UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES ELMER MITCHELL and JOHN JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. 16-MC-0036-JLQ ORDER RE: THIRD AND FOURTH MOTION TO COMPEL AND ASSERTION OF STATE SECRETS PRIVILEGE

Related Case:

SULEIMAN ABDULLAH SALIM, et al., Plaintiffs, vs. JAMES E. MITCHELL and JOHN JESSEN, Defendants.	No. CV-15-0286-JLQ

BEFORE THE COURT are Defendants/Petitioners' Third and Fourth Motions to Compel (ECF No. 54 & 64) which seek to compel documents pursuant to a subpoena and the depositions of two CIA officials: Gina Haspel and James Cotsana. The court previously heard argument on the Third Motion to Compel on February 14, 2017. On May 5, 2017, the court heard oral argument on privilege issues related to both Motions, including the Government's assertion of the state secrets privilege.

On May 5, 2017, Assistant United States Attorney Andrew Warden appeared on behalf of the Government. Christopher Tompkins, Brian Paszamant, Henry Schuelke, III,

and James Smith appeared for Defendants/Petitioners James Mitchell and John Jessen. Hina Shamsi, Lawrence Lustberg, Steven Watt, and Dror Ladin appeared on behalf of Plaintiffs in the primary case, *Salim et al. v. Mitchell et al.*, 15-286.

I. Introduction and Background

The procedural history and more detailed recitation of the alleged facts has been set forth in prior orders and is not repeated here. In brief, Petitioners James Mitchell and John Jessen in the miscellaneous action, 16-mc-0036, are the Defendants in the related case, *Salim et al. v. Mitchell et al.*, 15-286-JLQ, and are referred to as Defendants herein. Respondent is the United States, representing the interests of the Central Intelligence Agency ("CIA") and Department of Justice ("DOJ") in responding to the subpoenas and requests for depositions. Plaintiffs in the underlying action, 15-286-JLQ, allege Defendants worked under contract with the CIA and "designed, implemented, and personally administered an experimental torture program." (Complaint, ¶ 1). Defendants worked as independent contractors with the CIA. The parties have informed the court the contracts contain indemnity provisions and the Government has been paying all of Defendants' legal fees in these extended and prolonged proceedings.

Defendants and the Government have engaged in a protracted dispute over the subpoenas, resulting in the filing by counsel for the Defendants of four Motions to Compel. Plaintiffs, who bear the burden of proof on their claims, have consistently taken the position, "the facts necessary to adjudicate this matter are available in the public record." (ECF No. 34 in Case # 15-286-JLQ, at p. 3). Plaintiffs have previously asserted Defendants' discovery proposal was "overbroad, protracted, and unduly burdensome." (*Id*. at 4). Plaintiffs maintain that position in their most recent brief. (ECF No. 79).

Most of the discovery dispute has involved document production, redaction, and assertions of privilege. The Fourth Motion to Compel involves depositions of a current and former CIA official, and the Government has asserted the state secrets privilege precludes those depositions. The parties argue about the application of numerous other statutory and common law privileges, but the state secrets privilege is absolute. *United*

States v. Reynolds, 345 U.S. 1, 11 (1953)("Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that state secrets are at stake").

II. Current Posture and Local Rule 37.1 Statement

At the February 14, 2017, hearing on the Third Motion to Compel, the Government and Defendants stated approximately 170 documents remained in dispute, totaling approximately 1,300 pages. The court directed the parties to make a final attempt to resolve their disputes and file an additional Local Rule 37.1 Statement. (Order at ECF No. 81). The parties filed the Statement (ECF No. 88) on April 14, 2017, and state they have narrowed the dispute to 48 of the original 170 documents. Defendants state they do not concede the Government's assertion of privilege was proper, but believe the information withheld/redacted is immaterial. (ECF No. 88, p. 6). The parties disagree concerning: 1) the CIA Act; 2) the NSA Act; 3) deliberative process privilege; 4) attorney-client privilege; 5) attorney work product; and 6) the state secrets privilege. In addition to the document dispute, the parties additionally disagree concerning whether Gina Haspel, the current Deputy Director of the CIA, and James Cotsana, a former CIA official, should be subject to deposition in this matter.

