

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

ATTACHMENT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION,)
INC., et al.)
)
Plaintiffs,) CV No. 06-274-KI
)
vs.) April 25, 2006
)
GEORGE W. BUSH, et al,) Portland, Oregon
)
Defendants.)

TRANSCRIPT OF TELEPHONIC CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE GARR M. KING
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: J. Ashlee Albise
Zaha S. Hassan
Thomas H. Nelson
Steven Goldberg
Lisa R. Jaskol

FOR THE DEFENDANTS: Anthony J. Coppolino
Andrea Marie Gacki
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1 (March 20, 2006)

2 11:00 a.m.

3
4 P R O C E E D I N G S

5
6 THE CLERK: Good afternoon, counsel.

7 Ms. Albise, can you hear me?

8 MS. ALBISE: Yes.

9 THE CLERK: Mr. Goldberg?

10 MR. GOLDBERG: Yes.

11 THE CLERK: Ms. Jaskol?

12 MS. JASKOL: Yes.

13 THE CLERK: Mr. Hassan. Mr. Hassan?

14 MR. HASSAN: Yes.

15 THE CLERK: Mr. Nelson?

16 MR. NELSON: Yes.

17 THE CLERK: Mr. Sutherland?

18 MR. SUTHERLAND: Yes.

19 THE CLERK: Mr. Hinkle?

20 MR. HINKLE: Yes.

21 THE CLERK: Mr. Gacki?

22 MS. GACKI: Yes.

23 THE CLERK: And Mr. Coppolino?

24 MR. COPPOLINO: Yes.

25 THE CLERK: Your Honor, this is the time set for

1 a telephone conference in civil case 06-274-KI.
2 Al-Haramain Islamic Foundation, Inc., et al. vs. Bush, et
3 al.

4 Counsel, there's a court reporter present so
5 please be sure to state your name before you speak.

6 And here's Judge King.

7 THE COURT: Good afternoon, everyone.

8 I set up this telephone conference to
9 address the issue over the declaration that has been filed
10 ex parte and in camera. There is a pending motion by The
11 Oregonian to unseal records. We're not going to be
12 addressing the merits of that motion today. The purpose of
13 the conference is to address the issue regarding the
14 lodging of this material ex parte and in camera.

15 I have plaintiffs' opposition to the
16 lodging. I have the defendants' response to the
17 Oregonian's motion to intervene. That is the public
18 record.

19 The Court has not read the declaration that
20 was filed ex parte and in camera.

21 Now, Mr. Hinkle, does The Oregonian join in
22 plaintiffs' opposition to the lodging of this material
23 ex parte?

24 MR. HINKLE: Yes. This is Hinkle. My answer's
25 yes, Your Honor.

1 THE COURT: All right. Well, I have given you
2 the right to intervene and I will accept your oral joinder
3 in the position of the plaintiffs regarding this.

4 Now, as I said, we have to deal with the
5 declaration. That's all I want to deal with today.

6 Has the Government filed anything in
7 response to plaintiffs' opposition?

8 MR. COPPOLINO: Not as yet, Your Honor. It's
9 our understanding in reading your local rules that our
10 opposition, our reply briefs would be due on May 8th, and
11 we would like to avail ourselves of that opportunity so
12 that the Court could see the points and authorities that we
13 would cite which fully support our position that you may
14 review this declaration ex parte in camera.

15 THE COURT: Who was that speaking?

16 MR. COPPOLINO: Anthony Coppolino. I'm sorry,
17 Your Honor.

18 And, Your Honor, if you'd like to address
19 the issue to some extent today --

20 THE COURT: I do want to address the issue.
21 I've been looking at this and I'd like to have you make
22 your arguments at this point, then we'll determine whether
23 the Court will or can or should wait until the 8th, or
24 whether I feel that there's a basis to proceed with the
25 decision today.

1 MR. COPPOLINO: All right. Your Honor, if I
2 may, I'd like to ask my colleague, Andria Gacki, who's been
3 looking at the issue more closely, and in particular she
4 would address Your Honor's question.

5 THE COURT: All right. Ms. Gacki.

6 MS. GACKI: Yes, Your Honor. This is Andria
7 Gacki. It's our position that the Court has inherent
8 authority to consider our declaration which we filed
9 ex parte and in camera which justifies the status of --
10 which justifies our position that the status of the sealed
11 document is classified, cannot be declassified, cannot be
12 redacted, and that any disclosure of that document would be
13 great injury to national security.

