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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CAROLYN JEWEL, et al., Plaintiffs, v. NATIONAL SECURITY AGENCY, et al., Defendants.	**No. 08-4373 VRW** **INDIVIDUAL CAPACITY DEFENDANTS' NOTICE OF MOTION AND MOTION FOR RELIEF FROM THE COURT'S ORDERS OF APRIL 27, 2009, AND MAY 8, 2009** Date: September 17, 2009 Time: 10:00 a.m. Courtroom: 6, 17th Floor

PLEASE TAKE NOTICE that, on September 17, 2009, at 10:00 a.m., before Chief Judge Vaughn R. Walker, the Government defendants sued in their individual capacity in this action (George W. Bush, Richard B. Cheney, David S. Addington, Keith B. Alexander, Michael V. Hayden, John D. McConnell, John D. Negroponte, Michael B. Mukasey, Alberto R. Gonzales, and John D. Ashcroft) will request that the Court relieve them of their obligation under the Court's Orders of April 27, 2009, and May 8, 2009, to answer or otherwise respond to plaintiffs' complaint by July 15, 2009, and that it continue to relieve them of that obligation until after there is a final resolution of whether information subject to the state secrets and related statutory privileges is necessary to litigate plaintiffs' claims.

The individual capacity defendants should not be required to answer or otherwise respond to plaintiffs' complaint until the Court has resolved the United States' "Motion to Dismiss and for Summary Judgment," which invokes the state secrets and related statutory privileges. See Doc # 18. That is because, as explained in the accompanying memorandum of law, the privilege assertions preclude these defendants from presenting information in support of a qualified immunity defense by way of a prediscovery motion for summary judgment, as is their right. Compelling them to answer or otherwise respond under these circumstances therefore would deprive them of the intended benefits of the qualified immunity doctrine.

Respectfully submitted this 10th day of July, 2009,

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SAN FRANCISCO DIVISION

CAROLYN JEWEL, et al., Plaintiffs, v. NATIONAL SECURITY AGENCY, et al., Defendants.	**No. 08-4373 VRW** **INDIVIDUAL CAPACITY DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM THE COURT'S ORDERS OF APRIL 27, 2009, AND MAY 8, 2009** Date: September 17, 2009 Time: 10:00 a.m. Courtroom: 6, 17th Floor

INTRODUCTION

The individual capacity defendants respectfully submit this motion for relief from the Court's Orders of April 27 and May 8, 2009. Specifically, they ask to be relieved of their obligation to answer or otherwise respond to plaintiffs' complaint by July 15, 2009, and they renew their previous request that the Court continue to relieve them of that obligation until there is a final resolution of whether information subject to the Government's state secrets and related statutory privileges is necessary to litigate plaintiffs' claims.[1]

BACKGROUND

The individual capacity defendants previously were required to answer or otherwise respond by April 3, 2009. See Doc # 17. On that date the United States, along with the official capacity and federal agency defendants, filed a motion to dismiss and for summary judgment in which it invoked the state secrets and related statutory privileges. See Doc # 18. In doing so it has argued that because the various privileges exclude information needed by plaintiffs to establish standing and the prima facie elements of their causes of action and by all the defendants to defend themselves, the case should be dismissed in its entirety, see id. at 12-24, including the individual capacity claims, see id. at 18 & 19 n.17.

Also on April 3, 2009, the individual capacity defendants filed a motion requesting that the time for them to answer or otherwise respond to the complaint be extended until the effect of the privilege assertions on the litigation is determined. See Doc # 22. In an Order dated April 27, 2009, the Court denied that motion and directed these defendants to answer or otherwise respond no later than June 25, 2009. See Doc # 25. By the Court's Order of May 8, 2009, that date was extended to the present deadline of July 15, 2009, which is also when the United States' motion is set to be heard. See Doc # 27.

In light of this schedule, and absent relief from the Court's April 27 and May 8 Orders, the individual capacity defendants would be forced to answer or otherwise respond to plaintiffs'

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[1] By filing this motion the individual capacity defendants do not waive, and expressly reserve, all defenses available to them relating to all aspects of this action.

complaint before the United States' privilege assertions and dispositive motion are resolved. Such relief is appropriate here for the reasons discussed below, especially since the Court stated that its denial of the individual capacity defendants' administrative motion was "without prejudice," indicating that it would consider the matter again. Doc # 25.

