UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY AND CHARLIE SAVAGE, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	ECF CASE 14 CIV. 03777 (JPO)

THE UNITED STATES DEPARTMENT OF JUSTICE'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT FOLLOWING REMAND AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant the United States Department of Justice ("DOJ" or the "Government") respectfully submits this reply memorandum of law in further support of its motion for summary judgment, and in opposition to Plaintiffs' cross-motion for summary judgment.

Plaintiffs largely ignore the arguments raised in the Government's moving papers. They do not dispute that the identities of the subjects of the CIA's intelligence-collection and operational activities have generally been recognized to fall within Exemptions 1 and 3. They do not advance any arguments with respect to the Government's withholding of information pursuant to Exemptions 1 and 3 at pages 26-29 of the Preliminary Review Memorandum, and indeed do not even mention those redactions except in a footnote. Plaintiffs' Memorandum of Law in Support of Their Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment Following Remand [ECF No. 86] ("Opp. Br.") at 11 n.3. And they do not challenge the Government's argument that, absent explicit evidence in the text of the Preliminary Review Memorandum that indicates that Durham reached a conclusion that an individual had never been in CIA custody, the Second Circuit's decision regarding waiver is inapplicable. Their failure to oppose these arguments constitutes a waiver, and is fatal to their cross-motion. *Melo v. United States*, 825 F. Supp. 2d 457, 464 (S.D.N.Y. 2011) (arguments made for the first time in a reply brief are waived).

Moreover, the central argument advanced by the Plaintiffs—that the only information withheld at pages 7-9 of the Preliminary Review Report is an unembellished list of names derived from public source information—is false. The withheld information is neither a simple list of names nor public source information. The withheld information originates from classified CIA files, and includes such information as the identities of targets of the CIA's intelligence-

collection efforts, as well as specific pieces of intelligence and CIA operations associated with such individuals. Thus, the entire predicate for Plaintiffs' motion is fundamentally flawed. Accordingly, the Court should grant DOJ's motion for summary judgment, and deny Plaintiff's cross-motion for summary judgment.

ARGUMENT

POINT I

THE DISTRICT COURT HAS PREVIOUSLY UPHELD THE GOVERNMENT'S ASSERTION OF EXEMPTIONS 1 AND 3 OVER THE INFORMATION AT ISSUE AND THE MANDATE RULE THUS PRECLUDES PLAINTIFFS CHALLENGE

Plaintiffs unconvincingly assert that they should be allowed to religitate the Government's Exemption 1 and 3 withholdings notwithstanding the withdrawal of their appeal, the Second Circuit's affirmance of that aspect of the judgment, and the narrow mandate on remand. Plaintiffs argue that this case falls within an exception to the mandate rule for cases in which "substantially different evidence on remand" becomes available. Opp. Br. at 12. The Second Circuit has never recognized such an exception to the mandate rule, however.[1] And even assuming arguendo that such an exception exists, the only purportedly "different evidence" they cite is the release of certain sentences at page 7 of the Preliminary Review Memorandum. Plaintiffs claim that these sentences provided the first indication that the Government has withheld on Exemption 1 and 3 grounds public source information that does not fall within any of the six categories described in the Payne Declaration. *Id.* at 7-12. The "evidence" upon which

[1] Although some lower courts have suggested that such exceptions allow district courts to reconsider matters that fall outside the mandate on remand, an examination of Second Circuit precedent demonstrates that these exceptions apply only to the appellate court's reconsideration of its prior ruling. *See, e.g., United States v. Tenzer*, 213 F.3d 34, 40 (2d Cir. 2000) (while district court could not consider new evidence upon remand, the "law-of-the-case doctrine does not bind us with the same rigidity as it binds the district court"); *see also United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002) ("*appellate courts* may . . . reconsider the issue for 'cogent' and 'compelling' reasons such as . . . the availability of new evidence'" (emphasis added; quoting *Tenzer*, 213 F.3d at 39)). In contrast, "the rule that the district court's authority on remand is limited to those issues left open by the mandate is a firm one and rigidly binds the district court." *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006).

they rely, however, is not new information and it does not suggest that any of the withheld information comes from public sources. Moreover, because the Government's declarations establish that the withheld information falls within the categories for which the Government previously asserted Exemptions 1 and 3, and because this Court has already upheld the withholding of information that falls within those categories, the mandate rule plainly forecloses Plaintiffs' challenge.