14 We have numerous cases that would support
15 our position. For example, the case of Jeffrey vs. Federal
16 Aviation Administration in the DC Circuit very recently
17 that cited 370 F.3d 1174 did find that the Court had the
18 inherent authority to review the classified material ex
19 parte and in camera as part of this judicial review
20 function.

21 In addition, to the extent that our
22 filing -- our justification for this document being
23 classified and that the fact that it cannot be disclosed to
24 the public to a certain extent resembles FOIA cases and an
25 indication of Exemption 1 under FOIA.

1 And in such cases it's very standard for the
2 Government to file declarations ex parte and in camera to
3 justify the fact that the document should be maintained in
4 a secure setting, it should not be disclosed to the public.

5 MR. COPPOLINO: Your Honor, Anthony Coppolino
6 again, if I may --

7 THE COURT: Yes.

8 MR. COPPOLINO: -- make a point? And that is in
9 another very common context which we encounter as civil
10 litigation in defending the Government, the state secrets
11 privilege, the indication of the military and state secrets
12 privilege.

13 The Government quite often indeed typically
14 in such cases files classified declarations for the court's
15 ex parte in camera review. In fact, as we would set forth
16 in explaining this law to you in response to this pending
17 matter, the Supreme Court has made clear that the courts
18 can and should consider ex parte in camera declarations in
19 order to satisfy themselves that the material that the
20 Government has identified as a state secret and as to which
21 disclosure would harm national security cannot be
22 disclosed.

23 Not only in the FOIA context but also in the
24 state secrets context it's often necessary for a court to
25 understand just what the information is and why its

1 disclosure would harm national security, and this
2 presentation to a court can only be made in a classified
3 submission.

4 Article III federal judges have access to
5 classified national security information by virtue of the
6 constitutional office that they hold. Private litigants
7 and the public at large do not have that right of access.
8 And quite often in dealing with classified matters
9 involving the Federal Government it is necessary to advise
10 the Article III judge as to the matters that are at issue,
11 and this is particularly the case in the state secrets
12 context.

13 It's occasionally possible to brief a court
14 and to indicate on the public record why something is a
15 state secret without the need for actually submitting
16 classified information. But often it is not the case.
17 Case law that we have is quite clear that it does not
18 violate due process rights for the Government to submit
19 classified information to a court for its consideration as
20 to whether or not information should be protected, and
21 that's an important distinction.

22 There is some authority suggesting that if
23 we were to submit classified information for the court to
24 decide the merits of a dispute, a constitutional claim for
25 example, there is some authority that disfavors that.

1 In this context that we're considering here
2 today the issue is whether the document should be disclosed
3 to the public, and as Ms. Gacki pointed out, much like in a
4 FOIA context, they typically rely on classified information
5 that we disclose to the court.

6 Similarly in a state secret context the
7 issue is whether a privilege should be upheld to protect
8 information, and of course in that context, just like the
9 one before the Court, we have to explain to the court the
10 context of that information and why it's classified.

11 As Ms. Gacki indicated, we have, I think, a
12 very substantial body of authority that we would like to
13 cite to the Court before you rule if you have any doubt as
14 to the strength of our position.

15 And I believe Ms. Gacki would like to make
16 one more point.

17 MS. GACKI: Yes. Your Honor, this is Andria
18 Gacki again.

19 We have had the opportunity to review the
20 cases cited by plaintiffs in the filing that they made
21 yesterday in opposition to our notice of lodging ex parte
22 and in camera classified material.

23 I will note that based on the review of all
24 those cases, not one involved -- not one found there was a
25 due process violation in the filings of material --

1 classified material ex parte and in camera in a civil
2 proceeding.

3 Essentially there is no case on point to
4 support their position that it violates any right of due
5 process that they should not have access to a document, to
6 a classified declaration that justifies the Government's
7 position with respect to the document in this case.

8 THE COURT: All right. Mr. Hinkle, do you wish
9 to respond?

10 MR. HINKLE: This is Charles Hinkle. It is not
11 the Oregonian's position that the Court never has the
12 authority to consider in camera filings made by any party
13 when the very point at issue is whether something should be
14 disclosed. And I don't understand the plaintiffs to be
15 contending that either, but I'll let them speak for
16 themselves. I will speak only for The Oregonian.

