

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

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Civil Action No. 13-cv-1363 (EGS)

**PLAINTIFF’S MOTION TO COMPEL  
TESTIMONY OF JOHN A. BENTEL**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 37 of the Federal Rules of Civil Procedure, respectfully moves to compel the testimony of John A. Bentel. Mr. Bentel opposes this motion; the State Department takes no position. As grounds therefor, Plaintiff states as follows:

**STATEMENT OF POINTS AND AUTHORITIES**

**I. Introduction.**

In response to 87 questions, Mr. Bentel invoked his Fifth Amendment rights. To date, Mr. Bentel has not demonstrated he has a legitimate fear that answers to all 87 questions present a danger to him. Nor has he demonstrated any such fear is more than fanciful or merely speculative. Mr. Bentel therefore must answer all questions asked of him during his deposition.

**II. Background.**

The Court granted Plaintiff’s request to depose Mr. Bentel for four reasons. First, “the record in this case appears to contradict his sworn testimony before the Benghazi Committee.” Memorandum Opinion at 24. Second, “Mr. Bentel declined to assist the Rule 30(b)(6) deponent

in preparation for her deposition.” *Id.* at 25. Third, “the OIG May 2016 report found that Mr. Bentel told employees in his office that Secretary Clinton’s email arrangement had been approved by the State Department’s legal staff and also instructed his subordinates not to discuss the Secretary’s email again.” *Id.* Fourth, “Mr. Bentel informed a State Department staff person that anything sent to the Secretary on her state.gov Blackberry address ‘would be subject to FOIA searches.’” *Id.* at 26. Because “the record suggests Mr. Bentel has knowledge of the operation of the clintonemail.com system, which is within the scope of discovery authorized by the Court” (*Id.*), the Court authorized Plaintiff to depose Mr. Bentel.

Plaintiff conferred with counsel for Mr. Bentel and the State Department and scheduled Mr. Bentel’s deposition for October 24, 2016. On October 20, 2016, Mr. Bentel’s counsel informed Plaintiff that he intended to decline “to answer all substantive questions concerning the topic upon which [the Court] has ordered his deposition be taken, in reliance on his rights under the Fifth Amendment.” *See* Exhibit A. Because the Court “court must review assertions of privilege on a question-by-question basis” (*Anton v. Prospect Cafe Milano, Inc.*, 233 F.R.D. 216, 218 (D.D.C. 2006)), Plaintiff deposed Mr. Bentel on October 24, 2016. Mr. Bentel declined to answer 87 questions and instead asserted, “On advice from my legal counsel, I decline to answer the question and I invoke my Fifth Amendment rights.” *See* Deposition Transcript of John Bentel at pp. 9-83.<sup>1</sup> Mr. Bentel’s counsel also instructed Mr. Bentel not to answer nine questions based on an objection that the questions were outside the scope of discovery. Although Plaintiff does not concede that these questions exceeded the scope of permissible discovery, Plaintiff does not move to compel Mr. Bentel to answer these questions.

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<sup>1</sup> The transcripts and the audiovisual recording of the deposition have already been provided to the Court.

After reviewing the deposition transcript, Plaintiff informed Mr. Bentel's counsel that it intended to move to compel Mr. Bentel's testimony because he failed to substantiate his invocation of his Fifth Amendment rights. On October 31, 2016, Mr. Bentel's counsel stated, "Mr. Bentel stands by the invocation of his Fifth Amendment rights." He did not identify any reasonable fear of prosecution. *See* Exhibit B.

### **III. Argument.**

The Fifth Amendment "protects a person against being incriminated by his own compelled, testimonial communications." *Anton*, 233 F.R.D. at 218. It "applies in any proceeding to 'disclosures which the witness reasonably believes could be used [against him or her] in a criminal prosecution or could lead to other evidence that might be so used.'" *Id.* (quoting *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)). Stated another way,

[t]he privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.

*Hoffman v. United States*, 341 U.S. 479, 486 (1951) (internal citations omitted). In addition, "[t]he witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." *Id.*

To determine whether the invocation is proper, the Court "must review assertions of privilege on a question-by-question basis." *Anton*, 233 F.R.D. at 218. When doing so, the Court must determine "whether there is a reasonable basis for believing a danger to the witness might exist in answering a particular question." *Id.* The danger cannot be merely speculative, however. To sustain the invocation, the witness must "demonstrate a fear of prosecution which

is more than fanciful or merely speculative.” *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 883 (D.C. Cir. 1981).

Mr. Bentel has invoked his Fifth Amendment rights without providing any justification whatsoever. He has not identified – let alone demonstrated – a fear of prosecution in answering any of the 87 questions asked of him during his deposition. Nor has he demonstrated any such fear is more than fanciful or merely speculative. Mr. Bentel has not provided Plaintiff or the Court with any pertinent information to allow it to assess the validity of the invocation for each of the 87 questions Mr. Bentel declined to answer.

#### **IV. Conclusion.**

Plaintiff respectfully requests the Court compel Mr. Bentel to answer the 87 questions asked of him during his deposition.

