

U.S. at 827 & n.25, 86 S.Ct. at 1812 & n.25, between the "punish or attempt to punish" language of § 203(c) and language which speaks of coercion, intimidation, etc., see pp. 674-675, *supra*. Under the former language the very bringing of the state prosecution against a member of the protected class violates federal law and no purpose is served by making a class member present in a state court a defense which that court is bound to accept. Under the latter type of statute there would have to be a preliminary determination whether the bringing of the foreclosure action was or was not a forbidden "intimidation". Furthermore, where as here the asserted intimidation is a civil action to enforce property rights, it is not clear that dismissal is demanded.

To accept Elan's claim for removal would, as said in *Peacock*, *supra*, 384 U.S. at 831, 86 S.Ct. at 1814, disregard the words of the removal statute and a construction now dating back for over a hundred years. The result of *Rachel* and *Peacock*, strongly criticized by the four *Peacock* dissents, was to leave that construction unchanged, save under the "narrow circumstances" of *Rachel*, 384 U.S. at 804, 86 S.Ct. at 1796. As was mentioned in *Peacock*, 384 U.S. at 834-35 & n.34, 86 S.Ct. at 1816 n.34, the 1964 Congress deliberately passed over a proposal to broaden civil rights removal. The Court noted in *Johnson v. Mississippi*, *supra*, 421 U.S. at 228, 95 S.Ct. at 1599, that when *Peacock* was decided, there had been introduced in Congress 12 bills which would have enlarged civil rights removal, but that none of these was ever reported. Sixteen years have passed since *Peacock*, and seven since *Johnson*, but the civil rights removal statute remains unchanged. *Peacock* had been decided nearly two years before the Fair Housing Act was passed. If the framers of that statute had desired to afford a right of removal of actions for the foreclosure of mortgages alleged to be tainted by a breach of the Act, or to do the same with respect to violations of other provisions such as § 3604 (discrimination in sale or rental of housing), it would have been easy to say so.

interference. Under our view of the case it is unnecessary to pass upon the correctness of

We have recognized that a case might arise in which the Fair Housing Act would justify removal under 28 U.S.C. § 1443(1), see the hypothetical in *New York v. Davis*, *supra*, 411 F.2d at 753. Here we hold only that under the rule of *Strauder* and *Rives* as modified and explicated in *Rachel* and *Peacock* a mortgagor cannot remove a foreclosure action based upon allegations that refusal to restructure the mortgage was racially motivated and that the action was brought because of its complaints on that score where the state's foreclosure law is not in conflict with any federal law or the Constitution. This is not one of those "rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." *Peacock*, *supra*, 384 U.S. at 828, 86 S.Ct. at 1812.

In light of our decision we have no occasion to consider Emigrant's argument that a foreclosure action is not an action "against any person" within 28 U.S.C. § 1443(1).

Judgment affirmed.



Alan Jules WEBERMAN,
Plaintiff-Appellant,

v.

NATIONAL SECURITY AGENCY,
Defendant-Appellee.

No. 483, Docket 81-6163.

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1981.

Decided Jan. 12, 1982.

Suit was brought under the Freedom of Information Act against the National Se-

this ruling.

Cite as 668 F.2d 676 (1982)

curity Agency, seeking copy of telegram supposedly sent to Havana, Cuba, prior to assassination of President Kennedy. Following grant of summary judgment to plaintiff, 490 F.Supp. 9, and remand by the Court of Appeals, 646 F.2d 563, the United States District Court for the Southern District of New York, Charles L. Brieant, J., excluded plaintiff's counsel from in-camera viewing of secret affidavit submitted by the National Security Agency, 507 F.Supp. 117, and granted summary judgment to the Agency, and plaintiff appealed. The Court of Appeals, Lumbard, Circuit Judge, held that: (1) District Court properly excluded counsel from in-camera viewing, and (2) there was no error in grant of summary judgment.

Affirmed.

1. Records ⇐66

In Freedom of Information suit seeking disclosure of telegram supposedly sent to Havana, Cuba prior to assassination of President Kennedy, district court properly excluded plaintiff's counsel from its in-camera view of secret affidavit submitted by the National Security Agency explaining contention that whether telegram was or was not intercepted was a matter of national security exempt from disclosure, where disclosure of details of affidavit might result in serious consequences to nation's security operations and risk presented by participation of counsel outweighed utility of counsel, or adversary process, in construing supplement to the record. 5 U.S.C.A. § 552(b), (b)(1, 3).

2. Records ⇐66

Record, including affidavit viewed by court in-camera, supported denial on national security grounds of disclosure under the Freedom of Information Act of whether telegram supposedly sent to Havana, Cuba prior to assassination of President Kennedy had been intercepted. 5 U.S.C.A. § 552(b), (b)(1, 3).