The released sentences from page 7, upon which Plaintiffs place so much weight, is found in the introductory paragraph to a section entitled "Detainees Not in CIA Custody [Redacted]." The introduction to that section states:

> According to open-source human rights articles, the following detainees were reported to have been detained in secret CIA interrogation sites. Contrary to open source reports, a thorough review of FBI, CIA and DOD documents failed to confirm that these detainees were held in CIA custody.

(Declaration of Jeannette A. Vargas, dated September 28, 2020 [ECF No. 82] ("Vargas Decl."), Ex. A). The remainder of this paragraph, as well as the text that follows, is redacted.

Plaintiffs appear to read these sentences to suggest that the only information at issue is a unadorned "list of names" derived from public sources, "and nothing more," similar to what was released on page 3 of the Preliminary Review Memorandum. Opp. Br. at 10. Plaintiffs argue that names of individuals do not fall within the six categories of information over which the CIA previously asserted Exemption 1 and 3, and furthermore, that a list of names derived from public sources cannot be protected under Exemptions 1 and 3. Opp. Br. at 7-12. These arguments are both factually and legally flawed.

As an initial matter, the material that has been withheld under Exemptions 1 and 3 is not a list of names. The Government has withheld paragraphs of text that contain discussions of

classified information derived from CIA files regarding specific individuals, including CIA intelligence associated with those individuals and CIA operations and activities that took place in relation to those individuals. (Declaration of Vanna Blaine, dated September 25, 2020 [ECF No. 80] ("Blaine Decl."), ¶¶ 11-14). Plaintiffs' arguments regarding whether a "list of names" derived from public sources can be subject to Exemptions 1 and 3 are inapt.

To the extent that Plaintiffs are suggesting that the Government could essentially transform the withheld text on pages 7-9 into a "list of names" by redacting the information regarding the CIA's intelligence and activities associated with each individual, Opp. Br. at 10, the Blaine Declaration explains why this would nonetheless tend to reveal that these individuals "were the subjects of CIA intelligence collection, operational activities, or analysis." (Blaine Decl. ¶ 13). Each name would appear in the midst of a sea of material that has been redacted because it contains classified CIA information. This would reveal that these individuals "were considered of sufficient intelligence interest to warrant analysis or assessment" of some kind by the CIA, even if the details of such intelligence-gathering or operations was unknown, thereby highlighting the CIA's intelligence priorities and tradecraft. (*Id.* ¶ 14). Furthermore, because Durham did not include these names in the section of the memorandum which listed the individuals for whom Durham found no evidence of CIA involvement, but instead put these individuals in other categories, the implication could be drawn that, as to the individuals identified in the section beginning on page 7, there was some level of CIA involvement. (*Id.*).

As the Government explained in its moving papers, information that identifies the targets of the CIA's intelligence-collection or operational efforts is protected under Exemptions 1 and 3. Gov't Br. at 17-21. Plaintiffs do not contest this. Instead, they raise a procedural argument, claiming that the identification of intelligence targets does not fall within the six categories over

which the Government previously asserted Exemptions 1 and 3. Such an argument is meritless. The names of CIA intelligence targets plainly fall within Category 5 of the Payne Declaration, which covers details regarding the CIA's intelligence activities and methods. Indeed, it has long been recognized that the selection of the targets of the CIA's intelligence-collection efforts constitute part of its intelligence methods, including its prioritization of its resources. *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 376-77 (D.C. Cir. 2007); *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992).

Plaintiffs' contention that the paragraphs at issue could not possibly contain information falling into the six categories is premised, like so many of Plaintiffs' arguments, on the erroneous assumption that the withheld material is nothing more than a list of names. Opp. Br. at 11-12. In particular, Plaintiffs argue that names standing alone cannot constitute "descriptions" of intelligence activities and methods. *Id.* But the names do not stand alone in a vacuum, devoid of context—they are intertwined in text that describes intelligence activities and methods associated with each individual, and are themselves an integral part of the description of the CIA's intelligence activities and methods. And because Durham did not place these names in the section of the report pertaining to individuals for whom there was no CIA involvement, but in a different section of the report, this context further suggests that the CIA had some intelligence interest in the individuals in question.

More fundamentally, however, in making this argument, Plaintiffs focus on a single phrase in the Payne declaration, "description of intelligence activities and methods," and ignore entirely the rest of Payne's lengthy description of what is included by this category. As described in the Payne Declaration, this category is quite broad, and generally encompasses all:

> details that would disclose other intelligence methods and activities of the CIA. Intelligence methods are the means by which the CIA accomplishes its mission.