At the May 5, 2017, hearing, the parties informed the court the dispute had been slightly reduced to 47 documents. The Government presented a chart dividing the remaining documents into three categories: 1) 24 documents which do not withhold information about Defendants; 2) 3 documents where the Government and Defendants "agree information can be withheld based on the listed privilege"; and 3) 20 documents "requiring privilege adjudication". This chart was labeled Exhibit 2 and filed. (ECF No. 89-1).

Despite the many areas of privilege dispute, as stated *supra*, the state secrets privilege is largely dispositive.

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III. The State Secrets Privilege

The state secrets doctrine encompasses two applications: 1) complete bar to adjudication of claims premised on state secrets (the 'Totten bar', *Totten v. United States*, 92 U.S. 105 (1876)); and 2) an evidentiary privilege that excludes privileged evidence from the case and may result in dismissal of a claim (the 'Reynolds privilege', *United States v. Reynolds*, 345 U.S. 1 (1953)). The *Totten* bar does not apply in this case. This is not an action where "the very subject matter of the action is a matter of state secret." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1078 (9th Cir. 2010)(en banc). In fact, *Mohamed*, dealt with the CIA's rendition, detention, and interrogation program and applied the *Reynolds* privilege analysis. Similarly, in *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), plaintiff claimed he was rendered, detained, and interrogated by the CIA in 2004. The court applied a *Reynolds* analysis rather than the *Totten* bar. In both *El-Masri* and *Mohamed* the Government argued for dismissal and the court found application of the state secrets doctrine required dismissal of each case.

However, both *El-Masri* and *Mohamed* were opinions issued years before the Senate Select Committee on Intelligence (SSCI) issued its report in 2014 on the CIA enhanced interrogation program. In *Mohamed* the Ninth Circuit specifically stated: "we do not hold that the existence of the extraordinary rendition program is itself a state secret." *Id.* at 1090. The Circuit also stated, "partial disclosure of the existence and even some aspects of the extraordinary rendition program does not preclude other details from remaining state secrets if their disclosure would risk grave harm to national security." *Id.* at 1090. Considerably more information about the program is now public, and there can be no argument the *Totten* bar applies.

A. The Reynolds Privilege In the case of *United States v. Reynolds*, 345 U.S. 1 (1953), the plaintiffs were the widows of three civilian observers who died in an airplane crash where onboard the military was testing "secret electronic equipment." In discovery, Plaintiffs sought an Air Force official accident report and the statements of three survivors. The Government asserted a national security interest in not disclosing

the information. The court stated: "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked." *Id*. at 532.

The court stated in determining if the privilege applies: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."*Id*. at 9-10. If there is "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," then the privilege applies. *Id*. at 10. The degree of showing of necessity for the information will determine how far the court must probe in determining if the privilege applies, "but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id*. at 11. In *Reynolds*, the court remanded for further proceedings because "it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id*.

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010)(en banc), is the leading authority on the state secrets doctrine in the Ninth Circuit and application of the *Reynolds* privilege. It sets forth a three-step analysis:

1) First, the court must "ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied";

2) Second, the court must make an independent determination whether the information is privileged; and

3) Third, the court must determine how the matter will proceed in light of a successful privilege claim. *Id.* at 1080.

The procedural component requires "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer." *Id*. The second step of the *Reynolds* analysis "places on the court a special burden to assure itself that an appropriate balance is struck between

protecting national security matters and preserving an open court system." *Id*. at 1081. Third, the court must determine how the matter will proceed if the privilege applies. There are three circumstances, discussed further *infra*, when the *Reynolds* privilege may justify terminating the case.

