No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN
A.K.A. ABU ZUBAYDAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35218
D.C. No. 2:17-cv-00171-JLQ

ZAYN AL-ABIDIN MUHAMMAD HUSAYN;
JOSEPH MARGULIES, PETITIONERS-APPELLANTS

v.

JAMES ELMER MITCHELL; JOHN JESSEN,
RESPONDENTS

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE

Argued and Submitted: Mar. 5, 2019
Seattle, Washington
Filed: Sept. 18, 2019

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

OPINION

Before: RONALD M. GOULD and RICHARD A. PAEZ, Circuit Judges, and DEAN D. PREGERSON,[*] District Judge.

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[*] The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

PAEZ, Circuit Judge:

Zayn al-Abidin Muhammad Husayn ("Abu Zubaydah")[1] is currently held at the U.S. detention facility in the Guantanamo Bay Naval Base in Cuba. Abu Zubaydah was formerly detained as part of the Central Intelligence Agency ("CIA")'s detention and interrogation program, also commonly known as the post-9/11 "enhanced interrogation" or torture program. In 2017, Abu Zubaydah and his attorney, Joseph Margulies (collectively "Petitioners"), filed an ex parte application for discovery pursuant to 28 U.S.C. § 1782, which permits certain domestic discovery for use in foreign proceedings. They sought an order to subpoena James Elmer Mitchell and John Jessen for their depositions for use in an ongoing criminal investigation in Poland about the torture to which Abu Zubaydah was subjected in that country. The district court originally granted the discovery application, but subsequently quashed the subpoenas after the U.S. government intervened and asserted the state secrets privilege.

The Supreme Court has long recognized that in exceptional circumstances, courts must act in the interest of the country's national security to prevent the disclosure of state secrets by excluding privileged evidence from the case and, in some instances, dismissing the case entirely. *See Totten v. United States*, 92 U.S. 105 (1875); *see also United States v. Reynolds*, 345 U.S. 1 (1953). This appeal presents a narrow but important question: whether the district court erred in quashing

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[1] Abu Zubaydah's birth name was Zayn al-Abidin Muhammad Husayn but he is known as Abu Zubaydah in litigation and public records.

the subpoenas after concluding that not all the discovery sought was subject to the state secrets privilege.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse. We agree with the district court that certain information requested is not privileged because it is not a state secret that would pose an exceptionally grave risk to national security. We also agree that the government's assertion of the state secrets privilege is valid over much of the information requested. We conclude, however, that the district court erred in quashing the subpoenas in toto rather than attempting to disentangle nonprivileged from privileged information.

We have "emphasize[d] that it should be a rare case when the state secrets doctrine leads to dismissal at the outset of a case." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 (2010) (en banc); *see also Reynolds*, 345 U.S. at 9-10 (noting that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers"). Here, the underlying proceeding is a limited discovery request that can be managed by the district court, which is obligated "to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified." *Mohamed*, 614 F.3d at 1093. We therefore reverse the district court's judgment dismissing Petitioners' section 1782 application for discovery and remand for further proceedings.[2]

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[2] Because the district court granted the motion to quash based on the state secrets privilege, it did not address the government's alternative arguments under the Central Intelligence Agency Act, 50 U.S.C. § 3507, and the National Security Act, 50 U.S.C. § 3024(i). If relevant, the district court may consider these arguments on remand.

I.

A.

In late March 2002, Pakistani government authorities, working with the CIA, captured Abu Zubaydah in Pakistan. At the time, Abu Zubaydah was thought to be a high-level member of Al-Qa'ida[3] with detailed knowledge of terrorist plans. A 2014 report by the Senate Select Committee on Intelligence Study on the CIA's detention and interrogation program ("Senate Select Committee Report") later revealed this characterization to be erroneous.

In the first four years of his detention, Abu Zubaydah was held as an enemy combatant and transferred to various secret CIA "dark sites" for interrogation. Journalists, non-governmental organizations, and Polish government officials have widely reported that one of those sites was in Poland. In 2015, the European Court on Human Rights ("ECHR") found that Abu Zubaydah was detained at a CIA site in Poland from December 2002 to September 2003.

Numerous sources also confirm that Abu Zubaydah was subjected to so-called "enhanced interrogation" techniques while detained at these CIA sites. These techniques were proposed and developed by Mitchell and Jessen,[4] who at that point were independent contractors for the CIA. They worked on "novel interrogation

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[3] For consistency, we employ the spelling used by the Senate Select Committee Report in this opinion.

[4] Mitchell and Jessen are referred to as "SWIGERT" and "DUNBAR" in the Senate Select Committee Report, and have admitted to their involvement with the CIA program in a separate lawsuit, *Salim*

methods" intended to break down Abu Zubaydah's resistance, including the use of insects—to take advantage of his entomophobia—and mock burial. The details of Abu Zubaydah's treatment during this period are uncontroverted: he was persistently and repeatedly waterboarded; he spent hundreds of hours in a "confinement box," described as coffin-sized; he was subjected to various combinations of interrogation techniques including "walling,[5] attention grasps,[6] slapping, facial hold, stress positions, cramped confinement, white noise and sleep deprivation"; his food intake was manipulated to minimize the potential of vomiting during waterboarding. To use colloquial terms, as was suggested by the Senate Select Committee Report, Abu Zubaydah was tortured.

The ECHR found that some of this torture took place in Poland. Mitchell and Jessen traveled to the CIA black site there at least twice to supervise the interrogations. Declassified CIA cables confirm Mitchell's and Jessen's involvement in Abu Zubaydah's torture. Abu Zubaydah was eventually transferred to a succession of facilities outside of Poland before arriving in Guantanamo Bay, where he remains today. Abu Zubaydah has allegedly sustained permanent brain damage and physical

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v. Mitchell, No. 2:15-cv-286-JLQ, Answer to Complaint and Affirmative Defenses (E.D. Wash. June 16, 2016) ("*Salim*").

[5] According to a declassified U.S. Department of Justice Office of Legal Counsel ("OLC") memo, "walling" refers to when an individual is firmly pushed against a flexible false wall, hitting the shoulder blades, to create the sensation of physical impact that is worse than it is.

[6] The same OLC memo describes "attention grasp" to consist of grasping an individual with both hands, one hand on each side of the collar opening, in a controlled and quick motion, drawing the individual toward the interrogator.

impairments, including over 300 seizures in the span of three years and the loss of his left eye.

In 2010, Abu Zubaydah's attorneys and certain humanitarian organizations filed a criminal complaint in Poland on his behalf seeking to hold Polish officials accountable for their complicity in his unlawful detention and torture. That investigation closed without any prosecutions or convictions. In 2013, Abu Zubaydah's attorneys filed an application with the ECHR alleging that Poland had violated the Convention for the Protection of Human Rights and Fundamental Rights and failed to undertake a proper investigation. This resulted in the ECHR's decision in *Case of Husayn (Abu Zubaydah) v. Poland*, No. 7511/13, Eur. Ct. H.R. (2015). The court found "beyond reasonable doubt" that Abu Zubaydah was detained in Poland, that "the treatment to which [he] was subjected by the CIA during his detention in Poland . . . amount[ed] to torture," and that Poland had failed to abide by its obligations under the European Convention on Human Rights. The court accordingly awarded damages to Abu Zubaydah.

After the ECHR issued its decision—finding, among other things, that Poland failed to sufficiently investigate human rights violations related to Abu Zubaydah's treatment in Poland—Polish authorities reopened their investigations into the violations, focusing on the culpability of Polish citizens and government officials in Abu Zubaydah's detention. The Polish government requested evidence from the United States through the Mutual Legal Assistance Treaty ("MLAT") between the two countries. The United States denied the Polish government's request. Subsequently, Polish prosecutors

followed up with Abu Zubaydah's lawyers to ask for assistance with obtaining evidence necessary to pursue the prosecution.[7]

B.

Abu Zubaydah and his attorney, Margulies, filed an ex parte application for discovery in the Eastern District of Washington pursuant to 28 U.S.C. § 1782. Section 1782 provides that "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." Abu Zubaydah and his attorney sought a discovery order subpoenaing Mitchell and Jessen to produce documents and give deposition testimony for use in the ongoing criminal investigation in Poland.[8] They requested that Mitchell and Jessen provide, among other related items, documents concerning the detention facility in Poland, the identities of Polish officials involved in the establishment or operation of the detention facility, the use of interrogation techniques, conditions of confinement and torture of those being held, and any contracts made between Polish government officials or private persons residing in Poland and U.S. personnel for use of the property upon which the detention facilities was located.

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[7] Under Polish law, victims of crimes under investigation, like Abu Zubaydah, have a right to submit evidence through counsel to aid in the Polish Prosecutor's Office's investigation.

[8] Mitchell and Jessen co-founded Mitchell, Jessen & Associates, which is headquartered in Spokane, Washington, and Jessen resides in Spokane. Hence, they both "reside[] or [are] found" in the relevant district. 28 U.S.C. § 1782.

The United States submitted a "Statement of Interest" arguing that the district court should not grant Abu Zubaydah's application based on the four factors outlined in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).[9] The district court evaluated the section 1782 application under the *Intel* factors and found that the *Intel* factors weighed in favor of granting the application for discovery. It noted that the government's concerns regarding privilege and classification of documents were hypothetical and could be raised at a later point. The district court granted the application and Petitioners served the subpoenas on Mitchell and Jessen.

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[9] The four *Intel* factors are: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad and the receptivity of the foreign government to U.S. federal-court assistance; (3) whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and, (4) whether the discovery request is unduly intrusive or burdensome. *Intel*, 542 U.S. at 264-65. The third *Intel* factor allows the court to consider the potential for abuse of discovery for use in the foreign court. *Id*. at 265. "Once the court has determined that such abuses are unlikely," and grants the section 1782 application, "the ordinary tools of discovery management, including [Federal Rule of Civil Procedure] 26, come into play; and with objections based on the fact that discovery is being sought for use in a foreign court cleared away, section 1782 drops out." *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir. 2011) (citing *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 377-78 (5th Cir. 2010); *Weber v. Finker*, 554 F.3d 1379, 1384-85 (11th Cir. 2009)). In other words, once a section 1782 application is granted, the ordinary rules of civil procedure relating to discovery shift into place.

After Mitchell and Jessen entered their appearance in district court,[10] the U.S. government filed a motion to intervene and a motion to quash the subpoenas. In support of the latter motion, the government made three arguments. First, it argued that the district court lacked jurisdiction over the case under 28 U.S.C. § 2241(e)(2), which strips jurisdiction for courts to hear or consider any nonhabeas action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement of a designated enemy combatant outside the provisions of the Detainee Treatment Act of 2005, 10 U.S.C. § 801. Second, the government argued that the discovery sought is protected by the state secrets privilege, relying on two declarations from then-CIA Director, Michael Pompeo.[11] Third, it argued that both the National Security Act of 1947 and the Central Intelligence Agency Act of 1949 prohibit the discovery sought.

The district court granted the government's motion to intervene and motion to quash the subpoenas. The court rejected the government's first argument regarding the lack of jurisdiction, noting that the government offered nothing to establish an agency relationship between Mitchell and Jessen and the United States. The court then applied the three-part test outlined in *Mohamed*, 614 F.3d at 1080, to evaluate the government's

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[10] Neither Mitchell nor Jessen opposed the discovery requested in this case and have taken no position on the issues in this appeal.

[11] Pompeo submitted a declaration addressing Petitioners' section 1782 application and incorporated a prior declaration that he submitted in the *Salim* lawsuit.

assertion of the state secrets privilege.[12] First, it found that the government had followed the procedural requirements for invoking the privilege. Second, it concluded that the fact of the CIA's involvement with a facility in Poland was not a state secret that posed an exceptionally grave risk to national security. The court agreed, however, that other information, such as the roles and identities of Polish citizens involved with the CIA site, is covered by the state secrets privilege. Third, the court concluded that "[m]eaningful discovery cannot proceed in this matter without disclosing information that the Government contends is subject to the state secrets privilege," and thus it granted the motion to quash the subpoenas in their entirety and entered judgment. Abu Zubaydah and Margulies timely appealed.

II.

"We review de novo the interpretation and application of the state secrets doctrine and review for clear error the district court's underlying factual findings." *Mohamed*, 614 F.3d at 1077 (citing *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007)).

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[12] Although the state secrets doctrine encompasses a complete bar under *Totten*, 92 U.S. at 107, and an evidentiary privilege under *Reynolds*, 345 U.S. at 7-8, the district court correctly concluded that the *Totten* bar does not apply in this case because the very subject matter of the action—the CIA's enhanced interrogation program—is not a state secret. *See Mohamed*, 614 F.3d at 1085-89 (applying *Reynolds* privilege analysis); *see also El-Masri v. United States*, 479 F.3d 296, 307-10 (4th Cir. 2007) (same).

III.

Petitioners argue that the district court erred in quashing the subpoenas in their entirety based on the state secrets privilege. The parties essentially disagree over the proper analysis under steps two and three under *Reynolds*.[13]

A.

Before reviewing the district court's decision, we provide some brief background on the state secrets privilege. The privilege derives from a common law doctrine that "encompasses a 'privilege against revealing military [or state] secrets, a privilege which is well established in the law of evidence.'" *Mohamed*, 614 F.3d at 1079 (alterations in original) (quoting *Reynolds*, 345 U.S. at 6-7). "The privilege is not to be lightly invoked." *Al-Haramain*, 507 F.3d at 1196. "A successful assertion of privilege under *Reynolds* will remove the privileged evidence from the litigation." *Mohamed*, 614 F.3d at 1079. "Unlike the *Totten* bar, a valid claim of privilege under *Reynolds* does not automatically require

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[13] We are not persuaded by the government's alternative argument that the district court's decision can be affirmed as an exercise of discretion to deny section 1782 discovery requests. First, the district court exercised its discretion to *grant* the section 1782 application after applying the *Intel* factors. That order is not on appeal. Moreover, the order that was appealed was not a discretionary one. The district court concluded that it was required by the state secrets privilege to quash the subpoenas. The government's attempt to challenge the district court's first order seeks to avoid the discretion expressly given to district courts over section 1782 applications. *See Intel*, 542 U.S. at 255-61 (rejecting categorical limitations on section 1782's reach based on the statute's text and legislative history giving discretion to the district court).

dismissal of the case." *Id.* Assertion of the state secrets privilege "will require dismissal [where] it . . . become[s] apparent during the *Reynolds* analysis that the case cannot proceed without privileged evidence, or that litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Id.*

The Supreme Court identified and applied the state secrets privilege in *Reynolds*, where three estates filed wrongful-death suits against the government following the untimely deaths of three civilian observers during a test flight of a B-29 bomber. 345 U.S. at 3. In discovery, plaintiffs sought production of the Air Force's official accident investigation report and the statements of three surviving crew members. *Id.* The Air Force refused to produce the materials, citing the need to protect national security and military secrets because the aircraft and personnel on board "were engaged in a highly secret mission," *id.* at 4, and the material could reveal information about the "development of highly technical and secret military equipment," *id.* at 5. The district court ordered the government to produce the documents in camera so that the court could determine whether they contained privileged material. When the government refused, the district court imposed sanctions and ruled against the government on the issue of negligence. *Id.* The Court of Appeals affirmed. *Id.*

The Supreme Court reversed and sustained the government's assertion of privilege after concluding, "from all the circumstances of the case, that there [wa]s a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national

security, should not be divulged." *Id.* at 10. In reaching this conclusion, the Court noted "that this is a time of vigorous preparation for national defense" and that "air power is one of the most potent weapons in [the United States'] scheme of defense." *Id.* Rather than dismissing the case, however, the Court noted that it could be possible for the plaintiffs "to adduce the essential facts as to causation [in support of their tort claims] without resort to material touching upon military secrets," and remanded for further proceedings. *Id.* at 11-12.

Based on *Reynolds*, we identified three steps for analyzing claims of the state secrets privilege:

> First, we must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, we must make an independent determination whether the information is privileged. Finally, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

Mohamed, 614 F.3d at 1080 (internal alterations and quotation marks omitted) (quoting *Al-Haramain*, 507 F.3d at 1202). The parties do not contest that the government fulfilled the first requirement by filing the declarations from then-CIA Director Pompeo, who formally asserted the state secrets privilege with specificity in this case. *See Reynolds*, 245 U.S. at 7-8 ("There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer."). We therefore proceed to the second and third steps of the *Reynolds* test.

B.

"When the privilege has been properly invoked, 'we must make an independent determination whether the information is privileged.'" *Mohamed*, 614 F.3d at 1081 (quoting *Al-Haramain*, 507 F.3d at 1202). "The court must sustain a claim of privilege when 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.'" *Id.* (quoting *Reynolds*, 345 U.S. at 10). "The state secrets privilege has been held to apply to information that would result in 'impairment to the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments, or where disclosure would be inimical to national security.'" *Fazaga v. Fed. Bureau of Investigation*, 916 F.3d 1202, 1227 (9th Cir. 2019) (quoting *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir. 1995)). We have on more than one occasion commented on the difficulty of defining what constitutes a "state secret." *Id.* (noting "the ambiguity . . . at the outset"); *Mohamed*, 614 F.3d at 1082 ("We do not offer a detailed definition of what constitutes a state secret.").

