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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, *et al.*,

Plaintiffs,

v.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

No. 2:15-CV-286-JLQ

STATEMENT OF INTEREST OF THE UNITED STATES

Motion Hearing:4p004qiN1.1545 TD21 o

INTRODUCTION

Pursuant to 28 U.S.C. § 517,[1] the United States of America submits this Statement of Interest to advise the Court of the United States' interest in the discovery issues presented in this case.

BACKGROUND

This case involves an action brought by three former detainees seeking damages related to their alleged treatment in the Central Intelligence Agency's ("CIA") former detention and interrogation program. Neither the United States Government nor the CIA is a defendant in this case. Instead, Plaintiffs have brought this action against two individual psychologists, whom Plaintiffs allege worked as contractors for the CIA and, in that capacity, designed, implemented, and participated in the detention and interrogation program. *See* Complaint, ECF No. 1 at ¶¶ 1-4, 12-13. Plaintiffs

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the Unite thpTc-

raise multiple claims for violations of international law under the Alien Tort Statute and seek compensatory and punitive damages. *See id*. at ¶¶ 168-185.

On December 15, 2015, Plaintiffs and Defendants filed a joint motion to establish a briefing schedule for Defendants' motion to dismiss and to stay initial discovery pending a decision on Defendants' motion. *See* ECF No. 15. With respect to discovery in the case, Defendants represented that they believe discovery will be "complex and costly, likely involving issues relating to classified materials and state secrets." *Id*. at 2. Defendants also stated that they "anticipate seeking discovery involving classified information and documents in the possession of the CIA, other United States government agencies and/or foreign governments." *Id*. at 4. For their part, Plaintiffs stated that they "believe all the information required to adjudicate this matter is available on the public record and disagree that discovery of classified information and/or state secrets will be required." *Id*. at 5. Notwithstanding the parties' disagreement over the need for and scope of any discovery, which the parties acknowledged "will be disputed and require resolution through motion practice," the parties agreed to stay discovery during the pendency of the motion to dismiss. *Id*. at 4, 7.

On December 21, 2015, the Court granted the parties' motion to stay discovery. *See* Order Setting Briefing Schedule, ECF No. 22. In doing so, the Court noted that it would "revisit whether a stay of discovery is appropriate after the Motion to Dismiss is filed." *Id*. at 2-3.

On March 2, 2016, the parties completed briefing on the motion to dismiss. *See* ECF Nos. 27-29. The next day, on March 3, 2016, the Court issued an order partially lifting the stay of discovery, concluding that "this matter should not be unduly delayed" during the pendency of the motion to dismiss. *See* Order Directing Filing of Discovery Plan and Proposed Schedule, ECF No. 30 at 1-2. The Court directed the parties to meet and confer on a joint discovery and scheduling plan by March 25, 2015, and then file a joint plan, or competing plans in the event of a disagreement, by April 8, 2016. *See id*. at 2. Among other things, the Court directed the parties to address the need for any "special procedures" that would govern discovery in the case. *Id*. The Court also scheduled a two-hour hearing on April 22, 2016, to address both the motion to dismiss and the proposed discovery plan and schedule. *See id*. In the meantime, the Court ordered that the "stay of discovery shall remain in effect as to written discovery and depositions." *Id*. However, the Court stated the "parties may begin exchange of initial disclosures pursuant to Rule 26(a)(1), but if the parties are still in agreement as to withholding such disclosures, they may withhold such disclosures pending the April 22, 2016 hearing." *Id*.

DISCUSSION

classified information, and that may be called for in discovery but which, as discussed below, the Defendants are prohibited from disclosing, including in this litigation.

Discovery in this case will center around the CIA's former detention and interrogation program, a covert action program authorized by the President of the United States in 2001, as well as Defendants' role in that program. Over time, certain information about the detention and interrogation program has been officially declassified by the United States and released to the public. Most recently, on December 9, 2014, the Senate Select Committee on Intelligence ("SSCI") publicly released a redacted version of the Findings and Conclusions and Executive Summary of the Committee's Study of the CIA's Detention and Interrogation Program ("Executive Summary"), at http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program. The President determined that the Executive Summary should be declassified with the appropriate redactions necessary to protect national security. The Director of National Intelligence and the CIA, in consultation with other Executive Branch agencies, conducted a declassification review of the Executive Summary and transmitted a redacted, unclassified version of it to the SSCI. Public release of the Executive Summary by the SSCI – along with a separate redacted report from minority committee members and the CIA's response to the Executive Summary – had the effect of disclosing a significant amount of information concerning the detention and interrogation program that the Executive Branch had declassified. For example, some general information

