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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, *et al.*,

Plaintiffs,

v.

GEORGE W. BUSH, *et al.*,

Defendants.

CV. 06-274- KI

DEFENDANTS' RESPONSE TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' LODGING OF MATERIAL EX PARTE AND IN CAMERA

INTRODUCTION

Despite Plaintiffs' claim that it offends notions of due process for the Court to review classified material *ex parte* and *in camera*, *see* Opposition to Defendants' Lodging of Material Ex Parte and In Camera (Apr. 24, 2006) [Docket No. 30] ("Pls.' Opp'n"), the United States is permitted to submit classified information to the Court *ex parte* and *in camera*, and the Court is entitled to consider such information. And in the context of this case, moreover, it is particularly remarkable for Plaintiffs now to seek to prevent the Court from considering Defendants' classified declaration, which was necessarily lodged *ex parte* and *in camera*, so that the Court would have an explanation and understanding of the nature of the document that Plaintiffs themselves filed under seal with the Court when they filed this lawsuit.[1/]

As has been explained previously to the Court, a classified document was disclosed to counsel for Plaintiff Al-Haramain Islamic Foundation in Oregon, designated as a "Specially Designated Global Terrorist," who indicated that they distributed this document to a limited number of people. After the Federal Bureau of Investigation ("FBI") conducted a non-public investigation into the source of and motivation for this disclosure and determined that it was inadvertent, the FBI took steps to retrieve the inadvertently disclosed classified document. Plaintiffs themselves, however, apparently failed to return all copies of the document at issue in this case, despite clear instructions from the FBI. Plaintiffs instead saw fit to file a copy of this classified document under seal in support of a Complaint challenging alleged electronic surveillance, when the actual contents of this classified document are irrelevant to Plaintiffs' core constitutional and statutory claims. The classified declaration that Plaintiffs now oppose is

[1] In addition to the previous classified declaration — which the Court has not reviewed — with this public filing, Defendants will lodge a superseding classified declaration, *ex parte* and *in camera*, for reasons that must be explained in the superseding classified declaration.

the only means by which Defendants can explain to the Court in detail the nature of the document and the consequences of its public disclosure.

The Court already has recognized that it has inherent authority to review classified material *ex parte* and *in camera*, and Plaintiffs have cited no authority to the contrary. Indeed, the Court's consideration of classified material *ex parte* and *in camera* is based on longstanding authority in a variety of different legal contexts.

Consistent with the Court's direction, Defendants have sought to place as much on the public record as possible. As the attached unclassified declaration of the Office of the Director of National Intelligence demonstrates, and as set forth below, the document at issue remains properly classified and cannot be publicly disclosed without harming national security. On the basis of the public record, therefore, the Oregonian's Motion to Unseal Records (Mar. 17, 2006) [Docket Nos. 7 & 8] should be denied. Should the Court require additional detail regarding the sealed classified document in this case, however, such detail can only be conveyed in a classified format, which must be reviewed *ex parte* and *in camera*, and the Court's review of Defendants' classified declaration is appropriate in these circumstances.

In response to the Court's request that Defendants consider alternative procedures for Plaintiffs' counsel's access to classified documents in this case, Defendants submit that they are not able to agree to any such procedures. Any alternative procedures — such as protective orders or security clearances for Plaintiffs' counsel — present an even greater risk of further disclosure of this classified document because they necessarily compromise well-established security procedures for access to and storage of classified material.

SUPPLEMENTAL STATEMENT OF FACTS

Defendants hereby incorporate the facts set forth in their Response in Opposition to the Oregonian's Motion to Unseal Records (Apr. 14, 2006) [Docket No. 24] ("Defs.' Opp'n to Mot.

to Unseal"). Because the Court requested that the government explain certain facets of the inadvertent disclosure of the classified document and place more information about the sealed classified document on the public record, the following facts are intended to supplement Defendants' Opposition to the Oregonian's Motion to Unseal Records.