17 And it is our position that this particular
18 in camera filing appears to be part of the overall case
19 where the secrecy being maintained by the Government
20 appears to be not so much a secrecy concern over state
21 secrets or classified information as it is a concern for
22 concealing governmental wrongdoing. That is the
23 Oregonian's interest here, not in the declassification or
24 the publicity of state secrets, but in the public
25 publicizing, in the public disclosure of, the public

1 revelation of, the public information about governmental
2 wrongdoing.

3 So, Your Honor, I wouldn't -- I quite agree
4 with Mr. Coppolino that the FOIA analogy may be
5 appropriate. It's certainly common under the Oregon Public
6 Records Law. The Court has to look at a particular
7 document without revealing it to the press and the public
8 in order to determine whether it should be revealed to the
9 public or the press.

10 So I don't object to that procedure in the
11 abstract. I am asking the Court to give particular
12 attention to what the particular submission is here and to
13 view it with the somewhat skeptical eye in terms of the
14 Government's claims of confidentiality and privilege.

15 THE COURT: All right. I'll hear from the
16 plaintiff if you wish to make any further argument beyond
17 the opposition that you filed.

18 MR. GOLDBERG: This is Goldberg, Your Honor.

19 Most of the arguments that I want to make
20 are set forth in our opposition. I just want to highlight
21 a couple of points to the Court.

22 We think that the FOIA analogy is in fact a
23 good analogy to use in this case in terms of the principles
24 enunciated in those cases. And I don't want to repeat
25 those principles but I do want to refer the Court to pages

1 which we cited, page 7.

2 THE COURT: I've read those cases, Mr. Goldberg.

3 MR. GOLDBERG: I'm sorry?

4 THE COURT: I've read those cases.

5 MR. GOLDBERG: Okay. The point, I think, that
6 we want to make is that our focus today is on the issue of
7 the ex parte filing, and I think you do have to begin from
8 the premise then the way that we read those cases, and
9 specifically the cases that the Ninth Circuit has used, the
10 Doyle case and the Pollard case.

11 The premise is that ex parte contacts, what
12 we're really objecting to right now, are essentially
13 something which has to be scrutinized very, very carefully
14 by the Court, and that it does imitate various principles
15 and certainly not the least of which are the constitutional
16 principles, both due process and First Amendment issues in
17 this particular case.

18 Now, we recognized that given the fact that
19 we're dealing with a classified document there may be
20 limitations necessarily on how openly that document and
21 other documents, we expect this issue will come up as
22 documents are produced or not produced in response to our
23 discovery request, how they be dealt with in this
24 litigation.

25 But there's a difference between allowing

1 documents into the public record and not allowing
2 plaintiffs' attorneys access to those documents.

3 And as Mr. Hinkle has pointed out, the
4 context of this case has to be considered. We are alleging
5 illegal conduct by the defendants, by the national security
6 agencies, by the CIA, by the FBI, and by the President.

7 And our concern is that those will only be
8 exposed if plaintiff and the Court can adequately
9 scrutinize all of the relevant evidence in this case. But
10 the FOIA cases say that at least on a preliminary basis the
11 kind of filing made by the Government in this case, which
12 really says nothing other than national security is
13 implicated, is simply not enough.

14 That what the FOIA case suggest that the
15 initial step has to be a public filing by the Government
16 which details specifically why this contact has to be made
17 on an ex parte basis. And it's just not -- at least what
18 those cases suggest -- that it's simply not enough to rely
19 on the kind of conclusory statements that the Government
20 makes in this case, which is essentially, judge, we need to
21 talk to you alone because this case involves grave issues
22 of national security.

23 Our position is that that's simply not
24 enough. And it's particularly true in this case when both
25 the Court and the plaintiffs have examined the document as

1 a result of the Government's own disclosure, presumably
2 inadvertence of the documents in this case.

3 And it's our position that these
4 conversations discussed in that document don't implicate
5 national security. The documents may implicate national
6 security insofar as its evidence is illegal warrantless
7 electronic surveillance by the Government. But the
8 Government has admitted that conduct previously.

