnapping. And so I
22 understand the Court's position, but I think there are
23 scenarios that one could envision that would necessarily
24 fall for a conviction under 115 but wouldn't statutorily
25 meet the definition of domestic terrorism.

1 **THE COURT:** Ms. Gonzalez-Horowitz, I would be more
2 persuaded by your position if the Government had said or
3 does say to U.S. Attorneys around the country, "Look, we are
4 reporting all the time to Congress about domestic terrorism
5 in this country. The public is relying on this; members of
6 Congress are relying on this. They're appropriating money,
7 hundreds of millions, if not billions, of dollars in
8 appropriations for purposes of fighting domestic terrorism.
9 You better make sure you are applying this definition when
10 you put something in that database and say it's domestic
11 terrorism." If they're doing that, I'm with you, that's
12 domestic terrorism.

13 The problem here is what the plaintiffs are trying
14 to get at and trying to understand is what does the
15 Government think domestic terrorism is. And quite frankly,
16 the Government is sort of talking out of both sides of its
17 mouth about this. And when it comes to its obligations in
18 this case, it's saying this is a very narrow concept; and
19 that you've got to look at this statute here, and there are
20 all these other statutes out there. I can imagine a
21 circumstance in which it wouldn't be domestic terrorism
22 under the statute, and therefore we're not going to include
23 it. But that's not what the Department of Justice is saying
24 to Congress or to the public when it's talking about what
25 the Government is doing.

1 So I think the public interest here in what the
2 Brennan Center and the individual plaintiffs are trying to
3 get at, they're saying it's hugely important to understand
4 what the Government actually thinks domestic terrorism is.
5 And I have to say, as I sit here as the Judge today, I don't
6 know. I mean, my guess is frankly that the Government
7 doesn't know what it is, and that it's just completely
8 haphazard and this information that's being reported to
9 Congress is not reliable. But if that's the case, then I
10 think that there is a big public interest in knowing that.

11 It just doesn't help to say here is this very
12 narrow definition of domestic terrorism, that's what we're
13 living by. And if you're living by it, that's great. But
14 if it's not, then I think that there's a public interest in
15 knowing what it is that the Government is applying and how
16 the Government is defining something as terrorism or not.

17 **MS. GONZALEZ-HOROWITZ:** I understand the Court's
18 concern. I would just reiterate -- and I think this has
19 obviously been briefed before the Court and argued before
20 today. But just as a general matter, it's line AUSAs who
21 are inputting these program categories into LIONS. So I
22 understand that there may be sort of varying views as to
23 when those program categories are being input into LIONS.
24 And again, those program categories are being used at the
25 beginning of an investigation when an AUSA perhaps thinks

1 the case may be one thing, but then it turns out to be
2 another.

3 And I just want to clarify, I just want to bring
4 back that we're not arguing at this point that plaintiffs
5 aren't entitled to the information that the Court has found
6 under its order they would be entitled to, which are
7 convictions that have a public link to terrorism. We're not
8 arguing against that. What I'm saying is simply that the
9 Government should be afforded to conduct a manual review to
10 ensure that the cases that have tags, one of these six
11 terrorism tags in the database in the pool that we're
12 talking about, actually had a public link to terrorism.

13 Because as the Court has already noted, there
14 might be cases that are tagged with one of the six program
15 tags in error. There are cases where the Government may
16 think initially it relates to terrorism, and then down the
17 line the investigation doesn't pan out or the charges or
18 convictions don't pan out. Or there's that third bucket
19 that the Court identified where cases that internally the
20 Government thinks may be terrorism but hasn't publicly
21 disclosed as much. So I think -- and those are the cases
22 that the Court really highlighted in its opinion to say that
23 in those particular cases, there exists a very significant
24 privacy interest for those individuals to not have this
25 information released for the first time in response to a

1 FOIA request. And so --

2 **THE COURT:** But that category -- I mean, I think
3 that's what the nub of the issue is here. You're pushing on
4 an open door with respect to everything else because I've
5 already ruled in your favor on those other issues. But it's
6 that category, and it strikes me that there are perhaps
7 different subcategories there. There could be a category in
8 which we haven't publicly called this terrorism because even
9 though we think it is, we just don't think there's enough
10 information there. And it would be unfair to call this a
11 public terrorism case because it's just -- it's too thin.
12 You know, it's our suspicion, but we were not able to prove
13 it. We're not saying it was a mistake to call it terrorism,
14 because in our view it probably was. But had we had to
15 prove it in court, we probably couldn't have proven it.

16 There's another category, though, where something
17 really meets the definition of terrorism, the definition
18 you're pointing to here of terrorism. The person is
19 convicted of it; they have done something completely heinous
20 and have been convicted of it. For whatever reason, the
21 Government just didn't use the label of terrorism, but the
22 statute does. I mean, there's nothing -- it's not revealing
23 anything that's not public already, because the person was
24 convicted of blowing up a government facility. And they
25 attached a note when they blew up -- or sent a communication

1 when they blew up the Government facility, and they said,
2 "We're going to keep doing this until you adopt this policy
3 that we like."

4 I don't think any of us would have any doubt that
5 that is an act of terrorism. Maybe it wasn't called
6 terrorism in a public release or something, but it's hard
7 for me to see how that person's privacy interest would be
8 injured by releasing it and saying yes, that was an act of
9 terrorism. In the same way, for example, if the Government
10 were to issue a press release tomorrow to say, "In our view,
11 violations of 18 U.S.C. section 115 are terrorism related";
12 or if you were to say to me today in this court, "Judge,
13 you've convinced me, 18 U.S.C. 115 is a terrorism related
14 case," that's not announcing anything -- or revealing
15 anything that's not already public. The only thing it's
16 doing is clarifying how the Government actually defines
17 terrorism. It's not saying anything different about the
18 case that was brought years ago or the culpability of that
19 individual. It's not attacking that person's privacy
20 interests in any way, it's just clarifying what the
21 Government actually thinks is terrorism.

