IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

STEVEN J. ROSEN and
KEITH WEISSMAN,
Appellees.

Case No. 08-4358

APPELLEES-DEFENDANTS ROSEN AND WEISSMAN'S
SECOND MOTION TO DISMISS[1]

INTRODUCTION

Appellees-defendants file this second motion to dismiss the government's interlocutory appeal and state:

This is a criminal case under the Espionage Act of 1917, 18 U.S.C. § 793, charging Dr. Steven J. Rosen and Mr. Keith Weissman with disclosing classified national defense information. Defendants were pro-Israel foreign policy advocates with the American Israel Public Affairs Committee ("AIPAC"), a well-respected lobbying organization. In this unprecedented prosecution, Defendants are charged with repeating to others the discussions they had about Middle East issues with various high-level government officials.

On March 19, 2008, the District Court, T.S. Ellis III, J., issued a 278-page order under Section 6(c) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, delineating what classified information Defendants would be allowed to use at trial and in what form.

The government noticed this interlocutory appeal on March 27, 2008.

[1] This motion is filed together with Defendants' separate appellate brief on the merits.

In its opening brief filed on July 25, 2008, the government specified which precise aspects of the District Court's ruling it was appealing. According to the government, the District Court erred with respect to two documents, referred to as "the FBI Report" and "the Israeli Briefing Document," in allowing the Defendants to use certain classified information contained in those documents at the upcoming trial. The government claimed that CIPA § 7 provided jurisdiction for its interlocutory appeal. (Government Opening Brief ("Br.") at 2.)

Appellees submit that the government's appeal of the District Court's rulings regarding these two documents is not yet properly before this Court. In order to pursue an appeal under CIPA § 7, and the associated classified information privilege, the government bears the burden of establishing that the two documents at issue were, in fact, classified, and secondly, that the head of the two relevant agencies in this instance, the Department of State ("State Department") and the FBI, personally reviewed the documents and personally asserted the privilege. Because the government has failed to establish that the two documents were classified and failed to assert the classified information privilege through the agencies' heads, the government's appeal should be dismissed.[2]

ARGUMENT

I. THE DISTRICT COURT'S RULING ON THE TWO DOCUMENTS IS NOT YET APPEALABLE UNDER CIPA § 7 BECAUSE THE GOVERNMENT HAS FAILED TO ESTABLISH THAT THE DOCUMENTS ARE CLASSIFIED

CIPA governs the use of classified information in criminal cases. 18 U.S.C. App. 3. Section 7 of CIPA allows the government to appeal a district court's determination authorizing

[2] This is the second motion to dismiss filed by the Defendants in this Court regarding this matter. The first motion was filed on April 29, 2008, after the government filed its notice of appeal indicating that it sought to appeal not only the District Court's March 19, 2008 CIPA § 6(c) Order, but also, among other issues, the District Court's earlier constitutional rulings on 18 U.S.C. § 793. This Court dismissed those extraneous grounds and limited the government to an appeal based on rulings in the lower court's March 19, 2008 CIPA § 6(c) Order.

the disclosure of classified information. In this case, the government has failed to demonstrate that the lower court's ruling on the two documents at issue would allow for the disclosure of any such information. Consequently, the government has not perfected its appeal and the appeal must be dismissed.

CIPA § 7 provides as follows:

> An interlocutory appeal by the United States . . . shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

The statute could not be clearer: an appeal is permitted only when the district court's determination will allow a defendant to disclose information that is classified.

It is incumbent on the appellant, in this case the government, to demonstrate the "relevant facts establishing jurisdiction." Fed. R. App. P. 28(a)(4)(B). As demonstrated below, for both documents identified by the government in this appeal, the government failed to make the requisite showing that the information, whose disclosure has been authorized by the District Court, is classified.

A. The FBI Report

1. Relevant Background[3]

[4] the second of the Superseding Indictment's alleged nine episodes of disclosures, is set forth in Overt Acts 3 and 4.

[5] Defendants themselves have never been permitted to see most of the classified documents that the government intends to use in its case against them.

REDACTED

REDACTED

2. The Government Has Failed to Demonstrate That the District Court's CIPA § 6(c) Ruling Will Allow the Disclosure of Information That Is Classified

[13] *See* CIPA § 6(c)(1) (allowing the court to order substitutions in the form of statements or summaries if the substitution provides the defendant with substantially the same ability to make his defense as would the disclosure of the specific classified information).

It is a cardinal rule that changing even one word in a classified text may well change the classification of the text, and could conceivably reduce the classification from, for example, Top Secret to Unclassified.

In short, it is entirely unclear whether the District Court's decision will ultimately cause the disclosure of any additional classified information, beyond that which the government wants to introduce for its own purposes. The government has failed to demonstrate this predicate to a CIPA § 7 appeal, and the appeal as to this document must therefore be dismissed.

