PETER D. KEISLER
Assistant Attorney General, Civil Division
CARL J. NICHOLS
Deputy Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
ANTHONY J. COPPOLINO
Special Litigation Counsel
tony.coppolino@usdoj.gov
ANDREA GACKI
andrea.gacki@usdoj.gov
ANDREW H. TANNENBAUM
andrew.tannenbaum@usdoj.gov
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20001
Phone: (202) 514-4782/(202) 514-4263/(202) 514-4336
Fax: (202) 616-8460/(202) 616-8202/(202) 318-2461

KARIN J. IMMERGUT, OSB# 96314
United States Attorney
District of Oregon
JAMES L. SUTHERLAND, OSB# 68160
Assistant United States Attorney
1000 SW Third Avenue, Suite 600
Portland, Oregon 97204-2902
Phone: (503) 727-1194
Fax: (503) 727-1117
Email: jim.sutherland@usdoj.gov
Attorneys for the United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION, *et al.*,	CV. 06-274- KI
Plaintiffs,	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO PREVENT PLAINTIFFS' ACCESS TO THE SEALED CLASSIFIED DOCUMENT**
v.	
GEORGE W. BUSH, *et al.*,	
Defendants.	ORAL ARGUMENT REQUESTED

INTRODUCTION

During an April 7, 2006 teleconference, the Court ordered that the sealed classified document at issue in this case[1] be stored in a "Sensitive Compartmented Information Facility" in the offices of the Federal Bureau of Investigation ("FBI") in Portland, Oregon, subject to certain additional security measures as agreed to by the parties.[2] The Court did not at that time resolve the question of whether Plaintiffs would be permitted continued access to the document in question, and instead ordered briefing on the issues of (1) whether Plaintiffs could be permitted continued access, and (2) if so, under what protective measures. *See* Attach. 1, Transcript of Teleconference at 8 (Apr. 7, 2006).[3]

For the reasons set forth below, Plaintiffs should not be permitted continued access to the document in question — or, indeed, access to any other classified material in this case — notwithstanding the fact that Plaintiffs have apparently been in possession of the document.

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[1] On February 28, 2006, Plaintiffs had moved to file a classified document under seal. *See* Pls.' Mot. and Mem. in Support to File Material Under Seal and Request for In-Camera Inspection (Feb. 28, 2006) [Docket No. 2]. The Court subsequently granted Plaintiffs' Motion to File Material Under Seal. *See* Order (Mar. 20, 2006) [Docket No. 9].

[2] *See* Order (Apr. 10, 2006) [Docket No. 23].

[3] During the April 7, 2006 teleconference, the Court specifically stated:

> The question of access is a separate question from where [the document] should be located. . . . Now, I think I do want briefing on the issue of the plaintiffs' continued access. You have the basic question. . . . Then you have a question, I take it, of if it is conceded, agreed, or determined by the Court that plaintiff should have access, then whatever safeguards are necessary regarding that access. And what I would like to see from both of you is a proposed protective order in the event the Court determines that the plaintiff is entitled to access.

Attach. 1, Transcript of Teleconference at 8-9 (Apr. 7, 2006). The Court therefore ordered Defendants to submit a memorandum regarding Plaintiffs' continued access to the sealed document. *See* Order on Briefing Schedule (Apr. 7, 2006) [Docket No. 22].

Further, Defendants respectfully request that the Court order the return of any and all copies of the document in question that remain in Plaintiffs' possession.

Plaintiffs were in possession of the document only as a result of an inadvertent disclosure, and notwithstanding efforts by the FBI to procure the return of all copies of the document. Because that inadvertent disclosure did not result in the document's declassification, that disclosure does *not* confer either an entitlement or a right of access to this document. The document was and remains properly classified, and was and remains the property of the Executive Branch. Plaintiffs could only have access to the document if they have been determined by the Executive Branch to be eligible for such access, based on an appropriate background investigation and a determination that they have the requisite "need to know" the classified information. These determinations are within the exclusive prerogative of the Executive Branch, and such decisions are entirely within its discretion.