9 So we have to ask where is the grave threat
10 to national security. There's simply nothing in the filing
11 by the Government which satisfies this threshold
12 compliance.

13 Two final points. At page 5 of our
14 opposition we do point out the fact that the specific facts
15 of this case to some extent belies the Government's
16 concerns that somehow there's grave national security
17 considerations in this case. Their conduct, both before
18 and after, what they did and the delays that happened after
19 the FBI learned, per the Government's admission that this
20 document had been inadvertently disclosed, faces the
21 question of whether there really is some terrible national
22 emergency which would have -- where you would have expected
23 the Government to have acted much more quickly than they
24 did in this particular case.

25 The final point. As we suggest in our

1 memorandum, is that we have suggested alternative
2 procedures to protect the classified information filed by
3 the Government and to some extent protect the ex parte --
4 or to protect ours, that is plaintiffs' attorneys, viewing
5 of that document.

6 The Court certainly has discretion -- it has
7 inherent authority to issue some kind of protective order
8 in this particular case. If the issue of security
9 clearances are an issue, the Court, as we suggest, can
10 perhaps encourage the Government to facilitate plaintiffs'
11 attorneys getting the necessary security clearances to be
12 able to view the document.

13 But the bottom line is that our position is
14 that there should be no ex parte contact. If the
15 defendants want to rely on the information and they don't
16 want to disclose it and to deal with it openly, at least in
17 terms of plaintiffs' attorneys that are involved in this
18 litigation, then that's in fact their choice, but they
19 should not be able to use it in this litigation.

20 And we truly believe that, and we're making
21 a lot of this at this point because we expect further
22 ex parte filings. But the Court really needs to send the
23 Government a clear message that the issues in this case
24 will not be litigated in secret, and that's really the
25 basis of our opposition.

1 THE COURT: All right. Ms. Gacki, do you wish
2 to respond?

3 MS. GACKI: Mr. Coppolino would like to say a
4 few words, Your Honor.

5 THE COURT: All right. Mr. Coppolino.

6 MR. COPPOLINO: Well, a couple of points, Your
7 Honor. Thank you.

8 First, I understood the Court was only
9 addressing today the issue of the public disclosure of this
10 document. We have, as you know, pending a schedule for
11 addressing the issue of whether the plaintiffs' attorney
12 should have continued access to the document itself, and
13 the Court has at our last conference scheduled that matter
14 for briefing.

15 So I would like to just put that issue aside
16 for the moment and address that at the appropriate time in
17 accordance with the schedule the Court has already set.

18 With respect to the public record,
19 disclosing this document on the public record. We have
20 submitted extensive materials on the public record
21 describing our position. We submitted a public record
22 brief and two declarations describing the circumstances of
23 the disclosure.

24 If it were possible to have said more to the
25 Court about the specific nature of the document on the

1 public record, we would have. However, in order to explain
2 to the Court why a sealed, classified document needs to
3 remain sealed and classified, we felt it was necessary to
4 describe to you the nature of the document and what it
5 reveals, and that's why we submitted it to the Court
6 ex parte in camera, which is a perfectly normal and lawful
7 procedure utilized routinely by the United States
8 Government in submitting classified materials to Article
9 III federal judges.

10 I think quite clearly the law is on our side
11 on this. If you have any doubts or any concerns about some
12 of the points that have been made regarding the lawfulness
13 of the allegations of the activities that are alleged,
14 you'll, of course, have ample time in the litigation to
15 consider our position and to consider the information that
16 we would put forward to the Court on that subject.

17 If you were to review this declaration, for
18 instance, you would already have begun to understand some
19 details regarding our position on that matter, specifically
20 in the context of whether this document should be
21 disclosed.

22 Further down the road in this case, if the
23 Government does find it necessary to assert the claim of
24 military and state secrets privilege, that too would be
25 submitted to the Court ex parte in camera through a

1 procedure the Supreme Court has repeatedly said is
2 appropriate and proper and necessary to advise the Court as
3 to the information we think the Court needs to be aware of
4 in addressing this case.

5 And so, Your Honor, I would just conclude by
6 saying we are quite confident the law is on our side, that
7 we can share with you classified materials. We think it
8 would be inappropriate for the Court to order the
9 disclosure of this document on the public record or to any
10 of the counsel for the purposes of deciding the motion.