Our guidance on evaluating the need for secrecy has been contradictory. On the one hand, "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 area." *Al-Haramain*, 507 F.3d at 1203. On the other hand, "the state secrets doctrine does not represent a surrender of judicial control over access to the courts." *Mohamed*, 614 F.3d at 1082 (quoting *El-*

Masri, 479 F.3d at 312). "Rather, 'to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation." *Id.* (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983)). "We take very seriously our obligation to review the [claim] with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al-Haramain*, 507 F.3d at 1203. For instance, "an executive decision to *classify* the information is insufficient to establish that the information is privileged." *Mohamed*, 614 F.3d at 1082 (citing *Ellsberg*, 709 F.2d at 57). "Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege." *Al-Haramain*, 507 F.3d at 1203.

Here, the government asserts the state secrets privilege over seven categories of information: (1) information that could identify individuals involved in the CIA detention and interrogation program; (2) information regarding foreign government cooperation with the CIA; (3) information pertaining to the operation or location of any clandestine overseas CIA station, base, or detention facility; (4) information regarding the capture and/or transfer of detainees; (5) intelligence information about detainees and terrorist organizations, including intelligence obtained or discussed in debriefing or interrogation sessions; (6) information concerning CIA intelligence sources and methods, as well as specific intelligence operations; and, (7) information concerning the CIA's internal structure and administration.

One of the Pompeo declarations asserts that the discovery sought by Petitioners "would tend to confirm or deny whether or not [Mitchell and Jessen] have information about these categories as they pertain to whether or not the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government." Disclosure of the existence of a clandestine intelligence relationship or the extent to which a foreign government is covertly operating or sharing intelligence would, according to Pompeo, cause significant harm to national security because it would: (1) breach the trust on which the relationship is based; (2) compromise the CIA's ability to obtain intelligence information or secure cooperation in counterterrorism operations; and (3) engender backlash from foreign governments. Furthermore, Pompeo asserts that the specific locations of CIA stations and information about former detention facilities are generally classified as "SECRET" and "TOP SECRET" respectively because acknowledging the location of covert facilities could endanger the safety of CIA officers and incite backlash from the host country.

Reviewing the government's documents, we note that much of the concern animating the assertion of the state secret privilege is that harm might result from the government's disclosure of certain information—in particular, confirming or denying the location of a CIA black site—rather than a concern that harm might result from the spread of the information *per se*. This is not surprising, as substantial aspects of the information that

the government insists are privileged are basically public knowledge.[14] The Pompeo declaration acknowledges that there have been allegations by the media, nongovernmental organizations, and former Polish government officials of the CIA operating a detention facility in Poland. Pompeo explains that the government cannot control what former foreign government officials might choose to say, but that the absence of official confirmation from the CIA is the key to preserving an "important element of doubt about the veracity of the information."[15]

Even if we accept that logic, however, the government fails to explain why discovery here could amount to such an "official confirmation." The conclusion that the existence of a CIA site in Poland is not a secret is *not* equivalent to a finding, either by the district court or this court, that the government has taken any official

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[14] We cannot agree with the dissent that Article III judges are "not in a position" to reach conclusions with publicly available facts. Dissent at 31. Indeed, the dissent's position appears to be inconsistent with our essential obligation to review state secrets critically, with a skeptical eye. *See Mohamed*, 614 F.3d at 1082 (quoting *El-Masri*, 479 F.3d at 312); *Al-Haramain*, 507 F.3d at 1203. We note further that, in the context of preliminary proceedings such as those here, we are not called upon to, and do not, render any final decision on the merits.

[15] The district court, we note, did not accept the government's position, and did "not find convincing the claim that merely acknowledging, or denying, the fact the CIA was involved with a facility in Poland poses an exceptionally grave risk to national security." We need not and do not address that determination because, regardless whether governmental acknowledgment would implicate national security, as discussed below, nothing about the government's participation in discovery would constitute governmental acknowledgement or denial of the site's existence.

position on the existence of such a facility. Nothing in this opinion should be read to suggest otherwise. As the district court found, neither Mitchell nor Jessen are agents of the government.[16] The government has not contested—and we will not disturb—that finding. *See Mohamed*, 614 F.3d at 1077 (noting clear error standard). As private parties, Mitchell's and Jessen's disclosures are not equivalent to the United States confirming or denying anything.

Moreover, in light of the record, we agree with the district court that disclosure of certain basic facts would not "cause grave damage to national security." *Al-Haramain*, 507 F.3d at 1195. First, we agree with the district court and Petitioners that in order to be a "state secret," a fact must first be a "secret." In other contexts where the state secrets privilege was applied, the privilege was used to withhold information that was not publicly accessible. *See Mohamed*, 614 F.3d at 1087 ("We are precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect."); *id.* at 1095 (Hawkins, J., joined by Schroeder, J., Canby, J., Thomas, J., and Paez, J., dissenting) (describing onerous procedure undertaken to preserve a "'cone of silence' environment" for us to review the sealed record en banc); *Al-Haramain*, 507 F.3d at 1203 (concluding that the "Sealed Document is protected by the state secrets privilege" after reviewing it in camera); *Kasza v. Browner*,

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[16] Despite so concluding, the district court inconsistently determined at step three of the *Reynolds* analysis that the government's participation in discovery would constitute implicit governmental acknowledgment of the program. As discussed herein, *see infra* at n.18, we do not share that assessment.

133 F.3d 1159, 1170 (9th Cir. 1998) ("Based on our *in camera* review of both General Moorman's and Secretary Widnall's classified declarations, . . . [w]e are convinced that release of such information would reasonably endanger national security interests."). Insofar as the government asserts privilege over the basic fact that the CIA detained Abu Zubaydah in Poland and that he was subjected to torture there, this certainly does not protect the disclosure of secret information, but rather prevents the discussion of already disclosed information in a particular case.

We note that the discovery request here comes indirectly from *current* Polish authorities, specifically, prosecutors who have been tasked by the ECHR and the Polish government to investigate the circumstances surrounding Abu Zubaydah's detention in Poland. This is significant for two reasons. First, it reaffirms our conclusion that the fact that the CIA operated in Poland and possibly collaborated with Polish individuals over Abu Zubaydah's detention is not a secret that would harm national security. *Cf. Al-Haramain*, 507 F.3d at 1200 (noting how details given through "voluntary disclosures made by various officials" are not state secrets). Second, it undermines the asserted national security risks outlined by Pompeo's declarations, such as breaching trust with the cooperating country or generating backlash in that country. While we recognize the legitimacy of these concerns, they appear less of a concern when the other country—here, Poland—is investigating criminal liability of the subject matter involved in this discovery application.

Last, we emphasize the importance of striking "an appropriate balance . . . between protecting national security matters and preserving an open court system." *Id.* at 1203. While it is essential to guard the courts from becoming conduits for undermining the executive branch's control over information related to national security, these concerns do not apply when the alleged state secret is no secret at all, but rather a matter that is sensitive or embarrassing to the government. In other words, the rationale behind the state secrets privilege is to protect legitimate government interests, not to shield the government from uncomfortable facts that may be disclosed or discussed in litigation. Protecting the former is an unfortunate necessity in our complicated world of national and international affairs. Protecting the latter is inconsistent with the principle of an independent judiciary.

Reviewing Petitioners' request for documents, we agree with the district court that much, although not all, of the information requested by Petitioners is covered by the state secrets privilege. For instance, documents, memoranda, and correspondence about the identities and roles of foreign individuals involved with the detention facility, operational details about the facility, and any contracts made with Polish government officials or private persons residing in Poland might implicate the CIA's intelligence gathering efforts. As explained in the Pompeo declaration, disclosure of the identities of foreign nationals who work with the CIA risks damaging the intelligence relationship and compromising current and future counterterrorism operations.

Nonetheless, we also agree with the district court that a subset of information is not—at least in broad

strokes—a state secret, namely: the fact that the CIA operated a detention facility in Poland in the early 2000s; information about the use of interrogation techniques and conditions of confinement in that detention facility; and details of Abu Zubaydah's treatment there. These facts have been in the public eye for some years now, and we find no reason to believe that Mitchell and Jessen testifying about these facts "will expose . . . matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. We therefore reject the government's blanket assertion of state secrets privilege over everything in Petitioners' discovery request. *See Fazaga*, 1202 F.3d at 1228 (reiterating "caution[] that courts should work 'to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary.'" (quoting *Mohamed*, 614 F.3d at 1082)).

C.

At step three of the *Reynolds* analysis, we face the more difficult task of determining how the matter should proceed in light of a successful claim of privilege.[17] *Mohamed*, 614 F.3d at 1082. We have held

[17] As the dissent notes, our main disagreement is at the third *Reynolds* step. Dissent at 30. The dissent's concern about "walking close" to "the line of actual state secrets" simply does not reflect the test from *Mohamed*, which requires that nonsensitive information be released "whenever possible." *Compare* Dissent at 31, *with Mohamed*, 614 F.3d at 1087-89. The dissent also asserts, without any support, that the *Reynolds* step two analysis must also take into consideration the fact that the information sought here is ultimately destined for a foreign tribunal in Poland. Dissent at 34. A state secret, however, is a state secret in any forum, domestic or foreign. The crux of the question is whether "there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the

that, "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for release of the latter." *Id.* (original alterations omitted) (quoting *Kasza*, 133 F.3d at 1166; *Ellsberg*, 709 F.2d at 57). There are three limited circumstances in which a successful claim of privilege requires outright termination of the case: (1) where the plaintiff cannot prove the prima facie elements of the claim with nonprivileged evidence; (2) where the privilege deprives that defendant of information that would have otherwise given the defendant a valid defense to the claim; or (3) where the claims and defenses might theoretically be established without relying on the privileged evidence, but "it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Id.* at 1083.

The district court properly identified the third circumstance as the only one potentially applicable to a discovery proceeding such as this case. We agree with Petitioners, however, that it is not impossible to separate secret information, and that the district court was

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interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. Moreover, the dissent's analysis of *Reynolds* fails to consider the district court's authority to decide whether discovery should be provided to Petitioners in the first instance. Only then would Petitioners be able to provide any information to a foreign tribunal.

too quick to quash the subpoenas and dismiss the case in its entirety.[18]

Unlike our prior cases, this case is a pure discovery matter where there are no claims to prove or defenses to assert.[19] *See Mohamed*, 614 F.3d at 1075, 1093 (dismissing suit against a U.S. corporation under the Alien

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[18] The district court determined that the government's acknowledgment of the existence of a CIA facility in Poland would not implicate a state secret, a conclusion we need not address nor that we necessarily share. *See supra* at n.15. The district court nonetheless proceeded to find dismissal appropriate under *Reynolds* step three because, given that Petitioners made clear that they seek information about Poland, "the Government participating could be viewed as implicit confirmation of operation of the Program in Poland." As mentioned above, we reject that determination. *See supra* at n.16. The district court's inconsistent and erroneous view of the effect of the government's participation in discovery was fundamental to the court's conclusion that this case should be dismissed outright. The district court found that implicit government acknowledgment, although "seemingly innocuous," was intertwined with state secrets. As we already noted, however, nothing about the government's participation in this case would constitute official acknowledgment, implicit or otherwise. Thus, the district court's *Reynolds* step three conclusion was based entirely upon a faulty predicate.

[19] For this reason, the dissent's reliance on *Mohamed*, *Al-Haramain*, and *Kasza* is off-base. In those cases, plaintiffs sought information that belonged to what the courts deemed a "classified mosaic." *Kasza*, 133 F.3d at 1166. The courts were able to reach that conclusion because they all underwent the process of reviewing the contested material to determine that there was privileged information that could not be disentangled. *See Mohamed*, 614 F.3d at 1095; *Al-Haramain*, 507 F.3d at 1203; *Kasza*, 133 F.3d at 1170. That was an essential predicate to the courts' dismissal at step three of the *Reynolds* analysis. *See, e.g.*, *Mohamed*, 614 F.3d at 1087 ("We have thoroughly considered plaintiffs' claims, several possible defenses and the prospective path of this litigation. We also have

Tort Statute based on its alleged involvement in the CIA extraordinary rendition program); *Al-Haramain*, 507 F.3d at 1205 (dismissing lawsuit against the United States because plaintiffs could not show standing without privileged document); *Kasza*, 133 F.3d at 1162-63 (affirming dismissal of citizen suits against the U.S. Air Force and Environmental Protection agency). Section 1782 provides the district court discretion to order an individual to give deposition testimony or produce documents for use in a foreign proceeding provided it does not violate "any legally applicable privilege." 28 U.S.C. § 1782(a). The government does not challenge the district court's exercise of that discretion or application of the *Intel* factors. *See supra* at n.13. By the terms of the statute, Petitioners can pursue any nonprivileged discovery within the parameters set by the district court.[20]

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carefully and skeptically reviewed the government's classified submissions . . . We rely heavily on these submissions, which describe the state secrets implicated here, the harm to national security that the government believes would result from explicit or implicit disclosure and the reasons why, in the government's view, further litigation would risk that disclosure.").

Conversely, here, neither the district court nor we have had any occasion to review the contested material to reach that threshold question. Given the limited factual record, the dissent repeats the same error that the district court made by assuming the truth of the government's assertions—that it would not be possible to disentangle the privileged from nonprivileged—without first invoking available discovery tools as required by *Mohamed*. *See* 614 F.3d at 1089.

[20] We agree with Petitioners that, to the extent the district court denied discovery because disclosure of some information "would not seem to aid the Polish investigation," the district court erred by im-

Moreover, the record suggests that Petitioners can obtain nonprivileged information from Mitchell and Jessen. At the district court, Petitioners argued:

> [W]e are here in order to understand the story around [Abu Zubaydah's claims in Poland] . . . You know, what was the narrative, what sort of treatment was Mr. Zubaydah subjected to, what was the feeding regime, how was he held, what medical care was he given, and of course, yes, we want to know if locals were involved in that and to what extent.
>
> . . .
>
> Now, ideally, Your Honor, because we think that these are not state secrets at this point in time, we would prefer that Mitchell and Jessen be permitted to testify as to the identities of people and where it occurred. But the prosecutor already knows where the events occurred and my suspicion is he has a good idea, although I'm not privy to the specifics of his investigation, of who, you know, who his targets are.

Even if Mitchell and Jessen are restricted from disclosing state secrets such as the identities of individuals involved with the detention facility, the non-secret information in their possession could provide context to Polish prosecutors or corroborate prosecutors' independent investigations.

More importantly, we conclude that the district court did not adequately attempt to disentangle the privileged

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posing an extraneous requirement upon Petitioners. Whether discoverable information may or may not be "useful" in foreign proceedings has no bearing on whether the information is privileged.

from nonprivileged information.[21] As we noted in *Mohamed*, "the standards for peremptory dismissal are very high and it is the district court's role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified." 614 F.3d at 1092-93; *see also Reynolds*, 345 U.S. at 11-12 (remanding for further proceedings where plaintiffs potentially could pursue their tort action without using material touching upon military secrets); *cf. Heraeus*, 633 F.3d at 597 (noting that once the district court grants a section 1782 application, "the ordinary tools of discovery management . . . come into play").

Mitchell and Jessen have already provided nonprivileged information similar to that sought here in the *Salim* lawsuit before the district court, illustrating the viability of this disentanglement. Excerpts of those depositions were included in the record and reflect how depositions could proceed in this case, such as with the use of code names and pseudonyms, where appropriate.[22] While this no doubt imposes a burden on the government to participate in discovery and object, where

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[21] *See supra* at n.18. This is an essential point that the dissent overlooks: where *Reynolds* privilege is successfully asserted at steps one and two, the default at step three is nonetheless to "whenever possible . . . disentangle[] [the sensitive information] from nonsensitive information to allow for the release of the latter." *Kasza*, 133 F.3d at 1166 (quoting *Ellsberg*, 709 F.2d at 57); *see also Mohamed*, 614 F.3d at 1089 ("Dismissal at the pleading stage under *Reynolds* is a drastic result and should not be readily granted."). The dissent would flip the default to dismissal, unless Petitioners met a newly imposed burden to demonstrate a specific plan for disentanglement.

[22] The dissent attempts to distinguish the situation in *Salim* and faults Petitioners for not presenting a viable disentanglement plan to the district court. Dissent at 32-33. Again, this disregards the

appropriate,[23] we have stressed that cases should be dismissed only "in the[] rare circumstances" that the district court is not able to employ protective procedures to prevent disclosure of state secrets. *Mohamed*, 614 F.3d at 1089. We are not convinced that those rare circumstances exist here. On remand, the district court may use the Pompeo declarations as a guide while employing tools such as in camera review, protective orders, and restrictions on testimony, *see id.*, in tailoring the scope of Mitchell's and Jessen's deposition and the documents they may be required to produce.

IV.

We have grappled with the state secrets privilege on only rare occasions. Given that the district court had only *Kasza*, *Al-Haramain* and *Mohamed* as guides in conducting its *Reynolds* analysis, we can understand why the district court was so quick to dismiss the proceedings at the third step. The court's hasty dismissal, however, overlooked our "special burden to assure . . . that an appropriate balance is struck between protecting national security matters and preserving an open court system," *Mohamed*, 614 F.3d at 1081 (quoting *Al-Haramain*, 507 F.3d at 1203).

Our holding is a limited one: if, upon reviewing disputed discovery and meaningfully engaging the panoply of tools at its disposal, the district court determines that

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fact that the district court never engaged in any disentanglement process or assessed what protective measures could be utilized to accomplish disentanglement.

