The Coffee Table with Ears

It took 15 years, but a Clovis sole practitioner forced the U.S. government to settle—for the first time ever—a state secrets privilege case.

by Matthew Heller

When the Drug Enforcement Administration first posted Special Agent Richard A. Horn to Burma's section of the infamous Golden Triangle, he considered his two-year assignment "a godsend." It was 1992, Horn was a mid-career operative stationed in Fresno, and Burma—officially renamed the Union of Myanmar just three years before—was producing more heroin than any other country in the world. As country attaché, Horn's duties included assisting the drug-fighting efforts of the repressive military regime, even though the United States had limited diplomatic relations with the government.

He arrived in the capital city of Rangoon in June, after the poppy harvest. But within months his drug enforcement work had degenerated amid a hornet's nest of U.S. bureaucratic infighting, with the DEA on one side and the Central Intelligence Agency and State Department on the other.

According to Horn, officials at the American Embassy "shaped" their reports to ensure that the governing Burmese junta received no credit in Washington, D.C., for its antidrug initiatives. Horn says he strongly objected to this "intellectual dishonesty"—a position that put him in direct conflict with Arthur Brown, the CIA's station chief, and Franklin "Pancho" Huddle Jr., the State Department's top official in Burma.

Among other transgressions, Horn refused to introduce Brown to his liaison contact with the Burmese government, or provide the full address of the safe house where he met informants. "It was important that our mission not be confused with the CIA's," Horn explains. "The CIA can't always be depended upon to act honorably."

One day, Horn returned home to Rangoon from a business trip and noticed something different in his living room, where he conducted most of his meetings as attaché. Instead of the rectangular coffee table previously supplied by the Government Service Office, he now had an oval one. "My servant said the GSO had stopped by and swapped out my coffee table," he recalls. He hadn't asked for a new table, but the GSO left a note explaining that "the original coffee table was needed to complete a sofa set at another residence." The new one, Horn later learned, "was a coffee table with ears."

On August 12, 1993, Horn made a fateful call from the telephone in his living room to David Sikorra, a fellow DEA special agent and subordinate who also was stationed in Rangoon. Horn described why he believed that the State Department's Huddle was trying to force him out of Burma, and the agents discussed whether the DEA would stand up for him if he fought back.

Less than four weeks later, Horn was reassigned to New Orleans. During his last weeks in Burma, he asked Huddle for copies of any State Department cables regarding him that had been forwarded to superiors. Huddle wrote down some numbers from the cable logs, and Horn took the list to a friend in the Embassy's communications department. The men found the listed cables—and another one Huddle had sent to State Department officials in Washington, D.C., that was dated August 13, the day after Horn's phone conversation with Sikorra. As the friend read it, Horn recalls, he stopped and said, "Holy shit! They wired you up!"

The following year Clovis sole practitioner Brian C. Leighton filed a federal suit on Horn's behalf against Huddle and Brown, who was identified in the complaint only as "Defendant II." (Horn v. Huddle, No. 94-1756 (D.D.C. filed Aug. 11, 1994).) An earlier ruling by the U.S. Supreme Court had authorized individuals to sue federal officials for monetary damages over violations of their Fourth Amendment rights against unreasonable search and seizure (Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)).

Horn's complaint cited the cable of August 13, 1993, alleging that the State Department's Huddle had quoted verbatim from Horn's telephone conversation with Sikorra the day before. "Horn shows increasing signs of evident strain," the cable read. "Late last night, for example, he telephoned his junior agent to say that 'I am bringing the whole DEA operation down here ... You will be leaving with me ... We'll all leave together.'"

The complaint alleged that Brown, the CIA station chief, had wiretapped Horn's home in Rangoon and passed the content of his communications to Huddle "in furtherance of their political and personal agenda to thwart and undermine DEA's mission in Burma." Horn sought unspecified compensation.

Horn maintains that he only wanted justice for himself and for other DEA agents who he believes had been victims of sabotage by the CIA. "I wasn't going into this for the money," he insists. "It was for a cause."

The Clinton administration, however, asserted that in his pleadings Horn had improperly disclosed classified national security information on the public record. To prevent further disclosure, the Department of Justice promptly filed a motion to seal the proceedings, which the court granted. Then in 2000, the DOJ asserted the rarely invoked state secrets privilege—a Cold War–era, court-made doctrine—over information in two classified reports created by the inspectors general of the CIA and the State Department in response to Horn's allegations.

