UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| IN RE: SEALED CASE | ) | Misc. No. 12-197 |

**MEMORANDUM AND ORDER**

Before the Court are motions [10] filed by the petitioners [redacted] (Misc. No. 12-196) [redacted] (Misc. No. 12-197) on May 9, 2012 for a stay pending the consolidated appeal of their Fed. R. Crim. P. 41(g) motions. The parties have filed identical memoranda in both cases, and the Court will issue one order disposing of both motions. Upon consideration of the motions, the government's responses, the petitioners' replies thereto, the entire record herein, and the applicable law, the Court will deny the motions.[1]

## I. BACKGROUND

The facts underlying this miscellaneous case are described in this Court's May 3, 2012 memorandum and order, and a brief summary will suffice for present purposes. The government executed a search of [redacted] and [redacted] and seized a vast assortment of physical documents, and documents and records stored on electronic media. The petitioners and the government agree that some of those documents may be subject to evidentiary privileges, in particular the attorney-client privilege, but the parties disagree about how to conduct a privilege review. The government proposes to run search terms on the electronic records and scanned versions of physical documents to create a list of documents potentially

[1] The petitioners have opposed the government's submission of an *ex parte*, unredacted version of their opposition to the Court. Although the use of *ex parte* submissions is disfavored, *see, e.g.*, *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), they are occasionally necessitated by "the paramount concern of all courts for the sanctity and secrecy of grand jury proceedings." *In re Sealed Case*, 151 F.3d 1049, 1075 (D.C. Cir. 1998) (quotations omitted). The Court determines that to be the case here.

responsive to the warrant. It would provide that subset of documents to the petitioners. The government would then have an internal "filter team" comprised of individuals not associated with the investigation review the potentially responsive documents for privilege issues. The petitioners would contemporaneously conduct a privilege review. The government would turn over indisputably non-privileged documents to the investigatory team, erase copies of indisputably privileged documents, and submit privilege disputes to the Court for resolution.

The petitioners objected to the government's use of a filter team, arguing that any instance of a government agent viewing a privileged document constitutes a violation of the relevant privilege. The petitioners agreed that the government could run search terms to weed out unresponsive documents but suggested that the petitioners alone could conduct a substantive privilege review, with the Court mediating privilege disputes between the parties. The petitioners also argued that once the government ran the initial search terms, it needed to employ third parties (such as another filter team) to remove inadvertently captured unresponsive documents from the results, or alternatively to waive reliance on the plain view doctrine with respect to unresponsive documents. The petitioners filed motions [1] for return of property under Fed. R. Crim. P. 41(g) on April 2, 2012, seeking an order from the Court requiring the government to comply with their suggested approach. The Court issued an order [9] on May 3, 2012 denying those motions, finding that the government's proposed protocol would not engender privilege violations sufficient to warrant the relief sought. The petitioners filed notices of appeal on May 8, 2012 [11] and now seek a stay of the Court's May 3 order.

## II. DISCUSSION

A party seeking a stay pending appeal must show (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury absent a stay; (3) that a stay will

not cause substantial harm to other parties; and (4) that the public interest will be served by a stay. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 558 F.2d 841, 843 (D.C. Cir. 1997); *see also Louisville & N. R. Co. v. Sullivan*, 617 F.2d 793, 799 (D.C. Cir. 1980) (holding that standard for stay pending appeal is identical to standard for preliminary injunction).

As a threshold matter, the government asserts the petitioners have no substantial likelihood of success because the D.C. Circuit lacks jurisdiction to entertain their appeal. The Court similarly suspects that its order is unreviewable. In *DiBella v. United States*, 369 U.S. 121 (1962), the Supreme Court determined that motions for return of property are unreviewable on appeal unless the "motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *Id.* at 131-32. The government argues that because the instant motion is tied to a criminal investigation, *DiBella* prohibits an appeal.[2] However, it is not clear whether a criminal investigation or grand jury proceeding constitutes a "criminal prosecution *in esse*" under *DiBella*. Some courts reason that the close ties between investigations, grand jury proceedings, and criminal prosecutions bring the former two within the *DiBella* prohibition. As the Third Circuit explained in *In re Grand Jury*, "the property [at issue] was seized in connection with an ongoing grand jury investigation of which the appellant is a target. Given the clear connection between the motion and a criminal prosecution (albeit an incipient one), the appellant does not satisfy . . . *DiBella*." 635 F.3d at 105 (quotations and internal modifications omitted); *see also Andersen v. United States*, 298 F.3d 804, 807-08 (9th