A. FBI Investigation into the Disclosure of the Classified Document

The accompanying supplemental declaration of Frances R. Hourihan, *see* Attach. 2, Supplemental Declaration of Frances R. Hourihan (May 10, 2006) [hereinafter, "Supp. Hourihan Decl."], answers certain questions raised by the Court.[2/] In particular, the FBI investigation revealed that, prior to the inadvertent disclosure of the classified document at issue here, that document had been properly maintained in a secure facility at the Office of Foreign Assets Control ("OFAC") at the U.S. Department of Treasury. *See id.* ¶ 5. While working within an approved "Sensitive Compartmented Information Facility," or "SCIF," maintained by Treasury, an OFAC employee assembled a package of putatively unclassified documents for disclosure to counsel for Al-Haramain Islamic Foundation in Oregon. *See id*. The classified document at issue here, however, was inadvertently included in that package; according to the FBI, "[d]uring the unclassified document assembly process and while within the SCIF, the classified document, which was related to the terrorist designation, was inadvertently copied by the government employee and inadvertently included with the unclassified OFAC materials that were collected

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[2] During the telephonic conference proceedings on April 26, 2006, the Court stated:

> I think the Government can supplement the public submission with general facts and arguments. For example, why this, quote, "highly classified," end quote, document was floating around Government agencies if it contained information as damaging published security as the Government states. Why the FBI did not take action for about two months.

See Attach. 1, Transcript of Telephonic Conference Proceedings (Apr. 26, 2006), at 20.

for disclosure to private counsel." *See id.* Contrary to Plaintiffs' insinuation that this classified document was not being properly maintained in a SCIF at Treasury, *see* Pls.' Opp'n at 5, the FBI investigation determined that the original classified government document that was inadvertently disclosed to Plaintiffs' counsel remained stored within the SCIF maintained by Treasury. *See* Supp. Hourihan Decl. ¶ 5.

Further, based on information developed during its investigation, the FBI determined that the disclosure of this classified document occurred on or about August 20, 2004. *See* Supp. Hourihan Decl. ¶ 4. The FBI had first received notification in late August 2004 that classified information had been improperly disclosed to a private party, and after receipt of that notification, the FBI Washington Field Office initiated an investigation shortly after, on August 31, 2004. *See id.* ¶ 3. The first six weeks of this investigation were a non-public national security investigation, after which the FBI made the determination that the unauthorized disclosure of this classified document was inadvertent and not the result of a knowing or intentional unauthorized disclosure. *See id.*; *see also id.* ¶ 4. According to the FBI, this initial, non-public FBI national security investigation was necessary for several significant reasons, including, but not limited to, the investigative need to:

> determine the facts and circumstances relating to this unauthorized disclosure without alerting potential subject(s), known or unknown, to the existence or scope of the investigation which would provide the opportunity to destroy, conceal, or alter evidence; identify the full scope of the unauthorized disclosure; assess whether the unauthorized disclosure was an isolated event or an indication of a broader intentional compromise; conduct a security risk assessment of the involved government employees; and make the investigative determination whether the unauthorized disclosure was or was not an intentional or knowing unauthorized disclosure of classified information to a Specially Designated Global Terrorist with the intent to harm the national security of the United States.

See id. ¶ 6. The FBI could not therefore make efforts to retrieve the classified document during

this stage because its investigation into the source of and motivation for the disclosure would have been thereby publicized, undermining the aforementioned law enforcement and investigative efforts. *See id.*

At the conclusion of the non-public aspect of the national security investigation, FBI personnel with appropriate government clearances were able to begin the process of retrieving copies of the classified document. *See* Supp. Hourihan Decl. ¶ 7. The FBI identified and interviewed several people who had unauthorized access to this government document. *See id.* Among those identified and interviewed were Plaintiff Wendel Belew, who was interviewed on October 14, 2004, and Plaintiff Asim Ghafoor, who was interviewed on October 13, 2004, November 1, 2004, and November 3, 2004. *See id.* The FBI instructed these Plaintiffs, as well as other individuals identified and interviewed, not to further review, disclose, discuss, retain, or disseminate the classified document or the classified information contained in the document. *See id.* The copies of the classified document retrieved by FBI personnel were transported by FBI special agents with appropriate government security clearances to a secure and limited access FBI facility that is approved for the storage of classified government materials. *See id.*

