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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES E. MITCHELL and JOHN JESSEN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 16-MC-0036-JLQ

UNITED STATES' REPLY IN OPPOSITION TO DEFENDANTS' THIRD AND FOURTH MOTIONS TO COMPEL

Motion Hearing:
To Be Scheduled At Court's Discretion

Related Case:

SULEIMAN ABDULLAH SALIM, *et al.*,

Plaintiffs,

v.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

No. 15-CV-286-JLQ

The Government hereby submits this reply memorandum in support of its arguments that Defendants' third and fourth motions to compel should be denied.

1. Disputed Issues. With respect to depositions, only the depositions of Mr. Cotsana and Ms. Haspel remain in dispute. *See* ECF No. 76 at 3 n.3.

Defendants also have narrowed their challenge to only 60 Government documents, *see* Decl. of Ann Querns ¶ 13, Ex. 105, within which they seek "only information that relates to [1] the CIA's command and control over Defendants and [2] the extent, if any, of Defendants' involvement with the Plaintiffs." *See* ECF No. 76 at 9-10. As explained in the Government's response memorandum, most of the information withheld from the documents does not relate to these categories and, thus, falls outside of the scope of Defendants' challenge. *See* ECF No. 75 at 28-29, Exs. 16, 19. Consequently, the Court need only adjudicate the Government's privilege assertions with respect to these two narrow categories of information to the extent they are withheld in the 60 documents.

2. CIA Act. The CIA Act, 50 U.S.C. § 3507, bars the depositions of Ms. Haspel and Mr. Cotsana. The CIA Act is an absolute privilege, not subject to a showing of need. *See Kronisch v. United States*, 1995 WL 303625, at *8 (S.D.N.Y May 18, 1995). Accordingly, Defendants' arguments regarding their purported need for the depositions is irrelevant. *See* ECF No. 76 at 3-6. The Government need only demonstrate that the information to be protected describes "the organization, function, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. The Government has made that showing here. *See* Pompeo Declaration (Gov't Ex. 16).

Contrary to Defendants' arguments, any deposition of Mr. Cotsana or Ms. Haspel will require them to disclose their duties and functions as employees with the CIA. Indeed, Defendants admit that the purpose of these depositions is to learn "the chain-of-command under which Defendants' acted," including whether or not Mr. Cotsana or Ms. Haspel "directly supervised [Defendants'] work with the CIA," and to "connect the dots" between the interrogation team and personnel at CIA headquarters. *See* ECF No. 76 at 3-4, 11. This type of inquiry regarding the specific job responsibilities of CIA employees is prohibited by the CIA Act. Further, although Defendants claim that they seek to depose Mr. Cotsana and Ms. Haspel about only information concerning Defendants' role in the former detention and interrogation program, *see id.* at 7-8, it would be impossible for Mr. Cotsana or Ms. Haspel to answer any of those questions without confirming or denying their own role and function, if any, in the program. The Court of Appeals has held that the CIA Act prohibits the disclosure of information about an employee's "alleged CIA activities" as well as information that would "tacitly reveal" such activities. *See Minier v. CIA*, 88 F.3d 796, 801-02 (9th Cir. 1996). Thus, the depositions are prohibited by the CIA Act because every piece of information that Defendants intend to elicit from Mr. Cotsana and Ms. Haspel would require them to disclose their job functions and duties.

There is also no merit to Defendants' argument that the Government has failed to explain how the CIA Act applies to the disputed documents at issue. *See* ECF No. 76 at 8. To facilitate the Court's review of that issue, the Government has provided Director Pompeo's declaration that explains in granular detail the specific information within the

CIA Act's categories that have been withheld from the documents, and an accompanying appendix that also itemizes on a document-by-document basis where such information was redacted. *See* Gov't Ex. 16. In the event, however, the Court requires more information beyond the unclassified record, the Government will provide the classified versions of the disputed documents for review *ex parte* and *in camera.*

3. State Secrets Privilege. Director Pompeo's declaration establishes that the identities of the individuals who worked in the program are properly state secrets, and the official disclosure of their identifying information could reasonably be expected to cause exceptionally grave damage to the national security, including increasing the threat to the individuals and their families, jeopardizing intelligence sources, and hindering the CIA's ability to recruit and retain qualified staff officers for high-risk counterterrorism assignments. *See* Pompeo Decl. ¶¶ 13-22. The proposed depositions of Ms. Haspel and Mr. Cotsana are reasonably likely to lead to those harms by forcing them to confirm or deny their role in the CIA's program, answer questions about their job functions and operational assignments, and disclose information they acquired while in their alleged positions.

Defendants respond that the state secrets privilege cannot apply to Ms. Haspel because her role in the program has been officially acknowledged by the CIA. *See* ECF No. 76 at 11-13. Defendants are incorrect. The CIA has never officially acknowledged whether or not Ms. Haspel was involved in the program. *See* Pompeo Decl. ¶ 18. As the Court of Appeals has explained, to constitute an official disclosure, the information

requested "must match" and "be as specific" as the information previously released. *Pickard v. Dep't of Justice*, 653 F.3d 782, 786 (9th Cir. 2011). That is certainly not the case here, as the two sources of information that Defendants rely upon to support their position fail to establish an official disclosure by the CIA.

