

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION
Washington, D.C. 20530

and

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

Defendants.

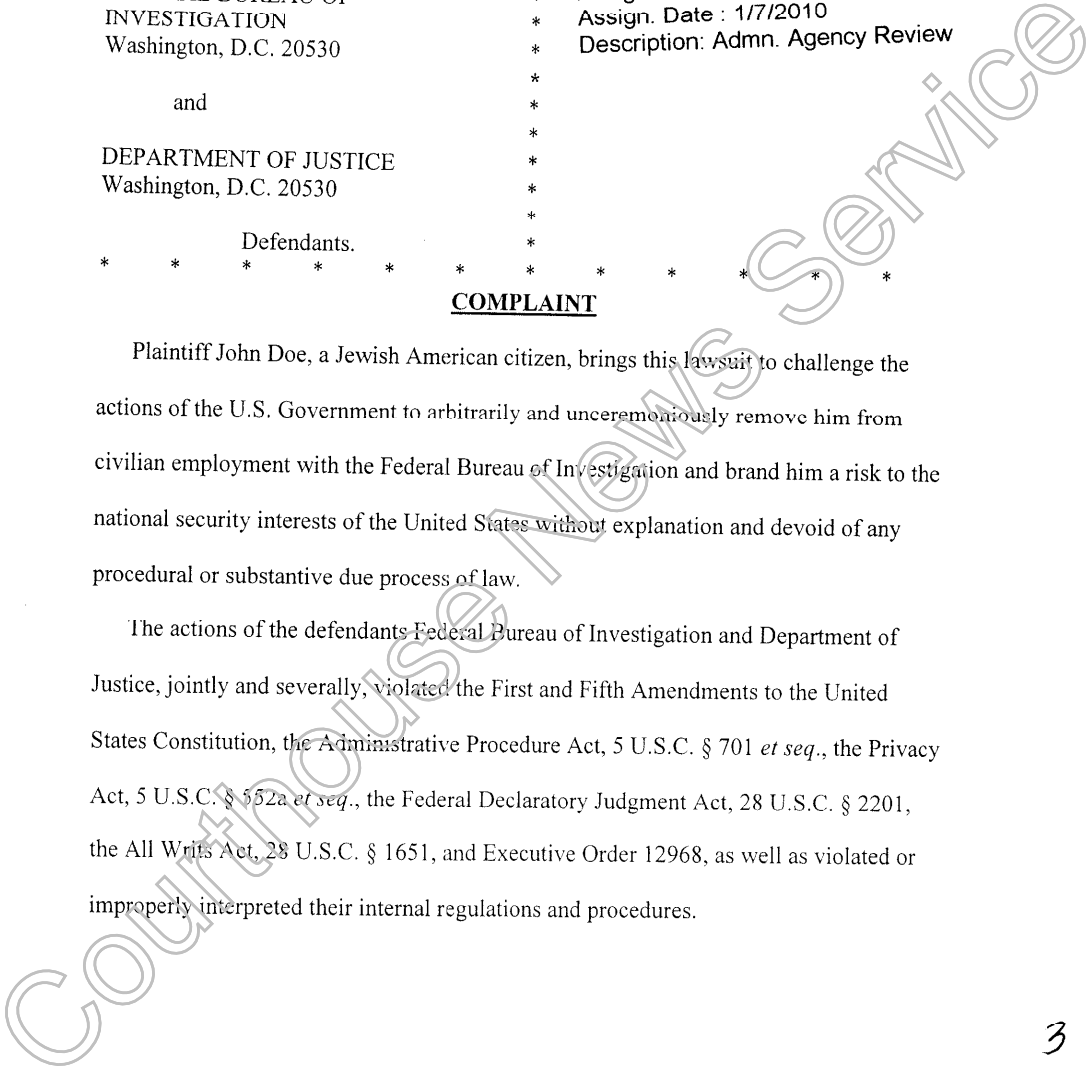
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Case: 1:10-cv-00049
Assigned To : Collyer, Rosemary M.
Assign. Date : 1/7/2010
Description: Admn. Agency Review

COMPLAINT

Plaintiff John Doe, a Jewish American citizen, brings this lawsuit to challenge the actions of the U.S. Government to arbitrarily and unceremoniously remove him from civilian employment with the Federal Bureau of Investigation and brand him a risk to the national security interests of the United States without explanation and devoid of any procedural or substantive due process of law.

