ORAL ARGUMENT NOT SCHEDULED

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

No. 09-5311

RICHARD A. HORN,
Plaintiff-Appellee,
v.
FRANKLIN HUDDLE, JR., ARTHUR BROWN,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Intervenor-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiff Richard Horn invoked the jurisdiction of the district court under 28 U.S.C. § 1331. JA 23.[1] In an order dated August 26, 2009, the district court directed the United States to grant security clearances to private counsel for plaintiff and defendants, and to authorize disclosure to those counsel of classified national security information. JA 236-237. The United States filed a notice of appeal on September 2, 2009. JA 238. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).[2]

[1] Citations to pages in the Joint Appendix are in the form "JA __." Citations to docket entries in the record below are in the form "Dkt# __." See JA 1-17.

[2] If there were any doubt about this Court's jurisdiction to review the district court's "injunctive" order, JA 241, the Court could also review the order under the collateral-order doctrine. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Al Odah v. United States, 559 F.3d 539, 543-544 (D.C. Cir. 2009) (district court order compelling counsel access to classified information is an appealable

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The United States will invoke the state secrets privilege only when absolutely necessary to safeguard this nation's security, and only after review at the highest levels of the Department of Justice. In this case, the government has invoked the state secrets privilege to bar disclosure of sensitive national security information. The privilege was first asserted in 2000 in this case, and re-asserted more narrowly earlier this year. The assertion of the state secrets privilege in this case has been the subject of careful consideration at the Justice Department and the intelligence community as part of the review process over the privilege set up by Attorney General Eric Holder. In support of the privilege here, the government has offered both public and in camera declarations – including those of the Director of the Central Intelligence Agency (DCIA), Leon Panetta – explaining that disclosure of the privileged information could reasonably be expected to cause serious, or even exceptionally grave, damage to the national security of the United States.[3]

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collateral order); see also Stillman v. CIA, 319 F.3d 546 (D.C. Cir. 2003) (ruling on merits of analogous interlocutory appeal, without addressing jurisdiction). Alternatively, this Court could issue a writ of mandamus. See Cheney v. United States Dist. Ct., 542 U.S. 367, 380-381 (2004).

[3] On September 23, 2009, the Attorney General issued new Policies and Procedures Governing Invocation of the State Secrets Privilege. Those procedures apply to cases in which the government invokes the state secrets privilege after October 1, 2009. Nevertheless, the assertion of the privilege in this case satisfies the standards in the new policy concerning the applicable legal standards, narrow tailoring, and limitations on the assertion of the privilege. Moreover, the privilege as invoked in this case has been carefully reviewed by senior Department of Justice

The district court ordered that plaintiff Richard Horn and defendants Franklin Huddle and Arthur Brown – former government employees who properly had access to certain classified information during their employment, and who remain subject to the non-disclosure agreements they signed – be permitted to disclose classified information to their counsel so those counsel could challenge the validity and scope of the state secrets privilege. Those disclosures to counsel for plaintiff and defendants have not been authorized by the Executive Branch agency responsible for the classified information.

This interlocutory appeal presents the question whether the district court's order prematurely and unnecessarily orders a breach of the safeguards for protecting classified national security information from unauthorized disclosure before the court has completed its in camera, ex parte review of the justification for the invocation of the state secrets privilege.

STATEMENT OF THE CASE

1. This interlocutory appeal concerns the propriety of a judicial order compelling the United States to grant security clearances and authorize disclosure of classified national security information, over the objection of the Executive Branch. "The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). National security information is classified by the

officials, who have determined that invocation of the privilege in this litigation is warranted.

Executive Branch according to the degree of harm to national security that can be expected to result from disclosure of particular information. The requirements for classification, and for safeguarding such information, are set forth in Executive Order 12958, as amended by Executive Order 13292. See 68 Fed. Reg. 15315, 15324 (Mar. 28, 2003) (pertinent portions set forth in Addendum, infra).

An essential prerequisite for access to classified information is a "need-to-know" determination. Under existing law, as the governing executive order makes clear, disclosure of classified information is not authorized – even if an individual has a security clearance (that is, has been deemed eligible for access to classified information generally) – unless the Executive Branch agency responsible for the classified information has determined that the "prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Exec. Order 12958, § 6.1(z), 68 Fed. Reg. 15332. Here, the district court purported to make a need-to-know determination for purposes of this litigation. See JA 234, 236. In conjunction with that determination, the court compelled the Executive Branch to grant security clearances and authorize disclosure of classified information to counsel for plaintiff and defendants. JA 236-237. This Court has stayed that order, and the government here urges reversal.

2. Plaintiff Richard Horn was formerly a Special Agent for the United States Drug Enforcement Administration (DEA), and was stationed in Burma in 1993, along with the two defendants – Franklin Huddle, then the State Department official in charge of the American embassy, and Arthur Brown, then a covert employee of the

Central Intelligence Agency (CIA). In this suit against Huddle and Brown in their individual capacities, Horn alleges that they violated his constitutional rights. Horn's complaint, filed in open court in 1994, improperly disclosed classified national security information on the public record. The Department of Justice promptly appeared and moved to seal the proceedings to prevent further disclosure of classified information. The district court granted the motion to seal, and the government continued to protect classified information from disclosure in this litigation.

In 2000, the United States asserted the state secrets privilege over information sought by Horn in two classified reports created by the Inspectors General of the CIA and the State Department. The privileged information encompassed intelligence activities, sources, and methods, as well as the identity and other details of covert intelligence personnel, including defendant Brown, who at the time was still a covert employee of the CIA. In 2004, the district court dismissed the case, ruling that the litigation could not proceed without the privileged information, and this Court partially affirmed and partially reversed that judgment.

3. On remand, government counsel learned – and promptly informed the district court, as well as this Court and opposing counsel – that the CIA had made a serious error earlier in the course of the litigation by failing to identify a material change in some of the information covered by the state secrets privilege pertaining to one CIA employee: In 2002, the CIA lifted and rolled back Brown's cover, meaning that his CIA employment was no longer covert and he could disclose that he had worked for the CIA during the period at issue in this case. The CIA did not

inform the district court or the Department of Justice (or, later, this Court) of the change. Thus, unaware of Brown's new status, the district court dismissed the case in 2004, and this Court affirmed in relevant part in 2007, based on a record that mistakenly continued to refer to Brown as a covert CIA employee. Following the government's prompt notification to the district court of that error, that court reinstated plaintiff's claims against Brown.

Based on the newly discovered change in Brown's status, the government undertook a careful review of the classification status of other information in the record, as well as information previously sought by Horn. In April 2009, and again in September 2009, the government invoked a new, narrower assertion of the state secrets privilege, which continues to cover intelligence activities, sources, and methods, but clarifies that the identity of Brown (and others whose cover status had changed in the intervening decade) is no longer privileged or classified.

The district court concluded that the state secrets privilege properly covers some of the information at issue, but the court was uncertain about the proper scope of the privilege. Although the government submitted additional clarifying information ex parte and in camera – in April and September 2009 – the court has not ruled on the validity of the privilege based on those materials. Instead, the court proposes to allow each of the parties to challenge the government's assertion of the privilege by identifying classified information that the individual plaintiff or defendant knows and would seek to use in the litigation to establish claims or defenses, and that the party therefore seeks to exclude from the scope of the state

secrets privilege. To facilitate that process, the district court ordered the United States to provide each party's counsel with a security clearance, and to authorize disclosure to counsel of any classified information known to the party and relevant to the litigation. The government has appealed from that interlocutory order to prevent unauthorized disclosure of classified information.[4]

STATEMENT OF FACTS

1. Plaintiff Richard Horn was a Special Agent of the DEA in 1993, when he was stationed in Rangoon, Burma as the DEA's country attache. JA 20, 22, 24. In this suit, Horn seeks damages for an alleged violation of his constitutional rights under the Fourth Amendment; he has sued two other former federal employees in their individual capacities. One defendant, Franklin Huddle, Jr., was an employee of the State Department and Chief of Mission at the United States Embassy in Rangoon in 1993. JA 21-22. The other, Arthur Brown, was at that time a covert employee of the CIA. Ibid. Horn alleges that Brown tapped Horn's residential telephone in Rangoon, and recorded a late-night telephone conversation between Horn and another DEA Special Agent (also in Rangoon), and that the contents of that conversation were disclosed to Huddle. JA 29.