It is well-established that a litigant's access to classified information cannot be granted merely because such classified information is implicated in civil litigation. And Plaintiffs do not have the requisite security clearances that would entitle them to such access, and thus cannot be permitted access to the document. Indeed, after the document's inadvertent disclosure, FBI agents specifically instructed Plaintiffs *not* to further review, disclose, discuss, retain, or disseminate the classified document or classified information contained within the document. Plaintiffs did not abide by these instructions.

Plaintiffs appear to concede that the contents of the sealed classified document are of slight use to them; they contend, instead, that the *existence* of this document, and not its contents, proves sufficient for Plaintiffs' purposes in challenging the President's electronic surveillance program as a violation of the Constitution and the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 *et seq.* *See* Pls.' Reply to Defs.' Resp. to Objection to Filing

Material Ex Parte and In Camera, at 15 (May 22, 2006) [Docket No. 34]. According to Plaintiffs, "[t]he document's value to plaintiffs is in its confirmation that *plaintiffs were targets of the President's warrantless surveillance electronic surveillance program* — which establishes their standing to prosecute this lawsuit." *See id.* These allegations — which are based on nothing other than supposition and innuendo — will be addressed in due course through Defendants' response to the Complaint.[4/] In any event, there is no basis on which the Court can reject the Executive's proper determination that Plaintiffs may not have access to the document in question. Indeed, if anything, these claims support rejecting Plaintiffs' having access to the document (since they presently are free to make arguments relating to its existence).

STATEMENT OF FACTS

In late August 2004, a classified document was inadvertently disclosed to counsel for Plaintiff Al-Haramain Islamic Foundation located in Ashland, Oregon ("AHF"), through what was supposed to have been a production of unclassified documents relating to AHF's designation as a "Specially Designated Global Terrorist" ("SDGT") pursuant to Exec. Order No. 13,224 and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1706. *See* Supplemental Declaration of Frances R. Hourihan ¶ 3 [hereinafter, "Supp. Hourihan Decl."] (Attach 2 to Defs.' Mem. in Opp'n to Pls.' Opp'n to Defs.' Lodging of Material Ex Parte and In Camera (May 12, 2006) [Docket No. 32]); *see also* Declaration of Barbara C. Hammerle ¶¶ 8-9 [hereinafter, "Hammerle Decl."] (Attach. A to Defs.' Resp. in Opp'n to Mot. to Unseal Records and to Mot. to Intervene (Apr. 14, 2006) [Docket No. 24]). This document was clearly marked and properly classified as "TOP SECRET." *See* Declaration of John F. Hackett,

[4] Defendants have not yet responded to the Complaint and have neither confirmed nor denied that Plaintiffs were subject to electronic surveillance as alleged in the Complaint, nor have they confirmed or denied that the sealed classified document at all provides Plaintiffs with standing to bring this lawsuit.

Director, Information Management Office, Office of the Director of National Intelligence ¶¶ 5, 6-9 [hereinafter, "Hackett Decl."] (Attach. 3 to Defs.' Mem. in Opp'n to Pls.' Opp'n to Defs.' Lodging of Material Ex Parte and In Camera (May 12, 2006) [Docket No. 32]); *see also* Declaration of Frances R. Hourihan ¶ 7 & Ex. 1 and 2 [hereinafter, "First Hourihan Decl."] (Attach. B to Defs.' Resp. in Opp'n to Mot. to Unseal Records and to Mot. to Intervene (Apr. 14, 2006) [Docket No. 24]).

Following the discovery of this inadvertent disclosure, the FBI identified several individuals without government security clearances who received unauthorized access to the classified government document. *See* First Hourihan Decl. ¶ 5. These individuals included Plaintiffs Wendell Belew and Asim Ghafoor, as well as likely recipients Soliman Al'Buthe and Pirouz Sedaghaty (a/k/a Pete Seda),[5/] two officers of AHF. *See id.* ¶¶ 5, 7-8. In October 2004, the FBI specifically notified Plaintiffs Belew and Ghafoor as follows:

> This document was not intended to be disclosed and the government employee who provided the document had no authorization to make this disclosure. The inadvertently disclosed document remains the property of the U.S. government. . . . Accordingly, we request that you immediately return this U.S. government document, as well as any and all copies (paper or otherwise) of said document. We further request that you safeguard the document in a manner that ensures that the document and the classified information are not read or reviewed by anyone.

