UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 CAPRONI, in her official capacity as Senior Counsel to the Federal Bureau of Investigation,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR DISCLOSURE OF GOVERNMENT'S *EX PARTE* FILING OR, IN THE ALTERNATIVE, TO REQUIRE THE GOVERNMENT TO PRODUCE AN UNCLASSIFIED SUMMARY

04 Civ. 2614 (VM)

Plaintiffs' opening brief amply demonstrated why due process requires the government to disclose its *ex parte* affidavit to plaintiffs' counsel or, at a minimum, to provide a substitute disclosure that explains the substance of its classified *ex parte* filing in an unclassified form. Plaintiffs submit this brief reply to respond to the principal contentions raised in the government's opposition brief.

1. The government argues that it has exclusive and unreviewable authority with regard to all decisions concerning classified information and security clearances and that, as a result, this Court lacks authority to order the government to share its *ex parte* evidence with opposing counsel. 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 ("Gov't Br.") at 2. The government is incorrect. Courts are empowered, and indeed constitutionally required, to review Executive determinations with regard to security clearances where competing constitutional rights are at stake. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592

(1988) (reviewing constitutional challenge by former CIA employee found ineligible for a security clearance and terminated); *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 289 (D.C. Cir. 1993) (holding "[i]t is simply not the case that all security-clearance decisions are immune from judicial review"); *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990) (finding "federal courts may entertain colorable constitutional challenges to security clearance decisions"); *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) (same); *In re NSA Telecomms. Records Litigation*, 564 F. Supp. 2d 1109, 1121 (N.D. Cal. 2008) (holding "the authority to protect national security information is neither exclusive nor absolute in the executive branch"); *In re NSA Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1088 (N.D. Cal. 2009).[1]

The judiciary also routinely conducts independent assessments of Executive branch decisions involving classified information. Courts determine whether information is properly classified in the context of pre-publication review determinations, *see, e.g.*, *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring *de novo* judicial review of pre-publication classification determinations), and in the context of the Freedom of Information Act ("FOIA"), *see, e.g.*, *Halpern v. FBI*, 181 F.3d 279 (2d Cir. 1999) (rejecting government's Exemption 1 claim); *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (stating, in FOIA case, that the "court must make a *de novo* review of the agency's classification decision"). In the state secrets context, federal courts routinely engage in

[1] In asserting that the Executive has exclusive control over classification and clearance matters, the government relies heavily on *Dep't of Navy v. Egan*, 484 U.S. 518 (1988). Gov't Br. 2-4, 8. *Egan* concerned only the "narrow question" whether the Merit Systems Protection Board had statutory authority to review employee security clearance determinations, *id.* at 520, and expressly observed that the other branches of government can have a role to play in national security-related matters, *id.* at 530; *see also In re NSA Telecomms. Records Litig.*, 564 F. Supp. 2d at 1121 (construing *Egan* narrowly). The Supreme Court's ruling in *Webster v. Doe* shows that the government's reading of *Egan* is overbroad. The *Webster* ruling – issued only four months after *Egan* and joined by the Justice who authored *Egan* – permitted judicial evaluation of a security clearance denial.

independent review to determine whether the disclosure of evidence would harm the nation's security. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 10 (1953).

More importantly, the Court – not the government – is the ultimate arbiter of what due process requires and has the authority to require that all parties to a dispute have access to the evidence. *See* Memorandum in Support of Plaintiffs' Motion for Disclosure of Government's *Ex Parte* Filing or, in the Alternative, to Require the Government to Produce an Unclassified Summary ("Pl. Brief") at 7-9; *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004); *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) (the "power to interpret the Constitution . . . remains in the Judiciary"); *Reynolds*, 345 U.S. at 9-10 (judicial control over the evidence in a case "cannot be abdicated to the caprice of executive officers").