DISCUSSION

Government officials sued in an individual capacity normally have an unquestionable right to raise qualified immunity via a prediscovery motion for summary judgment. In this case, however, the United States has asserted the state secrets and related statutory privileges over facts essential to the litigation. Because the decision to invoke those privileges resides exclusively with the United States and is one over which former or current federal office holders have no power to control in their individual (as opposed to official) capacity, the individual capacity defendants are foreclosed from using any of the privileged information to support what may be an otherwise available, valid, and complete qualified immunity defense when initially responding to plaintiffs' complaint. As a result, ordering these defendants to answer or otherwise respond under such circumstances, before the United States' privilege assertions and dispositive motion have been finally resolved, would effectively deprive them of the intended benefits of the qualified immunity doctrine by subjecting them to unnecessary and inappropriate pretrial proceedings. And that would be inherently prejudicial and contrary to the law.

I. QUALIFIED IMMUNITY IS AN ESSENTIAL PERSONAL DEFENSE THAT MAY BE RAISED IN A PREDISCOVERY SUMMARY JUDGMENT MOTION

The doctrine of qualified immunity shields public officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The need for such immunity derives from the fact that individual capacity suits "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Anderson v. Creighton, 483 U.S. 635, 638 (1987). Just recently the

Supreme Court has explained that these "costs of diversion are only magnified" when the case, like this one, is brought against high-level Government officials "who must be neither deterred nor detracted from the vigorous performance of their duties" when "responding to . . . a national and international security emergency unprecedented in the history of the American Republic[, i.e., the terrorist attacks of September 11, 2001]." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953, 1954 (2009) (internal quotations and citation omitted). Qualified immunity hedges such costs by providing "ample room for mistaken judgments" and protecting all public officials except "the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 343 (1986).

Given the foregoing concerns, qualified immunity is more than a defense to liability. It is also "an immunity from suit." Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (internal quotations and citation omitted). "The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery." Iqbal, 129 S. Ct. at 1953 (internal quotations and citation omitted); see Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (describing qualified immunity as "an entitlement not to stand trial or face the other burdens of litigation"); Harlow, 457 U.S. at 806 (explaining that qualified immunity is meant "to shield [officials] from undue interference with their duties and from potentially disabling threats of liability"). In keeping with that purpose, the Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage," Pearson, 129 S. Ct. at 815 (internal quotations and citation omitted), and emphasized that "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right, Harlow, 457 U.S. at 818-19. See Crawford-El v. Britton, 523 U.S. 574, 598 (1998); Anderson, 483 U.S. at 646 n.6. These issues are so significant in fact that the denial of qualified immunity and the rejection of arguments that are "inextricably intertwined with" the defense, Iqbal, 129 S. Ct. at 1945-47 (internal quotations and citation omitted), at different procedural stages of a case are subject to repeated interlocutory appeals. See Mitchell, 472 U.S. at 530; Behrens v. Pelletier, 516 U.S. 299, 307-11 (1996).

The importance of the right of a Government official sued in an individual capacity to assert a qualified immunity defense—and its preeminence in an official's arsenal of tools when responding to a complaint—thus cannot be overstated. The same is true of a defendant's right to advance that defense in the form of a prediscovery motion for summary judgment, as the law allows and as both the Supreme Court and the Ninth Circuit have recognized.[2]

II. THE INDIVIDUAL CAPACITY DEFENDANTS CANNOT USE PRIVILEGED INFORMATION TO SUPPORT A QUALIFIED IMMUNITY DEFENSE

In the current procedural posture of this case, the Government's state secrets and related statutory privilege assertions preclude the individual capacity defendants from relying on any of the privileged information to seek dismissal on qualified immunity grounds.[3] Indeed, the United States has stated clearly that its privilege assertions are meant to protect and exclude from the

