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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*, Plaintiffs, v. GEORGE W. BUSH, *et al.*, Defendants.	No. CV 06 274 KI PLAINTIFFS' OPPOSITION TO DEFENDANTS' LODGING OF MATERIAL EX PARTE AND IN CAMERA

INTRODUCTION

Something remarkable and disturbing is happening in this case and in others across the country challenging the defendants' program of warrantless surveillance. The executive branch of our federal government, disregarding the admonition that "[d]emocracies die behind closed

doors," Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002), is attempting to draw a veil of secrecy over judicial proceedings to determine whether the warrantless eavesdropping program, itself kept secret for years, is unlawful.

Plaintiffs have filed under seal a document supporting their allegation that they were victims of defendants' unlawful electronic surveillance. The Oregonian Publishing Company has asked this court to unseal the document. Defendants, in response to that motion, have filed a declaration for the court's consideration *ex parte* and *in camera*. The plaintiffs have no idea what the secret declaration says. Defendants' written response to the Oregonian's motion says nothing about the declaration itself, only that (1) disclosure of the sealed document could "cause exceptionally grave damage to the national security of the United States," and (2) "it is not possible" to redact the document in a manner that would protect the national security. Defendants' Response to the Oregonian's Motion to Intervene and to Unseal Records ("Defendants' Response") at 17.

Plaintiffs oppose the *ex parte* and *in camera* lodging of defendants' secret declaration, which violates plaintiffs' right to due process and, as the Oregonian has shown, the constitutional and common law right of public access to court documents. The declaration's secrecy prevents plaintiffs from effectively addressing defendants' response to the Oregonian's motion. In the most fundamental sense, this is a denial of an opportunity to be heard in judicial proceedings.

DISCUSSION

I. DUE PROCESS REQUIRES THAT PLAINTIFFS HAVE ACCESS AND AN OPPORTUNITY TO RESPOND TO DEFENDANTS' SECRET DECLARATION.

A. Secret communications and submissions to the court are forbidden absent a compelling justification.

The Oregonian's motion to unseal the underlying document is based on the First

Amendment and common law right of public access to court documents. Plaintiffs' opposition to defendants' responsive lodging of their declaration *ex parte* and *in camera* is based on those rights and more – the due process right guaranteed by the Fifth Amendment.

"[E]x parte proceedings are anathema in our system of justice." Guenther v. Comm'r of Internal Revenue, 889 F.2d 882, 884 (9th. Cir. 1989), *appeal after remand,* 939 F.2d 758 (9th Cir. 1991) ("Guenther I"); *see* United States v. Thompson, 827 F.2d 1254, 1258-59 (9th Cir. 1987). This is because the Fifth Amendment requires "[n]otice and an opportunity to be heard," which are the "hallmarks of procedural due process." Id.; *see* U.S. v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (1998), *cert. denied*, 528 U.S. 842 (1999); U.S. v. Alisal Water Corp., 431 F.3d 643, 657 (9th Cir. 2005) ("At its core, due process requires that a party have adequate notice and opportunity to be heard.") (citing Dusenbery v. United States, 534 U.S. 161, 167 (2002); LaChance v. Erickson, 522 U.S. 262, 266 (1998)).

Due process also mandates neutrality in civil proceedings. Guenther v. Comm'r of Internal Revenue, 939 F.2d 758, 760 (9th Cir. 1991) ("Guenther II"). Unless a party can see and respond to evidence submitted against it, the court's impartiality is jeopardized. *See* Guenther I, 889 F.2d at 884. As a result, courts have historically "safeguard[ed] party access to the evidence tendered in support of a requested court judgment." Abourezk v. Reagan, 785 F.2d 1043, 1060 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987).

Ex parte contacts that limit a party's ability to participate in hearings or refute the government's evidence violate the spirit of due process. *See* Guenther II, 939 F.2d at 760. Particularly where questions of fact are at issue, denial of access to the government's submission defeats the opposing party's right to fair consideration of its case. *See* Guenther I, 889 F.2d at 884-85. Thus, "[o]nly in light of a 'compelling justification' would *ex parte* communications be

tolerated." Guenther II, 939 F.2d at 760.

B. Defendants have not demonstrated a compelling justification for *in camera*, *ex parte* review of their secret declaration.

Here, defendants have failed to establish a compelling justification for lodging their secret declaration *ex parte* and *in camera*. Indeed, they have made no attempt at all to demonstrate any justification for keeping the declaration secret. They offer not a clue why plaintiffs cannot see or respond to it.

Instead, defendants make a conclusory and unsupported assertion that disclosure of the *underlying document* that plaintiffs filed under seal "would reveal highly classified information" and "could reasonably be expected to cause exceptionally grave damage to the national security of the United States." Defendants' Response at 17-18. That is not a legitimate basis for denying access to the *declaration*, absent a showing – which is entirely absent here – that the declaration itself cannot be disclosed without revealing the classified information in the underlying sealed document.