22 I mean, that's what's troubling me here. I mean,
23 as I'm sure you've gathered and what I'm trying to get at in
24 this case is, I do think that there is a huge public
25 interest in this day and age in understanding how the

1 Government and the Justice Department defines domestic
2 terrorism. I think that there's -- under FOIA, there's an
3 interest in disclosure of materials that elucidate how the
4 Government defines domestic terrorism, which is a question
5 of huge importance. Many, many millions of dollars of money
6 are being appropriated to fight this thing, whatever it
7 might be. It would really be good to know what the
8 Government thinks it is. And if you could reveal and
9 elucidate what that is without in the process of doing that
10 unfairly tarnish people's reputations, that should be done.
11 That's what I'm trying to get at.

12 **MS. GONZALEZ-HOROWITZ:** I fully understand that,
13 your Honor. I think the issue is there may be cases where
14 perhaps the conduct could meet the definition under domestic
15 terrorism or international terrorism, but the problem is
16 you're adding a new layer. I think the Court highlighted
17 this in its opinion. You're adding a new layer when you
18 have the Department of Justice identifying you by a certain
19 tag, and that's by calling you a terrorist or saying you
20 committed a terrorism related offense. That is a
21 significant label that you would be putting on individuals
22 who perhaps were not convicted of an offense that was
23 necessarily or had publicly been said to be terrorism. And
24 so I understand the Court's position.

25 Frankly, plaintiffs have submitted with the joint

1 status report this list of 70 statutes which they contend is
2 self-evident to domestic terrorism. Not surprisingly, the
3 Government does not agree with the list that plaintiffs have
4 come up with.

5 And I just want to just highlight a couple of
6 examples for the Court as to why we think this list is so
7 incredibly overbroad. So, for example, plaintiffs include a
8 citation to 49 U.S.C. 46504. And that's a statute that
9 plaintiffs contend bear a self-evident link to domestic
10 terrorism. That statute relates to interference with flight
11 crew members. I did a 30-minute Google search yesterday
12 which -- 30-minute, a 30-second Google search yesterday
13 which indicated that someone convicted under that statute
14 was a gentleman who got drunk on an airplane and tried to
15 assault a flight member. Again, no mention of terrorism in
16 any of the newspaper articles that I looked at, no DOJ press
17 release to indicate that his conduct was terrorism. And
18 frankly, if you look at the definition of domestic
19 terrorism, he likely would not fall under that definition.

20 **THE COURT:** Although, just as a qualifier, the
21 additional screen here, this would only apply to those cases
22 that the Government's database had already designated as
23 terrorism related cases. So it's unlikely you're going to
24 get the drunk obnoxious person on a flight under those
25 circumstances. This is a subgroup already that has been

1 flagged by the database as being terrorism related.

2 **MS. GONZALEZ-HOROWITZ:** That's true, your Honor.
3 But again, that would just bring me back to my first point
4 which was at the time that these categorizations are being
5 made in LIONS, this is being done by a line AUSA all over
6 the country who at the time that they're opening the case
7 maybe they don't know sufficient facts to know whether it is
8 or is not terrorism. And so I think just saying that we're
9 relying on categories that have already been defined to be
10 terrorism, I think that's a little bit of an overbroad
11 position to take, because it doesn't mean that the
12 Government actually thinks it was terrorism or then publicly
13 linked it to terrorism. It's an initial determination that
14 the Government's making.

15 **THE COURT:** When the AUSA is making that
16 determination, is there any guidance from Main Justice or
17 EOUSA that says this is what you should consider in deciding
18 whether to flag something as terrorism related? How does
19 the individual AUSA make that decision?

20 **MS. GONZALEZ-HOROWITZ:** I think there is guidance.
21 I'm aware of recent guidance that was issued regarding
22 coding and categorizations as it relates to terrorism
23 related offenses. I'm not sure for the time period that
24 we're discussing which started in 2006 -- the pool up to the
25 Court's order last year, I'm not sure whether there was

1 specific guidance that was given departmentally or
2 departmentally wide to all AUSAs to say this is what the
3 Government believes is international terrorism or domestic
4 terrorism. I'm not sure that there's sort of a broad or
5 consistent approach that's being taken departmentally, I'm
6 just not sure.

7 **THE COURT:** Okay. Anything else you want to add?
8 I'll give you a chance to respond after I hear from the
9 plaintiffs.

10 **MS. GONZALEZ-HOROWITZ:** Okay.

11 **THE COURT:** Who's speaking on behalf of plaintiffs
12 today?

13 **MR. MOSES:** Good morning, your Honor. Ms. Livshiz
14 is going to address the Court on our behalf. Thank you.

15 **THE COURT:** Okay, thank you. Ms. Livshiz.

16 **MS. LIVSHIZ:** Good morning, your Honor. First, I
17 want to thank your Honor for your very thoughtful opinion.
18 Plaintiffs believe that the July 1st, 2021 order was clear.
19 The order said that there are certain statutes where there's
20 a sufficiently self-evident link to terrorism such that the
21 revelation that a defendant convicted under such statutes
22 was also linked to a terrorism related program category
23 would not be an unwarranted invasion of privacy. In other
24 words, for such defendants, the public interest outweighs
25 the privacy interest, as your Honor identified, because the

1 privacy interest is only marginally invaded by the
2 additional disclosure.

