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15 UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF WASHINGTON

17
18 SULEIMAN ABDULLAH SALIM, *et al.*,

19 Plaintiffs,

20 v.

21 JAMES ELMER MITCHELL and
22 JOHN "BRUCE" JESSEN,

23 Defendants.
24

No. 15-CV-286-JLQ

UNITED STATES' UNOPPOSED
MOTION FOR PROCEDURES
GOVERNING TRIAL TESTIMONY
OF FORMER GOVERNMENT
OFFICIALS AND CONTRACTORS

Motion Hearing (Pre-trial Conference):
August 21, 2017 at 10 a.m.
Spokane, WA

1 **Related Case:**

2
3 JAMES E. MITCHELL and
4 JOHN JESSEN,

5 Petitioners,

6 v.

7 UNITED STATES OF AMERICA,

8 Respondents.

No. 16-MC-0036-JLQ

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INTRODUCTION

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2 The United States hereby requests that the Court establish trial procedures to
3 ensure that certain classified or privileged information related to the Central Intelligence
4 Agency's (CIA) former detention and interrogation program is not revealed during the
5 testimony of five former federal Government officials or contractors in this trial of this
6 case.
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9 The United States has been an active non-party participant in the discovery phase
10 of this case to protect from disclosure certain classified and privileged information
11 related to the CIA's former detention and interrogation program. In the event this case
12 proceeds to trial, Plaintiffs and Defendants have indicated that they intend to call as
13 witnesses five former Government officials or contractors, and seek testimony from
14 them about the CIA's former program. The United States does not object to allowing
15 these witnesses to testify in this case, but given the likely subject matter of their
16 testimony, procedural safeguards should be established to prevent the unauthorized
17 disclosure of classified or privileged information. Such disclosures, if they were to
18 occur, would be detrimental to the national security interests of the United States.
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22 To avoid these harms from occurring during trial, the United States requests that
23 the Court permit attorneys from the Department of Justice, as assisted by attorneys or
24 representatives from appropriate Government agencies, to attend the trial and assert
25 objections as necessary to prevent the unauthorized disclosure of the United States'
26 privileged or classified information. Undersigned counsel for the Government has
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1 conferred with counsel for Plaintiffs and Defendants regarding this motion, and both
2 parties have no objection to the Government's proposed order. Accordingly, as
3 explained further below, the United States' motion should be granted.
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5 **BACKGROUND**

6 On April 8, 2016, the United States filed a Statement of Interest requesting that
7 the Court consider the interests of the United States when formulating a discovery plan
8 in this case. *See* ECF No. 33. The Statement of Interest explained, among other things,
9 that the United States has a strong interest in protecting its classified and privileged
10 information from unauthorized disclosure. *See id.*
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13 In recognition of the Government's interests, the parties and the Government
14 filed a Joint Stipulation on May 23, 2106, prior to the start of discovery, establishing
15 various procedural mechanisms designed to prevent the unauthorized disclosure of
16 information deemed classified or privileged by the Government during the discovery
17 process. *See* ECF No. 47. As relevant here, the parties agreed that "[a]ttorneys for the
18 United States and representatives from appropriate Government agencies may attend all
19 depositions and proceedings in this case and may make objections they deem necessary
20 to prevent the unauthorized disclosure of privileged or classified information." *Id.* ¶ 14.
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22 In the event of an objection by the Government, the parties agreed that "the witness
23 shall be precluded from responding to any question to which [an] objection is made
24 pending further order of the Court." *Id.*
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27 On June 10, 2016, Defendants filed an unopposed motion to have several sections
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1 of the Joint Stipulation incorporated into a Court order, including the provision
2 permitting Government attorneys to assert objections during depositions and
3 proceedings. *See* ECF No. 48. On June 15, 2016, the Court denied the motion in part,
4 stating that “[i]t has been the long-standing practice of this court to refrain from
5 incorporating parties’ discovery agreements . . . in a court order.” *See* ECF No. 51 at 1-
6 2. The Court acknowledged that the parties and the Government were “free” to agree to
7 various discovery protections, but the Court stated that it would “treat discovery
8 agreements as matters between the parties with any person or entity thereto who feels
9 the agreement has been breached or needs court attention to bring an appropriate motion
10 in the court.” *Id.* at 1, 3.

