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17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF WASHINGTON

19 JAMES E. MITCHELL and
20 JOHN JESSEN,
21
22 Petitioners,
23 v.
24 UNITED STATES OF AMERICA,
25
26 Respondent.

No. 16-MC-0036-JLQ

UNITED STATES' OPPOSITION TO
DEFENDANTS' MOTION TO
COMPEL AND CROSS-MOTION TO
ESTABLISH PROCEDURES AND
BRIEFING SCHEDULE FOR
RESOLUTION OF PRIVILEGE
DISPUTES

Motion Hearing:
February 14, 2017 at 10:00 a.m.
Spokane, Washington (telephonic)

Related Case:

SULEIMAN ABDULLAH SALIM, *et al.*,

No. 15-CV-286-JLQ

Plaintiffs,

v.

JAMES E. MITCHELL and
JOHN JESSEN,

Defendants.

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INTRODUCTION

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2 The Government opposes Petitioners' (Defendants in related case No. CV-15-
3 0286-JLQ) motion to compel and cross-moves to establish procedures and a briefing
4 schedule for the resolution of the privilege disputes in this case.
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6 The Government has produced to Defendants approximately 2,000 pages of
7 documents from the Central Intelligence Agency ("CIA") and the Department of Justice
8 ("DOJ") about the CIA's former detention and interrogation program. Collectively, the
9 documents provide an extraordinary amount of information about the operation of
10 CIA's program. The overwhelming majority of these documents are redacted in part
11 and the Government has filed a detailed status report explaining the legal basis for the
12 redactions in these documents, as well as the categories of information that are redacted.
13 *See* Gov't Status Report (ECF No. 85 in No. CV-15-0286-JLQ). Further, in accordance
14 with the Court's November 23, 2016 Order (ECF No. 52), the Government has
15 provided Defendants with privilege logs from the CIA and DOJ specifically itemizing
16 and describing every document produced or withheld by the Government in this
17 litigation, including a list of the specific objections asserted on a document-by-
18 document basis, and a description of the categories of information withheld from each
19 document. *See* Decl. of Christopher Tompkins, Ex. B (ECF No. 55).
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24 Notwithstanding these comprehensive efforts, Defendants' motion contends that
25 the Government's objections based on privilege are procedurally deficient because the
26 Government did not formally assert certain privileges, namely the state secrets and
27 deliberative process privileges, through the submission of declarations from high-
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1 ranking Government officials when it served its privilege logs. Defendants' position is
2 erroneous and misguided. Courts consistently have rejected Defendants' position,
3 holding that any formal assertion of privilege and any requisite agency declarations by
4 the Government, as a non-party, are necessary only in response to a motion to compel
5 specific information filed in court. Separately, as to the remaining privilege objections
6 made by the Government that require no such procedural invocation beyond their
7 inclusion on a privilege log (*e.g.*, attorney-client privilege, statutory privileges), there is
8 no basis for Defendants' contention that the Government "has yet to explain their
9 applicability." *See* Defs' Mot. at 1. To the contrary, the Government has provided
10 privilege logs that comply with the Court's requirement that the Government "state the
11 reason(s) why a document has been redacted." *See* ECF No. 52 at 5.
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15 At this stage of the process, where the Government has met its obligation to
16 provide a privilege log, the appropriate next step is for the Government and Defendants
17 to narrow the areas of dispute and present to the Court a list of documents and disputed
18 issues therein that warrant the Court's resolution. That is the proper process, as
19 otherwise, limited party, Government, and judicial resources will be wasted preparing,
20 litigating, and adjudicating privilege claims over redactions and documents that are
21 immaterial to the resolution of this case. Defendants' motion, however, makes no effort
22 to identify the documents or categories of information that are in dispute. Instead,
23 Defendants present the Court with a generic and unduly burdensome challenge to "each
24 redaction" in the Government's document production without identifying the specific
25 documents or issues in dispute, apparently expecting the Government to prepare on an
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1 expedited basis, and the Court to adjudicate, potentially voluminous privilege assertions
2 covering every redaction in over 2,000 pages of material. *See* Defs.' Mot. at 3.