The actions of the defendants Federal Bureau of Investigation and Department of Justice, jointly and severally, violated the First and Fifth Amendments to the United States Constitution, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, the Privacy Act, 5 U.S.C. § 552a *et seq.*, the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, the All Writs Act, 28 U.S.C. § 1651, and Executive Order 12968, as well as violated or improperly interpreted their internal regulations and procedures.



An American citizen is entitled to know the charge(s) against him. He is also entitled to notice and opportunity to be heard, which are fundamental principles of due process of law. Yet John Doe was, instead, shown the door in the so-called interests of national security, thereby rendering the actions of the defendants unconstitutional and in violation of everything the United States – and the Administration of President Barack Obama in particular - portends to stand for.

JURISDICTION AND VENUE

1. Jurisdiction and venue is proper in this Court under 5 U.S.C. § 702, 28 U.S.C. §§ 1331, 1346 and 2201.

PARTIES

2. Plaintiff John Doe worked as an Intelligence Research Specialist at the Department of State from 1999 to 2003, on a Department of Homeland Security contract in 2004, and at the Federal Bureau of Investigation from 2004 until his termination in 2008 (although he was on unpaid administrative leave beginning October 29, 2005). At least two federal agencies have investigated his background and he has been favorably adjudicated for access to classified information including up to the Top Secret/Sensitive Compartmented Information (“SCI”) level. He also previously worked on Capitol Hill for two members of the House of Representatives and for a United States Senator researching judiciary, education, and foreign policy issues.

3. Defendant Federal Bureau of Investigation (“FBI”) is an agency of the United States Government as defined by 5 U.S.C. §§ 552a(a)(1), 701.

4. Defendant Department of Justice (“DOJ”) is an agency of the United States Government as defined by 5 U.S.C. §§ 552a(a)(1), 701.

FACTS

5. While at the State Department, John Doe was assigned to primarily cover issues relating to Palestinian terrorism and the Jewish extremists account within the Bureau of Intelligence and Research (INR). He also handled analytical responsibilities for terrorism in Lebanon and Jordan and state-sponsored terrorism in Syria and Iran. At times he represented INR at weekly Consular Affairs briefings analyzing emerging threats to U.S. interests overseas and was selected to help educate new members of the diplomatic core on terrorism affecting the Middle East peace process and new intelligence analysts on analytical tradecraft.

6. Additionally, during his State Department tenure John Doe's responsibilities included preparing written and oral briefings for senior State Department leaders on the capabilities, plans, and activities of Middle East-based terrorists and being a primary or contributing author to National Intelligence Estimates and other Intelligence Community-wide documents assessing emerging threats to U.S. interests overseas.

7. At the FBI's Counterterrorism Division, John Doe was given the responsibility of educating new Agents on international terrorism during their induction training at the FBI Academy in Quantico, Virginia. The primary target of his analysis was Palestinian terrorists and their front groups located inside the U.S. In particular, he conducted analysis on terrorist financing.

8. He traveled to Jordan once and Israel twice on official State Department business and to Israel once on official FBI business, as well as to the Palestinian-administered areas once on official State Department business.

9. As part of the formal hiring process with the FBI John Doe was required to undertake a polygraph examination and his test results fell within acceptable parameters to allow him to be hired. The polygraph questioning included whether John Doe had ever shared classified information with anyone not entitled to receive it. included topics relating to espionage.

10. On October 28, 2005, John Doe met with FBI Special Agents Thomas Dugan and Catherine Hanna to allegedly discuss matters relating to his pre-employment background investigation. At the time he had been employed at the FBI for approximately 11 months.

11. During the 2.5 hour meeting John Doe learned that he was the apparent subject of a criminal investigation. He was specifically asked if he knew and/or had contact with Steven Rosen or Keith Weissman, who served as the Policy Director and Senior Iran Analyst, respectively, for the American Israeli Public Affairs Committee ("AIPAC"). The Agents asked numerous questions pertaining to John Doe's prior contacts, including during the time he had been an employee of the Department of State, with employees at AIPAC as well as other individuals who were either Jewish federal employees or Israelis.

