UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

v.

JEFFREY SEARLS, in his official capacity Acting Assistant Field Office Director and Administrator of the Buffalo Federal Detention Facility,

Respondent.

Case No. 1:19-cv-00370-EAW

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DEFER CONSIDERATION OF A POSSIBLE STATE SECRETS PRIVILEGE ASSERTION

Petitioner opposes the government's request to defer its deadline to assert the state-secrets privilege over any responsive discovery "until 21 days after the Court has reviewed and rejected all other privileges asserted." ECF No. 90-1 at 7. Petitioner agrees with the government that the state-secrets privilege should be asserted "only when necessary." *Id.* at 2; *see* Memorandum from the Attorney General to the Heads of Exec. Dep'ts and Agencies: Policies and Procedures Governing Invocation of the State Secrets Privilege 1 (Sept. 23, 2009), http://www.justice.gov/opa/documents/state-secret-privileges.pdf ("State-Secrets Guidance") (requiring the Attorney General to determine that any assertion of the state-secrets privilege is necessary to protect against the risk of significant harm to national security" and that the assertion is "narrow[ly] tailor[ed]" to allow cases to move forward whenever possible notwithstanding the privilege). However, the government's proposal could lead to significant and unnecessary delays that prejudice Petitioner's defense.

Instead, in the interests of efficiency, timeliness, and fairness, Petitioner respectfully requests that the Court order the government to promptly identify any responsive discovery that *may be* subject to the state-secrets privilege, and that the Court review such information *in camera* to determine if any of it is relevant and helpful to Petitioner's case. As explained more fully below, given the quasi-criminal nature of this case, in which the government seeks to strip Petitioner of his liberty and bears the burden of proof in order to do so, any information that is relevant and helpful to Petitioner—even if subject to a valid state-secrets claim—could not be withheld from Petitioner in any event (at least absent the provision of an adequate substitute or summary). *See, e.g.*, *Jencks v. United States*, 353 U.S. 657, 672 (1957). Delaying any evaluation of the classified evidence's relevance and helpfulness, therefore, makes little sense; rather, that process should begin as soon as possible.

The state-secrets privilege is a common law evidentiary rule that, when properly invoked, allows the government to withhold information from discovery by establishing "'there is a reasonable danger' that disclosure will 'expose military matters which, in the interest of national security, should not be divulged.'" *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)); *see Fazaga v. FBI*, 916 F.3d 1202, 1227 (9th Cir. 2019) ("The state secrets privilege has been held to apply to information that would result in impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, or where disclosure would be inimical to national security." (quotation marks and citation omitted)). The government bears the burden of establishing the privilege, which "is not to be lightly invoked." *Reynolds*, 345 U.S. at 7. As courts have repeatedly admonished, the government may not use the privilege "to shield any material not strictly

necessary" to prevent harm to national security. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1082 (9th Cir. 2010) (en banc) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)). "Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise 'should in every instance be limited to their narrowest purpose.'" *In re United States*, 872 F.2d 472, 478–79 (D.C. Cir. 1989) (citation omitted).

Assertions of the state-secrets privilege are therefore subject to the most stringent judicial scrutiny. The courts 'active role in evaluating the government's claims of privilege is essential, as it "ensure[s] that" the privilege applies only when absolutely necessary. *Jeppesen*, 614 F.3d at 1082 (quoting *Ellsberg*, 709 F.2d at 58). Courts must "take very seriously [their] obligation to review the government's claims with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Id.* at 1082 (alteration omitted) (quoting *Al-Haramain*, 507 F.3d at 1203). As a result, successful claims of the privilege are found only "in exceptional circumstances." *Id.* at 1077.

While the government has identified roughly 250 pages of discovery material that has been "deemed classified," ECF No. 90-1 at 1 (referring to Volume 3 production DEF-00009275 to DEF-00009523), "not all classified information is necessarily privileged" under the state-secrets privilege. *Fazaga*, 916 F.3d at 1227. While courts have not provided a "detailed definition of what constitutes a state secret," *Jeppesen*, 614 F.3d at 1082; *see Fazaga*, 916 F.3d at 1227, and the categories may overlap, mere classification "is insufficient" for use as a proxy to determine whether information is subject to the privilege, *Fazaga*, 916 F.3d at 1227 (quotation marks and citation omitted). Indeed, the government itself imposes a higher bar to a state-secrets assertion than the fact of even proper classification. *See* State-Secrets Guidance. Moreover, blind

acceptance of government classification as a basis for applying the privilege "would trivialize the court's role, which the Supreme Court has clearly admonished 'cannot be abdicated to the caprice of executive officers.'" *Jeppesen*, 614 F.3d at 1082 (quoting *Reynolds*, 345 U.S. at 9–10). It would also ignore reality. Even leading members of the intelligence community have acknowledged that not all classification decisions would withstand judicial scrutiny, and disclosure of classified material may not lead to harm at all—let alone the type of harm required to be shown in the state secrets context.[1]