[23] Eight U.S. government attorneys or experts were present at the depositions of Mitchell and Jessen in *Salim* to ensure that nothing confidential or privileged would be disclosed.

it is not possible to disentangle the privileged from non-privileged, it may again conclude that dismissal is appropriate at step three of the *Reynolds* analysis. However, the district court may not skip directly to dismissal without doing more. "[A]s judges, we strive to honor *all* of these principles [of justice, transparency, accountability and national security]," and while "there are times when exceptional circumstances create an irreconcilable conflict between them," *id.* at 1073—on the limited record before us, this is not one of those times.

The world has moved on since we discussed the state secrets privilege in *Mohamed.* In the near decade that has passed, we have engaged in a public debate over the CIA's conduct during the early years of the war on terror. The district court correctly recognized that the state secrets privilege did not cover all the discovery sought by Petitioners, but failed to recognize that complete dismissal based on the state secrets privilege is reserved only for "rare cases." *Id.* at 1092.

REVERSED and **REMANDED** for further proceedings.

GOULD, Circuit Judge, dissenting:

I respectfully dissent. The majority jeopardizes critical national security concerns in the hope that the district court will be able to segregate secret information from public information that could be discovered. In this case, I would defer to the view of then-CIA Director and now Secretary of State Michael Pompeo that the disclosure of secret information in this proceeding "reasonably could be expected to cause serious, and in many instances, exceptionally grave damage to U.S. national security."

I

A major source of my disagreement with the majority concerns Section III.C of the opinion, with its analysis of step three of the *United States v. Reynolds* test. The majority and I agree with the district court that information about foreign nationals cooperating with the CIA, "operational details about the facility," and details about Poland's intelligence cooperation with the CIA are subject to the state secrets privilege. We part ways with respect to how to proceed with carving this kind of information out of Petitioners' broad discovery requests. Our circuit has previously contemplated a situation in which, in the face of the government's successful claim of state secrets privilege, "it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information . . . —litigating the case . . . would present an unacceptable risk of disclosing state secrets." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (en banc). I would hold that this is such a proceeding and affirm the district court.

I also note that, while step three is a major concern in dissent, I am not in a position as an Article III judge to make a conclusion that it is agreed that Abu Zubaydah was detained and tortured in Poland. Doubtless there is much media comment and some reasoning of the European Court of Human Rights that looked at this matter suggesting that conclusion. But while the District Court findings suggest that there was some facility in Poland, I do not read the District Court findings to acknowledge that Abu Zubaydah was in fact tortured, and the definition of torture was highly disputed in our country and not ultimately decided by the U.S. Supreme Court in the context of this case. For purposes of my dissenting analysis, it is sufficient if at step three of the *Reynolds*' test it appears that walking close to the line of actual state secrets may result in someone overstepping that line to the detriment of the United States. I would not need to go further than that to accept the position of the CIA in its intervenor role in this case that the discovery should not proceed.

The majority remands this case so that Petitioners can pursue details about Abu Zubaydah's treatment that it believes are no longer secret, tasking the district court with disentangling that information from closely related topics that are indisputably subject to the state secrets privilege. The majority opinion characterizes this remaining information as information that Petitioners could provide as part of a "context to Polish prosecutors" under § 1782. However, our circuit has recognized that even otherwise innocuous information that provides a more coherent and complete narrative should not be produced where it may risk exposing a broader picture. *See Kasza v. Browner*, 133 F.3d 1159, 1166

(9th Cir. 1998) (holding that "if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information"). This is the risk presented by the residual information that Petitioners will seek on remand. In combination with the circumstances of the proceeding and facts already made public, an attempt to disentangle the details of Abu Zubaydah's treatment in Poland could expose a broader mosaic of clandestine "intelligence activities, sources, or methods." *Mohamed*, 614 F.3d at 1086.

The majority recognizes that Petitioners' discovery requests could potentially pose a "risk of disclosing state secrets" such as details about the CIA's involvement with locations, individuals, and governments overseas because this kind of information may be closely tied to nonprivileged information. *Id.* at 1083. The majority responds to this concern by advising that "depositions could proceed in this case, with the use of code names and pseudonyms" in order to protect privileged details of CIA operations. Code names and pseudonyms had been used in a prior lawsuit to enable Mitchell and Jessen to be deposed without revealing sensitive information about a CIA black site.

But the district court judge in this case, who also heard that prior lawsuit, understood exactly why those tools would be ineffective in this circumstance. Because the entire premise of the proceeding and the basis for our jurisdiction concerns Polish prosecutorial efforts, the district court was correct to reason that "[a]llowing the matter to proceed with a code word, such

as 'detention site blue' to replace Poland seems disingenuous." As the government argued, "regardless of what pseudonyms or fictitious words [Petitioners] would propose to use as a substitute, there's no escaping the fact that everything [they are] asking would relate to allegations about things that occurred in Poland, people that were there, [and] activities that allegedly occurred there." Like the approach of the district court in *Al-Haramain*, the majority's instruction to use code names opens the door to secret information being "revealed through reconstruct[ion]" even if it is not directly produced. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007). The *Al-Haramain* court rejected this sort of approach as the "worst of both world[s]." *Id.* Petitioners have not demonstrated that the use of code words could meaningfully restrict the information ultimately made public through these discovery requests, and the majority should not, therefore, suggest that national security would be protected by their use.

In brief, although the majority is right to emphasize our "special burden to assure . . . that an appropriate balance is struck between protecting national security matters and preserving an open court system," the majority does not recognize some of the ways in which this particular case presents unique challenges for step three of the *Reynolds* analysis. *Mohamed*, 614 F.3d at 1081. Because of the circumstances presented by a § 1782 proceeding, the information Petitioners seek is inextricably linked with particular intelligence missions and particular foreign intelligence contacts. Details about "the use of interrogation techniques and conditions of confinement in that detention facility . . . [and] Abu Zubaydah's treatment there" will inevitably

be placed in the context of a Polish prosecution seeking to discover aspects of the CIA's presence in Poland and any foreign nationals working with the CIA there, topics the majority recognizes to be privileged. Without a more specific and plausible plan for obtaining that non-privileged information and not risking the exposure of a broader picture of national security material, I would defer to then-Director Pompeo's assessment of the risks presented in allowing the discovery proceeding to go forward. For that reason, I must respectfully dissent from the majority's application of step three of the *United States v. Reynolds* test. These concerns apply to any case in which the *Reynolds* test is applied and step three of that test must be addressed.

II

Also, there are aspects of this case peculiar to the context of § 1782 and consideration of the *Reynolds* test when the sought information will be produced for a foreign country under § 1782. I find it very troubling that the majority's analysis of the extent of the *Reynolds* privilege in section III.B of the opinion does not acknowledge and evaluate the consequences of the fact that the information sought in a discovery proceeding here under § 1782 is ultimately destined for a foreign tribunal in Poland. Determining the extent of the state secrets privilege is a task that always aims at assuring "that an appropriate balance is struck between protecting national security matters and preserving an open court system." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081 (9th Cir. 2010) (en banc) (citing *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)). *Reynolds* itself contemplated balancing the legitimate rights of survivors to sue about

the deaths of their loved ones against concerns of potential harm from disclosing military secrets. *See United States v. Reynolds*, 345 U.S. 1, 9 (1953) (holding that the state secrets privilege is guided by a "formula of compromise"). But how is that balance to be struck here where the information is sought for potential prosecutions in Poland of Polish citizens who may have worked in Poland with the Respondents?

I would hold that the *Reynolds* balance should recognize that information produced in domestic proceedings remains under the supervision of the United States court system in a way that information produced in discovery for overseas tribunals does not. *Reynolds* makes clear that it is our domestic national security concerns that create a privilege against disclosure of information that may harm our country. *Id.* at 10. This country's judicial system stands to gain little from providing information to Polish prosecutors, while it is this country's national security that is being risked. Although it is true that § 1782 authorizes discovery for the benefit of foreign proceedings, it is also true that the *Reynolds* privilege requires a balancing test that can take into account that the sought discovery will be shipped overseas for the benefit of another country's judicial system, and at that point, totally out of control of a domestic court.

III

For the reasons set forth above, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. 2:17-CV-0171-JLQ

IN RE APPLICATION OF ZAYN AL-ABIDIN MUHAMMAD HUSAYN (ABU ZUBAYDAH) AND JOSEPH MARGULIES, PETITIONERS

[Filed: Feb. 21, 2018]

ORDER RE: MOTION TO QUASH AND MOTION TO INTERVENE

BEFORE THE COURT is the Motion to Intervene (ECF No. 29) and Motion to Quash (ECF No. 30) filed by the United States of America (hereafter "Government"). Petitioners filed a Response (ECF No. 31) to the Motion to Quash, but no response to the Motion to Intervene was filed. The court heard telephonic oral argument on November 28, 2017. Andrew Warden appeared for the Government. John Chamberlain, David Klein, and Jerry Moberg represented the Petitioners. Chris Tompkins appeared for Respondents James Mitchell and John Jessen.

I. Background and Procedural History

On May 22, 2017, Petitioners Zayn Al-Abidin Muhammad Husayn ("Abu Zubaydah") and Joseph Margulies filed an "Ex Parte Application for Discovery" (ECF No. 1) pursuant to 28 U.S.C. § 1782, requesting this

court to issue subpoenas to James Elmer Mitchell and John Jessen (collectively "Respondents") to produce documents and give testimony for use in an ongoing criminal investigation in Krakow, Poland. Although denominated "ex parte" the Application stated advance notice and a copy of the Application was provided to counsel for Mitchell and Jessen. (ECF No. 1, p. 2).

Petitioner Abu Zubaydah is allegedly detained at Guantanamo Bay, Cuba. Petitioner Joseph Margulies is his attorney. Zubaydah alleges he was detained by the United States Government in March 2002, and has been in U.S. custody ever since. (ECF No. 1, p. 3-4). Relevant to this action, Zubaydah alleges he was detained at various CIA black sites, including at "Detention Site Blue" in Poland, from December 2002 to September 2003. (ECF No. 1, p. 6). Petitioners allege there is an ongoing criminal investigation in Poland into Polish official's alleged complicity in claimed unlawful detention and torture of Zubaydah. (ECF No. 1, p. 6-7). Specifically, Petitioners state: "The Polish criminal investigation is charged with examining whether Polish officials violated domestic law by opening, operating, and conspiring with the United States to detain and mistreat prisoners, including Abu Zubaydah." (*Id.* at 7). Zubaydah alleges he has the right to submit evidence in that matter and claims he has been invited by the Polish prosecutor to do so.

On May 31, 2017, the Government filed a Notice of Potential Participation (ECF No. 7) and requested 30 days to evaluate the matter and determine whether to file a Statement of Interest. On June 30, 2017, the Government filed a Statement of Interest (ECF No. 11)

wherein it opposed Petitioners' Application for a Discovery Order pursuant to 28 U.S.C. § 1782. On July 21, 2017, Petitioners filed a Response (ECF No. 16) to the Government's Statement of Interest. Thereafter, on August 4, 2017, Petitioners filed a "Motion for Leave to Serve Subpoenas, or, in the Alternative, to Set Hearing Date." (ECF No. 19). The Motion for Leave argued issuance of the subpoenas is the "beginning of a process" and any objections are properly raised via motion to quash after issuance of the subpoena.

The court granted the Application for Discovery on September 7, 2017. (ECF No. 23). A Notice of Appearance (ECF No. 25) on behalf of Respondents was filed on October 16, 2017, but Respondents did not challenge the Application for Discovery nor did they file a motion to quash. The court issued an Order requiring any motion to quash or for protective order be filed no later than October 25, 2017. (ECF No. 28). The Government filed a Motion to Intervene and Motion to Quash on October 24, 2017. The Motion to Quash asserts the state secrets privilege.

II. Discussion

A. Motion to Intervene—The Government asserts the right to intervene in this matter pursuant to Fed. R. Civ. P. 24(a). Petitioners have filed a response to the Motion to Quash, but have not filed a response to the Motion to Intervene. Failure to file a response may be deemed consent to the entry of an adverse order. Local Rule 7.1(d). The court has reviewed the Motion and determined the Government has met the requirements for intervention. See *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128, 1133 (N.D. Cal. 2008). The Motion to Intervene (ECF No. 29) is GRANTED.

B. Motion to Quash—The Government advances three arguments: 1) the court lacks subject matter jurisdiction due to 28 U.S.C. § 2241(e)(2), the Military Commissions Act; 2) the state secrets privilege bars the requested discovery; and 3) the CIA Act and NSA Act protect disclosure of the requested information. Petitioners contest all these assertions.

1. The Military Commissions Act—The relevant statutory provision, 28 U.S.C. 2241(e)(2) provides:

> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

The Ninth Circuit Court of Appeals has established a five element test for determining whether the court lacks jurisdiction under the MCA: 1) the action is against the "United States or its agents"; 2) the action relates to "any aspect of the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States"; 3) the action relates to an alien who was "determined by the United States to have been properly detained as an enemy combatant" or an alien awaiting such a determination; 4) the action is other than an application for writ of habeas corpus; and 5) the action does not qualify for an exception under the

Detainee Treatment Act. *Hamad v. Gates*, 732 F.3d 990, 995 (9th Cir. 2013).

The Government argues the MCA applies and strips the court of jurisdiction. Petitioners argue the MCA does not apply for three reasons: 1) this is a non-adversarial proceeding and not an "action" as contemplated by the MCA; 2) the action is not against the United States or its agents, as the Government has not established Mitchell and Jessen are "agents"; and 3) the Government has not proven that either Petitioner is an "enemy combatant." (ECF No. 31, p. 6-7).

The Government's argument the court lacks jurisdiction is asserted in a short and limited manner. The Government devotes just a page and a half of its 25-page brief to the jurisdictional argument, which if accepted, would be dispositive. Counsel for the Government, Mr. Warden, was also counsel in *Salim v. Mitchell*, 15-286-JLQ, and is aware a similar jurisdictional argument was advanced in *Salim*. The Government is aware the court rejected the argument in *Salim* for two reasons: 1) Defendants in *Salim* did not establish Mr. Mitchell and Mr. Jessen were "agents of the United States"; and 2) Defendants had not established Plaintiffs were "enemy combatants." (ECF No. 135 in Case No. 15-CV-286-JLQ). Petitioners herein argue the Government offers nothing to establish an agency relationship between Mitchell and Jessen and the United States.

The MCA does not deprive the court of jurisdiction over this matter. The court rejects Petitioners' argument this legal proceeding is not an "action", but the court does agree it is not "against the United States or its agents." The United States was not named in this action, and is not a respondent to the subpoenas. The

court, in *Salim v. Mitchell*, 15-286-JLQ, previously analyzed the agency issue and found an agency relationship between Mitchell and Jessen and the United States was not established. The determination in *Salim* was based on a more fulsome evidentiary record than has been presented in this matter.

The Government, as the party asserting agency, has the burden of establishing it. See *Atrium of Princeton v. NLRB*, 684 F.3d 1310, 1315 (D.C. Cir. 2012) ("The party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence"); and *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994) ("Agency is never to be presumed; it must be shown affirmatively."). In *Salim* the court discussed how the contracts between the CIA and Mitchell and Jessen referred to Mitchell and Jessen as "independent contractors." Defendants are referred to as "independent contractors" in their contracts with the Government and not as "agents". (For more detailed discussion see court's Order of January 27, 2017 at ECF No. 135 in Case No. 15-286). However, "whether a relationship is characterized as an agency in an agreement between parties or in the context of the industry or popular usage is not controlling." *Restatement (Third) of Agency* § 1.02 (2006). Rather, "agency", as defined at common law, "posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person." *Id.* at § 1.01, Comment (c). The Restatement states "the common term 'independent contractor' is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent

service providers." *Id*. The Ninth Circuit, albeit in a different context, has agreed the term is equivocal: "Unlike employees, independent contractors are not ordinarily agents." *United States v. Bonds*, 608 F.3d 495, 505 (9th Cir. 2010). However, independent contractor status "does not preclude a finding the speaker is also an agent for some purposes." *Id*.

The MCA does not strip the court of subject matter jurisdiction over this proceeding concerning an application for discovery under 28 U.S.C. § 1782. This matter was not filed "against" the United States. The Government has not established Mitchell and Jessen are or were agents of the United States, and even as to "enemy combatant" status the record is sparse. Although it may be commonly known that Abu Zubaydah has been categorized as an "enemy combatant," Petitioners pointed out in their Response the Government had failed to provide such evidence. (ECF No. 31, p. 7). The Government then belatedly filed additional factual material with its Reply brief supporting the assertion that Abu Zubaydah is an "enemy combatant." It is generally not appropriate to introduce new factual material with a reply brief. For all the aforesaid reasons, the Government's argument the court lacks jurisdiction is rejected.

2. <u>The State Secrets Privilege</u>—The Government argues the court should quash the subpoenas and issue a protective order prohibiting the requested depositions and all document discovery. (ECF No. 30, p. 7). The Government argues the requested discovery is "predicated on a singular allegation that the United States can neither confirm nor deny without risking significant harm to national security—that is, whether or not the CIA conducted detention and interrogation operations

in Poland or with the assistance of the Polish Government." (*Id.*). The Government contends the "entire line of inquiry is prohibited" (*Id.*) and the discovery must be precluded in its entirety.

Petitioners counter stating the discovery need not be precluded in its entirety. Petitioners argue the Government has already allowed Mitchell and Jessen to testify and produce evidence in *Salim v. Mitchell*, and they did so with reference to "Detention Site Cobalt" without acknowledging its location, even though it is widely believed to have been in Afghanistan. (ECF No. 31, p. 22). Similarly, Petitioners argue Mitchell and Jessen can testify in regard to "Detention Site Blue" without testifying to the location of the site or the cooperation of any foreign government. Petitioners contend: "Valuable discovery may proceed without requiring Respondents to confirm either the location of any particular site, or the cooperation of any particular government." (ECF No. 31, p. 16).