11 We would appreciate, if you're still in
12 doubt about our position, an opportunity to present further
13 points and authority so that you can consider and read.

14 We were not aware that they were going to
15 file this opposition until they did. It was their every
16 right to but I believe we would have a right of reply if
17 the Court felt that were necessary.

18 I thank the Court.

19 THE COURT: All right. I do want to make it
20 clear that today in this telephone conference we're dealing
21 only with the declaration which was lodged ex parte and in
22 camera and with plaintiffs' opposition to that. We're not
23 dealing with the merits of the Oregonian's motion to unseal
24 records or any of the other matters that Mr. Coppolino
25 addressed.

1 I did this by telephone conference because I
2 wanted to get to this as quickly as possible, and I did not
3 want to have you expend the time and money that it would
4 cost for ten people to show up here in court. I think we
5 can handle this appropriately by telephone today.

6 Further arguments will probably be scheduled
7 in court.

8 Now, you've mentioned the public filing, Mr.
9 Coppolino, and I have gone through that several times.
10 It's 17 pages. It discusses the history of disclosure. It
11 has a heading that says "Classified Nature of the Sealed
12 Document" but there are no details, just the history of the
13 filing of the sealed document and this Court's order
14 regarding storage.

15 Your public filing does refer to the
16 declaration that has been filed ex parte in camera, but
17 there are no facts. There are no specifics other than the
18 facts that the document in question is classified and that
19 disclosure would result in harm to the U.S. national
20 security interest. That's basically a conclusory statement
21 that the Government has made.

22 In that filing you argue that The Oregonian
23 has no First Amendment right to classified information, but
24 also argue that even if they did the Government can
25 establish a compelling national security interest and

1 prohibit the disclosure of that.

2 Now, one of the things I wanted to ask you
3 is in your filing you say "as established in the
4 Government's classified declaration filed ex parte and in
5 camera." Is that declaration classified?

6 MR. COPPOLINO: Yes, Your Honor.

7 MR. GOLDBERG: Yes, Your Honor.

8 THE COURT: How does that occur? I'm not
9 familiar with that.

10 MR. COPPOLINO: Well, the declaration is
11 prepared by the appropriate declarant to advise the court
12 with respect to the nature of the classified nature of the
13 document. And that individual has classification authority
14 under the President's executive order for designating
15 information as national security classified information.

16 And so the individual who declares indicates
17 to the court that the reasons that are set forth in the
18 declaration as to why the document cannot be disclosed are
19 classified under the executive order and he is the
20 authority to do that.

21 It's actually legally done, if that's your
22 question.

23 THE COURT: All right. So for someone to read
24 that declaration, they would have to receive a security
25 clearance; is that correct?

1 MR. COPPOLINO: That's correct, Your Honor.

2 THE COURT: Okay. I will say, and I'm making
3 preliminary statements at this time in view of your request
4 to file a response by May 8th, but this is my thinking at
5 this time:

6 In my view the public submission basically
7 contains conclusions. There are no real facts or
8 arguments, and I understand the Government's position on
9 that. There is no question that the Court has the
10 discretion and the authority to review an ex parte in
11 camera filing under appropriate circumstances.

12 Now, plaintiff argues in this matter that
13 the document which was filed under seal supports their
14 allegations. They argue generally that they're entitled to
15 know and respond to the Government arguments.

16 It's clear there is a need to balance the
17 issues of national security with the right to due process,
18 and I hear your argument that this does not violate due
19 process, but there is a right to be heard and a right to
20 participate in judicial proceedings so long as that can be
21 done without an adverse effect on national security.

22 That's what the Court has to balance. And
23 I've been doing some reading on some of the cases. There
24 isn't anything that's going to be a -- tell us exactly what
25 to do in this case, but I'd like to quote from a U.S.

1 District Court decision. It's U.S. District Court,
2 District of Connecticut (Doe) vs. Alberto Gonzales. It's
3 386 F.Supp Second 66. In that case the plaintiffs were
4 arguing that the ex parte consideration materials on which
5 the court's ruling on the merits was likely to turn
6 violated their due process rights.