Mark H. Lynch, Washington, D. C.
(American Civil Liberties Union Founda-

tion, Washington, D. C., Susan W. Shaffer, Washington, D. C., of counsel), for plaintiff-appellant.

John S. Martin, Jr., U. S. Atty., for the Southern District of New York, New York City (Stuart M. Bernstein, Peter C. Salerno, Asst. U. S. Attys., for the Southern District of New York, New York City, of counsel), for defendant-appellee.

Before LUMBARD, WATERMAN, and VAN GRAAFEILAND, Circuit Judges.

LUMBARD, Circuit Judge:

Investigation and speculation about the assassination of President Kennedy continues unabated. Lee Harvey Oswald shot the President on November 22, 1963. Oswald was killed the next day in Police Headquarters, Dallas, Texas, by Jack Ruby. Jack Ruby's brother Earl had, according to appellant Weberman, sent a telegram to Havana, Cuba, on April 1, 1962. Weberman alleged that the telegram had been intercepted by the National Security Agency (NSA) and sought disclosure of the telegram for a book he was writing on the Kennedy assassination, "Coup d'Etat". When his request was rebuffed, Weberman brought this suit in the Southern District on October 17, 1977, against the NSA under the Freedom of Information Act, 5 U.S.C. § 552(b). The NSA contended that whether the telegram was or was not intercepted is a matter of national security exempt from disclosure under the FOIA, § 552(b)(1) & (3). In support of its contention, the NSA submitted a top secret affidavit by Michie F. Tillie, assistant director for policy and liaison. Judge Brieant originally refused to consider the Tillie affidavit and granted summary judgment to Weberman, 490 F.Supp. 9 (S.D.N.Y.1980). After this court held such refusal an abuse of discretion, 646 F.2d 563 (2d Cir. 1980), Judge Brieant viewed the affidavit *in camera* and *ex parte*, and granted summary judgment to the NSA on June 5, 1981.

On this appeal, Weberman challenges Judge Brieant's decision to exclude his counsel and view the affidavit *ex parte*, 507

F.Supp. 117 (S.D.N.Y.1981). Immediately following argument of the appeal, the United States Attorney submitted to us the top secret Tillie affidavit. We have examined the affidavit and we agree with the district court that, under the circumstances, it was not error to deny to plaintiff's counsel the right to be present at the *in camera* inspection of the affidavit. We also conclude from our reading of the Tillie affidavit that there was no error in granting summary judgment for NSA on the basis of the affidavit's disclosures.

When the NSA moved for summary judgment in December, 1979, it offered two affidavits of John R. Harney, Tillie's predecessor. Both affidavits set forth why the existence or non-existence of the Ruby intercept was classified, and why the fact of interception fell under either § 552(b)(1), exempting from FOIA matters "specifically authorized, . . . by an Executive order to be kept secret in the interest of national security," or under § 552(b)(3), concerning matters "specifically exempted from disclosure by statute" which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue."

[1, 2] Mr. Harney's second affidavit explained that he had disclosed as much as possible without violating national security. He offered to furnish an *in camera* affidavit, if the court required further information. We directed the district court to view the proffered affidavit *in camera*, which the district court construed to mean an *ex parte* proceeding, *i.e.*, without counsel present. There is no dispute that all Judge Brieant did was to go to the United States Attorney's office immediately adjacent to the courthouse, and read the Tillie affidavit alone, without argument from the United States Attorney. As Judge Brieant wrote in his grant of summary judgment, the Tillie affidavit sets forth specifically the damage to national security that might well result from disclosing whether or not the Ruby message was intercepted. That is, the Tillie affidavit simply creates a more complete record. *Phillippi v. CIA*, 546 F.2d

1009, 1013 (D.C.Cir.1976). Disclosure of the details of this affidavit might result in serious consequences to the nation's security operations. The risk presented by participation of counsel, *Hayden v. NSA*, 608 F.2d 1381, 1385-86 (D.C.Cir.1979), outweighs the utility of counsel, or adversary process, in construing a supplement to the record. Given these circumstances, Judge Brieant was correct in following our directions and excluding counsel from the *in camera* viewing. We also find no error in his grant of summary judgment.

Affirmed.



Daniel SILVERMAN, Regional Director of Region 2 of the National Labor Relations Board, and on behalf of the National Labor Relations Board, Petitioner-Appellee,

v.

40-41 REALTY ASSOCIATES, INC., et al., Respondents-Appellants.

No. 223, Docket 81-7461.

United States Court of Appeals,
Second Circuit.

Argued Nov. 18, 1981.

Decided Jan. 13, 1982.

Employer appealed from an order of the United States District Court for the Southern District of New York, Constance Baker Motley, J., issuing an injunction permitting picketing in the corridors of an office building outside the employer's premises. The Court of Appeals, Newman, Circuit Judge, held that because neither the National Labor Relations Board nor any court had ever construed the National Labor Relations Act to permit interior picketing in the corridors of an office building,