14 In accordance with the Joint Stipulation, attorneys from the Department of
15 Justice, along with representatives from the CIA and Department of Defense (DoD),
16 attended the depositions of five former Government employees or contractors in this
17 case:
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- 19 • James Mitchell: Defendant; former DoD employee and CIA contractor;
- 20
- 21 • John “Bruce” Jessen: Defendant; former DoD employee and CIA
22 contractor;
- 23 • John Rizzo: Non-party witness for Defendants; former acting general
24 counsel of the CIA;
- 25 • Jose Rodriguez: Non-party witness for Defendants; former director of the
26 CIA’s National Clandestine Service;
- 27 • Charles Morgan: Expert witness for Plaintiffs; former CIA employee and
28 DoD contractor.

1 The witnesses were generally able to respond to a broad array of questions posed to
2 them about their Government service on the basis of unclassified and non-privileged
3 information. *See, e.g.*, Excerpts from Deposition of James Mitchell (attached as Exhibit
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5 1. In some instances, attorneys for the United States asserted objections to questions
6 that would tend to call for the witnesses to reveal classified or privileged Government
7 information. *See id.* In many such instances, Government attorneys and agency
8 representatives provided guidance and clarification to the witnesses, off the record,
9 regarding the classification or privileged nature of the witnesses' proposed answers to
10 certain questions, so as to permit the witness to answer the questions without reference
11 to such information. *See id.* Only in rare instances were witnesses unable to answer
12 questions because of an objection from the Government based on a question calling for
13 the disclosure of classified or privileged information. *See id.*

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17 Plaintiffs and Defendants have listed these five former Government officials or
18 contractors on their respective witness lists for the upcoming trial in this case, which is
19 scheduled to begin on September 5, 2017. *See* ECF Nos. 123, 130.¹
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23 ¹ Defendants' witness list also includes four additional current or former Government
24 employees – Gina “Doe”, John/Jane “Doe”, James Cotsana, and Jonathan Fredman –
25 but the Government's understanding is that these witnesses will not testify at trial. *See*
26 ECF No. 123. The Court prohibited the testimony of Gina “Doe” and James Cotsana
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ARGUMENT

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2 Before the former Government officials or contractors testify in this case,
3 procedures should be established in order to protect the Government’s significant
4 interest in preventing the inadvertent disclosure of classified or privileged information.
5 *See, e.g., Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The scope of the
6 Government’s request is narrow and merely seeks to apply the parties’ joint discovery
7 stipulation regarding Government attorney attendance at depositions and proceedings to
8 the trial testimony in this case. *See* ECF No. 47 ¶ 14. Specifically, the Government
9 requests that the Court allow attorneys from the Department of Justice, as assisted by
10 attorneys or representatives from appropriate Government agencies, to be present for
11 the testimony of the five former Government officials or contractors referenced above,
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17 when it upheld the Government’s state secrets privilege assertion with respect to them.
18 *See* Order Re: Third and Fourth Motion to Compel and Assertion of State
19 Secrets Privilege (ECF No. 188). Additionally, Defendants withdrew their requests to
20 depose John/Jane “Doe” and Jonathan Fredman, and the Government understands this
21 withdrawal extends to their trial testimony as well. *See* ECF Nos. 76 at 3 n.3, 82 at 4.
22 Accordingly, this motion is limited to the five former Government officials or
23 contractors listed in the text above whom the Government understands are likely to
24 testify at trial. The Government reserves the right to amend this motion to include
25 additional witnesses should such a need arise.
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1 and be permitted to assert objections as necessary to prevent the unauthorized
2 disclosure of the United States' privileged or classified information. This procedure
3 will be sufficient to protect the Government's significant national security interests
4 while at the same time allowing the testimony of these witnesses to proceed without
5 undue interruption or delay.²

7 Based on the questions posed to the five witnesses during their depositions,
8 the Government anticipates that they will be asked various questions at trial related to
9 CIA's former detention and interrogation program. Over time, various categories of
10 information about the former detention and interrogation program have been officially
11 declassified by the United States and released to the public, including through the
12 Government's document productions in this case. *See, e.g.*, ECF Nos. 33 at 6, 47 at 4-
13 8. The Government would not object to the witnesses testifying on the basis of this

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18 ² The Government understands that Plaintiffs Salim and Ben Soud will present their trial
19 testimony by way of video deposition. The Government will not seek to restrict their
20 testimony, as any statement Plaintiffs make regarding their detention in the CIA's
21 former program would not constitute an official acknowledgment binding on the
22 Executive Branch and, in any event, the Government would neither confirm nor deny
23 the accuracy of any such statements. *See, e.g., Mohamed v. Jeppesen Dataplan, Inc.*,
24 614 F.3d 1070, 1086 (9th Cir. 2010); *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir.
25 1999).