B. Unclassified Description of the Classified Document

The Office of the Director of National Intelligence ("ODNI") has also submitted an unclassified declaration in an attempt to make a more public description of the inadvertently disclosed classified document at issue in this case. *See* Attach. 3, Declaration of John F. Hackett (May 12, 2006) [hereinafter, "Hackett Decl."]. The Director of National Intelligence is the head of the intelligence community, and Mr. Hackett, as Director of the ODNI Information Management Office, supports him in that role. *See id.* ¶ 1; *see also* Intelligence Reform and Terrorism Prevention Act of 2004, § 1011, Pub. L. No. 108-458 (amending 50 U.S.C. §§ 403, 403-3). In preparation for this public declaration, the ODNI reviewed both the inadvertently

disclosed classified document and the superseding classified declaration that will be lodged *ex parte* and *in camera* with the Court on May 12, 2006. *See* Hackett Decl. ¶ 4. Because of the sensitivity of this classified document and classified declaration, the ODNI is not able to describe the contents in great detail. *See id.*

Nevertheless, the ODNI has concluded that the sealed classified document was clearly marked and properly classified as "TOP SECRET." *See id.* ¶¶ 5-7. Pursuant to Exec. Order No. 12,958 (as amended by Exec. Order No. 13,292), information is classified as "TOP SECRET" if unauthorized disclosure of the information reasonably could be expected to cause exceptionally grave damage to United States national security. *See id.* ¶ 5. According to the ODNI, the categories of information at issue in the sealed document which warrant the classification of "TOP SECRET" are "intelligence activities (including special activities) and intelligence sources and methods, and . . . scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism." *See id.* ¶¶ 6-7 (citing Exec. Order No. 12,958, as amended, § 1.4(c), (g)). The ODNI further concludes that disclosure of this document reasonably could be expected to cause exceptionally grave damage to national security. *See id.* ¶ 7.

In addition, the clear markings on this document indicate that it contains "sensitive compartmented information," or "SCI." *See* Hackett Decl. ¶ 9. SCI information must be afforded special protections in excess of normal procedures afforded to classified information. *See id.* For example, information concerning or derived from intelligence sources, methods, or analytical processes may be protected with "special access procedures exceeding those normally applicable to 'TOP SECRET' procedures." *See id.* While the sealed classified document is protected based on its basic classification level of "TOP SECRET," because it also contains SCI information, this document must be protected further — because of the exceptional sensitivity

and vulnerability of SCI information, safeguards for such information exceed the access standards that are normally required for information of the same classification level. *See id.* Thus, the ODNI has concluded that "the document filed under seal with the Court should only properly be stored in a facility certified to contain SCI materials, and individuals without appropriate clearances for this information should not be permitted access to it." *See id.*

The ODNI has further concluded that no portion of the sealed classified document can be declassified because no portion of the document meets the criteria for declassification set forth in Exec. Order No. 12,958, as amended. *See* Hackett Decl. ¶ 10. Further, neither the inadvertent disclosure of this document, nor the publication of information that may be derived from or may be contained in this classified document, would result in the functional declassification of the document. *See id.* (citing Exec. Order No. 12,958, as amended, § 1.1(b)). The document therefore remains properly classified.

Although this classified document was inadvertently disclosed to a limited number of people, further disclosure would only exacerbate the harm that has already occurred. *See* Hackett Decl. ¶ 11. As described by the ODNI:

> Further disclosure would entail widespread distribution of and attention to this document. There are many individuals, organizations, and foreign adversaries, including foreign governments, who may seek to harm U.S. national security interests. Even the release of what might appear to the untrained eye as innocuous information poses the substantial risk that our adversaries will be able to piece together sensitive information from other sources. Public, widespread access to this classified document would essentially facilitate the study of this document by those who would do us harm.

See id. ¶ 12.