(i) Waiver - Before addressing the procedural requirements for assertion of the privilege, the court briefly addresses the argument of waiver. On March 8, 2017, the Government formally asserted the state secrets privilege herein. This was approximately 8 months after Defendants first served the subpoena for documents, and 11 months after the Government first appeared in the related 15-286 case. The Government has previously argued it need not assert the privilege until a specific document was at issue in a motion to compel. That argument runs contrary to the Ninth Circuit's decision in *Mohamed*, where plaintiffs argued invocation of the privilege was made too early: "The privilege may be asserted at any time, even at the pleading stage." *Id*. at 1080. At the hearing on the Third Motion to Compel on February 14, 2017, Defendants raised the issue of waiver. The court addressed the issue in its prior Order and reserved ruling on the issue of waiver. See (ECF No. 70, p. 6)("The parties may present any such authority they have on the issue of waiver in the upcoming briefing."). In subsequent briefing the Government argued the privilege had not been waived (ECF No. 75, p. 10-15). Defendants presented the court with little argument, and no authority, to support a determination the privilege had been waived. The court finds the state secrets privilege has not been waived.

(ii) Step 1: Procedural Requirements

In this case, a formal claim of the state secrets privilege requires the claim be made by the director of the CIA. The Government has made this claim, supported by the Declaration of CIA Director Michael Pompeo (ECF No. 75-16). The Government states it also utilized the Executive Branch guidance issued in 2009 by Attorney General Holder which requires assertion of the privilege be approved by the Attorney General. (ECF No. 59-1). The Government did not file a Declaration from Attorney General Sessions, but

states the guidance memo was followed, including "personal consideration of the matter by the Attorney General". (ECF No. 75, p. 20).

Defendants have not argued a formal Declaration by the Attorney General was required, but the court raised the issue at the hearing. In *Mohamed*, the Ninth Circuit stated it was "informed at oral argument that the current Attorney General Eric Holder, has also reviewed and approved the ongoing claim of privilege." 614 F.3d at 1080. The *Mohamed* court also stated, "although *Reynolds* does not require review and approval by the Attorney General .... such additional review by the executive branch's chief lawyer is appropriate and to be encouraged." *Id*. The court finds the Government's assertion the Attorney General personally considered the matter is sufficient under *Mohamed* and in consideration of Director Pompeo's quite thorough and detailed Declaration.

The claim of state secrets privilege "must be presented in sufficient detail for the court to make an independent determination of the validity of the claim of privilege and the scope of the evidence subject to the privilege." *Mohamed* at 1080. The Pompeo Declaration states through the exercise of his official duties he has become familiar with this lawsuit and the claims therein. (ECF No. 75-16, ¶ 6). He states he is asserting the state secrets privilege after "careful and personal consideration ... to protect and preserve national security information, the disclosure of which reasonably could be expected to cause serious, and in many instances, exceptionally grave damage to U.S. national security." (*Id*. at ¶ 7). He states that through the Senate Select Committee investigation and Report, some information about the CIA's Detention and Interrogation Program (hereafter the "Program") has been officially declassified and publically released. However, he also avers "many details surrounding the Program remain highly classified due to the damage to national security that reasonably could be expected to result from disclosure." (*Id*. at ¶ 10). Director Pompeo further states he is asserting the privilege over various categories of information, including: 1) information identifying individuals involved with the Program; 2) information regarding foreign government cooperation with the CIA; 3) information concerning the operation and location of clandestine

overseas CIA facilities; 4) information regarding capture and transfer of detainees; 5) intelligence information about detainees and terrorist organizations, including intelligence obtained from interrogations; 6) information concerning intelligence sources and methods; and 7) information concerning the CIA's internal structure and administration. (*Id*. at ¶11). Director Pompeo states all 172 documents then at issue (which was reduced to 47 by the May 5, 2017 hearing) were made available to him in unredacted form. He states he reviewed a "representative sample" as well as the Appendix attached to his Declaration which contains "unclassified summaries" of all the documents. (*Id*. at ¶ 12).

In regard to the Fourth Motion to Compel and requested depositions of James Cotsana and Gina Haspel, Director Pompeo states he is "aware there has been public speculation" Cotsana and Haspel were involved with the Program. (*Id*. at ¶18). However, he states the CIA has never officially acknowledged their role, if any, and, "the concept of official acknowledgment is important to the protection of the CIA's intelligence mission and its personnel." (*Id*.). Director Pompeo also states "the absence of official confirmation from the CIA leaves an important element of doubt about the veracity of the information," which carries an additional layer of protection and confidentiality. (*Id*.). He states the CIA "could not permit these individuals to answer any questions pertaining to the program." (*Id*. at ¶19).