1 unclassified, non-privileged information.

2 Other categories of information about the program, however, remain classified
3 and protected from disclosure, including by the Government's assertion of the State
4 Secrets privilege in this case. *See* Order Re: Third and Fourth Motion to Compel and
5 Assertion of State Secrets Privilege (ECF No. 188). Although the Government has
6 provided the witnesses with classification guidance from the CIA and DoD to help them
7 navigate through these categories, *see* Exhibits 2-3, the witnesses' view of whether
8 particular information is classified may not be accurate or consistent with
9 determinations made by the Executive Branch with regard to such information. Indeed,
10 determining whether certain information about the CIA's former program remains
11 classified can turn on subtle nuances, carefully parsed distinctions, and the context in
12 which the information arises. Absent the attendance of Government attorneys with the
13 ability to assert objections, as assisted by knowledgeable agency officials, a risk exists
14 that classified information could be inadvertently disclosed by the witnesses during
15 their testimony.
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21 The Government's proposed procedures strike an appropriate balance between,
22 on the one hand, the Government's interest in protecting classified and privileged
23 information and, on the other hand, the parties' interest in obtaining unclassified and
24 non-privileged testimony from the former Government officials or contractors related to
25 the CIA's former program. Consistent with the joint discovery stipulation and the
26 practice adopted during the depositions of the five witnesses, the Government's role at
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1 trial would be limited to monitoring the witnesses' testimony for the sole purpose of
2 ensuring that any answers provided by the witnesses would not disclose classified or
3 privileged information. Based on the experience of the depositions, it is likely that the
4 witnesses will be able to answer a wide range of questions without risking harm to the
5 Government's national security interests. But it is possible that some questions and
6 answers at trial may implicate the Government's classified or privileged information.
7 As other courts have recognized, "[i]n examining witnesses with personal knowledge of
8 relevant [state] secrets, the parties would have every incentive to probe dangerously
9 close to the state secrets" that the Government is attempting to protect. *Jeppesen*
10 *Dataplan, Inc.*, 614 F.3d at 1088-89 (quoting *Fitzgerald v. Penthouse Int'l, Ltd.*, 776
11 F.2d 1236, 1243 (4th Cir. 1985)). The presence of knowledgeable Government
12 attorneys and agency officials at trial will ensure that this line is not crossed. *Cf. United*
13 *States v. Reynolds*, 345 U.S. 1, 7-8 (1953) ("The [state secrets] privilege belongs to the
14 Government and must be asserted by it; it can neither be claimed nor waived by a
15 private party.").

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21 The Government has no desire to interpose unnecessary objections to questions
22 that could conceivably call for the disclosure of classified or privileged information.
23 Absent a question the answer to which would likely call for the disclosure of classified
24 or privileged information, the Government anticipates refraining from asserting
25 objections and allowing the witnesses to answer the question posed, as was the practice
26 during the witnesses' depositions. In the event, however, an answer to an otherwise
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1 non-objectionable question were to approach privileged subjects or areas covered by the
2 Government's state secrets assertion, the Government would be prepared to assert an
3 objection or otherwise signal that the witness should proceed with caution so as to not
4 reveal such information. To signal such caution, the Government attorney could make a
5 non-verbal signal to the witness, such as stand up or hold up a hand. This procedure is
6 merely a suggestion; acceptable alternatives may exist that can be devised in
7 consultation with the parties and the Court at the pre-trial conference. The Government
8 merely seeks appropriate procedures that permit the Government to signal caution to the
9 witness should an answer approach the line that could reveal classified or privileged
10 information and that otherwise permits the Government to assert an objection and
11 prevent the disclosure of classified or privileged information.³

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15 In sum, the presence of Government attorneys and agency officials during
16 testimony of the five former Government officials or contractors should enable their
17 testimony to proceed in a smooth manner while simultaneously protecting against the
18 inadvertent disclosure of classified or privileged information that could harm the
19 Government's national security interests.
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25 ³ The Government is also willing to submit a proposed informational or orientational
26 instruction to the jury explaining the presence and limited role of Government counsel
27 during the witnesses' testimony.
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CONCLUSION

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2 For the reasons stated above, the Government’s motion should be granted. A
3 proposed order is attached.
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6 Dated: August 2, 2017

7 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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