TTD A BOLD VOICE FOR TRANSPORTATION WORKERS

COMMENTS OF THE
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

BEFORE THE
DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
DOCKET NO. TSA-2003-14610

DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DOCKET NO. FMCSA-2001-11117

DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION
DOCKET NO. RSPA-03-14982 (HM-232C)

JULY 7, 2003

The Transportation Trades Department, AFL-CIO (TTD), is pleased to submit the following comments in the above captioned proceedings. TTD consists of 35 affiliated unions representing workers in virtually every mode of transportation, including workers who are required, as part of their job, to have a hazardous material (hazmat) endorsement on their commercial drivers licence (CDL).[1] In addition, TTD member unions represent workers who are already subject to background checks similar to the ones at issue in this proceeding or will face such requirements in the near future.[2] We thus have a direct stake in both the security threat assessments conducted for hazmat workers and any precedent setting impact these rules will have on future workforces.

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[1]Attached at 1 is a list of TTD affiliated unions.

[2]It should be noted, however, that these comments only state our position in relation to the rules in this proceeding. As the Transportation Security Administration imposes background checks on other workers, our affiliates individually, and through TTD, must have the opportunity to review and comment on those procedures without prejudice with the views taken in this proceeding.

Transportation Trades Department, AFL-CIO
888 16th Street, NW • Suite 650 • Washington, DC 20006 • tel: 202.628.9262 • fax: 202.628.0391 • www.ttd.org
Sonny Hall, President • Patricia Friend, Secretary-Treasurer • Edward Wytkind, Executive Director

At the outset, TTD wants to express its support for the comments filed by the International Brotherhood of Teamsters (IBT).[3] The IBT directly represents workers who are covered by these rules and we urge you to take advantage of their expertise as you seek to finalize the rules and procedures governing security threat assessments.[4]

As a general matter, TTD recognizes, and in fact strongly supports, the need to increase the security of our nation's transportation system. We also recognize that conducting security threat assessments across the transportation network is part of the federal government's responsibility. As the Administration moves forward in implementing employee background check requirements, however, we will insist that the rights of covered workers are not needlessly jeopardized. In this regard, we do appreciate the inclusion by the Transportation Security Administration (TSA) of waiver rights modeled after the Maritime Security Transportation Act (MTSA). As the TSA correctly points out, "individuals who have committed a disqualifying crime may be rehabilitated to the point that they may be trusted in potentially dangerous jobs, such as the transportation of hazardous material."[5] However, the waiver rights included should be seen as a minimum level of due process protection and enhancements to the process should be considered (explained in more detail below). In addition, there are other aspects of the rules that do raise serious concerns from an employee standpoint that must be addressed before these regulations are finalized.

The purpose of these rules is to enhance the security of hazardous material transport. Workers, both on an individual basis and through their unions, should be viewed as partners in this endeavor. If overly intrusive or unworkable background checks are imposed, it will render this partnership ineffective, thereby stalling much needed transportation security enhancements. To ensure this does not happen, and that the background checks required by Section 1012 of the USA PATRIOT Act (P.L. 107-56, Oct. 26, 2001) are implemented in fair and balanced manner, we would suggest the following changes and modifications to the proposals embodied in this proceeding.

Disqualifying Criminal Offenses

In enacting the USA PATRIOT Act, Congress did not specify which criminal offenses should be used to disqualify workers from holding a hazmat endorsement, leaving TSA discretion to craft a list that addresses the security needs of the country. As a general matter, we note that what might be a felony in one state may not rise to that level in another jurisdiction. This potential for conflict and inconsistency raises a basic fairness and uniformity question. While states are indeed permitted

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[3]We should note that International Union of Operating Engineers, a TTD affiliate, has also filed comments in this proceeding endorsing TTD's submission and specific issues that we have raised.

[4]We especially want to note our concurrence with concerns raised by the IBT regarding the timing and implementation of the background checks.

[5]68 Fed. Reg. 23864 (May 5, 2003).

to set their own criminal penalties for state crimes, the federal government should not permit a potential hodgepodge of standards to determine which employees pose a security threat. In the Frequently Asked Questions (FAQ) released with this rule, the TSA notes, for example, that in Illinois marijuana possession is not considered a felony until a person possess more than 30 grams. In Washington the quantity is 40 grams, and in Texas it is 112 grams. As the rule currently stands, someone who possesses 30 grams of marijuana is a security threat if the crime occurs in Illinois, but not a security threat if the crime takes place in Texas. Obviously, this result makes no sense if the goal of the rule is to establish a national level of security. And of course we could provide countless other examples where different state laws would determine whether the same act constitutes a felony. To address these inconsistencies, we urge the TSA to better define offenses that will constitute a disqualifying offense and to ensure that included offenses have a consistent and direct link to security.