The court finds CIA Director Pompeo's Declaration to be comprehensive and thorough and the procedural requirements for invoking the state secrets privilege have been met.

(iii) Step Two - Evaluation of the Claim of Privilege -

This second step of the *Reynolds* analysis "places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system." *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1081 (9th Cir. 2010). The Ninth Circuit further stated: "In evaluating the need for secrecy we acknowledge the need to defer to the Executive on matters of foreign policy

and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena. But the state secrets doctrine does not represent a surrender of judicial control over access to the courts." *Id*. at 1081-82. The Ninth Circuit instructs courts to view claims of state secrets privilege with a "skeptical eye" and not accept at "face value" claims of privilege, but cautions "too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect." *Id*. at 1082.

A court is not required to look at the documents at issue. In *Reynolds*, the Supreme Court stated it may be possible the court is satisfied from the circumstances of the case that compulsion of the evidence at issue poses a reasonable danger to national security and should not be divulged. "When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 345 U.S. at 10 (1953). However, in other cases, such as *Mohamed*, the court examined all the documents.

At the second step of the *Reynolds* analysis, the court must sustain a claim of privilege if "it is satisfied from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose matters which, in the interest of national security, should not be divulged." *Mohamed* at 1081. The court states "we do not offer a detailed definition of what constitutes a state secret ... We do note, however, that **an executive decision to classify information is insufficient to establish the information is privileged**." *Id*. at 1082 (emphasis added). Although classification may be some support for a determination of privilege, it is not conclusive. *Id*.

In *Mohamed*, the Government asserted the privilege over four categories of evidence: 1) information that would tend to confirm or deny whether Defendant or another private entity assisted the CIA with clandestine intelligence activities; 2) information about whether any foreign government cooperated with the CIA in clandestine activities; 3) information about the scope or operation of the CIA detention

and interrogation program; and 4) any other information concerning CIA clandestine intelligence operations that would reveal activities, sources, or methods. *Id*. at 1086. The Ninth Circuit stated: "These indisputably are matters that the state secrets privilege may cover." *Id*. These categories are similar, or in some instances, identical to the categories of information at issue herein.

This court evaluated three of the 47 documents at issue during the court proceedings on May 5, 2017. The court reviewed one document from each of the three categories presented in Exhibit 2. (ECF No. 157-1). The court reviewed **Document 39**, which is 36-pages in length and described as: "Memorandum for Deputy Director of Operations, Subject: Death Investigation - Gul Rahman."[1] This document was produced to Defendants with redactions. The Unclassified Summary (ECF No. 75-16) provides fairly specific detail as to the types of information redacted. The court ruled the redactions were appropriate based on the state secrets privilege and the CIA Act.

The court then reviewed **Document 241** which is described as an email concerning interrogation training. This document had been produced in redacted form, and the redactions are described in the Unclassified Summary. The court found redactions were appropriate based on the state secrets privilege and the CIA Act.

The court also reviewed **Document 197**, this document is described as a May 2002 email, and was withheld in full from Defendants. The court found the document was protected from production by the state secrets privilege and CIA Act and was properly withheld in full.

After making these rulings, the court recessed for approximately an hour and a half and directed Defendants and the Government to meet further in light of these rulings to see if they could resolve disagreements. When the parties returned to court, they reported only 7 documents remained at issue. The parties disputed application of the state secrets

[1]The document descriptions are taken from a summary chart jointly submitted by the parties (ECF No. 88-1)and the "unclassified summaries" filed by Director Pompeo. (ECF No. 75-16).

privilege to **Document 40**, which is described as an article written by Defendants entitled: "Recognizing and Developing Countermeasures to Al Qaeda Resistance to Interrogation Techniques: A Resistance Training Perspective." (ECF No. 88-1). The parties also disputed application of the attorney-client privilege to **Document 165**, described as a two-page email from January 2003 between a CIA lawyer and Defendant Jessen.