> Intelligence activities refers to the actual implementation of intelligence methods in an operational context. Intelligence activities are highly sensitive because their disclosure would often reveal details regarding specific methods, which in turn could provide adversaries with valuable insight into CIA operations that could impair the effectiveness of CIA's intelligence collection.

(Declaration of Jan M. Payne, dated April 27, 2016 [ECF No. 41] ("Payne Decl.") ¶ 13). The selection of certain individuals as subjects of the CIA's intelligence-collection efforts falls within the description of "the actual implementation of intelligence methods in an operational context." The Payne Declaration further explains that this category includes "undisclosed details about the practice of intelligence gathering and Agency tradecraft, which continue to have application to other types of CIA operations and activities. . . . From these details, a picture of the breadth, capabilities, and limitations of the CIA's intelligence collection or activities would begin to emerge." (*Id.* ¶ 15). Again, the names of the individuals who were the subjects of such intelligence-collection efforts plainly are among the "details about the practice of intelligence gathering and Agency tradecraft" that could tend to reveal "a picture of the breadth, capabilities, and limitations of the CIA's intelligence collection or activities." Thus, even a list of individuals of intelligence interest to the CIA, without more, would fall within the category of intelligence methods.

Plaintiffs falsely claim that Blaine "stops short of saying that the names . . . fit into any of the [Payne] categories." Opp. Br. at 11. But Blaine explicitly affirms that "disclosure of the names would tend to reveal" information in Category 5, "specific intelligence methods and tradecraft," in particular methods and tradecraft "related to the CIA's interest in and prioritization of particular targets," as well as information in Category 1, "human intelligence sources." (Blaine Decl. ¶ 13).[2] Blaine further states that "terrorist organizations, foreign

[2] Plaintiffs also argue that the wording of paragraph 12 of the Blaine Declaration left unclear whether Blaine was asserting that all of the information that has been withheld under Exemptions 1 and 3 in the sections of the

intelligence services, and other hostile groups continuously gather information concerning the Agency's intelligence capabilities and priorities, and exploit such information to undermine the Agency's mission. In order to continue the effective collection of foreign intelligence, the CIA must avoid disclosing the subjects of such collection." (*Id.*). This assessment by an original classification authority, to which this Court must grant deference, Gov't Br. at 16-17, is dispositive of Plaintiffs' arguments.

In the face of Blaine's definitive statements regarding the applicability of Exemptions 1 and 3 to the information at issue, Plaintiffs attempt to cast doubt on the foundation of Blaine's testimony regarding Durham's categorization of the detainees, on the grounds that there is no indication in the record that she spoke with Durham himself. Opp. Br. at 11. But Blaine, in stating that Durham categorized individuals based upon information obtained from classified CIA records, is doing nothing more than describing the literal contents of the Preliminary Review Memorandum and how it is organized. And not only does the Memorandum state that Durham reached his conclusions based upon his review of CIA records (*see* Vargas Decl., Ex. A), as an original classification authority, Blaine is aware of what information has been classified by the CIA and can recognize that information when it appears in the Memorandum.

Plaintiffs also attempt to equate the material withheld from pages 7-9 with the material released at page 3 of the Preliminary Review Memorandum, to suggest that if the latter could be released without harm to national security, so could the former. Opp. Br. at 10-11. But in contrast to the information withheld at pages 7-9, the information released on page 3 was, in fact, a bare list of names without any other associated information, under a heading that identifies

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Memorandum at issue fell within the six Payne categories, or just some of the information. Opp. Br. at 11. The Government can confirm that Blaine determined that all information over which the Government has asserted Exemptions 1 and 3 in the relevant sections (including the names themselves) falls within one of the six categories.

them as individuals for whom there was no CIA involvement. The two sections of the memorandum therefore are not equivalent, or even similar in nature.