3 Since the service of the Government's privilege log and the filing of Defendants'
4 motion, however, the Government and Defendants have been in active discussions in an
5 effort to narrow the scope of the documents that remain in dispute. At this time the
6 Government believes that continuation of these discussions will be fruitful, with the
7 goal to present the Court with an agreed-upon list of the specific documents and the
8 categories of information therein that require a privilege adjudication by the Court. To
9 enable these discussion to continue, the Government respectfully requests that the Court
10 provide the Government and Defendants until February 10, 2017, to file an updated
11 statement of disputed issues required by Local Rule 37.1. Once the disputed issues are
12 narrowed, the Government respectfully suggests that the Court set a briefing schedule
13 during the February 14, 2017, telephone hearing for the formal assertion of privileges.
14 At this time, given the anticipated number and complexity of the issues to litigated, the
15 Government would respectfully request until March 15, 2017, to submit its formal
16 privilege assertions for the disputed documents.

17 Defendants' motion to compel also challenges the Government's objections with
18 respect to the deposition of former CIA officer James Cotsana. *See* Defs.' Mot. at 2.
19 Unlike with respect to Defendants' overbroad challenge to the Government's document
20 productions, the Government agrees that a formal assertion of privilege with respect to
21 whether Mr. Cotsana can be compelled to sit for a deposition is now fully narrowed and
22 ripe. The Government is currently in the process of working through the rigorous and
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1 careful multi-level internal process for review of this potential state secrets privilege
2 assertion, which includes personal approval from the Director of the CIA as well as
3 from the Attorney General, following a comprehensive internal review process within
4 the DOJ. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir.
5 2010) (en banc) (emphasizing the importance of the Government following these
6 rigorous internal policies and procedures). In order to complete this careful
7 consideration at senior policy levels of the Government, and taking into account the
8 ongoing turnover in senior Government personnel in light of the recent change of
9 Administration, the Government respectfully requests until March 15, 2017, to assert its
10 privilege claims with respect to Mr. Cotsana's deposition.
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13 ARGUMENT

14 **A. The Government Is Not Required To Submit Formal Privilege Assertions 15 Until After A Specific Motion To Compel Is Filed In Court.**

16 The primary argument in Defendants' motion is that the Government did not
17 properly invoke the privileges listed on its privilege logs (*see* Tompkins Decl., Ex. B)
18 and the letter objecting to Mr. Cotsana's deposition (*see id.* Ex. E) because the
19 Government did not support its privilege objections with declarations from agency
20 officials. *See* Defs' Mot. at 4-9. This argument should be rejected. It is well
21 established that the Government is not required to submit a declaration asserting the
22 state secrets privilege or any other governmental privilege until after a motion to
23 compel is filed raising a specific challenge to the Government's privilege objections.
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25 *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *Huntleigh USA Corp. v.*
26 *United States*, 71 Fed. Cl. 726, 727 (2006); *Maria Del Socorro Quintero Perez, CY v.*
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1 *United States*, 2016 WL 362508, at *3 (S.D. Cal. Jan. 29, 2016); *A.I.A. Holdings, S.A. v.*
2 *Lehman Bros.*, 2002 WL 31385824, at *3 (S.D.N.Y. Oct. 21, 2002).