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 court found application of the *Reynolds* privilege required dismissal of the case.

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. The *Totten* bar does not apply.

(a) The Reynolds Privilege—In the case *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 aircraft the military was testing "secret electronic equipment." In discovery, Plaintiffs in *Reynolds* 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 greater the 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.*

(b) ***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.

(c) Step 1: Procedural Requirements

In this case, a formal claim of the state secret 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. 30-1). 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. 30, p. 11) 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 and authorization by him to defend the assertion of the privilege." (*Id.*).

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 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.* Petitioners do not challenge that the Government has fulfilled the procedural requirements for invoking the state secrets privilege. (ECF No. 31, p. 10).

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. 30-1, ¶ 4). Director Pompeo states he is aware of the European Court of Human Rights' decision and the award of money damages to Abu Zubaydah. (*Id.*). 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 ¶ 2).

Director Pompeo 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 CIA; 3) information concerning the operation and location of clandestine overseas CIA facilities; 4) information regarding capture and transfer of detain-

ees; 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 ¶6). Of most import to the subpoenas at issue are the two categories concerning the operation and locations of overseas CIA facilities and information regarding foreign government cooperation with the CIA.

Pompeo states: "whether or not the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government—remains a classified fact that cannot be divulged without risking significant damage to national security." (*Id.* at ¶ 8). The court finds the Government has fulfilled the procedural requirements for invoking the privilege.

(d) Step Two—Evaluation of the Claim of Privilege—

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." *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1081 (9th Cir. 2010). The Ninth Circuit 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.

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.

Petitioners argue the Government has not provided a convincing argument harm to national security would

result from responding to the discovery. The Government argues identifying foreign cooperating governments would make them less likely to cooperate in the future, or embarrass the foreign government, damage relations, etc. Petitioners argue the alleged threat to national security in this case is "illusory". (ECF No. 31, p. 12). Petitioners point out the Polish government itself has requested some of the information now being sought through MLAT requests, and the Polish criminal proceeding seeks such information now.

Petitioners also rebut the argument that if the Government acknowledges Poland cooperated, Poland might be at greater risk from terrorists or other bad actors. Petitioners state: "If the Government's fears have any foundation, the harm the Government warns of has already come to pass." (*Id.* at 13). Petitioners argue the European Court of Human Rights ("ECHR") has already found, based on a standard of proof beyond a reasonable doubt, that the CIA operated a facility at Stare Kiejkuty, Poland. (Citing to ECHR Opinion at ¶ 419; ECF No. 12-1). Petitioners convincingly argue, "given the notoriety of these facts, there must logically come a point at which they have become so widely and credibly recognized as true that confirmation or denial cannot exacerbate the harm already done." (ECF No. 31, p. 14).

Petitioners stated at oral argument that in order to be a "state secret" a fact must first be a "secret." The Government contended at the hearing the CIA has never officially acknowledged any foreign government assisted with the CIA's Detention and Interrogation Program and the names of foreign governments were redacted from the Senate Select Committee's Report issued in 2014. The Government also argued the Ninth

Circuit, in *Jeppesen Dataplan*, had addressed the same argument—that the fact some information about the Detention and Interrogation Program was being publicly reported in the media, did not mean the Government could not assert the privilege. The Ninth Circuit has also recently stated: "National security concerns can, of course, provide a compelling reason for shrouding in secrecy even documents once in the public domain." *Ground Zero Center v. United States Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017). However, in assessing the compelling reason, the court stated it would consider the allegation of harm to national security and also "the extent to which the information [the documents] contain already has been publicly disclosed." *Id.*

The Second Circuit, in the context of a Freedom of Information Act ("FOIA") request, also rejected the argument that because some of the withheld information was so general in relation to previously disclosed information of the CIA, it could not compromise national security. *ACLU v. Department of Justice*, 681 F.3d 61, 71 (2nd Cir. 2012). The court stated, "even if the redacted information seems innocuous in the context of what is already known by the public, minor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of a jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance itself." *Id.* The court found it was both "logical and plausible" disclosure of the information could jeopardize the CIA's work with foreign intelligence liaison partners. *Id.* The Second Circuit was also quite deferential to the Government's assertion that harm to national security may re-

sult: "We have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." Id. at 70.

The Government herein relies heavily on *Jeppesen Dataplan,* a 6-to-5 *en banc* decision of the Ninth Circuit Court of Appeals. The decision was rendered in 2010, when more aspects of the CIA's Detention and Interrogation Program were secret. In 2014, the Senate Select Committee made public portions of its report, revealing additional information about the Program, but also still withholding many specific details. However, as this court stated in *Salim*, the fact that some details have been made public by the Government or otherwise reported by the media, does not compel the Government to release other classified information concerning the Program. 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 is not aware of there being any mention of Poland in the over 500-page Executive Summary to the SSCI Report concerning the Detention and Interrogation Program that the Senate Select Committee released to the public. The Petitioners contend references to "Detention Site Blue" in the Report refer to Poland, but the Government has not officially acknowledged Poland's cooperation or assistance with the Program.

The Government argues official acknowledgment is an important concept and is distinct from information simply being reported in the media or by non-governmental sources. Courts, at least in the context of FOIA requests, have largely agreed with the Government's argument concerning official acknowledgment. See for example *ACLU v. U.S. Dept. of Defense*, 628 F.3d 612 (D.C. Circuit 2011). Therein, the D.C. Circuit applied a three criterion test for determining whether the information requested had been officially acknowledged: 1) the information requested must be as specific as the information previously released; 2) the information requested must match the information previously disclosed; and 3) the information requested must already have been made public through an official and documented disclosure. *Id.* at 621. The D.C. Circuit further cited favorably to the Fourth Circuit's statement: "It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Id.* at 621-22.

Viewing the Government's claim of privilege with a "skeptical eye," the court does not find convincing the claim that merely acknowledging, or denying, the fact the CIA was involved with a facility in Poland poses an exceptionally grave risk to national security. The fact has been the subject of governmental investigations in Poland and Europe going back to 2005 and 2007. According to the parties' briefs, in 2014, the former President of Poland, Kwasniewski, who was President from 2000 to 2005, acknowledged the cooperation with CIA, but claimed he did not have knowledge of "torture". The European Court of Human Rights has found by

proof beyond a reasonable doubt the CIA operated a facility in Poland. The fact has also been fairly widely reported in media.

However, compelling Mitchell and Jessen to address the mere fact of whether they were part of CIA operations conducted in Poland, or whether they interrogated Zubaydah in Poland, would not seem to aid the Polish investigation. The Polish investigators already have a ECHR Opinion finding that Poland was complicit "in that it enabled the US authorities to subject the applicant [Abu Zubaydah] to torture and other ill treatment on its territory." (ECF No. 2-3, p. 14). Petitioners seek to obtain more detail as to what occurred and who was involved. At oral argument, counsel for Petitioners stated they were particularly interested in the involvement of the locals, Polish citizens. However, directing Mitchell and Jessen to answer questions about the presence of Polish citizens, their identities if known, and their involvement with the Detention and Interrogation Program legitimately could jeopardize national security. The ECHR cites the 2007 Marty Report, presented to the Parliamentary Assembly, which states: "The secret detention facilities in Europe were run directly and exclusively by the CIA. To our knowledge, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter." (ECF No. 2-3, p. 7). Disclosing operational details concerning the staffing and securing of the sites, which would confirm or refute what has been unofficially reported, could reasonably be expected to pose a risk to national security, as averred to by Director Pompeo.

This case is different from *Salim* in an important respect because in *Salim* discovery was on-going for several months before the Government then asserted various privileges as to specific documents. Here, the Government seeks to preclude all discovery. Additionally, in *Salim*, Mitchell and Jessen were both deposed at length. Petitioners argue that even if the court upholds the privilege and allows the Government to neither confirm or deny the CIA operated a facility in Poland, Petitioners can still obtain useful information from the written discovery and depositions.

In *Jeppessen Dataplan*, the Ninth Circuit allowed the Government to assert the *Reynolds* privilege at an early stage: "We also conclude that the government may assert a *Reynolds* privilege claim prospectively, even at the pleading stage, rather than waiting for an evidentiary dispute to arise during discovery or trial." 614 F.3d 1070, 1081 (9th Cir. 2010). This court could allow depositions to go forward, have the Government object, and resolve specific objections, however that would likely prove futile as the Government objects to any evidence or acknowledgment that a site for the Detention and Interrogation Program was operated in Poland. This situation is analogous to that presented in *Salim* by the request for deposition of Gina Haspel. Although there were numerous media reports that Ms. Haspel, who is currently the Deputy Director of the CIA, had previously managed a "black site" in a foreign country, the Government had never officially acknowledged she had any role. As the Government would not confirm or deny she had any role with the Program, this court did not allow the Haspel deposition to proceed. See (Order of May 31, 2017, Case No. 15-286, ECF No. 188, p. 16-18).

Petitioners argue that depositions were conducted in *Salim*, and the detention site was just referred to by its code name "Detention Site Cobalt", without anyone confirming or denying it was in Afghanistan. Petitioners argue they should be allowed to pursue discovery in this case about "Detention Site Blue", and then others can decide whether there is sufficient evidence Detention Site Blue is the Stare Kiejkuty, Poland site. (ECF No. 31, p. 21). As to the document requests, 12 of the 13 requests mention "Poland" or "Polish," and the one which does not is an overbroad request for "all documents, memoranda and correspondence concerning Petitioner Abu Zubaydah." (ECF No. 1-2). The Government argues Petitioners "cannot avoid the application of the state secrets privilege by asking this court to rewrite his subpoenas to seek non-privileged information." (ECF No. 34, p. 8). The Government is wrong on that contention. The court can modify or limit the scope of the subpoena. The Supreme Court in *Intel* specifically stated "unduly intrusive or burdensome requests may be rejected or trimmed." *Intel Corp. v. AMD, Inc.*, 542 U.S. 241, 265 (2004). The Government argues that because this proceeding is discovery in aid of a foreign proceeding in Poland, no modification of the subpoenas or use of code names can "escape the fact the discovery he seeks is focused entirely on alleged events in Poland." (ECF No. 34, p. 9).

The Government has asserted the privilege over aspects of the Detention and Interrogation Program and over matters which the Ninth Circuit has previously stated are "indisputably" matters which the privilege may cover. As set forth herein, the court particularly finds operational details concerning the specifics of cooperation with a foreign government, including the roles

and identities of foreign individuals, to be covered by the claim of state secrets privilege.

(e) Step Three—How Should the Matter Proceed

Third, the court has determined the Government's assertion of privilege is valid, and must determine how the matter will proceed. The Government argues the court should uphold the privilege, quash the subpoenas, and dismiss the case. Generally, 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; and

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

The first two circumstances are not applicable here, as this is purely a discovery proceeding. Petitioners argue discovery can proceed, as discussed *supra*, even without the Government confirming or denying operation of a detention facility in Poland. The court disagrees. As stated *supra*, 12 of the 13 document requests specifically reference Poland, and Petitioners stated at oral argument they wanted to garner information on the role of foreign (Polish) nationals. Allowing the matter to proceed with a code word, such as "detention site blue" to replace Poland seems disingenuous, and the Government participating could be viewed as implicit confirmation of operation of the Program in Poland.

Even this seemingly innocuous fact can be protected by the privilege. See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("If seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the government to disentangle this information from other classified information."). Meaningful discovery cannot proceed in this matter without disclosing information the Government contends is subject to the state secrets privilege. Proceeding with discovery would present an unacceptable risk of disclosing state secrets.

3. The CIA Act

The Government also relies on the CIA Act, 50 U.S.C. § 3507, in resisting the requested discovery and argues the Act prohibits the requested discovery. 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]".

Petitioners argue the CIA Act does not apply by its plain terms because it "exempts the CIA—not private individuals" from provisions of law which require the publication or disclosure of "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. (ECF No. 31, p. 24). Petitioners argue the CIA Act does not reach facts such as the location of a foreign detention site, nor does it apply to private citizens such as Mitchell and Jessen who are not CIA employees.

The CIA Act does protect disclosure of the names and functions of officers and protects intelligence sources and methods. The court need not elaborate on the Act's operation here, having found the state secrets privilege applies.

4. <u>The NSA Act</u>

The Government also cites to the NSA Act, 50 U.S.C. 3024(I) in support of its Motion to Quash. However, the Government devoted less than 1-page of its 25-page brief to arguing both the CIA and NSA Act. The NSA Act provides: "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." In *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) the Ninth Circuit stated, "courts are required to give great deference to the CIA's assertion that a particular disclosure could reveal intelligence sources or methods."

Petitioners argue the NSA Act does not apply because it specifically states the "Director of National Intelligence" shall protect sources and methods and here we have no Declaration from the Director of National

Intelligence. Further, Petitioners argue the location of a foreign detention site is not a "source or method." (ECF No. 31, p. 23-24). The court finds it unnecessary to resolve this issue given its findings and conclusion the state secrets privilege applies.

III. Conclusion

The Government's argument that merely confirming a detention site was operated in Poland would pose a grave risk to national security is not convincing. The fact of such operation has been widely reported, has been acknowledged by the individual who was President of Poland at the time the site allegedly operated, and has been found by proof beyond a reasonable doubt by the European Court of Human Rights. However, compelling Mitchell and Jessen to answer as to the mere fact of whether operations were conducted in Poland would not seem of much, if any, assistance to a Polish investigation. Rather, counsel for Petitioners said it would be useful if Mitchell and Jessen could identify if there were foreign (Polish) officials at the detention site, and the nature of their roles at the site. In regard to these particulars, after review, the court defers to the CIA Director's assertion that the release of such information could reasonably pose a grave risk to national security.

Upholding the state secrets privilege serves the interests of national security, an important and compelling interest. The Ninth Circuit in *Jeppessen Dataplan* recognized that sometimes honoring the importance of the national security interest, comes at the detriment of other important interests: transparency, accountability, and justice. 614 F.3d at 1073. The Ninth Circuit stated the court strives to honor all these important

principles but "there are times when exceptional circumstances create an irreconcilable conflict between them." *Id.* The court then stated it must "reluctantly conclude" the case was one in which the national security interests, and assertion of the state secrets privilege required dismissal of the case. *Id.* The court further acknowledged the case presented "a painful conflict between human rights and national security." *Id.* at 1093. Similarly, this court concludes the CIA Director's assertion of the Government's national security interests and assertion of the state secrets privilege necessitates dismissal of the action.

IT IS HEREBY ORDERED:

1. The Government's Motion to Intervene (ECF No. 29) is **GRANTED**.

2. The Government's Motion to Quash (ECF No. 30) is **GRANTED**.

3. The Clerk is directed to enter Judgment dismissing the Application for Discovery (ECF No. 1) and close the file.

IT IS SO ORDERED. The Clerk shall file this Order, enter Judgment, and furnish copies to counsel.

Dated this 21st day of February, 2018.

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

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

No. CV-17-0171-JLQ

IN RE APPLICATION OF ZAYN AL-ABIDIN MUHAMMAD HUSAYN (ABU ZUBAYDAH) AND JOSEPH MARGULIES, PETITIONERS

Filed: Sept. 7, 2017

ORDER GRANTING APPLICATION FOR DISCOVERY

I. Introduction and Background

On May 22, 2017, Petitioners Zayn Al-Abidin Muhammad Husayn ("Abu Zubaydah") and Joseph Margulies filed an "Ex Parte Application for Discovery" (ECF No. 1) pursuant to 28 U.S.C. § 1782, requesting this court issue subpoenas to James Elmer Mitchell and John Jessen to produce documents and give testimony for use in an ongoing criminal investigation in Krakow, Poland. Although denominated "ex parte" the Application stated advance notice was provided to counsel for Mitchell and Jessen and a courtesy copy of the Application was provided. (ECF No. 1, p. 2). Mitchell and Jessen have not appeared in this action and have not challenged the Application for Discovery.

On May 31, 2017, the United States of America (hereafter "Government") filed a Notice of Potential Participation (ECF No. 7) and requested 30 days to evaluate

the matter and determine whether to file a Statement of Interest. On June 30, 2017, the Government filed a Statement of Interest (ECF No. 11) wherein it opposes Petitioners' Application for a Discovery Order pursuant to 28 U.S.C. § 1782. Alternatively, the Government argues if the Application is granted, the court should establish a return date on the subpoenas at least 60 days after service.

On July 21, 2017, Petitioners filed a Response (ECF No. 16) to the Government's Statement of Interest. Thereafter, on August 4, 2017, Petitioners filed a "Motion for Leave to Serve Subpoenas, or, in the Alternative, to Set Hearing Date." (ECF No. 19). This Motion was redundant, as the original Application seeks permission to serve the subpoenas. The Motion acknowledges this redundancy: "The Application itself seeks the Court's leave to serve subpoenas." The Motion further argued issuance of the subpoenas is the "beginning of a process" and any objections are properly raised via motion to quash after issuance of the subpoena.

The Government and Petitioner have now filed response and reply briefs concerning the August 4, 2017 Motion. The Government states the issues are ripe for decision. (ECF No. 21). Neither the original Application or the subsequent Motion was set for hearing with oral argument, although the Motion did request argument in the alternative. The court has determined oral argument is not necessary. Local Rule 7.1(h)(3)(B)(iv) ("Court may decide that oral argument is not warranted and proceed to determine any motion without oral argument.).

