CIA FRAUD IN STATE SECRETS ASSERTIONS

There is a new case causing a stir on the state secrets front today. The case is *Horn v. Huddle et. al*, is filed in the DC District, and has been quietly going on behind the scenes since 1994. From Del Wilber at the Washington Post:

> A federal judge has ruled that government officials committed fraud while defending a lawsuit brought by a former DEA agent who accused a CIA operative of illegally bugging his home.
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> In rulings unsealed Monday, U.S. District Judge Royce C. Lamberth wrote that he was also considering sanctions against five current and former agency lawyers and officials, including former director George Tenet, for withholding key information about the operative's covert status.
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> The rulings, issued in recent months, highlighted what the judge called fraudulent work by CIA lawyers in defending a suit that Lamberth said had a lengthy and "twisted history."

Here is the ruling issued by Judge Royce Lamberth today that set off the firestorm.

There is a lot of great background on the case, and events behind it, in an old post from Bill Conroy at Narco News in 2004:

> Former DEA agent Richard Horn has been fighting the U.S. government for the past 10 years trying to prove the CIA illegally spied on him as part of an effort to thwart his mission in the Southeast Asian country of Burma.
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> After being removed from his post in Burma, Horn filed litigation in federal court in Washington, D.C., in 1994

> accusing top officials for the CIA and State Department in Burma of violating his Fourth Amendment rights.
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> After languishing in the federal court system for some 10 years, Horn's case was dismissed in late July of this year [2004] after crucial evidence in the case was suppressed on national security grounds.
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> What really happened in the Horn case, though, is not supposed to come out, if the government has its way. From the start, Horn's litigation was sealed and critical evidence that could have supported his claims censored by the court.
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> Specifically, the evidence – two federal Inspector General (IG) reports that centered on Horn's accusations – was determined by the court to be protected from disclosure based on something called state secrets privilege. The privilege, which was established as part of a 1953 Supreme Court ruling known as the Reynolds case, allows the government to deep-six information if it is deemed a threat to national security.
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> "Having determined that state secrets privilege bars disclosure of the IG Reports and certain attachments … the case cannot continue and must be dismissed," wrote U.S. District Court Judge Royce Lamberth in his July 28, 2004, ruling in the Horn case. "As a result of the state secrets privilege, plaintiff cannot make out a … case, defendants cannot present facts necessary to their defense and the very subject matter at the heart of this case is protected from disclosure as a state secret."

Read the rest of the background at Narco News, it is a fascinating and riveting story.

The long and short of it is the US government, and the CIA, have been fighting this case tooth and nail since it was filed as a *Bivens* action in 1994. The case was originally assigned to Judge Harold H. Greene (the judge who famously broke up AT&T in the anti-trust case) who in 1997 allowed most of the case to go forward in the face of a summary judgment motion by the government on the behalf of the individual defendants. In 2000, however, Judge Greene died and the case was subsequently assigned to Judge Royce Lamberth. Sometime thereafter, the attorney for Plaintiff Horn, Brian Leighton, a former AUSA in EDCA, apllied for a security clearance (As Eisenberg did in *al-Haramain*) so that he may proceed intelligently as plaintiff's counsel with the case at bar in light of the sensitive nature of a sealed case.

Then, the government, after six years of litigation, filed on behalf of the CIA and the individual defendants a state secrets assertion and moved to dismiss. The court, in a July 28, 2004 opinion by Judge Lamberth, granted complete dismissal of the case:

> In The alternative, even if the Court were to find that it could not resolve the Motion to Dismiss without the assistance of plaintiffs oounsel, it would still be required to balance that need against the United States' interest in national security. Stillman, 319 F.3d at 549. But the result of such balancing was determined when the Court found the state secrets privilege applied to the information in the IG Reports and certain attachments and made the determination that the information was protected from disclosure. If the Court were to award clearances it would be encouraging the dissemination of information found to be so important that it was protected from further

> disclosure by the state secrets privilege.
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> In its August 15, 2000 Opinion the Court sustained the United States assertion of the state secrets privilege over certain portions of two IG Reports and certain attachments to those reports. The Court must now address, on motion of me United States, whether or not the case must be dismissed as a result of the removal of the information contained in the IG Reports from the case. For the reasons set forth below the Court concludes that in the absence of the material protected from disclosure by the state secrets privilege the case must be dismissed.

