

ORAL ARGUMENT NOT YET SCHEDULED

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

_____)
RICHARD A. HORN,)
Plaintiff-Appellee,)
)
v.)
)
FRANKLIN HUDDLE, JR.,)
ARTHUR BROWN,)
Defendants-Appellees,)
_____)
)
UNITED STATES OF AMERICA,)
Intervenor-Appellant.)
_____)

No. 09-5311

**REPLY IN SUPPORT OF
EMERGENCY MOTION OF THE UNITED STATES
FOR STAY PENDING APPEAL**

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This Court should enter a stay to preserve the status quo pending review of the district court's order compelling the government to grant security clearances to counsel and to authorize disclosure of classified information over the objection of the Executive. If allowed to go into effect on the district court's deadline, the significant constitutional and national security issues presented by the government's appeal could become moot once the classified information is disclosed to counsel. At a minimum, we urge the Court to enter an interim stay for one week to allow the government time to consider filing an application for stay before the Supreme Court.

A. The district court here improperly and unnecessarily seeks to involve private counsel in assessing the scope of the state secrets privilege. That fundamental error has precipitated confusion among the parties and led the district court to exceed its authority by compelling the Executive to grant security clearances to counsel. A stay is warranted to preserve the status quo.

Judicial review of the privilege should be undertaken *ex parte* and *in camera*. "It is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requester's counsel to participate in an *in camera* examination of putatively privileged material." Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983). The district court cannot avoid that obligation based on its misunderstanding concerning the scope of the privilege and the government's ability to protect intelligence sources and methods that have not been officially

confirmed. See Stay Mot. 11-12 & n.6; see also, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990) (“in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures”).

Once that process is complete, the parties may rely on unprivileged information to present their claims and defenses. Information subject to the privilege is properly removed from the litigation, and unavailable to the parties. See, e.g., In re Sealed Case, 494 F.3d 148, 152 (D.C. Cir. 2007); In re United States, 872 F.2d 472, 476 (D.C. Cir. 1989). Litigation counsel need not inquire into the scope or content of the privilege. Parties and their counsel “do not have the right to use the information that the government has asserted contains state secrets to oppose that assertion in the district court.” Doe v. CIA, ___ F.3d ___, 2009 WL 238275, *10 (2d Cir. 2009).¹

B. The district court denied the government’s stay motion in an order issued shortly before our emergency stay motion was filed in this Court.² The court

¹ This appeal and stay concern unauthorized disclosure of classified information to counsel before the district court has ruled on the scope of the state secrets privilege. Speculation about parties’ desire to share classified but unprivileged information (if there were any such category) with their counsel are therefore premature. See Brown Resp. 1, 7-8. And the denial of the privilege without prejudice offers no basis for overriding the Executive’s national security responsibilities.

² We were not able to address the court’s rationale in our motion. Notably, the district court agreed that “the nature of [the] August 26th order is injunctive,” 9/4 Op. 2, confirming this Court’s jurisdiction under 28 U.S.C. § 1292(a)(1).

concluded that the delay occasioned by even an expedited appeal – which the court speculated “could take up to a year” – “could have major consequences,” perhaps “forever depriving the plaintiff of evidence and testimony which may decide whether he prevails on his claims.” 9/4 Op. 2 & n.2 (attached) (referring to a deposition requested by plaintiff that would encompass classified information). But that concern results from the district court’s failure to rule on the privilege; counsel needs no security clearance to conduct a deposition into unprivileged and unclassified information.

The district court and the parties emphasize the limited scope of information included within the district court’s order. See 9/4 Op. 4-5; Huddle Resp. 11-12; Brown Resp. 6-7; Horn Resp. 6. But the Executive Branch agency has not made a need-to-know determination even for “the classified information already known to [counsel] or to their clients regarding this case.” Ibid. In any event, a party’s knowledge is irrelevant: “Even if they already know some of” the privileged information, parties should not be permitted “to use the information to oppose the assertion of privilege” because of the “danger of ‘[i]nadvertent disclosure.’” Doe, 2009 WL 238275, at *10.