Challenge to the Characterization of an Offense

Even if the TSA accepts the suggestion made above to clarify offenses, we remain concerned that the regulations do not provide any mechanism for a person to challenge the determination that a particular crime is covered in § 1572.103(b). There may be situations where a person is convicted of a crime that appears to be a disqualifying offense, but that a legitimate argument could be made that this is not the case. To address this problem, drivers should be permitted to challenge the characterization of a particular offense during either the appeal or waiver process.

Eliminating Certain Offenses

The inconsistencies cited above are especially problematic because some of the offenses included in the interim final rule are not related to whether a person poses a true security risk. In particular, we would recommend eliminating from the list the following offenses now included in 49 CFR Part 1572 (Subpart B): § 1572.103(b)(13) (distribution of, intent to distribute, possession, or importation of a controlled substance); § 1572.103(b)(14) (dishonesty, fraud, or misrepresentation, including identity fraud); and § 1572.103(b)(16) (improper transportation of a hazardous material). While none of these crimes can be condoned (and workers, like all individuals, should and do pay an appropriate criminal penalty) they do not demonstrate a propensity to commit a terrorist or security attack, and the TSA has offered no evidence to the contrary.

For example, the use and distribution of controlled substances is indeed a serious problem in this country, but again, we question whether someone who at one time engaged in this practice is a security threat. There are already rules imposing drug testing requirements on drivers of commercial motor vehicles and other regulations designed to ensure a drug-free workplace.[6] In addition, existing regulations require employers to promulgate a policy to combat the use of alcohol and controlled

[6] *See*, 49 CFR Part 382.

substances.[7] Finally, many of our member unions, including the IBT, have extensive programs to stop and treat drug and alcohol abuse. In short, rules, laws and procedures already exist to stop the use of drugs in the commercial motor vehicle sector. While problems still exists and transportation labor is committed to addressing the use of illegal drugs in the workplace, the TSA should separate security needs from a desire to be "tough on crime."

Similarly, crimes related to dishonesty, fraud or misrepresentation may indicate dishonesty, but individuals who commit a dishonest act should not be automatically classified as a threat to our nation's security. For example, thousands of individuals are convicted every year of check fraud. But do we really think that because someone engaged in this offense they are a national security risk? A bank may not want to put that person in charge of customer accounts, but the Act and the regulations at issue are not designed to stop all bad acts or to make the trucking industry a crime-free zone. The purpose of this proceeding and the legislation that gave rise to the proposed regulations is to stop terrorist elements. Section 1572.103(b)(14) specifically cites "identity theft" as an offense to be included in the broader category of dishonest crimes. While this specific offense may be an indicator of someone who is able and willing to create a false identity (which is often used by terrorist elements), the offenses listed in (b)(14) cover a broader range of offenses. We would thus suggest eliminating these general offenses. If identity theft remains a concern for TSA, it can be specifically cited, by itself, as a disqualifying offense.

We also maintain that crimes related to the "improper transportation of a hazardous material" is too broad and includes acts that do not indicate a true security threat. We note that crimes involving a "severe transportation security incident" are separately included, and these offenses appear to cover those crimes that are of a more serious nature. There are countless laws and regulations governing the transportation of hazardous material for safety reasons. If an employee violates these rules, then existing penalties should apply.[8] But again we question whether someone who makes a mistake in transporting covered material is really a threat to the security of our country. If there are specific acts that raise concerns, then the TSA should list them and not allow broad offenses, based on arbitrary and subjective interpretations, to disqualify otherwise qualified drivers.

The fact is that if an individual commits just one of the criminal offenses listed, that individual can be barred from holding a hazmat endorsement which in most instances will result in the individual losing his or her livelihood.[9] While we recognize a waiver might be available in certain situations,

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[7]*See*, 49 CFR § 382.601.

[8]For example, see 49 CFR Parts 383 and 384.