B. The Israeli Briefing Document

1. Relevant Background[17]

The Superseding Indictment charges that classified information

was the fourth of the nine alleged episodes of disclosures, and is set forth in Overt Acts 6 and 7 of the Superseding Indictment.

about the o Rosen, and that Rosen repeated the information to others.[19] As part of their defense, Defendants will demonstrate that at no time did ever indicate that the information he was disclosing was classified; that Rosen had no reason to doubt authority to disclose this information; that the U.S. government, through and others, was intentionally publicizing this information; and that was also intentionally publicizing the information.

In addition, and of special significance to this motion to dismiss, the defense will demonstrate that the was not even classified.

[19] While Rosen and Weissman are charged with conspiring to violate the Espionage Act in repeating the information disclosed to them by no charges have ever been brought against

See Appeal of United States (United States v. Fernandez), 887 F.2d 465, 470 (4th Cir. 1989) (recognizing propriety of appellate review of CIPA rulings at various stages of CIPA process).

2. The Government Has Failed to Demonstrate that the Israeli Briefing Document is Classified

any event, when defending the lower court's decision, a party is permitted to raise alternate arguments from the record supporting the lower court's ruling even if not raised below. *United States v. Greenlaw,* 128 S. Ct. 2559 n.5 (2008) ("An appellee or respondent may defend the judgment below on a ground not earlier aired.") (citing *United States v. American Railways,* 265 U.S. 425, 435-36 (1924)). That is true even if the new argument involves additional factual material. *See United States v. Newland,* 246 F. App'x 180, 190-91 (4th Cir. 2007) (unpublished opinion) (allowing defendant to raise alternate theory and additional facts to support lower court's suppression order). The *Newland* court recognized that the defendant was free to raise the new argument on appeal, then remanded the case back to the district court with instructions to supplement the record in light of the defendant's new legal argument.

REDACTED

Since the document is not classified, there can be no CIPA § 7 appeal from a District Court order authorizing its disclosure. The appeal with respect to this document must be dismissed as well.[24]

II. THE DISTRICT COURT'S RULING ON THE TWO DOCUMENTS IS NOT APPEALABLE BECAUSE THE GOVERNMENT FAILED TO ASSERT THE CLASSIFIED INFORMATION PRIVILEGE THROUGH THE HEADS OF THE RELEVANT AGENCIES

Now that it is clear which specific documents form the basis for the government's appeal, it is also clear that the government has not perfected its challenge to the lower court's ruling. The lower court's ruling on the classified information privilege is not appealable.

The government's classified information privilege over the FBI Report and the Israeli Briefing Document was not properly asserted before the District Court. The privilege can be invoked only if the head of the relevant agency or department personally considers the classified information at issue and then personally asserts the privilege.

Therefore, an appeal of the ruling by the District Court on the government's privilege is premature and must be dismissed.

A. The Classified Information Privilege Must be Invoked through the Head of the Department

For the classified information privilege to prevail and prevent the disclosure of information, the District Court must find that "there is a reasonable danger that compulsion of

---

[24]

the evidence will expose . . . matters which, in the interest of national security, should not be divulged . . . ." *United States v. Aref*, No. 07-09891-cr(L), 2008 WL 2598018, at *5 (2d Cir. July 2, 2008) (citing *United States v. Reynolds*, 345 U.S. 1, 8 (1953)). But the District Court is not empowered to make that finding based on the invocation of the privilege by just anyone. As the Second Circuit held just last month, the privilege must be asserted only "by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* The Defendants urge this Court to adopt that holding.[25]

The requirements that the material must be considered by the agency head and that the privilege must be invoked only by the agency head originally arose in the context of the state secrets privilege as a means to protect the government's national security information in *civil* cases. *Reynolds*, 345 U.S. at 7-8 (recognizing formal claim of privilege over Air Force accident report requested by plaintiffs in civil suit against government and indicating that "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"); *Sterling v. Tenet*, 416 F.3d 338, 342-45 (4th Cir. 2005) (applying *Reynolds* analysis). In the civil context, the privilege is absolute. *Reynolds*, 345 U.S. at 11 ("[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."). By contrast, in criminal cases, the protection of national security information or classified information is

---

[25] Although Defendants did not raise this argument below, an intervening change in law is an accepted exception to the rule that a party is barred from introducing arguments not presented before the lower court. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 717 (1974); *United States v. Tomlinson*, 67 F.3d 508, 512 n.6 (4th Cir. 1995); *Wilson v. Shultz*, 475 F.2d 997, 1002-03 (D.C. Cir. 1973) (recognizing change in law from Federal Circuit as intervening change in law). The Second Circuit's opinion in *Aref* post-dates the notice of appeal and Defendants urge this Court to adopt the new *Aref* analysis. Furthermore, where Defendants are defending the lower court's decision, they are entitled to raise alternate legal arguments, even if they were not raised below. *See* n.22, *supra*. In this instance, the sealed *ex parte* record should make clear the identity of the person who asserted the privilege.

