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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' 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

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## I. INTRODUCTION

Petitioners' (Defendants' in related case no. 15-CV-286-JLQ) third and fourth motions to compel should be denied. As explained below, Defendants' request to depose three Central Intelligence Agency ("CIA") officers is prohibited by the CIA Act, 50 U.S.C. § 3507, and the state secrets privilege. Additionally, the information redacted and withheld from the Government's document productions is protected from disclosure by privilege, including the state secrets privilege; the National Security Act, 50 U.S.C. § 3024; the CIA Act; the deliberative process privilege, the attorney-client privilege; and the work-product protection.

## II. BACKGROUND

### A. The Government's Document Productions

The non-party document discovery against the Government in this case began on June 28 and 29, 2016, when Defendants served so-called *Touhy* (*United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) requests and nonparty document subpoenas on the CIA and the Department of Justice ("DOJ"). The CIA subpoena sought a wide range of documents in twenty-eight broad categories regarding nearly every facet of the CIA's former detention and interrogation program ("the program"). *See* Gov't Ex. 1. The DOJ subpoena was similarly broad and sought documents in the same categories, as well as three additional categories related to legal advice about the program. *See* Gov't Ex. 2. On July 19, 2016, the CIA and DOJ objected to the production called for in the subpoenas for various reasons. *See* Gov't Exs. 3 & 4. Notwithstanding these

objections, the Government began to produce a significant quantity of responsive documents about the CIA program and engaged Defendants to narrow their requests, but Defendants nonetheless moved to compel production on August 22, 2016. *See* ECF No. 1. The Government opposed this motion and cross-moved to quash or modify the document subpoenas. *See* ECF No. 19.

On October 4, 2016, the Court addressed these motions and issued an Order, ECF No. 31, that narrowed the Government's production obligation to three categories of CIA documents:

1. Documents that reference one or both of the Defendants *and* at least one of the Plaintiffs, with a date range of September 11, 2001, to the present. *See* Oct. 4 Order at 4; Transcript (Sept. 29, 2016) at 37:13-15, 43:19-44:4, 46:11-19.

2. Documents that reference one or both of the Defendants *and* Abu Zubaydah, with a date range of September 11, 2001, to August 1, 2004. *See* Oct. 4. Order at 4-5; Transcript (Sept. 29, 2016) at 33:11-17, 34:8-10, 34:23-25, 43:19-44:4.

3. Documents that reference or describe the role Defendants played in the design and development of the former detention and interrogation program, with a date range of September 11, 2001, to August 1, 2004. *See* Oct. 4 Order 4-5; Transcript (Sept. 29, 2016) at 45:4-8; 46:16-19; 48:19-20.[1]

The Court's Order expressly stated that the Government was not required to produce a privilege log "at this time." *See* ECF No. 31 at 6; *see also* Transcript (Sept. 29, 2016) at 37:19-22. The Court subsequently established a final production deadline of December

[1] The Court's Order addressed document production only by the CIA, as the Government and Defendants had reached an agreement regarding the DOJ subpoena.

20, 2016, *see* ECF No. 36, and also required the Government to file regular status reports on its rolling productions and to submit a filing explaining the basis for its document redactions. *See* ECF No. 31 at 8-9.

On October 19, 2016, Defendants moved for reconsideration of the Court's October 4 Order, seeking to expand the scope of the Government's document production obligations. *See* ECF No. 32. The Government opposed, *see* ECF No. 37, and on November 8, 2016, the Court issued an order that required the Government to produce certain contracts between the CIA and Defendants relating to the program, but otherwise denied Defendants' motion. *See* ECF No. 47.

On October 28, 2016, Defendants filed their second motion to compel, which sought the same relief as the first motion to compel – namely the production of CIA documents in unredacted form – and generally repeated the same arguments they presented in their first motion. *See* ECF No. 38. The Government again opposed the relief sought by Defendants, *see* ECF No. 48, and on November 23, 2016, the Court denied Defendants' request for unredacted documents, but required the Government to produce a privilege log by December 20, 2016. *See* ECF No. 52 at 4-5.

The Government met the Court's document production and privilege log deadline, in the end producing 310 CIA and DOJ documents, totaling approximately 2,000 pages. These documents included, among other things, comprehensive CIA Inspector General reports about the operation of the program and the death of Plaintiff Gul Rahman; operational cables between CIA officers at overseas detention facilities

and CIA headquarters regarding the detention and interrogation of Plaintiff Rahman and Abu Zubaydah; contracts governing Defendants' work on the program; and legal memoranda that DOJ authored regarding various legal aspects of the program. Collectively, the documents publicly disclose an extraordinary and unprecedented amount of information about the operation of CIA's program. The majority of these documents was produced with partial redactions and collectively contained thousands of discrete redactions to privileged information.

Additionally, the Government provided Defendants with privilege logs from the CIA and DOJ specifically itemizing and describing every document produced or withheld in this litigation, including a list of the specific objections asserted on a document-by-document basis and a description of the categories of information withheld from each document. *See* Gov't Exs. 5-6. For DOJ, 60 documents were listed and produced, all of which were either disclosed in full without redactions or redacted in part; no DOJ documents were withheld in full. *See* Gov't Ex. 5. The CIA privilege log listed 250 documents, 210 of which were either disclosed in full without redactions or redacted in part; 40 CIA documents were withheld in full. *See* Gov't Ex. 6.

On January 18, 2017, Defendants filed their third motion to compel, which purported to challenge "each redaction" in the Government's document production without identifying the specific documents or issues in dispute. *See* ECF No. 54. The Government opposed Defendants' overbroad motion and argued that, where the Government had met its obligation to provide a privilege log, the appropriate next step

was for the Government and Defendants to narrow the areas of dispute and present to the Court a list of documents and disputed issues that require resolution. *See* ECF No. 59. Counsel for the Government and Defendants then conferred in a cooperative manner to narrow the areas of dispute and filed two statements pursuant to Local Civil Rule 37.1 listing the specific topic areas and documents that are no longer challenged by Defendants and, therefore, do not require adjudication by the Court. *See* ECF Nos. 60, 63. The Court held a telephonic hearing on the third motion to compel on February 14, 2017, and subsequently issued an order on February 20, reserving a ruling on the motion and establishing a deadline of March 8, 2017, for the Government to assert its formal claims of privilege over the redacted and withheld documents. *See* ECF No. 70.