[9]As the IBT correctly explains in their comments, while a CDL can be obtained without a hazmat endorsement, in reality a professional driver needs both. Many shipments contain both hazmat and non-hazmat material and to ensure that drivers can haul both, LTL carriers generally require drivers, as a condition of employment, to have a hazmat endorsement. Thus, if a driver cannot obtain or renew a hazmat endorsement, he or she will often lose his or her job.

once a person has committed a disqualifying offense, there is a presumption that they are a security risk. This presumption should not be imposed unjustly or arbitrarily. Yet, the inclusion of broad, non-security related offenses does just that. In addition, the offenses included in the sections cited are so overly broad that waivers could flood the process and create delays and backlogs for TSA. For these reasons we urge TSA to modify the list of offenses as suggested in these comments.

Wanted or Under Indictment

TTD is also concerned that an individual will not be able to obtain a hazmat endorsement if he or she is wanted or under indictment (not necessarily convicted) for a disqualifying offense. This unjust standard is completely counter to the background check provision in the aviation sector which only disqualifies someone for a conviction or a finding of not guilty by reason of insanity.[10] It is a basic tenet of our criminal justice system, as guaranteed by the U.S. Constitution, that someone is innocent until proven guilty. While TSA is not seeking to incarcerate anyone with these rules, the loss of a job is indeed an extremely serious penalty. To mark someone a security threat and force them out of a profession, simply because they are wanted for an offense is neither fair nor consistent with the aviation model that TSA cites.[11]

Someone could be under indictment for years before acquittal. During this time that individual would not be able to hold a hazmat endorsement and could very well be unfairly forced out of a job. If convicted of a crime, we question how the time requirements would apply. For example, if someone is under indictment for two years and then convicted, the regulations would bar that person from holding a hazmat endorsement for nine years (instead of seven) from the date of conviction. If this is the case, then the rules would serve to extend the period during which an individual would be barred from holding a hazmat endorsement for slow prosecution -- not for a genuine security reason.

Modify the Look-Back Provision

Finally, we would urge TSA to reevaluate the seven-year look-back. While we understand that this time frame was included in the MTSA, the USA PATRIOT Act gives the TSA broader discretion in this area, and there is no statutory requirement for a set number of years. A number of individuals who have a criminal history have been able to use the steady employment provided by the trucking industry to become responsible members of society. The TSA should recognize this positive experience and shorten the covered time-frame to five years, at a maximum.

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[10]*See*, 49 CFR 1544.229(d).

[11]We should also note that in the FAQ document, TSA states that a "person may not qualify for hazmat endorsement if he or she was convicted or found not guilty by reason of insanity for certain felony-level crimes." The FAQ makes no reference to the fact that the rule also covers employees who are wanted or under indictment.

Violations of CFR Requirements

The TSA's interim final rule states that the TSA will not issue a Notification of No Security Threat if the records indicate a disqualifying criminal offense listed in the Federal Motor Carrier Safety Administration's (FMCSA) rules for holders of CDLs, until the FMCSA or the state informs the TSA that the individual is not disqualified under that section. It is not clear if the "disqualifying criminal offenses" cited in this section are the same offenses listed in §1572.103. If they are not the same, then this section would essentially extend the triggers for not obtaining a hazmat endorsement for security reasons to all the violations contained in the FMCSA's rules governing CDLs. We understand that this prohibition would apply only until the state or the FMCSA determined that a person is no longer disqualified, but this process seems unnecessarily complicated. TSA should make a security determination regardless of violations of FMCSA rules. The TSA already has a stated criteria in this rule for making threat assessments, and should not need to rely on the violations of existing safety rules to make this determination. If the TSA makes a determination that an individual is not a security threat, but is currently disqualified for another reason, then the driver certainly should not be allowed to drive. But there is no reason to withhold or delay a finding of No Security Threat based on unrelated reasons.

Waiver Process

As noted earlier, we are pleased that the TSA has decided to adopt the waiver process included in the MTSA. TTD, and its longshore affiliates, were actively involved in the discussions and negotiations that led to enactment of the MTSA and we insisted on the waiver procedures as a minimum level of worker protection. However, given the broad employee impact of the rules in this proceeding, we believe the waiver framework can and should be improved.