The district court also refers to Horn’s prior unauthorized disclosures to his counsel. See, e.g., 9/4 Op. 4-5 (“counsel for Horn * * * discussed most, if not all, of

the classified information Horn knew related to this case”). But the government assuredly did not “allow[] disclosure of the information it now seeks to ‘protect.’” Id. at 5. To the contrary, the government has consistently sought to prevent unauthorized disclosure of national security information, beginning with the multiple disclosures in Horn’s complaint.³ See, e.g., Dkt# 234 (motion to seal). The district court itself recognized in 2000 that Horn’s counsel was not entitled to access to classified national security information, absent a need-to-know determination by the CIA, the agency with original classification authority over the information. See Dkt# 340 at 14-17 (Aug. 15, 2000 Order). In that order, the district court expressly rejected Horn’s arguments that his counsel should have access to the classified information at issue in this case. Horn’s prior and repeated breaches of security by disclosing classified information to his counsel (and more broadly on the public record) do not

³ The district court has no basis for the assertion that “[t]he only secret the government might have left to preserve is the fact they did what Horn alleges.” 9/4 Op. 4. Horn also makes wild and unsupported assertions of bad faith. See Horn Resp. 2, 5-6, 9. The United States has asserted the state secrets privilege in good faith to protect national security. Nor is the court correct to assert that the government has “time after time failed to provide a sufficient basis as to why this decades-old information should be protected.” Ibid. The government has responded fully and thoroughly to every demand from the district court for additional information concerning the harm to national security that could be expected to result from disclosure of the privileged information, most recently in an extensive and detailed submission on September 4, 2009 (if requested, we will provide those materials to this Court *ex parte* and *in camera*). The district court has nevertheless failed to exercise the *in camera* and *ex parte* review required here.

justify the district court's disregard of the Executive's well-established procedures for safeguarding that information against further breaches.⁴

The district court improperly assumed it could order disclosure of classified information unless the government demonstrates to the court's satisfaction that "the government will be concretely harmed" by "disclosure to these attorneys." 9/4 Op. 5; see also, e.g., Huddle Resp. 10-12 (assuming that burden is on government to prove harm to national security to court's satisfaction). That approach turns on its head the clear holding of Egan that "[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official." 484 U.S. at 528.⁵

As the Supreme Court and this Court have emphasized, it is not for the judiciary to determine whether disclosure of particular information to a specific individual could harm national security. See, e.g., Egan, 484 U.S. at 527 ("the grant

⁴ In any event, even if earlier disclosures had been authorized, they would not undermine the proper classification of that information, and would not diminish the harm that could be expected result from further disclosure. See Students Against Genocide v. Department of State, 257 F.3d 828, 836-837 (D.C. Cir. 2001).

⁵ Horn offers no basis for distinguishing Egan. See Horn Resp. 3-4. And he misunderstands the Supreme Court's decision in Webster v. Doe, 486 U.S. 592 (1988), which did not consider either the state secrets privilege or the separation of powers principles underlying the Executive's responsibility to control access to national security information. Nor does this case concern the types of questions the government may ask in background investigations, as in National Federation of Federal Employees v. Greenberg, 983 F.2d 286 (D. C. Cir. 1993).

of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch”) (quoted in Oryszak v. Sullivan, ___ F.3d ___, 2009 WL 2475289, *2 (D.C. Cir. Aug. 14, 2009)); Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (“The assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts.”; trial court should not have “performed its own calculus as to whether or not harm to the national security * * * would result from disclosure”).⁶ The presumption is against disclosure of classified information, unless the responsible Executive Branch agency makes a discretionary finding that national security interests would be advanced by granting access to the particular information. See In re United States, 1 F.3d 1251 (Table), 1993 WL 262656, *7 (Fed Cir. 1993) (“the general standard for security clearance determinations, * * * presumes no access in close cases”). The district court here would compel disclosure unless the Executive shows a specific harm to national security from the disclosure of classified information to a particular individual.

