UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT GRAY,	)	
	)	No. 05-2024
Petitioner,	)	
	)	
v.	)	
	)	
TRANSPORTATION SECURITY ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

RESPONSE TO MOTION TO RECONSIDER ALLOWANCE OF MOTION TO FILE MATERIALS UNDER SEAL FOR EX PARTE AND IN CAMERA REVIEW AND, IN THE ALTERNATIVE, FOR AN ORDER COMPELLING PRODUCTION OF AS MUCH INFORMATION AS POSSIBLE

Respondent, the Transportation Security Administration ("TSA"), hereby submits this response to petitioner's motion to reconsider this Court's Order of September 28, 2005, in which this Court granted the TSA's motion to file materials under seal for ex parte and in camera review. In his motion, petitioner contends (Motion at 6) that "[t]he submission of secret evidence violates the fundamental principles of our adversary system of justice as well as the clear Federal Rules of Appellate Procedure." As we demonstrate below, those contentions lack merit in the circumstances presented in this case.

1. It is well-established that "the court has inherent authority to review classified material ex parte, in camera as part of its judicial review function." Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004), cert. denied, 125 S. Ct. 1299 (2005) (citing Molerio v. FBI, 749 F.2d 815, 822 & n.2 (D.C. Cir. 1984); Holy Land Foundation for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); National Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208-09 (D.C. Cir. 2001)). The reasons for this rule are manifest. "It is 'obvious and

unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)). It likewise is beyond peradventure that, "under the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has [a] 'compelling interest' in withholding national security information from unauthorized persons." People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (quoting Dep't of State v. Egan, 484 U.S. 518, 527 (1988)); accord Holy Land Foundation, 333 F.3d at 164 (noting "the primacy of the Executive in controlling and exercising responsibility over access to classified information"). As the Supreme Court has recognized, "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam).

"[T]hat strong interest of the government clearly affects the nature * * * of the due process which must be afforded petitioners." National Council of Resistance of Iran, 251 F.3d at 207. As the D.C. Circuit adumbrated in that case, 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. Consequently, in cases in which the Government, informed by classified information, has taken action that adversely affects an individual's or entity's property or liberty interests, "due process require[s] the disclosure of only the unclassified portions of the administrative record," People's Mojahedin Org. of Iran, 327 F.3d at 1242 (emphasis in original), and the complaint that "due process prevents [governmental action] based upon classified

information to which [a party] has not had access is of no avail." Holy Land Foundation, 333 F.3d at 164.

Thus, contrary to petitioner's contentions, numerous courts have considered on an ex parte and in camera basis classified or protected information in resolving the merits of civil litigation challenging actions taken by the federal government. See, e.g., Jifry, 370 F.3d at 1181-83 (denying petition for review by two pilots challenging the revocation of their airmen's certificates upon a determination by the TSA that they posed security risks because "[v]iewing as a whole the record evidence before the TSA, including ex parte in camera review of the classified intelligence reports, we hold that there was substantial evidence to support the TSA's determination that the pilots were security risks."); Holy Land Foundation, 333 F.3d at 165 (noting that court of appeals had already rejected "claim that the use of classified information disclosed only to the court ex parte and in camera in the designation of a foreign terrorist organization * * * was violative of due process"); People's Mojahedin Org. of Iran, 327 F.3d at 1242 (same); Global Relief Foundation v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) (rejecting constitutional challenge to statute authorizing district court's ex parte consideration of classified evidence in connection with judicial challenges to Executive decision to freeze assets of entity that assists or sponsors terrorism), cert. denied, 540 U.S. 1003 (2003); Vining v. Runyon, 99 F.3d 1056, 1057 (11th Cir. 1996) ("[C]onsideration 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."); Patterson v. FBI, 893 F.2d 595, 600 n.9, 604-05 (3d Cir. 1990) (dismissing First and Fourth Amendment claims as moot based on in camera declaration and noting that "the D.C. Circuit, as well as other circuits, have allowed the use of in camera affidavits

in national security cases"); Molerio, 749 F.2d at 825 (dismissing First Amendment claim based on court's review of in camera declaration); see also Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002) (noting that district court's dismissal of complaint challenging airline search was based, in part, on in camera review of sensitive security information).[1]