First, Defendants cite to a press release by the CIA announcing Ms. Haspel's appointment to the position of Deputy Director of the CIA, but that document says nothing about whether Ms. Haspel had any role in the program. *See* Defs' Ex. 117. The press release merely states that Ms. Haspel is a CIA employee who has served in a variety of positions, including in the Counterterrorism Center. *See id.* As explained by Director Pompeo, although the CIA may have officially acknowledged that an individual is a CIA officer, or even worked in the counterterrorism arena, that does not mean that the CIA has confirmed either that the officer worked in a particular intelligence program or the details of the officer's work. *See* Pompeo Decl. ¶ 20. Counterterrorism a broad category, and the program was but one highly-compartmented aspect of the CIA's world-wide counterterrorism operations. *See id.* Accordingly, there is no basis to conclude that the CIA has officially acknowledged whether or not Ms. Haspel had any role in the program.

Second, Defendants cite a book written by Jose Rodriguez, the former director of the CIA's National Clandestine Service and Counterterrorism Center, *see* Defs' Ex. 118, but books written by former CIA officials, even those reviewed by the CIA prior to publication, do not constitute official disclosures. *See, e.g.*, *Afshar v. Dep't of State*, 702 F.2d 1125, 1133-34 (D.C. Cir. 1983). Defendants also fail to note that the book's

introduction expressly states that it does "not reflect the official positions or views of the CIA or any other U.S. Government agency." *See* Defs' Ex. 118. In any event, the book makes no mention of Ms. Haspel. *See id.* Instead, the author describes a person with the pseudonym "Jane" as the author's chief of staff. *Id.* Defendants thus speculate that "Jane" is Ms. Haspel, but the CIA has never confirmed or denied that, and Defendants cannot point to any official CIA statement that confirms their speculation. The absence of an official acknowledgment by the CIA reaffirms the point above that the central purpose of the proposed deposition is for Defendants to seek an official confirmation or denial from Ms. Haspel regarding her job functions that they currently lack. Here, where Director Pompeo has explained the harm to national security reasonably likely to result from forcing official disclosure of such information, the Court must give the "utmost deference" to that judgment and uphold assertion of the privilege. *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

Defendants' remaining arguments boil down to an unpersuasive attempt to second-guess the well-reasoned judgements of Director Pompeo regarding the harm to national security that is reasonably likely to result from the depositions. *See* ECF 76 at 13-15. In the state secrets context, the Court of Appeals has emphasized that courts "need to defer to the Executive on matters of foreign policy and national security" and found that courts "surely cannot legitimately find ourselves second guessing the Executive in this arena." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007). Contrary to this precedent, Defendants contend that there is now less risk of harm in light of various

unofficial public sources speculating about the role Mr. Cotsana and Ms. Haspel may or may not have played in the program. But as Director Pompeo's declaration explains in detail, there a significant difference in terms of the consequences to national security between public speculation and official confirmation. *See* Pompeo Decl. ¶¶ 15-21. Defendants ignore this important distinction, and fail to acknowledge the deference due the Director's judgment regarding the national security harms that would flow from any official confirmation.

With respect to the documents protected by the state secrets privilege, Defendants do not challenge that the state secrets privilege prohibits the disclosure of the seven categories of information set forth in Director Pompeo's declaration. *See* ECF No. 76 at 15-17. Nor could they, as these categories "fall[] squarely within the ambit of the state secrets privilege." *Abilt v. CIA*, 848 F.3d 305, 314 (4th Cir. 2017). Instead, Defendants' only response is that the Court should be skeptical of the Government's redactions because of purported errors in the Government's production. *See* ECF No. 76 at 15-17. Defendants' arguments lack merit. First, the fact that the Government produced supplemental documents to Defendants in response to their request for additional information about Abu Zubaydah's interrogations after the Government's December 20, 2016 production reflects the Government's good faith. *See* Gov't Exs. 20-21 (attached hereto). The discovery standard is reasonableness, not perfection. *See, e.g., Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 614-15 (C.D. Cal. 2013). In any event, it is a complete *non-sequitur* to suggest that this supplemental production calls into question

the overall integrity of the Government's redactions to state secrets information.

Second, Defendants point to two documents that they claim the Government has redacted in a manner inconsistent with the way the documents are described in the SSCI report. *See* ECF No. 76 at 15-16. The Government has re-reviewed the documents and can represent that the SSCI Report's summary of Document #158 at footnote 150 of the Report mischaracterizes the redacted language in the cable and misdescribes a properly deliberative communication. As for Document #226, the Government agrees that the SSCI Report quotes language regarding Zubaydah's interrogations that was redacted from this cable, although none of redactions relate to the two categories of information Defendants currently seek. The Government regrets this error and will correct the redactions in this document.