Dated: November 1, 2016

Respectfully submitted,

/s/ Michael Bekesha  
Michael Bekesha  
D.C. Bar No. 995749  
JUDICIAL WATCH, INC.  
425 Third Street S.W., Suite 800  
Washington, DC 20024  
(202) 646-5172

*Counsel for Plaintiff Judicial Watch, Inc.*

**Certification**

I hereby certify that Plaintiff has in good faith conferred with John A. Bentel and the U.S. Department of State in an effort to obtain Mr. Bentel's testimony without court action.

/s/ Michael Bekesha

# EXHIBIT A

**BAKER BOTTS** LLP

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| HONG KONG | SAN FRANCISCO     |
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October 20, 2016

VIA E-MAIL (MBEKESHA@JUDICIALWATCH.ORG)

Kyle Clark  
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Michael Bekesha  
Judicial Watch, Inc.  
425 Third Street, S.W.  
Suite 800  
Washington, D.C. 20024

Re: *Judicial Watch, Inc. v U.S. Department of State*, Case Number 13-cv-1363 (EGS)

Dear Michael:

I write to confirm that our client, Mr. John A. Bentel, will decline to answer all substantive questions concerning the topic upon which Judge Sullivan has order his deposition be taken, in reliance on his rights under the Fifth Amendment. *See* Doc. 124, Memorandum Opinion, 13-cv-1363 (D.D.C., Aug. 19, 2016).

We hope that by confirming Mr. Bentel's intentions in writing, Judicial Watch will conserve court reporter time and avoid unnecessary court reporter fees and attorney time and fees by withdrawing the deposition request.

I look forward to your reply.

Respectfully,



Kyle Clark

# EXHIBIT B

**BAKER BOTTS** LLP

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October 31, 2016

**VIA E-MAIL (MBEKESHA@JUDICIALWATCH.ORG)**

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Michael Bekesha  
Judicial Watch, Inc.  
425 Third Street, S.W.  
Suite 800  
Washington, D.C. 20024

Re: *Judicial Watch, Inc. v U.S. Department of State*, Case Number 13-cv-1363 (EGS)

Dear Michael:

We are in receipt of your October 26, 2016 letter and also your follow-up email of October 28, 2016. We appreciate you seeking our input before moving to compel Mr. Bentel to answer any of the 87 questions asked of him.

Mr. Bentel stands by the invocation of his Fifth Amendment rights during the October 24, 2016 deposition. As we told you in advance of the deposition, Mr. Bentel declined “to answer all substantive questions concerning the topic upon which Judge Sullivan has ordered his deposition be taken, in reliance on his rights under the Fifth Amendment.”

Your October 26 letter claims that Mr. Bentel must demonstrate that he has a reasonable belief that his answers would support a conviction under a federal criminal statute or furnish a link in a chain of evidence needed to prosecute. That is not the correct legal standard. The correct standard is for the court to determine “*only* whether there is a reasonable basis for believing a danger to the witness *might* exist.” Anton v. Prospect Cafe Milano, Inc., 233 F.R.D. 216, 218 (D.D.C. 2006) (emphasis added). In so doing, the witness is specifically not required to “prove incrimination by testimony” or otherwise demonstrate a risk of prosecution because that would “surrender the very protection which the privilege is designed to guarantee.” In re Corrugated Container Antitrust Litig., 662 F.2d 875, 882-83 (D.C. Cir. 1981).

Given Judge Sullivan’s observations on the record and in his Memorandum Opinion in ordering the deposition of Mr. Bentel (Mem. Order, ECF No. 124 at 24-26), coupled with Judge Sullivan’s sound legal observation that another nonparty deponent, Bryan Pagliano, had the right to invoke his own Fifth Amendment protections in response to the same type of substantive questions posed to Mr. Bentel (July 18, 2016 Hr’g Tr. at 6), we ask that Judicial Watch reconsider its intention to file such a motion to compel where the law does not support it. We

**BAKER BOTTS** LLP

Michael Bekesha

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October 31, 2016

believe filing such a motion under these circumstances would needlessly waste court resources and attorney time and fees.

Respectfully,

A handwritten signature in black ink, appearing to read 'Kyle Clark', with a stylized flourish at the end.

Kyle Clark

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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|---------------------------|---|-----------------------------------|
| JUDICIAL WATCH, INC.,     | ) |                                   |
|                           | ) |                                   |
| Plaintiff,                | ) |                                   |
|                           | ) | Civil Action No. 13-cv-1363 (EGS) |
| v.                        | ) |                                   |
|                           | ) |                                   |
| U.S. DEPARTMENT OF STATE, | ) |                                   |
|                           | ) |                                   |
| Defendant.                | ) |                                   |
|                           | ) |                                   |

**[PROPOSED] ORDER**

Upon consideration of Plaintiff's Motion to Compel Testimony of John A. Bentel and the entire record herein, it is hereby ORDERED that:

1. Plaintiff's motion is **GRANTED**.

**SO ORDERED.**

DATE:\_\_\_\_\_

The Hon. Emmet G. Sullivan, U.S.D.J.