**B. Depositions of Current and Former CIA Officers**

In addition to document subpoenas, Defendants have also sought to depose CIA officers. On September 6, 2016, Defendants sent counsel for the United States *Touhy* requests and nonparty subpoenas seeking oral deposition testimony from one current and three former CIA officers. *See* Gov't Ex. 7. As relevant to the current motions to compel, Defendants sought the testimony of James Cotsana, a retired intelligence officer who has never been officially acknowledged by the Government as having any role in the program. Defendants, however, allege that Mr. Cotsana was their supervisor when they worked as independent contractors for the CIA. *See* ECF No. 54 at 9. The Government agreed to accept service of the subpoena on Mr. Cotsana's behalf, *see* Gov't Ex. 8, and filed a timely motion for a protective order to require that the

deposition be conducted by written questions instead of oral examination. *See* ECF No. 73 (in No. 15-cv-00286-JLQ). The Court denied the Government's motion on October 4, 2016. *See* ECF No. 31. The Court, however, acknowledged that an oral deposition of Mr. Cotsana might be fruitless because the Government intended to object to any question that might serve to confirm or deny whether he had any role in the program. *See id*. at 7. Consequently, the Court ordered that Defendants provide the Government with list of subjects to be covered and anticipated questions at least ten days before any oral deposition of Mr. Cotsana. *See id*. at 8.

Defendants subsequently scheduled Mr. Cotsana's deposition for January 10, 2017, in New Hampshire, and provided the Government with a list of anticipated questions on December 29, 2016. *See* Gov't Ex. 9. The Government responded by providing a short declaration from Mr. Cotsana, consistent with his classified information nondisclosure obligations to the Government, containing unclassified background information about Mr. Cotsana. *See* Gov't Ex. 10. The Government also provided a separate outline of the Government's objections to Defendants' anticipated questions. *See* Gov't Ex. 11. These objections indicated that Defendants' questions sought privileged information and the Government would instruct Mr. Cotsana not to answer any substantive questions about any alleged role in the program. *See id*. Based on this response, Defendants agreed to delay the deposition of Mr. Cotsana and subsequently moved to compel his deposition testimony in their third motion to compel filed on January 18, 2017. *See* ECF No. 54. As explained above, the Court's February

20, 2017 Order directed the Government to assert its privileges in response to the motion by March 8, 2017. *See* ECF No. 70.

In addition to Mr. Cotsana, on December 1, 2016, Defendants sent counsel for the Government *Touhy* requests and subpoenas to depose two unnamed CIA employees, "John/Jane Doe" and "Gina Doe." *See* Gov't Ex. 12. Defendants alleged that "Gina Doe" served as the chief of staff to Jose Rodriguez when he served as director of the CIA's National Clandestine Service and Counterterrorism Center, and that "John/Jane Doe" was the immediate successor of Mr. Cotsana as the supervisor of Defendants. *See id*. On December 14, 2016, counsel for the Government agreed to accept service of the *Touhy* request on behalf of the CIA, but expressly stated that counsel for the Government was not accepting service of the deposition subpoenas on behalf of the two anonymous individual witnesses while the CIA considered the *Touhy* request. *See* Gov't Ex. 13. On February 13, 2017, counsel for the Government informed Defendants' counsel that the CIA had denied the *Touhy* request and would not authorize the requested deposition testimony. *See* Gov't Ex. 14. Thereafter, on February 14, 2017, Defendants filed their fourth motion to compel. *See* ECF No. 64. In that motion, Defendants alleged, based on media reporting, that the individual identified in the deposition subpoena as "Gina Doe" is Gina Haspel, who was recently appointed Deputy Director of the CIA. *See id*. The Government filed a response to Defendants' motion on February 22, 2016, explaining that the legal issues raised by Defendants' fourth motion are the same as those raised by Defendants' third motion to compel the

deposition testimony of Mr. Cotsana. *See* ECF No. 71. Accordingly, given the March 8, 2017 deadline to respond with its privilege assertion over Mr. Cotsana's deposition, the Court granted the Government's unopposed request for leave to submit its privilege assertions over the Doe and Haspel depositions by March 8, as well. *See* ECF No. 74.

**C. Discovery Issues Requiring Resolution by the Court**

As explained above, the Government and Defendants have conferred on multiple occasions in an effort to narrow the scope of the issues in dispute. *See* ECF Nos. 60, 63. Although significant progress has been made, a number of disputed issues require this Court's resolution.

With respect to Defendants' requested depositions, the Government and Defendants continue to disagree on whether Mr. Cotsana, Ms. Haspel, and "John/Jane Doe" can be compelled over the Government's objection to provide oral testimony. The Government's position is that it has never officially acknowledged whether or not any of these individual had any role in the program. To require the witnesses to answer deposition questions about the program, and thus confirm or deny their role and functions, if any, within the program, would disclose information protected from disclosure by the CIA Act, 50 U.S.C. § 3507, and the state secrets privilege.

With respect to the Government's document production, 170 CIA documents and one page of one DOJ document containing CIA information, together totaling approximately 1300 pages, remain in dispute. 139 of these documents have been disclosed to Defendants with partial redactions; 32 documents have been withheld in

full. The redacted and withheld information is protected from disclosure by privilege, including the state secrets privilege; the National Security Act, 50 U.S.C. § 3024; the CIA Act, 50 U.S.C. § 3507; the deliberative process privilege, the attorney-client privilege; and the attorney work-product protection.

Defendants have agreed that their challenge to the withheld information in these 171 documents does not extend to various categories of information listed in the amended joint Rule 37.1 statement filed on February 10, 2017. *See* ECF No. 63.

To assist the Court in its adjudication of this matter, the Government has prepared a chart listing the disputed documents, by reference to their entry numbers on the Government's privilege logs, their approximate page lengths, and the specific privileges the Government is formally asserting to protect the information withheld in each document.[2] *See* Gov't Ex. 15. Additionally, a detailed unclassified summary of the information withheld from each of documents is appended to the declaration of the

[2] Given the volume of disputed documents at issue, the Government has not filed with the Court the 139 documents released to Defendants in partially redacted form. The Government can provide these documents to the Court upon request. Additionally, should it be of assistance to the Court, the Government has no objection to providing the Court with the classified unredacted versions of any of the 171 disputed documents for the Court's review *ex parte* and *in camera*, subject to appropriate storage and handling protocols for classified information.

