IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL-HARAMAIN ISLAMIC FOUNDATION, INC., *et al.*,	)	
Plaintiffs/Appellees,	)	
v.	)	No. 06-36083 (Consolidated with Nos. 06-17132/17137)
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Defendants/Appellants.	)	

GOVERNMENT'S MOTION PROPOSING PROCEDURES FOR FILING SEPARATE PUBLIC AND SEALED VERSIONS OF ITS BRIEFS TO PROTECT CLASSIFIED INFORMATION IN THE RECORD

For the following reasons, George W. Bush, President of the United States, et al., defendants-appellants in the above-captioned matter, hereby respectfully request that the Court approve procedures for filing both public and sealed *ex parte/in camera* versions of the Government's briefs, as described below, in order to account for the fact that the record contains sensitive classified information that the Government's briefs must discuss. See Ninth Circuit Rule 27-13. We have previously filed a materially identical motion in *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir.), with which this appeal has now been consolidated by this Court.

1. Plaintiffs in this action are Al-Haramain Islamic Foundation, Inc., an entity designated by the United Nations and the United States as a terrorist organization, and two lawyers affiliated with Al-Haramain. In their complaint, Plaintiffs alleged that, in March and April of 2004, they were subjected to assertedly unlawful Presidentially-authorized foreign intelligence surveillance, and sought damages and equitable relief. The Government formally invoked the state secrets privilege, and moved to dismiss and for summary judgment, on the ground that plaintiffs cannot establish standing or a *prima facie* case, and the Government cannot seek to refute standing or defend the case on the merits, without recourse to highly classified state secrets concerning foreign intelligence gathering.

In a September 2006 ruling, the district court rejected the argument that the state secrets privilege requires dismissal. *Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215 (D. Or. 2006). Relying on the fact that plaintiffs had inadvertently been shown a classified document during the Treasury Department's terrorist designation process, the court held that they were entitled to attempt to prove standing and a *prima facie* case based on their recollection of the document's contents. The court on this basis denied the Government's motion to dismiss, and *sua sponte* certified its order for interlocutory appeal under 28 U.S.C. 1292(b). This Court granted interlocutory review, and subsequently consolidated this appeal with *Hepting v. AT&T Corp.*, Nos. 06-17132, 06-17137 (9th Cir.).

This Court has issued a briefing schedule, pursuant to which the appellants' opening brief is due on today's date, June 6, 2007.

2. The Government hereby respectfully requests that the Court approve the procedures below for filing both public and sealed *ex parte/in camera* versions of the Government's briefs. In the district court proceedings in this case, the Government submitted both public and non-public versions of its briefs in order to provide pertinent classified information to the court while at the same time protecting the secrecy of the information. Similarly, in support of its assertion of the state secrets privilege, the Government submitted public and non-public versions of its declarations. All of these non-public materials contain sensitive classified information, the improper disclosure of which would violate federal law and threaten grave harm to national security.

The Government cannot fully explain its position on this appeal without submitting classified information in its briefs for the judges of this Court to read *ex parte/in camera*. According to plaintiffs' complaint, plaintiffs have been subjected to assertedly unlawful Presidentially-authorized foreign intelligence surveillance. Properly describing the context for the alleged activity that is the subject of this suit, including even confirming or denying certain aspects of that alleged activity, necessarily entails the discussion of classified information.

Crucially, the briefs and declarations at issue here are not merely "under seal." Because they contain classified Top-Secret "Sensitive Compartmented Information," access restrictions are even more stringent than would normally apply even in the context of Top-Secret classified information, and requirements for physical custody and storage are heightened as well. See 50 U.S.C. § 403-1(j); Exec. Order 12,958 § 4.3(a)(2), 68 Fed. Reg. 15,326 (2003) (as amended by Exec. Order 13,292); DCI Directive No. 6/1 ("Security Policy for Sensitive Compartmented Information"); DCI Directive No. 6/9 ("Physical Security Standards for Sensitive Compartmented Information Facilities"). The highly restricted access to this information, and the special security requirements for its handling and storage, underlie the procedures that the Government is proposing herein and has utilized in the district court proceedings in this case and other cases like it. See 28 C.F.R. §§ 17.17(c), 17.46(a)-(c).

