

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

JOHN DOE, et al., :  
 :  
 Plaintiffs, : CIVIL NO. 3:05cv1256(JCH)  
 :  
 v. :  
 :  
 ALBERTO GONZALES, Attorney General :  
 of the United States, et al, :  
 :  
 Defendants. : SEPTEMBER 1, 2005

**INTRODUCTION**

At oral argument on August 31, 2005 on Plaintiffs' Motion for a Preliminary Injunction, this Court instructed the parties to provide additional briefing as to whether the Court properly may consider the classified materials underlying the government's investigation ex parte and in camera in deciding the merits of Plaintiffs' motion. The Court has indicated that review of this material may be helpful to the Court in determining (1) whether the information sought by the NSL is relevant to an authorized counter-intelligence or counter-terrorism investigation; and therefore (2) whether the government has a legitimate need for non-disclosure of details concerning the NSL. This memorandum responds to the Court's instruction. As discussed below, this Court lawfully may consider classified materials submitted ex parte and in camera in deciding the merits of Plaintiffs' motion.

**I. The Court May Consider Classified Materials Ex Parte and In Camera in Deciding the Merits of Plaintiffs' Motion for Preliminary Injunction.**

The Court "has inherent authority to review classified material ex parte, in camera as part of its judicial review function," as necessary to reach a decision on the merits. Jifry v. FAA, 370

F.3d 1174, 1182 (D.C. Cir. 2004). Contrary to Plaintiffs' assertion, see Pls.' Reply in Support of Mot. Prelim. Inj. ("Reply") at 4, a court's consideration of classified materials ex parte and in camera to assess the merits of government action does not violate Plaintiffs' constitutional rights. See Holy Land Relief Found. v. Ashcroft, 333 F.3d 156, 165-66 (D.C. Cir. 2003) (upholding ex parte and in camera review of classified documents in deciding merits of government decision to designate plaintiff as terrorist organization); Global Relief Found., Inc. v. O'Neill, 315 F.3d 748 (7<sup>th</sup> Cir. 2002) (same); National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 208-09 (D.C. Cir. 2001) (same); United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982) ("it has constantly been held that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an in camera, ex parte basis ... [i]n a field as delicate and sensitive as foreign intelligence gathering, as opposed to domestic, criminal surveillance, there is every reason why the court should proceed in camera and without disclosure to determine the legality of a surveillance." (internal quotation omitted)); see also Weberman v. National Security Agency, 668 F.2d 676 (2d Cir. 1982) (court could consider ex parte and in camera affidavits in examining government assertion of right to non-disclosure).

The Supreme Court and various courts of appeal have recognized that the process due to litigants under the Constitution's Due Process Clause varies according to the nature of the case before the court. See Holy Land Relief Found., 333 F.3d at 165; People's Mojahedin, 327 F.3d at 1242. In the context of cases involving national security and decisions based on classified information, courts have recognized (1) that the government has a compelling interest in protecting classified material, and (2) may not be forced to choose between providing the court with all evidence relevant to review of an issue and preserving the secrecy of classified materials.

See People's Mojahedin, 327 F.3d at 1242; Global Relief, 315 F.3d at 754; National Council of Resistance of Iran, 251 F.3d at 208-09 (D.C. Cir. 2001) ("it is within the privilege and prerogative of the executive" to withhold classified evidence from plaintiff in this context, and "we do not intend to compel a breach in the security which that branch is charged to protect."); see also Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (Executive Branch has control over classified information under constitutional scheme and "a 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business"). The rationale for this rule is clear: "[t]he Constitution would indeed be a suicide pact ... if the only way to curtail enemies' access to assets were to reveal information that might cost lives." Global Relief, 315 F.3d at 754.