Director of the Central Intelligence Agency, Michael Pompeo, asserting the state secrets and statutory privileges in this case. *See* Decl. and Formal Claim of State Secrets Privilege and Statutory Privileges by Michael R. Pompeo, Dir. Of the CIA ("Pompeo Decl.") (Gov't Ex. 16).[3]

## III. ARGUMENT

### A. The Government's Formal Privilege Assertions Are Timely and Have Not Been Waived.

The Court's February 20, 2017 Order raised the issue of whether the Government had waived its ability to assert certain privileges, including the state secrets privilege, by not submitting declarations to support those privileges at the time the Government served its privilege logs on Defendants. *See* ECF No. 70 at 5-6. The Government's formal invocation of privileges and the submission of appropriate declarations in this filing – that is, in opposition to Defendants' third and fourth motions to compel – is a timely assertion of the privileges, and there has been no waiver in this case.

As an initial matter, it is important to distinguish between those privileges that have a formal procedural component required for their invocation and those privileges that do not. As relevant here, the Government has asserted, as applicable, the attorney-

[3] The appendix lists 172 documents, but one of the listed documents (#236) is no longer in dispute. *See* ECF No. 63. Additionally, the appendix inadvertently omitted that three documents (#211, #212, and #214) were withheld in full when describing those documents. The correct status of the three documents is listed on Exhibit 15.

client privilege, the attorney work-product protection, and statutory privileges (CIA Act, National Security Act), all of which have no procedural invocation requirement and only require an appropriate listing on a privilege log. *See* Fed. R Civ. P. 45(e)(2). The Government satisfied its requirement to preserve these privileges by submitting a detailed privilege log by the December 20, 2016 deadline established by the Court's November 22, 2016 Order. Accordingly, there was no waiver of these privileges.

Other Executive privileges that the Government has asserted in this case, namely the state secrets privilege and the deliberative process privilege, contain a procedural element that requires a Government official, typically by declaration, to formally invoke the privileges. *See infra* at 19-20, 35. But there is no legal requirement that the Government must submit these declarations at same the time it serves privilege objections to document discovery in a privilege log. To the contrary, it is well established that the Government is not required to submit declarations asserting the state secrets privilege or any other governmental privilege until after a motion to compel is filed raising a specific challenge to the Government's privilege objections. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997); *Huntleigh USA Corp. v. United States*, 71 Fed. Cl. 726, 727 (2006); *Maria Del Socorro Quintero Perez, CY v. United States*, 2016 WL 362508, at *3 (S.D. Cal. Jan. 29, 2016); *Ibrahim v. Dep't of Homeland Security*, No. C 06-00545 WHA (ECF No. 420) (N.D. Cal. Feb. 25, 2013) (Gov't Ex. No. 17); *Tri–State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13 (D.D.C. 2005); *A.I.A. Holdings, S.A. v. Lehman Bros.*, 2002 WL 31385824, at *3 (S.D.N.Y. Oct. 21, 2002).

The Government is not aware of any case in which a court has found a waiver of the state secrets privilege due to a purported late submission of the required declaration. Indeed, the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), the leading state secrets case, did not find a waiver of the privilege even though the formal claim of the state secrets privilege was submitted *after* the district court had overruled an initial privilege assertion made under Air Force *Touhy* regulations and issued an order compelling production of a specific report and certain witness statements. *See id*. at 3-4. Notably, the Supreme Court concluded that it was "entirely proper" for the district court initially to order production of the disputed documents and then allow the Government to assert the privilege at a later stage "to cut off further demand" for the documents. *Id*. at 10-11. This case presents a similar situation, except that the Court has ordered only that the Government produce certain categories of documents (as opposed to specific documents), and the Government has responded by producing as much unclassified and non-privileged information as it can. After exhausting its productions and narrowing the issues in dispute, the Government is now formally asserting the privilege in opposition to Defendants' further demands for the withheld information in the specific documents. If there was no waiver in *Reynolds*, there certainly should not be a waiver in this case.

The Court of Appeals decision in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080-81 (9th Cir. 2010) (en banc) is consistent with this authority. The issue in *Jeppesen* was whether the Government's invocation of the state secrets privilege at the pleading stage, before any discovery had commenced, was premature. *Id*. The Court of

Appeals concluded that the Government may assert the privilege "prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial." *Id*. at 1081. The Court noted that the showing the Government must make for a pre-discovery assertion "may be especially difficult" but nothing foreclosed the Government "from even trying to make that assertion." *Id*. *Jeppesen*, therefore, did not address the issue of waiver.

Indeed, the Court of Appeals in *Jeppesen* was clear that the state secrets privilege should not be invoked "more often or extensively than necessary," *id*. at 1080, and the Supreme Court has stated that the privilege "is not to be lightly invoked." *Reynolds*, 345 U.S. at 7. Finding a waiver in this case would be inconsistent with this authority. Here, the Government has adhered to these principles by allowing the discovery process to run its course until assertion of the privilege became necessary, including through the production of documents in redacted and unclassified form as well as working with Defendants to narrow the scope of the disputed discovery issues. Under these circumstances, where the Government has undertaken significant, good faith efforts to produce as much unclassified discovery as possible and has asserted the privilege in response to a motion to compel after disputed issues are narrowed and fully ripe, there is no basis to conclude that the Government has waived the state secrets privilege.

Similarly, the Government has not waived its ability to assert privilege in response to the depositions sought by Defendants. With respect to the deposition of Mr. Cotsana, the Government and Defendants followed the procedure established the Court's October 4, 2016 Order by exchanging proposed questions and objections before

the deposition. *See supra* at 5-7. Thereafter, the parties agreed to postpone the deposition, Defendants moved to compel Mr. Cotsana's testimony, and the Court established the current March 8 deadline for the Government's response. *See id.* Under these circumstances, the Government's privilege assertions in this filing are timely, and there is no basis to find a waiver.

With respect to the depositions of "Gina Doe"/Gina Haspel and John/Jane Doe, there has not been a waiver of the Government's privilege assertions because Defendants have failed to properly serve the witnesses. "Serving a subpoena requires delivering a copy to the named person." Fed. R. Civ. P. 45(b). Although Defendants sent a copy of the "Doe" subpoenas to counsel for the Government via email on December 1, 2016, that action did not constitute service of the subpoena on the witnesses under Rule 45, *see Chima v. U.S. Dep't of Def.*, 23 F. App'x 721, 724 (9th Cir. 2001); *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 360-62 (D.D.C. 2011), and counsel for the Government expressly stated in the initial response to the subpoenas that Government counsel was not authorized to accept service of the subpoenas on behalf of the anonymous witnesses. *See* Gov't Ex. 13. The Government is unaware of any effort by Defendants to serve the witnesses, and Defendants have not submitted the proof of service required by Fed. R. Civ. P. 45(b)(4). Absent proper service, the Government was under no legal obligation to move to quash the subpoenas under Rule 45(d)(3) or to formally invoke its privileges until after Defendants filed their fourth motion to compel. Accordingly, there has been no waiver.