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[4] This brief contains only unclassified information. Likewise, the Joint Appendix filed this same date contains the unclassified, redacted versions of record materials available on the district court's public docket. Unredacted versions of documents that contain classified and privileged information can be made available to the court upon request for in camera, ex parte review, subject to appropriate security safeguards.

Horn brought this suit in August 1994. His complaint alleged a violation of Horn's Fourth Amendment rights, and also alleged claims under 18 U.S.C. § 2511 and 50 U.S.C. § 1809, as well as a claim of conspiracy. See JA 31-34.[5] Horn filed his complaint in open court, without seeking to seal or otherwise protect against disclosure any of the information within that complaint, which included the identity of a covert CIA employee, as well as other classified information. Thus, in his complaint Horn made an unauthorized public disclosure of classified information. The government therefore promptly moved to seal the case, and filed, ex parte and in camera, the declaration of a CIA official explaining the sensitivity of the classified information alleged in the complaint, and the risks that disclosure of such information could pose to national security. See Dkt# 234.[6]

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[5] The statutory and conspiracy claims were dismissed in 1997. See Dkt# 263, 264. The district court in that order denied defendants' summary judgment motion, holding that the defense of qualified immunity required a trial.

[6] That initial filing by the Assistant United States Attorney (AUSA) in this case, although made in the name of defendants, was solely for the purpose of moving to seal the proceedings, and sought to vindicate larger government interests in protecting classified national security information from disclosure. See Dkt# 234; see also Dkt#235 (initial appearance dated Aug. 19, 1994, solely for the purpose of filing the motion to seal the proceedings). The AUSA (and subsequent government counsel) later also represented the individual defendants because their interests in dismissal were aligned with the government's need to protect national security information from disclosure. See Dkt#239 (appearance dated Oct. 7, 1994). Following this Court's remand of the case in 2007, the government authorized separate private counsel for Huddle and Brown. Thus, while the Justice Department previously represented both defendants, as well as the United States, government counsel now represent only the United States as intervenor.

2. As the case proceeded, the government vigorously opposed Horn's efforts to obtain access to classified information, as well as his continued disclosures of classified information in district court proceedings. In June 1998, the district court observed that, pursuant to the governing executive order, there are three prerequisites for access to classified information:

> (1) a determination of eligibility for access following a background investigation;
>
> (2) a signed nondisclosure agreement; and
>
> (3) a determination that the person has a need-to-know the information.

See JA 36. (citing Exec. Order No. 12958, § 4.2).[7] The district court concluded that plaintiff's counsel should be allowed to apply for the first step in that process, but the court explained that "nothing in this Order shall be understood as stating the Court's position on whether plaintiff's counsel ultimately will satisfy all of the three prerequisites to obtaining access to classified information." JA 37.

Following the reassignment of the case to Judge Lamberth in 1999, the district court again analyzed the issue of counsel access to classified information, in conjunction with its August 2000 order upholding the assertion of the state secrets privilege. Horn argued that his counsel's favorable access-eligibility determination (security clearance) justified disclosure of classified and privileged information to that counsel. The district court rejected that argument, and went on to review the

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[7] Executive Order 12958 has since been amended by Executive Order 13292. See 68 Fed. Reg. 15315 (March 28, 2003). The relevant provisions are now in § 4.1 of the executive order, as amended. See Addendum, infra.

circumstances of the security clearance granted to plaintiff's counsel. See JA 93-97. The court held that "a security clearance does not, by itself, bestow on its holder the requisite 'need-to-know' for purposes of obtaining access to classified state secrets information." JA 93. Rather, information subject to the state secrets privilege "is privileged from disclosure notwithstanding any finding of trustworthiness on the part of the party seeking the information." JA 94.

The court explained that "access to classified information requires two determinations – a security clearance and a need-to-know." Ibid. The executive order governing protection of classified national security information provided that "classified information remains under the control of the originating agency and that before disclosing classified information, an agency, such as the Justice Department, must obtain authorization from the agency with original classification authority over the information." JA 95 (citing Exec. Order 12958, § 4.2). Because Horn and plaintiff's counsel had "satisfied only the first step in the requirements for access to classified information, * * * they did not automatically obtain access" to that information because the CIA (the authorized holder of the information) had not made a need-to-know determination. JA 95-96. The district court emphasized that "determinations of access must be placed in the hands of those who possess the fullest information about the risks to national security that would be implicated by disclosure," and that "[c]ourts * * * properly defer to the determinations made by the Executive Branch in the complex and sensitive area of national security." JA 96; see

also JA 96-97 (quoting In re United States, 872 F.2d 472, 475 (D.C. Cir. 1989), in turn quoting Halkin v. Helms, 598 F.2d 1, 8, 10 (D.C. Cir. 1978) (Halkin I)).

3. In February 2000, the United States invoked the state secrets privilege with respect to information contained in reports produced by the Inspectors General of the CIA and the State Department addressing Horn's allegations concerning activities in Burma during 1993. See Dkt# 313. The scope of the privilege, as asserted in 2000, included classified national security information such as the location of covert intelligence installations, information about CIA organization and functions, and details of intelligence-gathering sources, methods, and capabilities. The privilege also covered the identities of covert intelligence officers, including their names, official titles, and the nature of their functions. At the time the government asserted the state secrets privilege, defendant Brown was a covert CIA employee, whose identity and affiliation with the CIA were themselves classified.

The district court upheld the government's assertion of the state secrets privilege in August 2000. See JA 98. The court emphasized that privileged information is protected from disclosure, even where counsel or litigants have security clearances or where a protective order is in place. JA 86-87 (citing cases). Accordingly, the court rejected Horn's argument that a security clearance entitled him or his counsel to disclosure of information subject to the state secrets privilege. JA 93-97.

The United States subsequently intervened and moved to dismiss, based on the impossibility of litigating the case without the privileged information. Dkt# 348-351.

Horn never directly responded to the government's motion to dismiss. Instead, he filed a motion urging the district court to adapt procedures of the Classified Information Procedures Act, 18 U.S.C. App. III §§ 1-16 (CIPA), to this civil case. Dkt# 354-355. Briefing on those motions was completed by March 2001. The district court took no further action for more than three years.

4. On July 28, 2004, the district court dismissed Horn's complaint. JA 113-114. The district court first considered whether it could rule on the government's motion to dismiss in the absence of a substantive response. JA 101-102. The court looked to this Court's decision in Stillman v. CIA, 319 F.3d 546 (D.C. Cir. 2003), a case concerning a court-ordered disclosure of classified information to a plaintiff's counsel in litigation challenging a government pre-publication review decision. See JA 102-103. In Stillman, this Court held that a district court should have attempted to review the classification decision ex parte, without the assistance of plaintiff's counsel, before even considering the extraordinary step of directing the government to grant a security clearance and allow disclosure of classified information to an attorney for an adverse party. The district court in this case concluded that "the same procedure" outlined in Stillman would be "appropriate" here, and that it could rule on the motion to dismiss without awaiting any additional opposition because the motion to adapt CIPA procedures articulated Horn's opposition to the motion to dismiss. See JA 103-104.[8]

[8] The court was particularly concerned that ordering a security clearance could lead to further discussion between plaintiff's counsel and Horn of "classified

The district court reviewed its earlier ruling upholding the assertion of the state secrets privilege, observing that "[t]he information contained in the IG reports and those attachments protected by the state secrets privilege has now been removed from the case." JA 107. The court recounted the categories of information it had found protected by the privilege: " 1) information that would threaten to reveal the identities of certain covert CIA officers; 2) information as to the location of certain covert CIA installations and activities; 3) information as to the organizational functions of the CIA * * *; and 4) information on intelligence gathering sources, methods and capabilities, including liaison relationships with foreign governments." Ibid. (internal quotation marks omitted).

The district court dismissed Horn's complaint, concluding that the case could not be litigated without the information subject to the state secrets privilege. The court held that Horn's prima facie case, the defenses to be asserted, and the very subject matter of the case all implicated the state secrets privilege. See JA 108-110.

