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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	NO. 16-MC-0036-JLQ **PETITIONERS' MOTION FOR RECONSIDERATION OF COURT'S OCTOBER 4, 2016 ORDER RE: MOTION TO COMPEL [ECF No. 31]** Without Oral Argument November 18, 2016 Expedited Hearing Requested

Related Case:

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

NO. CV-15-0286-JLQ

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I. INTRODUCTION

This motion seeks to compel the production of evidence critical to Petitioners Drs. James Mitchell and John "Bruce" Jessen's ("Defendants") ability to defend themselves in a related action, *Salim, et al. v. Mitchell, et al.*, 15-286-JLQ. Specifically, Defendants requested documents pursuant to two subpoenas issued to the CIA and DOJ (collectively, "Government"). Following a disagreement about the scope of discovery to be provided thereunder, Defendants moved to compel the Government's compliance therewith.[1] This Court heard oral argument on that motion to compel, and issued a ruling memorialized in an October 4, 2016, *Order re: Motion to Compel* ("Order"). ECF No. 31.

This motion seeks clarification and, if appropriate, reconsideration, with regard to the scope of the Order; specifically, whether the Government is compelled to produce: (1) documents generated between September 11, 2001, and the present concerning one or both Defendants' role in the "design" or implementation of the CIA's Enhanced Interrogation Technique ("EIT") program ("Program"), but unrelated to plaintiffs in the related action ("Plaintiffs"); (2) documents referencing the decision to use enhanced interrogation techniques with Abu Zubaydah generated between September 2001 and August 2004 that do not mention Defendants; and (3) post-2004 contracts between Defendants and the

[1] A more detailed discussion of the underlying facts and the nature of this dispute can also be found in the Court's records. *See* ECF Nos. 1, 19, 23, 25, 26.

Government. Defendants respectfully believe all three questions should be answered in the affirmative.

II. ARGUMENT

A. Applicable Legal Standard for Reconsideration.

The Ninth Circuit permits litigants to seek reconsideration under Federal Rules of Civil Procedure 59(e) and 60(b)(6). *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003); *Sierra On-line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1419 (9th Cir. 1984). A Rule 60(b) motion permits reconsideration where there is a showing of, *inter alia*, "any [] reason that justifies relief." *Id*. Pursuant to Rule 59(e), a movant is entitled to reconsideration of an interlocutory order where it can show the "need to correct clear error or prevent manifest injustice." *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008). Whether or not to grant reconsideration is committed to the sound discretion of the court. *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000); *see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983). Here, Defendants urge the Court to reconsider the foregoing aspects of the Order to prevent "manifest injustice."

During oral argument with regard to Defendants' motion to compel, the Court explained that its rulings were preliminary in nature, and that "if either side determines that additional discovery should be furnished by the government, I certainly will order it." Sept. 29, 2016 Transcript ("Tr.") at 27:25–28:2. Upon

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further consultation with the Government, both via correspondence and a review of its October 11, 2016, submission, ECF No. 85, Defendants have determined that the Government's contemplated search criteria, based on its understanding of the Order, will lead to significant gaps in the production of relevant evidence potentially critical to their defense. For that reason, Defendants hereby respectfully seek reconsideration of the aforementioned discovery rulings.

B. The Court Should Reconsider the Current Limitation Regarding Documents Concerning the Program's Design and Implementation.

The Order provides the following with regard to Defendants' entitlement to secure documents related to the Program's design and implementation:

> Defendants also request documents pertaining to Abu Zubaydah *as relevant to Defendants alleged role in the design of the [Program]*. … [I]t appears Zubaydah was the first detainee in the [P]rogram …. As to documents referencing Abu Zubaydah, the relevant time period is September 11, 2001 to August 1, 2004.

Order, ECF No. 31, at 4-5 (emphasis added). As such, it appears that the Court has compelled the Government to produce documents relating to the Program's design and/or implementation ***only*** if those documents were created between September 11, 2001 and August 1, 2004.