That privilege had been established 47 years earlier when the U.S. Supreme Court held that the government may assert a state secrets privilege when "there is a reasonable danger that compulsion of [classified] evidence will expose military matters which, in the interest of national security, should not be divulged." (U.S. v. Reynolds, 345 U.S. 1 (1953).) The plaintiffs in that landmark case were the widows of civilian observers on a military aircraft that crashed while testing secret electronic equipment. The Supreme Court denied them access to the Air Force's accident report, finding that the electronic devices "must be kept secret if their full military advantage is to be exploited in the national interests." (345 U.S. at 10.)

Thereafter, Horn v. Huddle took on aspects of Jarndyce and Jarndyce, the interminable legal saga in Charles Dickens's Bleak House. The 15-year case would strengthen Horn's longtime friendship with Leighton, a former federal prosecutor he'd met back when both were working out of Fresno in the '80s. And then last November, in a most unlikely denouement, the case ended abruptly with a settlement that made legal history.

By the time Rick Horn left Burma in 1993, Brian Leighton had a private civil practice, working from a modest suite of offices in Clovis. After getting his law degree from Humphreys College in Stockton, Leighton spent the first six years of his career as an assistant U.S. attorney in Fresno. He originally teamed up with Horn on cases for the Justice Department's Organized Crime Drug Enforcement Task Force, which targets major drug trafficking operations. The two built a close rapport. "Brian was receptive to my ideas, and I was receptive to his," Horn recalls. "He and I just seemed to click."

Leighton, for his part, says he admired Horn's "bulldog" tenacity. During one of their drug investigations, Horn underwent hypnosis to help him remember the
address of a suspected dealer's storage unit. He had seen the address in a document at the suspect's home while serving a search warrant, but forgot to bring it with him. "He never gives up, he's tireless," says Leighton. A search of the storage unit turned up 32 kilograms of cocaine.

Leighton, now 60, describes himself as a conservative who opposes big government; in private practice he made a name for himself representing dissident farmers who challenged production quotas and mandatory advertising fees set by agricultural marketing committees in California. And while Horn was still in Rangoon, Leighton took several calls from the agent to discuss his problems with Huddle and Brown. "He asked me what I could do to prevent him from getting pulled out of Burma for doing his job," Leighton recalls.

After Horn's fears were realized and he was transferred stateside, he reached out to Leighton for help in seeking redress. For most sole practitioners, going into battle against the federal government is a daunting prospect. But Leighton had a good idea of what he was up against from his days at the U.S. Attorney's office, where he often battled DOJ headquarters in Washington, D.C. "I was fairly certain they would pull out every trick in the book" against a renegade like Horn, he says. But he was also disgusted by the treatment his friend described receiving in Burma. "Horn was doing what he was supposed to do—with DEA approval and applause—and he got absolutely hosed," Leighton says.

The long-shot challenge also appealed to the gambler side of Leighton's personality. He understood, he says, that it was unlikely Horn would ever be able to pay him. "I thought, 'Screw it'" he says. "This was a battle, a competition. I like this stuff."

The government's assertion of the state secrets privilege, however, significantly changed the game. "The privilege usually destroys the suit," Leighton observes. "The plaintiff can't make out a prima facie case without information that the government claims is privileged." Indeed, the Supreme Court in Reynolds recognized the potency of the privilege, cautioning, "It is not to be lightly invoked." (345 U.S. at 7.) And the U.S. Court of Appeals later noted that once invoked, the privilege is "absolute" and "cannot be compromised by any showing of need on the part of the party seeking the information." (Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984)).

In August 2000 U.S. District Judge Royce C. Lamberth in Washington, D.C., agreed with the Justice Department that the state secrets privilege applied to the two inspectors general reports regarding Horn. Three months later, in November 2000, the government filed a classified motion to dismiss the proceedings, arguing that Horn could not make a case without the information in the reports. "[T]here is no way to litigate around the privileged information in this case," Assistant U.S. Attorney Lisa S. Goldfluss wrote in a brief. "The essence of plaintiff's allegation is itself a state secret, implicating, as it does, information about the identities of covert intelligence officers, covert installations overseas, intelligence-gathering sources, methods and capabilities ... and the organization and function of the United States' intelligence agencies."

But Leighton felt the state secrets privilege had been "lightly invoked" against his client, and he sought to proceed with discovery under the Classified Information Procedures Act (CIPA) (18 U.S.C. app. III §§ 116). Unlike the civilian widows in Reynolds, Leighton argued, Horn was a government employee when he filed suit—and already privy to a significant array of classified information on U.S. intelligence-gathering and surveillance techniques.