asserted through the invocation of the "classified information privilege" and the assertion of the privilege is not absolute. *See United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004). In criminal cases, the trial court must balance the government's assertion of the privilege against the defendant's right to present evidence that is relevant and helpful to his defense or essential to a fair determination of a cause. *Id.*

In *Aref*, the Second Circuit made clear that the state secrets privilege that evolved in civil cases and the classified information privilege that evolved in criminal cases were one and the same. The primary difference was that, in criminal cases, the trial court also must consider the criminal defendant's right to present a defense.[26] *Aref*, 2008 WL 2598018, at *5. In *Aref*, a criminal case, the government asserted the classified information privilege to protect against the disclosure of national security information in pretrial discovery. *Id.* at *2. The court applied the *Reynolds* analysis of the state secrets privilege and found that the government's assertion of the privilege was valid and that the District Court did not deny the defendant the use of helpful evidence. *Id.* at *6.

However, the *Aref* court noted that the government had failed to satisfy the second prong of the *Reynolds* analysis. *Id.* The government did not assert the privilege through the head of the department which had control over the classified information at issue nor did it demonstrate that this individual personally had considered the information. The court noted that this prong of the *Reynolds* analysis was not to be ignored and that the government should have invoked the

[26] This Court applies the analysis for the state secrets privilege in civil cases, *see, e.g., El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007), and the classified information privilege in criminal cases, *see Moussaoui*, 382 F.3d at 472, but has not yet considered the question of whether the two privileges are really one and the same and thus whether the classified information privilege, like the state secrets privilege, must be asserted through the agency head.

privilege through the head of the department. *Aref*, 2008 WL 2598018, at *6 ("The Government failed, however, to invoke the privilege through the 'head of the department which has control over the matter, after actual personal consideration by that officer.' . . . Based on our holding today, . . . we trust that this issue will not arise in future CIPA cases.").[27]

The *Reynolds* Court recognized the impact of the government's assertion of privilege, even in the civil context, and thus required the government to meet the procedural requirements, including assertion by the agency head, before invoking the privilege. *Reynolds*, 345 U.S. at 7; *see also El-Masri*, 479 F.3d at 304 (noting that the *Reynolds* court set forth these stringent procedural requirements because the privilege was not to be invoked without due consideration). The need to have the privilege asserted by the agency head is especially important in criminal cases because of the impact that the government's assertion of the privilege can have on a criminal defendant. This invocation should not be allowed without some assurance that the various constitutional rights of the defendant are protected and that there truly is a national security interest to assert the privilege. This is not a task that should be delegated to various lower level officials.

---

[27] The Second Circuit ruled that the government's failure to comply with *Reynolds* was harmless error in the context of that specific case – after conviction when it was too late to correct the mistake and when it then announced that this oversight "will not arise in future CIPA cases." This case is on an interlocutory appeal where the error can be addressed and where the government has been put on specific notice after *Aref* that this important certification safeguard cannot be ignored.

It is precisely in the face of such disagreement that the government should be required to seek the consideration and approval of the head of the agency. And the current procedural posture of the case allows for the government to return to the necessary agencies and assert the privilege through the agency head.

Furthermore, the government as the defendant in the civil context does not initiate the litigation and does not affirmatively put its national security information at issue. Even still, the government is required to satisfy the standards set forth in *Reynolds* and have the privilege asserted by the agency head. By contrast, in the criminal context, it is the government that initiates the case. If the government initiates the criminal case, where the defendant's liberty is at stake, and then chooses to exercise its privilege over relevant information, it is only logical that the government be held to at least the same procedural standard – certification by the head of the agency – as is required in civil cases.

B. The Government's Assertion of the Classified Information Privilege Was Improper

Unless and until the record below demonstrates that these individuals personally reviewed the document and chose to invoke the privilege, the government has not satisfied the requirements to assert its privilege or to have this Court review its claim. Thus the appeal of the District Court's ruling on the classified information privilege must be dismissed.

CONCLUSION

For the reasons discussed, this Court should dismiss the government's appeal of the lower court's rulings on the FBI Report and Israeli Briefing Document because the government has failed to demonstrate that the District Court's ruling will result in the disclosure of classified

information, and because the government has failed to assert the classified information privilege through the agency head.

Statement by Counsel Pursuant to Local Rule 27(a)

Defendants' counsel avers that counsel for the United States was informed of defendants' intent to file this Motion, and the United States indicated that it intends to oppose the Motion.

Respectfully submitted,

Baruch Weiss
John N. Nassikas III
Kate B. Briscoe
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036-5339
T: (202) 857-6000
F: (202) 857-6395

Attorneys for Keith Weissman

Abbe David Lowell
Roy L. Austin, Jr.
Erica E. Paulson
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005
T: (202) 756-8000
F: (202) 756-8087

Attorney for Steven J. Rosen

August 20, 2008