IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMED SHEIKH ABDIRAHMAN KARIYE; FAISAL NABIN KASHEM; RAYMOND EARL KNAEBLE IV; AMIR MESHAL; STEPHEN DURGA PERSAUD, *Plaintiffs-Appellants,* v. JEFFERSON B. SESSIONS, III, Attorney General of the United States; CHRISTOPHER A. WRAY, Director, Federal Bureau of Investigation; CHARLES H. KABLE IV, Director, Terrorist Screening Center, *Defendants-Appellees*.	No. 17-35634

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO FILE MATERIALS *EX PARTE* AND *IN CAMERA*

I. INTRODUCTION

Plaintiffs oppose the government's motion to file materials with this Court *ex parte* and *in camera*, and respectfully ask the motions panel to refer the parties' dispute for consideration by the merits panel in this case, because the issues raised are inextricably intertwined with issues raised on appeal.[1] The merits panel of this Court can and should rule on the issues raised in this appeal without reviewing the materials the government seeks to submit outside the adversarial process, for three reasons.

First, the district court reached the issue of whether to consider materials *ex parte* and *in camera* only because it erroneously applied what it referred to as an "undue risk to national security" standard when determining whether to permit the government to deprive Plaintiffs of access to information about the No Fly List redress process and its application to them. The district court failed even to define the "undue risk" standard that it invented, but it nevertheless applied that standard to give undue deference to the government's sweeping and categorical secrecy assertions. The district court's subsequent decision to permit the government to submit materials *ex parte* and *in camera* hinged on its application of this novel and erroneous standard.

[1] Plaintiffs consented to the government's motions for leave to file a sealed answering brief and to exceed the word limit.

Second and relatedly, the government has never properly explored alternatives to its categorical withholding of classified information, nor has it invoked any privilege as a basis for withholding the materials it seeks to file *ex parte* and *in camera*—a failure that contravenes long-established, court-mandated procedures for adjudicating withholdings that are otherwise subject to disclosure. The government concedes—as it conceded before the district court—that the materials it seeks to withhold from Plaintiffs include *unclassified* information. Defendants' Motion ("Defs.' Mot.") at 3; *see also* Plaintiffs' Opening Brief ("Opening Br."), ECF No. 13 at 17. Indeed, in the district court proceedings, the government admitted that it provided Plaintiffs only with a *summary* of unclassified, unprivileged information, meaning that it was withholding information that was not classified and not privileged. The district court erred in failing to adjudicate the propriety of the government's withholdings and specifically in failing to require the government to invoke and justify specific privileges.

Third, elemental due process principles counsel against consideration of *ex parte* materials. As this Court has recognized, the adversarial process is integral to a fair outcome. This Court, like the district court, is hampered in its ability to adjudicate procedural deficiencies in the government's revised redress process without the benefit of adversarial process. It should decline to review the materials

the government seeks to submit *ex parte* and *in camera*.

Ultimately, whether or not some or all of the information the government seeks to introduce *ex parte* and *in camera* may be withheld from Plaintiffs turns on the application of long-established standards routinely employed by courts. If the information at issue is properly classified, the government can and should use substitute procedures such as those used under the Classified Information Procedures Act—as this Court suggested in this very case in 2012—or invoke the state secrets privilege. If the government believes information is separately or also protected by the law enforcement or other privilege, it must properly invoke it, and the court should adjudicate that invocation. The government has never taken these steps, and its request should be denied.

II. BACKGROUND

In the proceedings below, Plaintiffs challenged the adequacy of the government's No Fly List redress process, moving for partial summary judgment on their procedural due process and Administrative Procedure Act claims in April 2015. Memorandum in Support of Plaintiffs' Renewed Motion for Partial Summary Judgment, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. April 17, 2015) ("*Latif*"), ECF No. 207. The district court denied Plaintiffs' motion and granted the government's cross-motion for summary judgment, holding that the revised procedures satisfy due process requirements "in principle." ER 50. The

district court further held that the government could deny Plaintiffs notice of all the reasons for their continued placement on the No Fly List, evidence supporting (or contradicting) those reasons, and hearings during which Plaintiffs could challenge evidence and witnesses against them, on the basis of "undue risk to national security." ER 167. The court nonetheless held that it could not determine whether the procedures were adequate as applied to Plaintiffs because the record did not indicate what the government had withheld or the reasons for the withholdings. ER 13.