3 The statute of conviction for those defendants is
4 already revealing. And that is the crux of the issue as it
5 relates to the exercise of making the list of statutes that
6 your Honor requested. Your Honor asked DOJ to assemble the
7 list of statutes that meet this description, and gave
8 guidance on how to do so. Nevertheless, DOJ claims that
9 there are no such statutes. DOJ justifies its position by
10 pointing to a definition of domestic terrorism found in a
11 particular statute, 18 U.S.C. 2331, which was enacted as
12 part of the Patriot Act. But that definition has nothing to
13 do with this case. And in any event, it is broad enough to
14 encompass a wide variety of statutes, not just the few
15 listed in -- that DOJ listed in the status report.

16 First, here's why it has nothing to do with this
17 case. Your Honor has never referred to international or
18 domestic terrorism as defined in that statute. By contrast,
19 your Honor made clear both in your recent order, the
20 July 1st order, and in your order from August 19th of last
21 year that you were distinguishing between international
22 cases and the remainder, which your Honor described as
23 having, quote, domestic aspects, close quote.

24 And after all, when plaintiffs sought data from
25 DOJ, they sought data for six categories. Yes, we sought

1 data for international terrorism and domestic terrorism.
2 But we also sought data relating to terrorism related
3 hoaxes, terrorist financing, expert enforcement -- export
4 enforcement that's terrorism related, and critical
5 infrastructure protection. DOJ's position seems to ignore
6 those four other categories and forgets the history and
7 context specific to this case when it latches on to the
8 phrase domestic terrorism.

9 Again, in referring to domestic terrorism, your
10 Honor was not requiring that the statute of conviction
11 incorporate by reference a statutory definition. The order
12 was instead mandating a list of statutes that, just as the
13 DOJ does in the international terrorism context as your
14 Honor recognized this morning, the public could reasonably
15 link to terrorism such that the revelation of convictions
16 under such statutes would just not constitute an unwarranted
17 invasion of privacy. So again, the statutory definition
18 should not be introduced to this case at this stage.

19 But this --

20 **THE COURT:** Can I ask you a question about this?
21 I mean, one of the things I'm struggling with a little bit
22 is to my mind, the most important public interest that
23 weighs in the FOIA balance here is a public interest in
24 understanding how the Government defines domestic terrorism.
25 If I just adopt your list, that just tells us how the

1 Brennan Center or how I define domestic terrorism, and
2 that's not really the point here. The point is to try and
3 understand how the Government defines it.

4 At some level, isn't it -- I mean, the researchers
5 and the public interest in this, is it enough to come away
6 from this case with saying, look, the Government has
7 reported for years that there were X thousand prosecutions
8 brought in terrorism cases, so many numbers of convictions
9 that were brought in those cases. Guess what, when we
10 actually sent a FOIA request to the Government, they were
11 only able to identify 10 percent of those cases that they've
12 been reporting as terrorism cases that they actually have --
13 are willing to actually step forward now and say were
14 terrorism cases. In all other cases, all they'll say is it
15 was a mistake, it might have initially been a terrorism case
16 that wasn't brought as a terrorism case or we don't have
17 sufficient confidence that it was actually a terrorism case
18 that we're willing to say so publicly.

19 Doesn't that kind of make your point just knowing
20 that? And doesn't it sort of give you -- or serve sort of a
21 large portion of what the public interest is here is, is to
22 understand what the department has been doing to show that
23 in fact there really has not been a coherent understanding
24 of what terrorism has been, and that there may have been
25 substantial over reporting of terrorism convictions?

1 **MS. LIVSHIZ:** Yes, your Honor. So I want to
2 address -- there's a lot there that I would like to address,
3 and I think there's a lot of points that are worth sort of
4 dwelling on. First is, you know, the list that we put
5 together was not meant to be a list that defines domestic
6 terrorism. The list we put together was trying to heed the
7 broader and overall concern that the additional, quote,
8 invasion of privacy is outweighed by the public interest
9 because it is marginal based on the conduct underlying those
10 convictions that's evident on its face.

11 So just for a moment to pause on how we compiled
12 that list, you know, we tried to compile it in good faith.
13 We looked at statutes that were listed as prerequisites
14 under the material support statute. We analyzed the conduct
15 prescribed by a variety of statutes to see if it was similar
16 to the ones the DOJ associates with international terrorism
17 as your Honor suggested earlier. We researched DOJ's public
18 statements relating to domestic terrorism, and we did an
19 analysis of underlying conduct to come up with that list.
20 So it is not meant to be a list that defines domestic
21 terrorism, but it instead is a list where we think the
22 public interest outweighs the privacy interest, at least as
23 articulated by your Honor's July 1st order.

24 And just to pause for a second, I think the
25 Government brought up 49 U.S.C. 46504 as an example of a

1 statute that is overbroad. We just want to say that that
2 statute was taken from 18 U.S.C. 2332b(g) which is -- which
3 defines the federal crime of terrorism. Not the crime of
4 domestic terrorism, but it provides a list of statutes that
5 are prerequisites for the federal crime of terrorism. So it
6 was not selected out of thin air, it was selected with a
7 reason.

8 But moving more directly I think to your Honor's
9 question of isn't the public interest here important, and
10 isn't distinguishing between what the DOJ qualifies as
11 terrorism and what it uses terrorism dollars for, for
12 example, isn't that very important. Of course we agree it's
13 very important. Part of the reason for this case is to
14 understand exactly how terrorism dollars are used, and
15 exactly what resources the DOJ brings to bear on all sorts
16 of terrorism including domestic terrorism. But it's also
17 important to mention that even DOJ's definition of domestic
18 terrorism is quite broad, and it does incorporate statutes
19 other than those that expressly incorporate that statutory
20 definition.