After his return from Burma in 1993, Horn had spoken to a former government official who told him about listening devices placed in other coffee tables. The official "knew they did it to diplomats," Horn says. "It was a program." He remembered that the telephone in his living room had been near the coffee table—which would explain how agents might record what he was saying.

The government's legal strategy, Horn contends, was not to stop him from learning new information but rather to keep him from talking about what he already knew.

"What occurred in Burma had nothing to do with national security," Leighton insists, "nothing to do with what the state secrets privilege is designed to protect." The government, he believes, asserted the privilege to cover up illegal wiretapping and to save officials from embarrassment—abusing the Supreme Court's guidelines under Reynolds. And Leighton says he wasn't going to let the Justice Department get away with it. "I said, 'I'm going to prove you bastards wrong.'"

At his Clovis office, Leighton employed only a paralegal and a bookkeeper—who also transcribed some of his pleadings. With the inspectors general reports off-limits, he would need the government's help to search for relevant unclassified documents under CIPA's Rules of Discovery. "They put up every roadblock in the world," Leighton recalls. The CIA would allow him to view certain documents only in a "secure room" at its Fresno office. Because of their classified nature, he had to file all his pleadings through the security office of the federal court. There were interminable battles over security clearance for him and for his two employees: One of his pleadings was entitled "Plaintiff's Motion for the Court to Order the Court Security Officer to Conduct the Process for Plaintiff's Counsel's Secretaries to Receive a Security Clearance."

When Horn retired from the DEA in December 2000, the government automatically withdrew his security clearance. All the proceedings remained sealed. One key unclassified document, however, was an affidavit in which Huddle stated that the information he related to superiors in the August 13, 1993, cable came from another DEA agent, Bruce Stubbs.

However, Stubbs denied telling Huddle anything about Horn's telephone conversation with Sikorra. And if Huddle hadn't learned of the conversation from Stubbs, Leighton argued, he must have done so through electronic eavesdropping. The verbatim quotes and ellipses in the cable, the attorney claimed, also made it appear that Horn's conversation had been transcribed.

Judge Lamberth was no stranger to government secrecy cases. In 1995 he had begun a seven-year term as chief judge of the special court established to scrutinize government applications for wiretaps under the Foreign Intelligence Surveillance Act (FISA) of 1978 (50 U.S.C., § 1801-1812). "Lamberth did not believe that anyone applying for a FISA warrant would ever lie to get a warrant," Leighton says. In the Horn case, the judge took his time deciding the motion to dismiss—so much time that Leighton filed writs of mandate in appellate court to get the judge to rule.

After three years and eight months, Lamberth finally issued an opinion in July 2004. Since CIA station chief Arthur Brown was a covert agent, the judge wrote, all of the evidence connecting him to Horn's allegations was privileged. "At most [Horn] has a dispute about whether or not [Huddle] learned the information from another person or from [unconstitutional surveillance]," he concluded. "But [Horn] cannot establish a prima facie case by offering any evidence that [surveillance] occurred."

Lamberth ruled that the state secrets privilege required dismissal of the suit on three independent grounds: the plaintiff's inability to present a prima facie case, the defendants' inability to present information in their defense, and the subject matter of the complaint. And he denied Horn's motion to adopt classified information procedures for evidence discovery, holding that CIPA applies only to criminal cases and that the state secrets privilege is "absolute." The reasoning closely followed a document in support of dismissal filed by then-CIA director George Tenet.
There would be no testimony about coffee tables with ears—or any other eavesdropping device. "God bless him," Leighton says, the judge "had swallowed Tenet's declaration hook, line, and sinker. He had drunk the Kool-Aid."

Horn appealed, contending that the state secrets privilege asserted in Reynolds could not be invoked to dismiss constitutional claims in a Bivens action. Alternatively, he argued that his case could proceed with unprivileged materials, including the Huddle cable and other circumstantial evidence. Another two years would pass before oral argument at the D.C. Circuit.

The stress of litigation can strain even the best of friendships. But as the years went by Leighton and Horn only grew closer. The frustrations of the case—such as flying across the country for court appearances at which nothing happened—just made them more determined to keep going.

"Brian said to me once—and only once—"You know, I don't think there's another attorney anywhere who would have ever taken this case,"" Horn recalls. "That was a huge understatement. If our roles were reversed, I would have been thinking—if not actually saying—the same thing on an almost daily basis."