ARGUMENT

I. THE OREGONIAN'S MOTION TO UNSEAL RECORDS CAN AND SHOULD BE DENIED ON THE BASIS OF THE UNCLASSIFIED EVIDENCE NOW BEFORE THE COURT.

Plaintiffs' opposition to any consideration of Defendants' *ex parte* and *in camera* filing in this case must be considered in context: that is, Defendants submitted this classified declaration in order to establish that the Oregonian has no First Amendment right of access to classified information, and thus no First Amendment right of access to the sealed document at issue in this case. *See* Defs.' Opp'n to Mot. to Unseal at 10-17. Now that Defendants have filed, at the Court's direction, an unclassified declaration regarding the sealed document at issue in this case, the Oregonian's Motion to Unseal Records can and should be denied on the basis of unclassified evidence alone.

As first noted in opposition to the Oregonian's Motion to Unseal Records, the law is well-settled that classified materials are not subject to disclosure in civil proceedings. *See Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir.) (refusing to require production of classified materials where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged") (internal quotation marks omitted), *cert. denied*, 525 U.S. 967 (1998); *see also United States v. Reynolds*, 345 U.S. 1, 6 (1953); *National Council of Resistance of Iran v. Dep't of State* (*"NCRI"*), 251 F.3d 192, 208-09 (D.C. Cir. 2001); *In re United States*, 872 F.2d 472, 474-77 (D.C. Cir. 1989); *American Civil Liberties Union v. Brown*, 619 F.2d 1170, 1172-73 (7th Cir. 1980); *United States v. Marzook*, 412 F. Supp. 2d 913, 926 (N.D. Ill. 2006). Because classified materials have never been subject to disclosure in civil proceedings, the Oregonian can establish no traditional First Amendment right of access to such materials, which is required before the Oregonian can even make such a claim.

See Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona, 156 F.3d 940, 946 (9th Cir. 1998).

Defendants have now submitted a sworn declaration from the Office of the Director of National Intelligence attesting to the fact that sealed document at issue in this case is a United States government record classified at the "TOP SECRET" level pursuant to Executive Order No. 12,958, as amended by Exec. Order No. 13,292, § 1.2. *See* Hackett Decl. ¶¶ 6-8. The sealed document was classified because it contains information related to intelligence activities and intelligence sources and methods, as well as scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism. *See id.* ¶ 7 (citing Exec. Order No. 12,958, as amended, § 1.4(c), (g)). The document was classified at the "TOP SECRET" level because its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to United States national security. *See id.* ¶ 6. Further, this sealed document contains "sensitive compartmented information," or "SCI," which is exceptionally sensitive and vulnerable. *See id.* ¶ 9. Because the Director of National Intelligence imposes additional safeguards and access requirements for SCI intelligence, the sealed classified document in this case must therefore be stored in a facility certified to contain SCI information. *See id.*

No portion of this sealed classified document can be declassified, and although this document was inadvertently disclosed to a limited number of people, that inadvertent disclosure does not render it unclassified. *See* Hackett Decl. ¶ 10 (citing Exec. Order No. 12,958, as amended, § 1.1(b)). Any widespread public disclosure of this document — such as to the Oregonian — would exacerbate the harm that has already occurred from the inadvertent disclosure. *See id.* ¶ 11. Release of even innocuous-seeming information poses the substantial risk that our adversaries would be able to piece this information together with other sensitive

information and essentially facilitate the study of this document by those who seek to harm Unitd States national security interests. *See id.* ¶ 12.

Thus, based on the unclassified evidence presented in this case, the Court should reject the Oregonian's claim that it has a First Amendment right to a classified government document and deny the newspaper's Motion to Unseal Records. Should the Court require more detail in order to assess the government's claim that this is a properly classified document, however, such detail can only be offered in a classified declaration submitted *ex parte* and *in camera* herewith. *See* Hackett Decl. ¶ 4. As will be set forth below, the Court has the authority to review classified material *ex parte* and *in camera* and, indeed, such review is common in a variety of different legal contexts.