II. Discussion

Petitioners bring their request for discovery pursuant to 28 U.S.C. § 1782, which provides in part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

The Supreme Court has instructed the statute "authorizes but does not require, a federal district court to provide assistance to a complainant." *Intel Corp. v. AMD, Inc.*, 542 U.S. 241, 255 (2004).

Petitioner Abu Zubaydah is allegedly detained by the United States at Guantanamo Bay, Cuba. Petitioner Joseph Margulies is his attorney. Zubaydah alleges he was detained by the United States in March 2002, and has been in U.S. custody ever since. (ECF No. 1, p. 3-4). Relevant to this action, Zubaydah alleges he was detained at various CIA black sites, including at "Detention Site Blue" in Poland, from December 2002 to September 2003. (ECF No. 1, p. 6). Petitioners state

there is an ongoing criminal investigation in Poland into Polish official's alleged complicity in the unlawful detention and torture of Zubaydah. (ECF No. 1, p. 6-7). Specifically, Petitioners state: "The Polish criminal investigation is charged with examining whether Polish officials violated domestic law by opening, operating, and conspiring with the United States to detain and mistreat prisoners, including Abu Zubaydah." (*Id.* at 7). Zubaydah alleges he has the right to submit evidence in that matter and has been invited by the Polish prosecutor to do so.

Petitioners state that because Zubaydah is being detained at Guantanamo Bay he cannot give direct testimony in the Poland proceeding. Petitioners state this is a "paradigmatic case for judicial assistance," and other attempts by Polish investigators to obtain similar discovery have failed. (ECF No. 1, p. 10). Petitioners argue the § 1782 statutory requirements are satisfied. Petitioners contend Jessen resides in this District and Mitchell can be "found" here, as evidenced by his participation in *Salim et al. v. Mitchell et al.*, 15-286-JLQ. Petitioners contend they are "interested persons" under the statute as Zubaydah is the complaining victim in the Polish criminal investigation and has procedural rights in that matter, including the right to submit evidence. Lastly, Petitioners state the requested discovery is for use in foreign proceedings, and § 1782 specifically references "criminal investigations conducted before formal accusation." (ECF No. 1, p. 13). Petitioners argue granting the Application is a proper exercise of the court's discretion and argue the four *Intel* factors weigh in Petitioners' favor.

A. Government's Statement of Interest

The United States Government argues it has a "substantial interest in the proper construction of 28 U.S.C. § 1782" and it opposes Zubaydah's Application. (ECF No. 11, p. 1-2). The Government contends the Application is an attempt to circumvent established treaty procedures. The Government argues the United States and Poland have established treaty procedures "specifically providing for the exchange of evidence for criminal investigations". However, the United States has repeatedly denied Poland's requests for information in regard to this investigation. (ECF No. 11, p. 3). The Government further asserts that some of the information may be privileged or classified and the Government "has an interest in preventing Dr. Mitchell and Dr. Jessen from confirming or denying Zubaydah's allegations to the extent any such responses would harm national security or foreign relations." (*Id.* at 3-4). The Government concedes Zubaydah has "satisfied the minimum statutory elements" under § 1782, but argues the court should exercise its discretion to deny the Application. (ECF No. 11, p. 8).

B. The Intel Factors

The Supreme Court in *Intel Corp. v. AMD, Inc.*, 542 U.S. 241, 264 (2004), stated: "A district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so." *Id.* at 264. The court then set forth four factors to be considered:

1) whether the person from whom discovery is sought is a participant in the foreign proceeding;

2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity

of the foreign government to U.S. federal-court assistance;

3) whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States;

4) whether the discovery request is unduly intrusive or burdensome.

Id. at 264-65.

Mitchell and Jessen are not participants in the Polish criminal investigation, therefore the first factor weighs in favor of Petitioners. *Id.* at 264 ("Nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid."). The Government concedes Mitchell and Jessen are not participants in the Polish criminal investigation, but argue "the MLAT[1] provides the Government of Poland with a legal procedure through which it can request documents and testimony from them, through the United States." (ECF No. 11, p. 14). This argument is fallacious. The Government's own brief states the United States has on numerous occasions rejected Poland's request for assistance in this matter.

As to the second factor, the nature and character of the foreign proceeding, it is a criminal investigation "being conducted by the Organized Crimes Division of the Regional Public Prosecutor's Office in Krakow." (ECF No. 2, ¶ 34). Petitioners allege the criminal investigation was re-opened after the European Court of Human Rights issued a ruling in favor of Abu Zubaydah, and

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[1] Mutual Legal Assistance Treaty

found Polish officials had been complicit in his detention and torture in Poland. (*Id.* at ¶ 32-33). Petitioners allege the Polish government's receptivity to assistance is demonstrated by the prosecutor inviting counsel for Zubaydah to submit information. The Government's argument again focuses solely on the treaty process and is not convincing. The fact the Polish government has sought information through the treaty process, and been denied by the United States Government further demonstrates the Polish government would be receptive to receiving the information. The second factor weights in favor of granting the Application.

The third factor—whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States—cuts both ways. There is nothing in the materials filed with the court to indicate the Application seeks to circumvent Poland's proof-gathering restrictions or policies of Poland. Rather, Zubaydah, as the Government concedes, has been invited to participate in the foreign proceeding. See Government's Statement of Interest (ECF No. 11, p. 8) ("Zubaydah has been granted 'injured person' status by the Polish Government under Poland's Code of Criminal Procedure, which grants injured persons various procedural and participatory rights in pending criminal investigations.") Further, the Polish government's repeated treaty requests indicate granting the Application would not offend the policies of Poland, but rather, would be welcome. The Government argues this factor weighs in favor of denying the Application because granting the Application would offend the policies of the United States because the United States "has denied Poland's repeated MLAT

requests for assistance in connection with pending criminal investigation regarding alleged CIA activities." (ECF No. 11, p. 10).

The fourth factor—whether the discovery request is unduly intrusive or burdensome—is contested and its determination premature. Petitioners argue the discovery sought is restricted to Mitchell and Jessen's "oral testimony and documents within their personal possession." (ECF No. 1, p. 16). Petitioners argue the relatively de minimus burden on Respondents' time and resources is outweighed by the potential benefit to Polish prosecutorial authorities. (ECF No. 1, p. 16). The Government argues addressing the issues of classification and privilege will be unduly burdensome. In Reply, Petitioners counter the "Government cannot assert an undue burden on Respondents' behalf" and the burden on the Government is "tangential". (ECF No. 16, p. 3).

Addressing the issues of classification and privilege is premature at this time. See for example *In re Letter Rogatory from Tokyo*, 539 F.2d 1216, 1219 (9th Cir. 1976) (in the context of § 1782: "Similarly, it is not now appropriate to consider the possibility that they may claim their Fifth Amendment privileges against testifying, as no witness has yet made any claim of privilege."). The Government has only broadly invoked these concerns and has not asserted state secrets privilege. Respondents Mitchell and Jessen are not yet before the court. Section 1782(a) provides the Federal Rules of Civil Procedure apply unless otherwise ordered. Therefore, Respondents may challenge the scope of the subpoena via a motion for protective order, motion to quash, etc. See *In re Letter Rogatory from Tokyo*, 539 F.2d 1216, 1219 (9th Cir. 1976) (in the context of § 1782:

"The witnesses can and have raised objections and exercised their due process rights by motions to quash the subpoenas."). The Supreme Court in *Intel* stated that "unduly intrusive or burdensome requests may be rejected or trimmed." 542 U.S. at 265. Thus Respondents, if they believe the requests are overly burdensome, may raise that issue with the court.

At this stage in the proceedings, the United States Government, a third-party, is seeking to preemptively raise these issues when no request for discovery from the Government is pending. The Government itself may not be subject to a § 1782 request. See *Al Fayed v. C.I.A.*, 229 F.3d 272 (D.C. Cir. 2000) (holding federal government was not a "person" subject to subpoena under § 1782). From a review of the subpoenas (ECF No. 1-2 & 1-4) it is possible Respondents will have nothing responsive as to certain categories of information. For example, it may seem doubtful Respondents have documents concerning the Polish detention site's "access to Polish amenities such as water and electricity." (ECF No. 1-2, Request #9). It is not unduly burdensome to proffer a negative response. If Respondents do have responsive documents, any objection to their production can be raised when Respondents are before the court. It is the court's recollection from *Salim et al. v. Mitchell et al.*, 15-286-JLQ, Respondents claimed to not be in possession of many of the documents pertaining to the Enhanced Interrogation Program and thus Respondents sought the documents from the Government via subpoena. Respondents argued it was not unduly burdensome for the Government to undertake the various privilege and classification reviews necessary to produce the documents. There may be objections to be made concerning the scope of the subpoena, and those objections

may be appropriately addressed by Respondents. For example, the temporal scope of the subpoena may be overbroad. Documents are sought over a five-year period from 2001 to 2005, yet it is alleged Abu Zubaydah was in Poland for a 9 or 10-month period in 2002 and 2003. However, the issue of temporal scope has not been briefed and argued. The court has no conclusion at this juncture as to the appropriate scope.

III. Conclusion

The Government agrees the minimum statutory prerequisites under § 1782 are met. The Government contends application of the *Intel* factors should lead the court to exercise its discretion and deny the Application for Discovery. The court has exercised its discretion and determined the *Intel* factors favor granting the Application for Discovery. The objections raised by the Government are premature at this point, as no discovery is being requested from the Government. Similarly, the Government has only raised unspecified hypothetical concerns regarding privilege and classification of documents.

IT IS HEREBY ORDERED:

1. The Application for Discovery (ECF No. 1) is **GRANTED**. The Motion for Leave to Serve Subpoenas (ECF No. 19), which is somewhat duplicative, is also **GRANTED** as set forth herein.

2. Petitioners may serve the proposed subpoenas on Respondents John Jessen and James Mitchell. The return date shall be no earlier than **28 days** after the date of service. Any motion to quash, motion for protective order, or motion to modify directed to the subpoenas

shall be filed no later than **21 days** after the date of service.

3. Petitioners shall serve a copy of this Order with the subpoena.

4. Petitioners shall file proof of service within **7 days** of serving the subpoenas.

IT IS SO ORDERED. The Clerk shall enter this Order and provide copies to counsel.

Dated this 7th day of September, 2017.

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

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35218
D.C. No. 2:17-cv-00171-JLQ

ZAYN AL-ABIDIN MUHAMMAD HUSAYN; JOSEPH MARGULIES, PETITIONERS-APPELLANTS

v.

JAMES ELMER MITCHELL; JOHN JESSEN, RESPONDENTS

UNITED STATES OF AMERICA, INTERVENOR-APPELLEE

Filed: July 20, 2020

ORDER

Before: Ronald M. Gould and Richard A. Paez, Circuit Judges, and Dean D. Pregerson,[*] District Judge.

Order; Concurrence by Judge PAEZ; Dissent by Judge BRESS

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active

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[*] The Honorable Dean D. Pregerson, United States District Judge for the Central district of California, sitting by designation.

judges in favor of en banc consideration.[1] Fed R. App. P. 35. The petition for rehearing en banc is denied.

Attached are a concurrence to and dissent from the denial of rehearing en banc.

PAEZ, Circuit Judge, joined by FLETCHER and BERZON, Circuit Judges, concurring in the denial of rehearing en banc:

I concur in the decision not to rehear this case en banc and write to emphasize why rehearing was not warranted.

I.

I begin with what the majority opinion does not do. It does not require the government to disclose information, and it certainly does not require the disclosure of state secrets. *See Husayn v. Mitchell*, 938 F.3d 1123, 1137-38 (9th Cir. 2019). It does not compel the government to confirm or even acknowledge any alleged malfeasance abroad. *See id.* at 1133, 1135 n.18. And, critically, it does not direct the district court to compel discovery on remand if the court determines that non-privileged materials cannot be disentangled from privileged materials. *See id.* at 1137-38.

Instead, the majority opinion stands solely for the narrow and well-settled proposition that before a court dismisses a case on state secret grounds, it must follow the three-step framework set forth in *Reynolds*—a procedure we have followed for decades and reaffirmed as

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[1] Judges Miller and Collins did not participate in the deliberations or vote in this case.

recently as 2010. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc); *see also Husayn*, 938 F.3d at 1136-37. The district court never conducted the third step of that process, which requires a court to determine whether the contested materials contain nonprivileged information and, if so, whether there is any feasible way to segregate the nonprivileged information from the privileged information. *Mohamed*, 614 F.3d at 1082. Only after exhausting this effort can a district court contemplate dismissal. *Id.* The district court, however, never undertook that process. It instead dismissed Petitioners' discovery application outright, without ever "us[ing] its fact-finding or other tools to full advantage before . . . conclud[ing] that [this] rare step . . . [was] justified." *Id.* at 1093. We thus remanded with a simple instruction: use the panoply of tools at the court's disposal to identify nonprivileged information and determine whether that information can be disclosed without risking national security, as our precedent requires. *Husayn*, 938 F.3d at 1137-38.

It may be that, on remand, the district court will ultimately reach the same result and determine that the government's motion to quash should be granted and that the proceeding must end. But rather than let the matter proceed as it should under our precedent, Judge Bress's dissent seeks to eliminate the required analysis, without providing any factual or legal basis for doing so. The dissent mischaracterizes the district court proceedings and the majority opinion's holding. It also disregards the law of this circuit. For those reasons, en banc review is inappropriate.

II.

This matter began with Petitioners' application for discovery under 28 U.S.C. § 1782, which authorizes district courts to assist litigants in foreign tribunals in obtaining discovery.[1] The district court applied the relevant factors under *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 244-45 (2004),[2] considered the government's opposition to Petitioners' application, and granted the application for discovery. The government did not appeal the district court's § 1782 ruling.

The government later moved to quash the resulting subpoenas for depositions and documents. It first argued the district court lacked jurisdiction under 28 U.S.C. § 2241(e)(2), which deprives courts of jurisdiction over actions against the "United States or its agents" for the confinement of alien enemy combatants. 28 U.S.C. § 2241(e)(2); *see also Hamad v. Gates*, 732 F.3d 990, 995 (9th Cir. 2013). The district court rejected that argument, concluding that there was no evidence of an agency relationship between the government and James Elmer Mitchell and John Jessen. The government did not appeal this determination.

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[1] Because the majority opinion lays out the relevant facts and procedures, there is no need to repeat them in full here.

[2] A court considering whether to grant a § 1782 request may consider "the nature of the foreign tribunal"; "the character of the proceedings underway abroad and the receptivity of the foreign government to U.S. federal-court assistance"; "the receptivity of the foreign government, court, or agency to federal-court judicial assistance"; "whether the . . . request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States"; and whether the request is "unduly intrusive or burdensome." *Intel Corp.*, 542 U.S. at 264-65.

The government also argued that the information was privileged as a state secret under *Reynolds*. The district court ostensibly applied the *Reynolds* framework, which sets forth a three-step inquiry to analyze claims of state secrets privilege. At the second step, the court concluded that some, but not all, of the information sought by Petitioners was privileged. Although our caselaw requires that non-sensitive information be disentangled from privileged material and disclosed "whenever possible," *Mohamed*, 614 F.3d at 1082, the district court did not follow this precedent, and it did not make any attempt to disentangle the non-sensitive information. Instead, the court quashed the subpoenas and dismissed the petition in its entirety without conducting the required analysis, speculating that any nonprivileged information "would not seem to aid the [foreign] investigation."

III.

As stated above, the majority opinion does not require the disclosure of information. It does not require the court to reach any specific conclusion about whether dismissal is warranted. It simply reemphasizes our requirement to conduct a proper, three-step *Reynolds* analysis in the first instance. The district court has not yet done so, having dismissed the entire matter without using any discovery tools at its disposal. Our decision in *Mohamed* is clear: "[I]t is the district court's role to use its fact-finding and other tools to full advantage before it concludes that the rare step of dismissal is justified." 614 F.3d at 1092-93. Accordingly, the majority opinion instructs the district court to "employ[]" those tools to "tailor[] the scope of Mitchell's and Jessen's dep-

osition and the documents they may be required to produce." *Husayn*, 938 F.3d at 1137. The majority opinion recognized that, even after doing so, the district court may still determine dismissal is appropriate: "[I]f, upon reviewing disputed discovery and meaningfully engaging the panoply of tools at its disposal, the district court determines that it is not possible to disentangle the privileged from nonprivileged, it may again conclude that dismissal is appropriate at step three of the *Reynolds* analysis." *Id.*

IV.

Judge Bress's dissent appears to raise three distinct arguments: (1) the majority opinion erred in holding that Abu Zubaydah's detention at a CIA black site in Poland is not a state secret, despite widespread acknowledgment of this fact; (2) the majority opinion did not sufficiently defer to former CIA Director Michael Pompeo's assertion that *any* disclosures sought by Petitioners pose national security risks, even though a court has never independently reviewed the disclosures to confirm this representation; and (3) our instruction to *attempt* to disentangle privileged and nonprivileged information is an "impossible task" for district courts to undertake, even though our precedent requires it, and even though we did so in *Mohamed*.

