

1 MICHAEL F. HERTZ
 Deputy Assistant Attorney General, Civil Division
 DOUGLAS N. LETTER
 2 Terrorism Litigation Counsel
 JOSEPH H. HUNT
 3 Director, Federal Programs Branch
 VINCENT M. GARVEY
 4 Deputy Branch Director
 ANTHONY J. COPPOLINO
 5 Special Litigation Counsel
 MARCIA BERMAN
 6 Senior Counsel
 U.S. Department of Justice
 7 Civil Division, Federal Programs Branch
 20 Massachusetts Avenue, NW, Rm. 6102
 8 Washington, D.C. 20001
 Phone: (202) 514-4782
 9 Fax: (202) 616-8460

10 *Attorneys for the Government Defendants*
 11 *Sued in their Official Capacity*

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **SAN FRANCISCO DIVISION**

| | |
|---|---|
| 15 CAROLYN JEWEL, et. al., 16 <i>Plaintiffs,</i> 17 v. 18 NATIONAL SECURITY AGENCY, et. al. 19 <i>Defendants.</i> |) Case No. C:08-cv-4373-VRW)) GOVERNMENT DEFENDANTS’) STATEMENT IN SUPPORT OF) INDIVIDUAL CAPACITY) DEFENDANTS’ MOTION) FOR RELIEF FROM COURT) ORDERS) [Dkt. 32] |
|---|---|

Date: September 17, 2009
 Time: 10:00 a.m.
 Courtroom: 6, 17th Floor

Chief Judge Vaughn R. Walker

INTRODUCTION

1 The Government Defendants agree that the current and former government officials sued
2 in their individual capacities in this case should not be required to answer or otherwise respond
3 to the complaint until the Government's pending state secrets and statutory privilege assertions
4 have been adjudicated. The decision to invoke those privileges resides exclusively with the
5 United States and is one over which former (or even current) federal officeholders have no
6 power to control in their personal capacity. The United States has not authorized the individual
7 capacity defendants to reveal any of the information subject to the state secrets and statutory
8 privilege assertions in this case, and the individual capacity defendants are foreclosed from
9 revealing that information at any stage in this case, including to support any motion based on
10 qualified immunity grounds. To avoid prejudicing these defendants and risking any disclosure
11 of information properly protected by the United States, the Court should grant the individual
12 capacity defendants' request and relieve them of the obligation to answer or otherwise respond to
13 the complaint until there is a final resolution of the state secrets privilege assertion.

DISCUSSION

15 Plaintiffs allege that the National Security Agency, with the assistance of AT&T,
16 engaged in warrantless "dragnet" surveillance activities after the 9/11 terrorist attacks, allegedly
17 including the interception of plaintiffs' domestic and international telephone and Internet
18 communications and the collection of their communication records. Plaintiffs have sued the
19 current director of the NSA and several former officials in their individual capacity, along with
20 the United States and Government officials in their official capacity. The Government has
21 asserted and supported the state secrets privilege over information needed to litigate this case,
22 including for plaintiffs to prove their standing and claims, and for the Government and
23 individual capacity defendants to present their defense. For example, the Government has
24 asserted the state secrets privilege over information concerning whether plaintiffs have been
25 subject to alleged NSA intelligence activities, and over information concerning plaintiffs'
26 allegations that NSA, with the assistance of AT&T, indiscriminately intercepts the content of
27

1 communications and collects the communication records of millions of Americans. *See* Public
2 and Classified In Camera, Ex Parte Declarations of Admiral Dennis C. Blair, Director of
3 National Intelligence, and of Deborah A. Bonanni, Chief of Staff, National Security Agency.
4 Based on this privilege assertion, the Government has also filed a dispositive motion on the
5 ground that all claims in this case, including those against the individual capacity defendants,
6 cannot proceed. Govt. Defs. Mtn. to Dismiss and for Summ. Judgment (Dkt. 18) at 24-34. The
7 Court has not yet ruled on the Government's privilege assertion or dispositive motion.

8 It would clearly prejudice the individual capacity defendants to require them to answer or
9 otherwise respond to the complaint before the privilege assertions are resolved. As the
10 individual capacity defendants have explained, they cannot present a qualified immunity defense
11 based on the actual facts without information protected by the Government's state secrets and
12 statutory privilege assertions. *See* Individ. Cap. Defs. Mtn. for Relief (Dkt. 32) at 7-8; Individ. Cap.
13 Defs. Reply in Supp. of Mtn. for Relief (Dkt. 44) at 2, 5-8. That information would be necessary
14 to litigate a qualified immunity defense on a threshold motion for summary judgment, but the
15 Government's privilege assertion forecloses use of that information in this litigation.