II. THE COURT HAS INHERENT AUTHORITY TO REVIEW CLASSIFIED INTELLIGENCE INFORMATION EX PARTE AND IN CAMERA, AND ITS EXERCISE OF THAT AUTHORITY COMPLIES FULLY WITH THE DUE PROCESS CLAUSE.

The Court already has recognized that it has inherent authority to review classified material *ex parte* and *in camera.* *See* Attach. 1, Transcript of Telephonic Conference Proceedings (Apr. 26, 2004), at 20 ("There is no question that the Court has the discretion and the authority to review an ex parte, in camera filing under appropriate circumstances."); *see also id.* at 28. Despite Plaintiffs' Opposition to consideration of Defendants' classified declaration lodged with the Court, the Court's consideration of it is appropriate and, indeed, the circumstances of this case arguably warrant such consideration.

As the Supreme Court has emphasized, "it is by now well established that '"due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted)).

Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In determining what process is constitutionally required, courts must consider not only the private interests that will be affected and the risk of an erroneous deprivation of those interests, but also the particular "Government[al] interest, including the function involved" and the "burdens that the additional or substitute procedural requirements would entail." *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

"[N]o governmental interest is more compelling than the security of the nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981); *see also Wayte v. United States*, 470 U.S. 598, 612 (1985) ("Unless a society has the capability and will to defend itself from the aggression of others, constitutional protections of any sort have little meaning."). As the Supreme Court has recognized, "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). Despite Plaintiffs' assertion that Defendants have not offered a compelling justification for filing classified declaration *ex parte* and *in camera*, *see* Pls.' Opp'n at 4-6, what has always clearly been apparent in Defendants' opposition to the Oregonian's Motion to Unseal Records is the government interest in protecting the secrecy of information important to national security, *see, e.g.*, Hackett Decl. ¶¶ 5-9.

Plaintiffs have also asserted that Defendants' claim of a threat to national security "rings hollow." *See* Pls.' Opp'n at 5. For example, Plaintiffs assert that Defendants' claims of a threat are belied by the fact that they waited "until almost two months" after the disclosure to retrieve the inadvertently disclosed classified document. *See id.* As the FBI has now explained, however, the initial phase of its investigation was focused on uncovering the source of and

motivation (if any) for the disclosure of this classified document, and public disclosure of the investigation at that stage would have compromised law enforcement and national security interests. *See* Supp. Hourihan Decl. ¶ 6. Given the FBI's need to find out whether "the unauthorized disclosure was or was not an intentional or knowing unauthorized disclosure of classified information to a Specially Designated Global Terrorist with the intent to harm the national security of the United States," and the need to avoid "alerting potential subject(s), known or unknown, to the existence or scope of the investigation which would provide the opportunity to destroy, conceal or alter evidence," a public effort to recover the classified document would have undermined the investigation. *See id.* Only after the FBI concluded that the disclosure was inadvertent did the FBI attempt to recover all copies of the document. *See id.* ¶ 7.

Plaintiffs have also implied that the inadvertently disclosed classified document was not being properly maintained prior to disclosure, but the FBI's investigation revealed that the document, notwithstanding its inadvertent disclosure, had been properly maintained. *See* Supp. Hourihan Decl. ¶ 5. Apart from being pure conjecture that is refuted by Defendants' sworn declaration, Plaintiffs are simply not in a position to assess the national security interests at stake here — such an assessment is reserved exclusively for the Executive. *See Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("Predictive judgment [about whether someone might 'compromise sensitive information'] must be made by those with the necessary expertise in protecting classified information."); *Central Intelligence Agency v. Sims*, 471 U.S. 159, 170 (1985) ("Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process. The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent."). Indeed, courts (let alone individuals such as Plaintiffs) are ill-equipped to judge harm to national

security. *See Egan*, 484 U.S. at 529 ("The Court also has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" (quoting *Haig*, 453 U.S. at 293-94)). Plaintiffs' opinion on the particular classified document at issue in this case — *i.e.*, that "the substantive content of the document . . . does not implicate national security," *see* Pls.' Opp'n at 6 — is simply uninformed and deserves no weight. As explained by the ODNI, "[e]ven the release of what might appear to the untrained eye as innocuous information poses the substantial risk that our adversaries will be able to piece together sensitive information from other sources." *See* Hackett Decl. ¶ 12.

