

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Al Haramain Islamic Foundation, Inc., <i>et al.</i> ,)
)
Plaintiffs-Appellants,)
)
v.) No. 10-35032
)
United States Department of the Treasury, <i>et al.</i> ,) D.C. No. 07-CV-1155-KI
) District of Oregon, Portland
Defendants-Appellees.)
)

**APPELLANTS’ RESPONSE IN OPPOSITION
TO MOTION FOR PROCEDURES FOR FILING IN THIS APPEAL
DOCUMENTS CONTAINING CLASSIFIED INFORMATION**

INTRODUCTION

Appellants Al Haramain Islamic Foundation, Inc. (AHIF-Oregon) and Multicultural Association of Southern Oregon respectfully submit their opposition to the Appellees’ Motion for Procedures for Filing in This Appeal Documents Containing Classified Information (Sept. 15, 2010).

For the same reasons that it violated due process for the Office of Foreign Assets Control (OFAC) to base its designation and redesignation decisions on classified evidence that AHIF-Oregon had no opportunity to confront or rebut, so, too, it would violate due process for this Court to resolve this appeal on the basis of such classified evidence. Accordingly, for the reasons set forth below, and in more

detail in Point III of Appellants' Opening Brief, this Court should decline OFAC's invitation to consider classified evidence in resolving the merits of this appeal. At a minimum, this Court should not consider the classified evidence until it has first resolved whether due process permits it to do so where, as here, OFAC has made no effort whatsoever to pursue available alternative avenues that would simultaneously protect the confidentiality of its information and provide AHIF-Oregon some opportunity to respond to that evidence.

FACTUAL BACKGROUND

OFAC relied almost exclusively on classified evidence to designate and redesignate AHIF-Oregon as a "specially designated global terrorist." Approximately 22 of the 26 pages of its memorandum supporting redesignation are partially or completely redacted, including the vast majority of the pages concerning the individuals (Mr. Al-Aqil and Mr. Al-Buthe) and the organization (Al Haramain Islamic Foundation in Saudi Arabia and its "branch offices") whose association with AHIF-Oregon formed the predicate for OFAC's redesignation decision. ER 2026-2051. As elaborated in Appellants' Opening Brief, the unclassified evidence provides no support for the redesignation, and the district court relied on the classified record in upholding the redesignation (even though it simultaneously ruled that AHIF-Oregon's due process rights were violated by the redesignation process).

Moreover, OFAC has failed to pursue available alternative avenues for proceeding that would simultaneously protect the confidentiality of any properly classified evidence, and afford AHIF-Oregon a more meaningful opportunity to respond. It has not provided AHIF-Oregon with a declassified summary of any of the classified evidence. And it has not permitted counsel for AHIF-Oregon to review the classified evidence pursuant to security clearances and a protective order. Both alternatives would increase the adversarial fairness of the process, and neither would undermine the government's interest in maintaining the confidentiality of its information. A district court reviewing a similar OFAC blocking order under the "terrorist designation" authority recently required OFAC to pursue precisely such steps in order to satisfy due process. *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (KindHearts II)*, No. 3:08-CV-2400, 2010 WL 1840841, at *16-17 (N.D. Ohio May 10, 2010) (requiring the provision of an adequate declassified summary and access to classified evidence by counsel with security clearances).

I. RELYING ON CLASSIFIED EVIDENCE PRODUCED IN CAMERA AND EX PARTE TO RESOLVE THE MERITS OF THIS APPEAL WOULD VIOLATE DUE PROCESS

For the same reasons that it violates due process for OFAC to predicate its redesignation decision on classified evidence without affording AHIF-Oregon a meaningful opportunity to respond, so, too, it would violate due process for this

Court to rest *its* decision in this appeal on such classified evidence. *See generally* Appellants' Opening Br., Point III.

As the Supreme Court has warned, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951); *see also United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) ("due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other").

This rule applies to civil litigation as well as administrative proceedings. "It is . . . the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986)), *aff'd by an equally divided Court*, 484 U.S. 1 (1987); *see also Vining v. Runyon*, 99 F.3d 1056, 1057 (11th Cir. 1996) ("[o]ur adversarial legal system generally does not tolerate ex parte determinations on the merits of a civil case'" (alteration in original) (quoting *In re Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. Unit B Sept. 1981))).