The July 28, 2004 Opinion by Lamberth gives a great procedural history of the case and a peek inside the contrivances of sealed cases and state secret assertions by the government. Note that one of the declarations filed by the government that led to that action by the Court was by none other than George Tenet, the head of the CIA.

Subsequent to Lamberth's complete dismissal of the case, Horn and his attorney, Brian Leighton, filed an appeal to the Circuit Court of Appeals which affirmed the dismissal as to the CIA operative in the suit, which we now know to be Arthur Brown, and reversed and remanded the action to the District court as to the other individual in the suit, the State Department officer, Franklin Huddle.

Once the case was remanded by the Circuit Court of Appeals in late 2007 to Judge Lamberth for further proceedings as to the remaining defendant Huddle, all hell broke loose. The government suddenly admitted that the basis for their state secrets assertion in the first place, the "covert agent" status of their agent in Burma, now known to be Arthur Brown, was

incorrect and that there may have been a "change in defendant two's status". That was government speak for admitting that Brown had blown his own cover by admitting his CIA covert status in seeking different employment and had done so with CIA knowledge and, presumably, consent back in 2002.

In the spring of 2008, Plaintiff Horn filed a motion seeking relief from the judgment that had been entered against him as to defendant Brown (the part that was affirmed by the Circuit Court) and the government filed opposition thereto. In support of the government's opposition, affidavits were filed by CIA Acting general Counsel John Rizzo, as well as a couple of other heavy hitter CIA Office of General Counsel (OGC) attorneys by the names of Robert Eatinger and John Radsan.

At this point, Judge Lamberth was having nothing to do with the perfidy of the government and CIA lying. On January 15, 2009 Lamberth entered an opinion literally excoriating the governmental defendants and entities:

> Next the government argues that Brown has failed to establish fraud on the court. The government, citing cases, states that fraud on the court must be attributable to "counsel," it must be "directed to the judicial machinery itself," and there must be an "intent to deceive or defraud the court." (Gov't Opp'n 9-10.) In contrast to the government's claim, that burden was met in this case. The government has acknowledged that counsel within the OGC was aware of the inaccuracy and failed to bring it to the attention of his supervisors or the Court. Brown himself was clearly aware of his changed status beginning in 2002. When the OGC attorney reviewed the draft appellate pleadings knowing that they contained a false submission, and knowing that the information was critical to the

> government's argument and would be helpful to the defendant's case, the Court has no choice but to conclude that the failure to correct the falsity was intentional. And, of course, the false statement about Brown's cover was contained in a briefIng submitted to the court itself. Therefore, the fraud in this case was attributable to counsel and directed to the judicial machinery with an intent to deceive the court.
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> The plaintiff's motion also requests various other sanctions and/or contempt proceedings. Those requests will be denied. Instead, the government will be directed to provide Sheldon Snook, the Administrative Assistant to the Chief Judge, who is also the Clerk to the Committee on Grievances for the United States District Court for the District of Columbia, the name of the CIA attorney who was put on actual notice of the change in Brown's cover status in 2005 and failed to report it. Because the fraud occurred in front of this Court, this Court's committee on grievances will conduct an investigation and, if discipline is imposed, report the results to the Court and the licensing authorities in any state in which that attorney is licensed.