7 The Court quoted from a U.S. Supreme Court
8 decision, (1951), as follows: "The openness of judicial
9 proceedings serves to preserve both the appearance and the
10 reality of fairness in the adjudications of United States
11 courts. It is therefore the firmly held main rule that a
12 court may not dispose of the merits of the case on the
13 basis of ex parte in camera submissions.

14 "For good reason our system of justice
15 relies on the adversarial process to bring to the attention
16 of the finder of fact the strengths and deficiencies in
17 parties' litigation postures. Fairness can rarely be
18 obtained by secret one-sided determinations of facts
19 decisive of rights."

20 Now, the Court did go on to say in that
21 case: "While it is only in the most extraordinary
22 circumstances that precedent countenances, court reliance
23 upon ex parte evidence to decide the merits of a dispute,
24 the instant situation where the executive branch determines
25 that certain information ought to remain classified in the

1 interest of national security, but is necessary to the
2 defense of this action, constitutes such an extraordinary
3 circumstance.

4 "The court remains concerned, however, about
5 the plaintiffs' ability to participate fully in this case.
6 Currently neither plaintiffs nor their attorneys possess
7 the requisite security clearance to view the classified
8 evidence that defendant's have provided this court in
9 support of their opposition to the motion."

10 And the court goes on to order or direct the
11 defendants that they attempt to provide plaintiffs with the
12 opportunity for their lead attorney to seek to obtain the
13 security clearance. I'm not necessarily citing the case
14 for that purpose. I'm citing it for the general language
15 in that case, which I think appropriately addresses the
16 standards and the issues that this Court has to address.

17 So, as I've indicated, to the extent it can
18 be done without compromising national security interests, a
19 litigant has a right to know the legal and factual
20 positions being taken by the Government so they can respond
21 to them.

22 I believe the Court should avoid, if
23 possible, receiving secret declarations from one side and
24 basing decisions on facts or arguments not disclosed to the
25 other side.

1 Now, I hasten to say that I understand that
2 in issues involving national security that may be
3 necessary.

4 I'll note, based on some of the arguments
5 Mr. Coppolino made about what the Government experience has
6 been with other courts, I have a criminal case pending in
7 this court where the Government strenuously has objected to
8 the defendants submitting affidavits and memos under seal,
9 arguing the unfairness and their inability to respond to
10 unknown arguments. So this is a factor that is present in
11 a number of situations.

12 Now, the Government is arguing that this is
13 a highly classified Government document and that disclosure
14 would severely damage the national security interests, and
15 that issue will be addressed when the merits of the motion
16 are argued. And, as I say, today we're only addressing the
17 issue of the ex parte declaration.

18 My question is, is it impossible for the
19 Government to frame their arguments without disclosing the
20 specific information in the document in question?

21 Now, my problem at this point is the
22 Government has made no attempt to do so. Their public
23 filing is conclusory, they basically state the conclusory
24 position that the document is highly classified, and that
25 the reason why it should not be further disclosed should be

1 treated as classified, the declaration.

2 In response, the plaintiff argues that the
3 written response, the public response says nothing about
4 the declaration itself and the secrecy prevents plaintiffs
5 from effectively addressing the response.

6 Now, plaintiff's do note the history.
7 Mr. Goldberg mentioned that. I think the specific history
8 is a matter that the Court should consider. Apparently the
9 Office of Foreign Asset Control inadvertently furnished
10 this document to the plaintiff on August 20th, 2004.

11 Now, as I read this, and just the obvious
12 thing is this document was not in a SCIF, a secured
13 facility. The FBI learned of the disclosure in August but
14 made no effort to retrieve the document from plaintiffs
15 until October 13th, 2004. That's the argument made by
16 plaintiffs. I don't have any confirmation of that date but
17 at this point that's the only date the Court's been given.

18 The Government argued in our previous
19 conference the requirement that this document be in a SCIF.
20 Nothing was served but that it had to be taken to Seattle
21 and put in a SCIF.

22 Now, there's no indication in the submission
23 whether it was ever in a SCIF before this time, no
24 indication of how this document made its way to the stack
25 of documents voluntarily disclosed in litigation to the

1 plaintiffs. The document has been read by the plaintiffs,
2 by their attorneys, probably by others. These facts could
3 cause the Court to question the conclusory statements
4 regarding the classification and the national security
5 effect.