21 And so for that reason, I think it's important to
22 flag that in other contexts, DOJ candidly reveals that there
23 are certain statutes that reach conduct prescribing
24 activities fairly described as domestic terrorism. And one
25 example of that is the recent FBI/DHS strategic assessment

1 on domestic terrorism -- which we would be happy to provide
2 to your Honor, which provides a preliminary list of -- and
3 I'm quoting here, "statutes that reach conduct that may be
4 associated with terrorism without regard to whether the
5 offense itself involves domestic or international
6 terrorism," close quote.

7 And in that specific report, the statutes listed
8 by DOJ itself is aircraft sabotage, weapons of mass
9 destruction, arson and bombing a federal property and
10 causing injury or death to a federal official, among others.
11 And so we think that's important in also kind of separating
12 out what the DOJ is now claiming are the only statutes that
13 implicate domestic terrorism directly even though --

14 **THE COURT:** Can I make a suggestion perhaps or one
15 possibility to try and just cut to the chase here?

16 **MS. LIVSHIZ:** Sure.

17 **THE COURT:** And this is a question for you, but
18 also for Ms. Gonzalez-Horowitz. Perhaps one way for me to
19 kind of work through this is to say, look, the Department of
20 Justice is going to have to do a case by case review already
21 based on what I've already said. If there's any public
22 indication in any of the documents or media that we've
23 talked about previously linking the case to terrorism, the
24 Government's going to have to disclose that.

25 In addition, the Government can apply a two-step

1 screen as it goes through. First, it can take the 70
2 statutes or so, whatever it was that you've identified. By
3 using that, it can I think hopefully screen out quite a few
4 of the 3,500 or so cases where it's not going to have to do
5 the sort of deeper dive that I'm about to describe.

6 Let's say that they apply this screen with respect
7 to those cases of conviction -- and I'm just pulling numbers
8 from nowhere on this. But let's say of the 3,500 cases that
9 they look at, that there are 200 or 300 convictions that are
10 under one of these 70 statutes that you've identified. As
11 to those cases, someone from the department -- and I think
12 it presumably would have to be a lawyer, is then going to
13 have to take a look at the definition of domestic terrorism
14 that Ms. Gonzalez-Horowitz has pointed us to, and look at
15 each of those cases. And it's not going to be terribly hard
16 for the convictions, you can look at the sentencing
17 memoranda or you can look at the -- if there's a plea, you
18 can look at the statement of offense. Someone can look at
19 it and say, okay, does it satisfy those conditions or not.

20 Hopefully then -- and again, off the top of my
21 head, maybe that boils down to 50 or 60 or maybe a hundred
22 cases, I don't know what it would be. As to those, if the
23 Government continues to be of the view that it would be an
24 unwarranted invasion of the privacy of those individuals,
25 the Government can put that information in a Vaughn index

1 and disclose to the Court the docket numbers in those cases.
2 And I can just take a look at them myself and get a sense as
3 to whether I think it would be an unwarranted invasion of
4 those individuals' privacy to disclose the fact that in the
5 Government's view, the crime of conviction does satisfy the
6 statutory definition of terrorism.

7 And I think that might both protect the privacy
8 interests of individuals involved in doing it in that way,
9 and I also think that it's going to get you at the end of
10 the day to a place in which you're at least going to know
11 the universe of the cases that the Government actually
12 believes at the end of the day in the database either that
13 it's publicly identified with terrorism or that today is
14 willing to stand up and say we think these were terrorism
15 cases. And I can then decide whether they're disclosed or
16 not.

17 And then you're also going to know from that
18 everything else at least was either a mistake, was initially
19 a terrorism case but wasn't a terrorism case in the end or
20 was a case in which maybe an AUSA thought it was a terrorism
21 case, but the actual policymakers at Main Justice don't
22 think it qualifies as a terrorism case. That's going to
23 provide you with some pretty valuable information to comment
24 on public policy, to write papers, scholarly work or
25 whatever it is you want to do with this information in a way

1 I think that perhaps balances the interests of those who are
2 here, but also those who aren't represented here today.

3 So why don't I hear from Ms. Livshiz first about
4 that, and then Ms. Gonzalez-Horowitz.

5 **MS. LIVSHIZ:** Sure, and thank you, your Honor. I
6 think it might take us a little bit of time to fully digest
7 sort of that plan. But one reaction is that, again, we
8 really believe that the statutory definition of domestic
9 terrorism is not the full story here. And the balancing of
10 the public and private interests shouldn't necessarily rest
11 on that. Just for example, if someone is in the program
12 category of critical infrastructure protection, their
13 privacy interests are not meaningfully impeded if it turns
14 out that they're included on a list of people who are in the
15 program category of critical infrastructure protection. And
16 that's sort of true whether or not it also relates to
17 domestic terrorism as defined under the statute.

18 So we think that there's a --

19 **THE COURT:** Just to make sure, do you think that
20 means that if a hacker knocks out internet service for an
21 hour somewhere without any demands or to influence policy in
22 any way, but simply does it because they can and they want
23 to prove to their friends they can do it, do you think
24 that's an act of terrorism?

25 **MS. LIVSHIZ:** No, your Honor, we don't think so.

1 And that's actually the point. So the point is that they
2 were labeled by DOJ as falling within the category of
3 critical infrastructure protection.

4 **THE COURT:** I see what you're saying.

5 **MS. LIVSHIZ:** So the privacy interest here of
6 disclosing someone who hacks a large computer system, let's
7 say the Solar Winds hacker, something akin to that --
8 although the privacy interests of such an individual would
9 not be invaded by the public knowing that they were included
10 on a list of people who had critical infrastructure related
11 prosecutions. Because -- and that's why -- oh, I'm sorry.