3 The Government has complied with every applicable legal requirement imposed
4 by the Federal Rules of Civil Procedure and this Court's Orders regarding its objections
5 and withholdings, to include the submission of a detailed status report, a 101-page
6 privilege log (in the case of documents), and an objection letter (in the case of Mr.
7 Cotsana's deposition), which itemize each privilege objection on a specific and
8 individualized basis. Nothing more was required prior to the filing of Defendants'
9 motion to compel.
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12 Now that Defendants have moved to compel, the Government is taking steps
13 necessary to submit any formal claims of privilege to this Court for adjudication. But
14 the Government objects to the overwhelming breadth of the privilege challenge that
15 Defendants have raised in their motion, which on its face challenges thousands of
16 redactions in over 2,000 pages of national security documents, as well as the
17 unreasonable timeline in which Defendants demand that the Government prepare its
18 potentially voluminous privilege assertions and accompanying senior-level declarations.
19 Accordingly, as explained below, the Court should establish an orderly set of
20 procedures and deadlines for the submission of the Government's formal privilege
21 claims to ensure that the significant and potentially complex national security issues
22 presented in this case are appropriately considered by senior officials of the current
23 Administration and narrowed to the fullest extent before consideration by the Court.
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1 **B. The Government Requests Until March 15, 2017, To Assert The State**
2 **Secrets And Other Privileges In Opposition To The Deposition Of James**
3 **Cotsana.**

4 The Government has initiated the internal process to obtain the requisite
5 authorization to assert the state secrets privilege in opposition to Mr. Cotsana's
6 deposition. While the Government has been working diligently to fulfill its
7 responsibilities regarding this potential assertion of the state secrets privilege, additional
8 time, until March 15, 2017, is needed to complete the intra- and inter-agency
9 consultations necessary for the privilege assertion and to obtain the high-level
10 authorizations from new members of the current Administration that would form the
11 basis of an assertion of the privilege. The Government's requested extension is not
12 intended to prejudice any party, or to unnecessarily delay resolution of this case. To the
13 contrary, the process for assessing whether the state secrets privilege can and should
14 formally be invoked serves to ensure protection of the public's interest in national
15 security, while at the same time avoiding the need for a rushed and less rigorous
16 decision that could have lasting prejudicial effect on a litigant.

17 The invocation of the state secrets privilege is no ordinary or simple occurrence.
18 *United States v. Reynolds*, 345 U.S. 1 (1953), its progeny, and current Executive Branch
19 policy demand that any determination as to whether the United States will invoke the
20 state secrets privilege can be made only by senior officials of the Executive Branch
21 after their personal consideration. As the Supreme Court stated in *Reynolds*, the state
22 secrets privilege "is not to be lightly invoked. There must be a formal claim of
23 privilege, lodged by the head of the department which has control over the matter, after
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1 personal consideration by that officer.” *Id.* at 7-8; *see also Mohamed*, 614 F.3d at 1080
2 (“[T]he decision to invoke the privilege must be a serious, considered judgment, not
3 simply an administrative formality.”)

4 As such, the privilege must be invoked in this case, if at all, by the Director of the
5 CIA after his personal consideration of, *inter alia*, the disputed information at issue and
6 the consequences of its disclosure. Further, if the Director concludes that the assertion
7 of the state secrets privilege is necessary, that assertion cannot be made under current
8 DOJ policy without the further approval of the Attorney General. *See* Memorandum
9 from the Attorney General to the Heads of Executive Departments and Agencies on
10 Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23,
11 2009) (Ex. 1); *see also Mohamed*, 614 F.3d at 1080 (“review by the executive branch’s
12 chief lawyer is appropriate and to be encouraged”).

13 These multiple layers of review are meticulous and take a significant amount of
14 time. They also present unique challenges in this case given the recent change of
15 Administration that occurred on January 20, 2017. Both the CIA and DOJ are now
16 undergoing an active transition in leadership at the highest levels, and many key offices
17 involved in the state secrets authorization process are operating under the authority of
18 acting officials, to include at present the Acting Attorney General. The additional time
19 requested to complete the state secrets authorization process will enable senior members
20 of new Administration to assess the privilege assertion in this case, as needed.