[2] *DiBella*—and many circuit courts of appeals decisions applying it—predates the 1989 amendments to Rule 41. The predecessor rule to Rule 41(g), Rule 41(e), read: "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property . . . [and if granted] *it shall not be admissible in evidence at any hearing or trial*" (emphasis added). The 1989 amendments deleted the suppression language. *DiBella*'s holding reflects the fact that any Rule 41(e) motion *a fortiori* included a motion to suppress, and orders denying motions to suppress are not appealable. Under Rule 41(g), however, not all motions for the return of property are motions to suppress. The logic of *DiBella* is thus upset to some extent by the intervening rule amendment. *See, e.g.*, *In re Grand Jury*, 635 F.3d 101, 104 & n.2 (3d Cir. 2011) (discussing change). Nonetheless, many courts still apply the *DiBella* framework to appeals of Rule 41(g) motions, particularly when they are properly understood as motions to suppress.

Cir. 2002) (finding no jurisdiction in pre-indictment context). Other circuits, however, allow appeals from orders denying pre-indictment Rule 41(g) motions, reasoning that prior to an indictment there is no ongoing criminal proceeding. *See, e.g.*, *Frisby v. United States*, 79 F.2d 29, 31 n.1 (6th Cir. 1996) (exercising jurisdiction where no indictment or information had yet issued); *United States v. Davis*, 1 F.3d 606, 607 (7th Cir. 1993) (noting difference between pre-indictment and post-indictment appeals for purposes of applying *DiBella*); *In re 6455 South Yosemite*, 897 F.2d 1549, 1554-55 (10th Cir. 1990) (discussing effect of amendments to Rule 41(e) and determining that orders dismissing pre-indictment Rule 41(g) motions are appealable).

The D.C. Circuit Court of Appeals has not addressed this question directly. Indeed, in *United States v. Rayburn House Office Building*, 497 F.3d 654, 656 (D.C. Cir. 2007), the D.C. Circuit expressly avoided the jurisdictional question: "Neither party suggests that the return of the indictment divests this court of jurisdiction or renders this appeal moot or urges that the court not proceed to decide this appeal." Here, where the government has forcefully raised the issue, there is a substantial question as to whether the D.C. Circuit will determine it has jurisdiction over the instant appeal.[3] If it determines that it does not, the petitioners have no chance of success.

[3] In addition to relying on *DiBella*, the government in the alternative classifies the petitioners' appeal as interlocutory. However, the Court's order was a final disposition of the petitioners' Rule 41(g) motions and is only properly considered "interlocutory" in the sense that indictments may issue in the future, and the motion may become relevant to criminal proceedings that the government may initiate. The government's reliance on *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), seems misplaced. *Mohawk Industries* dealt with an appeal from a district court order that the petitioners alleged would infringe on the attorney-client privilege. But the order was a discovery order in an ongoing civil case, and it was indisputably interlocutory. The order at issue in this motion defies such simple classification.

Oddly enough, however, the D.C. Circuit in *Rayburn* stipulated that its jurisdiction "rest[ed] on the collateral order doctrine" and cited to *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995). Accordingly, the government's reliance on *Mohawk Industries* appears more pertinent. Both *Rayburn* and *Rostenkowski* predate *Mohawk Industries*, which throws their precedential force into question. In addition, *Rostenkowski* in particular noted the special nature of the Speech or Debate Clause. It is therefore unclear whether the D.C. Circuit's presumed exercise of jurisdiction withstands *Mohawk Industries*, or could apply to other privileges.

Even if jurisdiction exists, the petitioners still stand little chance of success on the merits. The Court need not fully reiterate its previous discussion regarding this issue. The petitioners' primarily argue that the D.C. Circuit's decision in *Rayburn* forecloses any use of a government filter team to resolve privilege disputes. But *Rayburn* turned on the unique separation of powers concerns underlying the Speech and Debate Clause, and does not apply outside that context. Further, this case presents a set of circumstances under which use of a filter team is highly appropriate. *See, e.g.*, *United States v. Jackson*, Crim. No. 07-35, 2007 U.S. Dist. LEXIS 80120, *16-*18 (D.D.C. Oct. 30, 2007) (summarizing and collecting cases regarding propriety of filter team resolution of privilege disputes). And with respect to the issue of documents outside the scope of the warrant, the Court is confident that the Fourth Amendment does not require the government to use a filter team to screen out potentially unresponsive materials. *See United States v. Burgess*, 576 F.3d 1078, 1094 (10th Cir. 2009). On neither issue are the petitioners likely to prevail.

