

suspected terrorist ties before they were eventually deported or left the country. Now that they are abroad, they are fearful that under this "Terrorist Surveillance Program" ("TSP"), as it is called, the defendants are listening to their privileged communications with their lawyers in the United States. Accordingly, the plaintiffs sought discovery into the matter, which resulted in Magistrate Judge Steven Gold ordering the defendants to "state whether any member of the trial team or any individual who has been identified as a likely witness ... is aware of any monitoring or surveillance of communications between any of the plaintiffs and their attorneys in either of these related actions." May 30, 2206 Order at 10.

The United States objects to that order on the ground that compliance with it will require the disclosure of classified information. Specifically, the United States argues that although the basic structure of the TSP has been publicly revealed, the details of it -- including the identities of the specific individuals being monitored -- remain highly secret, and that if the government were required to deny any monitoring of the plaintiffs' attorney-client communications in this case, then in other cases a refusal to make such a denial could be revealing of classified information, thus potentially damaging our national security. Moreover, the United States contends, it has already represented to the Court and to the plaintiffs that "no such intercepts will be used in the defense of the action," and, as the plaintiffs themselves acknowledge, the "Department of Justice is 'ordinarily scrupulous in its efforts to avoid intercepting an adversary's attorney-client communications,' and that, if such intercepts occur, the Department 'insulates those with knowledge of the intercepts from involvement in any pending ... litigation.'" Reply Br. of United States at 2, quoting Br. of Pl. at 1.

As Judge Gold recognized, it is a cardinal rule of litigation that one side may not

eavesdrop on the other's privileged attorney-client communications. Litigation involving officials of the executive branch of government is no exception. I also agree with Judge Gold that, because of the unusual circumstances of this case, the plaintiffs' request for further assurance that the rule has not been violated in this case is reasonable. First, the government has claimed the authority -- indeed, the necessity -- to monitor suspected terrorists abroad making electronic communications into the United States, and to do so without any judicial oversight. Second, the plaintiffs were detained in the United States for months based on the government's suspicion that they were involved in terrorist activity, and although they were apparently "cleared" of terrorist ties before they were deported, many of them claim they were subjected to further investigation and lengthy interrogation upon arrival to their home countries, leading the plaintiffs to believe that the United States had advised foreign authorities to keep an eye on them. Thus, regardless whether the plaintiffs are actually involved in terrorist activity -- they emphatically state that they are not -- they have reason to believe that the government thinks they are, and that they are therefore being monitored when they call the United States.

Of course, the plaintiffs' need for assurance that their attorney-client confidences are not being (and have not been) overheard by persons associated with this case must be balanced against the United States' interest in protecting classified information.¹ The United States contends that to confirm that these particular plaintiffs have in fact been subjected to monitoring under the TSP would reveal classified information. *See, e.g., Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978) ("There is a reasonable danger ... that confirmation or denial that a particular plaintiff's communications have been acquired would disclose NSA capabilities and

¹ I note that the legality of the TSP, which has been challenged elsewhere, is irrelevant here.

other valuable intelligence information to a sophisticated intelligence analyst.”) (internal quotation marks omitted). Neither the fact that the plaintiffs’ have previously been “cleared” of terrorist involvement nor the fact that they have sued the government and government officials shields them from being monitored under the TSP or other surveillance programs.

I recognize that this case involves certain high-level officials (and former officials) whose duties may be at once so broad and so essential to the administration of our government that a conflict could arise between their obligations, on the one hand, to maintain circumspect ignorance of intercepted communications involving opposing litigants, and, on the other, to prevent future terrorists attacks. It also seems possible that such officials could have become aware of intercepted communications inadvertently, but that they have little or no recollection of the substance of those communications. However, the vast majority of the government officials involved in these cases -- lawyers for the Civil Division of the Department of Justice and defendants and witnesses from the Bureau of Prisons with knowledge relevant to the plaintiffs’ remaining conditions-of-confinement claims -- have no such duties and therefore no “need to know” whatever information the NSA may have gleaned from possible intercepts of the plaintiffs’ attorney-client communications. *See* Br. of United States at 18 (“Department of Justice regulations prevent the disclosure of classified information -- even to persons who have the appropriate clearance -- absent an actual need to know that classified information”), citing 28 C.F.R. § 17.45; *see also* Br. of United States at 20 n.8 (“In light of the statutes, Executive Orders, and DOJ regulations limiting the sharing of classified information, no one could reasonably expect that the trial attorneys in these tort actions would be aware of the contents of classified intercepts”). For the government to say that these latter officials, whose duties do

not include the gathering or analysis of foreign intelligence, have not lately been involved in the gathering or analysis of foreign intelligence, is a revelation our national security can easily withstand. Moreover, it would not reveal classified information to say that the Department of Justice has been scrupulous in walling off the government officials who are involved in this litigation from exposure to TSP surveillance or knowledge derived from such surveillance. The Department has rightfully espoused that procedure as its policy, and the plaintiffs are entitled to the government's representation that it has made good on it.

Nevertheless, out of sensitivity to the government's concern for protecting classified information, particularly with regard to officials at the highest level, and because the plaintiffs have suggested that *ex parte* judicial oversight is a proper means of addressing their concerns, *see* Br. of Pl. at 12 (noting "the prospect of FISA monitoring, because it is subject to judicial review and minimization procedures, raises a far less substantial concern than monitoring pursuant to the TSP"), the defendants shall make the disclosures required by this Order *ex parte* for review *in camera*. Specifically, the defendants are directed to state, within 14 days of this order, whether any defendant, any likely witness or any member of the trial team (which includes all attorneys and support staff, and any supervisors or other individuals who are providing guidance or advice or exercising decision-making authority in connection with the defense of these actions) has knowledge (or had knowledge in the past) of the substance of any intercepted confidential communications between the plaintiffs and their attorneys.

In matters this important and sensitive, it seems to me prudent to take small steps. Accordingly, if in my judgment further action is warranted based on the information in the *ex parte* submission, the defendants will be given *ex parte* notice and an opportunity to be heard *ex*

parte.

As soon as practicable after the completion of my review, including my review of any subsequent *ex parte* submission directed pursuant to the preceding paragraph, the plaintiffs will be given either (1) assurance by the Court that the United States' representation that no TSP intercepts of the plaintiffs will be used in the defense of this action has been fully substantiated, or (2) notice of any remedial action that has been taken and an opportunity to be heard as to the necessity of further measures.

Finally, I am obviously not yet aware of the contents of the defendants' *ex parte* submissions. However, depending on what those contents are, I may require counsel for defendants to make further arguments as to why the submissions (or designated parts of them) should remain under seal.

This order supersedes Magistrate Judge Gold's Order of May 30, 2006.

So ordered.

John Gleeson, U.S.D.J.

Dated: Brooklyn, New York
October 3, 2006