To begin, the dissent characterizes the majority as disregarding the danger certain information poses to national security. The majority opinion does no such thing, and this argument is a red herring. The majority opinion acknowledges that some facts can be embarrassing to the government. 938 F.3d at 1134. The purpose of the state secrets privilege, however, is not to

insulate the government from criticism: the fundamental threshold question is whether certain facts are secrets. Only then can the privilege possibly apply.[3]

The dissent's haphazard citations to *Mohamed* do not support the argument that the facts the Petitioners are seeking to discover, despite being public knowledge, are sufficiently "secret" to warrant application of the privilege. Dissent at 29-31. Indeed, in *Mohamed*, the en banc court, after "thoroughly and critically review[ing] the government's public and classified declarations," concluded "that at least some of the matters" that the government sought to protect were privileged, 614 F.3d at 1086, but publicly available information was *not*, *id.* at 1090. The dissent's citations to *Mohamed* are drawn not from the court's Step 2 discussion of whether any of the information sought was subject to the state secrets privilege, but rather from the discussion of *Step 3* of the *Reynolds* analysis, i.e., whether the case could proceed without implicating privileged material. *See* Dissent at 29-31 (citing *Mohamed*, 614 F.3d at 1089-90). *Mohamed* recognized that even though publicly available information was not privileged, any effort to defend against the plaintiffs' case "would unjustifiably risk disclosure of state secrets." 614 F.3d at 1090. This is the precise analysis that has never been conducted by any court in this case—the analysis that the majority opinion instructed the district court to conduct on remand.[4]

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[3] Besides, "[s]imply . . . invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege." *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

[4] *Mohamed's* "observation" that certain undisclosed details about a publicly known project may themselves qualify as secrets is not

More troubling is the dissent's seemingly willful blindness to established facts. Given the overwhelming, publicly available evidence that Abu Zubaydah was detained at a black site in Poland, it is difficult to take seriously the suggestion that media outlets are untrustworthy and that the standards applied by other judicial bodies are inadequate. Good grief, the President of Poland publicly acknowledged in 2012 that, during his presidency, Abu Zubaydah was detained in Poland by the CIA.[5] As the majority opinion recognizes, to be "a 'state secret,' a fact must first be a secret." *Husayn*, 938 F.3d at 1133. Although it is not the court's role to compel the government to recognize these facts officially, it need not stand in thrall, in blithe disregard of the record and what the rest of the world has already acknowledged. The majority opinion does not require the government to take an official position on anything and agrees with the government's assertion of state secrets over other sensitive categories of information. *Id.* ("Nothing in this opinion should be read to suggest [that the government has taken any official position on the existence or location of such a facility]."); *id.* at 1135

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controversial, and it certainly does not stand for the proposition that *any* as-yet undisclosed information is privileged as a matter of course. *See* 614 F.3d at 1089-90.

[5] *See, e.g.*, *Case of Husayn (Abu Zubaydah) v. Poland*, Section VI(D)(3), European Ct. of Human Rights (Feb. 16, 2015) ("Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest."), *available at*: https://tinyurl.com/ybs7wane; "The hidden history of the CIA's prison in Poland," WASHINGTON POST (Jan. 23, 2014), *available at*: https://tinyurl.com/ybowwp8p; "Inside the CIA's Secret Polish Torture Site," THE ATLANTIC (Jan. 24, 2014), *available at*: https://tinyurl.com/y98n7x86.

n.18 ("[N]othing about the government's participation in this case would constitute official acknowledgment, implicit or otherwise."); *id.* at 1134 (listing categories of privileged information).

The dissent nonetheless takes up the government's belatedly raised argument, never presented to the panel, that any participation by Mitchell and Jessen would be tantamount to an official acknowledgment of certain facts. As an initial matter, the government's argument, to the extent it is grounded in an agency relationship, was presented to, and rejected by, the district court. Again, the government did not appeal that determination.

In any event, the dissent reads the majority opinion's treatment of Mitchell and Jessen as contractors far too broadly. The dissent asserts that no court "has held the state secrets privilege is removed or diminished when the discovery is directed to a government contractor," and warns that a "contrary rule" would free litigants from the constraints of the privilege against the disclosure of state secrets. Dissent at 32. The majority opinion does not say otherwise. It does not hold or suggest that the nature of a secret is lessened if transmitted to or by a contractor. It states only that the government failed to explain *why* discovery by Mitchell or Jessen would amount to an official confirmation. *Husayn*, 938 F.3d at 1133. Most importantly, the government can still argue on remand that it should not disclose any information from Mitchell and Jessen that would amount to an official confirmation.

And, contrary to the dissent's assertion, *Mohamed* did *not* "[hold] that the state secrets privilege applied in

a suit against a government contractor *because* the contractor could 'reveal[] information about how the United States government does or does not conduct covert operations.'" Dissent at 32 (quoting *Mohamed*, 614 F.3d at 1089) (emphasis added). Rather, we discussed the potential effects of a contractor's testimony in the context of *Reynolds* Step 3—not Step 2. *See Mohamed*, 614 F.3d at 1089. Our discussion had nothing to do with whether the privilege applied to the contractor's statements at Step 2, let alone whether the contractor's statements could be imputed to the government.

Notably absent from the government's petition for rehearing en banc and the dissent is any mention of the *Salim* litigation,[6] in which the same respondents, Mitchell and Jessen, disclosed similar information to that sought here, with the government's full participation in the discovery process. In fact, in that litigation, eight U.S. government attorneys or experts were present at the depositions of Mitchell and Jessen to ensure that nothing confidential or privileged would be disclosed. *Husayn*, 938 F.3d at 1137 n.23. As the majority opinion recognizes, the fact that Mitchell and Jessen have provided nonprivileged information like that sought here illustrates that disentanglement is viable. *Id.* at 1137.

Last, a word about deference. Rather than focus on "our obligation to review the [government's claims] with a very careful, indeed a skeptical, eye," *see Mohamed*, 614 F.3d at 1082, the dissent urges we owe "some level of deference," Dissent at 27. As an initial matter, the

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[6] *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. 2016).

majority opinion did give "some deference" to the government and did not dispute that official acknowledgment of certain facts might harm national security. The dissent, however, asks for a level of deference that is nothing short of unquestioning. The mere existence of information, absent any indication that it has been recognized by the United States government, is *not* an acknowledgment by the United States of anything. The majority opinion is clear on this point. *Husayn*, 938 F.3d at 1133.

The dissent urges deference not only to the government's assertion that official acknowledgment would be harmful, but also to the government's expansive definition of "official acknowledgment" itself. Indeed, the government takes the argument a step further, contending that Mitchell's and Jessen's actual relationship to the government is irrelevant because foreign governments might *perceive* their participation as official U.S. acknowledgment of the facts to which Mitchell and Jessen testify. Gov't Pet. for Reh'g En Banc at 12. This contention lays bare the philosophy underpinning the position advocated by the government and the dissent. It does not matter whether Mitchell and Jessen speak for the government, or indeed whether the government "officially" acknowledges anything. All that matters is that the government says it matters. Under the dissent's approach, courts are left with nothing to do but accept the government's assertions at face value. Such an approach, besides contradicting Supreme Court precedent, is antithetical to democratic governance and will inevitably breed abuse and misconduct.

Although the majority opinion holds only that the district court failed to conduct a proper *Reynolds* Step 3 analysis, the dissent does not discuss Step 3 until page 33. The dissent asserts that it would be an "impossible task" to disentangle classified information from nonprivileged material, and that dismissal is therefore appropriate. Dissent at 35. But we have conducted this analysis often, without difficulty. *See, e.g.*, *Kasza v. Browner*, 133 F.3d 1159, 1166, 1170 (9th Cir. 1998); *Mohamed*, 614 F.3d at 1095; *Al-Haramain*, 507 F.3d at 1203. Unlike the en banc court in *Mohamed*, where we reviewed the contested material and then determined that disentanglement was not feasible, *see* 614 F.3d at 1087-89, the district court has yet to undertake this full Step 3 analysis. The district court, without using a single tool at its disposal, such as in camera review, protective orders, or restrictions on testimony, summarily determined that any nonprivileged information that might be disclosed could not be disentangled from privileged information and therefore dismissed the discovery application.[7]

For similar reasons, the dissent's references to other cases we have decided are simply inapt in this context. As the majority opinion explains, those cases determined that nonprivileged information was enmeshed in a "classified mosaic," but only after reviewing specific, contested material and considering the role of that material in drawn-out litigation. *Husayn*, 938 F.3d at 1135 n.19 (citing *Kasza*, 133 F.3d at 1166; *Mohamed*, 614

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[7] As discussed above, the district court also inserted a "usefulness" requirement of its own design into the *Reynolds* Step 3 analysis and dismissed the entire matter because any non-privileged information "would not seem to aid the Polish investigation."

F.3d at 1095; *Al-Haramain*, 507 F.3d at 1203). Here, however, the court is presented with a pure discovery matter—unencumbered by the "inherently complex and unpredictable" nature of typical adversarial litigation. *See Mohamed*, 614 F.3d at 1089. More importantly, however, and as discussed above, no material has yet been disclosed, let alone reviewed.[8]

Finally, the majority anticipates that in some circumstances it may indeed be impossible to disentangle non-privileged information from privileged material. The opinion states that the district court may, after fulfilling

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[8] The dissent insists that "[in camera] review is *not* necessary to enforce the privilege," but this point is irrelevant for two reasons. Dissent at 36. First, *Reynolds* did not prohibit in camera review altogether. *See* 345 U.S. at 10 (refusing only to impose an "automatic[]" disclosure requirement under certain circumstances). Other courts, including ones cited by the dissent, recognize that in camera review may not only be appropriate but required. *Doe v. CIA*, 576 F.3d 95, 105 (2d Cir. 2009) ("Sometimes, however, review may require examination of the classified material itself."); *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) ("There may of course be cases where the necessity for evidence is sufficiently strong and the danger to national security sufficiently unclear that in camera review of all materials is required to evaluate the claim of privilege."). In any event, these limitations on in camera review, if they exist, come at *Reynolds* Step 2—not Step 3. *See Reynolds*, 345 U.S. at 10 ("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.") (emphasis added); *Doe*, 576 F.3d at 104-05; *Sterling*, 416 F.3d at 344. Here, the majority opinion agreed with the district court's assessment that at least some of the information Petitioners sought was not a state secret. *Husayn*, 938 F.3d at 1134. Thus, we simply reminded the district court that, during its attempt at disentanglement, it could use many tools at its disposal, including in camera review, to conduct a full *Reynolds* Step 3 analysis. *Id.* at 1137-38.

its role in the discovery process, so conclude. But the possibility that disentanglement will not be feasible does not justify the failure to make the attempt. Our precedent requires the district court to make every effort at disentanglement. *Mohamed*, 614 F.3d at 1082.

The dissent concludes with an entreaty to overhaul seventy years of precedent and kneecap *Reynolds* to limit its application in section 1782 proceedings. Dissent at 35-37. This proposal, which not even the government advocates, is not only extreme; it is unnecessary. The overwrought concerns about abuse by foreign litigants are addressed by section 1782 and the *Intel* factors. *See Intel*, 542 U.S. at 265 ("[A] district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. Also, unduly intrusive or burdensome requests may be rejected or trimmed."). It appears the dissent's true problem is not with *Reynolds*, but with the district court's initial decision to grant Petitioners' section 1782 application. The government appears to share that distaste. It could have appealed, but it did not. En banc proceedings would not have been the appropriate remedy for that error.

For these reasons, I concur in the court's decision to deny rehearing this case en banc.

BRESS, Circuit Judge, joined by GOULD, CALLAHAN, M. SMITH, IKUTA, BENNETT, R. NELSON, BADE, LEE, HUNSAKER, BUMATAY, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Over formal objections from the Director of the CIA, a divided panel in this case rejected the United States' assertion of the state secrets privilege, potentially allowing discovery into the CIA's overseas interrogation of a suspected terrorist. The panel issued this ruling in the context of a discovery application under 28 U.S.C. § 1782, enabling any resulting documents and testimony to be used in a foreign tribunal—here, a quasi-criminal proceeding in Poland over which we lack any visibility and whose entire purpose is to expose U.S.-led counterintelligence operations conducted abroad.

The majority's decision is premised on grave legal errors, conflicts with governing precedent, and poses a serious risk to our national security. I therefore respectfully dissent from our decision not to hear this important case en banc.

I

A

Zayn al-Abidin Muhammad Husayn ("Abu Zubaydah") is a suspected Al Qaeda-associated terrorist. *See Ali v. Obama*, 736 F.3d 542, 543 (D.C. Cir. 2013) (Kavanaugh, J.). He was captured in Pakistan in 2002 and detained by the CIA as part of its former detention and interrogation program; since 2006, the Department of Defense has held him at Guantanamo Bay. Prior to his transfer there, Abu Zubaydah claims he was tortured at a CIA "black site," which he alleges was located in Poland.

In 2013, Abu Zubaydah's attorneys filed an application in the European Court of Human Rights ("ECHR"), alleging that Polish officials had been complicit in his unlawful detention and mistreatment. *See Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. (2015). The Polish government declined to confirm or deny these claims but informed the ECHR that it had previously opened an investigation in 2008 into allegations that Polish officials had cooperated with the CIA. *Id.* ¶¶ 125-35, 370-71. As part of that investigation, Poland had requested information from the United States under a mutual legal assistance treaty ("MLAT") between the two countries. *Id.* ¶ 132. Citing reasons of national security, the United States repeatedly refused to provide information on the CIA's operations. *Id.* ¶¶ 132, 143.

Based in part on the negative inferences it drew from Poland's refusal to confirm or deny CIA operations within its borders, the ECHR determined that the CIA had tortured Abu Zubaydah with the complicity of the Polish government. *Id.* ¶¶ 370-71, 395-96, 414-15, 431-35. As a result, Poland renewed its inquiry, which Abu Zubaydah represents is a "Polish criminal investigation" that "is charged with examining whether Polish officials violated domestic law by opening, operating, and conspiring with the United States to detain and mistreat prisoners, including Abu Zubaydah," at a U.S.-run CIA facility in Poland. To aid its investigation, Poland again requested assistance under its MLAT with the United States. The United States again refused to surrender details concerning the CIA's activities—even after discussions between high-level officials from both governments. The Polish prosecutor's office then turned to Abu Zubaydah's counsel to identify alternative ways

to obtain the information, in this case through United States courts.

In May 2017, Abu Zubaydah and his attorney filed an application in federal district court under 28 U.S.C. § 1782, seeking discovery related to the CIA's covert activities in Poland. Section 1782 permits a district court to order discovery "for use in a proceeding in a foreign or international tribunal, including criminal investigations." 28 U.S.C. § 1782(a). Abu Zubaydah's application sought documents and testimony from Dr. James Elmer Mitchell and Dr. John "Bruce" Jessen, two former CIA contractors who "proposed and developed" the CIA's enhanced interrogation techniques, "supervise[d]" Abu Zubaydah's interrogations, and were "involve[d] in" his alleged torture. *Husayn v. Mitchell*, 938 F.3d 1123, 1127 (9th Cir. 2019).

Abu Zubaydah's § 1782 application was expansive, seeking a broad range of information relating to "the crimes committed against Abu Zubaydah on Polish soil," the involvement of Polish and United States officials in his detainment, and details about the CIA black site where the alleged interrogation and torture occurred. Abu Zubaydah represented that given their "central role in the interrogation program and their presence at the Polish black site," Mitchell and Jessen could also provide information on "the identities of other witnesses to the crimes against Abu Zubaydah" and "agreements between Polish and U.S. officials." According to Abu Zubaydah's application, all this information would be used to "aid the Polish prosecutors in their understanding of Polish civilian and governmental complicity in the operation."

After the district court initially granted Abu Zubaydah's application, the United States moved to intervene and quash the subpoenas. In its motion to quash, the United States formally invoked the state secrets privilege and supported its assertion with two declarations from then-CIA Director and now Secretary of State Michael Pompeo. Director Pompeo's declarations outlined seven categories of information over which the United States asserted the privilege:

> [1] Information that could identify individuals involved in the program;
>
> [2] Information regarding foreign government cooperation with the CIA;
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> [3] Information pertaining to the operation or location of any clandestine overseas CIA station, base, or detention facility;
>
> [4] Information regarding the capture and/or transfer of detainees;
>
> [5] Intelligence information about detainees and terrorist organizations, to include intelligence obtained or discussed in debriefing or interrogation sessions;
>
> [6] Information concerning CIA intelligence sources and methods, as well as specific intelligence operations; and,
>
> [7] Information concerning the CIA's internal structure and administration.

As the CIA Director explained, Abu Zubaydah's requested discovery "would tend to confirm or deny whether or not [Mitchell and Jessen] have information about these categories as they pertain to whether or not the

CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government."

The Director warned that disclosure of this information "reasonably could be expected to cause serious, and in many instances, exceptionally grave damage to U.S. national security." He explained that maintaining the confidentiality of foreign partnerships is critical, for "if the CIA appears unable or unwilling to keep its clandestine liaison relationships secret, relationships with other foreign intelligence or security services could be jeopardized."

Pompeo also explained that whether some alleged information about the requested topics was already in the public domain was of no moment. "The absence of official confirmation from the CIA leaves an important element of doubt about the veracity of the information." That provided "an additional layer of confidentiality" that "would be lost . . . if the CIA were forced to confirm or deny the accuracy of speculation or unofficial disclosures."