The district court denied Horn's motion to adapt CIPA procedures, observing that the application of settled legal principles had already led to the conclusion that "the case must be dismissed because of the removal of information protected by the state secrets privilege." JA 110. Moreover, the court held that CIPA applies only to criminal cases and that any mechanisms envisioned by CIPA would be inconsistent with the "absolute" nature of the state secrets privilege. JA 111. Once the privilege

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information that neither plaintiff nor plaintiff's counsel is supposed to possess in the first place," because it was beyond their clearance levels. JA 103.

is properly asserted, there is no basis for balancing the government's protection of national security against a party's asserted need for the privileged information. Ibid.

5. Horn appealed from the district court's dismissal, and this Court partially affirmed and partially reversed. In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007). The Court upheld the government's assertion of the state secrets privilege, and observed that the well-established effect is that the privileged information "is unavailable." Id. at 145 (quoting Ellsberg v. Mitchell, 709 F.2d 51, 64 & n.56 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984)). This Court concluded that Horn could make out a prima facie case against Huddle without relying on such information. Id. at 145-148. Horn could invoke testimony concerning "unclassified matters, which are not subject to the state secrets privilege." Id. at 148; see also ibid. ("even after evidence relating to covert operatives, organizational structure and functions, and intelligence-gathering sources, methods, and capabilities is stricken from the proceedings under the state secrets privilege, Horn has alleged sufficient facts to survive a motion to dismiss under Rule 12(b)(6)"). The Court affirmed the dismissal of Horn's claims against Brown, holding that "[n]othing about this person would be admissible in evidence at a trial." Id. at 147.

The Court held that the unavailability of privileged evidence pertaining to particular defenses was not necessarily a basis for dismissal, unless "the district court determines from appropriately tailored in camera review of the privileged record that the truthful state of affairs would deny a defendant a valid defense that would likely cause a trier to reach an erroneous result." Id. at 151 (citations omitted). The Court

also held that dismissal would not be proper in this case on the ground that the very subject matter of the case is a state secret. Id. at 151-153. Finally, the Court expressly declined to reach Horn's arguments that the courts should invoke procedures based on CIPA and that he and his counsel's secretaries should receive security clearances and be authorized to have access to classified information. Id. at 154 ("we have no occasion to address whether Horn or his counsel have a 'need-to-know' additional classified information") (citations omitted).

6. On remand, government counsel learned that the CIA had lifted and rolled back Brown's cover in 2002. That action changed Brown's status from covert to overt CIA employee. Thus, Brown was under cover in 2000, when the then-accurate state secrets privilege declarations were filed and the district court upheld the privilege. But as of 2002, Brown and the CIA could disclose his employment by the agency, and his presence in Southeast Asia during the period of this lawsuit. The Department of Justice had been informed of the change in the underlying facts until after this Court's remand of the case in 2007. JA 131-136.

Upon learning of Brown's change in cover status, the Justice Department promptly informed both the district court and this Court, as well as opposing counsel. JA 115-140; Notice of Filing, D.C. Cir. No. 04-5313 (4/11/08). In early 2008, Horn moved to reinstate his claims against Brown. The district court granted that motion in January 2009, after a review of declarations provided by the United States explaining that a single attorney in the CIA Office of General Counsel had learned of Brown's change of cover status, but failed to inform the Justice Department. The

district court held that the failure to inform the Justice Department and the courts of the significant change in Brown's status was fraud on the court, and referred that individual CIA attorney to the Committee on Grievances of the district court for investigation and possible discipline. JA 141-155. The district court subsequently opened sanctions and contempt proceedings against CIA officials and attorneys who allegedly knew of Brown's change of status. JA 163, 204 n.2. Those proceedings remain pending and have not resulted in findings of wrongdoing by particular individuals.

7. As the district court directed, the United States again asserted the state secrets privilege in April 2009, based on Horn's discovery requests in 1998 and 2000. The new, narrower assertion of the privilege was supported by public as well as in camera declarations, including those of DCIA Panetta, who took office earlier this year. The privilege continues to cover intelligence activities, sources, and methods, but the identity of Brown (and others whose cover status had changed in the intervening decade) is no longer privileged. See Dkt# 427, 488. The government also submitted a proposed protective order establishing limits on discovery and trial to prevent disclosure of privileged and classified national security information. See Dkt# 432, 433

On July 16, 2009, the district court denied the state secrets privilege, without prejudice to the government re-asserting the privilege later. JA 201-216. In that decision, the court expressed reservations about the scope of the privilege and, in particular, questioned the relationship between the privilege assertion and redactions

of classified information made by the government to earlier filings and to the Inspector General reports.

The district court acknowledged "that there are certain categories of information that are properly covered by the state secrets privilege," but also gave the government, on an ex parte basis, "a further opportunity * * * to explain its basis for redacting certain information" because the court was "unable to uphold or deny the assertion of the privilege on the basis of the government's generalized declarations alone." JA 211-212. The court reached this conclusion largely due to a perceived discrepancy between the public and ex parte versions of Director Panetta's declarations concerning the significance of official government statements confirming or denying the use of particular pieces of surveillance equipment at particular locations. The district court also appeared to believe that the state secrets privilege would not cover particular types of surveillance equipment or techniques if there were some indication – even if unofficial – that they were used by the intelligence community of the United States. See JA 210-211 & nn.8-9 (referring to Microsoft Encarta Online Encyclopedia and Spy Museum as confirmation that intelligence community uses specific intelligence methods); see also JA 221 n.4 (subsequent order, referring to "U.S. Government coffee-table type eavesdropping devices similar to those in the Spy Museum"); JA 222 n.7 (similar). The court also declined to give the government's submissions "a high degree of deference because of its prior misrepresentations regarding the state secrets privilege in this case." JA 210.

The district court resolved to apply "CIPA-type procedures" to determine the scope of the privilege. JA 212-214. To that end, the court ordered each party to file a description of any information already known to him that: (1) the party intends to inquire into during discovery and/or present at trial; and (2) the party believes the government has improperly asserted the privilege over or redacted. JA 215-216. Because the court's July 16 Order made no need-to-know determination and did not set out a detailed schedule, the government did not interpret it as requiring counsel access at that time. In a subsequent filing, the government suggested that the prudent course, under Stillman, would be to consider ex parte and in camera the government's further justifications supporting the redactions to the documents and explaining the basis for the state secrets privilege. See Dkt# 454.

8. On August 26, 2009, the court agreed that the government should file additional materials justifying redactions to the documents and further explaining the basis of the privilege assertion, and ordered that such explanations be filed ex parte by September 4, 2009. JA 234, 236. That decision also concluded that, from the court's perspective, the individual parties' counsel have a need-to-know the classified information their clients possess and intend to rely on. Ibid. The court therefore ordered the government to grant security clearances to those counsel and to authorize disclosure of classified information to them. The district court acknowledged that no other decision has compelled the disclosure of classified information to counsel over the objection of the Executive. JA 217-218.

As part of the discussion justifying its extraordinary injunction, the district court cited this Court's decision in Oryszak v. Sullivan, 576 F.3d 522 (D.C. Cir. 2009), but relied on a mis-quotation of the opinion in that case, asserting that this Court adopted a rule that the Executive Branch's exclusive authority to determine security clearances applies "'at least in the absence of litigation,'" see JA 228 (emphasis added) (mis-quoting Oryszak, 576 F.2d at 525); see also JA 229 (same).[9] That error led the district court to conclude that Oryszak "apparently reserv[ed] the question as to whether the Court can order counsel to have access to classified information in the context of litigation." JA 228.

In addition, the court called into question "the credibility of the government's representations given all the circumstances of this case." JA 220. The district court went beyond its earlier, limited findings, stating that "[t]he government committed fraud on the Court and the Court of Appeals by knowingly failing to correct a declaration of Director Tenet, who stated that defendant Brown's identity was covert, when the government knew that it was not." JA 220 n.3; ibid. (describing "an action that can only be construed as an attempt to dishonestly gain dismissal").

The purpose of the district court's order was to permit the parties' counsel to engage in CIPA-like procedures, which the court concluded are necessary to "fashion

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[9] The correct quote is: "The Supreme Court has made clear that, at least in the absence of legislation, 'the grant 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.'" Oryszak v. Sullivan, 576 F.3d 522, 525 (D.C. Cir. 2009) (emphasis added) (quoting Egan, 484 U.S. at 527).

a way for this case to ultimately proceed to discovery and trial." JA 226. The district court asserted that such a mechanism is needed to explain to counsel and the parties the contours of, and permit challenges to, the government's assertion of the state secrets privilege. The court reasoned that, "without clear boundaries as to what information is privileged and what is not, there would be an unacceptable risk to national security were this case to ultimately proceed to discovery and trial." JA 222.