In order to avoid delay and to facilitate prompt resolution of this matter, the Government is not insisting that Defendants reissue new subpoenas or personally serve the witnesses at this time. Given the current posture of the case and the fact that Defendants have now moved to compel the depositions of Ms. Haspel and John/Jane Doe, the Government has no objection to the Court adjudicating the merits of the Government's privilege assertions on the current record. However, given Defendants' failure to comply with Rule 45's service requirements, there is no basis for the Court to conclude that the Government has waived its ability to assert privilege.

**B. The CIA Act Bars Defendants' Requested Depositions and Document Discovery of CIA Officers.**

Defendants seek to depose three current or former CIA officers – Ms. Haspel, Mr. Cotsana, and John/Jane Doe – in order to discover the roles and functions, if any, those officers played in the program, to include the extent to which the officers' job responsibilities involved supervision of Dr. Mitchell and Dr. Jessen. *See* Gov't Exs. 9, 12. Additionally, Defendants seek the names of various CIA employees referenced in the disputed documents produced in this case as well as information related to their job functions. This discovery is prohibited by the CIA Act. *See* Pompeo Decl. ¶¶ 8-9, 22.

Section 6 of the CIA Act, currently codified at 50 U.S.C. § 3507, provides that "the Agency shall be exempted from the provisions of sections 1 and 2 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U.S.C. § 654), and 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" (emphasis added). The CIA Act is an absolute privilege and does not require any showing of harm

from the requested disclosure, as the statute reflects "Congress's express acknowledgment that the CIA may withhold agent names." *See Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996); *see also Baker v. CIA*, 580 F.2d 664, 668-69 (D.C. Cir. 1978). Indeed, in *Minier*, the Court of Appeals concluded that "there can be no doubt" that the CIA Act "authorizes the CIA's refusal to confirm or deny the existence of an employment relationship" with an alleged CIA employee and the CIA "may also decline to disclose [the employee's] alleged CIA activities." *Minier*, 88 F.3d at 801.[4]

Here, the purpose of Defendants' requested depositions is to discover the "names" and "functions" of CIA officers. Defendants want to depose John/Jane Doe so they can learn his or her real name, confirm whether he or she occupied a supervisory role within the program, and then pose questions about his or her duties and functions within the program. Similarly, Defendants seek to depose Mr. Cotsana and Ms. Haspel in order to learn whether their respective job responsibilities included working on the program and, if so, explore the nature of those duties as well as any supervisory duties they had with respect to Defendants' work on the program. The CIA Act prohibits this type of discovery into the "names" and "functions" of CIA employees. Indeed, every

[4] The protections offered by the CIA Act are applicable to information that is requested in the context of civil discovery. *See Kronisch v. United States*, 1995 WL 303625 at *9 (S.D.N.Y. May 18, 1995) ("[N]umerous courts have upheld the CIA's assertion of its statutory privilege in the context of civil discovery.").

area of Defendants' proposed inquiry is barred by the CIA Act, as it would require the witnesses to confirm or deny their duties with the CIA. *See* Gov't Exs. 9, 12.

The CIA Act also protects against disclosure of a broad range of personnel-related information regarding the functions, organization, and identities of CIA personnel. *See*, *e.g.*, *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 175-180 (D.D.C. 2013); *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 126 (D.D.C. 2009). As explained in Director Pompeo's declaration, and the appendix thereto, the redacted and withheld information in the documents involves a wide range of information about CIA employees and their functions, including, among other things, the names of CIA employees; descriptions of their job functions, duties, and titles; personally identifying information; the numbers of specific personnel assigned to various duties and jobs within the CIA; and information concerning the internal personnel organizational structure of the CIA. This type of information concerning the identification and functions of CIA employees is properly withheld pursuant to the CIA Act. *See* Pompeo Decl. ¶¶ 22, 29, 31, 34, 39, 42.

**C. The State Secrets Privilege Bars The Discovery Sought By Defendants.**

In addition to the CIA Act, the state secrets privilege prohibits the depositions sought in this case and prevents disclosure of seven categories of national security information redacted from the Government's documents.

**1. The State Secrets Privilege and Standard of Review**

The Supreme Court has long recognized that courts must act in the interest of the country's national security to prevent disclosure of state secrets. *See Reynolds*, 345

U.S. at 14. As relevant in this case, the state secrets privilege operates as "an evidentiary privilege . . . that excludes privileged evidence from the case . . . ." *Jeppesen*, 614 F.3d at 1077. When successfully invoked, the evidence subject to the privilege is "completely removed from the case." *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). In the normal course, after the privileged evidence is excluded, "the case will proceed accordingly, with no consequences save those resulting from the loss of evidence." *Al-Haramain Islamic Found. Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007). In some cases "application of the privilege may require dismissal of the action," *Jeppesen*, 614 F.3d at 1083, but the Government is not seeking dismissal here.

"[T]he Government may use the state secrets privilege to withhold a broad range of information." *Kasza*, 133 F.3d at 1166. In assessing whether to uphold a claim of the state secrets privilege, the Court does not balance the respective needs of the parties for the information. Rather, "[o]nce the privilege is properly invoked and the court is satisfied as to the danger of divulging state secrets, the privilege is absolute." *Id*. Thus, even though "the claim of privilege should not be lightly accepted," where it is properly asserted, "even the most compelling necessity cannot overcome the claim of privilege." *Reynolds*, 345 U.S. at 11; *Jeppesen*, 614 F.3d at 1081.

The Court of Appeals has also recognized that "the court's review of the claim of [state secrets] privilege is narrow." *Kasza*, 133 F.3d at 1166. The privilege must be sustained when the court 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." *Reynolds*, 345 U.S. at 10.

In conducting this analysis, the Court must afford "utmost deference" to the Government's privilege assertion and predictions of the harm that would result from disclosure of the information subject to privilege. *Kasza*, 133 F.3d at 1166.

Analyzing a state secrets privilege claim under this standard involves three steps. *Jeppesen*, 614 F.3d at 1080. First, the Court must ascertain that the procedural requirements for invoking the privilege have been satisfied. *Id*. Second, the Court must determine whether the information is properly privileged. *Id*. Finally, the Court must determine whether the case can proceed without risking the disclosure of the protected information. *Id*.