The declaration purportedly establishes that the sealed document is classified and may not be disclosed to the public. *See* Defendants' Response at 8. Plaintiffs' attorneys are aware of the document's classification, which is why they filed it under seal rather than in the public record when they filed this case. As plaintiffs have seen the document and know its contents, even if the court concludes that the document should not be publicly disclosed, there is no apparent justification for the submission of the declaration *ex parte*.

Defendants have failed to offer any basis for lodging their secret declaration *ex parte* and *in camera* other than the general assertion that it might damage national security. But how? By the very disclosure of the fact that the government has engaged in warrantless surveillance, a fact

already admitted by this Administration? Certainly before an *ex parte* contact should be allowed in this case, defendants must explain with greater particularity in a public filing how national security would be damaged. Relying on a general assertion is essentially classic ipse dixit – "because we say so."

Moreover, if we are to judge from defendants' response to the inadvertent disclosure of the sealed document, their assertion that the document threatens national security rings hollow. The Office of Foreign Asset Control ("OFAC") inadvertently disclosed the document to plaintiffs on August 20, 2004. Defendants' Response, Attachment B, Exhibit 1. The FBI learned of the disclosure that same month. Defendants' Response, Attachment B, Declaration of Frances R. Hourihan ("Hourihan decl."), ¶ 3. Far from making "immediate efforts" to retrieve the document as defendants claim, Defendants' Response at 2, the FBI made no effort to retrieve the document from plaintiffs Ghafoor and Belew until almost two months later, on October 13 and 14, 2004. Hourihan decl., ¶ 7. If the FBI and defendants did not see the urgency in retrieving a document that purportedly poses "exceptionally grave damage to the national security of the United States," it is difficult to believe that the contents of the secret declaration pose any more of a threat.

Other facts surrounding the treatment of the sealed document cast doubt on defendants' assertion that its disclosure would threaten national security. First, the government is supposed to house documents with the same classification as the sealed document in a sensitive compartmented information facility ("SCIF"), yet the sealed document here found its way out of a SCIF (if it was ever in one) and was included in OFAC's response to plaintiffs' discovery request. Second, defendants took no immediate action to secure the document when plaintiffs filed it under seal on February 28, 2006. Instead, defendants waited over two weeks before

requesting *ex parte* communications with the court regarding the handling of the document. In both instances, defendants' actions are inconsistent with their claim that the sealed document and the declaration threaten national security.

That information in the sealed document may be classified does not justify denial of plaintiffs' access to it or to the secret declaration. No classification is legitimate if its purpose is to "conceal violations of law," Executive Order 12958 (Apr. 17, 1995), §1.8(a) ("[i]n no case shall information be classified in order to . . . conceal violations of law, inefficiency, or administrative error"); *see also* Department of Defense Regulation 5200.1-R ("Classification may not be used to conceal violations of law inefficiency, or administrative error. . ."). If, as plaintiffs allege in this lawsuit, the defendants' warrantless surveillance program is unlawful, then the document's classification is as lawless as the program itself.

Plaintiffs recognize that if the secret declaration contains information on coding or cryptography, that information may be redacted if not relevant to Plaintiffs' case. However, due process principles entitle plaintiffs to review any factual allegations in the declaration that may affect the outcome of the case.

Likewise, anything in the underlying sealed document that might arguably endanger national security if publicly disclosed can easily be redacted if the document is eventually unsealed. However, the substantive content of the document – the intercepted conversations – does not implicate national security, as this court can readily confirm by reading the document. Therefore, this court should reject defendants' conclusory and unsupported assertion that "it is not possible" to provide a redacted version of the underlying document. Defendants' Response at 17.

C. In the analogous FOIA context, the government must make public submissions before the court will consider permitting *ex parte*, *in camera* review.

Courts' handling of classified information under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), provides a useful analogy in this case. Like FOIA, this case involves principles of civil litigation. Moreover, FOIA mandates public disclosure of government documents to ensure proper functioning of the democratic process, while this case involves the government's effort to avoid public oversight by trivializing the due process standards which support openness in litigation, particularly where concealment of illegal government conduct is alleged.

The Ninth Circuit "recognize[s] the danger inherent in relying on *ex parte* affidavits" in FOIA cases. Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983). The district court may be "'led astray in its determinations by factual conclusions founded in [a government] affidavit . . . .'" Id. (citing Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980)). Courts therefore "proceed with caution in endorsing *in camera* review of documents in FOIA cases." Pollard v. F.B.I., 705 F.2d 1151, 1153 (9th Cir. 1983).