12 **THE COURT:** I think I've already rejected that
13 argument. I was not unsympathetic to the argument you're
14 making, and I did in candid think about the proposition of
15 saying to myself, you know, what is the damage to somebody's
16 privacy interest for it to be disclosed that they were
17 labeled a terrorist when they in fact did something that
18 most people would scratch their head and say that doesn't
19 sound like terrorism by any stretch.

20 But I concluded ultimately that I think the risk
21 of significant reputational damage to those individuals is
22 not small, it is pretty great. And that you put yourself in
23 these situations and think about it, and if somebody -- if
24 the Department of Justice were to say -- release a report
25 saying I was a terrorist because I left my garbage out a day

1 before the day -- the pickup date for the garbage delivery,
2 you know, I might shrug that off and show that that just
3 shows how stupid their classification system is. But I also
4 might feel pretty bad and think to myself my neighbors may
5 think I'm a terrorist now.

6 So I think the fact that it may be even a silly
7 characterization I think doesn't necessarily mitigate the
8 potential reputational damage if it hasn't already been
9 publicly disclosed by the Government.

10 **MS. LIVSHIZ:** Sure. Your Honor, just to perhaps
11 clarify, I think what we're trying to explain is that
12 someone who is in that critical infrastructure category
13 isn't being labeled a terrorist, they're being labeled
14 someone who attacked the critical infrastructure of the
15 United States which is a slightly --

16 **THE COURT:** I thought those were the subcategories
17 for terrorism, though, and that was one type of terrorism?

18 **MS. LIVSHIZ:** But the Government could specify in
19 its list who is in what category in order to avoid that
20 harm.

21 **THE COURT:** I'm sorry, maybe I'm misunderstanding,
22 but I thought that what was going on in this case here was
23 that there is the general category of terrorism, and then
24 under that category of terrorism are a bunch of
25 subcategories and critical infrastructure is one of them.

1 One could imagine cases that are terrorism cases that are
2 related to critical infrastructure. So if someone blows up
3 a pipeline because they're angry about U.S. energy policy,
4 that is an act of critical infrastructure terrorism. I had
5 sort of understood that's what the category was intended to
6 get at, not just critical infrastructure protection and
7 prosecutions that are unrelated to terrorism.

8 **MS. LIVSHIZ:** I see, your Honor. I guess what we
9 were trying to get across is that at least some of this harm
10 that you're articulating could be resolved by just the
11 clarification that that category is more narrow. But having
12 said that, obviously we hear you and understand your point
13 and appreciate the concerns that you have. I think we would
14 also want to address the rest of what you proposed I
15 suppose, because I think that's what you requested. I think
16 something -- there's sort of a couple of issues that are
17 important to us in this, you know, either the two-step
18 screen or the manual review as DOJ has described it. And
19 those concerns are related to sort of speed and also
20 integrity of the process or sort of responsiveness.

21 For the first issue, one of the things we're
22 concerned about, and one of the reasons that the list of
23 statutes was appealing to us, is that this case has now been
24 going for over three years. We fear this manual process is
25 going to be used as an excuse to further delay providing

1 plaintiffs and the public with the docket numbers that
2 they're entitled to. And so while we believe that the list
3 that we came up with is a list that, again, does not
4 invade -- does not implicate the privacy interests that your
5 Honor is concerned with, and that the revelation of those
6 cases that were under those convictions would allow the
7 public to very sort of quickly have access to the
8 information to which they're entitled without the need for
9 this additional manual review which could delay things for
10 quite a while.

11 And the second item -- and you've alluded to this
12 yourself, your Honor, in saying that there would be some
13 sort of in-court review of some limited number of statutes.
14 But we are concerned about DOJ using information they
15 assemble to sort of construct overly narrow criteria for
16 what constitutes a public link to terrorism by relying too
17 narrowly on the statutory definition of domestic terrorism.
18 And so for that reason, I think we would want --

19 **THE COURT:** Well, I guess what I have in mind is
20 two different things. One is if the Government used the
21 word terrorism, they have to disclose, right. So if there's
22 a press release or a sentencing memorandum and they used
23 terrorism, that's bright-line rule. Then in addition to
24 that, there would be this separate review. And the
25 definition is -- you know, it's not crystal clear, but it's

1 pretty clear. I would just have to trust an AUSA or someone
2 like that to be able to go through and look at these --
3 hopefully it won't be too large a group, and make those
4 determinations. And I suppose what I could also do is to
5 say that in close questions, they should err on the side of
6 including it, and then the Court can look at it and make a
7 determination. I understand there always are -- all of us
8 have to make judgment calls, and sometimes there will be
9 close cases. Maybe the answer to that is if it is a close
10 case, include it and then I'll make a decision if need about
11 it.

12 It may be that the Government looks at some of
13 these things, and they decide when they roll up their
14 sleeves that there really is not any risk of damaging
15 someone's reputation by calling something an act of
16 terrorism, somebody who showed up at a Walmart and started
17 shooting everybody in the store. It's hard to imagine that
18 that person's reputation would be damaged in some way by
19 saying oh, by the way, that was an act of terrorism.

20 So let me get Ms. Gonzalez-Horowitz --

21 **MR. MOSES:** Your Honor, before you go, can I
22 just -- we're not in the same place; Ms. Livshiz and I,
23 we're in different places. So if I just might just say we
24 appreciate your Honor's effort here. We want to get this
25 information as quickly as possible, as Ms. Livshiz said. I

1 think the problem is the one you articulate in your opinion,
2 there's both an issue of overinclusiveness and
3 underinclusiveness. This definition of domestic terrorism
4 that the Government is now using, it has a kind of false
5 kind of sense that, well, maybe this will solve that
6 problem. But it doesn't.