Under these circumstances, we propose the following procedures, which we hereby respectfully ask this Court to approve. On the due dates for the Government's briefs (starting with today's due date for the opening brief), the Government will submit copies of its full, unredacted brief to the appropriate Department of Justice court security officer. As in the district court, the full, unredacted brief and underlying record material would be made available by the court security officer to the judges of this Court assigned to the case. No other Court personnel would have

access to this highly classified material, but the judges would have whatever access they need, consistent with proper security arrangements. (The Department's court security officers are responsible for safeguarding the integrity of documents in their custody and have no authority to alter them.)

Concurrently with the submission of the unredacted brief with the Justice Department court security officer, we will file with this Court's Clerk's Office, and serve on plaintiffs' counsel, copies of the public, redacted version of the brief, the contents of which would be the same as the non-public version, but with all classified information excised. The notation "[REDACTED TEXT]" would appear at any place in the public brief where classified material had been redacted; thus, the reader would be made aware at every point in the text where a redaction had been made. In addition to filing the public version of the brief with the Clerk's Office, we would also at the same time publicly file and serve a "Notice of Lodging," explaining that, concurrently with its filing of the public brief, the Government was also lodging a non-public, classified version of the brief with the Department of Justice court security officer. Thus, while the Government's unredacted briefs would not be publicly available or served on plaintiffs' counsel, but would be made available by the Department's court security officer to this Court's judges assigned to this case, the fact of the existence and submission of these pleadings would be publicly disclosed and would form part of this Court's public record of the case.

With respect to this appeal, when a judge on the panel assigned to this case indicates to the court security officer that he or she wishes to review the classified materials, the court security officer will make arrangements with the Court to hand-carry the materials in question from Washington, D.C. The judge, but not the judge's staff or the Court's staff, will then be able to examine the pertinent documents. If the judge takes any notes as part of his or her review, the notes themselves might become classified and have to be treated as such. At the end of the judge's review, the court security officer will retrieve the classified documents, and return them to Washington, D.C., for secure storage under the control of the court security officer.

These are essentially the same procedures that we followed in the district court proceedings in this case, with the district court's approval, as well as in similar cases in other district courts and courts of appeals. We note, in particular, that we have utilized the procedures described herein in an ongoing appeal in the Sixth Circuit involving issues related to those in this case, including issues involving the state secrets privilege. See *ACLU v. NSA*, Nos. 06-2095, 06-2140 (6th Cir.). And, as noted above, we have filed a motion essentially identical to this one, and have followed the procedures outlined therein, in *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir.), which this Court has recently consolidated with the present appeal.

CONCLUSION

For the foregoing reasons, this Court should approve the procedures described above for submitting public and sealed versions of the Government's briefs in this matter, because sensitive classified information must be provided to the appropriate judges of this Court.

Respectfully submitted,

PAUL D. CLEMENT
Solicitor General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
THOMAS M. BONDY
ANTHONY A. YANG
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-3602

JUNE 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2007, I dispatched the foregoing motion to the following by Federal Express and electronic mail:

Counsel for Plaintiffs-Appellees:

– via Federal Express & electronic mail:

Lisa R. Jaskol, Esq.
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436
ljaskol@horvitzlevy.com

– via electronic mail only:

Jon B. Eisenberg, Esq. (jon@eandhlaw.com)
Steven Goldberg, Esq. (goldberg@goldbergmechanic.com)
Thomas H. Nelson, Esq. (nelson@thnelson.com)
Zaha S. Hassan, Esq. (zahahassan@comcast.net)
J. Ashlee Albies, Esq. (ashlee@albieslaw.com)

Counsel for Intervenor (via Federal Express & electronic mail):

Charles F. Hinkle, Esq.
Emilie K. Edling, Esq.
Stoel Rives, LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
cfhinkle@stoel.com; ekedling@stoel.com

Thomas M. Bondy