The court concluded that it should limit such CIPA-like procedures to information already known by the parties. JA 223. But the court did not explain why these procedures were necessary at this juncture. The court reached its conclusion after rejecting the government's argument that the court should adopt mechanisms followed in other state secrets cases. The government proposed to exclude categories of information under the state secrets privilege, based on the demonstrated risk of harm to national security from disclosure of such information, and then allow the government to participate in the discovery process, so the Executive could take on the burden of protecting privileged and classified national security information from disclosure. The court explained its view that those "post hoc" measures were likely to cause more unauthorized disclosures of classified information than the counsel-access process the court had ordered. JA 233. The court therefore directed the government to grant security clearances to private counsel by September 10, 2009. JA 236-237. The United States appeals from that order.

The district court denied the government's motion for a stay pending appeal on September 4, 2009. JA 240-247. This Court granted a stay pending appeal on September 10, and ordered expedited briefing and argument.

STANDARD OF REVIEW

Although this Court typically reviews a "district court's weighing of [injunction] factors under an abuse of discretion standard, * * * to the extent the district court's decision hinges on questions of law our review is essentially de novo." O'Hara v. District No.1-PCD, 56 F.3d 1514, 1522 (D.C. Cir. 1995). Any "underlying factual findings" are subject to review "for clear error." Davenport v. International Bhd. of Teamsters, 166 F.3d 356, 361 (D.C. Cir. 1999). See also, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975) ("[T]he standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard, constituted an abuse of discretion."); Koon v. United States, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). Finally, this Court has held that it "cannot determine whether the District Court has abused its discretion in remedying a wrong where the court did not exercise that discretion in order to remedy the properly determined wrong." United States v. Microsoft Corp., 253 F.3d 34, 104 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

SUMMARY OF ARGUMENT

The district court's extraordinary order – compelling the government to grant security clearances and to authorize disclosure of classified national security information to private counsel so the parties can further challenge the validity and

scope of the state secrets privilege – unnecessarily usurps the Executive Branch's authority and responsibility to protect from disclosure classified national security information as to which the state secrets privilege has been invoked. As the district court itself recognized, its order is unprecedented. JA 217-218. The district court's order is plainly premature, in light of the court's failure to first consider the justifications for the privilege ex parte and in camera. Instead of interjecting the parties' counsel in the process of judicial review of the state secrets privilege, and overriding the safeguards established for the protection of national security information, the district court should have undertaken the in camera, ex parte review of materials justifying the state secrets privilege, as typically happens when the privilege is invoked. The failure to complete that process here has prompted this interlocutory appeal and needlessly created a separation-of-powers conflict in the sensitive area of national security.

This Court need not resolve the potentially difficult constitutional questions concerning a court's role in determining when counsel should have access to classified information in the course of civil litigation. It will suffice to reverse the order on appeal, and remand for the district court to complete the review of the state secrets privilege assertion. If unresolved questions remain about the validity and scope of the privilege, the court below can demand additional information from the government, ex parte and in camera, or it can reject the privilege (a decision that would be subject to review by this Court). There is simply no need to compel access by counsel to classified national security information.

The jurisprudence of the state secrets privilege is well established. Moreover, in other areas of law, this Court has made clear that a court should not prematurely order disclosure of classified information to counsel. For example, in FOIA litigation, just like pre-publication review cases, ex parte and in camera review is the norm. This Court has never upheld an order such as the one on review here.

And with good reason. The Supreme Court has repeatedly emphasized that, under existing law, the President, as Commander in Chief and head of the Executive Branch, has the responsibility of protecting national security information from unauthorized disclosure. The discretionary decision to grant a security clearance is not judicially reviewable, and the governing executive order is clear that access to classified information is not authorized – even for those with a security clearance (access-eligibility determination) – unless the Executive Branch agency responsible for the classified information makes a need-to-know determination. Such a determination should not be made by a court, which lacks the institutional competence to evaluate the potential for harm to national security that might result from disclosure.

The district court here attempted to overcome those established principles by asserting an inability to evaluate the state secrets privilege in this case. But the district court cannot override the Executive Branch's responsibility to protect classified national security information from unauthorized disclosure based on either the court's (inaccurate) perception of an inconsistency in the justifications for the privilege or the court's skepticism following the correction of the record concerning

Brown's cover status. And the district court is institutionally ill-equipped to conclude that the threat to national security from possible future inadvertent disclosures during the course of discovery and trial require disclosure of classified information to counsel now. Moreover, defendants' private counsel do not stand in the shoes of the government counsel who previously represented the United States (and accordingly sought to protect classified information from disclosure) as well as the individual defendants in this case. Nor do plaintiff's unauthorized disclosures of classified information to his counsel justify further breaches of security.

ARGUMENT

THE DISTRICT COURT IMPROPERLY ORDERED DISCLOSURE OF NATIONAL SECURITY INFORMATION BEFORE REVIEWING THE GOVERNMENT'S ASSERTION OF THE STATE SECRETS PRIVILEGE.

The district court order on appeal unnecessarily overrides the safeguards set forth under existing law for protecting classified national security information from unauthorized disclosure. Although that decision raises serious constitutional concerns in light of well-established precedent, this Court need not resolve those questions here. It was obviously premature for the district court to order that private counsel be granted access to classified information when the court has not yet completed its review of the state secrets privilege based on in camera and ex parte review of the comprehensive justifications provided by the government in support of the privilege.

A. The Executive Is Responsible For Protecting Classified National Security Information From Unauthorized Disclosure.

Under existing law, the governing executive order establishes the standards for classifying and safeguarding national security information. The procedures established in the executive order are consistent with the constitutional commitment of authority to the President to prevent harm to national security, and they should not lightly be disregarded. By ordering that counsel be given access to classified information before completing review of the state secrets privilege assertion, the district court's order here unnecessarily creates a conflict with those standards, and raises concerns about the court's authority to disregard the executive order. Although this Court need not reach the constitutional separation-of-powers question, we summarize those principles here to demonstrate the seriousness of the concerns implicated by the district court's decision.

1. The Constitution commits to the President the authority and responsibility to protect our Nation's security. A necessary component of that responsibility is the obligation to protect certain information from disclosure, where such disclosure could be expected to harm national security. "The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988).

For nearly a century, the Executive Branch has maintained a system of classifying national security information according to its sensitivity. See id. at 528. Access to such classified information is governed by Executive Order. See Exec.

Order 12958, as amended by Exec. Order 13292, § 4.1(a), 68 Fed. Reg. 15315, 15324 (Mar. 28, 2003). As the district court in this case recognized nine years ago, there are three prerequisites before an individual will have authorized access to particular classified national security information. See JA 93-97.

> First, an agency head must make "a favorable determination of eligibility for access," following a background investigation. Exec. Order 12958, as amended, § 4.1(a)(1), 68 Fed. Reg. 15324.
>
> Second, the individual must "sign[] an approved nondisclosure agreement." Id. § 4.1(a)(2).
>
> Third, access to particular information is allowed only if "the person has a need-to-know the information." Id. § 4.1(a)(3). The Executive Order defines "need-to-know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Exec. Order 12958, as amended, § 6.1(z), 68 Fed. Reg. 15332.[10]

Access eligibility – colloquially referred to as a "security clearance" – is therefore not sufficient to authorize disclosure of particular classified information to an individual. See JA 93-94. The governing executive orders have also consistently required a need-to-know determination by an authorized Executive Branch official before authorizing disclosure of classified information. This is an essential safeguard to ensure that classified information is not disseminated more widely than absolutely necessary, consistent with the obligation to "establish[] procedures to prevent unnecessary access to classified information, including procedures that * * * ensure

[10] Whether Congress may, via appropriate legislation, modify the classification of national security information, is not an issue before this Court. See infra, 32-33.

that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs." Exec. Order 12958, as amended, § 5.4(d)(5)(B), 68 Fed. Reg. 15329.

