UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD A. HORN,

Plaintiff,

v.

MADELEINE ALBRIGHT, *et al.*,

Defendants.

Civ. No. 96-2120 (RCL)
Civ. No. 94-1756
(Consolidated)

UNDER SEAL

MEMORANDUM AND ORDER

This matter comes before the court on the United States' Motion for Reconsideration of the court's February 1, 2000 order requiring the United States to disclose to the plaintiff certain documents the government contends are covered by the state secrets privilege and other statutory privileges.[1] In tandem with this motion, the United States has filed an Assertion of State Secrets and Statutory Privileges concerning the documents subject to the court's February 1, 2000 Order. Upon consideration of the motion, the opposition thereto, the United States' assertion of privilege, *in camera* review of the supporting

[1]Because the court concludes that the United States' assertion of the state secrets privilege is appropriate and therefore shields these materials from disclosure, the court need not address the alternative statutory privilege claims asserted by the United States.

declarations (both classified and unclassified), plaintiff's response, the applicable law, and for the reasons set forth below, the court hereby GRANTS the United States' Motion for Reconsideration and VACATES that portion of the February 1, 2000 Order requiring the United States to disclose to the plaintiff those portions of the Inspector General Reports ("IG Reports") and their attachments, including the State Department cable, which are covered by the state secrets privilege. In addition, the court hereby SUSTAINS the United States' assertion of the state secrets privilege over these materials.

I. BACKGROUND

The underlying allegations in these two related cases are as follows: Plaintiff Richard Horn, a Drug Enforcement Administration ("DEA") agent, served as DEA's Country Attache in a foreign country ("Country") from 1992 to 1993. In 1993, he was removed from that post by the Chief of Mission at the American Embassy. Horn subsequently filed a *Bivens*[2] action against that Embassy official ("*Bivens* Defendant I") and another senior official ("Defendant II") alleged by plaintiff to have been a Central Intelligence Agency ("CIA") employee in that same

[2]*Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Country. Claiming, *inter alia*, a violation of his constitutional rights under the Fourth Amendment, Horn alleges that on or about August 12, 1993, prior to his departure, Defendant II or someone under his authority "tapped" plaintiff's late-night telephone conversation in plaintiff's government leased quarters, and disclosed the content or a recording of the conversation to Defendant I. Plaintiff further alleges that the contents of the allegedly intercepted conversation was partially transmitted by Defendant I to his agency's headquarters in Washington, D.C. Horn maintains that his removal from his post in Country was retaliatory and resulted from his philosophical clashes with the Chief of Mission. Specifically, Horn contends that his removal was prompted because Horn had accused Defendant II of passing to Country's government a sensitive DEA document without consulting Horn or another DEA agent. In addition to his constitutional tort claims against Defendants I and II, Horn has subsequently filed a class action complaint, alleging that the State Department, the CIA and [another government agency] have engaged in an unlawful pattern and practice of intercepting the telephone conversations of DEA agents in violation of the Fourth Amendment, as well as the Foreign Intelligence Surveillance Act, 50 U.S.C. §

1801 *et seq.*, and Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*[3]

The present dispute centers on an order issued by this court on February 1, 2000, in which the court ordered the government to disclose certain documents to the plaintiff. Specifically, the court ordered the defendants to "produce the [IG Reports] and their attachments and make any claims of privilege with respect to use of such reports."[4] Order of February 1, 2000. The United States asks the court to reconsider its order in light of the United States' assertion of state secrets and statutory privileges over portions of the IG Reports and their attachments.[5] To that end, the United States has filed a formal

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[3]On February 10, 1997, the court denied the *Bivens* Defendants' Motion to Dismiss, concluding that defendants were not entitled to qualified immunity and that plaintiff's complaint, while failing to state a claim under the Foreign Intelligence Surveillance Act, adequately stated a claim under the Fourth Amendment for purposes of Fed. R. Civ. P. 12(b)(6). Currently pending before the court is the Government Defendants' Motion to Dismiss Plaintiff's Second Amended Class Action Complaint, a matter which the court shall address in a separate opinion issued today.

[4]There are, in fact, two so-called IG Reports at issue here. One such report is a joint report issued by the State Department IG and the CIA IG. The other is a report issued by the CIA IG only. Nonetheless, because the court finds that the state secrets privilege applies with equal force to both reports, in this opinion, the court shall refer to these reports simply as "the IG Reports."

[5]Defendants represent that they are not claiming the state secrets privilege with respect to certain of the attachments to the joint IG Report and that these unclassified materials have been provided to plaintiff. *See* Defendants' Memorandum in Support

assertion of state secrets and statutory privileges, which is supported by detailed classified and unclassified declarations provided by the Director of Central Intelligence ("DCI"), among others.

Essentially, plaintiff argues that the contested materials must be disclosed to him because plaintiff and his counsel have been granted Top Secret security clearances by the Department of Justice Security Officer. Simply put, plaintiff contends that his security clearance authorizes his access to these materials and thereby overrides the United States' state secrets privilege claim. Additionally, plaintiff maintains that DCI George Tenet's public declaration fails to explain how that the matter was "personally considered" by him, or to specify how national security will be impaired by disclosure.

Resolution of the present motion, therefore, turns upon whether the United States has properly asserted the state secrets privilege, and whether the fact that plaintiff and his counsel have Top Secret security clearances alters the court's analysis of the state secrets privilege claim. As discussed below, the court finds that the United States has adequately supported its assertion of the state secrets privilege over the withheld

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of the United States' Assertion of State Secrets and Statutory Privileges, at 3 n.2 (D.D.C. Feb. 8, 2000) (stating that the government would produce to plaintiff attachments 3, 5, 10-11, 13-17, 29, 36-37, 40-46, and 52-53 of the Joint State-CIA IG Report, with privileged portions redacted.

portions of the IG Reports and their attachments, including the State Department cable. In addition, the court finds that the fact that plaintiff and his counsel have been afforded a security clearance by the Court Security Officer at the Department of Justice does not afford plaintiff the requisite "need to know" for purposes of obtaining access to state secrets information. Accordingly, in light of these findings, the United States shall not be required to produce the contested materials to the plaintiff and that portion of the February 1, 2000 order that requires them to do so shall be vacated.

II. DISCUSSION

A. *The States Secrets Privilege*

It is well-established that the state secrets privilege protects against the disclosure of privileged information, and not simply its use at trial. *See United States v. Reynolds*, 345 U.S. 1, 6, 10-11 (1953) (claim of state secrets privilege was "sufficient showing of privilege to cut off further demand for the document"). Indeed, the protection afforded by the state secrets privilege is absolute. *Reynolds*, 345 U.S. at 10-11 (stating that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that

military secrets are at stake"); *see also Moliero v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1984) (determining that "[n]o competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of [state secrets] privilege") (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)); *Ellsberg v. Mitchell*, 709 F.2d 51, 56 (D.C. Cir. 1983) ("It is now well-established that the United States, by invoking its states secrets privilege, may block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."); *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (stating that "[Reynolds] establishes that secrets of state-matters the revelation of which reasonably could be seen as a threat to the military or diplomatic interests of the nation are absolutely privileged from disclosure in the courts. . . ."). Moreover, the state secrets privilege forecloses disclosure to litigants even where counsel or their clients have security clearances or where courts have issued protective orders to protect classified information. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 401-02 (D.C. Cir. 1984) (finding that the district court properly sustained the assertion of state secrets privilege, regardless of the fact that the party seeking the materials was entrusted with classified information in the past).

The state secrets privilege may be invoked to protect matters, which, if disclosed could cause harm to the nation's defense capabilities. *See Reynolds*, 345 U.S. at 6-7, 10; *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (state secrets privilege sustained in manufacturing and design defect against military weapon manufacturer); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546-47 (2d Cir. 1991)(wrongful death suit dismissed after sustaining claim of state secrets privilege); *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 270 (1996) (state secrets privilege forecloses contractor from discovery of information on "Stealth" technology); *N.S.N. Int'l Indus. v. E.I. duPont de Nemours & Co.*, 140 F.R.D. 275, 279 (S.D.N.Y. 1991) (foreign corporation barred from discovery of classified documents on Defense Department contract). In other instances, the state secrets privilege has been raised to shield materials that would disclose intelligence-gathering methods or capabilities, *see, e.g., Halkin v.* Helms, 690 F.2d 977, 993 (D.C. Cir. 1982); *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995); *Clift v. United States*, 808 F. Supp. 101 (D. Conn. 1991), or where disclosure could unsettle diplomatic relations with a foreign government. *Halkin*, 690 F.2d at 990 n. 53; *Attorney General v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1983).

To establish a proper state secrets privilege claim, the government must assert "a formal claim of privilege, lodged by

the head of the department who has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8. In assessing a claim of state secrets privilege, the scope of review is narrow and deferential. *Northrop Corp.*, 751 F.2d at 402 (noting that courts must defer to executive assertions of military or diplomatic secrets)(quoting *Halkin I*, 598 F.2d at 9 and *United States v. Nixon*, 418 U.S. 683 (1974)); *see also CIA v. Sims*, 471 U.S. 159, 179-80 (1974) (explaining that deference accorded executive branch in the area of national security is warranted in light of executive's greater familiarity with interests and risks involved). Thus, if a court is satisfied that a reasonable danger exists that harm to national security will result from disclosure, the assertion of state secrets privilege must be sustained. *Reynolds*, 345 U.S. at 10-11; *Ellsberg*, 709 F.2d at 58. Indeed, even though a court should examine a privilege claim more closely where the information sought appears critical to a party's case, once the government makes a showing of reasonable danger to national security, the court's inquiry ceases. *Id.* at 11 (stating that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake"). "Reasonable danger" to national security does not mean that the threat is

inevitable nor that the disclosure of privileged information will be public. *Northrop Corp.*, 751 F.2d at 402. Rather, the government need only demonstrate that national security interests might be harmed. *Reynolds*, 345 U.S. at 10.

Applying the standards set forth above, the court finds that the government has met the procedural and substantive requirements for invoking the state secrets privilege. As a preliminary matter, the court notes that the heads of the agencies that control the intelligence information have formally asserted the state secrets privilege. *See* Declaration of George J. Tenet, Director of Central Intelligence (Unclassified) ¶¶ 1-4 ("Tenet Decl."); Declaration of John J. Hamre, Deputy Secretary of Defense, ¶¶ 1-3, 6 ("Hamre Decl.")(acting, through delegated authority, for the Secretary of Defense while he was out of the country). Moreover, contrary to plaintiff's assertions, the court finds that the declarations-both classified and unclassified-adequately demonstrate that the agency heads have personally considered the grounds for the assertion of privilege. *See* Tenet Decl. (Unclassified) ¶¶ 7, 23; (Classified) ¶ 68; Hamre Decl. ¶ 5; *see also* Declaration of Michael V. Hayden, Director of the National Security Agency ("NSA") (Classified) ¶10.

In addition to satisfying the formal requirements of the privilege, the court concludes, after its *in camera* review of the classified declarations, as well as its consideration of the

unclassified declarations, that the United States has sufficiently demonstrated that the disclosure of the information contained in the IG Reports and their attachments could reasonably be expected to cause serious damage to the national security of the United States.[6] To begin with, DCI Tenet explains that disclosure of the IG reports and their attachments would threaten to reveal the identities of certain covert CIA officers. Tenet Decl. ¶ 9, 13. Not only could disclosure of the identities of these individuals in the clandestine service of the CIA endanger their own safety, but also that of their families, other government officials or foreign nationals with whom they associate. *Id.* ¶ 14. Moreover, and perhaps most importantly for purposes of this privilege claim, disclosure of the covert agents identified in these materials could threaten the security of current U.S. intelligence operations [redacted] *Id.; see also* Tenet Decl. (Classified) at 8 n.6; Hayden Decl. ¶ 15. For example, DCI Tenet details how these materials contain information [redacted]

[6]In light of their extremely sensitive nature, and in the interest of drafting an opinion that may someday appear on the public record, the court's discussion of the information contained in the classified declarations must be kept to a very generalized level.

[redacted] and thereby harm U.S. national security. Tenet Decl. ¶ 15. Furthermore, these materials provide information as to the organizational structure and functions of the CIA [redacted] *Id.* at ¶ 11. Disclosure of the extent of [redacted] could reasonably harm national security by allowing a hostile intelligence service to obtain a more complete picture of how our intelligence-gathering agencies, systems and procedures operate. Such information could then be used to thwart U.S. intelligence [redacted] *Id.*; ¶ 17. The IG Reports and attachments also identify intelligence-gathering sources, methods and capabilities, [redacted] *Id.* ¶¶ 12; 19-20. As Tenet explains, not only could disclosure of information about the strengths of our intelligence sources and methods reasonably harm national security, but exposures of areas of weakness could be equally, or perhaps more devastating to U.S. national security interests. *Id.* ¶¶ 18-21. The court finds that the explanations provided in the unclassified and the classified declarations in particular more than adequately establish a basis for concluding that the state secrets privilege applies to the IG Reports and their attachments.[7]

[7]The court is unpersuaded by plaintiff's argument that the defendants' disclosure of the IG Reports to the *Bivens* defendants constitutes a waiver of the state secrets privilege. To the

B. Plaintiff's Security Clearance

Finally, plaintiff advances that, notwithstanding the United States' invocation of the state secrets privilege, the government must nevertheless disclose the IG reports and attachments to the plaintiff and his counsel because they have been granted security clearances by the Department of Justice Security Officer. The United States contends that the fact that plaintiff and counsel currently possess security clearances is of no consequence to the issue of privilege and thus does not alter the inviolability of a properly supported claim of state secrets privilege.

The court agrees with the government defendants' contention 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. Rather, once the

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contrary, the defendants' disclosure of these reports to the individuals whose actions were the subject of such reports does not affect the privilege claim, where, as here, the agency determined that these government employees had a need-to-know the information to carry out a lawful governmental function. Likewise, the court disagrees with plaintiff's assertions that the Classified Information Procedures Act applies to this civil case, as, by its terms, the statute applies to criminal cases. *See, e.g.*, 18 U.S.C. App. 3 § 3 (providing that "[u]pon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any *criminal* case in a district court of the United States")(emphasis added).

court determines that the information is privileged, it is privileged from disclosure notwithstanding any finding of trustworthiness on the part of the party seeking the information. *See, e.g., Northrop Corp.*, 751 F.2d at 401-02; *Ellsberg*, 709 F.2d at 61; *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) ("[d]isclosure to one more person, particularly one found by the CIA to be a person of discretion and reliability, may seem of no great moment, but information may be compromised inadvertently as well as deliberately"); *Halkin I*, 598 F.2d at 7; *Monarch Assurance PLC v. United States*, 36 Fed. Cl. 324, 328 (Fed. Cl 1996); *Foster v. United States*, 12 Cl. Ct. 492, 494 (Cl. Ct. 1987); *Korkala v. CIA*, No. 87-1035, 1990 U.S. Dist. LEXIS 2947, at *9 (D.D.C. Mar. 15, 1990); *AT&T v. United States*, 4 Cl. Ct. 157, 159-61 (1983).

Moreover, access to classified information requires two determinations--a security clearance and a need-to-know. As this court has previously noted, access to classified information is governed by Executive Order 12958, *see* Order of June 10, 1998, which provides that "[a] person may have access to classified information if: (1) a favorable determination for eligibility for access has been made by an agency head or the agency head's designee [i.e., a security clearance]; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information." *Id.* (citing Executive Order 12958,

§ 4.2). Section 4.2 of Executive Order 12958 further 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, § 4.2(c); *see also* 28 C.F.R. § 17.41 (stating that "[n]o person may be given access to classified information or material originated by, in the custody, or under the control of the Department, unless the person-(1) has been determined to be eligible for access in accordance with sections 3.1-3.3 of Executive Order 12968; 92) has a demonstrated need-to-know; and (3) has signed an approved nondisclosure agreement."). By its terms, Executive Order 12958 provides 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. *Id.* § 4.2(b); *see also* 28 C.F.R. § 17.46(b).

Here, plaintiff and his counsel, in obtaining security clearances from the Justice Department Security Officer, have satisfied only the first step in the requirements for access to classified information under Executive Order 12958. In short, upon receiving their clearance, they became *eligible* for access to classified information; they did not automatically obtain

access. Here, notwithstanding the fact that plaintiff and his counsel have obtained a "favorable eligibility determination," the CIA, the authorized holder of the information, has determined that they do not have the requisite need-to-know for access to these state secrets materials under its control. Tenet Decl. ¶ 31 (Unclassified); Tenet Decl. ¶¶ 7, 65 (Classified); *see also* Hayden Decl. ¶ 4 (Classified). While plaintiff's counsel insists that his security clearance is "meaningless" if it does not grant access to these particular state secrets materials, the court disagrees. Instead, the court recognizes that the various procedures set forth under Executive Order 12958 are designed to safeguard sensitive information, such as that implicated by plaintiff's allegations. *See Colby*, 656 F.2d at 72. To that end, 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, which in this instance is the Director of Central Intelligence. *CIA v. Sims*, 471 U.S. at 179-80. Courts, which may only consider the discrete facts presented by the controversies placed before them, properly defer to the determinations made by the Executive Branch in the complex and sensitive area of national security. *See In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989)("It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more

akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate. This court applies an appropriately narrow standard of review, and will uphold a claim of privilege for information that standing alone may seem harmless, but that together with other information poses a reasonable danger of divulging too much to a 'sophisticated intelligence analyst.'")(citing *Halkin I*, 598 F.2d at 8, 10).

III. CONCLUSION

For the reasons set forth above, the court finds that the state secrets privilege has been properly asserted to bar disclosure of the IG Reports and certain of their attachments, including portions of the State Department cable. Accordingly, it is hereby

ORDERED that Defendants' Motion for Reconsideration is GRANTED; and it is further

ORDERED that the February 1, 2000 Order is VACATED to the extent that it required the disclosure of documents, or portions of documents, claimed and determined to be privileged under the state secrets privilege; and it is further

ORDERED that the United States Assertion of State Secrets and Statutory Privileges is SUSTAINED.

SO ORDERED.

DATE: 8-15-00

Royce C. Lamberth
United States District Judge