

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
JOHN DOE, INC.; JOHN DOE; AMERICAN  
CIVIL LIBERTIES UNION; and AMERICAN  
CIVIL LIBERTIES UNION FOUNDATION

Plaintiffs,

v.

ERIC HOLDER, JR., in his official capacity as  
Attorney General of the United States; ROBERT  
MUELLER, III, in his official capacity as  
Director of the Federal Bureau of Investigation;  
and VALERIE E. CAPRONI, in her official  
capacity as General Counsel of the Federal  
Bureau of Investigation,

Defendants.  
----- X

04 Civ. 2614 (VM)

**Memorandum of Law in Opposition to Plaintiffs' Motion for Disclosure of  
Government's Ex Parte Filing or to Require the Government to Produce an  
Unclassified Summary**

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## **Preliminary Statement**

The government respectfully submits this memorandum in opposition to plaintiffs' motion for disclosure of the government's *in camera*, *ex parte* filing of June 17, 2009. Plaintiffs are not entitled to access the classified information in the government's declaration.

Determinations of who may obtain classified information belong solely to the Executive branch, and may not be disturbed by the courts. That long-established rule is consistent with due process, as the government's compelling need to protect classified information outweighs plaintiffs' interest in disclosure or in responding in litigation. Moreover, consideration of classified information *ex parte* and *in camera* has been explicitly endorsed by Congress and the court of appeals in this case. For those reasons, plaintiffs' application must be denied.

## **Background**

In *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the Second Circuit set forth procedures by which the government could demonstrate that there is "a good reason to believe that a[ statutorily] enumerated harm may result" from disclosure of a national security letter ("NSL") issued under 18 U.S.C. § 2709. Specifically, the court stated that a district court must "normally defer to the Government's considered assessment of why disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities." *Id.* at 881. However, the court may not uphold a nondisclosure requirement based on a conclusory assurance by the government; the court must "requir[e] some elaboration" beyond the mere assertion of necessity. *Id.* Thus, "[i]n showing why disclosure would risk an enumerated harm, the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial."

*Id.* The circuit court specifically endorsed the statutory provisions of 18 U.S.C. § 3511(d) and (e)—which provide for ex parte and in camera review of the government’s submission—as the mechanism by which the government may make the required showing. *Id.* at 881–82.

After remand by the court of appeals to this court, the government on June 17, 2009, filed a certification by the deputy assistant director of the Federal Bureau of Investigation (“FBI”) that disclosure of the NSL at issue in this case may result in one of the harms enumerated in 18 U.S.C. § 2709(c). In support of that certification, the government also filed a classified declaration by an FBI supervisory special agent explaining why disclosure of the NSL may result in those harms. In filing that declaration, the government invoked 18 U.S.C. § 3511(e), which provides: “In all proceedings under this section, the court shall, upon request of the government, review ex parte and in camera any government submission or portions thereof, which may include classified information.”

On June 24, 2009, plaintiffs moved for disclosure of the classified declaration to plaintiffs’ counsel or, alternatively, for the government to provide an unclassified summary of the declaration. The government now opposes both requests.

## **Argument**

### **A. Determinations of Who May Be Granted Access to Classified Information Are Committed Solely to the Executive Branch and May Not Be Disturbed by the Court**

Under the separation of powers established by the Constitution, the Executive branch is exclusively responsible for the protection and control of national security information.

*Department of the Navy v. Egan*, 484 U.S. 518 (1988) (Executive supremacy on such decisions arises from President’s role as Commander in Chief under Art. II, § 2 of Constitution). 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); *see* Executive Order 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (amending Executive Order 12,958).

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. *Egan*, 484 U.S. at 529; *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (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.”). “A district court therefore cannot review the merits” of such a decision. *Dorfmont*, 913 F.2d at 1401; *accord 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. *In re United States*, 1 F.3d 1251 (Table), 1993 WL 262656, at \*9 (Fed. Cir. 1993). In keeping with this rule, the Second Circuit and other courts have repeatedly rejected demands that opposing counsel or parties be permitted access to classified material presented to the court *ex parte* and *in camera*. *Weberman v. National Security Agency*, 668 F.2d 676, 678 (2d Cir. 1982); *accord People’s Mojahedin Org. v. Department of State*, 327 F.3d 1238, 1242–43 (D.C. Cir. 2003); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001); *Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 973–74 & n.3 (D.C. 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).

The Executive’s determination of who may be provided access to classified information, and in what circumstances, is “‘sensitive and inherently discretionary.’” *Dorfmont*, 913 F.2d at 1401 (quoting *Egan*, 484 U.S. at 528). Even where 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; accord *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) (“[d]isclosure 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 of this kind

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 *CIA v. Sims*, 471 U.S. 159, 170 (1985)). A “federal court is an ‘outside nonexpert body’” under this formulation. *Dorfmont*, 913 F.2d at 1401 (quoting *Egan*, 484 U.S. at 529).

The Executive’s strict control over classified information, and the plenary nature of Executive discretion over such information, are reflected in the President’s instructions to federal agencies. Executive Order 13,292 directs agencies to grant access to classified data only where an agency official with appropriate authority concludes that an individual has a demonstrated a



“need to know” the information in connection with the performance of a “governmental function” that is “lawful and authorized” by the agency. Exec. Order 13,292 §§ 4.1(a), 4.2(a), 5.4(d)(5), 6.1(z); Declaration of Brenda L. Heck dated July 8, 2009 (“Heck Decl.”) ¶¶ 3, 6.

The President has instructed federal agencies making this determination 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.” Exec. Order 13,292 § 5.4(d)(5)(B); *see In re United States*, 1993 WL 262656, at \*7 (“the Executive Order specifically directs the Secretary to limit access as much as possible”). Accordingly, even where the Executive Branch considers access for its own employees, whose activities are subject to daily supervision, “[t]here is a strong presumption against granting” access to classified information. *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. Exec. Order 13,292 §§ 4.1(a), 4.2(a), 5.4(d)(5), 6.1(z); Heck Decl. ¶ 3. 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,” *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 13,292 § 5.4(d)(1)(A). 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.”).

The Executive’s presumption against granting access is higher still when a private litigant asks that his counsel be permitted access to classified information. Private counsel do not have the same incentive as government employees to protect classified information; they are not trained to the same degree as government employees; they are less likely to have experience at or facilities for properly handling or discussing classified materials; they are not subject to government inspectors general; and the government plainly does not have the sort of control over them as it does over its own employees. The Second Circuit and other courts of appeal have agreed with the Executive that providing classified information to private counsel is presumed to carry an inherent and unacceptable risk of unauthorized disclosure. *Weberman*, 668 F.2d at 678 (risk presented by giving private counsel access to classified information outweighs benefit of adversarial proceedings); *Ellsberg*, 709 F.2d at 61 (rule denying private counsel access to classified information is “well settled”); *Halkin*, 598 F.2d at 7 (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, *Arieff v. Department of the 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,” *Ellsberg*, 709 F.2d at 61; *cf. Assassination Archives & Research Ctr. v. CIA*, 48 F. Supp. 2d 1, 8–9 (D.D.C. 1999) (dismissing action because of plaintiff’s counsel’s disclosure of CIA document to client in violation of confidentiality pledge). It is also because in litigation “information may be compromised inadvertently as well as deliberately.” *Colby*, 656 F.2d at 72 (“[d]isclosure 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”); *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”).<sup>1</sup> “It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it the serious risk that highly sensitive information may be compromised.” *Halkin*, 598 F.2d at 7 (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975)).

*In re United States* illustrates all of these principles. There, the United States declined to grant two employees of the plaintiff access to classified information. 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 denied access. *Id.* at \*2. The

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<sup>1</sup> The risk of inadvertent disclosure despite a protective order is demonstrated by the history of this case, in which, as the government earlier pointed out, plaintiffs’ counsel has twice already inadvertently disclosed sealed information. *See* Dkt. No. 68, Reply Mem. in Support of Gov’t’s Mot. to Dismiss or for Summary J., at 26–27 (describing two instances in this case in which plaintiffs divulged sealed information, including once in a press release). In the companion case in the District of Connecticut, the plaintiffs—represented by the same counsel as here— included language in their public pleadings taken directly from the anonymous plaintiff’s website, which led to inappropriate speculation about the plaintiff’s true identity. *See* Alison L. Cowan, Hartford Libraries Watch as U.S. Makes Demands, N.Y. Times, Sep. 2, 2005, at B5.

district court 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. *Id.* at \*3. The district court therefore ordered the United States to “immediately arrange for” these persons to be granted access to the classified materials. *Id.* at \*3 (internal quotation marks omitted).

The court of appeals reversed, granting the United States’ petition for mandamus and vacating the district court’s order. *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. *Id.* at \*9 (quoting *Egan*, 484 U.S. at 527). The court of appeals 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.” *Id.* at \*10.

Accordingly, it is well established that the Executive—not the courts, and not private counsel—is solely entitled to determine who should be granted access to classified information. In this case, the Executive has reviewed the information at issue in this case and determined that plaintiffs’ counsel should not be given access. Heck Decl. ¶¶ 3, 7–9. That decision cannot be disturbed by this Court.

**B. Review of Classified Information Ex Parte and In Camera Does Not Violate Due Process**

Plaintiffs contend that ex parte, in camera submission of the FBI declaration violates due process because it deprives them of an opportunity to respond. But that procedure was not only

expressly authorized—indeed, required—by Congress in 18 U.S.C. § 3511(e), it was also acknowledged and endorsed by the court of appeals in this very case. The circuit court expressly held that the government, when seeking to meet its burden of “indicat[ing] the nature of the apprehended harm” and “provid[ing] [this] court with some basis to assure itself . . . that the link between disclosure and risk of harm is substantial,” may do so “based on *in camera* presentations where appropriate.” 549 F.3d at 881. More specifically, the court stated that “[t]he provisions in subsections 3511(d) and (e) for *ex parte* and *in camera* review provide a ready mechanism for the FBI to provide a more complete explanation of its reasoning.” *Id.* at 881–82 (internal quotation marks omitted). The circuit’s recognition that the *ex parte*, *in camera* procedure is appropriate is alone enough to foreclose plaintiffs’ argument.<sup>2</sup>

In any event, courts have uniformly upheld similar procedures where Congress authorized *in camera*, *ex parte* submission of classified evidence because of national security concerns. For example, courts have rejected due process challenges to provisions of the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1702(c), that authorize *in camera*, *ex parte* submissions by the government containing classified evidence as to why a particular entity has been designated as a terrorist organization. In *Holy Land Found. v. Ashcroft*, the court rejected a due process challenge to the use of classified evidence to support a foreign terrorist organization determination, holding that “HLF’s complaint, like that of the Designated Foreign Terrorist Organizations in the earlier cases, that due process prevents its designation based upon classified information to which it has not had access is of no avail.” 333 F.3d 156, 164 (D.C. Cir.

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<sup>2</sup> This Court earlier stated that its authority to “assess what process is due on a case-by-case basis is undisturbed by the language of § 3511(e).” 500 F. Supp. 2d at 423. The Second Circuit’s approval of the *ex parte* submission allowed by that subsection indicates that the process granted by the statute is sufficient for the inquiry at hand.

2003). Similarly, the Seventh Circuit rejected a due process challenge in *Global Relief Found. v. O'Neill*, holding that “IEEPA is not rendered unconstitutional because that statute authorizes the use of classified evidence that may be considered ex parte by the district court.” 315 F.3d 748, 754 (7th Cir. 2002) (citations omitted); accord *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 45 (D.D.C. 2005) (relying on classified record to reach a decision even though it was considered ex parte).

As the courts have recognized, in camera, ex parte review comports with due process because of the “‘compelling interest’ in withholding national security information from unauthorized persons in the course of executive business.’” *Holy Land Found.*, 333 F.3d at 164 (citing *People’s Mojahedin Organ. of Iran v. Department of State* (“PMOF”), 327 F.3d 1238, 1242 (D.C. Cir. 2003)). It cannot be disputed that “no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981). Indeed, the Supreme Court has recognized that “[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).

“[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.” *National Council of Resistance of Iran v. Dep’t of State* (“NCRF”), 251 F.3d 192, 207 (D.C. Cir. 2001). As the *NCRI* Court held, 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.” *Id.* at 208–09.

That governmental interest outweighs plaintiffs’s interest in arguing against the

government's evidence, as weighty as that due process interest is. As the District of Columbia Circuit has said,

[i]n the case of claims of military or state secrets' privilege . . . the superiority of well-informed advocacy becomes less justifiable in view of the substantial risk of unauthorized disclosure of privileged information. . . . Disclosures in camera are inconsistent with the normal rights of a plaintiff of inquiry and cross-examination, of course, but if the two interests cannot be reconciled, the interest of the individual litigant must give way to the government's privilege against disclosure of its secrets of state.

*Halkin*, 598 F.2d at 7 (internal quotation marks omitted). Indeed, plaintiffs' limited interest in overturning the NSL nondisclosure order is far less than the interest of the plaintiffs in the terrorist-designation cases. *See PMOI*, 327 F.3d at 1239 (terrorist designation carries with it very "serious[ ] . . . consequences": the "blocking of any funds . . . on deposit with any financial institution in the United States," the "exclusion from the United States of representatives of the organization," and "criminal penalties on any persons 'knowingly provid[ing] material support or resources' to such organization"). Similarly, the Second Circuit has held that "[t]he risk presented by participation of counsel outweighs the utility of counsel, or adversary process" in reviewing an evidentiary document. *Weberman*, 668 F.2d at 678; *accord Tabbaa v. Chertoff*, 509 F.3d 89, 93 (2d Cir. 2007) (reviewing classified documents ex parte and in camera); *Earth Pledge Found. v. CIA*, 128 F.3d 788 (2d Cir. 1997),<sup>3</sup> *aff'g* 988 F. Supp. 623, 626 (S.D.N.Y. 1996) ("[s]ubmission of in camera affidavits by the Government is appropriate in a case raising national security concerns").

Plaintiffs' lesser interests here cannot outweigh the governmental interests at stake, and

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<sup>3</sup> A district court opinion becomes binding circuit precedent when it is "adopted by or incorporated into one of [the circuit's] published opinions." *McCoy v. Holland*, 364 F.3d 166, 172 n.8 (4th Cir. 2004).

the Court’s review of the classified declaration thus does not rise to the level of a due process violation. In addition, courts considering the permissibility of ex parte procedures have also reasoned that the “risk of erroneous deprivation” is mitigated by the “ex parte, in camera judicial review of the [classified] record.” *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (courts have “inherent authority to review classified material ex parte and in camera as part of [their] judicial review function.”).

Plaintiffs’ reliance on *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995), is misplaced. Br. at 7. In that case, the Ninth Circuit held that classified information submitted for in camera, ex parte review in certain INS proceedings could not be considered because there was not a sufficiently clear statutory basis for such review. *Id.* at 1068. The procedure here under § 3511 presents no such concern—the statute expressly authorizes the submission of the FBI’s classified declaration. Also, weighing the relative interests at stake, the *American-Arab* court concluded that the government had presented no evidence that the particular aliens posed a threat to national security—indeed, they had lived free for eight years during the litigation and there was no evidence they had participated in terrorist activities. 70 F.3d at 1070. In contrast here, the government’s classified declaration itself demonstrates the harms to national security and the other interests enumerated in § 2709(c) that would result from its disclosure. Similarly, the court in *Rafeedie v. INS*, also cited by plaintiffs, Br. at 7, emphasized the “magnitude of plaintiff’s private interest” (he was threatened with removal from the country and separation from his family) and the weakness of the national-security claim (the alien had been paroled and allowed to move about the country). 795 F. Supp. 13, 18–20 (D.D.C. 1992); accord *Kiaraldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (alien’s interest in avoiding removal from country and family accorded “utmost weight”).



Examining ex parte evidence in this case is fully consistent with *Abourezk v. Reagan*, relied on by plaintiffs, Br. at 4–6, which recognized that the “acute national security concerns” behind a state secret constituted the “extraordinary circumstances” that permit consideration of ex parte evidence. 785 F.2d 1043, 1061 (D.C. Cir. 1986). Plaintiffs correctly note that the “main rule,” as it was called in *Abourezk*, prohibits ex parte evidence, but as described above that rule admits of exceptions for classified national security information.<sup>4</sup> “[C]ompelling national security concerns” justify an exception to the rule; equally, ex parte evidence may be considered under a “statutory scheme permitting closeted inspection of evidence.” *Id.*; accord *Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1997) (“consideration of *in camera* submissions to determine the merits of litigation is allowable only when the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* resolution of the dispute”). Both those exceptions apply here: not only are compelling national security concerns present, but Congress, in enacting § 3511, and the court of appeals, in endorsing that procedure, recognized the appropriateness of ex parte, *in camera* proceedings as necessary to protect national security concerns in this case.

Plaintiffs also rely on *In re NSA Telecomm. Records Litig.*, 595 F. Supp. 2d 1077 (N.D. Cal. 2009), and the companion to this case, *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005). Br. at 7. Neither case ordered disclosure of classified information, and therefore neither

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<sup>4</sup> Plaintiffs mischaracterize *Abourezk* as holding that a party “must ordinarily choose between making evidence available to its adversary or forgoing reliance on the evidence altogether.” Br. at 6. As is clear from the opinion, that choice posed by the *Abourezk* court only applies when a judge is inspecting materials *in camera* to determine if they can be used in litigation (e.g., reviewing them for privilege). 785 F.2d at 1061. Under the other two exceptions to the rule against ex parte evidence, the court may rely on such evidence “to decide the merits of a dispute.” *Id.*

supports plaintiffs' argument. In *Doe*, the district court did not, as plaintiffs state, "order[] government to process counsel for a security clearance because of due process concerns," Br. at 7; instead, the court merely directed the government to "attempt, *to the extent permitted by law*, to provide plaintiffs with the *opportunity* for their lead attorney *to seek to obtain* the security clearance," 386 F. Supp. 2d at 71 (emphasis added). The government responded by informing the court of its determination that it was not appropriate to grant counsel access to classified information, based on prior inadvertent disclosures by the plaintiffs' attorneys (the same attorneys who represent plaintiffs in this Court) and their lack of a "need to know" as defined in the governing Executive Order. *Doe*, No. 05 Cv. 1256, Defs.' Supp. Br. on Clearance of Opposing Counsel (Dkt. No. 57), at 8–14. The district court apparently took no further action, and classified information was never disclosed to plaintiffs' counsel.

Along the same lines, in *NSA Telecomm. Records*, the court directed the government to arrange for counsel to apply for security clearances, but did not actually order any disclosures. 595 F. Supp. 2d at 1089.<sup>5</sup> In subsequent filings, the government continued to oppose disclosure of classified information, and stated that it would appeal any order directing such disclosure. *NSA Telecomm. Records*, No. 07-109, Joint Submission in Response to Court's Apr. 17, 2009, Order (Dkt. No. 89), at 12–13, 16–28. The court to date has never ordered the government to disclose any classified information, and indeed appears to have obviated the issue by directing plaintiffs to base their upcoming motion for summary judgment on unclassified information. *Id.*, Order (Dkt. No. 96), at 1–2. Plaintiffs' mischaracterization of the *NSA Telecomm. Records* order is

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<sup>5</sup> The government's appeal from that order was dismissed for lack of jurisdiction. *Al-Haramain Islamic Found. v. Obama*, No. 09-15266 (9th Cir. Feb. 27, 2009). As noted in the text *infra*, however, the government indicated to the district court that it would immediately appeal any order directing actual disclosure.

highlighted by the fact that in a related case, the same judge of the same court rejected the arguments plaintiffs now advance:

The parties' contrasting positions highlight the tension between the government's concern for national security and the civil litigant's due process rights. While both interests are of great importance, the United States' argument prevails here. Other statutes providing for *ex parte*, *in camera* procedures have withstood due process challenges in other contexts having national security implications. . . . [The statute at issue] evinces a clear congressional intent that parties not have access to classified information. Given the special balancing that must take place when classified information is involved in a proceeding, the court is not prepared to hold that the Constitution requires more process than [the statute] provides in the circumstances of this case.

*In re NSA Telecomm. Records Litig.*, \_\_\_ F. Supp. 2d \_\_\_, No. 06-1791, 2009 WL 1561818, at \*19 (N.D. Cal. June 3, 2009). So, too, here: Congress has clearly indicated that classified information should be considered *ex parte*; the Second Circuit has endorsed that procedure; and due process has not been violated.<sup>6</sup>

Finally, under the particular circumstances of this case, plaintiffs' need to respond to the government's submission carries little weight in the due process balance. The legal standard applicable to whether the government can demonstrate a continuing need for secrecy is clear in the wake of the Second Circuit's opinion, and this Court can apply it without the aid of counsel. Indeed, the government submitted no memorandum of law to accompany the declaration, as the application of the legal standard to the facts is straightforward. Furthermore, plaintiffs' counsel is unlikely to be of assistance in this matter given the nature of the test set out by the court of

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<sup>6</sup> Plaintiffs string-cite a number of cases arising from the Guantánamo Bay detainee litigation. Br. at 8–9. Those cases are inapposite: first, because of the obviously different liberty interests at stake, and second because the government consented to disclosure of classified information in certain circumstances. *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (D.D.C. 2008) (Dkt. No. 1481). The cases cited by plaintiffs do not address or endorse their due process argument, and are therefore inapplicable.

appeals: whether “the *Government [can] indicate* the nature of the apprehended harm and provide a court with *some basis to assure itself* (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial.” 549 F.3d at 881 (emphasis added). Thus, the standard merely requires the government to set forth a reasonable basis for its conclusion that nondisclosure is still needed; it does not require the Court to make findings of fact or to agree with the government’s assessment, but simply to evaluate whether that assessment is substantiated. That inquiry can be made by the Court without the assistance of plaintiffs’ (or, as here, government) counsel, and accordingly plaintiffs’ due process interest is diminished.

### **C. An Unclassified Summary Is Not Possible Nor Required by Due Process**

Plaintiffs argue in the alternative for an unclassified summary of the government’s classified declaration. The FBI has reviewed the declaration, and concluded that neither declassification nor an unclassified summary is possible. Heck Decl. ¶ 8. Indeed, it is apparent from the classified declaration itself that unclassified information cannot be segregated out, or that no “summary” of the declaration’s contents is possible beyond saying that the “submission set forth classified information related to an authorized FBI investigation to protect against international terrorism or clandestine intelligence activities.” Heck Decl. ¶ 7.<sup>7</sup>

Plaintiffs argue for an unclassified summary based on *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004). That case is irrelevant for several reasons. First, it involved the rights of a criminal defendant at a bail hearing, where (as in the deportation cases described above) the

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<sup>7</sup> Although it is not possible to explain in detail why the government cannot summarize the classified document without disclosing classified information, the government can provide the court with a classified declaration setting forth more detail on request.

individual's liberty interests are obviously far greater than they are here. *Id.* at 314. Second, the court expressly stated that classified information was not involved in that case, and if it had been "we would be obliged to conduct a very different analysis of [the defendant's] due process claim than the one in which we here engage." *Id.* at 324. Other cases cited by plaintiffs are similarly distinguishable. *E.g.*, *Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (habeas case analogous to criminal proceedings); *Association for Reduction of Violence v. Hall*, 734 F.2d 63, 68 (1st Cir. 1984) (no classified information at issue).<sup>8</sup>

### Conclusion

For the foregoing reasons, plaintiffs' motion should be denied.

Dated: New York, New York  
July 8, 2009

Respectfully submitted,

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Southern District of New York  
Attorney for Defendants

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<sup>8</sup> Plaintiffs' observation that other statutes governing consideration of classified information may provide for unclassified summaries, Br. at 11–12, does not support their argument. That § 3511 does not provide for such summaries only highlights the fact that Congress chose not to require them.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JOHN DOE CORP., et al., )  
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 Plaintiffs, )  
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 v. )  
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 ERIC H. HOLDER, et al., )  
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 )  
 Defendants. )

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No. 04 Civ. 2614 (VM)

DECLARATION OF BRENDA L. HECK,  
SUPERVISORY SPECIAL AGENT

DECLARATION OF BRENDA L. HECK

I, Brenda L. Heck, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am a Supervisory Special Agent and Section Chief with the Federal Bureau of Investigation ("FBI"). I am also an Original Classification Authority, an official authorized in writing by the Assistant Director, Security Division, FBI, to make classification decisions. See Exec. Order No. 12958 § 1.3, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 25.2003). I am thus authorized to classify FBI information at the Confidential, Secret, or Top Secret level.
2. This declaration is submitted in connection with the above-captioned action and in response to Plaintiffs' Motion for Disclosure of Government's *Ex Parte* Filing, or, in the Alternative, to Require the Government to Produce an Unclassified Summary. The matters stated herein are based on my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and information furnished by Special Agents and other employees of the FBI; my conclusions have been reached in accordance therewith.
3. I have reviewed the content of the classified submission filed *ex parte* by the Government in this action. The purpose of this declaration is to summarize the process under which an individual may be granted access to classified FBI information. As set forth below, under these procedures, even if a person is found to be suitable to receive access to classified information, the agency that originates classified information would retain authority to make a separate determination on whether that person has a "need to know" and may in fact be granted access to its classified information. In addition, I have reviewed the matter and have determined that

Plaintiffs' counsel does not have the requisite "need to know" and, therefore, should not receive access to the FBI information contained in the submission.

A. Security Clearance and Access Process

4. The President of the United States, through the authority vested in him by the Constitution and the laws of the United States, has prescribed procedures governing access to classified information. Specifically, through Executive Orders issued by the President, a uniform system of classifying, safeguarding, and declassifying national security information has been created. *See* Exec. Order No. 12958; *see also* Exec. Order 12968. 60 Fed. Reg. 40,245 (Aug. 2, 1995) (establishing a uniform Federal personnel security program for employees who will be considered for access to classified information).
5. Pursuant to the Executive Order, all applicants seeking access to classified FBI information must complete a two-step process. *See* Exec. Order 12958 § 4.1. One step is that a person must receive a favorable determination of eligibility for access to classified information. *Id.* at § 4.1(a)(1). This is also referred to as a "suitability" determination. In this case, the process for determining the suitability of Plaintiffs' counsel to receive classified information would be overseen by officials with the United States Department of Justice who are responsible for ensuring the security of classified information in court proceedings. After a background investigation, DOJ security officials would determine if Plaintiffs' counsel are eligible for a security clearance at a particular level (*i.e.*, Confidential, Secret, or Top Secret). *See* Exec. Order 12958, § 1.2 (describing levels of clearances).
6. A favorable eligibility or "suitability" determination, and the granting of a security clearance, does not mean that a person may receive access to classified information, but only that they are eligible to receive such information. In order to receive actual access to classified information, separate approval by the Executive Branch department or agency that controls the information is also necessary. Specifically, the originating agency must separately determine whether an individual has a "need to know" certain classified information. *See* Exec. Order 12958 § 4.1(a)(3). A "need to know" classified information is defined as "a determination 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." *See* Exec. Order 12958 § 6.1(z).

B. Access to FBI information in this Case


7. In this case, the FBI decided to provide classified information directly to the Court for *ex parte, in camera* review in connection with the certification of the need for nondisclosure of the National Security Letter ("NSL"), and its contents, at issue. This submission set forth classified information related to an authorized FBI investigation to protect against international terrorism

or clandestine intelligence activities. The classified submission is properly classified at the "Secret" level because it contains information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security. Exec. Order No. 12958 § 1.2(2) & 1.4(c), 1.4(g). This information was not intended to be shared with the Plaintiffs' counsel, but to assist the Court in assessing the continued need for nondisclosure of the NSL at issue.

8. Upon my review of the classified submission, neither declassification nor an unclassified summary of the classified information is warranted or feasible. The classified information continues to meet the classification requirements and, thus, requires continued protection. The classified information also is not amenable to an unclassified summary without compromising the information sought to be protected. Classified information is not segregable from unclassified information.
9. Additionally, under the particular circumstances of this case, even if Plaintiffs' counsel were to obtain a favorable suitability determination, I have determined that neither Plaintiffs nor their counsel have a need for access to the classified FBI information submitted to the Court *ex parte, in camera*. I have further determined that it does not serve a governmental function, within the meaning of the Executive Order, to disclose the classified FBI information at issue in this case to assist the Plaintiffs' counsel in representing the interests of private parties who have filed suit against the Government and who seek to obtain disclosure of information relating to an authorized FBI investigation to protect against international terrorism or clandestine intelligence activities.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Washington, D.C.  
July 8, 2009

  
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Brenda L. Heck  
Supervisory Special Agent