A need-to-know determination can only be made by "an authorized holder of classified information." Exec. Order 12958, as amended, § 6.1(z), 68 Fed. Reg. 15332. Such an "authorized holder" must be an appropriate Executive Branch official, under existing law.[11] And that official must in turn obtain the consent of the agency that originally classified the information. See Exec. Order 12958, as amended, § 4.1(c), 68 Fed. Reg. 15324 ("Classified information shall remain under the control of the originating agency or its successor in function. An agency shall not disclose information originally classified by another agency without its authorization."). Here, the district court improperly overrode the requirements under the governing executive order for safeguarding national security information. While "[d]isclosure to one more person, particularly to one found by the CIA to be a person of discretion and reliability, may seem of no great moment," the courts should not underestimate the risks to national security from such disclosure. Colby v. Halperin, 656 F.2d 70, 72 (4th Cir. 1981).

[11] If there were any doubt about the meaning of the Executive Order, the Executive's consistent and longstanding resolution of that question would be entitled to substantial deference and controlling weight. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994).

2. The Supreme Court has left no doubt that the Executive has the authority and the responsibility to protect classified national security information from unauthorized disclosure, and that the courts should respect that authority. It is both "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve th[is] interest[]." Haig v. Agee, 453 U.S. 280, 307 (1981); see also, e.g., Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."). "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world." Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). In particular, information concerning foreign relations, as well as intelligence capabilities, sources, and methods indisputably must be protected from disclosure:

> "[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

The Supreme Court has made clear that the grant of a security clearance, and the authority to determine who or how many persons shall have access to classified information, "is committed by law to the appropriate agency of the Executive

Branch," and "flows primarily from [a] constitutional investment of power in the President." Egan, 484 U.S. at 527. The Court there explained that "the grant of security clearance to a particular employee" is "a sensitive and inherently discretionary judgment." Ibid. And the President's "authority to classify and control access to information bearing on national security" results from the constitutional role of the President as "'Commander in Chief of the Army and Navy of the United States.'" Ibid. (quoting U.S. Const., Art. II, § 2). And the government has a "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." Ibid. (quoting Snepp, 444 U.S. at 509). This Court likewise recognizes that the source of the authority to protect such information from unauthorized disclosure flows from the Executive's constitutional responsibility to protect national security: "This is within the privilege and the prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." Holy Land, 333 F.3d at 164.

It is essential to recognize that 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) (Halkin I) (quoting Alfred A. Knopf v. Colby, 509 F.2d 1362, 1369 (4th Cir.), cert. denied, 421 U.S. 992 (1975)). Indeed, courts have acknowledged that even disclosures to a court in camera and ex parte could pose such risks. See, e.g., United

States v. Reynolds, 345 U.S. 1, 10 (1953) ("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, 348 (4th Cir. 2005) ("Inadvertent disclosure during the course of a trial – or even in camera – is precisely the sort of risk that Reynolds attempts to avoid."), cert. denied, 546 U.S. 1093 (2006); id. at 343-344; Alfred A. Knopf, 509 F.2d at 1369.[12]

There are additional risks here, because an individual counsel's obligation to safeguard any national security information may well conflict with that same counsel's obligation of zealous advocacy on behalf of a client. This Court has acknowledged the risk that litigation counsel's "sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy," and has accordingly held 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), cert. denied, 465 U.S. 1038 (1984). Counsel's duty of undivided loyalty to the client give "every incentive

[12] Federal regulations provide that classified information may be disclosed by Justice Department attorneys to a court, as long as proper security measures are taken. See 28 C.F.R. § 17.17. Federal Article III Judges and Justices, like Members of Congress, do not require individual access-eligibility determinations. See 28 C.F.R. § 17.46(c). However, all others – including court staff and law clerks – are subject to the requirement of a background investigation and access-eligibility determination, as set forth in the executive order. And every prospective recipient of access to specific information must be determined, by the responsible Executive Branch agency, to have a need-to-know that information before disclosure will be authorized. See Exec. Order 12958, as amended, § 6.1(z) , 68 Fed. Reg. 15332.

to probe as close to the core secrets as the trial judge would permit." Farnsworth Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam). Involving counsel in the judicial function of considering the scope of the state secrets privilege would have the same effect with the same attendant risks of disclosure. But in the state secrets context, "[c]ourts are not required to play with fire and chance further disclosure – inadvertent, mistaken, or even intentional – that would defeat the very purpose for which the privilege exists." Sterling, 416 F.3d at 344.

B. Absent An Executive Branch Need-To-Know Determination, A Court Should Review Classified National Security Information Ex Parte, In Camera.

1. This Court has repeatedly recognized the government's "compelling interest in withholding national security information." See, e.g., People's Mojahedin Org. v. Department of State, 327 F.3d 1238, 1242-1243 (D.C. Cir. 2003). When necessary in litigation, the government may present classified information "in camera and ex parte to the court," but "need not disclose" such information to the parties or their counsel. Holy Land Found. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); see also, e.g., Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("the court has inherent authority to review classified material ex parte, in camera as part of its judicial review function"), cert. denied, 543 U.S. 1146 (2005).

It thus follows that a court should not order the Executive to grant private counsel or any other person access to classified information. In keeping with this rule, courts repeatedly have rejected demands that opposing counsel or parties be

permitted access to classified material presented to the court ex parte and in camera. See, e.g., Sterling, 416 F.3d at 348 (denying special accommodations such as, inter alia, giving private counsel access to classified information as giving "rise to added opportunity for leaked information."); In re United States, 1 F.3d 1251 (Table), 1993 WL 262656, at *9 (Fed Cir. 1993) (Executive's access decisions "may not be countermanded by either coordinate branch"); Pollard v. FBI, 705 F.2d 1151, 1153 (9th Cir. 1983) ("In camera proceedings, particularly in FOIA cases involving classified documents, are usually non-adversarial, with the party who is seeking the documents denied even this limited access to the documents he seeks to obtain."); Salisbury v. United States, 690 F.2d 966, 973-974 & n.3 (D.C. Cir. 1982) (where "considerations of national security mandate in camera proceedings, the District Court may act to exclude outside counsel when necessary for secrecy or other reasons").

The Court has reserved the question of what role the judiciary would have if Congress were to enact legislation governing access to classified national security information. In Oryszak v. Sullivan, this Court relied on Egan to hold that a government employee could not seek judicial review of the revocation of her security clearance. The Court stated: "The Supreme Court has made clear that, at least in the absence of legislation, 'the grant 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.'" Oryszak v. Sullivan, 576 F.3d 522,

525 (D.C. Cir. 2009) (quoting Egan, 484 U.S. at 527).[13] Neither Oryszak nor this case presents any question of legislative alteration of those well-understood principles, as there is no statute providing for review of security clearance decisions or giving district courts authority to override the Executive's power to limit access to national security information. As Oryszak makes clear, the absence of legislation confirms the Executive's authority. See also, e.g., American Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003) ("Given the President's independent authority 'in the areas of foreign policy and national security, ... congressional silence is not to be equated with congressional disapproval.'") (quoting Haig, 453 U.S. at 291).

This Court has held that a district court should make every effort to resolve any disputes concerning classified information ex parte and in camera. See Stillman v. CIA, 319 F.3d 546 548-549 (D.C. Cir. 2003). Plaintiff in that case – who had agreed to submit writings for pre-publication review to prevent disclosure of classified information – invoked the First Amendment and sought the assistance of his counsel to challenge Executive Branch determinations that his manuscript included classified information. This Court reversed a district court order (like the order here) that would have compelled the government to grant a security clearance and authorize disclosure of classified information to counsel. This Court held that such a decision was premature, and that a court should "determine first whether it can resolve the classification ex parte," relying on the government's in camera submissions, as well

[13] As we explain below, the district court in this case relied on a mis-quotation from Oryszak.

as any information provided by plaintiff in that case, a self-described expert on classification decisions, without disclosing classified information to his counsel. Id. at 548-549. Only if the court is unable to determine the propriety of classification, and only if the court also determines that "its need for such assistance [of counsel in reviewing the classification decisions] outweighs the concomitant intrusion upon the Government's interest in national security, * * * should [the court] decide whether to [order counsel access to classified information]." Id. at 549.

While "it is often difficult for a court to review the classification of national security information," Stillman, 319 F.3d at 548, that difficulty is not and never has been an invitation to grant security clearances to counsel and invite an adversary process concerning the potential harm to national security from disclosure of classified information. Rather, "the norm" is "in camera review of affidavits, followed if necessary by further judicial inquiry." Ibid. (quoting McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983)).