Plaintiffs rely primarily on the D.C. Circuit's decision in Abourezk v. Reagan for their claim that courts may never consider ex parte and in camera evidence in ruling on the merits of government action. See 785 F.2d 1043 (D.C. Cir. 1986) (suit challenging denial of visas). But the D.C. Circuit itself has held that Abourezk has no relevance in the specific context of counter-terrorism enforcement actions. See People's Mojahedin, 327 F.3d at 1242. Accordingly, Plaintiffs' reliance on this case, and others construing due process rights outside this specific national security context, see Vining v. Runyon, 99 F.3d 1056 (11<sup>th</sup> Cir. 1996) (Title VII action), Association for Reduction of Violence, 734 F.2d 63 (1<sup>st</sup> Cir. 1984) (prison inmate civil rights action), fails here.<sup>1</sup>

---

<sup>1</sup>Indeed, the court's decision in Vining v. Runyon explicitly recognizes that it may be appropriate to consider materials ex parte and in camera where review involves compelling national security concerns, which the Supreme Court has recognized is the case where classified information is relevant to the court's decision. See Vining, 99 F.3d at 1057; cf. Egan, 484 U.S.

Moreover, even outside the national security context, it is beyond dispute that courts may consider ex parte materials submitted by the government to demonstrate the legality of its subpoenas or requests for information. See In Re John Doe, Inc., 13 F.3d 633, 635-36 (2d Cir. 1994) (where government moved to compel compliance with grand jury subpoena, district court properly considered government's submission of ex parte affidavit from FBI agent justifying basis for subpoena); In Re John Doe Corp., 675 F.2d 482, 485-86, 489-91 (2d Cir. 1982) (district court properly considered government's ex parte submission, detailing ongoing grand jury investigation, in support of challenged grand jury subpoena); see also In Re Grand Jury Subpoena, 223 F.3d 213, 216-17, 219 (3d Cir. 2000) (where target of grand jury investigation challenged subpoena for grand jury testimony, district court properly relied on government's ex parte affidavit detailing grand jury investigation in order to demonstrate legality of subpoena). As in these cases, here the government may submit a classified declaration detailing the ongoing counter-terrorism investigation in connection with which the challenged NSL was issued, in order to demonstrate the constitutionality of its request.

For all these reasons, this Court may consider the classified evidence that underlies the government's action in this case ex parte and in camera. The specific procedures for doing so are well-established and discussed in detail below.

## **II. Specific Procedures Are Available to Allow for Ex Parte and In Camera Review.**

The authority to grant access to classified national security information is committed to the Executive Branch. See Egan, 484 U.S. 518, 527 (1988); People's Mojahedin, 327 F.3d 1238,

---

at 527; People's Mojahedin, 327 F.3d at 1242.

1242 (D.C. Cir. 2003). Access to classified information generally is limited to persons with a “need to know” the information “in order to perform or assist in a lawful and authorized governmental function.” Executive Order 13,292, §§ 4.1(a)(3), 6.1(z), 68 Fed. Reg. 15315, 15324, 15332 (Apr. 17, 1995), amending Executive Order 12,958, 60 Fed. Reg. 19825 (Apr. 17, 1995).

In civil cases involving classified national security information, access to and handling of such information is governed by regulations issued by the Department of Justice. See 28 C.F.R. §§ 17.17, 17.46. Consistent with these regulations, undersigned counsel for the Government must obtain authorization to release such information to any person outside the Executive Branch, including a United States District Court. 28 C.F.R. § 17.17(c)(2). However, a United States District Judge need not obtain a separate security clearance to receive classified information. See 28 C.F.R. § 17.46(c) (Though other judicial personnel must have a security clearance to have access to such information, “District Courts do not require a determination of their eligibility for access to classified information by the Department.”).

In cases where classified materials are submitted for review, the regulations require Government counsel to take all appropriate action to protect the information against unauthorized disclosure. See 28 C.F.R. § 17.17(a). The regulations set forth the minimum security measures necessary to protect the classified information, and require the undersigned to ensure the Court’s cooperation in adopting such measures. See 28 C.F.R. § 17.17(a)(2). In civil proceedings, the security procedures must include the following:

1. Classified information is not to be disclosed or introduced into evidence without the prior approval of either the originating agency, the Attorney General, or the President. See 28 C.F.R. § 17.17(c)(2);