Over Plaintiffs' repeated objections, *see Latif*, ECF Nos. 329 at 10, 333 at 2–3, the district court permitted the government to file *ex parte* and *in camera* a declaration and exhibits detailing the information the government withheld from Plaintiffs and "explain[ing] the bases for the various withholdings." *Latif*, ECF No. 327 at 1–2; ER 248–51, 739. The government also filed a public declaration describing the withheld information only in very general terms and asserting that disclosing more information would endanger national security or "impede law enforcement activities." ER 264–65.

In a brief order on October 6, 2016, the district court stated its conclusion that "Defendants have provided sufficient justifications for withholding additional information" from Plaintiffs, and granted the government's motions for summary judgment as to each individual Plaintiff. ER 42.

III. ARGUMENT

A. The District Court's Consideration of Materials *Ex Parte* and *In Camera* Hinged on Its Erroneous Application of the "Undue Risk" Standard.

As set forth in Plaintiffs' opening brief, the district court erred in permitting the government to withhold information based on blanket assertions of "undue risk to national security." *See* Opening Br., ECF No. 13 at 57–58. This Court has never permitted the government to justify categorical withholdings based on the mere possibility that they implicate national security, where, as here, due process mandates meaningful notice of the reasons for the deprivation of a protected liberty interest, and any legitimate government secrecy concerns can be addressed through time-tested procedural safeguards. Indeed, in ruling on jurisdictional issues earlier in this case, this Court instructed that subsequent district court proceedings could involve discovery of "sensitive intelligence information," and it suggested that such proceedings be managed through use of the Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16. *Latif v. Holder*, 686 F.3d 1122, 1130 (9th Cir. 2012). The district court disregarded that ruling, and longstanding authority in cases implicating national security, in creating and applying its "undue risk" standard. *See* Opening Br., ECF No. 13 at 49–54.

The district court's consideration of materials *ex parte* and *in camera* was contingent on its application of that erroneous standard. The court permitted the

government to make unilateral determinations as to "undue risk" and, in the same order, stated that the government could make supplemental submissions *ex parte* and *in camera* "[i]f necessary to protect sensitive national security information." ER 104. However, the materials the government submitted *ex parte* were not, as Defendants contend, "central to the district court's analysis and conclusion in this case." *See* Defs.' Mot. at 3. The district court, in fact, did not even consider those materials in ruling on the adequacy of the revised redress process in general. *See* ER 50–52, 103–05. The court's erroneous determination that the "undue risk" standard governs the process in general then led directly to its consideration of the government's *ex parte* and *in camera* submissions as to the Plaintiffs individually.

Thus, while the district court's review of *ex parte* materials resulted from its application of a standard Plaintiffs challenge on appeal, resolving that challenge need not, and should not, entail review of the secret materials themselves.

B. The Government Repeats the District Court's Error By Asking This Court to Consider Materials *Ex Parte* and *In Camera* Without Invoking Any Privilege or Applying the Correct Legal Standards.

If the government seeks to withhold information on national security and/or law enforcement grounds, it must invoke a specific privilege and do so by reference to specific information and according to established procedures. For a court to require less is to forfeit the role of the judiciary as a check on unconstitutional conduct. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)

("[T]he United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake."); *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) ("No matter how tempting it might be to do otherwise, we must apply the same rigorous standards even where national security is at stake."). Generalized national security concerns do not satisfy privilege requirements: "Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the [state secrets] privilege." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

The procedural requirements for the state secrets or law enforcement privileges are rigorous, and the government's proper invocation of those privileges is necessary—but just the start of the adjudicative process. When the government asserts the state secrets privilege, for example, a court must conduct an independent review and determination whether the specific information is privileged. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079–80 (9th Cir. 2010). If so, the privileged information would be removed from the case, and the court then decides how to proceed in light of the unavailability of that information. *Id.* Similarly, when the government properly invokes the law enforcement privilege, its assertion is subject to judicial review under a multi-factor test, *see In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988), and a

successful invocation of the privilege generally means removal of the privileged evidence from the case. *See Kinoy v. Mitchell*, 67 F.R.D. 1, 15 (S.D.N.Y. 1975).