16 Likewise, the individual capacity defendants cannot simply answer the complaint in the
17 meantime. In answering the complaint, the individual capacity defendants would be required to
18 admit or deny factual allegations subject to the privilege assertion, or aver that they lack
19 sufficient knowledge or information to do so. *See* Fed. R. Civ. P. 8(b).¹ But these defendants
20 cannot admit or deny allegations about the existence and/or scope of alleged NSA activities that
21 the Government has demonstrated are properly protected by its privilege assertions. The
22 Government has not authorized them to do so, and doing so has the potential to violate the
23 defendants' secrecy obligations and federal law. Indeed, in any further proceedings in this case,
24 these defendants would remain bound by any secrecy obligations they incurred when they gained
25 access to state secrets or classified information, including information about intelligence sources

26 ¹ While courts have recognized that a privilege may be invoked to avoid the obligation to
27 answer under Rule 8, *see, e.g., Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000), as noted
28 only the Government can assert privilege to protect state secrets.

1 and methods. *See Snepp v. United States*, 444 U.S. 507, 510-11 (1980); *United States v.*
2 *Marchetti*, 466 F.2d 1309, 1312 (4th Cir. 1972). These are lifetime obligations, continuing after
3 an official or employee leaves Government service, and enforceable against an official or
4 employee who violates them. *Id.*² Requiring a response to the allegations against them in this
5 case (or placing them in the position of providing information at any stage) would expose these
6 officials to an untenable choice: either to fail to respond as ordered by the Court or required by
7 the Federal Rules of Civil Procedure and face contempt, sanctions, or forfeit a qualified
8 immunity defense, or to disclose the very information that the Government has asserted must be
9 protected and that these individuals are obligated to protect. The individual capacity defendants
10 should not be placed in the position of being required to disclose and protect information at the
11 same time. The dispute concerning this information is between the Government and the
12 plaintiffs, and the individual capacity defendants should not be placed in between with no
13 adequate recourse for proceeding.³

14 Accordingly, the Government submits that the only reasonable approach at this stage is to
15 resolve the Government's privilege assertion first, and address the consequences of that assertion
16 on further proceedings, before injecting personal capacity claims into the litigation.

17
18
19
20
21
22

23 ² Not only are secrecy agreements enforceable, but the unauthorized disclosure of certain
24 classified information is a felony subject to up to ten years imprisonment. *See* 18 U.S.C. § 798.

25 ³ Nor has the Government authorized the individual capacity defendants, or anyone else,
26 to use the asserted state secrets information in the course of any proceeding under 50 U.S.C.
27 § 1806(f). The Government continues to contest whether the state secrets privilege has been
28 preempted by the FISA and objects to any such proceeding in the context of this case, including
as to the individual capacity claims. *See* Govt. Defs. Reply in Supp. of Mtn. to Dismiss and for
Summ. Judgment (Dkt. 31) at 14-15.

CONCLUSION

1 For the foregoing reasons, the Court should not require the individual capacity
2 defendants to answer or otherwise respond to the complaint until there is a final resolution of the
3 Government's state secrets and statutory privilege assertions.
4

5 Dated: Sept. 3, 2009

Respectfully Submitted,

6 MICHAEL F. HERTZ
7 Deputy Assistant Attorney General

8 DOUGLAS N. LETTER
9 Terrorism Litigation Counsel

10 JOSEPH H. HUNT
11 Director, Federal Programs Branch

12 VINCENT M. GARVEY
13 Deputy Branch Director

14 s/ Anthony J. Coppolino
15 ANTHONY J. COPPOLINO
16 Special Litigation Counsel

17 s/ Marcia Berman
18 MARCIA BERMAN
19 Senior Counsel
20 U.S. Department of Justice
21 Civil Division, Federal Programs Branch
22 20 Massachusetts Avenue, NW, Rm. 6102
23 Washington, D.C. 20001
24 Phone: (202) 514-4782—Fax: (202) 616-8460

25 *Attorneys for the Government Defendants*
26 *Sued in their Official Capacity*
27