12. On October 28, 2005, two other FBI Agents, accompanied by the Director of Human Resources for the FBI's Counterterrorism Bureau, visited John Doe at home. He was handed two letters.

13. The first letter, dated October 28, 2005 from Sharon Durkin, Chief, Personnel Security Adjudications Section, notified John Doe that his Top Secret security clearance was suspended "based on serious security concerns regarding your conduct that have been raised". The letter also noted that the "entire matter will be closely reviewed before

a final determination is made.” No explanation was provided as to the basis for the FBI’s action.

14. The second letter, dated October 28, 2005, from Diana M. DeCanio, Chief Performance, Recognition, and Awards Unit, Administrative Services Division, notified John Doe that he was being placed on unpaid administrative leave in accordance with 5 U.S.C. § 7513(b). The only stated reason was the action to suspend his eligibility for a Top Secret security clearance.

15. On October 31, 2005, John Doe spoke telephonically with Special Agent Dugan who informed him that he and Special Agent Hanna had found him to have been truthful during their meeting and that no evidence of wrong-doing had been found.

16. On November 1, 2005, John Doe spoke telephonically again with Special Agent Dugan and was told that there was no reason to investigate the matter further and that by November 4, 2005, it would be “over and done with” pending submission of his written report. John Doe requested a copy of the report, even if redacted, but never received one.

17. On November 9, 2005, Special Agent Dugan telephonically informed John Doe that his written report had been submitted.

18. On January 12, 2006, John Doe reported for a FBI administered polygraph examination. The FBI polygrapher, Nina Collins, wanted to mirandize him. When John Doe questioned the reason, the polygrapher told him he was under investigation for espionage. John Doe indicated he first wished to speak with an attorney and informed the polygrapher the examination would need to be rescheduled. The polygrapher stated that he would have to take the examination if he wanted any chance of keeping his FBI job.

19. On February 24, 2006 and March 1, 2006, John Doe met with FBI official Tron Brekke, Security Division, and another FBI official for approximately 15 hours. He was told that the interview was necessary because his security clearance was being re-adjudicated and if he wanted to ever work for the U.S. Government again, he would have to cooperate with the interview. Mr. Brekke indicated that John Doe was suspected of having an unspecified "foreign preference" for another country. Upon information and belief, that country is Israel.

20. On March 6, 2006, John Doe sat for a FBI administered polygraph examination. As part of the examination, he was asked whether he had ever improperly disclosed FBI information, to which he answered truthfully "No." He was not informed of the results of the examination.

21. In or around April 2006, John Doe filed a complaint with the DOJ Office of Inspector General and complained about the length of the investigation, the fact that he was being denied any procedural information or rights, and to allege that he was being targeted based on his Jewish religion. Upon information and belief, no formal action was ever taken by the DOJ OIG.

22. By letter dated January 9, 2007, Deborah Toomey, Human Resources Specialist, Human Resources Services Division, notified John Doe "that a risk assessment should be concluded in the near future and thereafter an adjudication will be conducted of your eligibility to retain a security clearance."

23. By letter dated February 20, 2007, Diana M. Decanio, Chief, Employee Relations Unit, Human Resources Services Division, confirmed that "the only information relied upon when initiating the indefinite suspension is the fact that your Top Secret Clearance

was suspended and not the underlying allegations of misconduct which resulted in your clearance being suspended.” Additionally, it noted, in contradiction to the October 28, 2005 letter, that his security clearance was suspended by Alvina Jones, Acting Chief, Personnel Security Adjudications Section, Security Division, “due to serious security concerns regarding your conduct.”

24. By letter dated May 8, 2008, Roland J. Corvington, Assistant Director, Security Division, notified John Doe of the decision to revoke his Top Secret security clearance “based on your documented behavior, including your own admissions, that casts serious doubt on your judgment, reliability, and trustworthiness.”

25. The letter further indicated that “[p]ursuant to Executive Order (EO) 12968 and Title 28 Code of Federal Regulations Part 17.47, the appeal procedures delineated therein are not available if the Deputy Attorney General (DAG) or Attorney General (AG) personally certifies that damage to the national security interests of the United States would result from those procedures by revealing classified information.” It was noted that the DAG had personally made that certification on March 31, 2008 and that “this revocation is final.”

26. In or around June 2008, John Doe was notified that he had been “removed” from FBI employment. No appeal rights were provided.

