SUPPLEMENTAL TESTIMONY OF
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Before the

Committee on the Judiciary
Subcommittee on Immigration and Citizenship

October 29, 2019
Washington, DC

I have reviewed the letter testimony of Mark H. Metcalf to this Committee dated October 29, 2019. I disagree with many of the assertions in his testimony but focus here on the following paragraph in his statement:

> Separate reviews conducted by Army and DoD representatives in May 2016 found problems with the vetting of MAVNI personnel. Among their findings, they concluded (1) a number of individuals accessed into the military used fraudulent visas to attend universities that did not exist in the U.S., (2) other MAVNI recruits falsified transcripts from universities owned by a Foreign National Security Agency and a State Sponsored Intelligence Organization (notably, most of the university classmates of one MAVNI recruit later worked for the same State Sponsored Intelligence Organization), and (3) one MAVNI recruit who entered the U.S. on a student visa professed support for the 9/11 terrorists and said he would voluntarily help China in a crisis situation. In another instance, a MAVNI applicant failed to list foreign contacts from Eastern Europe and Russia, even though the recruit's father managed the military department of a foreign factory and his brother-in-law worked for a foreign political party. Altogether, these examples indicated insufficient vetting of MAVNI personnel, contrary to the goal of avoiding accessions of individuals who would constitute potential security threats.

(Metcalf testimony p. 2 – 3) The above paragraph is taken nearly verbatim from a Declaration filed in the case of Tiwari v. Mattis (U.S. District Ct., Western District of Washington) by Roger Smith, Chief of Personnel Security for DOD, Office of Under Secretary of Defense for Intelligence. I am familiar with the Tiwari case because an attorney in my office litigated the

case and I testified as a fact and expert witness for the plaintiffs at trial.[1] [2] The merits of the above assertions were addressed in that trial and found by the Court to be erroneous, exaggerated, and/or generally unsubstantiated or unpersuasive. After explaining what the Tiwari case was about, I provide some examples that illustrate this point.

Tiwari v. Mattis involved a lawsuit challenging a number of discriminatory policies DOD applied to MAVNI soldiers who had become naturalized U.S. citizens. These MAVNI soldiers had almost all been naturalized during basic training. One new policy DOD adopted was to deny security clearances to all naturalized U.S. citizen MAVNI soldiers across-the-board (that is, without any individualized cause) for the first term of their enlistment (typically six or eight years). A security clearance is required for most positions in the military (i.e., to serve as an officer, to deploy overseas, to work in an office where there is access to personnel social security numbers, to work as a translator, etc.) This rule resulted in highly skilled U.S. citizen MAVNI soldiers (often with engineering, science, business, accounting, and medical and dental degrees) being relegated to jobs like power washing dirty trucks. DOD withdrew this policy in June 2017 shortly before the Court in Tiwari was highly likely to rule that this policy was illegal as constituting national origin discrimination in violation of the equal protection clause of the U.S. Constitution.

DOD next unofficially and without public notice implemented a policy to deny **interim** clearances across the board (again, without any individualized cause) to U.S. citizen MAVNI soldiers. This policy again had a major negative effect on U.S. citizen MAVNI soldiers' military careers since there is a huge backlog in issuing permanent clearances. Once this new policy

[1] Mr. Smith's Declaration dated 4/3/18, p. 13 – 14, states " For example, the review uncovered that (1) a number of individuals accessed into the military based on receiving fraudulent visas to attend universities that did not exist; (2) some MAVNI recruits attended, and later falsified transcripts from, universities owned by a Foreign National Security Agency and a State Sponsored Intelligence Organization (notably, most of the university classmates of one MAVNI recruit later worked for the same State Sponsored Intelligence Organization); and (3) one MAVNI recruit who entered the United States on a student visa professed support for 9/11 terrorists and said he would voluntarily help China in a crisis situation. In addition, the review uncovered a case where a MAVNI applicant failed to list foreign contacts from Eastern Europe and Russia, even though the recruit's father manages the military department of a foreign factory and his brother-in-law worked for a foreign political party. In DoD's judgment, these examples indicated that sufficient vetting of MAVNI personnel was not occurring at the accessions stage, contrary to the goal of avoiding altogether the accessions of individuals who present potential counter-intelligence, security, or insider threats." This same language was also found in a declaration filed by Christopher Arendt, the Deputy Director, Accession Policy Directorate, in the Office of the Under Secretary of Defense for Personnel and Readiness, earlier in the Tiwari litigation. (Arendt Declaration dated 5/8/17)

[2] Regarding my testimony, the Court observed "Having observed Lt. Col. Stock's demeanor on the witness stand and during the course of the trial, the Court finds her testimony, which was primarily factual in nature, credible and consistent with the documents admitted as evidence and the historical events about which the Court may take judicial notice, *see* Fed. R. Evid. 201." Tiwari v. Mattis, 363 F. Supp.3d 1154, 1168 n. 23 (W.D. Wash. 2019).

came to light, DOD claimed it was all a mistake and issued memos disavowing this practice. The judge in Tiwari was no longer willing to accept DOD's representations at face value, however, and issued a preliminary injunction expressly prohibiting this practice. Tiwari v. Mattis, 2018 WL 1737783 *7 (W.D. Wash. April 11, 2018) ("Defendant shall consider requests for interim security clearance eligibility for U.S. citizen MAVNI soldiers in the same manner as it would for any other soldier who is a U.S. citizen.")