The opinion by Lamberth is damning, to say the absolute least. Read it, that is where the fraud findings that begat this story are contained. The attorney whose name Lamberth was seeking appears to be Jeffrey Yeates. Since the time of the January 15, 2009 Opinion, Judge Lamberth has been further infuriated at the actions of the government and has now invited Plaintiff Horn to renew his request for sanctions. As they say in middle America, you just don't see that every day; it is remarkable. On February 6, 2009 Royce Lamberth entered another opinion effecting this

action. This time he cleans CIA Acting General Counsel John Rizzo's clock:

> Although the Court held that one government attorney intentionally misled the Circuit in 2005 and failed to report the change in Brown's cover upon remand, it believed, on the basis of Rizzo's declaration, that this was an isolated incident. Therefore, the Court felt that referring the attorney involved to the grievance committee was appropriate but that the case was ready to proceed, now with Arthur Brown reinstated as a defendant.
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> However, on January 27,2009, the Court was surprised yet again by a filing; this filing was from Arthur Brown. Brown' s declaration stated that the "Rizzo Declaration makes two assertions that, based on my personal knowledge are inaccurate,"
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> If multiple attorneys of the OGC within the CIA were aware of the change in Brown's cover status and filled to report it to the Courts it would be a material misrepresentation to both this Court and the Court of Appeals. The CIA was well-aware that the assertion of the state secrets privilege as to Brown was a key strategy in getting the case dismissed.

The hearing transcript in *Horn v. Huddle et. al* dated May 19, 2009 is a good read to see just how bad all these allegations are, and just how serious the court is taking them. Here is the Hearing Transcript Part 1 and Part 2.

Oh, and by the way, Leon Panetta has soiled his name in this as well by filing a declaration on April 1, 2009 still seeking to invoke state secrets and requesting a protective order in the Horn case. Judge Lamberth has already shot this

down this latest contrived bull manure in an Opinion dated July 16, 2009. Again, it is worth reading to see the tone of Judge Lamberth over what has occurred in front of him at the soiled hands of the government:

> After examining the motion for a protective order and supporting declarations, the redactions made by the government, and keeping in mind the twisted history of this case, the Court is not prepared to uphold the government's renewed assertion of the state secrets privilege without more information from the government. Moreover, with respect to information already known by the plaintiff or the defendants, the Court believes that the implementation of pre-trial CIPA like procedures is the best way to prevent unauthorized disclosure of classified information and to resolve any classification disputes between the parties and the government.

This is a huge development. Lamberth is no ordinary judge making these findings, as noted above, he is the former head of the FISC Court and his opinion is going to carry a lot of weight in courts all over the country. He is flat out suggesting a CIPA process, which has only officially been utilized in criminal cases to date, be applied in Horn, a civil case. Lamberth is dead on the money here. If Congress would get off its butt and take action on Russ Feingold and Pat Leahy about bogus state secrets claims and the need for legislation controlling the same, it would go a long way toward resolving these issues for trial courts and upholding the rule of law and plaintiffs' access to courts for redress. But, of course, Congress is too timid and lazy and the Department of Justice and President Obama would cravenly fight tooth and nail for the right to be opaque and prevent plaintiffs their day in court.

Additionally, again Marcy's question is germane,

how exactly did John Rizzo stay at CIA performing his duties as the Acting General Counsel of the CIA as long as he did under Obama?* The man who provided the list of torture techniques to Jay Bybee for inclusion in the infamous torture memos and the man who was central to the illegal destruction of the torture tapes is *still* out there committing ever more frauds upon courts. Rizzo is a serial offender, and yet that seems to be just fine in the eyes of Barack Obama; apparently President Obama does not feel the American people deserve any better. Curiously, I think we do.

The other note to be taken out of the Horn case is the complete evisceration of whatever gloss of credibility the CIA has left. They lie to Congress, they lie to courts (and remember Lamberth was the Chief FISA Court judge during this time as well) and they lie to the American people.

And let us not forget the good folks at the Department of Justice who are knee deep here as well. How can any court rely on their tainted assertion and declarations on state secrets. Their pattern and practice is to lie. It really is that simple at this point. I wonder if Judge Vaughn Walker and al-Haramain attorney Jon Eisenberg are taking note of what has occurred here. I bet they are.

[This portion corrected per MadDog to reflect that Rizzo appears to have been replaced as of the first week of July]