The discovery requests in this case are likely to center on the operational details and internal workings of the detention and interrogation program. While the United States possesses classified information about the program, this case also presents an additional complicating factor from a discovery perspective because Defendants, by virtue of their role as CIA contractors in the program, also likely have in their knowledge and possession information belonging to the United States that is classified, or which could tend to reveal classified information, that they are prohibited from disclosing.[2] Defendants signed nondisclosure agreements with the United States that prohibit them from disclosing classified information without authorization from the United States. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 155 (1989) (per curiam) ("As a condition of obtaining access to classified information, employees in the Executive Branch are required to sign 'nondislosure agreements' that detail the employees' oblig

("The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."). Given the subject matter at issue in this case, the Government has a particularized interest in preventing unauthorized disclosures that would harm national security interests or compromise or impose undue burdens on intelligence and military operations. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527, (1988) ("This Court has recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business.") (citing cases).

Further, any decision by the Government to consider the release of intelligence information requires careful scrutiny, sometimes by multiple Government agencies. This is especially so where the significance of one item of information frequently depends upon knowledge of other items of information, the value of which cannot be appropriately considered without knowledge of the entire landscape. As the Supreme Court explained in

be invoked in litigation in order to protect national security is no ordinary or simple occurrence; rather, it requires a searching review at the very highest levels of Government.

In addition to the judicial authority recognizing the significance of the state secrets privilege and the need for the Executive to invoke it with prudence, *Reynolds*, 345 U.S. at 7 (the state secrets privilege is "not to be lightly invoked"), the Executive Branch's own internal procedure provides for a rigorous, layered, and careful process for review of any potential state secrets privilege assertion, including personal approval from the head of the agency asserting the privilege as well as from the Attorney General. *See* Memorandum from the Attorney General to the Heads of Executive Departments and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009) ("State Secrets Guidance"), at http://www.justice.gov/opa/documents/state-secret-privileges.pdf; *see also Mohamed*, 614 F.3d at 1077, 1090 (citing Guidance). Under this process, the U.S. Department of Justice will defend an assertion of the state secrets privilege in litigation only when "necessary to protect against the risk of significant harm to national security." *See* State Secrets Guidance at 1. The Attorney General also has established detailed procedures for review of a proposed assertion of the state secrets privilege in a civil case. Those procedures require submissions by the relevant

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absolute[.]"). Rather, when the privilege is successfully invoked, the evidence subject to the privilege is "completely removed from the case." *Id.*

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appropriate to prevent improper disclosures; and permitting the United States to review any anticipated discovery disclosures by Defendants related to the detention and interrogation program in order to guard against the unauthorized disclosure of classified information. At this point in the discussions, the Government is optimistic that an agreement can be reached on at least some, though perhaps not all, of the Government's proposed procedures. Consequently, the Government respectfully requests that the Court permit the Government to continue to work with the parties to reach consensus on these special procedures prior to the Court establishing a discovery plan in this case. In order to be of assistance to the Court, undersigned counsel for the United States intends to attend the upcoming hearing set for April 22 to address this matter and any questions the Court may have of the Government. In the event the parties and the Government cannot reach agreement on certain procedures, the Government will be prepared to discuss options to promote the efficiency of any contested litigation over classified or privileged Government information in party discovery to which the Government may object to disclosure.

In addition to party discovery, this case is also likely to involve a substantial volume of third-party discovery requests directed to the CIA and perhaps other United States agencies related to the detention and interrogation program.[5] At this initial

[5] The foreword to Executive Summary states that Senate committee staffers reviewed over 6 million pages of CIA documents during a nearly four-year period while

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district court erred in crafting procedures that attempted to "thread the needle" to enable a private party to use classified information in a civil action where a valid privilege assertion by the Government had been upheld); *Sterling*, 416 F.3d at 348 (rejecting request for "special procedures" to allow party access to classified information, noting that "[s]uch procedures, whatever they might be, still entail considerable risk" of "leaked information" and "inadvertent disclosure" that would place "covert agents and intelligence sources alike at grave personal risk").

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court consider the interests of the United States as it formulates the discovery plan in this case.

Dated: April 8, 2016

Respectfully submitted,

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