See id. ¶ 7 & Ex. 1 & 2 (letters to Belew and Ghafoor). The FBI sought to retrieve all identified copies from Plaintiffs Belew and Ghafoor and provided each with letters "advising that they should not further review, disclose, discuss, retain and/or disseminate the classified document or

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[5] Al'Buthe and Sedaghaty, AHF officers, have been indicted for violating criminal statutes governing financial transactions. *See* First Hourihan Decl. ¶ 8. Al'Buthe has also been designated as an SDGT pursuant to IEEPA and Exec. Order No. 13,224. *See id.* Both individuals are believed to be living overseas, and neither was interviewed by the FBI with respect to the inadvertent disclosure. *See id.*

the classified information contained in the document." *See id.* ¶ 7 & Ex. 1 & 2 (letters to Belew and Ghafoor). Plaintiffs Belew and Ghafoor were further advised that "any further review, disclosure or dissemination of this classified document and the classified information contained in the document may be a federal crime." *See id.* ¶ 7 & Ex. 1 & 2 (letters to Belew and Ghafoor).[6/] As the FBI specifically informed Plaintiffs, the document in question is the property of the United States, and as such, all copies must be returned to the United States. *See id.* ¶ 7 & Ex. 1 and 2 (letters to Belew and Ghafoor). Plaintiffs Belew and Ghafoor further represented to the FBI that they had returned to the FBI all copies of the document in their possession. *See id.* ¶ 7.

In wholesale disregard of these instructions, on February 28, 2006, Plaintiffs filed a copy of the classified document under seal. *See* Pls.' Mot. and Mem. in Support to File Material Under Seal and Request for In-Camera Inspection (Feb. 28, 2006) [Docket No. 2]. In their Motion to File Material Under Seal, Plaintiffs professed to know *nothing* as to how to handle classified information, stating that "there appear to be no specific procedures for treatment of the material in the context of this case." *See id.* at 2. In the course of this litigation, Plaintiffs have described the document in inappropriate ways. *See, e.g.*, Attach. 2, Letter from Steven Goldberg, Esq., to the Honorable Garr M. King (Mar. 20, 2006) ("It is plaintiffs' position that the conversations discussed in the document are relatively benign and certainly do not implicate any conceivable national security concerns.").[7/]

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[6] *See, e.g.*, 18 U.S.C. 798(a) ("Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.").

[7] Plaintiffs, of course, cannot determine what does or does not implicate national security, (continued...)

ARGUMENT

I. THE INADVERTENT DISCLOSURE OF THIS DOCUMENT DOES NOT CONFER A RIGHT OF ACCESS TO PLAINTIFFS OR THEIR COUNSEL.

Notwithstanding the inadvertent and unauthorized disclosure of the classified document to Plaintiffs, they did not thereby acquire any rights to that document, or to any other classified material. Such limited disclosure, which the Government took steps to correct, *see* First Hourihan Decl. ¶¶ 5-8, does nothing to change the classified nature of the document or the prerogatives of the Executive to decide who may have access to classified material.

Because the document in question has not been declassified, *see* Hackett Decl. ¶ 5, Plaintiffs have no right of access to this non-public document. Moreover, it is well-established that the inadvertent and unauthorized disclosure of a classified document does not amount to a waiver of its classified status. *See* Exec. Order No. 12,958, § 1.1(b), *as amended by* Exec. Order No. 13,292 ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information."); *Pfeiffer v. Central Intelligence Agency*, 60 F.3d 861, 866 (D.C. Cir. 1995) (finding no First Amendment right of access to a classified government report wrongly retained by plaintiff, an historian who had written the report while employed by the CIA); *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993) (determining, in a Freedom of Information Act ("FOIA") case, that "[o]ur decisions make it clear that an agency will not be held to have waived exemption 1 [protecting classified information] absent a showing by a FOIA plaintiff that the *specific information at issue* has been *officially* disclosed" (latter emphasis added)); *Fitzgibbon v. Central Intelligence Agency*, 911

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[7](...continued)
see Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) ("The authority to protect such information [bearing on national security] falls on the President as head of the Executive Branch and as Commander in Chief."), and their continued access to the document and characterization of its purported contents pose a risk to national security.