Accordingly, the Ninth Circuit permits *in camera* review only when the "preferred alternative method to *in camera* review – government testimony and detailed affidavits – has first failed to provide a sufficient basis for decision." Pollard v. F.B.I., 705 F.2d at 1153-54. "Once the government has submitted as detailed *public* affidavits and testimony as possible, the district court may resort to '*in camera* review of the documents themselves and/or *in camera* affidavits[.]'" Doyle v. FBI, 722 F.2d at 556 (emphasis added).

Even where the government has submitted a public affidavit to justify its nondisclosure of classified information requested under FOIA, the Ninth Circuit has required more than mere

conclusory statements that the information is exempt from disclosure. Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). To permit the adversarial process to function, the court requires the government to provide "a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." Id. at 977-78; *see* id. at 979 ("[e]ffective advocacy is possible only if the [the person making the FOIA request] knows the precise basis for nondisclosure."); Lion Raisins, Inc. v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1083-84 (9th Cir. 2004) (district court's *in camera* review of U.S. attorney's declaration claiming exemption from disclosure under FOIA in lieu of "docketed public declarations" provided inadequate factual basis for permitting government to withhold documents).

Here too, this court should require defendants to make a public, particularized record in support of their request for *in camera*, *ex parte* consideration of the secret declaration. Only if the court determines that defendants' public submission is insufficient for it to render a decision on the Oregonian's motion should the court review the secret declaration *in camera* and *ex parte.* As in FOIA cases involving classified information, preservation of the adversarial system of justice requires no less.

Based on the public declarations submitted by defendants, *in camera* and *ex parte* review of the secret declaration appears unnecessary to protect national security. It appears that, instead, defendants are attempting to thwart public access to documents that reveal the nature and scope of their warrantless surveillance program. Their goal is to evade the judiciary's check on executive overreaching by suppressing the physical proof that courts and litigants need in their efforts to implement that check.

In furtherance of this goal, defendants would prevent plaintiffs from effectively

addressing defendants' response to the Oregonian's motion. This court should reject defendants' attempt to deny plaintiffs their due process rights and require defendants to file the declaration publicly or forego judicial consideration of its contents.

II. THE COURT HAS AUTHORITY TO CRAFT ALTERNATIVE PROCEDURES FOR PROTECTION OF CLASSIFIED INFORMATION.

As we have shown, *ex parte* submissions seriously undermine the adversarial process and litigants' due process rights. To prevent these evils while protecting classified material, the court may employ a number of alternatives, including targeted redactions as mentioned above.

In addition, the court may use its discretionary powers to issue protective orders to prevent the disclosure of classified information. *See*, *e.g.*, 18 U.S.C. Appx. III, § 3. Among other things, the protective order may (1) require housing of classified material in a safe room at the courthouse, (2) require counsel and those assisting counsel to obtain a security clearance before gaining access to the safe room, and (3) prevent the material, or notes based on the material, from being removed from the safe room. *See* U.S. v. Musa, 833 F.Supp. 752, 755-61 (E.D. Mo. 1993).

Plaintiffs' counsel are willing to apply for security clearances if the court deems this necessary. In that event, the court may facilitate counsel's application. *See* Doe v. Gonzales, 386 F.Supp.2d 66, 71 (D. Conn. 2005) ("direct[ing] the government to attempt, to the extent permitted by law, to provide plaintiffs' attorney the opportunity to obtain the security clearance required to review and respond to the classified materials.").

In the context of criminal proceedings, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. Appx. III, allows courts to "fashion creative solutions in the interests of justice for classified information problems." United States v. North, 713 F.Supp. 1452, 1453

(D.D.C. 1989) (citing legislative history). The court has the authority to "make *all determinations* concerning the *use, relevance, or admissibility* of classified information," 18 U.S.C. Appx. III, § 6(a) (emphasis added), and may order alternative procedures for the disclosure of classified information, including the substitution of a statement admitting relevant facts that the classified information would tend to prove, or a summary of the specific classified information, as long as the substituted information provides the defendant "substantially the same ability to make his defense as would disclosure of the specific classified information." Id. at §§ 4, 6(c).

Plaintiffs allege illegal activity by defendants that implicates the structure of our government and important individual rights. The court has a range of alternatives that will allow this case to be adjudicated in public without resorting to *ex parte* contacts. Plaintiffs respectfully request that the court look to such alternatives to preserve the important due process interests at stake here.

CONCLUSION

"Publicity is the soul of justice. Without publicity, all other checks are insufficient: In comparison of publicity, all other checks are of small account." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (quoting Jeremy Bentham, Rationale of Judicial Evidence 524 (1827)).

Publicity is precisely what is needed in this case – and in others like it. Defendants' warrantless surveillance program has been the subject of intense public concern since its December 2005 disclosure by the New York Times. That program raises profoundly important constitutional and policy issues concerning the post-9/11 tension between civil liberties and national security, which issues should not be litigated in the dark. This program, which began in

secrecy, should now be scrutinized in full sunlight.

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Respectfully submitted,

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