**2. The Government Has Properly Asserted the State Secrets Privilege.**

The Government has satisfied the procedural requirements for invoking the state secrets privilege. The state secrets privilege "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Jeppesen*, 614 F.3d at 1080. The Government must satisfy three procedural requirements to invoke the privilege formally: (1) there must be a "formal claim of privilege"; (2) the claim must be "lodged by the head of the department which has control over the matter"; and (3) the claim must be made "after actual personal consideration by that officer." *Id.*

The Government has satisfied these requirements in this case. First, the state secrets privilege has been formally asserted by the Director of the CIA through his

public declaration. *See* Pompeo Decl. ¶¶ 2, 7, 9, 11-12.[5] Second, the Director of the CIA is the head of the CIA, which has control over the documents and information implicated by this case. *Id*. ¶ 3. Third, the Director has personally considered the matter and has determined that disclosure of the information at issue reasonably could be expected to cause serious, and in some cases exceptionally grave, harm to national security. *Id*. ¶¶ 7-12; *see Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 400 (D.C. Cir. 1984).

In addition to the foregoing procedural requirements established by the case law, the Attorney General issued formal Executive Branch guidance in 2009 regarding the assertion and defense of the state secrets privilege in litigation. *See* Gov't Ex. 18. These standards and procedures were followed in this case, including personal consideration of the matter by the Attorney General and authorization by him to defend the assertion of the privilege. Accordingly, the Government has not

[5] The assertion of the state secrets privilege in certain cases can involve the submission of both public and classified, *ex parte* declarations, such as when the information sought to be protected cannot be described on the public record. *See, e.g., Jeppesen*, 614 F.3d at 1085-86. Such classified submissions are not required, and here, because the existence of the program and a significant amount of information about the operation of the program have been declassified and publicly acknowledged, the Government is able to explain the basis for its privilege assertion in a public unclassified declaration.

only satisfied the minimal procedural requirements for the assertion of the state secrets privilege in the case law, it also has taken the additional steps encouraged by the Court of Appeals to ensure a considered assertion of the privilege. *See Jeppesen*, 614 F.3d at 1080.

**3. The CIA Director Has Demonstrated That Disclosure of the Information Covered by the Privilege Assertion Risks Damage to National Security.**

The Director of the CIA has formally asserted the state secrets privilege over seven categories of information implicated by Defendants' document and deposition requests that cannot be disclosed without risking serious – and in some instances, exceptionally grave – danger to the national security of the United States:

- Information that could identity individuals involved in the CIA's former detention and interrogation program;
- Information regarding foreign government cooperation with the CIA;
- Information pertaining to the operation or location of any clandestine overseas CIA station, base, or detention facility;
- Information regarding the capture and/or transfer of detainees;
- Intelligence information about detainees and terrorist organizations, to include intelligence obtained or discussed in debriefing or interrogation sessions;
- Information concerning CIA intelligence sources and methods, as well as specific intelligence operations;
- Information concerning the CIA's internal structure or administration.

*See* Pompeo Decl. at ¶¶ 9-11. Director Pompeo's declaration explains in detail the harms to national security that would result from disclosure of these categories of

classified information; these harms are summarized below.

First, the CIA properly withheld information that could identify individuals involved in the program. *See id*. at ¶ 13-22. Releasing the names of CIA officers involved in the program would likely increase the risk of harm to the officers and their families. *See id*. at ¶¶ 15-16. Indeed, there have been death threats and security incidents involving officers who have been alleged to have worked in the program. *Id*. at ¶ 16. Further, to reveal the names of those individuals who worked in the program would confirm which persons were, and in some cases still are, engaged in highly sensitive intelligence activities. *Id*. at ¶ 15. Such disclosures would likely jeopardize the safety of the officers as well as potentially compromise the intelligence sources who have met with these officers. *Id*. at ¶¶ 15-16.

Additionally, the CIA, as a clandestine intelligence service, has a significant institutional interest in maintaining secrecy regarding its officers. *See id*. at ¶ 13. If the CIA breaks this duty of confidentiality to its officers, assets, and agents, the people and organizations the CIA relies upon to accomplish its intelligence mission will be less likely to trust it and work with it in the future when their assistance is needed. *Id.* This is particularly the case with respect to protecting the identity of CIA officers who worked on difficult and dangerous intelligence and counterterrorism assignments, such as the former detention and interrogation program. *Id*. ¶¶ 13, 17. If the CIA is unable to honor its duty to protect the identity of these officers from public disclosure, future officers may be less willing to accept

dangerous job assignments to defend the national security of the United States. *See id*. ¶ 17. Protecting the identities of CIA officers is among the highest priorities of the CIA, and releasing the identities of those officers associated with the program would likely lead to the harms discussed above. *Id.* ¶ 21.

Second, the CIA properly withheld information regarding foreign government cooperation with the CIA. *Id*. ¶¶ 23-25. Disclosing information pertaining to the countries and foreign intelligence services that assisted the CIA in the program would make those countries more vulnerable to terrorist attacks and also less likely to assist the CIA with current and future intelligence missions and counterterrorism operations. *See id*. ¶¶ 23-24. Such disclosure could have serious negative consequences for diplomatic relations with the United States and the CIA's intelligence relationship with the country's intelligence service. *See id*. ¶ 24. The result of this harm could reduce intelligence and operational cooperation and, therefore, harm the CIA's mission and national security. *See id*. ¶¶ 24-25.

Third, the CIA properly withheld information pertaining to the operation or location of any clandestine overseas CIA station, base, or detention facility. *Id*. at ¶¶ 26-29. The CIA's covert overseas facilities are critical to the CIA's mission, as they provide a base for the CIA's foreign intelligence activities. *Id.* at ¶ 26. Releasing identifying information about the location of these facilities can endanger the physical safety of CIA officers who work in those locations. *Id*. Further, acknowledging that the CIA maintains a base of operations in particular countries,

either now or in the past, could cause complications for the host countries. *Id.* at ¶ 27. Those harms could, in turn, lead those countries to curtail their intelligence cooperation with the CIA, to the detriment of national security. *See id.* Additionally, releasing information pertaining the operational protocols utilized by the CIA at its overseas facilities would inform adversaries how the CIA conducts its day-to-day intelligence business and operations, thereby enabling adversaries to identify the CIA's facilities, officers, and operations, and to diminish the effectiveness of the CIA's operations. *See id.* ¶ 28.