21 Requiring the submission of the privilege assertion on the expedited schedule requested
22 by Defendants would impair the careful review process contemplated in the Attorney
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1 General's policy and potentially require temporary acting officials to make decisions
2 that may have to be revisited at a later date, thereby leading to delay of this matter in the
3 long term. The requested extension until March 15, 2017, is reasonable given the need
4 to make a decision as to whether the invocation of the state secrets privilege is
5 appropriate, to give senior officials appropriate time to consider these significant issues,
6 and to account for the unique issues associated with the ongoing transition within the
7 Executive Branch.
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10 **C. The Court Should Allow The Government And Defendants To Narrow The**
11 **Areas Of Dispute Over The Government's Documents And Thereafter**
12 **Establish A Briefing Schedule Commensurate With The Privilege Disputes**
13 **That Must Be Adjudicated By The Court.**

14 Defendants' motion asks this Court to adjudicate every privilege objection for
15 "each redaction" on every page of the Government's 2,000-page document production.
16 *See* Defs' Mot. at 3. This request is plainly unreasonable; it would needlessly waste the
17 resources of the Court while the parties continue to narrow the issues and also impose
18 an undue burden on the Government. *See* Fed. R. Civ. P. 45(d)(1). The Government
19 should not have to shoulder the burden of having high-ranking officials, here the
20 Director of the CIA and the Attorney General, formally assert multiple privileges over
21 documents and redactions that have no material impact on this case, to say nothing of
22 the inefficiency of having the Court devote its resources to wade through potentially
23 voluminous submissions and adjudicate such pointless disputes. Indeed, Defendants'
24 approach is inconsistent with the Supreme Court's recognition that the state secrets
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1 privilege should not be invoked until it becomes absolutely necessary to do so. *See*
2 *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 492 (2011).

3 To minimize these burdens and the impact such unnecessary litigation would
4 have on timely resolution of this case, the Government and Defendants have been
5 engaged in active discussions to narrow the areas of dispute over the Government's
6 documents. Following the submission of the Government's privilege log on December
7 20, 2016, the Government agreed to re-review 35 documents identified by Defendants
8 as potentially material to their defense and has provided a more detailed description of
9 the information redacted from the documents, in an effort remove these documents from
10 the scope of the motion to compel by satisfying Defendants' questions about whether the
11 withheld information is privileged or material to their case. *See* Ex. 2. Additionally,
12 since the filing of the motion to compel, the Government and Defendants have agreed
13 that certain categories of information redacted from the Government's documents are
14 no longer in dispute, and discussions regarding additional categories and documents
15 remain ongoing. *See* Local Rule 37.1 Statement (filed January 31, 2015).

16 The Government is now in the process of reviewing its entire document
17 production to identify which specific documents contain information falling within
18 these agreed-upon exempt categories. The Government, however, requires additional
19 time to complete this analysis, at the conclusion of which the Government will be in a
20 position to identify the specific documents that can be excluded from the motion to
21 compel because they contain redactions to information only in exempt categories. The
22 Government anticipates that some documents will likely have redactions to information
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1 in the exempt categories as well as non-exempt categories. Absent further agreement
2 with Defendants, the Government's view is that only the information in non-exempt
3 categories would be subject to formal privilege assertions and require adjudication by
4 the Court. The Government believes this process is the most efficient way to identify
5 specific documents in dispute and narrow the categories of information that require
6 formal privilege assertions and resolution by the Court.
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8 In order to avoid the burdens associated with unnecessarily preparing formal
9 privilege assertions for a potentially large volume of documents, and wasting the
10 Court's resources by having it adjudicate immaterial disputes, the Government
11 respectfully requests that the Court provide the Government and Defendants with
12 additional time to complete the conferral process described above and permit the parties
13 to file an updated statement of disputed issues required by Local Rule 37.1 on or before
14 February 10, 2017. After the conferral process is complete and the disputed issues are
15 narrowed, the Government respectfully suggests that the Court set a briefing schedule
16 during the February 14, 2017, telephone hearing. At this time, given the anticipated
17 number and complexity of the issues to litigated, the Government would respectfully
18 request until March 15, 2017, to submit its formal privilege assertions for the disputed
19 documents.
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24 CONCLUSION

25 For the foregoing reasons, the Court should deny Defendants' motion to compel
26 and grant the Government's cross-motion to establish an appropriate schedule for
27 briefing and resolution of the privilege issues in this case. A proposed order is attached.
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1 Dated: January 31, 2017

Respectfully submitted,

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