In an ordinary civil case involving the state-secrets privilege—for example, a damages lawsuit against the government seeking redress for abuses made in the name of national security, *see, e.g.*, *Reynolds*, 345 U.S. 1—a successful claim of the privilege leads to the exclusion of the privileged evidence. *See, e.g.*, *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011). In extreme cases—where exclusion of the evidence means that either the plaintiff will be unable to prove their case through alternative means, or the government will be unable to offer its defense—a successful state-secrets assertion may lead to the dismissal of a case. *Jeppesen*, 614 F.3d at 1077 (citing *Totten v. United States*, 92 U.S. 105, 107 (1875)).

But criminal cases—where the government bears the burden of proof, and where government invocation of state secrets could result in deprivation of liberty *by* the government, rather than an inability to obtain money damages *against* the government—are different. While

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[1] *See, e.g.*, *Nom. of Lt. Gen. James Clapper, Jr., USAF, Ret., to Be Dir. of Nat'l Intelligence: Hearing Before S. Select Comm. on Intel.*, 111th Cong. 18 (2010) (testimony of then-nominee to the position of the Director of National Intelligence James Clapper), https://fas.org/irp/congress/2010_hr/clapper.pdf (stating that "we do overclassify" both as an "administrative default" and to "hide or protect things for political reasons," and suggesting that "we can be a lot more liberal . . . about declassifying, and we should be"); *Oversight of the FBI: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017), 2017 WL 1684512 (testimony of then–FBI Director James Comey) (agreeing that "over classification is a very significant problem within the executive branch" and that the release of classified material may not cause any harm).

such cases recognize the privilege, they "conclude that it must give way . . . . to a criminal defendant's right to present a meaningful defense . . . when the evidence at issue is material to the defense." *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)); *accord United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).[2] And this principle is interpreted broadly. "To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose exculpatory information." *Aref*, 533 F.3d at 80 (citing *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006)); *see also Kyles v. Whitley,* 514 U.S. 419, 436–37 (1995) ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.").

More than sixty years ago, the Supreme Court made clear that in criminal cases "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Reynolds*, 345 U.S. at 12. "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Id.* Thus, a "criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial." *Jencks*, 353 U.S. at 672 (citing *Roviaro*, 353 U.S. at 60–61). The Court explained that "[t]he burden is the Government's, not to be shifted to the trial judge, to

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[2] The *Aref* court explained that "the government-informant privilege at issue in *Roviaro* and the state-secrets privilege are part of 'the same doctrine.'" 533 F.3d at 79 (quoting *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950)).

decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Id.*; *see also United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (Learned Hand, J.) ("The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."). That principle applies not only to the confidential informant and investigatory files privileges addressed in Petitioner's motion to compel, *see* ECF No. 91, but to the state-secrets privilege as well.

As Petitioner has explained, *see, e.g.*, ECF No. 91 at 31–34, the nominally civil nature of this habeas action does not change its character as, at the very least, a quasi-criminal proceeding: Petitioner's indefinite liberty is at stake because of the government's own prosecutorial and administrative decisions, and the government bears the burden of proof in order to lawfully detain him. Those qualities mean that the rationale underlying the rule in criminal cases—that the government must choose between prosecution and privilege—is applicable here. The roles of the parties and the potential consequences for Petitioner make this proceeding quite unlike the standard suit "in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Reynolds*, 345 U.S. at 12. The government, in short, may not incarcerate a person while invoking privilege to withhold evidence that is relevant or helpful to the detainee, particularly in a proceeding—like this one and like criminal cases—where the government bears the burden of proof to justify incarceration.

