

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

LUCAS CALIXTO, *et al.*,

*Plaintiffs,*

v.

UNITED STATES DEPARTMENT OF  
THE ARMY, *et al.*,

*Defendants.*

Civil Action No. 18-1551 (PLF)

**JOINT STATUS REPORT AND MOTION FOR EXTENSION OF TIME TO FILE  
PLAINTIFFS' THIRD AMENDED COMPLAINT**

In accordance with the Court's Order entered on June 11, 2021 (ECF No. 199), the parties respectfully submit this joint report and extension motion.

1. On June 3, 2021, this Court granted Plaintiffs' Motion for Leave to File a Third Amended Complaint and ordered Plaintiffs to file their Third Amended Complaint ("TAC") on or before June 11, 2021. *See* ECFs 195, 196.

2. Also on June 3, 2021, Army counsel informed Plaintiffs' counsel by email that "[r]ecently, the [United States Department of Defense] published new guidance on the vetting of MAVNIs prior to shipping to BCT/AIT that may impact the current litigation in Calixto v. Army."

3. The Army counsel's email attached two documents, which counsel described as "the new guidance and Reference a) 'Directive-type Memorandum 19-008' of the guidance."

4. In their June 3, 2021 email, Army's counsel said that the New Policy "will replace the current MSSR/MSSD procedures" and that "[t]he Army is still assessing how to implement this policy."

5. On June 8 and June 9, 2021 Plaintiffs' counsel and Army counsel conferred by

phone regarding the New Policy and the potential impact that the New Policy may have on this litigation and the content of the TAC. During those calls, Plaintiffs' counsel raised questions about the New Policy, and Army counsel agreed to consult with the Army and DoD, and attempt to provide answers to those questions. Army's counsel estimated that the Army could provide any answers that it was willing to provide regarding the New Policy within 30 days.

6. On June 10, 2021 the parties filed a Joint Motion for Extension of Time to File Plaintiffs' Third Amended Complaint. ECF 198. The motion was granted on June 11, 2021 extending Plaintiffs' deadline to August 10, 2021. ECF 199. The Court also ordered the parties to file a joint status report on or before July 9, 2021 regarding their discussions on the New Policy. *Id.*

7. On July 8, 2021, Army's counsel informed Plaintiffs' counsel that they were unable to provide answers to Plaintiffs' questions in time for the July 9, 2021 joint status report and requested an additional 14 days to complete the process. Army counsel also stated that due to the delay in responding, they would not oppose a similar 14-day extension to Plaintiffs' deadline to file the TAC.

8. On July 9, 2021 the parties filed a Joint Status Report, ECF 201, informing the Court that Army counsel was unable to provide answers to Plaintiffs' questions prior to the filing and that the parties would file another status report in 14 days (July 23, 2021) to update the Court.

9. On July 22, 2021, Defendants' counsel provided the answers Defendants are willing to provide to Plaintiffs' questions via letter. That letter is attached as Attachment A.

10. Based on the responses provided to date, Plaintiffs believe the New Policy is unlawful and will amend their TAC to incorporate the New Policy and other changes in material facts since they sought leave to file the TAC on November 25, 2020.

11. In light of the 14-day extension for Defendants to provide answers to Plaintiffs' questions, Defendants have agreed to a corresponding 14-day extension, through and including August 24, 2021, for Plaintiffs to file the TAC.

12. The parties respectfully request that the Court grant this Motion and extend the deadline for filing the TAC to August 24, 2021.

\* \* \*

Dated: July 23, 2021

Respectfully submitted,

/s/ Jennifer M. Wollenberg

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# ATTACHMENT A



U.S. Department of Justice

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*District of Columbia*

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July 22, 2021

*By E-Mail*

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Re: *Calixto, et al., v. United States Department of the Army, et al.*, Civ. A.  
No. 18-1551 (PLF) (D.D.C.)

Dear Ms. Wollenberg:

On June 3, 2021, agency counsel informed Plaintiffs' counsel that the Department of Defense published new guidance on the vetting of MAVNIs prior to shipping to BCT/AIT. This letter provides the government's response to the questions posed about this new policy during a call on June 8, 2021.

The questions and answers as currently understood by the government are as follows:

1. What determines if an individual will go through ESP screening (e.g., where is the line)?

All applicants for military service may be screened through ESP based upon their answers to questions in the SF86. With respect to putative class members, those members who did not have a completed MSSD prior to May 18, 2021, would go through ESP screening. ESP screening is centered upon potential

allegiance, foreign preference, or foreign influence concerns based upon how the SF86 is answered.

2. What material does an ESP look at (NIAC, SF 86, PACSA, etc.)?

The ESP optimizes information gathered from the individual's SF86 and other data sources, both classified and unclassified, to evaluate for potential foreign risks. When available, background investigation results are also reviewed. Relevant information is then screened and evaluated through similar methods with the assistance of various inter-agency partners, including various intelligence and law enforcement agencies.

3. Will the MAVNI be notified he will undergo an ESP screening?

Consistent with current practice for all ESP screened individuals, the ESC does not inform ESP screening subjects, including MAVNIs, that they are getting screened through ESP.

4. Will he/she be given a chance to fill out or update the SF 86 (which in many cases is multiple years old)?

ESC does not seek out updated SF86s. As required by policy and consistent with current practice, if a Soldier has supplemental information that may have an impact on his/her suitability and clearance, he/she is required to report the information to the appropriate unit security manager. The Security Manager must report the supplemental information in DISS (system of record) and ESC will review and consider the supplemental material when applying the ESP.