2. The government argues that the Second Circuit concluded that the submission of evidence *ex parte* here is consistent with due process. Gov't Br. at 2, 9, n.2. This is not true. Nothing in the Second Circuit's ruling questioned this Court's (correct) conclusion that its authority to "assess what process is due on a case-by-case basis is undisturbed by the language of § 3511(e)." *Doe*, 500 F. Supp. 2d at 423.[2] The constitutionality of § 3511(e) was not at issue on appeal. The Second Circuit did not engage in any analysis of what due process requires in this context and it certainly did not categorically endorse the consideration of *ex parte* evidence in the context of NSL-related challenges. The Court merely observed that the NSL statute *permitted* the introduction of *in camera* evidence. *See John Doe, Inc. v. Mukasey*, 549 F.3d 861,

[2] The government previously agreed with this interpretation of § 3511(e). *See* Mem. of Law in Opp. to Pls.' Mot. for Partial Summ. J. and in Supp. of Government's Mot. to Dismiss or for Summ. J., *Doe v. Holder*, No. 04-2614, 46 (S.D.N.Y. Nov. 8, 2006) (dkt. no. 148) (asserting that nothing in § 3511(e) "requires the Court to accord any particular weight to the government's evidence" and does not "strip the district court of its inherent authority to determine that a matter submitted need not remain under seal.").

881 (2d Cir. 2008). That the statute *permits* the government to introduce evidence *in camera* and *ex parte* does not foreclose a case-by-case assessment of whether due process requires the evidence to be shared or, at a minimum, an unclassified summary of the *ex parte* filing provided to counsel. The Second Circuit said nothing that suggests otherwise.

3. The government's attempt to distinguish it notwithstanding, Gov't Br. 13-14, *In re NSA Telecomms. Records Litig.* actually illustrates the principles plaintiffs have articulated regarding the Court's power. Although Judge Walker has not yet ordered the disclosure of particular classified evidence, he has ordered – based on due process concerns – that opposing counsel be cleared, 595 F. Supp. 2d at 1089, and has stated that although plaintiffs should base their motion on unclassified evidence, "[i]f defendants rely upon the Sealed Document or other classified evidence in response, the court will enter a protective order and produce such classified evidence to those of plaintiffs' counsel who have obtained top secret/sensitive compartmented information clearances . . . for their review." *In re NSA Telecomms. Records Litig.*, 564 F. Supp 2d 1109 (June 5, 2009) (order). The government's attempt to distinguish *Library Connection* fares no better. The security clearance issue was never resolved, and no *ex parte* evidence disclosed, because the court ruled in plaintiffs' favor and ordered the gag order lifted.

4. Throughout its brief, the government relies heavily on state secrets privilege and FOIA cases to support its argument that courts often reject demands for access to classified evidence. *See, e.g.,* Gov't Br. 3, 11 (citing *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982) and *Earth Pledge Found. v. CIA*, 128 F.3d 788 (2d Cir. 1997)). But the refusal to share *ex parte* information with opposing counsel in those unique contexts rests on justifications which are inapposite here: ordering disclosure of putative state secrets would preemptively invade the asserted privilege; similarly, with respect to FOIA, sharing *ex parte* evidence would moot

litigation whose entire purpose is disclosure of secret records. These cases represent two narrow exceptions to the main rule that evidence necessary to decide the *merits* of a suit must be shared with opposing counsel. *See In re John Doe Corp.*, 675 F.2d 482, 490 (2d Cir. 1982) ("[w]e do not suggest that in camera submissions are to be routinely accepted").[3]

5. The government's suggestion that granting security clearance to plaintiffs' counsel would create a risk of inadvertent disclosure of sensitive information, Gov't Br. at 6-7, is refuted by the history of litigation surrounding national security letters. On at least one occasion, plaintiffs' counsel has affirmatively alerted the government's counsel when documents prepared for filing by the government did not fully redact all sealed information. *See* Declaration of Melissa Goodman, *Doe v. Gonzales*, No. 05-4896 (2d Cir. filed Sept. 19, 2005).[4] In other words, plaintiffs' counsel ensured that sealed material was not inadvertently disclosed due to oversight by government lawyers.

It is particularly perplexing that the government would refer to the Library Connection case as an example of the risks associated with granting clearance to plaintiffs' counsel. The government suggests that actions by plaintiffs' counsel in that case "led to inappropriate speculation about the plaintiff's true identity." Gov't Br. at 7 n.1. But the media report the government invokes makes clear that the documents which invited such "speculation" were subject to redaction by the government's counsel. *See* Alison L. Cowan, *Hartford Libraries Watch as U.S. Makes Demands*, N.Y. Times, Sept. 2, 2005 ("Careful reading of court records

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[3] The government cites to *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007), but that case is inapposite. In *Tabbaa,* the Second Circuit reviewed *ex parte* information in "an abundance of caution" to confirm evidence that was presented in the public record. *Id.* at 93 n.1. Here, the government has introduced information *ex parte* not merely to supplement or confirm the public record but *in lieu* of a public record.