The government interest at stake here is the Executive’s authority to limit disclosure of classified information to those who do not meet the requirements of the

⁶ Brown contends that the government’s decision not to grant need-to-know determinations to his counsel is “arbitrary and capricious.” Brown Resp. 6. That assertion is irrelevant because the decision is not subject to judicial review.

governing Executive Orders, including a need-to-know-determination by the agency with original classification authority over the information. The harm flowing from the district court's order is the intrusion by the court into an area of Executive Branch authority and responsibility – the protection of national security by strictly limiting those authorized to receive classified information.⁷

Nor is it significant that “the attorneys here * * * were deemed trustworthy and able to obtain security clearances.” 9/4 Op. 5; see also Huddle Resp. 8; Brown Resp. 4-5. This Court has rejected a similar argument from counsel who held security clearances and sought access to classified and privileged information over the objection of the Executive. “[T]he trustworthiness of the litigants * * * is not always dispositive in cases such as this.” Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 401 (D.C. Cir. 1984); see also In re United States, 1 F.3d 1251 (Table), 1993 WL 262656, *6 (Fed Cir. 1993) (noting that Egan “discussed ‘access to information’ as well as ‘an individual’s’ trustworthiness”); See Dkt# 340 at 14-16 (access eligibility insufficient without need-to-know). The question is not whether “these attorneys would be likely to improperly disclose classified information,” 9/4 Op. 5, but whether the appropriate Executive Branch agency has made a need-to-

⁷ The Executive Order also stresses the need to “ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs.” 68 Fed. Reg. 15328.

know determination that an individual requires access to national security information to aid a governmental function. See 68 Fed. Reg. 15332.

Every additional disclosure of classified information increases the risk to national security, irrespective of the trustworthiness of any particular individual. “It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised.” Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1978). Indeed, courts have acknowledged that even disclosures in camera and ex parte pose such risks. See, e.g., Reynolds, 345 U.S. at 10 (“the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers”); Sterling v. Tenet, 416 F.3d 338, 344, 348 (4th Cir. 2005). And there are additional risks here, as litigation counsel’s “sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy,” leading this Court to hold that “our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer * * * or to the coercive power of a protective order.” Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983).

C. Defendants Huddle and Brown argue that their private counsel should stand in the shoes of the government counsel who previously represented those defendants, jointly with the United States, during the previous stages of this litigation.

They contend that because government counsel had a need-to-know classified information during those earlier stages of the litigation, so too should their private counsel now be deemed to have a need-to-know the same information. See Huddle Resp. 5-7; Brown Resp. 2-3, 6; 9/4 Op. 5. That argument should be rejected.

Government counsel represented the interests of the United States throughout this litigation, in order to ensure the proper handling of classified information (including information subject to the state secrets privilege, once that privilege was asserted in 2000). Indeed, the initial appearance of the AUSA was solely for the purpose of filing the motion to seal the proceedings, in order to protect against further disclosure of classified information. See Dkt# 235 (appearance dated Aug. 19, 1994). Subsequently, the same government counsel also represented the individual defendants because their interests were aligned with the government's need to protect national security information from disclosure. See Dkt# 239 (appearance dated Oct. 7, 1994); cf. 28 C.F.R. § 50.15 (establishing procedure for current and former federal employees to request representation by Department of Justice in Bivens cases).

D. Brown also argues that he will be harmed by the limited scope of the stay requested by the government. See Brown Resp. 7-8. He points out that the district court has ordered the parties by October 5, 2009, to identify any classified and putatively privileged information they seek to use in the litigation. See 8/26 Order

2. But the district court is not likely to hold the parties to that deadline if this Court grants a stay pending appeal over the prerequisite counsel-access provisions. If there were such a risk, the remedy would be a broader stay, not the denial of any stay at all.

* * * *

This Court should grant a stay pending appeal to protect its authority to review the district court's decision.⁸ If the court's order is allowed to take effect, it will necessarily diminish the Executive's authority to prevent the unauthorized disclosure of classified information and could render the government's appeal moot before it can be heard. Neither the parties nor the district court offer any answer to this fundamental concern that would undermine this Court's appellate jurisdiction.

Respectfully submitted,

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September 9, 2009

⁸ At a minimum, the Court should enter an interim stay for one week to allow the government time to consider seeking a stay in the Supreme Court.