But, limiting the Government's production of documents relating to the Program's design and/or implementation to only those documents created between September 11, 2001 and August 1, 2004 serves to improperly divest Defendants of highly-relevant documents—as conclusively demonstrated by documents that the Government has already produced—greatly prejudicing

Defendants.[2] For instance, had the temporal limitation of 9/11/01 to 8/1/04 previously governed the Government's production of design/implementation documents, Defendants would have never received the document created on June 22, 2007, bearing the identifier "United States Bates #001175-77." A copy of this document is affixed as **Exhibit 1** to the Declaration of Jeffrey N. Rosenthal ("Rosenthal Dec.") attendant to this motion. As the Court can see, this document—memorializing a June 22, 2007, meeting involving Defendants and former United States Secretary of State, Condoleeza Rice, and discussing the "decision-making process at the genesis of the use of EITs" and "Jessen['s] and Mitchell['s] … work on alternative methods for implementing sleep deprivation EIT and propose[d] courses of action"—is highly relevant to Defendants' defense for multiple reasons, including its acknowledgment that Secretary Rice was personally involved in the Program's creation, and that the Program was not only legal, but implemented "professionally and responsibly." *Id.*

Similarly, were the Government's production of documents concerning the Program's design and/or implementation limited to documents created between 9/11/01 and 8/1/04, Defendants would have never received the document created on April 11, 2007, bearing the identifier "United States Bates #001099-100." A copy of this document is affixed as **Exhibit 2** to the Rosenthal Dec. But, a

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[2] Defendants agree the Government need not produce documents relating to the Program's implementation to the extent that they pertain to a particular detainee.

review of this document, like the document discussed above, demonstrates its direct relevance to the claims and defenses at issue in this action; in fact, it summarizes Defendants' role at the inception of the Program. Surely, Defendants should not be deprived of documents like these solely because they were generated after August 1, 2004.

Finally, the Court need look no further than the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* ("SSCI") Report, a primary foundation for the claims advanced in this action, to appreciate the significance of the 9/11/01-8/1/04 temporal limitation. Specifically, the SSCI Report was approved on December 13, 2012, and revised on April 3, 2014; adherence to this 9/11/01-8/1/04 temporal limitation would necessarily mean Defendants (and Plaintiffs) would not have come into possession of this Report had it not already been publicly-released.

In short, documents already produced by the Government and otherwise available demonstrate that there is very a strong likelihood that additional highly-relevant documents as to Defendants' involvement in the design and/or implementation of the Program created after August 1, 2004 exist—many of which may be critical to the defenses to be advanced. To exclude these highly-

relevant documents from discovery significantly prejudices Defendants, resulting in manifest injustice.[3]

C. The Court Should Reconsider the Current Limitation, if Any, Relating to Documents Concerning Zubaydah.

The Order provides the following with regard to Defendants' entitlement to secure documents related to Zubaydah: "As to documents referencing Abu Zubaydah, the relevant time period is September 11, 2001 to August 1, 2004." Order, ECF No. 31, at 5. Thus, it appears that the Court has compelled the Government to produce all documents relating to Zubaydah provided that such documents were generated between 9/11/01 and 8/1/04.[4]

However, the Government disagrees. The Government, relying upon the transcript of the argument, argues that it is obligated to produce documents

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[3] This is especially true where the sole reason for limiting the scope of discovery is to lessen the Government's burden. As the Court noted during argument, the Government "put this program together" and it cannot "assign the responsibility for furnishing evidence of what the government and the two defendants put together." Tr. at 35:11-14. Any minor additional burden on the Government associated with producing these documents is insignificant compared to the risks confronted by Defendants in the related suit.

[4] Defendants agree that the Government need not produce substantive intelligence reports concerning Zubaydah.

generated during the aforementioned temporal period only if those documents also reference one or both Defendants. *See* **Exhibit 3** to Rosenthal Dec. (portion of an email chain dated October 9-11, 2016, wherein the Government articulates its position as to documents concerning Zubaydah.) But, as the Court expressly stated during the oral argument: "[T]hese are preliminary rulings, although they will be finalized in an order." Tr. 27:22-24; *see also id.* at 33:12-13 ("I will include the Zubaydah documents from March of 2002, March 1, 2002, to August 1, 2004.").

Limiting the Government's production of Zubaydah-related documents to only those documents identifying Defendants could divest Defendants of highly relevant documents critical to Defendants' defense—as evidenced by documents already produced by the Government. For instance, the limitation would serve to exclude from discovery documents relating to the Government's decision to use EITs on Zubaydah, as well as the Government's application/analysis of the effectiveness of those techniques to procure credible intelligence if those documents did not also identify Defendants. Some documents relating to the Government's assessment of Zubaydah's withholding of information would not have involved Defendants. *See* Rosenthal Dec. at **Exhibit 4** (U.S. Bates #001162-66). Others may have involved Defendants, but not mentioned them specifically. *See id.* **Exhibit 5** (U.S. Bates #001158-61).