Fourth, the state secrets privilege covers information regarding the capture and/or transfer of detainees. *Id.* ¶ 30-31. Disclosing information about how the CIA came to have detainees in its custody and how the CIA went about covertly moving detainees, either unilaterally or with the assistance of foreign partners, would harm the CIA's intelligence mission. *See id.* at ¶ 30. Further, disclosing the role of foreign partners in such operations, which were undertaken with an expectation of secrecy, could harm relations with those governments or intelligence services and lead to a reduction in intelligence cooperation, particularly in the realm of counterterrorism. *See id.* Additionally, the operational protocols associated with the CIA's capture and transfer missions reveal particularly sensitive information about the CIA's means of overseas transportation, security measures, and targeting. *Id.* Disclosure would provide foreign adversaries with valuable insights into the CIA's clandestine operations and protocols for foreign intelligence, thereby

enabling adversaries to take steps to thwart the CIA's intelligence mission. *Id.*

Fifth, the CIA properly withheld intelligence information about detainees and terrorist organizations, including intelligence obtained or discussed in debriefing or interrogation sessions of detainees in the program. *Id.* at ¶¶ 32-34. Details of debriefings and interrogations show the specifics of what intelligence the CIA was trying to collect, analysis of intelligence about detainees and terrorist organizations, and the information that the CIA had already collected. *Id.* ¶ 32. Revealing the content and sources of the CIA's intelligence collections on these individuals and organizations, based on interrogations or other forms of collection, is reasonably likely to harm the national security by disclosing what the CIA knew, and did not know, about them at specific points in time, as well as the CIA's analysis of this information and actions the CIA undertook based on this information. *See id.* ¶¶ 32-33. This information would likely provide adversaries with helpful information about the CIA's sources and capabilities that would likely assist in their efforts to counter the CIA's intelligence collection efforts, and in turn, diminish the quality of the CIA's intelligence assessments for senior policymakers. *See id.*

Sixth, the CIA's state secrets assertion protects from disclosure information concerning CIA intelligence sources and methods, as well as specific intelligence operations. *Id.* ¶¶ 35-39. The CIA must guard against disclosure of any source-identifying information in order to protect sources of intelligence from discovery and harm. *See id.* at ¶ 36. Additionally, disclosure of source-revealing information could

seriously weaken the CIA's ability to recruit potential future sources, who would understandably be reluctant to provide information if their identity could not be protected. *Id.* The CIA must also protect the clandestine methods it uses to collect and analyze intelligence, to include the manner in which the CIA trains it officers, as well as its clandestine operations and activities. *See id.* at ¶¶ 37-38. These techniques, methods, and activities are the means by which the CIA accomplishes its mission. *See id.* This information must be protected from disclosure to prevent adversaries from gaining knowledge about how the CIA operates and subsequently developing effective countermeasures to diminish the CIA's ability to collect intelligence and carry out operations. *See id.*

Seventh, the CIA properly withheld intelligence information concerning the CIA's internal structure and administration. *Id.* at ¶¶ 40-42. The category covers a range of granular details about the CIA's overseas clandestine intelligence activities, including information about the CIA's human, financial, communication, and technological resources, as well as codenames, cryptonyms, and pseudonyms used to obfuscate operations, sources, and names of CIA officers. *See id.* at ¶¶ 40-41. The disclosure of information regarding the CIA's day-to-day operations would provide adversaries with significant information and could reasonably be expected to cause serious harm to the national security by impairing the CIA's ability to collect intelligence, engage in clandestine operations, and recruit sources. *See id.*

The same or similar categories of information have been upheld by other

courts as properly protected by the state secrets privilege. *See Jeppesen*, 614 F.3d at 1086; *Sterling v. Tenet*, 416 F.3d 338, 345-46 (4th Cir. 2005); *Abilt v. CIA*, 2017 WL 514208, at *5 (4th Cir. Feb. 8, 2017).

**4. The Information Withheld or Redacted From the 171 Disputed Documents Falls Within the Protected Categories.**

As explained above, there are currently 171 documents that remain in dispute. Information redacted or withheld from these 171 documents falls within the seven categories that are the subject of the CIA Director's state secrets assertion. In order to assist the Court with its review of this assertion, the Director has included in his declaration an appendix that summarizes in more specific and granular detail, on a document-by-document basis, the information redacted or withheld from each of the documents. *See* Pompeo Decl., App. The appendix establishes that the Government has properly redacted information falling within the categories described above. *Id.*

The explanations in the appendix also demonstrate that the vast majority of information withheld is immaterial and irrelevant to the issues in dispute between Defendants and Plaintiffs in the case. Indeed, in many of the documents the Government has disclosed the relevant information about Defendants' involvement in program and then redacted non-material, privileged information that simply happens to appear elsewhere in the same document. Put differently, the appendix demonstrates that most of the redacted or withheld information in the documents would not be responsive to the three categories of information the Court ordered the

Government to produce in this case. *See supra* at 2. This case, therefore, presents "a formal claim of privilege set against a dubious showing of necessity." *Reynolds*, 345 U.S. at 11. Although even the strongest claim of necessity cannot overcome the state secrets privilege, *see supra* at 18, the immateriality of the privileged information redacted from the documents further undermines Defendants' motion to compel with respect to the documents. Nonetheless, because the documents otherwise contain information responsive to the Court's production order, even if that responsive information has been disclosed to Defendants, the Government has properly asserted the state secrets privilege to protect against the disclosure of other information contained in the documents, even if that privileged information is non-responsive or immaterial to merits of this case.

**5. The State Secrets Privilege Bars The Requested Depositions of the CIA Officers.**

In the event the Court does not accept the argument that CIA Act bars the requested depositions, the Court should conclude in the alternative that the depositions are barred by the state secrets privilege.

As described in Director Pompeo's declaration, the identities of the individuals who worked in the program, and whose role has not been officially acknowledged by the CIA, are classified at the TOP SECRET level, and the disclosure of their identifying information could reasonably be expected to cause exceptionally grave damage to the national security. *See* Pompeo Decl. ¶¶ 13-22. The harm from such disclosure includes increased 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 id.* The proposed depositions in this case are reasonably likely to lead to those harms by forcing the CIA officers to identify themselves by their true name (in the case of Doe deponents); confirm or deny their role in the CIA's program; and otherwise answer questions about their job functions, operational assignments, and information they acquired while in their alleged positions. *See* Gov't Exs. 9, 12. Director Pompeo's state secrets privilege assertion bars the disclosure of this information. *See* Pompeo Decl. ¶ 19.

The assertion of the state secrets privilege in this case is unaffected by Defendants' allegations, or any other public speculation, that Ms. Haspel and Mr. Cotsana played a role in the program. The CIA has never officially acknowledged whether either individual was involved in the program. *See* Pompeo Decl. ¶ 18. The concept of official acknowledgment is important to the protection of the CIA's intelligence mission and its personnel. *Id.* Public speculation about the identities of persons who worked in the program – whether through media reporting, reports from non-governmental organizations, or otherwise – does not equate to declassification and official acknowledgment by the CIA. *Id.*; *see Pickard v. Dep't of Justice*, 653 F.3d 782, 786-87 (9th Cir. 2011). The absence of official confirmation leaves an important element of doubt about the veracity of information and, thus, carries with it an additional layer of protection and confidentiality.