27. Thus, John Doe was left with *no de jure* opportunity to appeal his clearance revocation and—without so much as notice of the charges against him—*no de facto* opportunity to appeal his termination.

28. Upon information and belief, the FBI focused on John Doe as a result of a 2004 search of AIPAC offices in connection with its investigation of Steve Rosen and Keith

Weissman. The case was related to the FBI's investigation of Lawrence Franklin, a mid-level Department of Defense analyst, suspected of spying for Israel. During the search it is believed the FBI retrieved unclassified FBIS articles that John Doe had faxed to colleagues at AIPAC, as well as at least one other unclassified document he had provided while an employee of the State Department. These documents were directly related to matters on which John Doe worked as an Intelligence Research Specialist and his contacts with AIPAC officials were neither inappropriate nor outside the scope of his employment with the federal government.

FIRST CAUSE OF ACTION
**(FIFTH AMENDMENT PROCEDURAL DUE PROCESS
AND NAME CLEARING HEARING – REVOCATION OF
SECURITY CLEARANCE – FBI, DOJ)**

29. John Doe repeats and realleges the allegations contained in paragraphs 5 through 28 above, inclusive.

30. John Doe's security clearance and its concomitant benefits constituted a liberty interest.

31. By revoking John Doe's security clearance without providing notice of the charges against him and adequate opportunity to refute such charges, the FBI and DOJ violated due process guarantees under the Fifth Amendment.

32. The FBI can not summarily revoke John Doe's security clearance when such action violates the due process clause of the U.S. Constitution.

33. The FBI failed to provide John Doe with a statement of reasons or other explanation for its actions simply citing "national security interests" based on authority granted under Executive Order 12968 and by the DOJ through Title 28 Code of Federal Regulations Part 17.47.

34. Section 5.2(d) of Executive Order 12968 states that “[w]hen the head of an agency or principal deputy personally certifies that a procedure set forth in this section cannot be made available in a particular case without damaging the national security interest of the United States by revealing classified information, the particular procedure shall not be made available. This certification shall be conclusive.” This paragraph violates the due process guarantees of the Fifth Amendment and is unconstitutional on its face.

35. Section 17.47(h) of Title 27 of the Code of Federal Regulation states that “[w]hen the Attorney General or Deputy Attorney General personally certifies that a procedure set forth in this section cannot be made available in a particular case without damaging the national security interests of the United States by revealing classified information, the particular procedure shall not be made available. This is a discretionary and final decision not subject to further review.” This provision fails to provide FBI or DOJ employees with any opportunity to appeal their clearance revocation. This policy, therefore, violates the due process guarantees of the Fifth Amendment and is unconstitutional on its face.

36. By revoking John Doe’s clearance and simultaneously removing all due process guarantees, FBI has acted ultra vires and violated the Fifth Amendment.

37. As no appropriate and/or effective opportunity was ever provided John Doe for an opportunity to refute the allegations made against him or clear his name, he is entitled to a name-clearing hearing and a written decision arising there from.

38. As a result, John Doe has suffered adverse and harmful stigmatizing effects, including, but not limited to, lost or jeopardized present or future employment and/or financial opportunities.

SECOND CAUSE OF ACTION
(FIFTH AMENDMENT LIBERTY INTEREST –FBI, DOJ)

39. John Doe repeats and realleges the allegations contained in paragraphs 5 through 28 above, inclusive.

40. The FBI and DOJ engaged in the conduct described above in order to unconstitutionally deprive John Doe of his federal employment primarily on the basis of unscientific and unreliable false polygraph results.

41. As a result of the actions of the FBI and DOJ, John Doe has been falsely branded as a national security threat, lost employment, lost and/or will lose the opportunity to obtain other positions of employment in his field of expertise, had his reputation in the community impugned which has resulted in foreclosing his freedom to take advantage of a range of employment opportunities, and has been precluded from further pursuing his chosen career.

42. The FBI and DOJ have constructively excluded John Doe from participating in his chosen profession within the national security and civilian law enforcement community. Should John Doe apply to work for a federal agency or a private civilian employer for a position that requires even the most rudimentary background investigation, the FBI and/or DOJ will disseminate information, to include known inaccurate and false information, it maintains in its files about John Doe that will adversely impact upon his reputation and harm or eliminate his chances for employment. As a result, the FBI and DOJ will have effectively stigmatized John Doe's reputation and imparted a "status change" upon him that has implicated his liberty interests.