The parties further disputed application of the deliberative process privilege as to five documents. The Government also asserts the state secrets privilege over all of these documents, so if the court were to find the deliberative process privilege did not apply, portions of the documents may still be withheld based on the state secrets privilege. The five documents are described as follows:

Doc. 46 - Summary of Reflections of Chief of Medical Services (Draft) - was produced in redacted form. Unclassified Summary states information about Defendants' role in development of Program was produced unredacted

Doc. 103 - Initial Draft Plan, March 2002, Outline for Interrogation Program - **withheld in full** - according to Unclassified Summary (ECF No. 75-16) this document was written by Defendants Mitchell and Jessen.

Doc. 137 - Origins of the Program - **withheld in full** - Unclassified Summary states this is an unfinished draft memorandum by an unknown author.

Doc. 157 - July 2002 Cable - Next Phase of Abu Zubaydah Interrogation

Doc. 158 - July 2002 Cable - Operational and Security Considerations for Next Phase of Zubaydah Interrogation.

The court has reviewed the seven documents described *supra* in an unredacted form at a secure facility and reached the following conclusions. This court's description of its conclusion and reasoning must necessarily be brief. See *Mohamed*, 614 F.3d 1070, 1085 (9th Cir. 2010)("...we explain our decision as much as we can without compromising the secrets we are required to protect."). Five of the seven documents involve a dispute concerning the deliberative process privilege.

The deliberative process privilege "shields certain intra-agency communications from disclosure to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 979 (9th Cir. 2009). To fall within this privilege a document must be both predecisional and deliberative. *Id*. The Ninth Circuit has given direction on the meaning of these two terms.

Predecisional - "A predecisional document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." 569 F.3d at 979.

Deliberative - a document is part of the deliberative process "if the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id*. at 979-980. In support of the deliberative process assertions, the Government submitted a 49-page Declaration of an anonymous "Deputy Director of CIA for Operations" (ECF No. 75-19). The Declaration attempts to describe, through unclassified summaries, how the documents at issue are predecisional and deliberative.

As to **Document 40**, the court denies the Motion to Compel and finds the state secrets privilege applies. The court also notes the document was allegedly written by Defendants and thus they would have knowledge of its contents. **Document 46**: the court denies the Motion to Compel and finds the deliberative process privilege does apply. The court finds the document contains the author's assessment and summary and is predecisional and deliberative. As to **Document 103**, the court grants the Motion to Compel as it does not find the deliberative process privilege applies. Further, it would appear to the court this document could be produced in a largely unredacted format. As to **Document 137**, the court finds the document is predecisional and deliberative and covered by the state secrets privilege. As to **Document 157**, the court grants the Motion

to Compel as it finds the document is operational rather than predecisional. The Government may make appropriate redactions based on state secrets privilege. As to **Document 158**, the court denies the Motion to Compel finding the deliberative process and state secrets privileges apply.

Finally, as to **Document 165**, the court grants the Motion to Compel. Although this document appears to be of minimal, if any, relevance, the court finds the attorney-client privilege asserted by the Government does not apply, The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The party asserting the privilege has the burden of establishing the relationship and privileged nature of the communication. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). "If the advice sought is not legal advice, but, for example, accounting advice from an accountant, then the privilege does not exist." *Id.* The Ninth Circuit has utilized an eight-part test for when the privilege applies: "1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or his legal adviser, (8) unless the protection be waived." *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

Document 165 is described in the unclassified summary (ECF No. 75-16) as a January 2003 "email exchange between a CIA lawyer and Dr. Jessen". Defendant Jessen argues the privilege does not apply because he is an independent contractor. In *Graf*, the Ninth Circuit held the attorney client privilege could cover communications between corporate counsel and an outside consult, if the consultant was a "functional employee". To protect any state secret or classified information therein, this court does not set forth the nature of the email communication, but the court concludes Document 165 is not protected by attorney-client privilege.

As to the three documents (103, 157, and 165) on which the court has overruled the

deliberative process or attorney client privilege, the Government has agreed to reprocess and produce those documents with appropriate redactions of information covered by state secrets privilege.