5. What are the steps involved in an ESP?

The steps involved in the ESP are outlined in DTM 19-008. Generally, once an applicant enters ESP, the SF86 and other obtained data is screened, and a risk assessment is conducted in light of any mitigating information. All available data sources are used to obtain information and make the risk assessment. When deemed necessary, coordination may be made with a background investigator to ask the individual clarifying questions. If an applicant is flagged by ESP and determined to be a high risk with no available mitigating information, the relevant units are notified and will determine whether administrative separation proceedings should be initiated.

6. What are the standards applied to the ESP at each step? Is there something comparable to the 13 adjudication guidelines used on MSSR/MSSD?

High risk criteria are information that meets or exceeds predetermined expandable focused investigation thresholds, outlined in the Federal Investigative Standards pertaining to adjudicative guidelines regarding allegiance to the United States, Foreign Influence and Foreign preference concern.

When ESP methodology is applied, the foreign nexus concerns must meet one or more of the following threshold: falsification or omission, direct or indirect association with known or suspected terrorist and subversive activities, direct or indirect association with known or suspected FIE, criminal conduct or activities, human rights violation or crimes against humanity and threat to critical program information (CPI) and technologies.

7. If the ESP is unfavorable, will the MAVNI have a chance to rebut that information?

Regardless of immigration or citizenship status, no applicant for military service or current Service member undergoing ESP gets an opportunity to rebut an ESP determination. Should an unfavorable determination ultimately result in the initiation of separation from service, the applicant and/or Service member will get the opportunity to present matters during the separation process.

8. What does that letter look like? Can the litigation team see a copy of a letter from a non-MAVNI as a reference?

Notification memoranda are generated by unit personnel once they are notified of the unfavorable ESP results. These memoranda will vary in format but will be issued consistent with the requirements contained in DTM 19-008, and the requirements of the applicable regulations including Army Regulations 635-200 and 135-178. For separations based on an unfavorable ESP screening result, notifications will, in general, include the circumstances and information upon which the separation is based, such as unclassified information contained in the Expedited Screening Information Report. Respondent Soldiers will be further advised of their rights to submit matters on their behalf.



9. Who sends the letter and by what means?

Separations are initiated at the lowest unit level. Accordingly, the Soldier's company-level commander will provide the Soldier with a copy of the notification memorandum. Actual notification can be accomplished through different mediums, including electronic notification, but regardless of notification method, the Soldier is provided with a copy of the notification and any supporting documents.

10. How long does the MAVNI get to rebut?

Consistent with DTM 19-008, the Soldier has 30 days from receipt of the notification memorandum to respond.

11. Where does the rebuttal material go and then what is the process?

The rebuttal matters will be reviewed by the Soldier's chain of command who will make recommendations as to whether the individual continues to meet eligibility requirements for enlistment or induction or whether the Soldier should be separated from the military service.

12. Have we begun processing MAVNIs through the ESP process?

Yes. Some of those have been completed by the ESC and as of today, none have been found as unfavorable or, in terms of the ESP "High Risk" and none have been discharged.

We have included an ESP flow chart for reference. If you wish to discuss this matter further, please contact me directly at the number below.

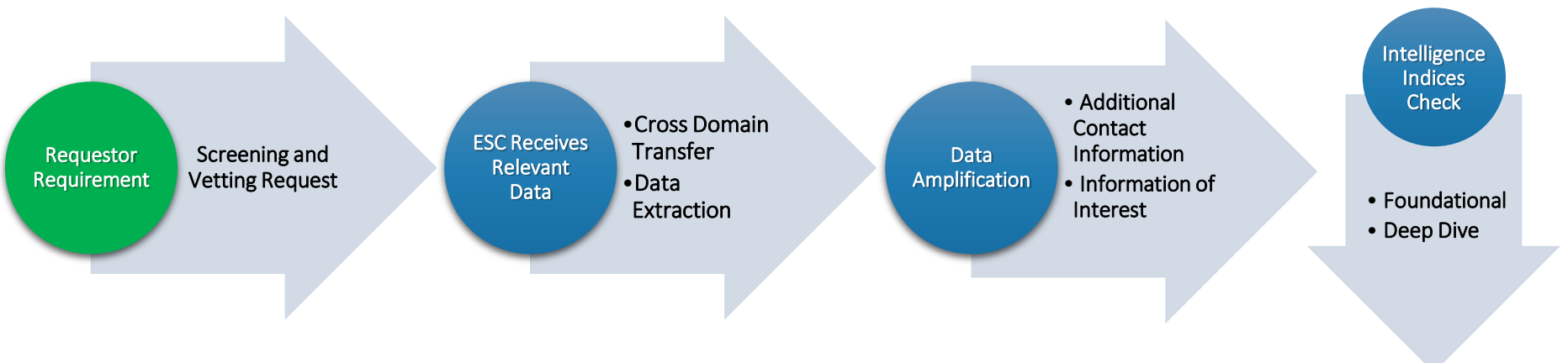
Sincerely,

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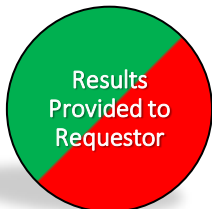


# ESP Process Overview



## ESC Two possible results:

- **No Alert** – ESP results reflected as favorable



- **Alert** – Risk Assessment conducted; Expedited Screening Information Report (ESIR) produced



## Results



1-90 days