43. As a result of the actions of one or more of the defendants, John Doe has suffered adverse and harmful stigmatizing effects, including, but not limited to, lost or jeopardized present or future employment and/or financial opportunities.

THIRD CAUSE OF ACTION
(ADMINISTRATIVE PROCEDURES ACT – FBI)

44. John Doe repeats and realleges the allegations contained in paragraphs 5 through 28 above, inclusive.

45. The FBI has engaged in, and continues to engage in, an unlawful and/or flawed process with respect to the utilization of polygraph examinations.

46. Upon information and belief, the FBI's unfavorable adjudication was based in large part on the false technical results of the polygraph examinations.

47. The FBI is not permitted to violate John Doe's constitutional rights, including but not limited to those under the First and Fifth Amendments, or violate its own regulations.

48. The FBI maintains a specific system of records within its Privacy Act system of records wherein information pertaining to John Doe and his polygraph/security processing are filed. The FBI permits information and records from within this system to be disseminated as a routine use, under the appropriate circumstances, to other federal, state, and local agencies. Additionally, the FBI's violation of its internal regulations pertaining to its polygraph examination in John Doe's case has resulted in inaccurate and harmful adverse information being maintained within databases available to third parties including defense contractors.

49. John Doe plans to apply and already has applied for employment that requires a security clearance, and the inaccurate and harmful information placed by FBI in its file,

or which will be or has been disseminated by FBI, has and will have an adverse impact upon John Doe.

50. The FBI, its officers and employees, committed and undertook actions that were arbitrary, capricious and/or an abuse of discretion pertaining to John Doe, including, but not limited to, conducting an improper polygraph examination and unfairly relying on the results of the polygraph examination, failing to conduct a comprehensive investigation, and took actions that were unwarranted by the facts, unsupported by substantial evidence, in violation of internal regulations and federal statutes as set forth above, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory jurisdiction, authority, or limitations, or short of statutory right thereby causing John Doe to suffer legal wrongs under the Administrative Procedures Act.

51. As a result of the FBI's actions, John Doe has suffered adverse and harmful stigmatizing effects, including, but not limited to, lost or jeopardized present or future employment and/or financial opportunities.

FOURTH CAUSE OF ACTION
(FIRST AMENDMENT RIGHT OF ASSOCIATION/ADMINISTRATIVE PROCEDURES ACT/DECLARATORY JUDGMENT ACT – FBI, DOJ)

52. John Doe repeats and realleges the allegations contained in paragraphs 5 through 28 above, inclusive.

53. Upon information and belief, one or more of the defendants effectively punished John Doe for lawful, proper, and necessary associations with American citizens who are Jewish and/or have association with the country of Israel by revoking his clearance and terminating his employment based on his contacts in violation of his First Amendment right of association.

54. At all times, John Doe's associations were in furtherance of his professional objectives on behalf of the U.S. government, or they were innocuous friendships that did not violate any U.S. government rules, regulations, or norms.

55. By contrast, defendants, through their officers and employees, have allowed their personal, unfounded, and ill-informed biases regarding the country of Israel and the loyalty of Jewish Americans to improperly and illegally color their personnel decisions. Defendants' false accusations that John Doe committed espionage on behalf of or for the benefit of Israel simply because he had contacts with Israeli citizens or AIPAC officials belie an unfounded paranoia far out of proportion to the innocuous and/or professional nature of John Doe's relationships. Defendants have failed to offer any factual evidence indicating John Doe's associations were illegal, suspect, dangerous, deceptive, improper, or even untoward.

56. Upon information and belief, the FBI used otherwise normal security proceedings as a vehicle to act on its anti-Israel fears — demonstrably misplaced in the case of John Doe — and retaliate against him based on the exercise of his First Amendment right of association.

57. The retaliation for the lawful exercising of John Doe's First Amendment rights resulted in an adverse official action by the FBI to falsely, deliberately and unconstitutionally revoke his security clearance and terminate his employment.

58. As a result of the actions of one or more of the defendants, John Doe has suffered adverse and harmful stigmatizing effects, including, but not limited to, lost or jeopardized present or future employment and/or financial opportunities.