The Court also need not repeat its analysis of the irreparable injury question. The petitioners face little to no irreparable injury simply because of the deprivation of documents or records, since the government has returned or will return originals or copies thereof. The Court does concede that the filter team will see documents that the petitioners claim are privileged, but the Court stresses that no such document will be reviewed by any member of the investigative team until the Court has determined whether in fact the document is privileged. What little harm this entails is not irreparable. *Cf. Mohawk Industries*, 130 S. Ct. at 606-07 ("In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege."). Preventing the investigation team from accessing potentially privileged documents will ensure that the petitioners face no prejudice, and indeed no adverse

consequences beyond the mere fact that a filter team agent has viewed these documents. The petitioners' arguments regarding the public interest are of similar weight. The petitioners note a public interest in robust enforcement of evidentiary privileges, and argue that the use of a filter team will have some chilling effect on "full and frank communications between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). But there is little "discernible chill" here, since "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order." *Mohawk Industries*, 130 S. Ct. at 607. Any chill is particularly insubstantial here given the government's proposed protocol and institutional incentives.

The government argues that a stay would compromise its and the public's strong interest in expeditious resolution of a criminal investigation. The Court agrees. The [redacted] at issue in this case warrant swift treatment, and a stay of the Court's order would delay the government's efforts. First, the government is of its own volition refraining from reviewing "any records from Petitioners in possession while Petitioners' motion for return of property is pending before this Court," Gov't Opp. [6] at 6, and may feel obligated to continue to refrain were a stay issued. Second, the petitioners' proposed procedures would promote delay in judicial resolution of privilege disputes. The petitioners note that under both their and the government's suggested approaches, the petitioners will conduct a privilege review. They thus question whether any delay will result from their proposed protocol. But use of a filter team will help ensure that the government makes more informed decisions about which privilege claims to concede and which to contest, thus narrowing the range of disputes and expediting adjudication. Third, the government represents that it has an even more pressing interest in avoiding any delay because of efforts by [redacted]. Accordingly, the government and

the public interest would be harmed through issuance of a stay. *See United States v. Dionisio*, 410 U.S. 1, 17 (1973) (noting public's "interest in the fair and expeditious administration of the criminal laws").

Aside from the delay posed by the petitioners' suggested procedures, the Court stresses the unfortunate strain this litigation places on the government's ability to enforce our nation's laws. The petitioners' filing of their Rule 41(g) motions has stalled the government's investigation for at least a month and a half. During that time, agents have not had the opportunity to review the substance of any of the documents seized. Appellate review, even on an expedited basis, will take even more time: at this point, the appellant's reply brief is not due until August 10, 2012, nearly three months from now. A stay of the Court's order would grind the government's efforts to a halt for an extended basis. These motions not only risk prohibitive delay but also consume institutional resources that could be better spent on conducting the underlying investigation. The Court cannot allow the Department of Justice to be dissuaded from its efforts by the expenses and procedural complexities engendered by such challenges. The government and the grand jury need the freedom to pursue potential criminal violations without the sort of bickering over the minutiae of privilege review that is endemic in the filings in this case. *Cf. Dinler v. City of New York*, 607 F.3d 923, 947-48 (2d Cir. 2010) ("[W]e think that an intrusion into the executive branch's historic control over criminal investigations . . . amounts to a clear abuse of discretion, if not a judicial usurpation of power." (quotations omitted)). The government in the pursuit of an investigation of serious potential criminal violations has seized documents through execution of a valid search warrant. The government has the right to review those documents on a prompt basis, and the public has the right to see alleged wrongdoers swiftly brought to trial.

## III. CONCLUSION AND ORDER

The petitioners have little likelihood of success, either of invoking the D.C. Circuit's jurisdiction or on the merits. Any harm they face from filter team review of allegedly privileged documents is minimal, and a stay would substantially hamper the government's investigation and would be contrary to the public interest. It is therefore hereby

**ORDERED** that the motions for a stay pending appeal are **DENIED**; and it is further

**ORDERED** that the government file *ex parte* and under seal within 5 days of the date of the issuance of this memorandum and order a proposed redacted version that could be released to the petitioners.

**SO ORDERED.**

**Signed by Royce C. Lamberth, Chief Judge, on 17 May 2012.**