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Behind Closed Doors: Secret Justice in America

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Audience Discussion

Professor Hellerstein

We could spend the rest of the day on criminal justice, but we do not have the time to do so in this symposium. We have much to cover, but we do have some time for questions to the panelists.

Audience Member

As of late, we have seen an increase in the participation of the United States military and intelligence agencies in criminal prosecutions, but no corresponding increase in discovery. Could the panel, specifically United States Attorney White, please address this issue?

Ms. White

We should see an increase in the information to the extent it is discoverable. I mean, obviously the procedures we have been talking about are necessary to safeguard intelligence gathering activities and various confidential sources. That is a judgment made by Congress. On the other hand, defendants are entitled to the discovery mandated by the Federal Rules of Criminal Procedure and the Constitution. They are entitled to it under law, no matter what kind of case it is and no matter where it comes from.

Judge Mukasey

The information to which you are entitled does not necessarily include how it was gathered or its source, which is not usually

* Following the presentations of the panelists, members of the audience presented questions to the panelists. The panelists, moreover, presented questions to each other.

relevant in a criminal case. That information, however, ought to be forthcoming. The whole point of both the Foreign Intelligence Surveillance Act[1] and the Classified Information Procedures Act,[2] is to provide the information without compromising the source to the point where no more information can be gathered.

Mr. Shargel

Judge Mukasey, I was thinking about cases where the defense lawyers had to have security clearance to learn certain information during the course of discovery. Obviously, defense lawyers are under an obligation not to share that information. But, because of the Federal Rules of Criminal Procedure, it is not necessary for defense lawyers to have such information to fully and fairly litigate the case.[3] Is that correct?

Judge Mukasey

That is true under the Classified Information Procedures Act as well ("CIPA").[4] Under CIPA, a defense lawyer may need to obtain clearance to access certain information. This is a very delicate problem for the attorney because the client obviously does not have top secret clearance. Thus, the lawyer will obtain information that cannot be shared with the client, resulting in a very difficult position for the attorney.

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[1] 50 U.S.C. §§ 1801-1811 (1994 & Supp. IV 1998).

[2] 18 U.S.C. app. §§ 1-16 (1994 & Supp. IV 1998).

[3] FED. R. CRIM. P. 16(a)(1)(A)-(E) (requiring that, upon request by the defendant, the government make available any of the defendant's statements, prior criminal records, documents, photographs, examination results, and summaries of expert witnesses that the government has in its possession and intends to use during the trial).

[4] 18 U.S.C. app. §§ 1-16 (1994 & Supp. IV 1998); *see also* United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983) (holding that, before a hearing is held, Section 5(a) of CIPA requires a defendant to state with particularity which items of classified information he reasonably expects will be revealed in his defense).

Mr. Shargel

Well, this difficult position is not so unusual and is not limited to cases involving national security. There was an issue, in a case I tried before Judge Trager,[5] where a certain piece of sensitive Jencks material[6] was disclosed and the issue was whether disclosure occurs once the material is submitted to the judge *in camera* and the judge decides, under the procedure of the Jencks Act,[7] that it should be turned over. There have been prohibitions about discussing classified information with the client. I do not recall, however, if those issues were addressed by the Second Circuit or reached the Supreme Court, though, where a defense lawyer is precluded from sharing information relevant to the defense with his client.[8]

Ms. White

Actually, in *Padilla* there was an ongoing plot to suborn perjury, which the defense attorneys were made privy to but their clients were not until later in the trial.[9]

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[5] Gordon v. United States, 887 F. Supp. 435, 447 (E.D.N.Y. 1995).

[6] 18 U.S.C. § 3500 (1994); *see also* United States v. Aulet, 618 F.2d 182, 186 n.4 (2d Cir. 1988) (explaining that Section 3500 of Title 18 provides for the "production of statements and reports made by government witnesses and in the government's possession, after the witness has testified on direct examination").

[7] 18 U.S.C. § 3500 (1994). Section 3500 sets forth the circumstances and procedures pursuant to which the government must produce the statements or reports of any government witnesses in a federal criminal prosecution. It provides that where the government objects to the production of certain materials, the court shall order an *in camera* inspection of the statement or report. *Id.* § 3500(c).

[8] United States v. Padilla, 203 F.3d 156 (2d Cir. 2000). In *Padilla*, the court held that there was no constitutional violation where defense counsel was precluded from discussing with the client an ongoing investigation into "activities implicating the trial's truth-seeking function" since the "communications proscribed did not implicate counsel's representation regarding the crimes charged." *Id.* at 160.

[9] *Id.* at 161-62.

Mr. Shargel

That is right. *Padilla* does address those issues. I am more concerned with historic events, however. In other words, events that are actually relevant to the defense of the case an attorney is trying. That is where the issue becomes very convoluted.

Audience Member

My question concerns the procedural safeguards employed in trials dealing with issues of an intelligence-sensitive nature and whether and to what extent the procedural safeguards mentioned by Mr. Liptak are followed, in particular the terms of the docketing of a sealed proceeding.

Ms. White

Now, I think one consequence of those procedures in terrorism cases is that the dockets will be validly sealed for longer periods of time. Although sealing is not limited to terrorism cases, it may be more prevalent there. In terrorism cases, the prosecutor's instinct is that something awful will occur if any of this material is prematurely released to the public. Thus, the prosecutor will seek to keep everything undisclosed for a longer period of time. And in litigation over closure, prosecutors must demonstrate in their motion papers that there is legal authority supporting the sealing they seek.

I do not think that not disclosing or delaying disclosing of docketing of certain matters in terrorism investigations is justified under the First Amendment. Closure of the courtroom can only occur in order to safeguard a compelling interest. That result may be undesirable for the press, but I would argue it is essential in some circumstances. What is required, however, is an enhancement of procedural safeguards surrounding closure. If we do not strengthen and abide by the procedural safeguards, the press and public may never know that there is anything out there to contest.

Mr. Liptak

But even there, Mary Jo, I would expect that if the docket were sealed in its entirety it would be sealed because of a court order and that court order would either be for a fixed period of time or until the happening of a specified event. I do not believe that the sealing should be kept indefinitely. There may be dozens of other cases that we happen to have little or no knowledge of. We, by happenstance, found out about the two previously closed proceedings. Thus, if there is no docketing at all, then there is an entire secret justice system practicing sort of "under the radar." I am confident that this is not true, but the possibility that it can occur is troubling.

Ms. White

I understand your point, but it is very rare for closed proceedings to occur after charges are filed even in terrorism cases. I think ultimately there is a government interest in providing information and in following the procedural safeguards when closure and sealing are sought. But as criminal investigations are active and ongoing, there are steps along the way that, for some period of time under the First Amendment, are appropriate. Indeed, I think it would be irresponsible for some proceedings not to remain sealed for the appropriate duration. What we cannot do is bypass what is required in the way of notice and in the way of limited duration of sealing orders such as they are. Mr. Liptak has raised the consciousness in this context. Prosecutors should do their job better to assure that they proceed through each of the procedural hoops required to keep material secret as long as it is permitted under existing law. They should also proceed carefully and scrutinize the government interests that they believe justify closure. Such scrutiny and care may result in information being disclosed sooner and getting notice earlier and so forth.

Professor Hellerstein

I think it's great that you guys can do some business here. Thank you.