F.2d 755, 765 (D.C. Cir. 1990) (finding that, in order for classified information to be "officially acknowledged," the "information requested must already have been made public through an *official and documented disclosure*" (emphasis added)); *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 659 F. Supp. 674, 684 (E.D.N.Y. 1987) ("*[O]nly authorized and official disclosures can result in declassification*. Thus, even if plaintiffs were able to obtain evidence that an unauthorized 'leak' had in fact occurred, these statements could not, as a matter of law, result in declassification of the existence of a Navy proposal to deploy nuclear weapons at the homeport." (emphasis added)), *aff'd*, 891 F.2d 414, 421 (2d Cir. 1989); *Nuclear Control Institute v. U.S. Nuclear Regulatory Comm'n*, 563 F. Supp. 768, 771 (D.D.C. 1983) ("[T]he unauthorized publication of a classified document does not require either declassification or disclosure of the document under the Freedom of Information Act." (citations omitted)).[8/]

Plaintiffs therefore cannot establish any right to continued access to this document as a result of its inadvertent disclosure. In addition, the inadvertent disclosure in no way diminishes

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[8] Even employees of the U.S. Government who have been granted appropriate security clearances do not have any right to that classified information upon leaving employment with the Government. *See* Exec. Order No. 12,958, § 4.1(c), *as amended by* Exec. Order No. 13,292 ("An official or employee leaving agency service may not remove classified information from the agency's control."). Nor do individuals for whom the Executive Branch has explicitly granted access to classified information, and who have generated work product based on that information, have a continued right of access to that classified information. For example, in *Pfeiffer*, 60 F.3d at 866, an historian for the Central Intelligence Agency ("CIA") was granted access to classified information in order to write a report on the agency's internal investigation into the Bay of Pigs Operation. *See id.* at 862. The historian subsequently requested a copy of the report and asked that the CIA review and clear the report for publication. *See id.* When the CIA refused, the historian sued on the theory that the report belonged to him and that any attempt to prevent him from publishing it was a violation of his First Amendment right to free speech. *See id.* The D.C. Circuit found to the contrary that "the report at issue in this case — in both its original form and in the form of Pfeiffer's copy — is indisputably the property of the Government." *See id.* at 864. The D.C. Circuit further held that while "the first amendment may protect his right to speak of his unclassified experiences with the Agency (classified material apart)," "no law grants him the right to keep — and therefore in this instance to publish — the papers that he purloined from the Agency." *See id.* at 866.

the considerable risk that could arise from providing Plaintiffs or their counsel with continued access to this document. As the Office of the Director of National Intelligence has already stated with respect to any further disclosure of the document:

> 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 Hackett Decl. ¶ 12.

II. PLAINTIFFS CANNOT CHALLENGE THE EXECUTIVE'S DECISION NOT TO GRANT THEM ACCESS TO CLASSIFIED INFORMATION, INCLUDING TO THE DOCUMENT.

The document at issue was and remains properly classified as "TOP SECRET" and additionally contains "sensitive compartmented information"; thus, it may only be accessed by those with appropriate security clearances. *See* Hackett Decl. ¶¶ 5-9; *see also* Exec. Order No. 12,958, § 4.1, *as amended by* Exec. Order No. 13,292. Security clearances require, *inter alia*, that "a favorable determination of eligibility for access has been made by an agency head or the agency head's designee" and that "the person has a need-to-know the information," *see id.* § 4.1(a), neither of which has occurred in this case. Neither Plaintiffs nor their counsel has been approved, based on background investigations and determinations of their "need to know," for access to classified information. Nor can they obtain this access to classified information through court order. Any decision whether to grant Plaintiffs or their counsel access to classified information so as to enable their continued access to the document in question resides firmly and exclusively with the Executive Branch.

