UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case No. 1:19-cv-370-EAW

v.

JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Center,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DEFER CONSIDERATION OF A POSSIBLE STATE SECRETS PRIVILEGE ASSERTION

Petitioner has moved to compel production of documents and information withheld by the Government and over which Respondent has expressly asserted privileges. *See* Petitioner's Motion to Compel, February 28, 2020 (filed under seal). Consistent with the Court's Scheduling Order, ECF No. 71, Respondent will file a response to Petitioner's motion to compel where the Government will demonstrate the withheld information is protected from disclosure by privilege, to include the investigative files privilege and the confidential informant privilege. Moreover, in addition to protection under the investigative files privilege and the confidential informant privilege, some of the documents and information Petitioner seeks to compel, Mem. in Support of Pet.'s Mot. to Compel at 3 (referring to Volume 3 production DEF-00009275 to DEF-00009523), are deemed classified material by the Government. Platt Decl. ¶ 9, Ex. A. While little of this classified information is relevant to the habeas petition before this Court, it may also be subject to the state secrets privilege. While the parties have worked and Respondent will continue to work to narrow the scope of the disputed information, Petitioner's current motion

raises the possibility that the Government will be required to formally assert the state secrets privilege.

Invocation of the state secrets privilege to protect national security interests necessarily requires careful consideration at senior policy levels of Government. Moreover, as indicated by the Supreme Court and circuit courts, litigation of the privilege should arise only when necessary. For these reasons, Respondent respectfully moves for an order deferring the need to formally assert the state secrets privilege in response to Petitioner's motion to compel until such time as the Court has reviewed, and rejected, all other privileges asserted and decided the relevance of any classified information that remains at issue in the case.

The parties have met and conferred several times to discuss Petitioner's discovery concerns, to include regarding documents containing classified information potentially subject to the state secrets privilege. Platt Decl. ¶¶ 4–8. They have reached agreement regarding certain classified materials, given Respondent's representation that (1) such documents date from prior to 2004 and are thus not relevant to the issues currently before the Court and (2) Respondent will not introduce them at the evidentiary hearing. *Id.* ¶ 8. The parties continue to discuss, and will notify the Court concerning any agreements reached, regarding other information implicating the privilege. *Id.* ¶ 10. Respondent asserts that with respect to the remaining classified information that may be subject to the state secrets privilege, Respondent will not introduce this information at the evidentiary hearing. *Id.* ¶ 11. Respondent has thus diligently attempted to resolve Petitioner's discovery objections regarding Respondent's potential assertion of the state secrets privilege by minimizing its necessity through the meet-and-confer process.

However, because the parties have been unable to reach agreement at this stage, Petitioner's motion for an order to compel production now brings the issue of the state secrets

privilege before this Court. Respondent respectfully requests that the Court avoid unnecessary litigation of the state secrets privilege by first assessing the Government's response to Petitioner's motion to compel on the other grounds Respondent intends to provide in its response, including other privileges as well as the relevance of any classified information that remains at issue in the motion. Only in the event the Court finds that any classified information remaining at issue may not be protected by other privileges and remains relevant in this case, should the Government be required to complete the intensive process of considering whether, and to what extent, it would be appropriate to formally assert the privilege in this case.

The Supreme Court has long recognized the Government's ability to protect state secrets from disclosure in the context of civil discovery. *See Totten v. United States*, 92 U.S. 105 (1875); *United States v. Reynolds*, 345 U.S. 1 (1953); *Gen. Dynamics Corp. v. United States*, 563 U.S. 478 (2011). The privilege allows the Government to prevent the disclosure of national security information that would otherwise be discoverable in civil litigation, where there is a "reasonable danger that compulsion of the evidence will expose [state secrets] which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10.[1]

To invoke the privilege the Government must satisfy three procedural requirements: (1) there must be a "formal claim of privilege"; (2) the claim must be "lodged by the head of the department which has control over the matter"; and (3) the claim must be made "after actual personal consideration by that officer." *Id.* at 7–8. The claim of privilege must reflect "the certifying official's personal judgment." *Id.* The basis for the privilege assertion also must be

[1] The privilege, where it applies, is absolute and cannot be overcome by the perceived need of a litigant to access or use the information at issue. *In re Sealed Case*, 494 F.3d 139, 144 (D.C. Cir. 2007). Rather, when the privilege is successfully invoked, the evidence subject to the privilege is completely removed from the case. *Id.* at 145.

presented "in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege." *Id.*

Accordingly, a decision concerning whether, when, or to what extent this privilege should be invoked in litigation in order to protect national security is no ordinary or simple occurrence; rather, it constitutes a policy judgment at the highest levels of the Government that the disclosure of certain information reasonably could be expected to damage national security. *Id.* at 7–8. Indeed, the D.C. Circuit has observed that the privilege to protect state secrets "must head the list" of various privileges recognized in courts. *See Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978); *see also El-Masri v. Tenet*, 2006 WL 1391390 (E.D. Va. 2006) (privilege to protect state secrets is of the highest dignity and significance), *aff'd*, 479 F.3d 296 (4th Cir. 2007). For the foregoing reasons, it cannot be disputed that consideration of whether to invoke this privilege to protect national security interests necessarily requires careful consideration at senior policy levels of the Government.