These categories of information are highly relevant to prove that it was the Government's decision—not Defendants—to pursue enhanced interrogation

methods, and that it was the Government—not Defendants—who decided which techniques to apply to Zubaydah. Yet, none of this information will ever be discovered if the Government is required to search ***only*** for documents referencing ***both*** Zubaydah and one of the Defendants. Without these materials, Defendants will be unable to present a fulsome defense to the claims asserted. Although Defendants were hired to consult on various EITs, they did so at the direction of the Government, within the scope of the authority set forth in their contracts with the Government, and pursuant to legal opinions provided by the Government. As the Court noted, this was the Government's program; it certainly has the resources to shoulder the minimal burden this production may impose. *See* Tr. at 5:7; 17:17-19; (A. Warden stating the "CIA operated the detention and interrogation program"); 23:12-15; 30:25-31:3; (A. Warden stating the "first detainee in the CIA detention program was . . . Abu Zubaydah"); 35:10-11.[5] To enable the Government to search only for documents concerning Zubaydah ***and*** identifying Defendants would work a "manifest injustice" here.

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[5] It is important to note that, should the Court reconsider its prior ruling and command the Government to search for and produce the additional documents set forth herein, it is unlikely to change the magnitude of the universe of potentially relevant and responsive documents. Prior to the Court's ruling, the Government represented that it had located and was in the process of reviewing approximately 36,000 documents in response to the subpoenas served upon the CIA. Despite the

D. The Court Should Require the Government to Produce All of Its Contracts with Defendants Relating to the EIT Program.

Early in the oral argument there was much discussion about Defendants' contracts with the Government, and whether those documents had been produced to Defendants. Tr. 6:20-9:7. During that discussion, counsel for the Government, Mr. Warden, acknowledged that the Government has not produced any contracts that it had with one or both Defendants postdating 2004, *id.* at 7:5-13, while acknowledging that such contracts exist. *Id.* at 8:3-5. Notwithstanding this discussion, the Court's Order is silent as to whether the Government is compelled to produce its contracts with Defendants postdating 2004, *see* Order, ECF No. 31, at 9, and the Government is refusing such production. *See, e.g.*, Tr. at 7:5-9:7.

The Government should be compelled to produce its contracts with one or both Defendants postdating 2004. As the Court is no doubt aware from prior filings, one of Defendants' primary defenses to Plaintiffs' claims is that any actions that they took in connection with the Program were authorized by the Government within its validly-conferred authority. Plainly, the terms of Defendants' contracts with the Government are highly relevant to establishing what actions the Government expected Defendants to perform.

In fact, the relevance of Defendants' contracts with the Government to the claims advanced in this action was identified by the Court many months ago.

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limitations in the Order, the Government's production appears to be unchanged; it still claims to have identified approximately 36,000 documents in need of review.

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Specifically, within its May 12, 2016, Order Granting Motion to Set Time to file Answer, the Court held: "On or before **May 23, 2016**, the United states, through Mr. Warden shall file a Statement as to its position on providing . . . on providing the contract between Defendants and the CIA that was discussed at the in-court hearing, and the time for providing such documents." ECF No. 45 at 2. In its subsequently-filed Statement, the Government stated its agreement to produce such contracts. *See* United States' Response to the Court's Order Addressing Production of Defendants' Non-Disclosure Agreements and Contracts, ECF No. 46, at 2 ("The United States also intends to produce to Defendants copies of the relevant contracts governing Defendants' work on the CIA's former detention and interrogation program."). Despite the contracts' plain relevance to the claims advanced, the Government refuses to produce contracts postdating 2004. And, the Government should not be heard to complain about any additional burden associated with producing these contracts in that it has already searched for and located these contracts. *Id.* ("Following the April 22, 2016 hearing in this case, the United States initiated a diligent search to identify and gather the relevant contracts. The search was recently completed and resulted in the collection of multiple potentially relevant contracts between the CIA and Defendants.").

III. CONCLUSION

For the foregoing reasons, Defendants' motion should be granted.

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DATED this 19th day of October, 2016.

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STATEMENT CERTIFYING ATTEMPTS TO MEET AND CONFER

Despite good faith efforts to resolve this matter without judicial intervention, the Government has not offered to compromise, although it consents to an expedited briefing schedule:

> The Government has no objection to expedited consideration of the motion and will file its opposition [five] business days after the motion is filed. The Government requests oral argument if the Court believes oral argument would be helpful to resolution of the motion.

See Rosenthal Dec. ¶ 9.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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