Under the separation of powers established by the Constitution, the Executive is exclusively responsible for the protection and control of national security information. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (noting that Executive supremacy on such decisions arises from the President's role as Commander in Chief under Art. II, § 2 of the U.S. Constitution). 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; *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."), *cert. denied*, 499 U.S. 905 (1991); *see also Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (noting that President has "exclusive constitutional authority over access to national security information"). As the Ninth Circuit has held, "[t]he district court therefore cannot review the merits" of such a decision. *Dorfmont*, 913 F.2d at 1401; *see also Egan*, 484 U.S. at 526-29.

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. *See In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656, at * 9 (Fed. Cir. 1993). In keeping with this rule, 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 v. Fed. Bureau of Investigation*, 705 F.2d 1151, 1153 (9th Cir. 1983) ("*In camera* proceedings, particularly in [Freedom of Information Act] cases involving classified documents, are usually non-adversarial, with the party who is seeking the documents denied even this limited access to the documents he seeks to obtain."); *see also Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (denying special accommodations such as, *inter alia*, giving private counsel access to classified information as giving "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"), *cert. denied*, 126 S. Ct. 1052 (2006); *People's Mojahedin Org. v. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); *Stillman v. Central Intelligence Agency*, 319 F.3d 546, 548 (D.C. Cir. 2003) (finding that "[t]he district court abused its discretion by unnecessarily deciding that a plaintiff has a first amendment right for his attorney to receive access to classified information where such access is needed to assist the court in resolving the plaintiff's challenge to the classification"); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001) ("The notice . . . need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute. This 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."); *Patterson v. Fed. Bureau of Investigation*, 893 F.2d 595, 600 (3d Cir.), *cert. denied*, 498 U.S. 812 (1990); *Salisbury v. United States*, 690 F.2d 966, 973-74 & n.3 (D.C. Cir. 1982) ("In any [Freedom of Information Act] case in which considerations of national security mandate in camera proceedings, the District Court may act to exclude outside counsel when necessary for secrecy or other reasons."); *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) ("[I]t is not appropriate, and not possible without grave risk, to allow access to classified defense-related material to counsel who lack security clearance, unless a court has already determined pursuant to FOIA procedures that the material should be publicly disclosed."), *cert. denied*, 446 U.S. 937 (1980); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) ("Protective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result. Therefore we reject the plaintiffs' argument that counsel should have been permitted to participate in the *in camera* proceedings below.").

The Executive's determination as to who may be provided access to classified

information, and under what circumstances, is "sensitive and inherently discretionary." *See Dorfmont*, 913 F.2d at 1401 (quoting *Egan*, 484 U.S. at 528); *see also New York Times Co. v. United States*, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring) ("If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully."). Even if an individual appears trustworthy and otherwise meets background eligibility requirements for access, the Executive must decide "the importance of the information, the harm from disclosure, the acceptable level of risk to national security, and the potential for leaks and disclosures, including purely inadvertent ones," and may find based on these factors that access is inappropriate. *In re United States*, 1993 WL 262656, at *6; *see also Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) ("Disclosure to one more person, particularly one found by the CIA to be a person of discretion and reliability, may seem of no great moment, but information may be compromised inadvertently as well as deliberately."). Predictive judgments about who would, or would not, present a security risk

> must be made by those with the necessary experience in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to decide who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative determination with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

Egan, 484 U.S. at 529 (quoting *Central Intelligence Agency v. Sims*, 471 U.S. 159, 170 (1985)). A "federal court is an 'outside nonexpert body'" under this formulation and thus "with no more business reviewing the merits of a decision to grant or revoke a security clearance" than any

other "outside nonexpert body." *See Dorfmont*, 913 F.2d at 1401.

The Executive's responsibility to control classified information, and the plenary nature of Executive discretion over such information, are reflected in the President's instructions to federal agencies. *See generally* Exec. Order No. 12,958, *as amended by* Exec. Order No. 13,292. 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 the national security.'" *See Dorfmont*, 913 F.2d at 1401 (quoting *Egan*, 484 U.S. at 528); *see generally* Exec. Order No. 12,958, *as amended by* Exec. Order No. 13,292. Exec. Order No. 12,958 directs agencies to grant access to classified data only where an agency official with appropriate authority concludes that an individual has a demonstrated "need to know" the information in connection with the performance of a "governmental function" that is "lawful and authorized" by the agency. *See* Exec. Order No. 12,958, §§ 4.1(a), 4.2(a), 5.4(d)(5), 6.1(z), *as amended by* Exec. Order No. 13,292.[9/]

In making this determination, the President has instructed federal agencies to "ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs." *See* Exec. Order No. 12,958 § 5.4(d)(5)(B), *as amended by* Exec. Order No. 13,292; *see also In re United States*, 1993 WL 262656, at *7 ("[T]he Executive Order specifically directs the Secretary to limit access as much as possible . . . ."). Accordingly, even where the Executive Branch considers access for its own

[9] Section § 6.1(z) of Exec. Order No. 12,958, *as amended by* Exec. Order No. 13,292, defines "need-to-know" as a "determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." The act of bringing a civil suit against the United States does not become a "need to know" classified information that might be involved in the case.

employees, whose activities are subject to daily supervision, "[t]here is a strong presumption against granting" access to classified information. *See Dorfmont*, 913 F.2d at 1401. On the "operational" side of this determination, the Executive grants access to classified information only where an agency official with appropriate authority determines that the applicant has a work-related need for the information in connection with the performance of a governmental function authorized by the agency. *See* Exec. Order No. 12,958 §§ 4.1(a), 4.2(a), 5.4(d)(5), 6.1(z), *as amended by* Exec. Order No. 13,292. On the "security" side of the "need to know" determination, the Executive, as discussed above, has responsibility for assessing "the importance of the information, the harm from disclosure, the acceptable level of risk to national security, and the potential for leaks and disclosures, including purely inadvertent ones," *see In re United States*, 1993 WL 262656, at *6, and grants access only where it determines that doing so is "clearly consistent with the interests of national security." *Dorfmont*, 913 F.2d at 1401. Only after the Executive has concluded that access is otherwise consistent with operational and security needs does it begin the administrative process of investigating an applicant's background. *See* Exec. Order No. 12,958 § 5.4(d)(5)(A), *as amended by* Exec. Order No. 13,292. Finally, in establishing instructions for agencies regarding release of classified information, the President specifically has disclaimed any intent to establish a right of judicial review arising from Executive determinations under the order. *See id.* § 6.2(c) ("This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its departments, agencies, officers, employees, or agents.").[10/]

[10] Regarding the Executive Branch's determination as to whether to grant its own employees access to classified information, Plaintiffs have persistently requested information about defense counsel's security clearances. The Court has indicated that this information would (continued...)

U.S. Courts of Appeals have agreed with the Executive that providing classified information to private counsel is presumed to carry an inherent and unacceptable risk of unauthorized disclosure. *See Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (finding that the rule denying access to classified information to private counsel is "well settled"), *cert. denied*, 465 U.S. 1038 (1984); *Weberman*, 668 F.2d at 678 (finding that the risk presented by giving private counsel access to classified information outweighs benefit of adversarial proceedings); *Halkin*, 598 F.2d at 7 (finding that the risk of inadvertent disclosure by private counsel justifies exclusion of counsel from access to classified materials). The rationale for this rule is that "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer . . . or to the coercive power of a protective order." *Ellsberg*, 709 F.2d at 61. This is in part because such access strains the attorney-client relationship between the opposing party and its lawyer, *see Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1470 (D.C. Cir. 1983), which in turn "is likely to strain [counsel's] fidelity to his pledge of secrecy," *see Ellsberg*, 709 F.2d at 61. Providing private counsel access to classified information presents a considerable risk that classified information will be deliberately disclosed to their clients, who themselves may be persons who pose security risks. *See* Attach. 3, Decision and Order of the Immigration Judge, *In re Rabih Sami Haddad*, at 18-21 (Nov. 22, 2002)

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[10](...continued)
be useful. *See* Attach. 1, Transcript of Teleconference at 11 (Apr. 7, 2006).

Government counsel represent agencies that produce and rely on classified material, and government counsel must have access to such material in order to defend these agencies. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). Such is the case here.