Even where the Executive Branch has made limited need-to-know determinations authorizing private counsel access to some classified information in the course of litigation, courts should not order further disclosure. In the Guantanamo Bay detainee habeas litigation, the government agreed to grant security clearances and access to some classified information in part because the detainees' liberty interests were at stake, in part to regulate and limit access to sensitive information by detainee counsel (including information known by the detainees themselves), and in part to facilitate physical access to the secure Guantanamo Bay facility. As Egan and

other cases demonstrate, the Executive Branch's discretionary decision to allow access in one context does not provide a basis for reviewing the denial of access in very different circumstances.

This Court's recent decision in Al Odah addressed whether a district court improperly ordered the government to allow private detainees' counsel access to classified information beyond the limited need-to-know determination granted by the Executive Branch for Guantanamo habeas litigation. See Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009). There, as in Stillman, the Court reiterated that a district court should "consider[] unclassified alternatives before ordering disclosure of classified information." Id. at 547. Thus, even in the context of habeas proceedings (which the Court analogized to criminal prosecutions for this purpose), where the responsible Executive Branch agency has not granted a need-to-know determination, disputed classified information "should be presented first to the court ex parte and in camera." Ibid. (internal quotation marks omitted).

2. In the context of the state secrets privilege, the law is particularly well-established that ex parte and in camera review by a court is necessary to determine the validity of the privilege. See Reynolds, 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.") (emphasis added); Sterling, 416 F.3d at 344 (noting the "judge's role" in evaluating privilege assertions and the attendant burdens of in camera review in

national security and other contexts). There is no role for the parties' counsel in that process.

It makes no difference whether an attorney has previously received an access-eligibility determination. As the executive order makes clear (and the district court itself recognized here in 2000, see JA 93-96), access-eligibility is a first step, but is not itself sufficient to authorize disclosure of particular classified information. Such disclosure is permitted only if the responsible Executive Branch agency has made a need-to-know determination, based on its judgment that an individual requires access to particular national security information to aid a governmental function. See Exec. Order 12958, as amended, § 6.1(z), 68 Fed. Reg. 15332.

In analogous private litigation, in which the United States intervened to assert the state secrets privilege and prevent disclosure of national security information, counsel who held security clearances sought access to classified and privileged information over the objection of the Executive. This Court unequivocally rejected their arguments. "[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, 1993 WL 262656, at *6 (noting that Egan "discussed 'access to information' as well as 'an individual's' trustworthiness"); Halkin I, 598 F.2d at 7.

C. The District Court's Rationales For Ordering Counsel Access Here Are Mistaken.

The district court articulated three reasons for its order compelling the government to grant security clearances and authorize disclosure of classified information to counsel over the objection of the Executive. First, the court prematurely concluded that it required the assistance of counsel to evaluate the validity and scope of the government's assertion of the state secrets privilege. Second, the district court held that counsel access was necessary to establish the "clear boundaries" of the privilege so that the court could "allow[] the case to proceed." JA 227. Third, the court justified its decision that defendants' new private counsel should have access to classified national security information over the Executive's objection because: (1) those counsel had been adjudicated favorably for access-eligibility; (2) government counsel – who had previously represented the individual defendants – had access to classified and privileged information; and (3) plaintiff had previously disclosed classified information to his counsel. All three justifications fail.

1. Due largely to the district court's misunderstanding about the scope and justification for the narrower state secrets privilege asserted in April 2009, the court erroneously sought to inject private counsel into the judicial evaluation of the validity of the privilege.

a. The district court denied the April 2009 assertion of the privilege without prejudice, principally because it believed that the privilege was invoked "too

broadly" and because it perceived "significant[] conflict[s]" or "inconsisten[cies]" in the government's declarations. JA 220-221. That perception was unfounded. The district court acknowledged "that there are certain categories of information that are properly covered by the state secrets privilege," and thus gave the government "a further opportunity * * * to explain its basis for redacting certain information" because the court was "unable to uphold or deny the assertion of the privilege on the basis of the government's generalized declarations alone." JA 211-212. The government has now submitted extensive and detailed in camera declarations, as well as a document-by-document table explaining the redactions of classified and privileged information in previously filed record materials.[14]

Instead of undertaking the process of judicial review to determine if the state secrets privilege was validly asserted, as described in Reynolds and subsequent state secrets cases, the district court here instead seeks to involve the parties' counsel in that process. See JA 213, 222 n.7. But the judicial review described in Reynolds does not contemplate judicially ordered access to classified information without the consent of the Executive. And there is no basis for compelling private counsel access to classified information merely because the district court denied, without prejudice, the state secrets privilege and asked for additional ex parte explanations from the government.

[14] Those submissions, provided to the district court on September 4, 2009, can be made available for this Court's review in camera and ex parte.

Such a step is doubly improper. As we have explained, the district court should not assume the authority to determine when disclosure of classified information is consistent with the requirements of national security. Moreover, there would be no need for such a step if the court reviews the newly submitted privilege materials in camera and ex parte, as exemplified by state secrets cases for the last fifty years. Thus, the district court's counsel-access order here unnecessarily precipitates a conflict with the Executive Branch that can easily be avoided.

The district court here did not conform to the requirements of this Court's decision in Stillman. The court stated that it "has already attempted to resolve the classification dispute ex parte." JA 225. But neither that statement nor the truncated process the district court engaged in represent the kind of undertaking required by Stillman. And a district court should not abandon the judicial review of the state secrets privilege required by Reynolds merely because the court has questions about the government's rationale. The proper step at that point is for a court to consider additional explanations from the government in camera and ex parte, or reject the privilege, not to override the established safeguards for protection of classified national security information.

The only step the district court actually took was to review the declarations submitted in support of the government's April 2009 re-assertion of the state secrets privilege. See JA 208-212, 218-221. The court apparently believed there was an inconsistency between Director Panetta's public and in camera declarations, to the extent that the state secrets privilege was being asserted over information concerning

intelligence sources and methods used by the United States. See JA 210-211 & n.9, 221 n.4. But the district court did not need to order disclosure of classified information to the parties' counsel in order to resolve its concerns about the scope and justification for the state secrets privilege. Instead, the court should have pursued its in camera and ex parte inquiry to ascertain the basis for the government's assertion of the privilege. Cf. Stillman, 319 F.3d at 548-549.

b. The government's most recent re-assertion of the privilege carefully drew a line between intelligence sources and methods actually used by the federal government intelligence community, which are protected by the state secrets privilege, and commercially available eavesdropping technology with no connection to the government. The declarations underlying the privilege make clear that official confirmation of intelligence sources and methods could be expected to cause serious or exceptionally grave harm to the national security. The district court here apparently did not understand the significance of that distinction, and misconstrued the Panetta declaration. See JA 210-211 n.9 ("Panetta's classified declaration appears to acknowledge that an eavesdropping transmitter of the type alleged by Horn is not a state secret even if used by the U.S. Government").

The district court appeared to believe that the state secrets privilege would not cover particular types of surveillance equipment or techniques if there were some indication that they were used by the intelligence community of the United States. But it is of no moment whether the Spy Museum or an online encyclopedia asserts that the intelligence community has certain capabilities; the potential harm to national

security often flows from official confirmation or denial of those capabilities. This Court has resolved that for purposes of proper classification for matters subject to "widespread media and public speculation" based on "[u]nofficial leaks and public surmise," those alleged facts are not actually established in the public domain. Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983). 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 to result from further disclosure. See Students Against Genocide v. Department of State, 257 F.3d 828, 836-837 (D.C. Cir. 2001) (even official prior disclosure of classified information to limited group does not compel disclosure to others); Halkin v. Helms, 690 F.2d 977, 994 (D.C. Cir. 1982) (Halkin II) (rejecting in state secrets context the allegation that "matters of public knowledge" lead to the assumption that a privilege assertion is "overbroad and suspect."). If the district court had rejected the assertion of the state secrets privilege over such intelligence sources and methods, the government would have an opportunity to seek further review of such a decision, and correct any such misunderstanding, before the disclosure of sensitive national security information.