In particular, we are extremely concerned that the waiver process requires employees to apply back to TSA – the agency that decided an individual was a security risk in the first place. Given the high public anxiety over terrorism, we believe that political pressure will force TSA to reject many waivers that otherwise have merit. Indeed, no political official would want to be charged with neglecting homeland security to give a convicted felon a second chance. To address this problem, and to give real meaning to the waiver process, decisions regarding waivers should be made by an Administrative Law Judge (ALJ) at a hearing on the record. This would allow employees to make their case in front of an impartial decision-maker not bound by political pressure or subject to agency interference. In addition, ALJ decisions would establish case precedent that would better define what constitutes a security risk. This would bring fairness and consistency to a system that is central both to employee rights and national security.

An ALJ review of security determinations by the TSA in the aviation sector has already been adopted by the House of Representatives. The TSA and the Federal Aviation Administration (FAA) recently issued rules requiring the FAA to revoke an airman certificate of any individual that TSA determines

poses a threat to aviation security.[12] As part of the Flight 100 -- Century of Aviation Reauthorization Act (H.R. 2115), the House included Section 421 which provides for an ALJ review of these decisions and procedures for handling of confidential information. We urge the TSA to review this provision (attached at 2) and to use it as basis for an ALJ framework in the final rule. In adopting this process we would ask the TSA to ensure that employee privacy is protected in all published ALJ decisions and other documents open to the public.

Application of Waiver to Section 1572.107 Decisions

We are also concerned that the waiver process does not currently apply to security threat assessments made by TSA pursuant to § 1572.107. This section appears to give TSA authority to make a more subjective determination of an individual's threat risk. While the TSA claims that waivers are not needed since all factors are already considered, we would make the opposite point. Given the fact that a worker can lose his or her job based on an inherently subjective decision, the availability of a waiver process is that much more important. The ALJ process described above would protect employees from arbitrary decisions and the process of handling confidential information included in Section 421 should alleviate concerns of exposing sensitive information to public view.

Additional Waiver Criteria

We are opposed to any suggestion that additional standards be imposed before an individual can obtain a waiver under §1572.143. The criteria incorporated as part of the MTSA, and adopted in the interim final rule, are sufficient for TSA to make a determination that an individual is not a security threat. In adopting a waiver process, Congress recognized the unfairness, in certain situations, of a security threat assessment and established a process that, while not perfect, does seek to balance security with employee rights. It would make little sense for the TSA to impose additional burdens on a waiver request when there has been no showing that security would be enhanced by doing so. We would also note that we are not aware that TSA has received a request from an affected party or a Member of Congress to add criteria to the waiver determination. For these reasons, we urge TSA not to adopt the suggested additional criteria.

Application to Foreign Drivers

We are also deeply concerned that the federal government's aggressive policy to impose criminal background checks on U.S. transportation workers does not impose the same surveillance mandates on Mexican drivers entering this country.[13] The FAQ document claims that Mexican drivers will

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[12]68 Fed. Reg. 3722, 3756, 3762 (Jan. 24, 2003).

[13]We understand from the interim final rule that procedures currently exist to conduct security assessments on Canadian drivers transporting explosives that enter the U.S. We assume that these procedures will be extended to Canadian drivers carrying hazmat, but this fact should be clarified in the final rule.

need to meet the same checks, but that such requirements will be done under separate agreement. Given the importance of this issue, and the Department of Transportation's own insistence that foreign domiciled motor carriers are subject to all U.S. safety regulations, security threat assessments must be applied before Mexican drivers are permitted to transport hazmat in the U.S. In addition, the TSA should be certain that Mexican drivers are subject to the same type of background checks and threat assessment analysis that U.S. drivers must undergo. If there are security reasons to subject U.S. drivers to this security review, then the same security reasons should require checks of any driver operating in the U.S. We urge TSA to resolve this issue now and to include procedures for checking foreign drivers in its final rule.

Privacy of Information

As we understand the interim rule, an employee's criminal history and other information gathered as part of the security threat assessment will not be shared with employers or anyone outside the agencies responsible for administering this process. We strongly support this common sense limitation. States should only know whether an individual is qualified to hold a hazmat endorsement. Any requests made by industry or others to have access to the raw data should be completely rejected as contrary to the purpose of the law and inconsistent with a worker's right to privacy.

The authority granted by Congress to conduct these background checks is intended for the sole purpose of enhancing national security. Yet, some in industry want access to this information for reasons far outside the scope of this purpose. According to press accounts, the American Trucking Associations (ATA) wants direct access to the federal databases containing information on criminal records.[14] The ATA states that it needs this information so that it can determine whether an employee is qualified to work in other areas (beside hazmat transport).[15] Again, the purpose of the rule is to enhance the security of hazmat transportation – it was not designed to give employers a government supplied dossier on its workers. Not only would ATA's request be outside the scope of the law, it would create a potential for abuse, both by private interests and the government, that is simply unwarranted.[16]

The information that will be gathered by the TSA and others will be highly sensitive. Some of the information will relate to security and some will not. We hope and expect that the TSA will be able to separate the two and make responsible decisions as required by the statute and its own regulations.