Accordingly, numerous courts have ruled that, where the government relies on classified evidence and that evidence is necessary to the resolution of a civil case, the government must give some form of access to that evidence to opposing

counsel. *See, e.g., In re Nat'l Sec. Agency Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1089 (N.D. Cal. 2009) (ordering the government to process the plaintiffs' counsel for "security clearances necessary to be able to litigate the case"); *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009) (same), *vacated due to settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010)¹; *Doe v. Gonzales*, 386 F. Supp. 2d 66, 71 (D. Conn. 2005) (ordering the government "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 th[e] case"); *see also Al Odah v. United States*, 559 F.3d 539, 547-48 (D.C. Cir. 2009) (affirming that Guantánamo habeas counsel are entitled to access to classified evidence or an adequate substitute, if feasible); *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2009 WL 50155 (D.D.C. Jan. 9, 2009) (same); *In re Guantanamo Detainee Cases*, 344 S. Supp. 2d 174, 179-80 (D.D.C. 2004) (providing for security clearances for counsel); *Anderson v. ITT Indus. Corp.*, 92 F. Supp. 2d 516, 519 (E.D. Va. 2000) (counsel given security clearance); *United States v. Lockheed Martin Corp.*, No. 1:98-CV-731, 1998 WL 306755, at *5 (D.D.C. 1998) (same).

¹ Chief Judge Lamberth vacated his opinion in *Horn* to consummate the government's \$3,000,000 settlement offer. 699 F. Supp. 2d at 238. He expressed "misgiving" about his decision to vacate, but was "mindful" that vacatur would leave the "reasoning [of his opinion] unaltered, to the extent it is deemed persuasive." *Id.*

Prior decisions reviewing “terrorist” designations are not to the contrary, as the D.C. Circuit recently made clear in *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State (PMOI II)*, 613 F.3d 220, 230-31 (D.C. Cir. 2010). The court there explained that prior terrorist-designation cases suggest only that reliance on *in camera* evidence “can satisfy due process requirements, at least where the [government] has not relied critically on classified material and the unclassified material provided to the [designated entity] is sufficient to justify the designation.” *PMOI II*, 613 F.3d at 230-31. But “none of the [terrorist-designation] cases decides whether an administrative decision relying critically on undisclosed classified material would comport with due process because in none was the classified record essential to uphold [the] designation.” *Id.* at 231; *see, e.g., People’s Mojahedin Org. of Iran v. Dep’t of State (PMOI I)*, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (“even the unclassified record taken alone is quite adequate to support the Secretary’s determination”); *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 733-34 (D.C. Cir. 2007) (finding that the unclassified record “provides substantial evidence for the conclusion that IARA-USA” is designatable).

The fact that Congress has statutorily authorized the courts to consider such evidence does not resolve whether its consideration in a specific case accords with due process. Thus, before reviewing OFAC’s classified evidence, this Court

should rule on AHIF-Oregon's constitutional challenge to the consideration of such evidence at all, where, as here, no efforts have been made to reduce the inherent unfairness of a one-sided proceeding, even where avenues are available that would not undermine the government's interest in confidentiality.

CONCLUSION

For all the above reasons, this Court should decline to consider classified evidence on an *ex parte* and *in camera* basis without first ensuring that AHIF-Oregon's due process right to notice and a meaningful opportunity to respond to such evidence is fully protected.

/s/ David Cole

David Cole
Amanda Shanor, Thomas H. Nelson,
J. Ashlee Albies, Lynne Bernabei, and
Alan R. Kabat
Attorneys for Plaintiffs-Appellants

Certificate of Service

I hereby certify that on this 22nd day of September, 2010, a copy of the foregoing Appellants' Response in Opposition was served on counsel of record by this Court's ECF system, and by electronic mail, to:

Douglas N. Letter, Esquire
Michael P. Abate, Esquire
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, N.W., No. 7318
Washington, D.C. 20530

/s/ Alan R. Kabat

Alan R. Kabat
Bernabei & Wachtel, PLLC
1775 T Street, N.W.
Washington, D.C. 20009-7124
(202) 745-1942 (Tel)
(202) 745-2627 (Fax)
Kabat@bernabeipllc.com
Attorney for Plaintiffs-Appellants