

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AL HARAMAIN ISLAMIC FOUNDATION INC., et al.,)	
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 10-35032
)	
UNITED STATES DEPARTMENT OF THE TREASURY, et al.,)	
)	
Defendants-Appellees.)	
)	

MOTION FOR PROCEDURES FOR FILING IN THIS APPEAL DOCUMENTS CONTAINING CLASSIFIED INFORMATION

Defendants-appellees United States Department of Treasury *et al.* respectfully move this Court to approve the procedures proposed in this motion for the Government to file both public and classified *ex parte/in camera* versions of the Government's appellee brief, as well as classified *ex parte/in camera* materials that are part of the district court record in this case. The Government's appellee brief is due by September 29, 2010. We make this motion because the record here contains highly classified information, which must be discussed in the Government's appellee brief in order to provide optimal assistance to this Court in the appeal. *See* Ninth Circuit Rule 27-13. Moreover, we note that the International Emergency Economic Powers Act ("IEEPA") – the statute under which plaintiffs were designated for their

control by and support of Specially Designated Global Terrorists – explicitly authorizes such *ex parte/in camera* submissions. *See* 50 U.S.C. § 1702(c).

The procedures proposed here are identical to the ones successfully utilized by the district court in this case, as well as by this Court in the recent appeals in *Mohamed et al. v. Jeppesen Dataplan, Inc.*, No 08-15693 (9th Cir.), *Al-Haramain Islamic Foundation, Inc. et al. v. Bush*, No. 06-36083 (9th Cir.), and *Hepting v. AT&T Corp.*, No. 06-17137 (9th Cir.). As discussed below, these procedures will provide the judges of this Court assigned to this case with ample access to the documents containing classified information, while at the same time properly protecting that sensitive information, and permitting the maximum allowable access by the public and the private parties and attorneys in this case, consistent with protecting national security interests.

1. Plaintiff Al Haramain Islamic Foundation, Inc. (“AHIF-Oregon”), the United States chapter of the former Saudi-based Al Haramain Islamic Foundation, challenges the Secretary of the Treasury’s decision to “designate” it under IEEPA and Exec. Order 13224 because of its control by, and support of, Specially Designated Global Terrorists (“SDGT”). As the district court opinion in this case notes, the Secretary’s decision in this case was based in part on classified information. ER 0079. That complete classified record, along with a classified version of the

Government's brief, was submitted to the district court pursuant to IEEPA, 50 U.S.C. § 1702(c).

2. On appeal, the Government wishes to provide this Court with similar access to pertinent portions of the classified record in this case. Therefore, it plans to submit a Classified Supplemental Excerpts of Record containing the most relevant materials necessary for this Court's review of the Secretary's designation decision. The Government also intends to submit a classified version of its Brief for Appellees, in which it can most effectively lay out for this Court the correctness of the Secretary's decision.

It is important to understand that the appellee brief and Classified Supplemental Excerpts of Record would not merely be "under seal." Because the key material here contains 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); Executive Order 13,526 ("E.O. 13,526") § 4.3, 75 Fed. Reg. 707 (Jan. 5, 2010); Intelligence Community Directive ("ICD") 703 ("Protection of SCI and Sources & Methods"). The highly restricted access to this information, and the special security requirements for its proper handling and storage, underlie the procedures we are proposing, which were used successfully in the district court proceedings in this case with respect to the

classified *ex parte/in camera* Administrative Record and briefs. *See* 28 C.F.R. §§ 17.17(c), 17.46(a)-(c). These same concerns prompted the Government to file motions – which this Court granted – to employ similar procedures in *Jeppesen Dataplan*, *Al-Haramain*, and *Hepting*, even though those cases, unlike this one, did not arise under IEEPA, which explicitly authorizes such *ex parte/in camera* submissions.