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[14]William B. Cassidy, *Your Prints, Please*, Traffic World, May 12, 2003, at 10.

[15]*Id.*

[16]We should note that TTD is aware of many instances in which aviation employers have used, or attempted to use, background information collected pursuant to 49 U.S.C. § 44936 for purposes not related to security.

Private interests do not have the authority or a legitimate need for the wide range of data or information that TSA may collect. Employers have other avenues to conduct checks on their employers if they feel it is necessary.

As stated above, we support TSA's decision to tell states only if someone is qualified to hold a hazmat endorsement. We are concerned, however, that employers would learn of an employee's disqualification for security reasons. According to the TSA, upon learning that an individual is disqualified for a security reason, states will update a driver's permanent driving record to note the TSA decision. By TSA's own admission, employers will then have access to this permanent record and will know that someone is a security risk, at least according to the TSA. To address this problem, the final rules should require states to keep confidential the reason that someone is not qualified to hold a hazmat endorsement. It should be sufficient for an employer simply to know whether or not someone has a hazmat endorsement.

On a broader scale, we also ask that a strong privacy policy be included in the final rule to ensure that all information related to a security threat assessment be kept strictly confidential. In short, we believe that information submitted by employees in order to obtain a security assessment from the TSA and all information used in making this determination should not be released (except to the employee for purposes of pursuing an appeal or waiver) and used only for security reasons. In the interim final rule, the TSA states that it has and will continue to coordinate with the National Crime Prevention and Privacy Compact Council in conducting these checks. The TSA also states that the Council has the authority to promulgate rules and procedures governing the use of the Federal-State criminal history records system for non-criminal justice reasons. While we appreciate the TSA recognizing the privacy concerns inherent in this rule, it remains unclear to us what procedures, if any, will be followed to protect the legitimate privacy interests of employees. Instead of simply referring to actions of a third-party, the TSA, and the other agencies involved, should clearly state in its regulations the specific procedures it will follow. Government agencies and private companies are required to follow privacy rules in the handling of certain sensitive personnel information. Information related to the criminal and security background of employees deserves the same treatment. The agencies can then be held directly responsible for any breaches that might occur of privacy protocols.

Cost of Security Assessments

The security threat assessments required by these rules are considered necessary to enhance the security of our nation, and is part of our overall effort to fight terrorist elements. Given the reality of this national priority, TTD asks that government, and not individual workers, absorb the costs of the background checks. Drivers did not ask for these checks and it would be unfair to impose this cost on to workers who are already struggling to make ends meet. We would note that our nation's air carriers just received $2.9 billion from the U.S. government, in part to reimburse the carriers for certain security costs. The carriers successfully argued that security is a government responsibility and that the government should thus pay for security enhancements. In addition, states, port

authorities and other private businesses are seeking, and in some cases receiving, security funding from the federal government. We would argue that rank and file workers deserve the same consideration.

Conclusion

As we stated at the outset, TTD appreciates the fact that TSA has attempted to strike a balance between security needs and worker rights. The suggestions made in these comments are intended to advance that important objective and in our view will make the process better for all concerned. We look forward to working with TSA on this matter and appreciate your consideration of our concerns.

Respectfully Submitted,

Edward Wytkind, Executive Director
Larry I. Willis, General Counsel
Transportation Trades Department, AFL-CIO
888 16th Street NW, Suite 650
Washington, DC 20006
202/628-9262

ATTACHMENT 1

TTD AFFILIATES

The following labor organizations are members of and represented by the TTD:

Air Line Pilots Association
Amalgamated Transit Union
American Federation of State, County and Municipal Employees
American Federation of Teachers
Association of Flight Attendants
American Train Dispatchers Department
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Communications Workers of America
Hotel Employees and Restaurant Employees Union
International Association of Fire Fighters
International Association of Machinists and Aerospace Workers
International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Teamsters
International Federation of Professional and Technical Engineers
International Longshoremen's Association
International Longshore and Warehouse Union
International Organization of Masters, Mates & Pilots, ILA
International Union of Operating Engineers
Laborers' International Union of North America
Marine Engineers Beneficial Association
National Air Traffic Controllers Association
National Association of Letter Carriers
National Federation of Public and Private Employees
Office and Professional Employees International Union
Professional Airways Systems Specialists
Retail, Wholesale and Department Store Union
Service Employees International Union
Sheet Metal Workers International Association
Transportation • Communications International Union
Transport Workers Union of America
United Mine Workers of America
United Steelworkers of America

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Transportation Trades Department, AFL-CIO

ATTACHMENT 2

SEC. 421. CERTIFICATE ACTIONS IN RESPONSE TO A SECURITY THREAT.

(a) IN GENERAL.—Chapter 461 is amended by adding at the end the following:

"§ 46111. Certificate actions in response to a security threat

"(a) ORDERS.—The Administrator of Federal Aviation Administration shall issue an order amending, modifying, suspending, or revoking any part of a certificate issued under this title if the Administrator is notified by the Under Secretary for Border and Transportation Security of the Department of Homeland Security that the holder of the certificate poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety. If requested by the Under Secretary, the order shall be effective immediately.

"(b) HEARINGS FOR CITIZENS.—An individual who is a citizen of the United States who is adversely affected by an order of the Administrator under subsection (a) is entitled to a hearing on the record.

"(c) HEARINGS.—When conducting a hearing under this section, the administrative law judge shall not be bound by findings of fact or interpretations of laws and regulations of the Administrator or the Under Secretary.

"(d) APPEALS.—An appeal from a decision of an administrative law judge as the result of a hearing under subsection (b) shall be made to the Transportation Security Oversight Board established by section 115. The Board shall establish a panel to review the decision. The members of this panel (1) shall not be employees of the Transportation Security Administration, (2) shall have the level of security clearance needed to review the determination made under this section, and (3) shall be given access to all relevant documents that support that determination. The panel may affirm, modify, or reverse the decision.

"(e) REVIEW.—A person substantially affected by an action of a panel under subsection (d), or the Under Secretary when the Under Secretary decides that the action of the panel under this section will have a significant adverse impact on carrying out this part, may obtain review of the order under section 46110. The Under Secretary and the Administrator shall be made a party to the review proceedings. Findings of fact of the panel are conclusive if supported by substantial evidence.

"(f) EXPLANATION OF DECISIONS.—An individual who commences an appeal under this section shall receive a written explanation of the basis for the determination or decision and all relevant documents that support that determination to the maximum extent that the national security interests of the United States and other applicable laws permit.

"(g) CLASSIFIED EVIDENCE.—

"(1) IN GENERAL.—The Under Secretary, in consultation with the Administrator, shall issue regulations to establish procedures by which the Under Secretary, as part of a hearing conducting under this section, may substitute an unclassified summary of classified evidence upon the approval of the administrative law judge.

"(2) APPROVAL AND DISAPPROVAL OF SUMMARIES.—Under the procedures, an administrative law judge shall—

"(A) approve a summary if the judge finds that it is sufficient to enable the certificate holder to appeal an order issued under subsection (a); or

"(B) disapprove a summary if the judge finds that it is not sufficient to enable the certificate holder to appeal such an order.

"(3) MODIFICATIONS.—If an administrative law judge disapproves a summary under paragraph (2)(B), the judge shall direct the Under Secretary to modify the summary and resubmit the summary for approval.

"(4) INSUFFICIENT MODIFICATIONS.—If an administrative law judge is unable to approve a modified summary, the order issued under subsection (a) that is the subject of the hearing shall be set aside unless the judge finds that such a result—

"(A) would likely cause serious and irreparable harm to the national security; or

"(B) would likely cause death or serious bodily injury to any person.

"(5) SPECIAL PROCEDURES.—If an administrative law judge makes a finding under subparagraph (A) or (B) of paragraph (4), the hearing shall proceed without an unclassified summary provided to the certificate holder. In such a case, subject to procedures established by regulation by the Under Secretary in consultation with the Administrator, the administrative law judge shall appoint a special attorney to assist the accused by—

"(A) reviewing in camera the classified evidence; and

"(B) challenging, through an in camera proceeding, the veracity of the evidence contained in the classified information.".

(b) CONFORMING AMENDMENT.—The analysis for chapter 461 is amended by adding at the end the following:

"46111. Certificate actions in response to a security threat.".