Finally, Plaintiffs point to the released sentences at page 7 as suggesting that the information withheld from pages 7-9 came from public source reporting. The released language suggests no such thing. Indeed, the released portion explicitly states that based upon, *inter alia*, Durham's review of CIA files, he determined that the public source reporting with respect to the individuals in question was *incorrect*. And the CIA's declaration makes clear that the paragraphs that follow contain information Durham obtained from classified CIA files, not from public reporting. (Blaine Decl. ¶¶ 11-14).[3]

The released sentences do nothing more than indicate that Durham identified certain of the individuals whose treatment would be the subject of his investigation by looking at open source reporting. But even this is not new information. Attorney General Holder announced that Durham's mandate was to "examine any possible CIA involvement with respect to 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001" and that he "identified the matters to include in his review by examining various sources including . . . public source information." (Declaration of Douglas Hibbard, dated September 9, 2014 ("Hibbard Decl.") [ECF No. 17], Ex. F). This evidence was part of the record before the district court when it decided the Government's summary judgment motion.

Plaintiffs essentially argue that, because Durham identified certain of the alleged detainees who would be the subject of his review by looking at public source information, the classified information he examined regarding the CIA's intelligence and activities with respect to

[3] Even though the information withheld here is not in fact public source information, there are many instances where information can be protected under Exemptions 1 and 3 even if originally derived from public sources. *See, e.g.*, *CIA v. Sims*, 471 U.S. 159, 176-77 (1985) (holding that public sources of information can constitute intelligence sources and methods within the meaning of the National Security Act).

each such individual is no longer protected under Exemptions 1 or 3. Plaintiffs are unable to cite any precedent in support of this illogical proposition, however, as the law is quite clear that unconfirmed public reporting does not suffice to waive the protection of Exemptions 1 or 3. *See, e.g.*, *New York Times v. CIA*, 965 F.3d 109, 116 (2d Cir. 2020) (under "strict" test for official acknowledgment, information must (1) "[be] as specific as the information previously released," (2) "match[] the information previously disclosed," and (3) "[be] made public through an official and documented disclosure"); *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 621-22 (D.C. Cir. 2011) ("'[I]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.'" (citation omitted)). The manner in which Durham originally derived the matters that would be the subject of his review has no bearing on whether the classified information to which he was given access as part of that review, and which he then set forth in the Preliminary Review Memorandum, remains protected under FOIA Exemptions 1 and 3. Nor does it constitute new evidence that would allow Plaintiffs to overcome the mandate rule and relitigate matters that they elected not to challenge on appeal.

POINT II

THE GOVERNMENT HAS CORRECTLY IDENTIFIED THE INFORMATION SUBJECT TO THE SECOND CIRCUIT'S MANDATE

In arguing that DOJ has failed to comply with the Second Circuit's mandate, Plaintiffs attack a straw man. Plaintiffs repeatedly claim that the Government has taken the position that "only those passages that set forth Durham's ultimate conclusion that a detainee was not in CIA custody" should be released, and that the Government has therefore read out the term "related to" from the Second Circuit's mandate. Opp. Br. at 1, 4. Plaintiffs demand that the Government "release not just statements of Durham's conclusion, but also material that contributed to—that

is, 'related to' —that conclusion, such as the law and facts that Durham relied upon to reach that conclusion." Opp. Br. at 7. Yet the Government has never argued to the contrary. For the avoidance of doubt, the Government agrees that, where the Preliminary Review Memorandum explicitly sets forth a conclusion that a particular detainee was not in CIA custody, the Second Circuit's waiver decision applies to the statement that sets forth such a conclusion, as well as to any facts, law, or reasoning set forth in the Preliminary Review Memorandum that explains the basis for this conclusion. Furthermore, DOJ affirms that it has released the portions of the Preliminary Review Memorandum that relate to any such conclusion, except to the extent that such information was protected by another FOIA exemption. Thus, Plaintiffs' lengthy discussion of the meaning of the phrase "related to" is inapposite.[4]

But Plaintiffs nowhere address the Government's actual argument—that the Second Circuit's decision applies only where there is a textual indication in the memorandum that Durham made a determination, conclusion, or finding that an individual had not been in CIA custody. Gov't Br. at 22-25. If the Preliminary Review Memorandum does not indicate that Durham made a determination about whether a detainee was in CIA custody in the first instance, then there is no "conclusion" to which any material in the memorandum can "relate."

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Government's motion papers, DOJ's motion for summary judgment should be granted.

[4] Plaintiffs mention that the Second Circuit's decision also encompasses any exhibits to the Durham memoranda, and suggest that any research or evidence found in such exhibits which support Durham's conclusions that an individual was not in CIA detention should be produced. Opp. Br. at 7. As set forth in the *Vaughn* index, however, the Preliminary Review Memorandum did not have any attached exhibits. *See* Hibbard Decl., Ex. C Entry 7.

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November 20, 2020

Respectfully submitted,

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