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[2] See Fed. R. Civ. P. 56(b) (permitting defendant to seek summary judgment "at any time"); Crawford-El, 523 U.S. at 597-98 (holding that "trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense," such as by insisting "that the plaintiff put forward specific, nonconclusory factual allegations . . . in order to survive a prediscovery motion for dismissal or summary judgment") (internal quotations and citation omitted); Harlow, 457 U.S. at 818 (advising that qualified immunity often can be decided "on summary judgment" while instructing that "discovery should not be allowed" until the "threshold immunity question is resolved"); Kluver v. Sheets, 27 Fed. Appx. 873, 875 (9th Cir. 2001) (affirming grant of prediscovery summary judgment on qualified immunity grounds); accord Elliott v. Thomas, 937 F.2d 338, 345-46 (7th Cir. 1991) (reversing denial of qualified immunity because plaintiff did not supply the "minimum quantum of proof required to defeat" prediscovery motion for summary judgment); Lewis v. City of Ft. Collins, 903 F.2d 752, 759-60 (10th Cir. 1990) (reversing denial of qualified immunity raised in prediscovery summary judgment motion).

[3] To be clear, the above representation about the potential availability of a qualified immunity defense in this case is not intended to, and should not, be read as either confirming or denying plaintiffs' allegations. See Doc # 18 at 15; Hepting v. AT&T, 439 F. Supp. 2d 974, 997 (N.D. Cal. 2006). Evidence establishing qualified immunity can come in many forms: the alleged activities did not occur at all; a particular plaintiff was not subjected to the alleged conduct; the particular defendants were not involved in the alleged activities in general; the particular defendants were not involved in subjecting a particular plaintiff to the alleged conduct; the alleged activities are lawful in general; the alleged activities are lawful as applied to a particular plaintiff; or countless other variations. Cf. El-Masri v. United States, 479 F.3d 296, 309 (4th Cir. 2007). This is not to "suggest that any of these hypothetical defenses represents the true state of affairs in this matter," id. at 310, but merely to illustrate that having a qualified immunity defense can encompass a host of particular types of qualified immunity defenses.

litigation "the very information necessary for plaintiffs to establish their standing or a prima facie case, as well as information relevant to the defense of both the Government and personal capacity defendants." Doc # 18 at 18 (emphasis added); see also id. at 19 n.17.

At the same time, the individual capacity defendants have no control over whether or to what extent the state secrets privilege is invoked. The Supreme Court has unequivocally held that the privilege "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." United States v. Reynolds, 345 U.S. 1, 7 (1953).[4] The latter category necessarily includes Government officials (current or former) when sued in an individual capacity.[5] Plaintiffs themselves have said in this very case that "the state secrets privilege is not [the individual defendants'] to assert." Doc # 23 at 4. This means the individual capacity defendants are unable to respond effectively until there is a final resolution of the privilege issues; their ability to present information in support of a personal defense, and thereby fully defend themselves, is subordinated to the United States' independent decision to invoke the various privileges. That decision is based entirely on the United States' assessment of the need to protect certain information, not the need of a private party (even a Government official sued in an individual capacity) to defend himself. See Reynolds, 345 U.S. at 10 (explaining that assertion of state secrets privilege requires Government to establish a "reasonable danger that compulsion of the evidence" would harm national security); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007) (same); cf. El-Masri, 479 F.3d at 306 (stating that once "information has been determined to be privileged under the state secrets doctrine," it is

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[4] See In re Nat'l Sec. Agency Telecomms. Records Litig., 564 F. Supp. 2d 1109, 1118 (N.D. Cal. 2008); accord In re Sealed Case, 494 F.3d 139, 150 (D.C. Cir. 2007) (noting that Executive Branch "controls . . . the power to invoke the state secrets privilege"); id. at 144 (holding that privilege "may be invoked by the United States in a Bivens action") (emphasis added); El-Masri, 479 F.3d at 304; In re United States, 872 F.2d 472, 475 (D.C. Cir. 1989).

[5] With respect to defendant Alexander, who is the current Director of the National Security Agency and the only individual capacity defendant still in office, it is precisely because he has been sued in his individual capacity that he "recused himself from the decision of whether to assert the statutory privilege in his official capacity." Doc # 18-4 ¶ 2.

removed from the proceedings entirely and "no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure").