"[T]hat strong interest of the government [in protecting against the disclosure of classified information] clearly affects the nature . . . of the due process which must be afforded petitioners." *NCRI*, 251 F.3d at 207. As the D.C. Circuit explained in *NCRI*, disclosure of classified information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *See id.* at 208-09. Consequently, while the Due Process Clause requires that the government provide notice of the action sought and an opportunity to be heard, the government "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute." *Id.* at 208.

Indeed, contrary to Plaintiffs' suggestion here, numerous courts have considered *ex parte* and *in camera* submissions containing information that is classified or that relates to ongoing counter-terrorism activities of the federal government. *See, e.g.*, *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (finding the court has "inherent authority to review classified material *ex parte, in camera* as part of its judicial review function"), *cert. denied*, 543 U.S. 1146 (2005); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (noting that the court of appeals had already rejected the "claim that the use of classified

information disclosed only to the court *ex parte* and *in camera* in the designation of a foreign terrorist organization . . . was violative of due process"), *cert. denied*, 540 U.S. 1218 (2004); *People's Mojahedin Organization of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (same); *Global Relief Found. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting constitutional challenge to the International Emergency Economic Powers Act, which authorized the district court's *ex parte* and *in camera* consideration of classified evidence in connection with a judicial challenge to an Executive decision to freeze the assets of entity that assisted or sponsored terrorism), *cert. denied*, 540 U.S. 1003 (2003); *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 600 n.9, 604-05 (3d Cir. 1990) (dismissing First and Fourth Amendment claims as moot based on *in camera* declaration and noting that "the D.C. Circuit, as well as other circuits, have allowed the use of *in camera* affidavits in national security cases"); *Torbet v. United Airlines*, 298 F.3d 1087, 1089 (9th Cir. 2002) (affirming district court's dismissal of complaint challenging airline search based, in part, on *in camera* review of sensitive security information); *see also Doe v. Browner*, 902 F. Supp. 1240, 1250 n.7 (D. Nev. 1995) (dismissing environmental challenge as moot based on *in camera* inspection of classified documents), *aff'd in part and dismissed in part sub nom. Kasza v. Browner*, 133 F.3d 1159 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998).

Similarly, in litigation where the government has asserted the state secrets privilege, courts routinely examine classified information on an *in camera, ex parte* basis, and on the basis of that examination, make determinations that can affect or even dictate the outcome of a case. *See, e.g., Sterling v. Tenet*, 416 F.3d 338, 342 (4th Cir. 2005) (upholding dismissal of plaintiffs' claims based on determination, after reviewing *in camera* affidavits, that any attempt by plaintiffs to make out a prima facie case at trial would entail the revelation of state secrets), *cert. denied*, 126 S. Ct. 1052 (2006); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir.), *cert. denied*,

525 U.S. 967 (1998) (same); *Salisbury v. United States*, 690 F.2d 966, 974-77 (D.C. Cir. 1982).

Plaintiffs have cited no authority in support of their position that the Court's *ex parte* and *in camera* consideration of the classified declaration is a violation of due process. Rather, Plaintiffs have cited cases that undermine their arguments. Much of Plaintiffs' authority cited in support of their due process argument does not involve classified evidence but recognizes that *ex parte* contacts with the Court would be justified in the presence of compelling circumstances. *See, e.g., Guenther v. Comm'r of Internal Revenue*, 889 F.2d 882, 884 (9th Cir. 1989) ("And recently, we made clear that absent some 'compelling justification,' ex parte communications will not be tolerated."); *Guenther v. Comm'r of Internal Revenue*, 939 F.2d 758, 761 (9th Cir. 1991). Other cases cited by Plaintiffs acknowledge that the need to keep evidence secret may be a compelling justification in support of the Court's *ex parte* consideration. *See, e.g., United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987) ("The potential for release of confidential information, prejudicing the prosecution's ability to conduct its case, is precisely the type of concern that has justified ex parte proceedings in other situations."); *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (acknowledging that "acute national security concerns" would justify the Court's *ex parte* consideration of sensitive material), *aff'd*, 484 U.S. 1 (1987). At least one case cited by Plaintiffs lends still further support to Defendants' position in this case. *See United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) ("In a case involving classified documents, however, *ex parte, in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use in order to decide the relevancy of the information."), *cert. denied*, 528 U.S. 842 (1999).