(iv) Step Three - How Should the Matter Proceed

Third, the court must determine how the matter will proceed given the Government's assertion of state secrets privilege, and the court's determination the privilege applies. There are three circumstances when the *Reynolds* privilege justifies terminating the case:

1) if the plaintiff cannot prove the prima facie elements of his claim with nonprivileged evidence;

2) if the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim; or

3) if litigating the case on the merits would present an unacceptable risk of disclosing state secrets because the privileged and nonprivileged evidence is "inseparable". 614 F.3d at 1083.

As to the first circumstance, Plaintiffs have long maintained they can prove their case with the publicly available information and do not need this additional discovery. As to the second circumstance, Defendants state if the privilege is upheld they "may need to seek relief". (ECF No. 76, p. 18). Unlike in *Mohamed* and the Fourth Circuit's *El-Masri* case, where the Government sought dismissal, here the Government states it "is not seeking dismissal". (ECF No. 75, p. 18). Defendants cite case law stating if information removed from the case deprives the defendant of a valid defense, the court may grant summary judgment for the defendant. Plaintiffs' brief argues, with some justification, much of the discovery being sought is disproportionate and unnecessary. (ECF No. 79, p. 1). Plaintiffs also argue much of the information goes to undisputed issues, such as "Defendants were not personally present for the torture of Mr. Salim and Mr. Ben Soud." (*Id*. at 2). The court observes the information sought is on a subject where there is already ample evidence such as that provided through the declarations and depositions of

former CIA officials Rizzo and Rodriguez.

Although the parties have somewhat addressed the impact of the state secrets privilege assertion on the litigation, the question is not fully before the court. The Government does not seek dismissal. Defendants state they may seek "relief" at some later time, and Plaintiffs contend the case may proceed. There are numerous cases in which the assertion of state secrets privilege has prevented the case from proceeding. However, the privilege did not result in dismissal in the Supreme Court's seminal *Reynolds* case. *In re Sealed Case*, 494 F.3d 139 (D.C. Cir. 2007) is also instructive on the impact of the *Reynolds* privilege. There the court stated when the state secrets privilege is successfully invoked, the effect "is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence." *Id*. at 145. The court found the plaintiff could make a prima facie case without the privileged information from the two Inspector General reports at issue, and noted portions of the report and attachments were not privileged. *Id*. at 145-46. The court also found the privileged information did not deprive the defendants of a "valid defense". The court stated a "valid defense" is more than just a hypothetical or possible defense: "A 'valid defense,' as contemplated by this circuit's precedents, is meritorious and not merely plausible and would require judgment for the defendant." *Id*. at 149. Lastly, the court did not find the privileged and unprivileged information so entangled as to require dismissal: "there is no basis on this record for a presumption that a witness who has access to classified materials is unable to testify without revealing information that he knows cannot lawfully be disclosed in a public forum." *Id*. at 153.

It is the court's determination, at this juncture, the Government's assertion of the state secrets privilege does not prevent this matter from proceeding. In fact, no party credibly argues dismissal is required because of the state secrets privilege. Plaintiffs and the Government contend the matter can proceed, and Defendants state they may seek relief.

IV. The CIA Act and NSA Act

In addition to the state secrets privilege, the Government also relies on the CIA Act, 50 U.S.C. § 3507, in resisting the requested discovery and argues the Act prohibits the depositions of Gina Haspel and James Cotsana. The Act provides, in part: "In the interests of the security of the foreign intelligence activities of the United States ... the Agency shall be exempted from ... the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." The Ninth Circuit has stated this statute provides the Director of the CIA shall "protect intelligence sources and methods from unauthorized disclosure." *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996). The court stated the statute provides "broad authority" and the statutory mandate is "only a short step from exempting all CIA records from FOIA." *Id*. The court held the statute "authorizes the CIA's refusal to confirm or deny the existence of an employment relationship between itself and [an alleged agent]". The parties also dispute whether the NSA Act, 50 U.S.C. 3024(I) shields the documents from discovery. The statute provides: "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." The analysis here is similar to the CIA act. See *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007)("courts are required to give great deference to the CIA's assertion that a particular disclosure could reveal intelligence sources or methods.")