3. The Government respectfully requests that the Court approve the following procedures for filing both public and *ex parte/in camera* classified versions of the Government's appellee brief, as well as its Classified Supplemental Excerpts of Record:

a. By the due date for the Government's brief, we will submit copies of the full, unredacted appellee brief to the appropriate Department of Justice Court Security Officer in Washington, D.C., who will store and protect the document, maintaining its integrity as part of this Court's record (Court Security Officers are responsible for safeguarding the integrity of court filings in their custody, and have no authority to alter them). This full, unredacted brief, as well as the Classified Supplemental Excerpts of Record, would then be made available by the Court Security Officer to the judges of this Court assigned to the case. Those judges will have whatever *ex parte/in camera* access to these documents that they need, consistent with proper security arrangements.

b. Concurrently with the submission of the Government's unredacted brief to the Court Security Officer, we will file with this Court's CM/ECF system, and serve on plaintiffs' counsel, copies of a public, redacted version of the brief, the contents of which will be the same as the non-public version, but with all classified information excised. The notation "[REDACTED TEXT]" will appear at any place in the public brief where classified material has been redacted; the reader will be made aware at every point in the text where a redaction had been made.

c. In addition to filing the public version of the brief with the Clerk's Office, we will also publicly file and serve a "Notice of Lodging," explaining that, concurrently with its filing of the public brief, the Government is also lodging a non-public, classified version of the brief and the Classified Supplemental Excerpts of Record with the Court Security Officer.

Thus, while the Government's unredacted brief and Classified Supplemental Excerpts of Record will not be publicly available or served on plaintiffs' counsel, they will be made readily available by the Court Security Officer to this Court's judges assigned to this case. Moreover, the fact of the existence and submission of these classified materials will be publicly disclosed and will form part of this Court's public record of the case.

4. 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 Officer will make arrangements with the Court to deliver the materials in question. The judge will then be able to fully examine the pertinent documents. At the end of the judge's review, the Court Security Officer will retrieve the classified documents for secure storage.

5. These are the same procedures followed successfully in the district court in this case. We note that plaintiffs object to the Government's use of classified information they have not seen. However, the district court correctly rejected that challenge on the merits, ER 0079-0082, as has every other court to consider it in the context of IEEPA and other terrorist designation statutes. *See, e.g., Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (IEEPA designation); *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (same); *see also People's Mojahedin Organization of Iran v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003) (AEDPA designation); *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001) (same).¹

¹ Moreover, numerous courts – including this Circuit – have upheld the use of *ex parte/in camera* evidence in other contexts. *See United States v. Ott*, 827 F.2d 473 (9th Cir. 1987) (FISA information); *see also United States v. Stewart*, 590 F.3d 93, 129 (2d Cir. 2009) (same); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005) (same); *United States v. Belfield*, 692 F.2d 141, 147-48 (D.C. Cir. 1982). That is true even where there is no express statutory authorization for such submissions, as there is in IEEPA. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir. (continued...))

In any event, this Court need not resolve the dispute over access to classified information in order to grant the Government's motion. If it were to agree ultimately with plaintiffs that access to this information is required, the appropriate course would be to remand the case to the district court to address in the first instance the myriad issues surrounding plaintiffs' request for access to classified material.

CONCLUSION

For the foregoing reasons, this Court should approve the procedures described above for submitting public and *ex parte/in camera* versions of the Government's appellee brief and Classified Supplemental Excerpts of Record in this matter, so that sensitive classified information can properly be made available to the appropriate judges of this Court.

¹(...continued)

1998) (state secrets); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (same); *Pollard v. FBI*, 705 F.2d 1151, 1153 -1154 (9th Cir. 1983) (FOIA); *see also, e.g., Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990); *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 973-74 n.3 (D.C. Cir. 1982); *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982); *Hayden v. NSA*, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978); *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968).

Respectfully submitted,

s/ Douglas N. Letter

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SEPTEMBER 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2010, I filed and served the foregoing Motion for Filing in this Appeal Documents Containing Classified Information by filing it with the Court's CM/ECF system.

s/Michael P. Abate
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SEPTEMBER 2010