The government has provided additional ex parte and in camera submissions explaining the scope of the privilege and also detailing the basis for each redaction of privileged and classified information in the public version of the court's docket. The government did so on September 4, 2009, and the district court can and should review those materials before considering any further steps. If the court still has

questions concerning the scope of the privilege, it could for example, conduct an ex parte, in camera hearing to raise questions with government counsel, or the court could ask for further clarification from any of the declarants in support of the privilege. If there were a demonstrated need for the court to consider the views of the individual plaintiff or defendants concerning classified information, those individuals could submit their views directly to the district court without disclosing classified information to their counsel, as this Court contemplated in Stillman, 319 F.3d at 548-549. The district court abused its discretion by ordering disclosure of classified information to private counsel before taking any of those obvious next steps.

c. Nor can the district court's extraordinary counsel-access order be justified by the court's skepticism about "the credibility of the government's representations given all the circumstances of this case." JA 220. The district court asserted that it "did not give a high degree of deference to the government because the government has already committed fraud on this Court and the Court of Appeals regarding what information is covered by the state secrets privilege in this case." Ibid. That statement mischaracterizes the district court's own findings, as well as the government's conduct in this case. The district court has not developed a record that would support any finding of wrongdoing by the government. But even if there had been misconduct, it would not justify compromising national security by ordering disclosure of classified information over the objection of the Executive.

As we explained to the district court, one CIA attorney some seven years ago failed to disclose a significant change in circumstances concerning the earlier

invocation of the state secrets privilege. See JA 118-140; see also JA 144-147.[15] While the government recognizes the seriousness of the failure to correct those nearly decade-old submissions, it bears emphasis that counsel for the United States informed the parties and the district court (as well as this Court) promptly upon learning of the error. See JA 115-117.

The district court invoked Rule 60(b)(3) – which allows a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding for * * * fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party" – in determining to reinstate Arthur Brown as a defendant after he had previously been dismissed. See JA 142-143. But the court has not definitively determined who was responsible for the failure to inform the courts (and the Justice Department) of the change in Brown's cover status. Although one former CIA attorney was originally referred to the district court's committee on grievances, JA 154, that referral was stayed a month later, JA 163. Plaintiff's sanctions motion against Brown, Tenet, and other individuals remains pending before the district court.[16]

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[15] Brown later offered a different recollection of events. See JA 156-157. And the district court permitted Horn to file sanctions proceedings against the CIA, three current CIA attorneys, one former CIA attorney, former DCIA George Tenet, and defendant Brown. See JA 163, 204 n.2.

[16] In its opinion addressing Rule 60(b)(3), the district court left open the possibility that the individual CIA attorney who failed to notify the courts (and the Department of Justice) was culpable because of "intent" or "reckless disregard for the truth." JA 146 n.4; see also JA 162 (speculating on significance of failure to inform

Moreover, any misconduct attributable to the government here would not justify breaches of the procedures established to safeguard national security information from unauthorized disclosure. The deference owed to Executive Branch determinations concerning national security is not diminished by individual failures on the part of agency employees. Rather, the judiciary rightly recognizes that the Executive Branch has the "broad view of the scene" in foreign intelligence matters and "courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area." See Halkin I, 598 F.2d at 8 (quoting United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972)); accord CIA v. Sims, 471 U.S. 159, 179 (1985) (noting that the CIA Director "must of course be familiar with 'the whole picture,' as judges are not" and his views are therefore "worthy of great deference given the magnitude of the national security interests and potential risks at stake").

The recent declarations in support of the state secrets declaration are not tainted by the previous failures of agency counsel to identify a material change in

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courts "[i]f multiple attorneys of the OGC within the CIA were aware of the change in Brown's cover status"); JA 204 n.2 (reviewing disputed allegations). In the order on appeal, the district court went far beyond its own limited record and carefully circumscribed prior findings on the issue of misconduct. See JA 220 n.3 (describing the failure to correct the record as "an action that can only be construed as an attempt to dishonestly gain dismissal"). To the extent that the district court now attributes individual misconduct to the United States or to the new DCIA, the record manifestly does not support such a step.

circumstances during a period while the case laid fallow. DCIA Panetta, for example, assumed his current office earlier this year and his fresh assessment of the risks of disclosure ought to be granted the high level of deference ordinarily due in the state secrets context.

Under these circumstances, the district court should not undermine the important intelligence interests of the United States by imposing steps that could harm national security as a punishment for the conduct of an individual CIA attorney. See, e.g., Halperin v. Department of State, 565 F.2d 699, 706-707 (D.C. Cir. 1977) (ordering remand, rather than automatic disclosure, where government failed to satisfy FOIA Exemption 1 requirements for national security information). Rather, in light of the foregoing, the court should grant the deference ordinarily owed to the government in considering the invocation of the state secrets privileges. And even if greater scrutiny of the government's privilege assertion were warranted, such judicial scrutiny provides no justification for compelling disclosure of classified information to private counsel.

d. Finally, the district court misunderstood – and mis-quoted – this Court's precedents concerning the role of the judiciary in determining access to classified information in litigation. In Oryszak, this Court recently reaffirmed the established principle set forth in Egan that the decision to grant or revoke a security clearance is committed by law to the discretion of the Executive Branch. See 576 F.3d at 525. The Court couched its conclusion with the caveat that such a commitment (flowing

from Article II of the Constitution) is operative "in the absence of legislation." Ibid. (emphasis added).[17]

The district court justified its disregard of the Executive's authority here by twice inaccurately quoting this Court's statement in Oryszak – substituting the word "litigation" for the Court's reference to "legislation." See JA 228-229. Nothing in Oryszak suggests that a district court may use the existence of civil litigation to replace the Executive Branch's responsibility to safeguard national security information, "in the absence of legislation."

The district court also misunderstood the significance of this Court's circumspection in this area. Even beyond the mis-quotations from Oryszak, the district court believed it was significant that such decisions as Sealed Case and Stillman reserved judgment on the possible role of a court in determining whether counsel has a need-to-know classified information. See JA 229-230. But this Court's proper disinclination to reach out and resolve potentially difficult constitutional questions unnecessarily does not suggest that those questions are foregone conclusions. Just the contrary, it demonstrates the importance of deferring such questions and avoiding premature conflicts between the Branches in our constitutional system.

[17] Neither Oryszak nor this case presents any occasion to consider the effect of legislation as there is no applicable statute establishing any mechanism other than the governing executive order for safeguarding national security information.

2. The district court's alternate rationale justifying counsel access – that it "must fashion a way for this case to ultimately proceed to discovery and trial," JA 226 – offers no stronger basis for disregarding established precedent concerning the state secrets privilege and counsel access to classified national security information. The district court stated that disclosure of classified information to counsel is necessary to provide "clear boundaries" to counsel about the scope of the privilege, in order to avoid inadvertent disclosure of privileged or classified information as the case proceeds. JA 222.

That analysis usurps the Executive's proper role in assessing the likelihood of harm to national security that will result from disclosure of classified information. The Executive Branch is better positioned to determine whether the risk of such harm is greater from authorizing counsel to have immediate access to all classified information known by their clients than it is from the possibility that the "government's post hoc approach to controlling classified information" is imperfect. JA 223; see also JA 233. The district court cannot properly evaluate hypothetical harms such as a "witness[] called to the stand" who might "divulge some privileged information" without the government objecting in time, id. at 11, and cannot compare those risks to the harms that could result from disclosing classified information to counsel now.[18]

[18] Notably, CIPA provides the government the right to object to "any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible." CIPA § 8(c).

The district court's concerns can be avoided by hewing to well-established practices in cases involving the state secrets privilege. A careful, incremental approach to the parties' discovery plans and their lines of inquiry will almost certainly avoid any potential questions of counsel access to classified information. Cf. Al-Odah, 559 F.3d at 547 (noting that in criminal proceedings, "before ordering disclosure of classified material to counsel, the court must determine that alternatives to disclosure would not effectively substitute for unredacted access"). The government offered a protective order that incorporates such an incremental approach and provides a clear line to guide both discovery and questioning at trial.

The district court could adopt various mechanisms that would allow the case to proceed without requiring counsel access. First, the district court should resolve the outstanding state secrets privilege assertion based on the government's ex parte, in camera submissions, as we have urged. If the court upholds the privilege, information subject to the state secrets privilege will be unavailable for use in the litigation. Thus, discovery would be prohibited into "covert operatives, organizational structure and functions, and intelligence-gathering sources, methods, and capabilities." In re Sealed Case, 494 F.3d 139, 148 (D.C. Cir. 2007); see also id. at 152 (adding locations of facilities).

Second, aside from such exclusions of categories of sensitive information, questions about the precise application of the privilege in discovery can be resolved by giving the government the opportunity to review discovery requests and responses that might implicate privileged and classified information. Likewise, deposition

testimony could be managed by giving the government the opportunity to review questions in advance and object, see Halkin II, 690 F.2d at 987 (protective order requiring plaintiffs to serve initial deposition questions in writing to permit assertion of the state secrets privilege), or even by requiring deposition by written question. Fed. R. Civ. P. 31. Third, to the extent that the parties seek to use classified information, the United States could work to provide substitutes, which may be a legitimate CIPA-like procedure. See CIPA § 4.

There are thus a range of appropriate, incremental approaches available to the district court that would address any concerns about the protection of privileged and classified information in future proceedings. But it is clearly wrong to conclude that the only way to protect against harm to the national security that might result from possible future inadvertent disclosures is to authorize disclosure of classified information now. Education of counsel concerning the scope of the privilege – by disclosing the very secrets sought to be protected by the privilege – has never previously been necessary to manage litigation involving state secrets. And the cases cited by the district court do not invoke the concern about inadvertent disclosure as a justification for disclosure of classified and privileged information over the objection of the Executive Branch; rather they invoke such findings as justification for broadly precluding inquiry into areas potentially close to the privilege. See, e.g., Farnsworth Cannon, 635 F.2d at 281(affirming dismissal on ground that plaintiff's attempt to state prima facie case could probe too close to privileged information of which plaintiff's counsel was unaware). While none of these approaches would

guarantee that all testimony would be limited to non-privileged information, it was not for the district court – as opposed to the Executive Branch – to decide that the potential harm to national security in such circumstances would be greater than the harm to national security from clearing counsel and disclosing classified information over the Executive's objection.

3. The district court observed that all six private counsel have been subject to background investigations and have been adjudicated favorably for access eligibility. JA 223. But as the executive order makes clear, that determination does not suffice to authorize actual disclosure of classified information. The responsible Executive Branch agency has not made the requisite need-to-know determination – that an individual requires access to particular national security information to aid a governmental function. See Exec. Order 12958, as amended, § 6.1(z), 68 Fed. Reg. 15332. The district court earlier recognized this requirement when it denied Horn's counsel access to classified and privileged information. See JA 93-97 (8/15/00 order). That prior recognition of the requirements of the governing executive order renders the district court's reference to Horn's disclosures the more puzzling. See, e.g., JA 243-244 ("for large portions of this litigation counsel for Horn had a security clearance and discussed most, if not all, of the classified information Horn knew related to this case").

And the government assuredly did not "allow[] disclosure of the information it now seeks to 'protect.'" JA 244. 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.[19] See, e.g., Dkt# 234 (motion to seal). Horn's prior and repeated breaches of security by disclosing classified information to his counsel (and more broadly on the public record) do not justify the district court's disregard of the Executive's well-established procedures for safeguarding that information against further breaches.[20] A contrary rule would create the most perverse of incentives.

Nor is there any significance to the district court's observations that government counsel – who previously represented the United States, along with Brown and Huddle – had access to classified and privileged information. Defendants Huddle and Brown now each have private counsel (furnished at government expense), and those private counsel do not stand in the shoes of the government counsel who previously represented those defendants jointly with the United States

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[19] 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." JA 243. As DCIA Panetta's recent declarations make clear, 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).

[20] 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, 257 F.3d at 836-837.

during the previous stages of this litigation. The district court asserted that because government counsel had a need-to-know classified information during those earlier stages of the litigation, so too should defendants' private counsel now be deemed to have a need-to-know the same information. See JA 233 n.18, 244. That argument is wrong.

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).[21] In the course of exercising that responsibility, government counsel were granted need-to-know determinations because their role was to aid the governmental function of protecting classified national security information from unauthorized disclosure. That governmental function – on behalf of the United States – was not diminished by government counsel's simultaneous and consistent efforts on behalf of the individual defendants to obtain dismissal (which would serve their interests by avoiding liability and the Executive's interests by protecting classified information from disclosure in litigation).

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[21] 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. 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).

Defendants' private counsel now seek access to classified information for a purpose directly contrary to the proper governmental function of protecting such information from unauthorized disclosure. They intend to use classified national security information in this litigation. That conduct would be inconsistent with the requirements of the executive order and existing law. And it would be inconsistent with the need-to-know determination granted to government counsel who previously represented defendants as well as the United States for the purpose of preventing disclosure.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court order compelling the United States to grant security clearances and authorize disclosure of classified information over the objection of the Executive.

Respectfully submitted,

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Horn v. Huddle, No. 09-5311

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. Plaintiff Richard Horn brought this action against two individual federal employees, Franklin Huddle, Jr. and Arthur Brown. The United States intervened after asserting the state secrets privilege. There are no amici. In district court, the following individuals (in addition to Arthur Brown) have been named as respondents to Horn's pending motion for contempt and/or sanctions: George Tenet, John A. Radsan, John A. Rizzo, Jeffrey W. Yeates, Robert J. Eatinger. In this Court, the United States is appellant; Horn, Huddle, and Brown are appellees.

(B) Rulings Under Review. On August 26, 2009, the district court entered the interlocutory order under review in this appeal, compelling the United States to grant security clearances to the parties' counsel and authorize disclosure of classified national security information. The August 26 order refers to an earlier order, entered July 16, 2009.

(C) Related Cases. This case has previously been before this Court in No. 04-5313, decided June 29, 2007, In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007). The case was also previously before this Court on an interlocutory appeal by the defendants, which was voluntarily dismissed before briefing. The case remains pending before the district court. It has not previously been before any other court.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24th day of September, 2009, served a copy of the foregoing Brief For The Appellant, by sending two copies a copy by email and by Federal Express for overnight delivery to counsel listed below. The Brief will be filed electronically and by hand this day.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I hereby certify that the foregoing Brief For The Appellees complies with the type-volume limitation of FRAP 32(a)(7)(B). The brief is printed in Times New Roman font in 14 point typeface. As counted by Corel WordPerfect 12, the brief contains 13,825 words.

/s/ H. Thomas Byron III
H. Thomas Byron III

ADDENDUM

EXECUTIVE PROVISIONS AT ISSUE

Excerpts From Exec. Order 12958, as amended by Exec. Order 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003):

Sec. 4.1. *General Restrictions on Access.*

(a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

* * *

(c) Classified information shall remain under the control of the originating agency or its successor in function. An agency shall not disclose information originally classified by another agency without its authorization. An official or employee leaving agency service may not remove classified information from the agency's control.

* * *

(e) Persons authorized to disseminate classified information outside the executive branch shall ensure the protection of the information in a manner equivalent to that provided within the executive branch.

* * *

(i) Except as otherwise provided by statute, this order, directives implementing this order, or by direction of the President, classified information originating in one agency shall not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. * * *

Sec. 4.2. *Distribution Controls.*

(a) Each agency shall establish controls over the distribution of classified information to ensure that it is distributed only to organizations or individuals eligible for access and with a need-to-know the information.

* * *

Sec. 5.4. *General Responsibilities.* Heads of agencies that originate or handle classified information shall:

* * *

(d) designate a senior agency official to direct and administer the program, whose responsibilities shall include:

* * *

(5) establishing procedures to prevent unnecessary access to classified information, including procedures that:

(A) require that a need for access to classified information is established before initiating administrative clearance procedures; and

(B) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs;

* * *

Sec. 6.1. *Definitions.* For purposes of this order:

(a) "Access" means the ability or opportunity to gain knowledge of classified information.

(b) "Agency" means any "Executive agency," as defined in 5 U.S.C. 105; any "Military department" as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

* * *

(h) "Classified national security information" or "classified information" means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status

when in documentary form.

* * *

(s) "Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government. "Control" means the authority of the agency that originates information, or its successor in function, to regulate access to the information.

* * *

(y) "National security" means the national defense or foreign relations of the United States.

(z) "Need-to-know" means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

* * *

(nn) "Unauthorized disclosure" means a communication or physical transfer of classified information to an unauthorized recipient.

Exec. Order 12958, as amended, 68 Fed. Reg. 15324-15325, 15329, 15330-15332.