In this case, it is public knowledge Gina Haspel is currently Deputy Director of the CIA. It has been widely reported she had a role in the Detention and Interrogation Program, including overseeing a 'black site' in a foreign country, where Abu Zubaydah was detained and interrogated, and she is also alleged to have played a role in destroying videotapes of interrogations. Information about her role in the Program has been reported by sources such as the New York Times (ECF No. 65-7)[2], however, the CIA has not

[2]Similar articles appeared in the Washington Post and The New Yorker magazine (ECF No. 77-22).

officially confirmed her role. Defendants argue the Government has officially confirmed her role, but the court disagrees. Defendants point to a CIA press release announcing her elevation to Deputy Director. (ECF No. 65-6) However, this press release does not detail her role, if any, in the Program. It lists former titles: "Deputy Director of the National Clandestine Service, Deputy Director of the National Clandestine Service for Foreign Intelligence and Covert Action, Chief of Staff for the Director of the National Clandestine Service, and in the Counterterrorist Center." Defendants argue her supervisor at one time, Jose Rodriguez, wrote about her alleged role in the Program in his book, but called her "Jane". Rather than confirming her participation in the Program, the use of a pseudonym evidences the desire to protect the confidentiality of the information.

James Cotsana is now retired, and the CIA has not confirmed his role in the Program. However, Defendants claim he was their direct report. Defendants argue his role with the Program is no longer secret and has been publicly disclosed. Defendants have filed an internet printout which purports to be from the Association of Former Intelligence Officers in Maine and states that on October 20, 2012, James Cotsana was scheduled to speak about the CIA's Detention and Interrogation Program. (ECF No. 77-23). Defendants also submitted a profile page from Artemus Consulting Group which states Mr. Cotsana worked for the CIA for over 20 years in various roles, including counterterroism. The profile does not specifically mention the enhanced interrogation program. Mr. Cotsana has prepared a Declaration (ECF No. 55-5), which confirms he is retired CIA and worked for CIA for more than 20 years. He states he is subject to various non-disclosure agreements. He states his understanding that the Government will not allow him to answer any questions related to the Program, including questions that would confirm or deny his role in the Program. (*Id*.).

The state secrets privilege belongs to the Government and can only be waived by it, not by a private party. *Reynolds*, 345 U.S. at 532. Therefore, an article in a newspaper does not override the Government's assertion of privilege. The Government has refused to confirm or deny Ms. Haspel and Mr. Cotsana's involvement with the Program. Mr.

Warden steadfastly maintained that position at the May 5, 2017, hearing. The court is not aware of there being any mention of Cotsana or Haspel in the over 500-page Executive Summary the Senate Select Committee on Intelligence released to the public. Although the Government has, over the years, made public certain details about the Program, others remain classified. It is generally not for this court to second-guess such determinations. See *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)("we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.")

The court finds the Government's invocation of the state secrets privilege and the CIA Act preclude Plaintiff's request for the depositions of Haspel and Cotsana.

V. Plaintiffs' Brief (ECF No. 79) and Necessity of Requested Discovery

In making these determinations, the court has also considered the briefing and argument of Plaintiffs, particularly in evaluating the necessity of the requested information. "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *United States v. Reynolds*, 345 U.S. 1, 11 (1953). If the showing of necessity is dubious, the claim of privilege will prevail. *Id*. The court can consider whether there was "an available alternative, which might have given [Defendants] the evidence to make out their case without forcing a showdown on the claim of privilege." *Id*.

Plaintiffs are not directly a party to the discovery dispute between Defendants and the Government concerning document production and the depositions of Cotsana and Haspel. Plaintiffs' counsel has attended all hearings involving these discovery disputes and requested, and was granted, the opportunity to file a brief addressing the Third and Fourth Motions to Compel. Plaintiffs contend none of the discovery at issue is necessary. Rather than arguing the various privilege issues, Plaintiffs' brief asks the court to find Defendants' discovery requests are disproportionate under Fed.R.Civ.P. 26. Plaintiffs

rely on language added to Rule 26 in the 2015 Amendments which states the scope of discovery should consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(1).