The Tiwari case eventually went to trial on the legality of DOD's policy of indefinitely "continuously monitoring" all U.S. citizen MAVNI (but not other) soldiers without any individualized cause. DOD argued this policy was necessary as a matter of national security citing the reasons listed in Mr. Smith's Declaration (and copied by Mr. Metcalf into his written testimony). The Court was unimpressed with these arguments. A few examples illustrate why DOD's assertions did not withstand scrutiny.

On cross-examination, Mr. Smith was asked about the "MAVNI recruit" who professed support for the 9/11 terrorists and said he would voluntarily help China in a crisis situation. Mr. Smith testified:

> Q If you look at page 11 [of a DOD memo that addressed this individual], . . . they're describing a situation where the subject was born in China, entered on a U.S. student visa. According to the source interview: Subject professes support for 9/11 terrorist[s] and said he, the subject, would voluntarily help China in a crisis situation. Does that look like the fellow we're talking about?
>
> A Yes, it does, sir.
>
> Q It goes on to say that this person openly admitted to being a communist, loving socialism, and subject openly identifies himself as Joseph Stalin. Do you see that?
>
> A Yes, I do, sir.
>
> Q Then farther down, the last paragraph says, "He's been seen on his campus in a Nazi uniform." Do you see that? A Yes, I do, sir.
>
> Q The last sentence says, "He was removed from campus housing and suspended from the university," right?
>
> A I believe it says the subject was not arrested.
>
> Q Right. However, he was removed from campus housing and suspended from the university?
>
> A Yes, sir.

Q And then under the first bullet point, the last dash says, "Army recruiting personnel reported having subject on their radar." Do you see that?

A The first bullet, sir?

Q Well, there's a first bullet and three dashes underneath it.

A Got it, right.

Q And the last dash says, "Army recruiting personnel reported having subject on their radar."

A Yes, sir.

Q So this guy wasn't even a recruit, right?

A Sir, if he's involved with Army recruiting personnel, then they would be recruiting him, right.

Q It looks like they have him on their radar as a mentally ill person, right?

A Right. But I'm sorry, sir, they wouldn't have this particular individual on their radar if they weren't in the recruitment process.

Q Well, in any event, this guy is obviously mentally ill, right?

MR. DUGAN: Objection, argumentative.

THE COURT: Overruled. You may answer, if you can.

A I don't think I'm qualified to diagnose someone's mental condition based on the few bullets on a slide dec from 2017, sir.

Q There's no way that the Army is ever going to enlist this person?

A I couldn't say that definitively, sir. I would hope not.

Roger Smith testimony in Tiwari v. Mattis, 11/29/18 pp. 66 – 68. As apparent from the above testimony (and nowhere apparent from the Smith Declaration or Mr. Metcalf's testimony), this obviously unstable mentally-ill individual was never going to be accepted into the MANVI program. The Court in Tiwari observed:

> While this person (and others like him) might pose a risk to community safety, defendant has not shown how he or similar individuals would escape detection

> through the MAVNI, or even the more lax non-MAVNI, enlistment protocols, and thus, defendant's reliance on this example as evidence that MAVNI soldiers constitute a national security threat is unpersuasive.

Tiwari v. Mattis, 363 F. Supp.3d 1154, 1169 (W.D. Wash. 2019).

The only "university that did not exist" that DOD could actually identify was an on-line University that the United States government **itself created** to appear to the world to be a real university: the "University of Northern New Jersey" or "UNNJ".[3] DHS went so far as to list UNNJ on its website as a DHS-certified Student and Exchange Visitor Program (SEVP) participating institution. UNNJ's marketing was directed in part to non-citizens who graduated from U.S. universities and who sought to extend their lawful F-1 status by working full-time at a job that qualified for Curricular or Optional Practical Training (and not to take academic courses). A number of MAVNI recruits were forced to cast about for ways (such as CPT or OPT) to remain in legal status pending shipping to basic training because (1) they were required by their enlistment contracts to remain in lawful immigration status prior to shipping to basic training, (2) DoD repeatedly put off their ship dates because of DoD's inability to timely implement DoD's ever growing extreme MAVNI vetting program, and (3) in addition to the above problems, many of these MAVNI recruits needed to be able to work legally to avoid becoming street people while waiting for DoD to fulfil the promises it made to them at their enlistment. Regarding this "fake university" issue, the Court in Tiwari observed:

> In a declaration filed in connection with motion practice, the DoD's Chief of Personnel Security, Roger Smith, indicated that "a number of individuals accessed into the military [through the MAVNI program] based on receiving fraudulent visas to attend universities that did not exist." Smith Decl. at ¶ 25 (docket nos. 131-1 & 132-1). The only example Mr. Smith could provide at trial concerned the University of Northern New Jersey, *see* Tr. (Nov. 29, 2018) at 60:14-23 (docket no. 190), which was a fake school created by the Department of Homeland Security as part of a "sting" operation aimed at trapping brokers who were unlawfully referring foreign students to academic institutions for a fee, *see* Tr. (Nov. 27, 2018) at 173:10-17 (docket no. 188). The Court is unimpressed with any assertion that MAVNI recruits who were deceived by an agency of the United States into believing that they were enrolled in, or engaged in either curricular or optional practical training through, a legitimate school constituted a threat to national security.

Tiwari v. Mattis, 363 F. Supp.3d 1154, 1169 (W.D. Wash. 2019).

DOD witnesses in Tiwari (and Mr. Metcalf in his written testimony to this Committee) also refer to the situation of Chinese student Chaoqun Ji. Mr. Ji was charged with sending

[3] UNNJ's 20-plus page professional website can still be found by entering http://www.unnj.edu into the search feature on the internet archive site "Wayback Machine" at https://web.archive.org.

publicly available information to a Chinese intelligence operative.[4] U.S.A. v. Ji Chaoqun, 18 C.R. 611 (N.D. Ill. 2018). The Court in Tiwari stated

> At trial, defendant's witnesses were asked about Chaoqun Ji, a Chinese national who attempted to access through the MAVNI program, but did not advance out of the Delayed Entry Program or ship to basic training. *See* Tr. (Nov. 29, 2018) at 45:1-5, 45:19-20, 153:2-7 (docket no. 190). Mr. Ji was arrested and is currently facing prosecution, as a result of an investigation dating back to 2015 or 2016, conducted by the Federal Bureau of Investigation. *Id.* at 46:4-6, 143:17-144:2. Although the charges against Mr. Ji seem to support some alarm about the efforts of other governments to infiltrate the United States military, the record also reflects that Mr. Ji was unsuccessful in avoiding detection, even before extraordinary screening protocols were set in motion by the [September 2016] Levine memorandum. In addition, defendant's witnesses acknowledged that no MAVNI soldier who has become a naturalized citizen has ever been charged or convicted of espionage or any other criminal offense or been denaturalized.

Tiwari v. Mattis, 363 F. Supp.3d 1154, 1169 (W.D. Wash. 2019).

Ultimately, the Court in Tiwari found that DOD had not justified on national security or any other ground the extraordinary across-the-board screening measures it sought to apply to U.S. citizen MAVNI soldiers. The Court concluded that DOD:

> has provided no explanation for engaging in flagrant profiling, *i.e.*, equating MAVNI status with national security risk, rather than justifying on a case-by-case basis the heightened monitoring or screening that the DoD wishes to conduct. . . . The Court agrees with plaintiffs that this stigmatizing persistent vetting protocol constitutes impermissibly unequal treatment of United States citizens on the basis of national origin. It is inconsistent with the representations made to plaintiffs upon their enlistment that they would be "treated like any other Soldier" and that they would enjoy "all the same opportunities afforded to ... any other Soldier" in the United States Army, *see* Ex. 15 at §§ E & R; Exs. 69 & 90 at §§ E & Q; Ex. 71 at §§ E & P, and it violates the military's own principles against discrimination based on immutable characteristics like national origin, *see* Ex. 37 at ¶ 3(e) ("The DoD shall not discriminate nor may any inference be raised on the basis of race, color, religion, sex, national origin, disability, or sexual orientation."); *see also* Ex. 36 at § 3.1(c) (Exec. Order No. 12,968). It deals unfairly with citizens who have volunteered to serve their nation by enduring extreme hardships and

[4] Another DOD witness at the Tiwari trial, Joseph Simon, the Senior Counterintelligence Advisor to the Army G2 and Chief of Staff of the Army, testified that "I believe the FBI brought him [Chaoqun Ji] to our attention." Mr. Simon further testified that: "Q And the information he obtained, that was some Intelius reports that if somebody paid 50 bucks, or whatever, anybody could download? A That's to my understanding, yes." (Simon testimony, 11/29/18 pp. 144, 153)

> lengthy deployments, during which they are often separated from family and friends, and by preparing each and every day to make the "ultimate sacrifice of their lives if necessary" to protect our country, its people, and the constitutional rights we hold so dear. [citations omitted] It is unconstitutional, and it must be enjoined.

Tiwari v. Mattis, 363 F. Supp.3d 1154, 1172-73 (W.D. Wash. 2019).