Because the Court has the inherent authority to consider classified information *ex parte* and *in camera*, without violating Plaintiffs' right to due process, nothing should prohibit the

Court's review of Defendants' classified declaration in this case.

III. THE SEALED CLASSIFIED DOCUMENT AT ISSUE IN THIS CASE WOULD NOT BE DISCLOSED UNDER THE FREEDOM OF INFORMATION ACT.

Although this case does not involve the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Plaintiffs have suggested that FOIA "provides a useful analogy in this case." *See* Pls.' Opp'n at 7. Defendants agree insofar as the classified document at issue in this case would not be publicly disclosed pursuant to FOIA.

Plaintiffs cite to *Doyle v. Fed. Bureau of Investigation*, 722 F.2d 554 (9th Cir. 1983), in which the Ninth Circuit actually affirmed the judgment of the district court's review of only the *ex parte* and *in camera* declarations to sustain an exemption in a FOIA case. As the Ninth Circuit noted, "the government's public description of a document and the reasons for exemption may reveal the very information that the government claims is exempt from disclosure. This court does not require the government to specify its objections in such detail as to compromise the secrecy of the information." *See id.* at 556. The Ninth Circuit affirmed the district court's review of only *ex parte, in camera* affidavits, holding that "[a]lthough we concede that only in the exceptional case would the district court be justified in relying solely on in camera affidavits, we are unwilling to hold as a matter of law that there are no situations in which affidavits alone are adequate." *See id.* at 556-57. Nevertheless, the Ninth Circuit has also held in the context of FOIA that "resort to *in camera* review is appropriate only after the government has submitted as much detail in the form of public affidavits and testimony as possible." *Lion Raisins v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1083 (9th Cir. 2004).

Here, pursuant to the Court's request, Defendants have proffered an unclassified declaration from the ODNI describing, to the extent possible in a public filing, the classified document at issue in this case and explaining the classified document must not be publicly

disclosed. *See* Hackett Decl. ¶¶ 5-13. The ODNI declarant has concluded that an analysis under FOIA would result in the non-disclosure of this classified document. *See id.* ¶ 13. Because FOIA protects from disclosure records "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy," and which are "in fact properly classified pursuant to such Executive Order," *see* 5 U.S.C. § 552(b)(1), the classified document at issue in this case would be exempt from disclosure under FOIA. Indeed, the government routinely exempts from release under FOIA documents that are properly classified and that thus may not be disclosed. As the ODNI declarant notes, the "Executive Order establishing the criteria here is Executive Order 12958, as amended." *See* Hackett Decl. ¶ 13. Moreover, "this sealed document is properly classified as TOP SECRET pursuant to the authority of this Executive Order because the unauthorized disclosure of this document could be expected to cause exceptionally grave damage to the national security." *See id.* Were this Court considering a FOIA claim, this sealed classified document could not be disclosed.[3/] As is appropriate in FOIA cases, Defendants have also proffered a classified declaration in support of the non-disclosure of this document, which is available for the Court's *ex parte* and *in camera* review. *See id.* The Court has the authority to review this classified declaration, and Plaintiffs have cited no authority to the contrary. *See, e.g.*, *Pollard v. Fed. Bureau of Investigation*, 705 F.2d 1151, 1153-54 (9th Cir. 1983).

IV. ALTERNATIVE PROCEDURES POSE TOO MUCH RISK OF FURTHER DISCLOSURE OF CLASSIFIED INFORMATION.

As a fallback to avoid the Court's *ex parte* and *in camera* consideration of classified material, Plaintiffs' counsel have suggested that the Court craft "alternative procedures" to

[3] The classified document at issue in this case would also be exempt from disclosure pursuant to Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), based on statutory privileges against non-disclosure identified in the classified declaration submitted *ex parte* and *in camera.*

permit their access to classified materials in this case, *see* Pls.' Opp'n at 9, and the Court has suggested that Defendants consider the question of agreeing to alternative procedures. Defendants cannot agree to such alternative procedures. Procedures such as protective orders merely present the opportunity for further disclosure of classified information. As the Fourth Circuit has held:

> Such procedures, whatever they might be, still entail considerable risk. . . . At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1052 (2006). Especially given the events of this case — for example, where the FBI took steps to retrieve a classified document from Plaintiffs and advised Plaintiffs that they should not retain or disseminate the classified document, *see* Supp. Hourihan Decl. ¶ 7, and Plaintiffs nevertheless filed a copy of the document under seal with the Court — Defendants can have no assurance that alternative procedures would maintain the security of their classified material at issue in this case.

Plaintiffs nevertheless suggest that the Court craft a protective order to enable their access to classified material in this case, perhaps pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3. *See* Pls.' Opp'n at 9-10. CIPA does not apply to civil cases such as this, however. *See* CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. App. 3) ("An act to provide certain pretrial, trial and appellate procedures for criminal cases involving classified information."). The application of CIPA to civil litigation would be an impermissible construction of that statute, distorting both its language and legislative rationale and ignoring the distinction between criminal and civil litigation. Unlike criminal prosecutions, where a prosecutor can choose to cease prosecution rather than disclose

classified information to a criminal defendant, in civil litigation, the government is essentially a captive party with no control over the continuation of the case. It would offend the doctrine of judicial deference to the Executive branch in matters of national security to force the government to disclose classified information in order to defend claims brought against it. *See, e.g.*, *Egan*, 484 U.S. at 527.

In addition, Plaintiffs' counsel's suggestion that they obtain security clearances, *see* Pls.' Opp'n at 9, is a decision that lies within the discretion of the Executive Branch. The President has instructed Executive agencies to strictly control classified information in their possession and to ensure that such information is disclosed only where an agency is able to determine that doing so is "clearly consistent with the interests of national security." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Because the Executive has the constitutional responsibility to protect classified information, the decision to grant or deny access to such information rests exclusively within the discretion of the Executive. *See Egan*, 484 U.S. at 529; *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (finding the President has "exclusive constitutional authority over access to national security information"); *Dorfmont*, 913 F.2d at 1401 ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."). As a corollary to this principle, a federal district court may not order the Executive to grant opposing counsel or any other person access to classified information, and in keeping with this rule, the Ninth Circuit and other courts repeatedly have rejected demands that opposing counsel or parties be permitted access to classified material presented to the court *ex parte* and *in camera*. *See Pollard*, 705 F.2d at 1153; *see also People's Mojahedin Org. v. Department of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); *NCRI*, 251 F.3d at 208-09; *Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 973-74 & n.3 (D.C. Cir.

1982); *Weberman v. National Security Agency*, 668 F.2d 676, 678 (2d Cir. 1982); *Hayden v. National Security Agency*, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

Defendants are unable to agree to any alternative procedures to permit Plaintiffs' counsel to have access to classified information. Nevertheless, because Defendants have sought to follow the Court's instructions and place as much on the public record as possible, *see, e.g.*, Hackett Decl., such alternative procedures — at least with respect to the Oregonian's Motion to Unseal Records — are unnecessary.

CONCLUSION

For the foregoing reasons as well as for the reasons stated in Defendants' Response in Opposition to the Oregonian's Motion to Intervene and to Unseal Records, the Oregonian's Motion to Intervene and to Unseal Records should be denied. Moreover, Plaintiffs' Opposition to Defendants' Lodging of Material Ex Parte and In Camera, which is incident to the Oregonian's motion, should be rejected.

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Respectfully submitted,

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