6 Now, the cases indicate that the Court can
7 fashion creative solutions in the interest of justice for
8 classified information problems. And these include
9 several. I'm going to mention first the decision of the
10 Ninth Circuit in the case of William Pollard vs. Federal
11 Bureau of Investigation. That's 705 F.2d 1151. It's cited
12 in the plaintiffs' submission.

13 This is a freedom of information case, and
14 everybody seems to feel that the concept in those cases
15 would be compelling, if not precedent, it would be at least
16 compelling in these cases.

17 In that case the court stated as follows:
18 They noted that the statute provided for in camera
19 inspection of documents that were sought to be disclosed.
20 They go on to say that although courts have commented on
21 the inherent problems, the practice of in camera ex parte
22 review remains appropriate in certain FOIA cases provided
23 the preferred alternative to in camera review, Government
24 testimony and detailed affidavits has first failed to
25 provide a sufficient basis for a decision.

1 They note that the district court may
2 require the Government to submit more detailed public
3 affidavits before resorting to in camera review of the
4 documents themselves and/or in camera affidavits. By doing
5 so, the district court will ensure that the record made is
6 as complete a public record as is possible.

7 And those words are significant: "As
8 complete a public record as is possible under the
9 circumstances."

10 Now, plaintiff argues that the Government
11 should make as detailed as possible submission and only
12 then should the court determine the public submission --
13 and only if the court determines that the public submission
14 is insufficient, then the Court could review the ex parte
15 declaration.

16 There are other alternative procedures that
17 have been suggested by the plaintiff that I think bears
18 some consideration. Redactions. I note that the
19 Government says it cannot be redacted. That's a
20 conclusion. They don't indicate why. Protective orders
21 are available. As indicated in the U.S.D.C. (Doe) vs.
22 Gonzales, a security clearance to lead plaintiff's attorney
23 is potentially available. And I know we're talking about
24 The Oregonian case but this is just a long range situation.

25 A statement admitting relevant facts, facts

1 relevant to the claims being made by the plaintiff that the
2 classified information would tend to prove. In other
3 words, not furnishing the classified information, arriving
4 at a statement that does not include the specifics that the
5 Government is concerned about. A summary of classified
6 information could be furnished which would accomplish the
7 same purpose.

8 Now, it's my preliminary feeling that the
9 process set forth in Pollard vs. FBI is appropriate.

10 I will give the Government until May 8th to
11 furnish the response that they proposed, but I want you to
12 think about this, about what I've said. I think the
13 Government can supplement the public submission with
14 general facts and arguments. For example, why this, quote,
15 "highly classified," end quote, document was floating
16 around Government agencies if it contained information as
17 damaging published security as the Government states. Why
18 the FBI did not take action for about two months.

19 Why can't you make a general reference to
20 why it is classified. For example, it contains names of
21 individuals whose activities would be compromised, or that
22 it contains information regarding methods of surveillance.

23 I'm not talking about specific details, I'm
24 talking about general responses. And these are only two
25 examples. Now, if its impossible to give any public basis

1 for the decision, then the Government should state
2 specifically why it's impossible rather than rely on the
3 conclusory statements that you made in the public
4 submission.

5 The Court may well eventually determine it
6 is necessary to review the declaration ex parte and in
7 camera. I have that authority. But at this point the
8 Government, in my view, has not made a case that it cannot
9 furnish public information that would support its position.

10 So my request is that the Government review
11 their submission and consider what I've said to you,
12 discuss this with counsel on the other side, discuss the
13 alternatives I've mentioned and address these in your
14 response.

15 If it is not acceptable, if any of these
16 alternatives are not acceptable, the Government should
17 address why they're not acceptable.

18 I will defer argument on the Oregonian's
19 motion until after I've received further positions from the
20 Government, and you have until -- do you need until May 8th
21 to respond, Mr. Coppolino?

22 MR. COPPOLINO: I'm quite certain of that, Your
23 Honor, and I'm actually pondering whether we could perhaps
24 use a few more days if we're going to try to gather up
25 public record declaration. If that's okay with the Court.

1 If the Court could indulge us till say the
2 12th, just another four days, particularly to accommodate
3 the Court's request to supplement the public records.

4 The declaration, what we would try to do is
5 prepare a public record declaration that provides, if
6 anything, what we can about this document.

7 THE COURT: Will you also during that four days
8 confer with counsel as I requested and talk about any other
9 alternatives, including those that I've listed?

10 MR. COPPOLINO: Of course, Your Honor. And also
11 address in our response whether -- whether and to what
12 extent any of those alternatives would be acceptable.

13 I take it my understanding is it would be
14 just in connection with this particular matter?

15 THE COURT: That's correct.

16 MR. COPPOLINO: Yes, of course we'd be happy to
17 confer and we will address those --

18 THE COURT: All right. I think it is well for
19 the Government to spend some time looking at this. I
20 accept the Government's position that the Court can do
21 this, and I accept the position that the Court might have
22 to. But I also believe -- well, I told you my feelings on
23 this. I think that the Government has to go further than
24 it has in its public disclosure.

25 MR. HINKLE: Your Honor, this is Hinkle, if I

1 may ask a question? It sounds to me now from the way this
2 conversation has evolved that the particular issue before
3 the Court today is now becoming intertwined with The
4 Oregonian's motion to unseal the underlying document.

5 There are now two documents at issue, as I
6 understand it, the original document filed by the
7 plaintiffs under seal and then the second document filed by
8 the Government under seal.

9 THE COURT: That's correct.

10 MR. HINKLE: My response, The Oregonian's
11 response to -- The Oregonian's reply to the Government's
12 response on our motion is due this Friday, April 28th, but
13 it sounds to me like your decision on today's motion may
14 implicate or indeed be the same as your decision on The
15 Oregonian's motion.

16 So I guess what I'm asking is, may I have
17 until -- may I defer my reply --

18 THE COURT: The answer is yes, Mr. Hinkle.
19 We're going to give the Government until May 12th to
20 respond and to address the issues that I posed today.

21 And then when do you want to reply to the
22 Government's response?

23 MR. HINKLE: A week or ten days would be fine,
24 Your Honor.

25 THE COURT: All right. The 22nd of May for your

1 response.

2 MR. HINKLE: All right. Thank you.

3 MR. GOLDBERG: Your Honor, this is Goldberg. If
4 appropriate, and as succinctly as possible, would it be
5 allowable for plaintiff to respond to the Government's
6 filing made on May 12?

7 THE COURT: You can file a response up through
8 the 22nd. You can have until the 22nd to file a response
9 as well.

10 MR. GOLDBERG: Thank you.

11 THE COURT: Mr. Coppolino, I want to end this at
12 some point, but if you feel it's absolutely necessary to
13 respond to their response of the 22nd, do that by May 25th.
14 I know that's only three days, but I would think everything
15 would be in to me that I need to review by that time, but
16 I'll give you a couple of days to respond if you want.

17 MR. GOLDBERG: Thank you, Your Honor.

18 THE COURT: Or reply is better than response. I
19 don't know where we are as far as the various responses and
20 replies.

21 MR. GOLDBERG: Thank you, Your Honor.

22 THE COURT: Okay. Anything else to discuss
23 today? Wait a minute. (Pause) Give me just a minute. I
24 want to look at something here.

25 Mr. Coppolino, we haven't received any

1 confirmation that the sealed document has been lodged at
2 the SCIF in Portland. My understanding was it was going to
3 be moved from Seattle to the SCIF in Portland.

4 Has that been moved?

5 MR. COPPOLINO: Your Honor, I don't know. I
6 don't believe so. I did -- I left that in the hands of the
7 department of the Security Litigation Group and I think
8 they were attempting to coordinate doing that with bringing
9 you the classified declaration we've just been discussing.

10 However, since that no longer seems to be an
11 operative procedural approach, I will tell them to just
12 separately get that document to the SCIF in Portland. I
13 think they were trying to do both things at once.
14 Basically come out there once, get the document, bring you
15 the classified declaration. But, again, since that's no
16 longer operative, I'll just tell them to get the document
17 to Portland.

18 THE COURT: All right. Now, do I receive a key
19 to the lock?

20 MR. COPPOLINO: Yes. I think that would be the
21 plan, Your Honor, that we would have the locked bag in the
22 Portland SCIF and then you would have the key to it. But I
23 have left the details of that in the hands of the security
24 litigation group which typically interfaces with the Court
25 directly. And I think it's attempted to do that.