The district court granted the United States' motion to quash. It agreed that the privilege covered "operational details concerning the specifics of cooperation with a foreign government" and that such discovery "legitimately could jeopardize national security." The district court concluded that the existence of a CIA facility on Polish soil and Poland's cooperation with the CIA were not secret because they had been discussed in publicly available documents. But it declined to allow discovery on that basis. Instead, the district court reasoned that "the mere fact of whether operations were

conducted in Poland would not seem of much, if any, assistance to a Polish investigation" in light of the public documents, whereas proceeding with discovery would pose an unacceptable risk of disclosing state secrets.

B

Abu Zubaydah appealed, and a divided panel of this court reversed. *Husayn v. Mitchell*, 938 F.3d 1123, 1126 (9th Cir. 2019). The majority opinion acknowledged that "the government's assertion of the state secrets privilege is valid over much of the information requested." *Id.* But it held that the following information is not a state secret: "the fact that the CIA operated a detention facility in Poland in the early 2000s; information about the use of interrogation techniques and conditions of confinement in that detention facility; and details of Abu Zubaydah's treatment there." *Id.* at 1134. According to the majority, these facts were no longer "secret" because they were the subject of a Polish investigation and had been discussed in publicly available documents, such as media reports. *Id.* at 1127, 1132-34. The majority opinion also held that because Mitchell and Jessen are "private parties," their testimony would not be "equivalent to the United States confirming or denying anything"—even though Mitchell and Jessen were the government contractors who "proposed and developed" the CIA's interrogation techniques and "supervise[d]" Abu Zubaydah's interrogation. *Id.* at 1127, 1133.

Although the majority determined that most of the requested discovery was privileged, it remanded to the district court "to disentangle nonprivileged from privileged information," because, in the panel's view, "it is not impossible to separate secret information." *Id.* at

1126, 1135. While the majority allowed that the district court could on remand "again conclude" that "it is not possible to disentangle the privileged from [the] nonprivileged," the panel expressed the view that "the record suggests that [Abu Zubaydah] can obtain nonprivileged information from Mitchell and Jessen." *Id.* at 1136-37.

Judge Gould dissented. At the outset, he observed that he is "not in a position as an Article III judge" to say that certain matters were nonprivileged due to public reporting and would have thus "defer[red]" to Director Pompeo's views. *Id.* at 1138 (Gould, J., dissenting). Regardless, Judge Gould would have dismissed the § 1782 application because "an attempt to disentangle the details of Abu Zubaydah's treatment in Poland could expose a broader mosaic of clandestine 'intelligence activities, sources, or methods,'" thereby "jeopardiz[ing] critical national security concerns." *Id.* at 1138, 1139 (quoting *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1086 (9th Cir. 2010) (en banc)). Indeed, Judge Gould wrote, the requested information will be used in a "Polish prosecution seeking to discover aspects of the CIA's presence in Poland and any foreign nationals working with the CIA there, topics the majority recognizes to be privileged." *Id.* at 1140.

Judge Gould also warned that these national security concerns are heightened in a § 1782 proceeding, where discovered information "is ultimately destined for a foreign tribunal." *Id.* In his view, the balance of interests "should recognize that information produced in domestic proceedings remains under the supervision of the United States court system in a way that information produced in discovery for overseas tribunals does not."

Id. In this case, any resulting documents and testimony would be exported for use in a quasi-criminal proceeding in Poland, "totally out of control" of the U.S. courts. *Id.*

II

The serious legal errors in the majority opinion, and the national security risks those errors portend, qualified this case for en banc review. The majority opinion treats information that is core state secrets material as fair game in discovery; it vitiates the state secrets privilege because of information that is supposedly in the public domain; it fails to give deference to the CIA Director on matters uniquely within his national security expertise; and it discounted the government's valid national security concerns because the discovery was only sought against government contractors—even though these contractors were the architects of the CIA's interrogation program and discovery of them is effectively discovery of the government itself.

The majority then tasked the district court with "disentangling" supposedly non-privileged information from information the majority acknowledged was clearly privileged. And all of this is happening in the context of a § 1782 application, where any resulting discovery will be transferred overseas to a foreign proceeding in Poland that purports to be investigating our country's intelligence efforts. This is not the result that precedent allowed, and I fear the majority's decision will pose unnecessary risks to our country's safety and security.

A

The state secrets privilege is a "privilege against revealing military secrets, a privilege which is well established in the law of evidence." *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953). The privilege ensures the non-disclosure of information 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." *Id.* at 10; *see also Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 484-85 (2011); *Mohamed*, 614 F.3d at 1081-82; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007).

Given the competing interests at stake, "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Reynolds*, 345 U.S. at 11. But the Supreme Court has also instructed that "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* Applying these principles, we have upheld application of the state secrets privilege on various occasions, as have other circuits. *See Mohamed*, 614 F.3d at 1073; *Al-Haramain*, 507 F.3d at 1204-05; *Kasza v. Browner*, 133 F.3d 1159, 1165-67, 1168-70 (9th Cir. 1998); *see also, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 299-300 (4th Cir. 2007); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 545 (2d Cir. 1991).

Applying the Supreme Court's leading decision in *Reynolds*, we analyze the United States' assertion of the state secrets privilege in three steps:

> First, we must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, we must make an independent determination whether the information is privileged. . . . Finally, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

Mohamed, 614 F.3d at 1080 (ellipsis in original) (quotations omitted). Everyone agrees that through declarations from then-CIA Director Pompeo, the United States has formally asserted the state secrets privilege. *Husayn*, 938 F.3d at 1131. It is on steps two and three that my fine colleagues in the panel majority regrettably but manifestly erred.

B

In concluding that the United States had not demonstrated that the information sought in this case was entirely privileged, the majority opinion contradicts governing precedent, jeopardizing national security. While the majority agreed that "much . . . of the information requested by [Abu Zubaydah] is covered by the state secrets privilege," it held that "a subset of information is not" privileged, specifically: "the fact that the CIA operated a detention facility in Poland in the early 2000s; information about the use of interrogation techniques and conditions of confinement in that detention facility; and details of Abu Zubaydah's treatment there." *Id.* at 1134. The majority also held that "the record suggests that [Abu Zubaydah] can obtain non-privileged information from Mitchell and Jessen," which the majority says would also include "the story around [Abu Zubaydah's claims in Poland]," "the narrative,"

and "what sort of treatment was Mr. Zubaydah subjected to." *Id.* at 1136 (second alteration in original) (quotations omitted).

This is serious error because the state secrets privilege should preclude discovery of these sensitive topics. In our en banc decision in *Mohamed*, we held that the state secrets doctrine "indisputably" may cover "information about whether any foreign government cooperated with the CIA in clandestine intelligence activities," "information about the scope or operation of the CIA terrorist detention and interrogation program," and "any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods." 614 F.3d at 1086; *see also El-Masri*, 479 F.3d at 309 (state secrets privilege covers "information regarding the means and methods by which the CIA gathers intelligence"); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (privilege covers "the methods and operations of the Central Intelligence Agency").

This is substantially the same information Abu Zubaydah seeks in this case. The state secrets privilege recognizes that "protecting our national security sometimes requires keeping information about our military, intelligence, and diplomatic efforts secret." *Gen. Dynamics*, 563 U.S. at 484. Contrary to precedent, the majority opinion in this case treats topics that lie at the core of our counterterrorism efforts as permissible areas of inquiry.

Although "we must make an independent determination whether the information is privileged," *Mohamed*, 614 F.3d at 1081 (quoting *Al-Haramain*, 507 F.3d at 1202), we have also held that some level of deference is

due to the government's assertion of privilege. As our en banc court explained in *Mohamed*, "[i]n 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.'" *Id.* at 1081-82 (quoting *Al-Haramain*, 507 F.3d at 1203); *see also Kasza*, 133 F.3d at 1166 (explaining that a "claim of privilege is accorded the 'utmost deference' and the court's review of the claim of privilege is narrow").

In this case, then-CIA Director Pompeo submitted two substantial declarations attesting to the national security risks that Abu Zubaydah's discovery requests would present. Based on his expertise and vantage point, Director Pompeo identified specific categories of information that would pose a risk to national security. He then explained how disclosure of this information would harm the United States' intelligence and counterterrorism activities, including its clandestine partnerships with other governments that assist the United States in its covert operations.

Contrary to our precedents and my colleague Judge Gould's compelling dissent, the panel decision does not reflect any apparent deference to the CIA Director's declarations. Instead, the majority reaches a conclusion directly at odds with that of the CIA Director: that "disclosure of certain basic facts would *not* cause grave damage to national security." *Husayn*, 938 F.3d at 1133 (emphasis added) (quotations omitted).

This is very concerning. Our deference to the Executive Branch is not unyielding, but when it comes to

the sorts of counterintelligence and counterterrorism issues presented here, courts must recognize that their field of vision is limited. Such deference is not an abdication of judicial duty, but reflects a justified appreciation for the constitutional and national security considerations that a request like Abu Zubaydah's necessarily implicates. *See, e.g.*, *CIA v. Sims*, 471 U.S. 159, 179 (1985) ("The decisions of the [CIA] Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.").

The majority's reason for not deferring to Director Pompeo's informed views marks an even further departure from precedent: that aspects of the government's program of interrogating suspected terrorists "are basically public knowledge." *Husayn*, 938 F.3d at 1132; *see also id.* at 1134 ("These facts have been in the public eye for some years now . . . ."); *id.* at 1138 ("[W]e have engaged in a public debate over the CIA's conduct during the early years of the war on terror."). As proof, the majority points to statements made by media outlets, the Polish government, and the European Court of Human Rights. *See id.* at 1132-33. The majority's refusal to accord state secret protection on grounds of "public knowledge" conflicts with precedent and underscores the national security risks that the court's decision poses.

The majority opinion's reliance on publicly available information to narrow the privilege is a stark departure from the bedrock principle that "[t]he privilege belongs to the Government" and "can neither be claimed nor waived by a private party." *Reynolds*, 345 U.S. at 7

(footnotes omitted). In *Mohamed*, our en banc court thus specifically rejected the theory that public disclosure of information (by entities other than the United States itself) could defeat an otherwise valid state secrets claim. The *Mohamed* court "recognize[d] that plaintiffs ha[d] proffered hundreds of pages of publicly available documents . . . that they say corroborate some of their allegations concerning [a government contractor's] alleged participation in aspects of the extraordinary rendition program," including numerous media reports. 614 F.3d at 1089-90. *Mohamed* likewise recognized that "[a]ccording to plaintiffs, '[v]irtually every aspect of [one plaintiff's] rendition, including his torture in Egypt, has been publicly acknowledged by the Swedish government.'" *Id.* at 1074.

Yet notwithstanding all of this, we held the discovery could not proceed based on the state secrets privilege because "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 (emphasis in original). The majority opinion in this case rejected this point on the theory that "[t]he world has moved on since we discussed the state secrets privilege in *Mohamed*." *Husayn*, 938 F.3d at 1138. That commentary is unsupported, but regardless, the principle that only the government may waive the state secrets privilege is not a time-limited one. If anything, that principle has even greater resonance in a technology-driven world in which information can quickly become "publicly available" through so many means.

Director Pompeo's declaration also directly addressed the public disclosure issue and explained why the CIA believed that discovery should not proceed in this matter notwithstanding the information already in the public domain. As Director Pompeo attested, while "the media, nongovernmental organizations, and former Polish government officials have publicly alleged that the CIA operated a detention facility in Poland," "[t]hese allegations do not constitute an official acknowledgment by the CIA." This "absence of official confirmation from the CIA" is critical: it "carries with it an additional layer of confidentiality" and preserves "an important element of doubt." That, in turn, reduces the "motivat[ion of] hostile entities or foreign governments to take action against the CIA," while ensuring that foreign partners can "trust our ability to honor our pledge to keep any clandestine cooperation with the CIA a secret."

Courts, including ours, have recognized that the government has a national security interest in neither confirming nor denying a sensitive fact or event. *See Mohamed*, 614 F.3d at 1089 ("[T]here is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations.") (emphasis in original); *Kasza*, 133 F.3d at 1163 (enforcing privilege where the government maintained that the privilege "barred the presentation of any evidence tending to confirm or disprove" certain facts relating to a classified facility); *see also Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981) (holding that allegations were "beyond judicial scrutiny" because "[d]ue to national security reasons, . . . the Navy can neither admit nor deny

that it proposes to store nuclear weapons at [the facility]").

The panel majority in this case thus failed to recognize that regardless of whether some information is in the public domain, the concerns animating the state secrets privilege remain. Indeed, the notion that our country's state secrets privilege should turn on "what the rest of the world" has supposedly acknowledged, as Judge Paez's concurrence in the denial of rehearing en banc maintains, is antithetical to the core principles on which the privilege is founded.[1]

The majority offered a specific reason for disregarding Director Pompeo's determination about the national security significance of the United States' refusal to confirm or deny CIA operations in Poland: Mitchell and Jessen are "private parties," so their "disclosures are not equivalent to the United States confirming or denying anything." *Husayn*, 938 F.3d at 1133; *see also id.* ("[N]either Mitchell nor Jessen are agents of the government."); *id.* at 1133 n.15 ("[N]othing about the government's participation in discovery would constitute

[1] The majority's reliance on findings of the European Court of Human Rights is especially troubling. *Husayn*, 938 F.3d at 1127-28, 1133-34. The ECHR reached conclusions about Abu Zubaydah's torture in Poland in part by drawing negative inferences from Poland's past "denial, lack of cooperation with the inquiry bodies and marked reluctance to disclose information of the CIA rendition activities in Poland." *Husayn (Abu Zubaydah)*, ¶ 435. If a foreign partner refused to confirm allegations to protect U.S. state secrets, and if a foreign court later relied on that refusal to infer the truth of the allegations, then under the majority's reasoning the allegations would become "public knowledge." It cannot be the law that foreign partners would destroy the U.S. state secrets privilege by trying to protect it.

governmental acknowledgement or denial of the site's existence."); *id.* at 1135 n.18 (same). This reflects another substantial legal error in the majority's opinion that creates national security risk and warranted en banc review.

I am aware of no court that has held the state secrets privilege is removed or diminished when the discovery is directed to a government contractor. To the contrary, in *Mohamed* itself, we held that the state secrets privilege applied in a suit against a government contractor because the contractor could "reveal[] information about how the United States government does or does not conduct covert operations." 614 F.3d at 1089 (emphasis omitted); *see also El-Masri*, 479 F.3d at 299-300 (applying state secrets privilege in suit involving government contractors). A contrary rule would enable an end-run around the privilege, as litigants could simply subpoena current or former contractors to avoid the privilege's strictures. That cannot be the law, especially when the United States regularly relies on contractors in national security functions.

According to Judge Paez's concurrence, the majority opinion "states only that the government failed to explain *why* discovery by Mitchell or Jessen would amount to an official confirmation." (Emphasis in original). The majority opinion is not so limited, but even so, the "why" here is abundantly clear. Mitchell and Jessen are not just any contractors. They are the experts who, by the majority's description, "proposed and developed" the CIA's enhanced interrogation techniques, "supervise[d] the interrogations" that are the subject of this proceeding, and were "involve[d] in Abu Zubaydah's

torture." *Husayn*, 938 F.3d at 1127. Their knowledge of CIA operations and interrogations in Poland is based on their work with the CIA. It is thus inconceivable that documents and testimony from such persons would not reflect U.S. "official acknowledgment, implicit or otherwise," as the majority opinion holds. *Id.* at 1135 n.18. That is especially the case when the United States will need to be actively involved in these proceedings to protect its interests the best it can.[2]

In short, while the majority opinion does not itself order the disclosure of state secret material, it introduces a legal framework under which privileged information is treated as non-privileged, for reasons that conflict with precedent. This improper framework poses untold risks for our national security, both in this case and in the future cases that must try to comply with the majority's decision.

C

Of course, even if some of the requested discovery here is non-privileged, the panel decision is still deeply problematic. Under our case law applying *Reynolds*, a matter cannot go forward when "it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an

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[2] I do not understand how Judge Paez's concurrence can claim that "the government can still argue on remand that it should not disclose any information from Mitchell and Jessen that would amount to an official confirmation." The majority opinion forecloses that argument by holding that "[a]s private parties, Mitchell's and Jessen's disclosures are not equivalent to the United States confirming or denying anything." *Husayn*, 938 F.3d at 1133.

unacceptable risk of disclosing state secrets." *Mohamed*, 614 F.3d at 1083. Judge Gould's panel dissent persuasively shows the majority's critical errors under this standard.

As Judge Gould explained, "even otherwise innocuous information that provides a more coherent and complete narrative should not be produced where it may risk exposing a broader picture." *Husayn*, 938 F.3d at 1139 (Gould, J., dissenting). That risk is acutely present here because the timing, location, and manner of Abu Zubaydah's alleged detention and interrogation are bound up in a "broader mosaic of clandestine 'intelligence activities, sources, or methods.'" *Id.* (quoting *Mohamed*, 614 F.3d at 1086).

The risk is even more severe given the nature of this proceeding. This is not a case where potentially secret information is relevant to some claim or defense in a lawsuit. Instead, exposing the classified "mosaic" is the *entire point* of the Polish criminal proceeding. As the panel majority explains, the requested discovery will ultimately be used to "provide context" to foreign prosecutors seeking to identify and prosecute Polish individuals who aided the CIA. *Id.* at 1136 (majority opinion). But the identities and roles of these individuals are privileged, as is much of their work with the CIA—as the panel concedes. *See id.* at 1134. The majority opinion thus creates a perfect storm, because any supposedly non-privileged information "will inevitably be placed in the context of a Polish prosecution seeking to discover aspects of the CIA's presence in Poland and any foreign nationals working with the CIA there, topics the majority recognizes to be privileged." *Id.* at 1140 (Gould, J., dissenting).