7 And I'll give you an example from your colloquy
8 with Ms. Gonzalez-Horowitz about that statute about killing
9 a federal officer in connection with their duty or a family
10 member. It came to mind the case of Judge Salas in our
11 neighboring district here of the district of New Jersey
12 where her family was killed by a litigant who was by reports
13 a misogynist as well. Is the Government calling that kind
14 of case domestic terrorism or not? I mean, I could see
15 arguments that it fits within the definition. But to be
16 frank, I don't trust the Government in this case to give us
17 that case and to call that domestic terrorism necessarily.

18 We really need to understand what these cases are
19 that they're calling domestic terrorism. If they're calling
20 the hacker domestic terrorism, we need to know that too,
21 because then they've been overinclusive if it's just the kid
22 in the high school -- the high school kid. That's what
23 we're struggling with here. The Brennan Center is very
24 conscious of the privacy interest, but we really need to get
25 this information.

1 **THE COURT:** But I think at the end of the day
2 you're going to know the answer to that question, because --
3 and it may be that the murder of Judge Salas' son falls
4 outside the temporal period. I can't remember whether it
5 would or not. That was obviously as vile an act as one can
6 imagine. Assuming it was within the period of time here,
7 the Government is going to make its disclosures. And if you
8 then go look at the docket numbers and that case isn't one
9 of them, you're going to know that at least as of today
10 that's not a case that the Government considers to be
11 domestic terrorism. You can make whatever point you want
12 with it in that regard.

13 So let me hear from Ms. Gonzalez-Horowitz, I'd
14 like to get her reaction to this as well.

15 **MS. GONZALEZ-HOROWITZ:** Thank you, your Honor. So
16 I just want to touch on a couple of things. First, I think
17 as the Court highlighted, the Court has already found that
18 the fact that a tag itself exists and a conviction exists in
19 the system is not sufficient for plaintiffs to have that
20 information. I think that ship has sailed; the Court has
21 already ruled on that. So I think really the focus here is
22 in addition to the conduct meeting the definition of
23 domestic terrorism under the statute -- and to be clear on a
24 point that Mr. Moses made just now, the Government has never
25 been inconsistent as to the definition of domestic

1 terrorism. That definition is statutory, it exists, it has
2 existed for the entirety of this case.

3 **THE COURT:** Well, you know, that's interesting to
4 me, because this is the first time I think anyone has cited
5 to it. Am I right about that? It's a little hard for me to
6 accept that the Government has been completely consistent
7 about this since day one, and it took three years of
8 litigation for the Government to cite the statute.

9 **MS. GONZALEZ-HOROWITZ:** I understand that, your
10 Honor. I just joined this case about two weeks ago, I can't
11 speak to what happened in the last three years of --

12 **THE COURT:** I'm willing to say that you've been
13 entirely consistent thus far.

14 **MS. GONZALEZ-HOROWITZ:** That's fair, that's fair.
15 In these last 50 minutes, I hope I have remained on the same
16 page, because otherwise we've got big issues. But no, you
17 know, I think I just want to point back to something the
18 Court said in its memorandum opinion. It's not just whether
19 the conduct meets the definition of domestic terrorism, it's
20 that there has to be some public acknowledgement to that.

21 So if we take the plaintiffs' position as true --
22 and that's that these 70 statutes, you know, automatically
23 meet the definition, then the chances are that a conviction
24 under any one of those statutes would have resulted in a
25 press release from the department indicating that there was

1 terrorism. And if that's the case, the Government will
2 release that consistent with the Court's order. But the
3 additional problem is that we're not going to know that
4 unless we do a manual review. And if there --

5 **THE COURT:** You're doing a manual review anyway,
6 you already have to look at every file.

7 **MS. GONZALEZ-HOROWITZ:** Okay, so I think that's
8 part of the reason why we're here, is that there's obviously
9 a disagreement with plaintiffs and the Government as to
10 releasing this data, releasing this information blindly
11 without being able to go through that process. So if we're
12 starting from the place that there has to be a manual review
13 conducted, then I understand plaintiffs' concerns; that they
14 have concerns about the speed at which the Government has
15 been operating and how long this litigation has been
16 happening, and that they want the records that they believe
17 they're entitled to. I understand that.

18 So I think certainly we could come up with some
19 sort of review protocol whereby -- and I think we noted this
20 in our joint status report. If there are certain statutes
21 that plaintiffs want us to run sort of first, prioritize --
22 and it can be the list of 70 or it could be the statutes
23 that the Court has identified on pages 31 and 32 of its
24 opinion, you know, the Government can start with those and
25 do a manual review. And if the word terrorism was used in a

1 press release, then that information would be, subject to
2 the Court's opinion, disclosed.

3 And I say all of this -- and I guess I should say
4 all of this with a caveat, you know, of course that the
5 Government takes this position subject to -- or I guess I
6 should say without implicating its potential rights on a
7 future appeal. Of course, that's not a decision that's
8 being made by me, so I want to be clear that the
9 department's position of course is subject to appellate
10 review in the future.

11 But I think certainly we agree with the Court that
12 if there are cases where it's a close call, we would be
13 happy to produce that information to the Court in camera for
14 it to review and make a determination as to whether in those
15 particular cases there has been a public link to terrorism.

16 **MS. LIVSHIZ:** Your Honor, may I respond?

17 **THE COURT:** Yes.