Pompeo Decl. ¶ 18. "There may be much left to hide, and if there is not, that itself may be worth hiding." *See Phillippi v. CIA*, 655 F.2d 1325, 1331 (D.C. Cir. 1981). That protection would be lost if the Government were forced to confirm or deny the accuracy of each unofficial disclosure about which individuals worked in the program. *Id.*; *see Wilson v. CIA*, 586 F.3d 171, 195 (2d Cir. 2009); *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999).

Even when alleged classified facts have been the "subject of widespread media and public speculation" based on "[u]nofficial leaks" or "public surmise," confirmation of or further elaboration on those alleged facts can still harm national security. *Afshar v. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 990 (N.D. Cal. 2006). For that reason, the CIA typically does not officially acknowledge whether classified information was disclosed. *See* Pompeo Decl. ¶ 18. Were it otherwise, the CIA would be forced to deny such allegations when they are incorrect. The Government's ability to protect national security information would, therefore, improperly turn on whether information has been disclosed without authorization, and whether such unofficial disclosures turn out to be correct.

Moreover, such disclosures or speculation may not be presumed accurate or reliable by the public or by foreign adversaries or governments, and any requirement that the United States must officially confirm or deny such allegations would in itself provide a confirmation that harms national security. *See Wilson*, 586 F.3d at 186-87;

*Afshar*, 702 F.2d at 1133-34. Indeed, "the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause harm." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Here, where Director Pompeo has explained with specificity the harm to national security reasonably likely to result from officially disclosing identifying information about the CIA officers who worked on the program, the Court must give the "utmost deference" to that judgment and uphold assertion of the privilege. *See Kasza*, 133 F.3d at 1166.

Further, the CIA's decision to declassify and officially acknowledge a few of the high-ranking officers that that worked on the program[6] does not require official disclosure of whether or not any other officers worked on the program, particularly in light of harms that reasonably could result from such disclosure as described in Director Pompeo's declaration. *See Ellsberg v. Mitchell*, 709 F.2d 51, 59-60 (D.C.

[6] For example, the CIA has officially acknowledged that several high-ranking CIA officers were involved in the program, including John Rizzo, former Acting General Counsel, and Jose Rodriguez, former Director of the CIA Counterterrorism Center. Defendants have obtained declarations from both of these individuals purporting to address the key legal and operational aspects of the program. Thus, although not relevant to the state secrets assertion, in light of these declarations, the Government documents produced, and the Defendants' own personal recollections, it is not clear why Defendants need the depositions at issue here. *See* Fed. R. Civ. P. 26(b)(2)(C).

Cir. 1983); *Halkin v. Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978). Indeed, in every instance where the CIA has officially acknowledged that a specific CIA staff officer was involved in the program, the official disclosure has exclusively been at the officer's request and always after careful consideration and deliberation within the Executive Branch. *See* Pompeo Decl. ¶ 16.

* * *

The Government has fully and sufficiently demonstrated the grounds for the state secrets privilege assertion in this case. Accordingly, the privileged information in the seven categories described by Director Pompeo should be excluded from the case and the depositions of the CIA officers should be denied.

**D. The National Security Act Protects the Disclosure of Sources and Methods Information.**

Because information subject to the Director Pompeo's state secrets privilege assertion concerns the sources and methods of intelligence gathering, that information is also protected by a separate statutory privilege under Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i). This statute provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." *Id*. Under the DNI's direction pursuant to Section 102A of the National Security Act, as amended, and consistent with the Executive Order 12333, Director Pompeo is responsible for protecting CIA sources and methods from unauthorized disclosure. *See* Pompeo Decl. ¶ 8.

This statutory duty to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both "sweeping," *CIA v. Sims*, 471 U.S. 159, 169 (1985), and "wideranging," *Snepp v. United States*, 444 U.S. 507, 509 (1980). "Because of this sweeping power, courts are required to give great deference to the CIA's assertion that a particular disclosure could reveal intelligence sources or methods." *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007).

This statutory privilege provides an additional, independent basis to withhold information concerning the sources and methods of intelligence gathering among the categories of information discussed above. *See* Pompeo Decl. ¶¶ 25, 29, 31, 34, 39, 42.

**E. The CIA Properly Withheld Information Protected by the Deliberative Process Privilege.**

The CIA has also properly withheld information from 58 documents, in whole or in part, on the basis of the deliberative process privilege. *See* Declaration of the Deputy Director of the CIA for Operations[7] ("DDO Decl.") (Gov't Ex. 19); Gov't Ex. 15.

[7] As a covert officer of the CIA, the DDO's affiliation with the CIA is classified. *See* DDO Decl. at n.1. Accordingly, the signature block of the declaration is redacted from this public filing. The classified declaration with the DDO's signature can be made available to the Court upon request for review *ex parte* and *in camera*.

The deliberative process privilege "permits the government to withhold documents that 'reflect[] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hongsermeier v. Comm'r*, 621 F.3d 890, 904 (9th Cir. 2010) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The Court of Appeals has recognized that the deliberative process privilege generally serves three basic purposes: (1) it protects and promotes candid discussions within a government agency; (2) it prevents public confusion from premature disclosure of agency opinions before the agency establishes its final policy; and (3) it protects the integrity of an agency's ultimate decision. *See FTC v. Warner Communications. Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1089-90 (9th Cir. 2002).

To satisfy the substantive requirements of the privilege, documents must be both predecisional and deliberative. *Id*. The Court of Appeals has said:

> 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. A predecisional document is a 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.

*Assembly of State of Cal. v. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992).

Once these two substantive requirements are established, the party challenging the assertion of the deliberative process privilege bears the burden of demonstrating

need for the information sufficient to overcome the Government's interest in non-disclosure. *Warner Communications.*, 742 F.2d at 1161. In considering need, the Court of Appeals has directed that the following factors be considered: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.*

To invoke the privilege in civil discovery litigation, the Government must submit "1) a formal claim of privilege by the head of the department possessing control over the requested information; (2) an assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, along with an explanation of why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

Here, the Government has submitted a declaration from CIA's Deputy Director of Operations, which states that he has personally considered the 58 disputed documents at issue and explains that he is formally asserting the deliberative process privilege over the predecisional and deliberative information in these documents. *See* DDO Declaration ¶¶ 4-13. The DDO is the appropriate head of the relevant department to assert the privilege because the disputed documents relate to the CIA's former detention and interrogation program, which was managed under the supervision of the CIA's Directorate of Operations. *See id.* at ¶ 4; *see Landry*, 204 F.3d at 1135-36.