Plaintiffs also rely on Rule 26(b)(2)(c) which states "on motion, or on its own, the court must limit the frequency or extent of discovery" if it determines: 1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; 2) the party seeking the discovery has had ample opportunity to obtain the information; or 3) the proposed discovery is outside the scope. Plaintiffs claim Defendants already have evidence to support their argument they were acting as directed by CIA headquarters. Plaintiffs point out Defendants have the declaration of former CIA general counsel John Rizzo who states he was "one of the key legal architects of the CIA's EIT Program, which I monitored and oversaw from its beginning to end." (ECF No. 80-15, ¶ 68). Defendants also have the declaration of Jose Rodriguez, who was Chief Operating Officer of the Counterterrorism Center. He claims the CIA and not Mitchell and Jessen, determined which of the proposed methods of interrogation would be used on a subject. (ECF No. 80-14).

The court observed at the May 5, 2017 hearing, the Haspel and Cotsana testimony would appear supplemental or confirmatory to Defendants' own testimony of what they did independently and what they did at the direction of the CIA. Both Rizzo and Rodriguez have been deposed and prepared lengthy declarations. It is alleged Rodriguez supervised Haspel during her alleged involvement with the Program. The excerpts of the Rodriguez declaration which have been submitted evidence support for the defense theory of the case that Defendants' actions were reviewed and authorized by the CIA. The court has observed those Declarations appear to be exculpatory, disclaiming illegal activity or responsibility on behalf of Defendants. It appears Defendants seek the Haspel

and Cotsana testimony as a third layer of defense. In that sense, the court agrees with Plaintiffs' contention the evidence is likely to be cumulative. Further, under *Reynolds*, the showing of necessity is lessened by the availability of alternative sources of evidence.

VI. Conclusion

The court finds the Government has validly invoked the state secrets privilege. CIA Director Pompeo's Declaration is well done, thorough, and meets the procedural requirement for invoking the state secrets privilege. The court finds that although the Government may have delayed in invoking the privilege, it has not waived the privilege. The court further finds that although it may have been preferable for the Attorney General to file a Declaration, the court accepts the Government's representation the Attorney General personally considered the matter in accord with the 2009 Policy.

The court has reviewed a subset of the withheld documents at issue, and the voluminous filings of the parties, including the Pompeo Declaration and unclassified summaries. The court is satisfied there is a reasonable danger that disclosure of the information being withheld could expose matters, which in the interest of national security, should not be disclosed. The court finds the disclosure of the categories of information described in the Pompeo Declaration, including: information identifying covert agents; information concerning the involvement of foreign countries; information obtained concerning terrorist organizations; and information involving intelligence sources and methods -- could cause significant harm to national defense or foreign relations. The Ninth Circuit evaluated the same general subject matter, the Program, in *Mohamed*, and concluded the state secrets privilege applied. The court recognizes more information about the Program is now public, and that some, including some members of Congress, have urged declassification of the entire SSCI Report. However, the fact is aspects of the Program remain classified, and the rationale underlying application of the state secrets privilege in *Mohamed* strongly supports application of the privilege here.

As to the impact of successful assertion of the state secrets privilege on the litigation, the court finds, at this juncture, the Government's assertion of the state secrets

privilege does not prevent this matter from proceeding. In fact, no party argues dismissal is required by assertion of the state secrets privilege. Plaintiffs and the Government contend the matter can proceed, and Defendants state they may seek relief.

IT IS HEREBY ORDERED:

1. Defendants' Third Motion to Compel (ECF No. 54) is **DENIED** with the exception of the three documents identified *supra*. The court has found, for the reasons stated herein, the Government has validly asserted the various privileges at issue, including the state secrets privilege. As to three documents (103, 157, and 165) where the court has overruled the deliberative process or attorney client privilege, the Government has agreed to reprocess and produce those documents with appropriate redactions of information covered by the state secrets privilege. The Government shall reprocess and produce those documents **within 10 days** of the date of this Order.

2. Defendants' Fourth Motion to Compel (ECF No. 64) seeking the depositions of Deputy Director of the CIA Gina Haspel and former CIA employee James Cotsana is **DENIED**. The court finds the depositions are precluded by the Government's assertion of the state secrets privilege and the CIA Act.

3. Any further evidentiary issues concerning application of the state secrets privilege and its impact on the remaining proceedings may be addressed via appropriate motion, including via motion in limine.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 31th day of May, 2017.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE