U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 26, 2014

VIA ECF
Hon. Edgardo Ramos
United States District Judge
United States District Court
500 Pearl Street
New York, New York 10007

Re: *Restis et al. v. American Coalition Against Nuclear Iran, et al.*, No. 13 Civ. 5032 (ER) (KNF)

Dear Judge Ramos:

I write on behalf of proposed intervenor the United States of America (the "Government") in response to Plaintiffs' September 17, 2014 letter (the "Letter"). In the Letter, Plaintiffs note their intention to file a motion seeking to compel the Government to file a public declaration in support of its September 12 motion to intervene, assertion of the state secrets privilege, and related motion to dismiss. For the reasons set forth below, Plaintiffs' proposed motion should be denied.

Plaintiffs' contention that due process considerations require the Government to submit a public declaration in support of a state secrets privilege assertion, or to grant clearance to private counsel for access to the privileged national security information, conflicts with fundamental principles underlying the state secrets doctrine and is without merit. The Supreme Court addressed the obvious concern with public disclosure of state secrets in *United States v. Reynolds*, and set forth the core principle that judicial review of a state secrets privilege assertion should proceed "without forcing a disclosure of the very thing the privilege is designed to protect." 345 U.S. 1, 8 (1953).[1] Courts, including the Second Circuit, continue to rely on this most basic caution in *Reynolds*. *See Zuckerbraun v. General Dynamics Corp.,* 935 F.2d 544, 547 (2d Cir. 1991) (quoting *Reynolds*). The D.C. Circuit similarly relied on *Reynolds* in declining to "adopt[] a strict rule that the trial judge must compel the government to defend its claim publicly before submitting materials *in camera*." *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Cir. 1983). *Ellsberg* further recognized that "[t]he government's public statement need be no more (and no less) specific than is practicable under the circumstances." *Id.* at 64; *see also id.* at 63 ("*in camera* proceedings should be preceded by *as full as possible* a public debate . . ." (emphasis added)).

Accordingly, nothing in the state secrets doctrine establishes a due process or other right to a public description of the privileged matters. To the contrary, the doctrine warns against

[1] Indeed, *Reynolds* further contemplates that, in some cases, "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." 345 U.S. at 10.

proceedings that might risk disclosure of the privileged information, and provides that whether there can be any public discussion of the privileged matter turns on what is "possible" and "practicable" in the circumstances of the particular case. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("*whenever possible*, sensitive information must be disentangled from nonsensitive information" and disclosed (emphasis added)). The fact that the Government often is able to submit a public declaration in support of the privilege assertion, *see* Letter 2, neither establishes a rule of law, nor requires a public declaration here. The fundamental question, rather, is whether the privileged matters at issue in a particular case can be publicly described "without risking disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; *see also Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) ("Courts 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."). This is necessarily a case-specific determination dependent on the facts and circumstances presented.

Here, no further discussion of the nature of the privileged information can safely be set forth on the public record, consistent with national security concerns, as explained in the Government's *ex parte* submission. Moreover, determinations as to whether certain disclosures may risk harm to national security are necessarily predictive judgments vested in Executive Branch officials with substantive expertise, and entitled to "utmost deference." *Zuckerbraun*, 935 F.2d at 547 ("[T]he court must accord the utmost deference to the executive's determination of the impact of disclosure on . . . security." (internal quotation marks omitted)). *See also Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081-82 (9th Cir. 2010) (*en banc*) (quoting *Al-Haramain*). *See also Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("Predictive judgment [about whether someone might 'compromise sensitive information'] must be made by those with the necessary expertise . . . ."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) (informed judgments of the Executive Branch in matters related to national security are entitled to judicial deference).

The caselaw cited by counsel is not to the contrary. *See* Letter 1-2. To begin with, neither the Supreme Court's decision in *Zolin* nor the Second Circuit's decision in *Abuhamra* concerned the Government's assertion of the state secrets privilege. *See United States v. Zolin*, 491 U.S. 554 (1989) (*in camera* review of evidence allegedly establishing the crime-fraud exception to the attorney-client privilege); *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004) (*ex parte* information submitted for purposes of application for bail pending sentencing). Even setting aside this important dissimilarity, these cases are consistent with the principle that the Government has articulated here. In determining that courts should not be required to conduct an *in camera* review of allegedly privileged attorney-client communications every time the crime-fraud exception was asserted, the Supreme Court in *Zolin* relied on *Reynolds*'s statement that complete disclosure of state secrets to the district court was not automatically required for a claim of privilege to be accepted. 491 U.S. at 571. And the Second Circuit's decision in *Abuhamra* was expressly premised on the recognition that, in that case, "disclosure of the evidence . . . would not have compromised national security," 389 F.3d at 324 – exactly the opposite of the circumstances presented by an assertion of the state secrets privilege. *Abuhamra* further noted that, had the proffered evidence been classified for reasons of national security, the

court would have been "oblige[d] to conduct a very different analysis." *Id.* These decisions thus do not contradict the principles set forth in *Reynolds* and other state secrets cases.

Counsel's alternative suggestion that he should be permitted to view the Government's *ex parte* submission also has no basis in law. *See* Letter at 1 n.1. Private parties and their counsel in civil cases involving the state secrets privilege have no right – due process or otherwise – to have access to privileged national security information presented to the court *ex parte* and *in camera*. *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007) (rejecting argument that "instead of dismissing [the] Complaint, the district court should have employed some procedure under which state secrets would have been revealed to [plaintiff], his counsel, and the court, but withheld from the public"); *see also Sterling*, 416 F.3d at 348 (denying private counsel access to classified information in states secrets case); *Ellsberg*, 709 F.2d at 61 (explaining that the rule denying counsel access to classified information is "well settled" and 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"); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (rejecting argument that counsel should have been permitted to participate in the *in camera* proceedings). *See also Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (no one has right to security clearance, and due process considerations do not apply).[2] Accordingly, Counsel's assertion that he has received security clearances in prior criminal cases, *see* Letter 1 n.1, has no bearing here. *Cf. Reynolds*, 345 U.S. at 12 (distinguishing due process issues presented by classified information in criminal cases from application of the state secrets privilege in civil cases).

For the foregoing reasons, the Government believes that Plaintiffs' proposed motion should be denied without further briefing or a pre-motion conference. Beyond the legal principles set forth herein, the Government cannot further address, in this response or at a conference with the parties, Plaintiffs' speculation as to what the privileged matters concern or their various questions concerning how that information may or may not relate to various claims and defenses in this case. *See* Letter at 2-3. The Government can of course address any questions the Court may have regarding the privileged matters *ex parte*, *in camera.*

We thank the Court for its consideration.

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[2] Nor do the symposium remarks of the Hon. Robert D. Sack, United States Circuit Judge, published in the Fordham Law Review suggest a different result here, especially because Judge Sack proceeded to recognize that there may be "reasons why the lawyer for the non-government party cannot participate--the danger that such participation alone will itself endanger the secrets." *The State Secrets Privilege and Access to Justice: What is the Proper Balance?*, 80 Fordham L. Rev. 1, 10 (2011) (symposium).

Respectfully submitted,

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