18 **MS. LIVSHIZ:** Thank you, your Honor. So a couple
19 things that DOJ just noted I think warrant mention. First
20 is the consistency of the use of the domestic terrorism
21 definition. We don't believe it is consistent at all. In
22 fact, it's inconsistent between what DOJ has said in this
23 case and how DOJ characterizes certain statutes as being
24 associated with domestic terrorism in other reports,
25 including the FBI/DHS report released in May 2021 where it

1 identified specific statutes as statutes associated with
2 domestic terrorism. So saying in this case that there are
3 only four statutes that plausibly or possibly implicate that
4 definition, and then saying in a report just a few months
5 ago that there are statutes that are routinely implicated in
6 domestic terrorism, that is inconsistent actually.

7 The other point I wanted to flag is the use of the
8 word terrorism as though it is the only proxy for
9 determining whether or not something is domestic terrorism.
10 That's wrong, and I think going through the press releases
11 related to a case -- the press releases and filings relating
12 to a case your Honor mentioned, which is the Walmart
13 shooter, shows that the word terrorism is not used in fact
14 in all cases relating to conduct that we would typically --

15 **THE COURT:** Was that not used in that case, did
16 the Justice Department not use the word terrorism in that
17 case?

18 **MS. LIVSHIZ:** No. It was United States vs.
19 Crusius, your Honor, and neither in the press release nor in
20 the filings was the word terrorism, terrorist or terror
21 used. But I think no reasonable person would not look at
22 the facts of that case -- which involved of course someone
23 motivated by animus towards Hispanic Americans who murdered
24 22 people in cold blood and injured 23 others, as a case
25 that was not domestic terrorism.

1 So one thing that's of great concern to us, to the
2 Brennan Center, your Honor, is that the use of the word
3 terrorism is not going to actually get at all cases where
4 any reasonable person would conceive of conduct as domestic
5 terrorism.

6 **THE COURT:** All right. So I realize that this is
7 not perfect, and I think we can just try and get at this in
8 multiple ways to try and do our best. But I reaffirm what
9 I've said previously in that the Government is going to have
10 to go back and look at every file and determine whether
11 there's been any public reference by the Department of
12 Justice treating a case as terrorism related.

13 With respect to the list of 70 cases, I've been
14 through this, and there are some on here that don't strike
15 me sort of by any stretch as being -- that you can say that
16 they are self-evidently related to terrorism. There's 18
17 U.S.C. section 922. I see 922 cases here all the time that
18 are not terrorism cases. There's a reference to 18 U.S.C.
19 section 1951 -- which I think is the Hobbs Act if I'm not
20 mistaken, but it's a very common criminal prosecution.
21 There are others here where it strikes me it would be pretty
22 hard to believe that they were not related in some way to
23 terrorism or that there's at least a very, very high
24 likelihood that they were related to terrorism.

25 So what I want the parties to do -- and I hope you

1 can do this quickly because I really do want to move forward
2 with this case, is I'm going to give you a chance to meet
3 and confer about this. I'm going to ask you through a
4 consultation process to boil that list down to 50 from the
5 70, because I think there's some that can just go off that
6 list. And I think you're better off probably figuring out
7 which ones should go than I am, so knock the list down to
8 50.

9 When the Government does its review, it should
10 look at those 50 cases. If the Government concludes on
11 looking at those that it believes that they satisfy the
12 Government -- what the Government points to as the
13 definition of terrorism now, my assumption would be that the
14 Government would release those docket numbers.

15 But Ms. Gonzalez-Horowitz, I will give you the
16 opportunity if you want to come back to the Court on that
17 and say no, here's the reason why. You can make an in
18 camera showing and say, look, we think it satisfies the
19 statute, but here's a good reason why it shouldn't be
20 released and here's where the privacy interest is in doing
21 so. And then if there are others that you look at that
22 don't in your view satisfy that standard, I'm going to
23 request that you provide those to the Court for my in camera
24 review.

25 If it turns out -- I think it's unlikely given the

1 nature of the statutes here, there are going to be a lot of
2 them. If there are more than a hundred or so cases that are
3 in that category, let me know and I may decide that I want
4 some random sampling of them rather than 500 cases to look
5 at. But if it's a hundred or less, then you can just
6 provide me the list for in camera review and I can look at
7 them. That way, that provides the Brennan Center with some
8 assurances that it's not just the Government's take as to
9 whether the statutory definition is satisfied or not.

10 But I'll let you all meet and confer, and a week
11 from today just file a joint status report with the Court.
12 I hope that you'll be able to reach agreement on just this,
13 because I've given you sort of most of the outline of what
14 it would be. But by July 30th, I want a joint status report
15 with respect to this issue.

16 On the question of the time period, I was not
17 convinced that the time period should be extended to
18 June 30th, 2021. I understand the frustration of the
19 Brennan Center here, but quite frankly the reason that I'm
20 perhaps being as demanding as I am being on the Government
21 now is because of the fact that this is all on a motion for
22 reconsideration. And as I indicated in my opinion, I'm
23 sympathetic to the interests of the individuals or the third
24 parties who aren't present here and their privacy interests.
25 Notwithstanding the fact that it's on reconsideration, I'm

1 less sympathetic to some of the demands that was being
2 placed on the Government because they didn't raise these
3 issues originally. But that doesn't mean we get to
4 piggyback on this case going forward. If the Brennan Center
5 wants to submit another FOIA request, it can do so. But the
6 standards and the approach the Court takes to it may be
7 somewhat different in the future just because the procedural
8 posture of the case will be different.

9 Was there any other issue that I needed to resolve
10 for the parties today?

11 **MS. GONZALEZ-HOROWITZ:** I just want to make clear,
12 your Honor, I guess our next step is to come up with this
13 list of statutes between the two parties that the Government
14 will then agree to run sort of as a first cut?