Although the individual capacity defendants thus have no influence over the decision to invoke the various privileges in this case, the final resolution of the privilege assertions will directly affect them. Numerous courts, including the Ninth Circuit, have held that a case must be dismissed if information subject to a state secrets privilege is necessary to a valid defense. See Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1001, 1006 & n.6 (9th Cir. 2009).[6] A practical application of this rule is succinctly summarized by the court of appeals in El-Masri (and alluded to above, see supra note 3), where the plaintiff sued a former CIA Director in his individual capacity over an alleged "extraordinary rendition" program:

> The main avenues of defense available in this matter are to show that El-Masri was not subject to the treatment that he alleges; that, if he was subject to such treatment, the defendants were not involved in it; or that, if they were involved, the nature of their involvement does not give rise to liability. Any of those three showings would require disclosure of information regarding the means and methods by which the CIA gathers intelligence.

El-Masri, 479 F.3d at 309. These premises are equally valid here, as is the conclusion they lead to: the case should be dismissed because "virtually any conceivable response to [the plaintiffs'] allegations would disclose privileged information." Id. at 310. At this point, however, when the Court has yet to rule on the privilege assertions, only the United States may—and in fact does—seek dismissal on that basis, including dismissal of the individual capacity claims.[7] This

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[6] See also Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998); accord In re Sealed Case, 494 F.3d at 149; El-Masri, 479 F.3d at 309-10; Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004); Zuckerbraun v. Gen. Dynamics Corp., 935 F.2d 544, 547 (2d Cir. 1991); In re United States, 872 F.2d at 476; Molerio v. FBI, 749 F.2d 815, 825 (D.C. Cir. 1984).

[7] See Doc # 18 at 18 & 19 n.17; In re Sealed Case, 494 F.3d at 141-42, 154 (affirming dismissal of one of two Bivens defendants in case where Government intervened to assert state secrets privilege and filed motion to dismiss on behalf of both defendants; noting that on remand the United States would have opportunity "to establish that privileged evidence demonstrates a valid defense for [the other Bivens defendant]"); El-Masri, 479 F.3d at 309-10 (affirming dismissal of Bivens claims in case where Government intervened to assert state secrets privilege and moved to dismiss entire action; finding that individual "defendants could not properly defend themselves without using privileged evidence"); Black v. United States, 900 F. Supp. 1129,

is once again because it is not for the individual capacity defendants to assert or waive the state secrets privilege, no matter how much it affects their personal interests.

Under these circumstances, ordering the individual capacity defendants to answer or otherwise respond while the state secrets issue remains pending and where the protected information could support a valid qualified immunity defense to all of the causes of action against them cannot be squared with the purpose of the privilege. As described by the Ninth Circuit, the state secrets doctrine "ensures protection of state secrets by requiring dismissal where defendants would otherwise have strong incentive to improperly disclose state secrets known to them during trial." Jeppesen, 563 F.3d at 1006 n.6. Plaintiffs here claim that the former President, Vice President, chief of staff to the Vice President, Directors of National Intelligence and the National Security Agency, and Attorneys General all were personally involved in the creation, development, implementation, supervision, and authorization of the alleged surveillance program. See Compl. ¶¶ 26-37. There can be no doubt that in their current and former official positions these individuals are and were routinely trusted with the most sensitive national security secrets maintained by our nation and that they remain legally obligated to safeguard those secrets from unauthorized disclosure after leaving office.

All of this places the individual capacity defendants in an extremely prejudicial dilemma. With no control over information relevant to a valid defense, they are left with several equally unpalatable options. At their own financial and personal peril, they would have to risk the unauthorized disclosure of state secrets and all of the attendant legal consequences of doing so (including possible criminal prosecution) in order to fully defend themselves, submit a materially deficient (if not misleading) answer without reliance on the privileged information that they are bound to protect, or forego their right to present a dispositive qualified immunity defense. Forcing a choice between these alternatives is also unnecessary at this stage, where the key threshold issues raised by the United States' privilege assertions and dispositive motion have not

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1136-37 (D. Minn. 1994) (dismissing Bivens claim based on United States' assertion of state secrets privilege "as a non-party"), aff'd, 62 F.3d 1115 (8th Cir. 1995).

been resolved. Because the case may be dismissed in its entirety for the reasons set out in that motion, the individual capacity defendants should not be put in the position of trying to answer or otherwise respond to plaintiffs' allegations in the meantime.[8]