Courts also have indicated that the state secrets privilege should be invoked only when necessary. Indeed, the Supreme Court in *Reynolds* criticized the prospect of a party not pursuing reasonable alternatives to seeking a state secrets assertion and instead "forcing a showdown on the claim of privilege." *Reynolds*, 345 U.S. at 10; *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc) (privilege should be "invoked no more often or extensively than necessary"); *El-Masri*, 479 F.3d at 304 (observing that the state secrets privilege "is not to be lightly invoked, and . . . constraints on its assertion give practical effect to that principle") (internal citations and quotations omitted); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 53–54 (D.D.C. 2010) (stating that the Government "also correctly and forcefully observe[d] that this Court need not, and should not, reach their claim of state secrets privilege because the case can be resolved on the other grounds they have presented," and declining to address the state

secrets privilege). Based on this clear guidance in the law, the Government should not be faulted for pursuing defenses in litigation that can be raised and adjudicated without risk of the disclosure of state secrets—such as by objecting to disclosure based on relevance or by asserting other privileges.

Thus, in addition to the judicial authority recognizing the significance of the state secrets privilege and the need for the Executive to invoke it with prudence, *Reynolds*, 345 U.S. at 7 (the state secrets privilege is "not to be lightly invoked"), the Executive Branch's own internal procedure provides for review of any potential state secrets privilege assertion, including personal approval from the head of the agency asserting the privilege as well as from the Attorney General. *See* Memorandum from the Attorney General to the Heads of Executive Departments and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009) ("State Secrets Guidance"), available at http://www.justice.gov/opa/documents/state-secret-privileges.pdf; *see also Jeppesen Dataplan*, 614 F.3d at 1090 (citing State Secrets Guidance). Under this process, the U.S. Department of Justice will defend an assertion of the state secrets privilege in litigation only when "necessary to protect against the risk of significant harm to national security." *See* State Secrets Guidance at 1.[2]

The Attorney General also has established procedures for review of a proposed assertion of the state secrets privilege in a civil case. Those procedures require submissions by the relevant government departments or agencies specifying "(i) the nature of the information that must be

[2] Moreover, "[t]he Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would reasonably be expected to cause significant harm to national security." State Secrets Guidance at 2.

protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; [and] (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm." *Id.* at 2.

Courts, including in this district, have appreciated the Department's process for review of such privilege assertions. *Al-Aulaqi*, 727 F. Supp. 2d at 53–54 (favorably citing the State Secrets Guidance requirement of "careful review"); *see also Jeppesen Dataplan*, 614 F.3d at 1080 (noting benefits of DOJ State Secrets Guidance). Given the highly significant determinations that must be made in deciding whether to assert the state secrets privilege, the Government has a strong interest in ensuring that adequate time is provided so that senior Executive Branch officials can carefully consider whether it would be appropriate to do so in this case.

Accordingly, as a matter of both law and policy, the process for assertion necessarily involves a careful consideration at the highest levels of Government of whether the information at issue should be protected. *See Jeppesen Dataplan*, 614 F.3d at 1080 (observing that "the decision to invoke the privilege must be a serious, considered judgment") (internal quotations and citation omitted); *El-Masri*, 479 F.3d at 304; *Al-Aulaqi*, 727 F. Supp. 2d at 53–54.

Consequently, Respondent respectfully moves the Court to defer any need for the Government to formally assert the state secrets privilege, until such time as the Court has adjudicated all other privileges asserted over challenged materials and assessed the relevance of any classified information that remains at issue. Indeed, the law is clear that when a discovery request calls for the production of potentially privileged information, a court may consider questions of relevance before reaching assertions of privilege. *See, e.g.*, *Alexander v. F.B.I.*, 186 F.R.D. 188, 192 (D.D.C. 1999) (deciding it was unnecessary to reach the issue of the presidential communication privilege when the court found the requested information to be irrelevant); *see also Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968) ("[M]atters of privilege"—including a

formal assertion of privilege—"can appropriately be deferred . . . until after the production demand has been adequately bolstered by a general showing of relevance and good cause."). In light of the law and Executive policy governing the privilege assertion, and in the present circumstances of this case, Respondent respectfully submits that the United States should not be required to formally invoke the state secrets privilege prior to a judicial determination concerning the other privileges and arguments Respondent will present in opposition to Petitioner's motion. Further, Respondent notes that the Government has worked diligently to assess these issues and minimize the assertion of the privilege. *See* Platt Decl. ¶¶ 8, 11. Furthermore, Respondents will continue to find ways to minimize the assertion of the privilege, to include its representation that Respondent will not introduce the remaining classified documents at the evidentiary hearing. *See id.* ¶ 11.

In describing these special procedures and in seeking this relief, Respondent does not waive any privileges, arguments, or defenses that he may assert to prevent disclosure of privileged information. Nor is Respondent asking the Court to delay or adjourn the evidentiary hearing. Rather, the goal of this motion is to provide a mechanism for the government to assert any appropriate objections to prevent the unauthorized disclosure of privileged information and to streamline, or make as efficient as possible, any contested litigation over access to such information.

For the foregoing reasons, Respondent respectfully moves for an order deferring the assertion of the state secrets privilege until 21 days after the Court has reviewed and rejected all other privileges asserted and decided that the classified information at issue is relevant to the habeas claims in this case. Respondents continue to work to narrow the issue and will promptly

notify the Court of any changes to or agreements reached regarding the outstanding discovery disputes.

Date: February 28, 2020

Respectfully submitted,

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