

[ARGUMENTS HELD ON MAY 15, 2007]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAJI BISMULLAH, et al.,)	
Petitioners,)	
v.)	No. 06-1197
)	
ROBERT M. GATES, Secretary of Defense)	
Respondent.)	
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HUZAIFA PARHAT, et al.)	
Petitioners,)	
v.)	No. 06-1397
)	
ROBERT M. GATES, Secretary of Defense,)	
Respondent.)	
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**MOTION FOR LEAVE TO FILE *EX PARTE/IN CAMERA*
TOP SECRET-SCI DECLARATIONS FOR JUDGES' REVIEW ONLY**

Respondent hereby moves the Court for leave to file *ex parte/in camera* two "Top Secret-SCI" declarations, to be reviewed only by the judges of this Court, in support of its petition for rehearing in this case. These non-public materials contain highly sensitive compartmentalized classified information, the disclosure of which would threaten grave harm to national security. The reasons for this motion are as follows:

1. In support of its petition for rehearing and rehearing en banc, respondent has attached unclassified declarations from Michael V. Hayden, Director, Central Intelligence Agency; Gordon R. England, Deputy Secretary of Defense; Keith B.

Alexander, Director, National Security Agency; Robert Mueller, Director, Federal Bureau of Investigation; and J. Michael McConnell, Director of National Intelligence. Those declarations generally explain, *inter alia*, the risks to national security imposed by the panel's decision requiring the Government to produce to the Court and counsel the broad class of information – termed “Government Information” – which includes classified material.

A classified Secret-version of the declaration of Director Mueller is being filed with the Court separately under seal and *ex parte/in camera*, through the Court Security Officer.

2. In addition, Top-Secret-SCI declarations from Directors Hayden and Alexander are being filed separately under seal and *ex parte/in camera* through the Court Security Officer. Because these declarations contain highly sensitive compartmentalized classified information, the handling of these declarations require special security precautions to safeguard that information.

Crucially, the 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”). Access to the information contained in these declarations is tightly controlled and limited even within the Executive Branch intelligence agencies. 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 been utilized in other cases. See 28 C.F.R. §§ 17.17(c), 17.46(a)-(c).

3. Under these circumstances, we propose the following procedures for the two Top-Secret SCI declarations, which we hereby respectfully ask this Court to approve.

On the same day (i.e., today, September 7, 2007) that the Government submits its rehearing petition, to which the unclassified declarations are attached, the Government will submit its classified declarations to the appropriate Department of Justice court security officer. The court security officer will delivery the declarations to Chief Deputy Clerk Marilyn Sargent. The Top-Secret SCI declarations may be stored at the Court while the petition remains pending, but must be properly stored within the safe at the Court’s secure facility, with access to that safe limited to the three Clerk Office’s personnel with Top Secret clearances. These personnel would maintain the declarations in closed envelopes in the safe in the secure facility and would only have access in order to deliver the envelopes containing the Top-Secret

SCI declarations to and from the judges of this Court, when requested.

Disclosing the information in these Top-Secret SCI declarations to individuals other than the judges of this Court would be inconsistent with the Government's system to compartmentalize and control access to its most sensitive information, and would increase the risk of public disclosure. As noted above, access to the information contained in these declarations is tightly controlled and strictly limited even within the intelligence agencies. Thus, consistent with the procedures followed in other cases involving the handling of such extremely sensitive information, no other Court personnel (including law clerks), would have access to these highly classified declarations, but the judges would have whatever access they need, consistent with proper security arrangements.

After final disposition of the petition, the court security officer will retrieve the classified documents for long-term secure storage under the control of the court security officer.

CONCLUSION

For the foregoing reasons, this Court should approve the procedures described above for the filing and handling of the Top-Secret SCI classified declarations in support of respondent's rehearing petition.

Respectfully submitted,

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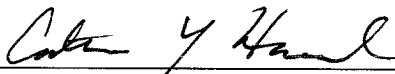
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SEPTEMBER 2007

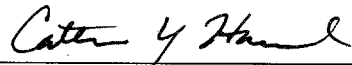
CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2007, I caused copies of the foregoing Motion for Leave to File *Ex Parte/In Camera* Top Secret Declarations for Judges' Review Only to be served upon counsel of record by causing copies to be sent by Federal Express or hand delivery (as specified) to:

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