[4] This declaration can be found as Appendix D to Plaintiffs-Appellees' Memorandum in Support of Emergency Motion to Vacate Stay Pending Appeal at http://action.aclu.org/nsl/legal/aclu_memo_vacate_stay_092205.pdf.

released on Wednesday in the Bridgeport case, *with large sections heavily blacked out*, indicate that the recipient of the national security letter was a library consortium based in Connecticut, not a public library.") (emphasis added). Follow up reporting demonstrated that the plaintiff's identity in that case was revealed at least in part due to oversights by counsel for the government:

> But even as the federal government was arguing in court that it needed to keep Library Connection's name secret, it had carelessly left its name sprinkled throughout court records. It was right there, in bold type, on Page 7 of an Aug. 16 memorandum of law, in between black splotches applied by government censors to wipe out hints of the organization's identity. It was also on Page 18 of the memo, and it was visible in the header line on a court Web site to anyone who looked up the case using the file number.

Alison L. Cowan, *A Court Fight to Keep a Secret That's Long Been Revealed*, N.Y. Times, Nov. 18, 2005. The government's claim that granting security clearance to opposing counsel in litigation inherently creates risks of disclosure is erroneous; its assertion such a risk "is demonstrated by the history of this case," Gov't Br. at 7 n.1, is simply untenable.

6. The government suggests that plaintiffs' participation in this proceeding is entirely unnecessary. Gov't Br. 16. This argument overlooks the benefits of adversarial testing of facts and arguments. The importance of adversarial testing does not evaporate simply because the government invokes a national security interest. *See, e.g., McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (even where court is evaluating whether information is properly classified, "courts should . . . strive to benefit from 'criticism and illumination by [the] party with the actual interest in forcing disclosure'") (citing *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C.Cir.1973)). The assumption that plaintiffs could not present any facts or arguments that would illuminate the constitutionality of or need for this gag order, or contradict the facts provided by the government, is incorrect. However this Court resolves the instant motion, plaintiffs intend to respond substantively to the government's June 17 filing, but plaintiffs filed the instant motion because

their ability to prepare a meaningful response will be greatly affected by knowledge of the government's actual arguments, not merely those which plaintiffs' counsel succeed in surmising.

7. The government also repeatedly denigrates plaintiffs' interest in this proceeding. Gov't Br. 11, 15. This proceeding, however, concerns whether the FBI can continue a long-standing and onerous restriction on plaintiffs' fundamental free speech rights. The government seeks – entirely on the basis of secret evidence – to restrict plaintiffs' ability to speak publicly about the government's use (and potential abuse) of a highly controversial surveillance tool. *See Doe,* 500 F. Supp. 2d at 379 ("The government's use of NSLs to obtain private information about activities of individuals using the internet is a matter of the utmost public interest.").

8. Finally, it is difficult to fathom why the government is incapable of providing *some* explanation for why it believes this gag order is necessary in unclassified form. Gov't Br. 16-17. It is hard to imagine why, for example, the government could not disclose to plaintiffs' counsel (even under a protective order if necessary) that it believes the gag order is necessary because disclosure would tip off the NSL target, because it could alert a foreign terrorist organization that it or one of its operatives is under investigation, or because it would allow a terrorist organization to learn about the FBI's investigatory methods. The government has made these general arguments publicly in the past. *See* Pl. Br. at 12-13. But even disclosures at this level of generality would assist plaintiffs in formulating a meaningful response to whether the gag order is justified here.

CONCLUSION

For the reasons stated above and in plaintiffs' opening brief, plaintiffs respectfully request that the Court order the government to provide plaintiffs' counsel with full access to its *ex parte* affidavit, or, in the alternative, to order the government to produce an unclassified

summary of its *ex parte* declaration that is sufficiently detailed to permit plaintiffs meaningfully to respond to the government's arguments.

Respectfully submitted,

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July 13, 2009