Moreover, there are ample alternative measures that can be taken to protect the government's legitimate national security interests. These include providing substitutes for classified information (subject to court supervision for adequacy) through procedures akin to those established by the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. III;

providing access to classified records to security-cleared counsel on an attorneys-eyes–only basis;[3] and other measures like creating unclassified summaries of classified information that reveal the relevant and helpful information contained in the classified discovery. *See generally Hanna v. Plumer*, 380 U.S. 460, 472–73 (1965) (noting that, subject to congressional limitations but "completely aside from the powers Congress expressly conferred in" the Federal Rules of Civil Procedure, "the administration of legal proceedings [is] an area in which federal courts have traditionally exerted strong inherent power"); Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 842–78 (2008) (discussing federal courts' "inherent authority over procedure").

These approaches would be consistent with how courts manage other actions involving classified information. Reliance on CIPA is routine in criminal cases involving classified information. *See, e.g.*, *Yunis*, 867 F.2d at 623; *United States v. Abu-Jihaad*, 630 F.3d 102, 142–43 (2d Cir. 2010). Courts in civil cases regularly adapt CIPA procedures where necessary, or otherwise provide for the sharing of classified information with security-cleared counsel. *See, e.g.*, *Horn v. Huddle*, 647 F. Supp. 2d 55, 62–63 (D.D.C. 2009), *vacated upon settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010); *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977); *Ibrahim v. DHS*, No. C 06-00545 WHA, 2013 WL 1703367 (N.D. Cal. Apr. 19, 2013); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010). Even in cases involving detainees held at Guantánamo Bay—in which the applicability of the full panoply of Due Process rights remains an unsettled question—counsel for detainees are routinely granted access to classified information under existing procedures.

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[3] As the government is aware, one of Petitioner's counsel, Jonathan Hafetz, presently holds a "secret"-level security clearance and has previously had access to classified information from the government as habeas counsel for a detainee held by the military at Guantánamo Bay.

See Case Management Order at 4, *In re: Guantánamo Bay Detainee Litig.*, Misc. No. 08-0442 (TFH) (D.D.C. Nov. 6, 2008), ECF No. 940.

As a result, the government's proposal to defer its own decisions on invocations of the state-secrets privilege is beside the point. If any of the classified discovery that "may be subject to the state secrets privilege," ECF No. 90-1 at 2, is relevant and helpful to Petitioner's case, the government cannot withhold it—full stop. It makes little sense, then, to defer judicial evaluation of the classified discovery for (at a minimum) three weeks, with a rapidly approaching evidentiary hearing set for the end of April. Instead, Petitioner respectfully requests that the Court review the roughly 250 pages of classified discovery *in camera* to determine whether—even assuming the government could meet the state-secrets bar for all of it—the information is relevant and helpful to Mr. Hassoun's defense. If any information is relevant and helpful, the government would then have to make its choice: (a) decide that maintaining secrecy is more important than continuing to detain Mr. Hassoun, and release him; or (b) provide the information to Mr. Hassoun in an adequate manner, for example by sharing it with Petitioner's security-cleared counsel and/or providing unclassified summaries to Mr. Hassoun that meaningfully convey the relevance of the information to his defense.

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Respectfully submitted,

/s/ Jonathan Hafetz

Jonathan Hafetz
Brett Max Kaufman
Charles Hogle*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2500
jhafetz@aclu.org
*Not admitted to W.D.N.Y.

A. Nicole Hallett
Supervising Attorney
Brian Zagrocki
Naphtalie Librun-Ukiki
Samantha Becci
Student Attorneys
Mandel Legal Aid Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, IL 60637
773-702-9611
nhallett@uchicago.edu

Jonathan Manes
Supervising Attorney
Roderick & Solange MacArthur Justice Center
160 E. Grand Ave., 6th Floor
Chicago, IL 60611
312-503-0012
jonathan.manes@law.northwestern.edu

Judy Rabinovitz
Celso Perez
American Civil Liberties Union Foundation
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
212-549-2616
jrabinovitz@aclu.org

Erin Barry
Colton Kells
Marline Paul
Student Attorneys
University at Buffalo School of Law
507 O'Brian Hall, North Campus
Buffalo, NY 14260
716-645-2167

Victoria Roeck
Christopher Dunn
New York Civil Liberties Union Foundation
125 Broad Street, 19th Floor
New York, NY 10004
212-607-3300
cdunn@nyclu.org

Counsel for Petitioner