The two worked as a team. "I'm not an attorney, he's not an investigator," Horn says. "But he is able to think like an investigator, and I have the ability to think like an attorney."

Leighton acknowledges that Horn "did a lot of the work with me. He knows how to do declarations ... He could review things I did ... He was almost like a paralegal." The attorney adds, "I never thought of him just as a client. I treated him as an equal, somebody I could discuss strategy with."

When it came time to argue their appeal in December 2006, the two met in Washington, D.C. The day before the court date, Horn paid a visit to the International Spy Museum, where he saw an exhibit of furniture—but not the sort sold by IKEA. Each of the chairs, lamps, and other items was a tool of espionage in which agents had implanted listening devices. "They had all kinds of stuff," Horn marvels. "It was all out in the open." The museum's executive director had been an agent in the CIA's clandestine service.

The visit proved to be a good omen. The following June the Court of Appeals affirmed Judge Lamberth's dismissal of the claims against Brown—identified once again as Defendant II—noting, "Nothing about this person would be admissible in evidence at a trial." But the three-judge panel reinstated the claims against Huddle, ruling that Horn had alleged sufficient facts to survive a motion to dismiss "even after evidence relating to ... intelligence-gathering sources, methods, and capabilities is stricken from the proceedings under the state secrets privilege." (In re Sealed Case, 494 F.3d 138, 148 (D.C. Cir. 2007).)

The appeals court suggested, "Horn can point to the highly suspicious use in the [August 13, 1993] cable of quotation marks and ellipses ... the seeming impossibility that Huddle would have learned of the conversation by lawful means, and the inconsistencies underlying Huddle's explanation about how he learned of the conversation." (494 F.3d at 147.)

After 13 years of litigation, winning the partial reversal was a singular achievement. Even more remarkable, a few months later the defense dropped a bomb on its own case. "Counsel for the United States recently learned that in 2002, Defendant II's cover was 'lifted' and 'rolled back' to his entrance on duty date with the Central Intelligence Agency," DOJ trial attorney Paul Freeborne revealed in a January 31, 2008, court filing.

Arthur Brown, therefore, was not a covert agent in 2004 when Lamberth ruled on the government's motion to dismiss. All his activities, in Burma and elsewhere, for his entire CIA career, were now an open book. Leighton seized the opening, filing a motion to reinstate Brown as a defendant because of a fraud on the court.

"It just shows you," he says, "that, number one, an assertion of state secrets privilege is more than likely bullshit unless it has something to do with military secrets, and, number two, what may be privileged now may not be tomorrow."

On February 4, 2009, the parties gathered in Washington, D.C., for a status conference in what had become, in effect, a new case. The defendants once again included both Huddle and Brown. The courtroom was filled with attorneys—Leighton, local counsel Janine M. Brookner, the DOJ's Freeborne, and a small army of lawyers from blue-chip defense firms, including Morrison & Foerster and Latham & Watkins. Some of them represented Huddle and Brown, who recognized that their interests might have diverged from those of the federal government.

This time Judge Lamberth showed a far more skeptical attitude toward the defense than he had in 2004. Just three weeks earlier he had granted Leighton's motion to reinstate Brown, finding that the misrepresentation of the CIA agent's status "was material, intentional, involved an officer of the court, and was directed at the judicial machinery itself." As late as 2005, Lamberth noted, an attorney with the CIA's Office of General Counsel had submitted a motion to him that "falsely stated that Mr. Brown was still undercover"—a submission that was "tantamount to the 'knowing participation of an attorney in the presentation of perjured testimony.' "

Lamberth held that the failure to inform the Justice Department and the courts of the change in Brown's status was indeed a fraud on the court, and he referred the CIA attorney to the district's Committee on Grievances for investigation and possible discipline.

At the status conference Leighton could sense that this wasn't the same Judge Lamberth who previously had trusted the government's attorneys. "I'm thinking, 'This is a new litigation,' " he recalls. As the conference ended, Lamberth gave the government some blunt advice. "This case," he said, "is going to have a tragic ending for the government unless the government settles the case."