Nevertheless, the specific scope and details of government counsel's security clearances is sensitive information that is ultimately irrelevant to whether Plaintiffs' counsel may obtain security clearances. *See In re United States*, 1993 WL 262658, at *7 ("That the United States' attorneys may have reviewed the compartmented information at issue here is entirely irrelevant to whether there would be a 'reasonable danger' to national security if the information is released to someone new . . . .").

(finding that despite the "direct and unequivocal order" of a U.S. district court judge in a case involving immigration proceedings of a major fundraiser for the Global Relief Foundation, an SDGT, "[c]ounsel[11/] deliberately disclosed" a document in violation of a protective order "without even a façade of attempted compliance."). Moreover, in litigation, "information may be compromised inadvertently as well as deliberately." *See Halperin*, 656 F.2d at 72; *see also Halkin*, 598 F.2d at 7.

The case of *In re United States* illustrates that, notwithstanding the determination of the Executive Branch that certain government contractors could have access to certain classified information in performance of a classified government contract, the court had no authority to order the Executive Branch to provide access to this particular classified information to these contractors' attorneys. The United States declined to grant two employees of the plaintiff access to classified information. *See In re United States*, 1993 WL 262656 at *2. Without questioning the basic eligibility of these employees for security clearances, the United States nevertheless concluded that the risk of unauthorized disclosure associated with granting access was not consistent with the interests of national security, and the United States denied access. *See id.* at *2. The Court of Federal Claims rejected this assessment, noting that the United States previously had granted access to ten other attorneys and consultants of the plaintiff and had provided "no reasons other than 'national security'" for not granting access to two additional persons. *See id.* at *3. The Court of Federal Claims therefore ordered the United States to "immediately arrange for" these persons to be granted access to the classified materials. *See id.* at *3 (internal quotation marks omitted).

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[11] The counsel in the *Haddad* immigration proceedings who "deliberately disclosed" information in violation of a protective order is also the counsel to the former Saudi head of the Al-Haramain Islamic Foundation. *See* Attach. 4, Am. Compl. in *Al-Aqeel v. Snow*, No. 05-943 (D.D.C.).

The Federal Circuit reversed, granting the United States' petition for mandamus and vacating the Court of Federal Claims's order. *See id.* at *10. The court reasoned that "the Executive's 'authority to classify and control access to information bearing on national security' is based on the President's constitutional power as the 'Commander in Chief of the Army and Navy of the United States'" and that "[b]ecause this power is rooted in the Constitution, separation of powers is implicated," and "bars judicial review" of the Executive's clearance determination. *See id.* at *9 (quoting *Egan*, 484 U.S. at 527). The Federal Circuit concluded that "the trial court will have to find ways to manage the pace of discovery that do not usurp the power to grant access to classified, compartmented data." *See id.* at *10.[12/]

Thus, any decision to grant a security clearance is firmly entrusted to the Executive Branch, and courts lack both the authority and competence to assess the merits of such a decision. Accordingly, the decision to permit Plaintiffs and their counsel access to the sealed classified document resides entirely within the Executive Branch's power and discretion. Defendants acknowledge that the Court has ordered the parties to propose protective orders "in the event the Court determines that the plaintiff is entitled to access." *See* Attach. 1, Transcript of Teleconference at 8-9 (Apr. 7, 2006). Because the Executive Branch has not granted access to

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[12] The case of *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005), *appeal dismissed as moot*, __ F.3d __, 2006 WL 1409351 (2d Cir. May 23, 2006) (per curiam), is not inconsistent with *In re United States*. In *Doe*, the district court found that the Government's introduction of classified material *ex parte* and *in camera* was warranted because "the instant situation, where the executive branch determines that certain information ought to remain classified in the interests of national security, but is necessary to its defense of this action, constitutes such an extraordinary circumstance." *See id.* at 71. Although the district court ordered the Government to take steps to facilitate plaintiffs' participation in the case, the district court did *not* order the Government to provide plaintiffs access to classified material, as indeed the court does not possess this power. *See id.* ("[T]he court directs that defendants attempt, to the extent permitted by law, to provide plaintiffs with the opportunity for their lead attorney to seek to obtain the security clearance required to review and respond to the classified materials in connection with the resolution of this case.").