FIFTH CAUSE OF ACTION
(PRIVACY ACT – FBI, DOJ)

59. John Doe repeats and realleges the allegations contained in paragraphs 5 through 28 above, inclusive.

60. The FBI and/of DOJ maintain records within one or more Privacy Act Systems of Records that pertain to John Doe.

61. The FBI and/or DOJ failed to maintain records concerning John Doe “with such accuracy, relevance, timeliness, and completeness” as would have been necessary “to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to” him that should have been “made on the basis of said record and consequently determinations were made which” were adverse to John Doe thereby violating 5 U.S.C. § 552a(e)(5).

62. The FBI and/or DOJ failed to afford John Doe an adequate opportunity to correct the record and/or ignored his attempts to do so.

63. In failing to properly maintain said records, the FBI and/or DOJ violated the provisions of 5 U.S.C. § 552a (g)(1)(C).

64. Upon information and belief, the FBI and/or DOJ continue to maintain records pertaining to John Doe in violation of 5 U.S.C. § 552a (g)(1)(C).

65. As a result of the actions of the FBI and/or DOJ, John Doe lost his employment and the opportunity to obtain other positions of employment, has had his reputation in the community impugned which has resulted in foreclosing his freedom to take advantage of a range of employment opportunities, and has precluded him from pursuing his chosen career within the Intelligence, Law Enforcement or foreign policy communities.

66. The FBI and/or DOJ, their employees and officers, to include one or more of the individual defendants, knew or should have known that their actions were improper, unlawful and/or in violation of the Privacy Act.

67. The FBI and/or DOJ, their employees and officers, to include one or more of the individual defendants, acted intentionally or willfully in violation of John Doe's privacy rights.

68. As a result of the actions of one or more of the defendants, John Doe has suffered adverse and harmful stigmatizing effects, including, but not limited to, lost or jeopardized present or future employment and/or financial opportunities.

WHEREFORE, John Doe requests that the Court award him the following relief:

(1) Declare and find that the defendants violated John Doe's right to due process under the Fifth Amendment to the Constitution, and require the defendants to provide him with notice of the charges, a name-clearing hearing in which he can refute and/or challenge the accuracy of the information underlying the fact-based findings that resulted in the revocation of his clearance access and employment termination and any other appropriate relief to be determined in future proceedings;

(2) Declare and find that the defendants violated John Doe's liberty interest under the Fifth Amendment to the Constitution, and require the FBI to rescind the revocation and termination notices and reinstate his employment;

(3) Declare and find that the defendants violated John Doe's freedom of association under the First Amendment to the Constitution, and require the FBI rescind the revocation and termination notices and reinstate his employment;

(4) Declare and find that the defendants FBI and/or DOJ violated the Administrative Procedure Act, their internal regulations and/or statutes governing their conduct involving John Doe, and require the FBI to rescind the revocation and termination notices and reinstate his employment and award, to the extent it is available, any appropriate monetary relief to be determined in future proceedings but not less than \$100,000;

(5) Declare and find that the defendants violated the Privacy Act by failing to make reasonable efforts to assure that such records regarding John Doe are accurate, complete, timely and relevant prior to dissemination, and award any damages in an amount not less than \$1,000, or other appropriate relief, that are deserved there from;

(6) Declare and find that the FBI's use of and reliance on the polygraph violated John Doe's constitutional rights and applicable internal regulations;

(7) Declare and find Section 17.47(h) of Title 28 of the Code of Federal Regulations unconstitutional;

(8) Declare and find Section 5.2(d) of Executive Order 12968 and all regulations based thereon unconstitutional;

(9) Invoke its equitable powers to expunge all records or information maintained by the defendants that are inaccurate, derogatory or infringe upon John Doe's express or implied constitutional or statutory rights;

(10) Award any damages caused by the defendants' actions in an amount to be determined in later proceedings but no less than \$100,000;

(11) Refer those FBI officials responsible for violating the Privacy Act for prosecution under 5 U.S.C. § 552a(i)(1);

(12) Award John Doe the costs of the action and reasonable attorney fees under the Equal Access to Justice Act, the Privacy Act or any other applicable law; and

(13) Grant such other relief as the Court may deem just and proper.

Date: January 7, 2010

Respectfully submitted,



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