Some initial settlement discussions ensued, mostly—Leighton believes—as a showing of respect for the judge. But in April 2009 the CIA again asserted the state secrets privilege to prevent Horn from showing that a coffee table was used to spy on him. Lamberth denied the government's motion for a protective order in July, and in an August 26, 2009, opinion he erupted again. "If the intention of the government's continued obstinance in this case is to demonstrate to the Court that this case is simply impossible and cannot proceed in light of sensitive national security concerns ... the government should save its theatrics for the Court of Appeals," Lamberth fumed. He also took the novel step of ruling that lawyers on both sides "have a need [to know] the classified and/or privileged information already known to them or to their clients."

The government's lawyers argued, appealing that only the executive branch has the authority to determine whether an attorney has a need to know classified information. But they also resumed settlement negotiations with Leighton. And on September 30, they announced a tentative agreement. Under terms of the settlement signed in November, the government agreed to pay Horn $3 million—that is, $200,000 for every year of litigation.

Brian Leighton had taken his client where no plaintiff in a state secrets case had gone before. "I don't know of any case where the government agreed to [a
settlement] when an assertion of the privilege had occurred," he says. Leighton believes the government folded for many reasons, including fear that Lamberth would grant motions he had filed to sanction former CIA director Tenet and three CIA lawyers in the Office of General Counsel. Moreover, because the sealing order on the case had been lifted by 2009, the Horn litigation was open to public scrutiny.

Others have benefited from Horn's case, including lawyers for an Islamic charity that sued the government for wiretapping conversations between two of its attorneys and a charity officer in Saudi Arabia (Al-Haramain Islamic Found. Inc. v. Obama, No. Civ. 07-0109 (N.D. Cal. plaintiff's motion for summary judgment granted March 31, 2010)). As one amicus brief noted, the Horn litigation has shed light on "questions of first impression whether a district court may decline to give a high degree of deference to an assertion of the state secrets privilege where the government has previously made misrepresentations to the court regarding the privilege ... and whether a district court may decide whether counsel who have been favorably adjudicated for access to classified information have a 'need to know' the information within the context of pending litigation."

Horn's triumph, however, hasn't given much encouragement to longtime critics of the state secrets privilege, which the Bush administration invoked in "extraordinary rendition" and domestic wiretapping cases. "In my judgment, the state secrets privilege is a legal monstrosity—its purpose is to inflict injustice," says Bruce Fein, a principal in The Litchfield Group in Washington, D.C., and a former associate attorney general during the Reagan administration. "Horn is the exception that proves the rule. You're not going to win [many cases] against the federal government with one attorney, a paralegal, and a secretary."

Some members of Congress are trying to make the privilege a bit less monstrous. In November the House Judiciary Committee approved the State Secrets Protection Act of 2009 (H.R. 984), which would permit the courts to assess a state secrets privilege claim and allow evidence to be withheld only if "public disclosure of the evidence that the government seeks to protect would be reasonably likely to cause significant harm to the national defense or diplomatic relations of the United States." The bill now goes to the full House for consideration.

Alan B. Morrison, associate dean for public interest and public service at George Washington University Law School, favors a different approach. He has proposed that the government should be able to invoke the state secrets privilege only if it cannot dismiss a case on any other grounds. At that point, the case would be referred to the U.S. Court of Federal Claims to determine the plaintiff's damages. Such a procedure, Morrison suggests, would bypass time-consuming, convoluted, and expensive litigation over whether secrecy claims are justified.

"Why go into this brouhaha about secrets?" Morrison asks. Under his proposal, the government still could assert the privilege—but not at the expense of the plaintiff's right to a remedy. "If you want to keep secrets, keep secrets," he says. "It's a simple choice."

Had Morrison's solution been applied in Horn's case, the litigation might have settled in half the time—making it more of a novella than a Dickensian epic.

As part of the settlement in Horn, Leighton agreed to refrain from opposing the government's motion to vacate. So on March 30, 2010, Judge Lamberth reluctantly vacated his earlier ruling on the need-to-know issue and made his final comments in the case. "The extraordinary circumstances of ending this 15-year-old, hotly contested litigation that has already consumed too much time and too many resources for everyone concerned and the desirability of finality are sufficient for this Court," he said. But he expressed concern that while the DOJ had agreed to settle the case for millions of dollars, "it does not appear that any government officials have been held accountable for this loss to the taxpayer. This is troubling to the Court."

As to the merits of the allegations, Lamberth concluded, "While the government makes no admission of wrongdoing in the settlement, the Court is persuaded that the government must at least have found them credible to pay the plaintiff $3 million."

Matthew Heller is a Los Angeles–based freelance writer and editor of On Point (www.onpointnews.com), a legal news website.