As described in the DDO's declaration, the withheld materials in this case consist of three different types of deliberative documents: 1) draft documents; 2) preliminary and predecisional email discussions and recommendations; and 3) other internal CIA documents containing deliberative information, including legal memoranda, cables, and other guidance. *See id.* at ¶¶ 7-12. The Court of Appeals has recognized that the deliberative process privilege applies to similar types of predecisional documents. *See, e.g.*, *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997); *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1123 (9th Cir. 1988). Further, the DDO's declaration explains in detail how these types of documents contribute to CIA's decision-making process in the national security and intelligence context, and the harm that would result from their disclosure. *See* DDO Decl. at ¶¶ 8-12.

The DDO's declaration also explains that these deliberative documents contributed to the CIA's decision-making process for a variety of specific issues and policies within the context of the program, including (1) determinations as to the use of various interrogation strategies and enhanced interrogation techniques; (2) determinations related to operational activities at detention facilities; (3) other operational decision-making related to the program; and (4) decisions related to the content of internal reports; and (4) other miscellaneous CIA actions or decisions. *Id.* at ¶¶ 13-14, 30, 41, 50, 68. The DDO's declaration describes the deliberative and predecisional nature of each of the specific documents within these categories. *See id.* at ¶¶ 14-75. As explained therein, these communications do not convey final CIA

viewpoints on a particular matter, but rather reflect discussion of different considerations, opinions, options, approaches, and recommendations for future action that preceded an ultimate decision or were part of the decision-making process in the program. *See id*. Accordingly, the documents are properly protected by the deliberative process privilege.

Although the deliberative process privileges is qualified, Defendants have not carried their burden of demonstrating sufficient need for this deliberative information to overcome the Government's interest in non-disclosure. Applying the factors set forth in *Warner Communications*, 742 F.2d at 1161, Defendants have not established how any of the information withheld as deliberative is relevant to their claims or defenses in this case. Indeed, as described in DDO's declaration, most of the information withheld as deliberative has no bearing on Defendants' role in the program generally or their involvement with any particular detainee. *See* DDO Decl. ¶¶ 14-75. Absent a showing that the specific information withheld as deliberative is relevant to their claims, Defendants' cannot even begin to overcome the Government's privilege assertion. *See United States v. Farley*, 11 F.3d 1385, 1390 (7th Cir. 1993). Additionally, in light of all the other information available to Defendants about their role in the program, both from Drs. Mitchell and Jessen's own recollections and the non-privileged information the Government has produced in this case, there is no compelling basis to require disclosure of the Government's privileged information on this same topic. *Warner Communications*, 742 F.2d at

1161-62. By contrast, the Government's interest in protecting its national security deliberations far outweighs any need of Defendants for the information, as disclosure of these deliberative communications and documents would chill free discussion among CIA officers regarding important counterterrorism and national security matters, and could compromise the CIA's ability to provide policymakers with complete and frank assessments. *See* DDO Decl. at ¶¶ 7-14, 30, 41, 50, 68.

**F. The CIA Properly Withheld Information Protected by the Attorney-Client Privilege and Attorney Work-Product Doctrine.**

The CIA has also properly withheld information from 25 documents, in whole or in part, on the basis of the attorney-client privilege and attorney work-product doctrine. *See id.* at ¶¶ 5, 76-110; Gov't Ex. 15. The attorney-client privilege applies to all 25 documents, and the work-product doctrine provides an additional basis for withholding information from six of the 25 documents. *See id.*

"The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice . . . as well as an attorney's advice in response to such disclosures." *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "Clients must be able to consult their lawyers candidly, and the lawyers in turn must be able to provide candid legal advice." *United States v. Christensen*, 828 F.3d 763, 802 (9th Cir. 2015). This rationale applies with

"special force in the government context" to encourage employees "to seek out and receive fully informed legal advice." *In re City of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

Similarly, the attorney work product doctrine protects documents and other memoranda prepared by an attorney in anticipation of litigation. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947). To qualify for work product protection, "documents must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *In re California Pub. Utils. Comm'n*, 892 F.2d 778, 780-81 (9th Cir. 1989).[8]

Here, the declaration from DDO establishes that each of the 25 documents for which CIA asserted the attorney-client privilege involved confidential communications between CIA officers and CIA attorneys, as well as between CIA attorneys and DOJ

[8] Under the law of this Circuit, non-parties cannot invoke the work-product protection directly under Rule 26(b)(3) in a non-party subpoena matter. *See In re California Pub. Utils. Comm'n*, 892 F.2d at 781. Rather, the courts of this Circuit have protected work product material for non-parties, such as the Government here, under Rules 26(c) and 45. *Id.*; *see ASARCO, LLC v. Americas Mining Corp.*, 2007 WL 3504774, at *4-7 (D. Idaho Nov. 15, 2007). Those rules authorize the Court to grant appropriate relief to protect against the disclosure of the Government's attorney work product in this case.

attorneys. *See* DDO Decl. at ¶¶ 77-102. These communications consist of factual information exchanged between lawyers and clients related to requests for legal advice, discussions between attorneys and clients that reflect those facts, and legal advice and analysis provided by attorneys to clients. *See id.* The communications also reflect discussions regarding various legal matters associated with the operation of the program, including the legal status of detainees and the legality of interrogation techniques. *See id.* Disclosure of this confidential information would inhibit open communication between CIA personnel and their attorneys, thereby depriving the CIA of full and frank legal counsel. *See id.* at ¶ 76. Accordingly, these confidential communications are protected from disclosure by the attorney-client privilege.

Additionally, the work product protection applies to six of these same documents that were prepared by or with the assistance of CIA lawyers in anticipation of litigation. *See id.* at ¶¶ 103-110. As relevant here, "where government lawyers act as legal advisors protecting their agency clients from the possibility of future litigation," the work product privilege applies to documents advising the agency as to potential legal challenges. *ACLU v. DOJ*, 2015 WL 3793496, at *6 (N.D. Cal. June 17, 2015).

## IV. CONCLUSION

For the reasons stated above, Defendants' third and fourth motions to compel should be denied, the depositions of the CIA officers should be denied, and the Government's assertions of privilege with respect to the 171 disputed documents should be upheld.

Dated: March 8, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 8, 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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