As these decisions make clear, the Court is empowered to consider ex parte and in camera submissions by the Government in rare cases involving classified intelligence or national security information, and petitioner's arguments to the contrary are simply erroneous.[2]

2. Petitioner also asserts (Motion at 12 n.12) that the cases we relied upon in our opposition memorandum "involve statutory frameworks that – unlike the statutory framework in this case – specifically authorize ex parte, in camera review." That is plainly wrong. The D.C. Circuit's decision in Jifry and the Northern District of California's decision in Chowdhury v. Northwest

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[1] Both this Court and other courts also have uniformly concluded that ex parte and in camera judicial review of applications for approval of surveillance and/or searches authorized by the Foreign Intelligence Surveillance Act ("FISA") to resolve the merits of constitutional challenges by defendants in criminal proceedings complies fully with Due Process requirements. See, e.g., United States v. Johnson, 952 F.2d 565, 571-72 (1st Cir.) ("At the request of all parties, this Court has conducted its own ex parte, in camera review of the surveillance applications and orders. Having done so, we agree with the magistrate judge and the district court that the FISA surveillance of appellants was lawfully authorized and conducted."), cert. denied, 506 U.S. 816 (1992); United States v. Ott, 827 F.2d 473, 476-477 (9th Cir. 1987) (district court's ex parte consideration of sealed FBI affidavit to determine whether electronic surveillance was legally obtained did not violate due process); In re Grand Jury Proceedings,, 856 F.2d 685, 686 n.3 (4th Cir. 1988) ("So far, every FISA wiretap review has been in camera and ex parte."); United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982) ("A claim that disclosure and an adversary hearing are constitutionally required goes directly contrary to all pre-FISA precedent on point. In this Circuit and in others, it has constantly been held that the legality of electronic, foreign intelligence surveillance may, even should, be determined on an in camera, ex parte basis.").

[2] Petitioner notes that the Ninth Circuit recently denied a motion by the Government to file classified information under seal for ex parte and in camera review in Gilmore v. Gonzales, No. 04-15736. The United States is seeking reconsideration of that ruling, which was not issued by a merits panel or an Article III judge, but rather by the Appellate Commissioner of the Ninth Circuit.

Airlines Corp., 226 F. Supp.2d 608 (N.D. Cal. 2004), both of which we cited in our opposition memorandum, affirmed the propriety of ex parte, in camera review based on the very same statutory and regulatory provisions that are at issue in this case, which do not expressly provide for ex parte, in camera review. See Jifry, 370 F.3d at 1182 (citing 49 U.S.C. § 114(s) and 49 C.F.R. Part 1520); Chowdhury, 226 F. Supp.2d at 610-15 (same). Petitioner's failure to acknowledge our reliance on these cases, or make any attempt to distinguish them, is inexplicable.

Nor do the cases in which courts have conducted an ex parte, in camera review of classified information pursuant to express statutory authorization anywhere suggest that such review is limited only to those circumstances. To the contrary, as Judge Lipez has correctly noted, "precedents from other circuits suggest that ex parte determinations may be allowable '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 circumstances justify the ex parte consideration of privileged information.'" Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 18 (1st Cir. 2004) (Lipez, J., concurring) (emphasis added) (quoting Vining, 99 F.3d at 1257, and citing Molerio, 749 F.2d at 825).

3. Petitioner's contention (Motion at 7) that the submission of materials under seal for ex parte and in camera review is precluded by the plain language of Rule 25(b) of the Federal Rules of Appellate Procedure is wholly without merit. Even assuming that Rule 25(b) somehow is implicated in this matter, Rule 2 of the Federal Rules of Appellate Procedure expressly provides that "a court of appeals may– to expedite its decision or for other good cause–suspend any provision of these rules in a particular case and order proceedings as it directs * * *," and this Court's Order of September 28, 2005, constitutes just such an order.