2. Attendance at any proceeding where classified information will be disclosed is limited to those persons with appropriate authorization to access this information, whose duties require knowledge or possession of the classified information to be disclosed. See 28 C.F.R. § 17.17(c)(3);
3. Aside from the District Judge herself, access to classified information disclosed in this action is to be limited to those Court employees who have been determined eligible for such access by the Department of Justice Security Officer and who have been fully advised of all pertinent safeguarding requirements and their liability in the event of unauthorized disclosure.<sup>2</sup> See 28 C.F.R. § 17.17(c)(3) & (10); 28 C.F.R. § 17.46(c).
4. Classified documents are to be appropriately handled and stored in a manner consistent with Department of Justice security directives. See 28 C.F.R. § 17.17(c)(4) & (7). With regard to National Security Information (NSI), this entails storage in an approved safe. With respect to Sensitive Compartmented Information (SCI), Department of Justice implementing directives require further security controls, including storage in a Sensitive Compartmented Information Facility (SCIF) and handling only by approved individuals.
5. Any notes or other documents prepared by the Court that contain classified information are to be prepared, handled, and stored consistent with the directives of the Department of Justice Security Officer, see 28 C.F.R. § 17.17(c)(7), and retrieved at the close of the proceedings by the Department of Justice Security Officer for safeguarding or destruction. 28 C.F.R. § 17.17(c)(9).
6. At the conclusion of the proceedings, all original classified information shall be returned to the Department of Justice or the originating agency, or placed under court seal for safekeeping by the Department of Justice Security Officer. See 28 C.F.R. § 17.17(c)(8).

In this case, the Court has indicated that other Court personnel, such as law clerks, will not need access to the classified information. Thus, the procedures for access to classified information disclosed to other Court personnel - - e.g., required security clearances by the Department of Justice Security Officer and full advisement of all pertinent safeguarding requirements and their liability in the event of unauthorized disclosure - - will not be necessary here. See 28 C.F.R. § 17.17(c)(3) & (10); 28 C.F.R. § 17.46(c).

---

<sup>2</sup> Even on an expedited basis, the eligibility determination required for other Court personnel can be expected to take at a minimum four weeks.

Based on the foregoing requirements, in the event the Court decides to review the classified information underlying the government's decision in this case, Defendants propose that an agent of the FBI hand-deliver the classified records to the Court for ex parte and in camera review, and that these records be returned to that agent at the conclusion of the Court's review session. Doing so would avoid the need for Court storage of these documents and the related requirements for such storage discussed above. See 28 C.F.R. § 17.17(c)(7).

Finally, as instructed by the Court, Government counsel is moving forward with efforts to obtain use authorization from relevant federal agencies for the classified information requested by the Court. Per the Court's orders, Government counsel either will present the Court with this information on September 5, 2005, or provide specific information to the Court as to the status of the government's efforts to obtain use authorization for this information and the date by which such information may be provided.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

KEVIN J. O'CONNOR  
United States Attorney

LISA E. PERKINS  
Assistant United States Attorney  
Federal Bar No. ct23164  
WILLIAM A. COLLIER  
Federal Bar No. ct00986  
450 Main Street  
Hartford, Connecticut 06103  
(860) 947-1101  
lisa.perkins@usdoj.gov

SANDRA M. SCHRAIBMAN  
Assistant Director, Federal Programs Branch

---

CARLTON E. GREENE  
Trial Attorney  
Civil Division, Federal Programs Branch  
United States Department of Justice  
Room 7308  
20 Massachusetts Avenue, NW  
Washington, DC 20530  
Tel: 202-514-4938; fax 202-514-8470  
Federal Bar No. ctPHV0524

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the within and foregoing has been served by federal express this 1st day of September, 2005, to:

Ann Beeson, Esq.  
Jameel Jaffer, Esq.  
Melissa Goodman, Esq.  
American Civil Liberties Union Foundation  
125 Broad Street, 17th Floor  
New York, NY 10004

Annette M. Lamoreaux, Esq.  
ACLU of Connecticut Foundation  
32 Grand Street  
Hartford, CT 06106

---

LISA E. PERKINS  
ASSISTANT UNITED STATES ATTORNEY