Compounding these inequities is plaintiffs' request (made after the Court's Orders of April 27 and May 8, in their opposition to the United States' motion) to conduct full-blown and far-ranging discovery into the alleged surveillance activities, including taking the depositions of all the individual capacity defendants (except President Bush) and several other current and former Government officials. See Doc # 29 at 23 n.11; Doc # 30 ¶ 7. It is well-established that an order allowing discovery "designed to flesh out the merits of a plaintiff's claim before [] ruling on the immunity defense" is tantamount to a denial of that defense, as its very purpose is to spare an official from disruptive discovery, and, like a decision denying immunity itself, is immediately appealable as a matter of right. Lion Boulos v. Wilson, 834 F.2d 504, 507 (5th Cir. 1987); see Iqbal, 129 S. Ct. at 1953 (holding that the "rejection of the careful-case-management approach," which would permit insufficiently pled cases to proceed into even limited and tightly controlled discovery, "is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity"); Siegert v. Gilley, 500 U.S. 226, 229-35 (1991) (finding, on interlocutory appeal, that district court erred by declining to rule on qualified immunity defense and then permitting limited discovery, including depositions of the parties).[9]

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[8] Organizing the proceedings in this manner is consistent with, if not mandated by, the sequence that the Ninth Circuit follows in cases involving the state secrets privilege. Until the Court decides if the formal requirements of the privilege are met, reviews the assertion of the privilege, determines whether the privileged information should be excluded, and then assesses the impact of that exclusion on the rest of the litigation, the individual capacity defendants have no way of knowing whether and to what extent the privilege will affect their ability to assert an otherwise available and valid qualified immunity defense. See Al-Haramain, 507 F.3d at 1202-04; Kasza, 133 F.3d at 1166-67.

[9] Accord Liberty Mut. Ins. Co. v. Louisiana Dep't of Ins., 62 F.3d 115, 117 (5th Cir. 1995) (holding that "discovery order became appealable when it implicitly denied the [defendants'] claim to qualified immunity," as "district court permitted limited discovery . . . before deciding the qualified immunity issue"); Lewis, 903 F.2d at 754 (holding that "until the threshold immunity question is determined, discovery shall be limited to resolving that issue

To this it is no answer to say that, except for the individual capacity defendants' depositions, plaintiffs may pursue the rest of their requested discovery from the other defendants. That is because the individual capacity defendants and their counsel would need "to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position." Iqbal, 129 S. Ct. at 1953. So even if they personally were not subjected to any discovery orders, "they would not be free from the burdens of discovery." Id.

The most common, if not exclusive, context in which the foregoing principles come into play is when a qualified immunity defense actually has been raised through a dispositive motion and remains pending. Yet these principles apply with still greater force in the unique setting of this case, where a valid qualified immunity defense may exist but cannot even be raised due to an assertion of the state secrets privilege. Allowing any of plaintiffs' requested discovery to go forward while the individual capacity defendants are blocked from presenting information in support of a qualified immunity defense therefore would amount to a de facto denial of qualified immunity, be contrary to relevant and binding precedent, and be immediately appealable.

To summarize, whether the litigation may proceed as to the individual capacity defendants can and should be decided in the first instance based solely on the merits of the United States' motion. Because these defendants, in their individual capacity, are powerless to control or change the decision to invoke the state secrets or related statutory privileges and are unable to use any of the privileged information to defend themselves, requiring them to answer or otherwise respond while the privilege assertions await a final determination effectively deprives them of the intended benefits of qualified immunity, such as avoiding the burdens of litigation. If the privileges are sustained by the courts, that will terminate this case in its entirety; if on the other hand the Government's current or future assertions of privilege over any state secrets that may be necessary to present a valid defense are ultimately rejected after all appeals have been

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alone" and that discovery orders not so limited are immediately appealable) (citing Maxey v. Fulton, 890 F.2d 279, 282-83 (10th Cir. 1989), and Harlow, 457 U.S. at 818).

exhausted and such information is no longer protected by the Government, then the individual capacity defendants would expect to seek dismissal on qualified immunity grounds.

CONCLUSION

For all of the reasons stated above, the individual capacity defendants respectfully request relief from the Court's Orders of April 27, 2009, and May 8, 2009. They specifically ask to be relieved of their obligation to answer or otherwise respond to plaintiffs' complaint by July 15, 2009, and that they continue to be relieved of that obligation until there is a final resolution of the issues raised in the United States' motion to dismiss and for summary judgment.

Respectfully submitted this 10th day of July, 2009,

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