classified information to Plaintiffs or their counsel, however, it is impossible for Defendants to propose or agree to any form of a protective order for the sealed classified document at issue in this case. Plaintiffs or their counsel could only obtain classified information pursuant to a protective order if they have appropriate clearances and the requisite "need to know," but even then, protective orders provide inadequate protection for classified information. *See Halkin*, 598 F.2d at 7 ("Protective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result.").[13/]

III. PLAINTIFFS WILL NOT BE PREJUDICED BY AN INABILITY TO ACCESS THE DOCUMENT IN QUESTION.

Plaintiffs have recently suggested that the value of the sealed classified document "to plaintiffs is in its confirmation that *plaintiffs were targets of the President's warrantless electronic surveillance program*" — which they claim establishes their standing to prosecute this lawsuit. *See* Pls.' Reply to Defs.' Resp. to Obj. to Filing Material Ex Parte and In Camera, at 15 (May 22, 2006) [Docket No. 34]. Plaintiffs suggest that they "do not seek to use the document for any other reason, and do not seek the disclosure of its contents at this time." *See id.* It therefore appears that the *existence* of this classified document is all that matters to Plaintiffs, and, therefore, neither Plaintiffs nor their counsel has any apparent need for continued access to the *contents* of the document. Plaintiffs thus cannot reasonably assert that they need access to

[13] As previously noted in Defs.' Resp. to Pls.' Opp'n to Defs.' Lodging of Material Ex Parte and In Camera (May 12, 2006) [Docket No. 32], the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, does not apply to civil cases such as this, and its procedures for defense counsel's access to classified information have no place in this case. *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.

the document in order to support an as-yet unrebutted allegation.[14/] Defendants do not concede this allegation at this point, and in any event, this is an issue that will be addressed in due course as the parties turn to the allegations of Plaintiffs' Complaint.

CONCLUSION

For the foregoing reasons, Plaintiffs are not permitted access to the sealed classified document at issue in this case, or to any other classified material that has been or may be filed in this case. Further, Plaintiffs should be ordered to return all copies of the document in question to the United States.

Dated: May 26, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

JOSEPH H. HUNT
Director, Federal Programs Branch

s/ Anthony J. Coppolino
ANTHONY J. COPPOLINO
Special Litigation Counsel
United States Department of Justice
Civil Division, Federal Programs Branch

[14] While Plaintiffs apparently believe they do not need access to the document to maintain their case, it is also apparent that the United States may not be penalized in litigation for withholding classified materials from an opposing party. *See United States v. Reynolds*, 345 U.S. 1, 12 (1953); *Ellsberg*, 709 F.2d at 64. "The rationale for this doctrine is that the United States, while waiving its sovereign immunity for many purposes, has never consented to an *increase* in its exposure to liability when it is compelled, for reasons of national security, to refuse to release relevant evidence." *Ellsberg*, 709 F.2d at 64. This is also because such a penalty inappropriately would force the United States to choose between defending its actions with all relevant information and preserving the secrecy of classified materials. *See Global Relief Found.*, 315 F.3d at 754 ("The Constitution would indeed be a suicide pact ... if the only way to curtail enemies' access to assets were to reveal information that might cost lives.").

20 Massachusetts Avenue, N.W. Room 6102
Washington, D.C. 20001
Telephone: (202) 514-4782
Fax: (202) 616-8460
tony.coppolino@usdoj.gov

s/ Andrea Gacki
ANDREA GACKI
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 7334
Washington, D.C. 20001
Telephone: (202) 514-4336
Fax: (202) 318-2461
andrea.gacki@usdoj.gov

s/ Andrew H. Tannenbaum
ANDREW H. TANNENBAUM
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W. Room 7332
Washington, D.C. 20001
Telephone: (202) 514-4263
Fax: (202) 616-8202
andrew.tannenbaum@usdoj.gov

KARIN J. IMMERGUT, OSB# 96314
United States Attorney
District of Oregon

JAMES L. SUTHERLAND, OSB# 68160
Assistant United States Attorney
1000 SW Third Avenue, Suite 600
Portland, Oregon 97204-2902
Phone: (503) 727-1194
Fax: (503) 727-1117
Email: jim.sutherland@usdoj.gov

Attorneys for the United States of America