15 **THE COURT:** Right.

16 **MS. GONZALEZ-HOROWITZ:** Okay. So I just want to
17 make sure that pending that agreement, the Government is not
18 under any sort of disclosure order that would be consistent
19 with the Court's July 1st order?

20 **THE COURT:** I mean, I think that -- has the
21 Government produced the international terrorism docket
22 numbers at this point?

23 **MS. GONZALEZ-HOROWITZ:** Yes, it has.

24 **THE COURT:** I think we have to unfortunately
25 resolve this question, and I'll do my best to do it quickly.

1 Hopefully you can give me something that I can just sign an
2 order. If not, I'll get you back on a videoconference
3 quickly to do it. But if some AUSA or group of AUSAs are
4 going to have to go out there and go through these cases
5 docket by docket, they should only have to do it once.
6 Therefore, we need to know what the rules are before they
7 start that process.

8 **MS. GONZALEZ-HOROWITZ:** Okay. So I guess in
9 following that, then we would ask also, because the Court
10 raised the point in its memorandum opinion, that the Court
11 not need to enter final judgment at this time.

12 **THE COURT:** Yeah, and I think everyone -- it
13 sounded like everyone was in agreement. Today's
14 conversation makes clear that I think we're not at the point
15 at which I can enter final judgment.

16 **MS. LIVSHIZ:** Your Honor, just to respond to one
17 point that my colleague just noted. So on the international
18 terrorism cases, we do still have some outstanding issues.
19 So it's not that they've all been released, just to be
20 clear. We identified 200 cases from the National Security
21 Division's publicized list that were not on the list that we
22 received. Obviously if it's on a publicized list, there's
23 been a public link to terrorism that's sort of self-evident
24 we would assume.

25 And so I just want to be clear that that issue is

1 not fully resolved yet, and it's still in the process of
2 being negotiating and resolved. We appreciate DOJ's
3 engagement on that issue, but it's not complete yet.

4 **THE COURT:** Well, I am concerned about how long
5 this has all been going on. So if you reach impasse,
6 jointly contact my Deputy Clerk, schedule a videoconference
7 and I'll get you on the line and we'll do our best to move
8 it forward.

9 **MR. MOSES:** Your Honor, I'm sorry, again we're not
10 together. But one issue, the protocol for the remainder
11 cases after that hundred, do you have any guidance on that?
12 Because we do have this issue which Ms. Livshiz raised that
13 the word terrorism just isn't used in some of these cases --
14 actually, we think a lot of these cases. For example, a lot
15 of the cases, according to this FBI report that are
16 prosecuted as terrorism cases, are people who have concerns
17 about the treatment of animals. And that I think could fit
18 the definition of domestic terrorism. It's certainly
19 something DHS thinks is terrorism. I suspect the word
20 terrorism is not used. The word extremist may be used,
21 things like this. So we are going to need some guidance on
22 this protocol for the remaining cases I believe.

23 **THE COURT:** By the remaining cases, you're talking
24 about all of the domestic terrorism cases?

25 **MR. MOSES:** Exactly, your Honor, yes.

1 **THE COURT:** I'm hoping the parties can come up
2 with a protocol to propose to me that I can sign off on. If
3 you can't, I'll resolve what the issues are with respect to
4 that. I just would ask you not to re-litigate what's
5 already been litigated. I mean, I've given you a fair
6 amount of guidance in my prior opinion. And if the
7 Government's called it terrorism anywhere, that's
8 sufficient. If they haven't -- which is I think a fairly
9 small category of cases that are ones where it pretty
10 self-evidently is a terrorism case even if the Government
11 hasn't used that phrase, and that's what this new protocol
12 is that I'm trying to get at of cases that will fall within
13 one of the 50 or so statutes that you identify. In which
14 case then if they do, then the Government is going to have
15 to do a further look at them and see whether the definition
16 of terrorism is satisfied.

17 If you want to in your negotiation with the
18 Government suggest some other very concrete statutory test
19 or factor they can apply in doing that second cut, you're
20 welcome to do so. I haven't gone through the U.S. Code to
21 see if the definition of domestic terrorism is the only
22 definition of domestic terrorism out there. But if there's
23 some other document that you can point to, either a statute
24 or something in the U.S. Attorney's manual or a press
25 release from the Government that explains what the word

1 terrorism means that you think is more capacious, you're
2 welcome to bring that to Ms. Gonzalez-Horowitz's attention
3 and then to the Court's attention if need be in the report.

4 But just saying it's one of those statutes in the
5 list of 50 is not going to do it, there's going to have to
6 be some further screen.

7 **MR. MOSES:** Thank you, your Honor.

8 **THE COURT:** Ms. Gonzalez-Horowitz, anything else
9 you wanted to raise today?

10 **MS. GONZALEZ-HOROWITZ:** No, your Honor. Thank
11 you.

12 **THE COURT:** Ms. Livshiz?

13 **MS. LIVSHIZ:** No, your Honor. Thank you.

14 **THE COURT:** Well, thank you all. I know that this
15 is a challenging case for the Court, and it's a challenging
16 case for all of you. Hopefully we're steering our way
17 through this and getting closer to at least a sensible
18 resolution. So thank you all, and have a good afternoon and
19 good weekend.

20 (Proceedings adjourned at 11:06 a.m.)

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C E R T I F I C A T E

I, Jeff Hook, Official Court Reporter,
certify that the foregoing is a true and correct transcript
of the remotely reported proceedings in the above-entitled
matter.

PLEASE NOTE: This hearing occurred during
the COVID-19 pandemic and is therefore subject to the
technological limitations of court reporting remotely.

July 27, 2021

DATE



Jeff M. Hook

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