4. Petitioner also misses the mark in contending (Brief at 12-13) that TSA's reliance on information designated as "SSI" or "sensitive security information" should not be considered by this Court ex parte and in camera, because "SSI itself need not constitute security information at all" and, in addition, "need not be secret" inasmuch as "TSA widely distributes information about name lists, boarding procedures, and other SSI to airlines and their staff." Under 49 U.S.C. § 114(s)(1)(C), "the Under Secretary [of Transportation for Security] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). Pursuant to that authority, the Under Secretary has defined a set of information known as "SSI" or "sensitive security information" (see 49 C.F.R. § 1520.3), and has directed that such information shall not be disclosed except in certain limited circumstances not applicable here. 49 C.F.R. § 1520.9(a)(1) ("A covered person must * * * disclose * * * SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA."). The Under Secretary has defined SSI to include "[a]ny aircraft operator or airport operator security program" and "[a]ny Security Directive or order * * * [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i). By regulation, aircraft operators must also "[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know." 49 C.F.R. § 1544.103(b)(4). Thus, in Jifry, the D.C. Circuit held that SSI and law enforcement sensitive information was properly reviewed ex parte and in camera. See 370 F.3d at 1182.

5. Finally, petitioner's contention (Motion at 14-15) that this Court order TSA to produce specific categories of information, should also be rejected. As noted above, the Government has a "compelling interest in protecting * * * the secrecy of information important to our national

security," Snepp, 444 U.S. at 509 n.3, and the Executive Branch is correspondingly vested with broad constitutional authority "to classify and control access to [such] information," and "to determine who may have access to it," authority which the courts may not intrude upon at least absent the most extraordinary of circumstances. See Dep't of the Navy v. Egan, 484 U.S. at 527-30. Courts of appeals have therefore consistently rejected requests that classified information be provided to private parties or their counsel during litigation against the Government. See Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003) (district court abused its discretion by ordering release of classified information to plaintiffs' counsel); Pollard v. FBI, 705 F.2d 1151, 1153 (9th Cir. 1983) (where the claimed exemption is national defense or foreign policy secrecy, it is "not necessary that additional reasons be recited for excluding Pollard's attorney from the in camera proceedings"); Jabara v. Webster, 691 F.2d 272, 274 (6th Cir. 1982) (rejecting defendant's claim that "the court should not consider the materials in the classified appendix at all unless the materials are made available to him or at least to his counsel subject to protective order"); Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982) ("The risk presented by participation of counsel * * * outweighs the utility of counsel, or [the] adversary process"); Hayden v. NSA. 608 F.2d 1381, 1385-86 (D.C. Cir. 1979) ("To the best of our knowledge, this privilege [of reviewing classified information *in camera*] has never been afforded a private attorney in a national security case * * *."), cert. denied, 446 U.S. 937 (1980). As the D.C. Circuit has recognized: "[O]ur nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983), cert. denied,465 U.S. 1038 (1984).

Consequently, the Court should reject petitioner's request that he be provided with specific classified or other protected information pertaining to him. See People's Mojahedin Org. of Iran, 327 F.3d at 1242 (holding that "due process require[s] the disclosure of only the unclassified portions of the administrative record") (emphasis in original).[3]

CONCLUSION

For the foregoing reasons, petitioner's motion for reconsideration should be denied.

Respectfully submitted,

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Dated: October 3, 2005

[3] Petitioner's reliance on American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995), is misplaced. The Supreme Court subsequently ruled that the lower federal courts lacked jurisdiction in the litigation. See Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). In any event, the Ninth Circuit's reasoning is in conflict with virtually every other circuit court opinion that has addressed the matter.

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, Assistant U.S. Attorney, certify that I caused copies of the **Response to Motion to Reconsider Allowance of Motion to File Materials under Seal for Ex Parte and In Camera Review and, in the Alternative, for an Order Compelling Production of as Much Information as Possible,** to be served by first-class mail on the petitioner's counsel, Hugh Dun Rappaport, Krokidas & Bluestein LLP, 600 Atlantic Avenue, Boston, MA 02210; and Sarah R. Wunsch, ACLU of Massachusetts, 211 Congress Street, Boston, MA 02110, on October 3, 2005.

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