Throughout this case the Government has worked diligently through a complicated and voluminous electronic discovery process that involved the application of thousands of individualized redactions to discrete pieces of information. That process was made all the more difficult given the need to ensure consistency with the many other documents about the program that have been disclosed in other cases and contexts. Human error is inevitable, and if mistakes are identified, the Government will correct them. But the proper remedy is not wholesale disclosure of privileged documents, as Defendants appear to contend. Rather, in the event the Court has questions about specific documents or redactions after review of the unclassified record, the Government is willing to provide those documents to the Court for review *ex parte* and *in camera*.

4. Deliberative Process Privilege. There is no merit to Defendants' argument that the Government has not provided sufficient information for the Court to assess the application of the deliberative process privilege to the Government's documents. *See* ECF No. 76 at 19-20. The detailed declaration from the Deputy Director of the CIA for Operations (DDO) explains the deliberative nature of each document with specificity and is consistent with the level of detail that courts in this Circuit have accepted. *See, e.g.*, *P.W. Arms, Inc. v. United States*, 2017 WL 319250, at *4-5 (W.D. Wash. Jan. 23, 2017). Defendants complain that the descriptions do not list the names of CIA employees who wrote or received the documents, but as explained above, this information is privileged, and the law does not require disclosure of privileged information in order to justify the privilege. *See* Fed. R. Civ. P. 45(e)(2)(A).

The DDO's declaration also adequately explains why the disputed documents are pre-decisional and deliberative. There is no merit to Defendants' argument that the Government is withholding post-decisional discussions about Abu Zubaydah's interrogations. As the DDO's declaration makes clear, the documents at issue were part of the CIA's deliberative process to determine, among other things, which strategies and interrogation approaches should be applied in specific instances in the future—those are the "decisions" at issue, not the CIA's past decision to authorize enhanced interrogation in general. The process of implementing a particular high-level policy necessarily involves additional subsidiary policy decisions. As such, these documents are privileged because they reflect the type of "smaller policy decisions" that "legitimately make up

major policy positions." *Sierra Club v. U.S. Dep't of Interior*, 384 F. Supp. 2d 1, 16 (D.D.C. 2004). For this reason, the deliberative character of the documents is self-evident in Defendants' own descriptions of the documents. *See* ECF No. 76 at 22.

Further, contrary to Defendants' claim, the fact that the Government has released information about the program and the implementation of interrogation techniques on Abu Zubaydah does not warrant disclosure of all deliberative information about these topics. *See id.* at 23-24. The concept of subject-matter waiver does not apply to the deliberative process privilege. *See, e.g., United States v. Wells Fargo Bank, N.A.*, 2015 WL 6395917, at *1-2 (S.D.N.Y. Oct. 22, 2015).

Although the deliberative process privilege is qualified, Defendants' claim of need is vastly overstated given the narrow nature of the two categories of information they currently seek. *See* ECF No. 76 at 24-26. Defendants make no effort to tailor their request appropriately and, in any event, the compelling reasons for confidentiality set forth in the DDO's declaration are sufficient to overcome Defendants' claims.

5. National Security Act. Director Pompeo's declaration adequately explains which documents contain sources and methods information protected from disclosure by the National Security Act, 50 U.S.C. § 3024(i). Although Defendants take issue with these descriptions, *see* ECF No. 76 at 27, the Government, of course, cannot disclose the actual sources and methods at issue without compromising its privilege claim. Thus, in the event the Court requires more information beyond the unclassified record, the Government will provide the disputed documents for review *ex parte* and *in camera*.

6. Attorney-Client Privilege & Work Product. The DDO's declaration establishes that the attorney-client privilege properly applies to 25 documents. Defendants highlight several documents (#46, 48, 127, 226) that in their view do not fall within the privilege, *see id.* at 27-28, but the DDO's Declaration explains how each of those documents contains communications between attorneys and clients for a legal purpose. *See* DDO Decl. ¶¶ 78, 80, 88, 99.

Defendants also mischaracterize the legal standard for application of the privilege to communications between organization counsel and independent contractors. *See* ECF No. 76 at 29. "[T]he dispositive question is the [contractor's] relationship to the company and whether by virtue of that relationship he possesses information about the company that would assist the company's attorney in rendering legal advice." *U.S. ex rel. Strom v. Scios, Inc.*, 2011 WL 4831193, at *4 (N.D. Cal. Oct. 12, 2011); *Fosbre v. Las Vegas Sands Corp.*, 2016 WL 183476, at *5 (D. Nev. Jan. 14, 2016). Here, regardless of whether or not Defendants were "agents" for purposes of 28 U.S.C. § 2241(e)(2), they worked alongside CIA employees and communicated directly with CIA counsel about the CIA's interrogation and detention program; thus, the attorney-client privilege extends to them.

Finally, with respect to work product, the fact that the Government cannot invoke Rule 26(b)(3) directly as a nonparty does not mean that that Government is without protection. *See* ECF No. 76 at 30. As explained in the Government's initial brief, *see* ECF No. 75 at 39, Rules 45 and 26(c) authorize the Court to tailor appropriate relief to nonparties, which in this context simply requires denial of Defendants' motions to compel.

Dated: March 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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