In erroneously applying its "undue risk" standard, the district court further erred in failing to require the government to invoke specific privileges and comply with the requirements for doing so. *See* Opening Br., ECF No. 13 at 75. The court instead permitted the government to submit materials *ex parte* and *in camera* based on the kind of "ethereal fear" that this Court held was insufficient in *Al-Haramain*, 507 F.3d at 1203. The government, in turn, has failed to invoke any specific privilege, and comply with its procedural requirements, at any point in this litigation.

That the materials the government seeks to submit *ex parte* include unclassified information highlights the unfairness of the process that the district court permitted. This Court has countenanced no such unfairness, including in national security cases. For instance, in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965 (9th Cir. 2012), this Court permitted the government to withhold only information that was *actually classified*, not just potentially so. And even then, the Court required "mitigation measures" such as declassification of relevant information, unclassified summaries, or the use of cleared counsel and protective orders, rather than blanket withholdings based on

generalized national security claims. *Id.* at 984.[2]

The district court erred in permitting the government to withhold information absent specific privilege invocations and judicial findings. This Court should not consider *ex parte* materials that the government submitted as a result of that error.

C. Bedrock Due Process Principles Weigh Against This Court's Consideration of *Ex Parte* Materials.

As Justice Frankfurter wrote over fifty years ago, "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 (1951) (Frankfurter, J., concurring) (holding use of *ex parte* evidence unauthorized by statute in employment context, even given national security concerns). Because of this time-honored principle, courts generally do not resolve litigants' claims on the merits based on *ex parte* submissions absent a proper invocation and adjudication of privilege. *See Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986);[3] *see*

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[2] *See also Mohamed v. Holder*, No. 1:11-cv-50 (AJT/MSN), 2015 WL 4394958, at *12 (E.D. Va. July 16, 2015) (determining, following review of the government's purported state secrets information, that not all of the information was subject to the privilege); *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 (WHA), 2009 WL 5069133, at *15–16 (N.D. Cal. Dec. 17, 2009) (ordering disclosure of certain documents despite government's assertion of law enforcement privilege), *vacated on other grounds*, 669 F.3d 983, 998 (9th Cir. 2012).

[3] Although the court in *Abourezk* acknowledged exceptions to this "main rule," it cautioned that those exceptions are "few and tightly contained." 785 F.2d at 1061.

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also United States v. Thompson, 827 F.2d 1254, 1258–59 (9th Cir. 1987) (observing that "ex parte proceedings are anathema in our system of justice" and only tolerated in the most compelling of circumstances).[4]

As a result, the due process interest in adversarial adjudication requires that this Court only permit *ex parte* proceedings in narrow and exceptional circumstances—upon a showing that "no alternative means of meeting [the] need [to maintain the secrecy of certain evidence] exist other than *ex parte* submission." *See United States v. Abuhamra*, 389 F.3d 309, 321 (2d Cir. 2004) (rejecting use of secret evidence in bail context); *cf. Waller v. Georgia*, 467 U.S. 39, 48 (1984) (holding that, prior to closure of pre-trial criminal proceedings, "the trial court must consider reasonable alternatives to closing the proceeding").

This Court should not adjudicate the procedural deficiencies in the revised redress process without the benefit of adversarial proceedings—and it need not do so. As set forth in Plaintiffs' opening brief, basic due process doctrine requires rigorous procedural safeguards—of which adversarial proceedings are an essential

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The court noted a single instance in which a court relied on *ex parte* material to resolve the merits of the dispute, and that came after the formal invocation of the state secrets privilege by the government. *Id.*

[4] Similarly, the First Amendment and the common law create a strong presumption in favor of access to courts and require a finding of "compelling reasons," supported by specific factual findings, to outweigh the presumption of disclosure. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

component—when the government restricts individual liberty through a process as error-prone as the revised No Fly List redress process. Opening Br., ECF No. 13 at 36–72. Plaintiffs respectfully request that the Court reject the government's motion. The Court should instead instruct the district court to require the government to (1) use CIPA-type procedures when it seeks to withhold legitimately classified information, and (2) properly invoke any asserted privilege so that it may be adjudicated by the court. These are steps that the government has never taken.

IV. CONCLUSION

For the reasons set forth above, this Court's merits panel should consider and deny Defendants' motion for leave to submit materials *ex parte* and *in camera*.

Dated: March 19, 2018

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Pursuant to Circuit Rule 25-5(e), I attest that all other signatories on whose behalf this filing is submitted concur in the filing's content.

Dated: March 19, 2018 *s/ Hugh Handeyside*

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 19, 2018 *s/ Hugh Handeyside*