How, then, is the district court on remand supposed to "disentangle" all of this, *id.* at 1126, 1137 (majority opinion), without inadvertently disclosing highly sensitive intelligence and counterterrorism information that could jeopardize our national security? The majority has no plausible answer. But what we know is that if a district court in *this case* is expected to undertake that impossible task, under the majority opinion district courts in virtually *any case* would be required to do so, because the information at issue here is at least as sensitive as any other.[3]

It was thus not accurate for the majority to frame its decision as a "narrow" and "limited" one. *Id.* at 1126, 1137. The decision instead conveys the broad message to district courts that even in the face of the Supreme Court's decision in *Reynolds* and declarations from the CIA Director, district courts risk reversal if they do not undertake a "disentanglement" process that will be fraught with peril. That should not be the law of this circuit.

Judge Paez's concurrence now suggests the problem here was merely that "the district court never conducted the third step of" the *Reynolds* analysis because it never "us[ed] any discovery tools at its disposal," such as "in

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[3] The majority suggested that depositions "could proceed in this case" "with the use of code names and pseudonyms, where appropriate," as was done in *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. 2016). *See Husayn*, 938 F.3d at 1137. That suggestion is not workable here. As the district judge—who also presided in *Salim*—explained, because the focus of Abu Zubaydah's proposed discovery is so plain, "[a]llowing the matter to proceed with a code word, such as 'detention site blue' to replace Poland seems disingenuous."

camera review, protective orders, or restrictions on testimony." But these "tools" all entail the district court reviewing or holding proceedings involving clearly privileged information, as part of an effort to "disentangle" supposedly non-privileged items. The suggestion that these "tools" must be utilized here is mistaken and only further jeopardizes national security.

Reynolds is clear that even an in camera review, the least intrusive and least risky of the options, is *not* necessary to enforce the privilege. *See Reynolds*, 345 U.S. at 10 ("[W]e 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"). As the *Reynolds* Court explained, when "there is a reasonable danger that compulsion of the evidence will expose" state secrets, "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." *Id.*

We acknowledged that in camera review is not always necessary in *Mohamed*. 614 F.3d at 1081. And other circuits are in accord. *See, e.g.*, *Doe v. CIA*, 576 F.3d 95, 104 (2d Cir. 2009); *Sterling*, 416 F.3d at 345; *Zuckerbraun*, 935 F.2d at 548. As the Fourth Circuit explained, "when a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not—indeed, should not—probe further" with an in camera proceeding. *Sterling*, 416 F.3d at 345. These observations apply perforce to other proceedings, like the concurrence's reference to potential depositions of Mitchell and Jessen, which would create even greater risk that privileged information is improperly disclosed.

The suggestion in Judge Paez's concurrence that *Reynolds* requires an in camera review, or other proceedings that are even more treacherous, is therefore contrary to settled law. The district court here thus did not somehow fail to evaluate the third part of a three-part test. But regardless, further proceedings involving privileged information is now the perilous course that the district court must follow, a course the majority opinion regrettably foreordains for many future cases where our country's sensitive military and intelligence information may be at stake.

D

This would all be troubling enough if the resulting discovery were being used in domestic litigation. But here, any materials that are released will be sent over to a foreign legal system that we do not control. We should have recognized that when the state secrets privilege is asserted, the considerations are vastly different when the materials are being sought for use exclusively in a foreign proceeding. *See* 28 U.S.C. § 1782. That is particularly so when the foreign proceeding is dedicated to investigating our country's counterintelligence operations abroad.

As we explained in *Mohamed*, courts evaluating state secrets claims must ensure "that an appropriate balance is struck between protecting national security matters and preserving an open court system." 614 F.3d at 1081 (quotations omitted). But when we have addressed state secrets issues in prior cases, we were considering whether the materials could be used in U.S. litigation. *See id.* at 1075-76 (claims brought under Alien Tort Statute against U.S. corporation for its alleged in-

volvement in the CIA's extraordinary rendition program); *Al-Haramain*, 507 F.3d at 1193, 1195 (claims for damages and declaratory relief brought against United States by Muslim charity allegedly subjected to surveillance program); *see also Reynolds*, 345 U.S. at 2-3 (claims under Tort Claims Act brought against United States concerning military aircraft accident).

The state secrets privilege was held to apply in these cases notwithstanding the resulting impediments it caused in our court system. Here, however, our courts are being used as a vehicle for obtaining information that will be sent to Poland, which has already tried but failed to obtain this information through diplomatic channels. I agree with Judge Gould's panel dissent that it is "very troubling that the majority's analysis . . . does not acknowledge and evaluate the consequences of the fact that the information sought in a discovery proceeding here under § 1782 is ultimately destined for a foreign tribunal." *Husayn*, 938 F.3d at 1140 (Gould, J., dissenting). The balance of interests must be different when "the sought discovery will be shipped overseas for the benefit of another country's judicial system, and at that point, totally out of control of a domestic court." *Id.*

What message does the majority opinion send to persons and regimes around the world desirous of our country's secret information? It is that even if they strike out with the Executive Branch, they can come to the U.S. courts and try their chances by pointing to the supposed need for information in a foreign proceeding whose rules and approach may be very different than our own. In some cases, these § 1782 requests will

yield nothing. But in other cases, the imprecise "disentanglement" process may shake loose a few nuggets of information, or even more. What will then be done with that information we cannot know. These are risks we should not tolerate and that a fair application of the state secrets privilege should protect against.

I respectfully dissent from the denial of rehearing en banc.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Misc. Case No. [2:17-CV-0171-JLQ]

IN RE APPLICATION OF ZAYN AL-ABIDIN MUHAMMAD HUSAYN (ABU ZUBAYDAH) AND JOSEPH MARGULIES, PETITIONERS

Filed: May 22, 2017

EX PARTE APPLICATION FOR DISCOVERY ORDER PURSUANT TO 28 U.S.C. § 1782 IN AID OF FOREIGN PROCEEDING

Petitioners Zayn Al-Abidin Muhammad Husayn ("Abu Zubaydah") and Joseph Margulies, by their counsel, hereby apply to the Court for an order under 28 U.S.C. § 1782(a) granting them leave to issue subpoenas to James Elmer Mitchell and John "Bruce" Jessen to produce documents and give Elmer Mitchell and John "Bruce" Jessn to produce documents and give testimony for use in an ongoing criminal investigation in Kraków, Poland.[1]

This Application is supported by the memorandum of points and authorities below, as well as the Declaration

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[1] Although Section 1782 applications are properly made *ex parte*, Petitioners have provided advance notice of this Application to counsel for Messrs. Jessen and Mitchell and will provide a courtesy copy of the Application and accompanying materials after filing.

of Joseph Margulies ("Margulies Decl."). A proposed discovery order and subpoenas have been contemporaneously filed as attachments to this Application.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview of 28 U.S.C. § 1782

Section 1782 authorizes a federal district court to order discovery of documents and testimony for use in a foreign proceeding from any person who resides or is found in the court's district:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782(a).

A successful application must meet three requirements: (1) the person(s) from whom discovery is sought must reside or be "found" in the district of the court issuing the discovery order; (2) the applicant must be a foreign tribunal or "interested person"; and (3) the discovery must be sought "for use in a proceeding in a foreign or international tribunal." *Govan Brown & Assocs. Ltd. v. Does 1 & 2*, No. C 10-02704 PVT, 2010 WL 3076295, *2 (N.D. Cal. Aug. 6, 2010). Because all three requirements are met here, this Application should be granted.

II. Factual Background

A. Abu Zubaydah's Detention

Abu Zubaydah is a stateless Palestinian currently held in Guantánamo Bay, Cuba. Margulies Decl. ¶ 5. Joseph Margulies is his counsel. *Id.* ¶¶ 1-3. Abu Zubaydah was captured in Pakistan in March 2002 by U.S. and Pakistani agents and is now being held as an "enemy combatant." *Id.* ¶ 5. The U.S. Government initially alleged that Abu Zubaydah was the "third or fourth man" in al Qaeda and had a role in every major al Qaeda terrorist operation, including as a planner of the attacks on September 11, 2001. *Id.*; Margulies Decl. Ex. A. However, a Senate Select Intelligence Committee report subsequently revealed that these allegations were unfounded, based on a review of contemporaneous CIA records. Margulies Decl. ¶ 5; Executive Summary of the Senate Select Committee on Intelligence—Study of the CIA's Detention and Interrogation Program, at 410-411. ("Senate Select Committee Report") (relevant excerpts appended to Margulies Decl. as Ex. B).

For several years after his capture, Abu Zubaydah was imprisoned in various CIA "black sites" in foreign countries, where he was subjected to so-called "enhanced interrogation techniques"—torture—including waterboarding, starvation, and other serious abuses. Margulies Decl. ¶¶ 7-24; *see generally* Senate Select Committee Report (describing the interrogations of Abu Zubaydah and others). Such acts of torture would be illegal on U.S. soil.[2] However, the executive branch

[2] The U.S. Supreme Court and other federal courts have long cited the use of force amounting to torture, or other forms of ill treatment in custody or during interrogations, as violating rights under the

has maintained that these black sites operated beyond the protections of U.S. law. Regardless of their domestic legal status, the sites existed with the knowing complicity of the sovereign nations in which they were located. Margulies Decl. ¶ 6. Without the complicity of foreign states, the CIA's black sites could not have existed and the torture performed there would not have happened.

From December 2002 until September 2003, Abu Zubaydah was imprisoned in a black site in Stare

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Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution. Some of the practices the federal courts have condemned include whipping, slapping, depriving a victim of food or sleep, keeping him naked or in a small cell for prolonged periods, holding a gun to his head, or threatening him with mob violence. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 731, 741 (2002) (exposing prisoner to the heat of the sun and use of stress positions were cruel and unusual punishment); *DeShaney v. Winnebago*, 489 U.S. 189, 199-200 (1989) (failure to provide food and clothing violated Eighth Amendment and Due Process Clause); *Ashcraft v. Tennessee*, 322 U.S. 143, 156 (1944) (sleep deprivation violated prisoner's due process rights); *Chambers v. Florida*, 309 U.S. 227 (1940) (holding prisoner incommunicado for five days of continuous questioning violated due process rights); *Brown v. Mississippi*, 297 U.S. 278, 282, 286 (1936) (whipping suspect to coerce confession violated due process); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (threatening prisoner with mob violence violated due process); *Bram v. United State*s, 108 U.S. 532, 565 (1897) (forcing suspect to strip before interrogation contributed to violation of Fifth Amendment due process rights); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (keeping cell constantly illuminated interfered with prisoner's sleep and violated Eighth Amendment); *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (beating and threatening prisoner violated Fifth and Fourteenth Amendments); *Burton v. Livingston*, 791 F.2d 97, 99, 100-01 (8th Cir. 1986) (pointing loaded pistol at prisoner violated his substantive due process rights); *Ware v. Reed*, 709 F.2d 345, 351 (5th Cir. 1983) (custodial use of force against prisoner violated his constitutional rights).

Kiejkuty, Poland. *Id.* ¶ 7. The Senate Select Committee Report refers to this site by the alias "Detention Site Blue." *Id.* ¶ 11. In 2010, attorneys for Abu Zubaydah filed a criminal complaint in Poland seeking to hold Polish officials accountable for their complicity in Abu Zubaydah's unlawful detention and torture. *Id.* ¶ 31. However, the case closed without any prosecutions or convictions. *Id.*

In 2013, attorneys for Abu Zubaydah—including Petitioner Joseph Margulies and his Polish co-counsel, Bartłomiej Jankowski—filed an application against the Republic of Poland before the European Court of Human Rights, alleging that Poland had failed to conduct a full and proper investigation into violations of international and Polish domestic law. *Id.* ¶ 32. The court agreed that Poland's actions violated the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that the investigation was inadequate; as a result, Poland reopened the criminal investigation of Polish official complicity in the operation of the black site. *Id.* ¶ 33; *Abu Zubaydah v. Poland,* No. 7511/13 (2014) (Ex. C to Margulies Decl.).

The Polish criminal investigation is charged with examining whether Polish officials violated domestic law by opening, operating, and conspiring with the United States to detain and mistreat prisoners, including Abu Zubaydah. Abu Zubaydah has the right to submit evidence in aid of the investigation through his attorneys, and the Polish prosecutor has invited counsel for Abu Zubaydah to do so. *Id.* ¶ 35.

Because Abu Zubaydah continues to be held *incommunicado* at the U.S. Naval Base at Guantánamo Bay, Cuba, he is unable to give direct testimony in the Polish

criminal investigation or any other public proceeding, making it even more critical to obtain evidence from other sources. Margulies Decl. ¶ 36.

B. Respondents Mitchell and Jessen

Respondent Mitchell is a former CIA contractor and was one of the architects of the CIA enhanced interrogation program. Margulies Decl. ¶ 12. Mitchell was the chief psychologist at the U.S. Air Force Survival, Evasion, Resistance and Escape training program at Fairchild Air Force Base, Washington. *Id.* From 2001 to 2005, Mitchell worked as an independent contractor for the CIA. *Id.* From 2005 to 2009 Mitchell was CEO of a company he co-founded with Jessen, called Mitchell, Jessen & Associates, with headquarters and offices in Spokane, Washington. Margulies Decl. ¶ 12. Mr. Mitchell resides at 20727 Lake Vienna Dr. in Land O'Lakes, Florida.

Respondent Jessen is also a former CIA contactor and, together with Mitchell, a co-architect of the CIA's enhanced interrogation program. Margulies Decl. ¶ 13. In July 2002, the CIA contracted with Jessen on Mitchell's recommendation. Margulies Decl. ¶ 14. From 2005 to 2009, Jessen was president of Mitchel, Jessen & Associates. *Id.* Jessen currently resides at 8719 South Palouse Highway in Spokane, Washington.

By their own admission as defendants in other legal proceedings, Respondents subjected Abu Zubaydah to waterboarding and other so-called "enhanced interrogation techniques." Margulies Decl. ¶ 15; *Salim v. Mitchell*, No. 2:15-CV-286-JLQ (E.D. Wash., June 21, 2016), Def.'s Am. Answer and Affirm. Defs. ¶¶ 47-53 (Ex.

E to Margulies Decl.). And according to the Senate Select Committee on Intelligence's report on the CIA's detention and interrogation program, Mitchell and Jessen visited the Polish black site at least twice. Margulies Decl. ¶ 27, Ex. B at 17-18. Accordingly, Petitioners expect Respondents to have relevant documents and personal knowledge regarding the identities of Polish officials complicit in the establishment and operation of the black site and the nature of their activities. Margulies Decl. ¶ 37.

Specifically, Respondents are in a position to describe or produce evidence relating to the following: the crimes committed against Abu Zubaydah on Polish soil; the identities of all perpetrators of those crimes; the presence of Polish officials at the facility in general, and during the commission of the various crimes; agreements between Polish and U.S. officials; the identities of other witnesses to the crimes against Abu Zubaydah; contracts or other agreements between the two governments regarding interrogations of Abu Zubaydah and other victims of crimes in Poland; knowledge or documentation of the day-to-day operations of the black site, including the provision of daily necessities such as food, water, medicine, etc.; interaction with the community surrounding the black site; flight arrival and departure operations; upkeep and provision of the black site grounds; and any interaction those working on the black site may have had with the local population. Respondents' production of documents and testimony would aid the Polish prosecutors in their understanding of Polish civilian and governmental complicity in the operation of Detention Site Blue.

III. ARGUMENT

Congress enacted Section 1782 to "facilitate the conduct of litigation in foreign tribunals, improve international cooperation in litigation, and put the United States into the leadership position among world nations in this respect." *In re Application Pursuant to 28 U.S.C. § 1782 for an Order Permitting Bayer AG to Take Discovery (In re Bayer AG)*, 146 F.3d 188, 191-92 (3d Cir. 1998). Liberal application of Section 1782 in appropriate cases furthers the statute's twin aims of "provid[ing] efficient means of assistance to participants in international litigation in our federal courts and encourag[ing] foreign countries by example to provide similar means of assistance to our courts." *Schmitz v. Bernstein, Liebhard & Lifshitz*, 376 F.3d 79, 84 (2d Cir. 2004).

This Application presents a paradigmatic case for judicial assistance. Other attempts by Polish investigators to obtain similar discovery have been thwarted. Margulies Decl. ¶ 39. The need for discovery is particularly acute because Abu Zubaydah, who remains *incommunicado*, cannot offer direct testimony on his own behalf. And, as explained below, the three threshold requirements for granting a Section 1782 application are readily met.

A. Respondent Jessen resides in this district and Respondent Mitchell is "found" in this district.

Mr. Jessen resides in Spokane, Washington, and is therefore subject to this Court's authority under Section 1782.

Mr. Mitchell is "found" in this district and is therefore also subject to this Court's authority under Section

1782. Mr. Mitchell has served as the CEO of a company headquartered in this district. Margulies Decl. ¶ 12. He is also a defendant in ongoing civil litigation in this district and is already subject to this Court's power to compel discovery from him in that matter. Additionally, although Mr. Mitchell contested the court's subject matter jurisdiction in that litigation, he did not contest that the court had personal jurisdiction over him. *Id.*, Ex. G (Def.'s Mot. to Dismiss). Because the requirement that a litigant be "found" in a district should not be more restrictive than the requirement of personal jurisdiction,[3] Mitchell is properly "found" in this district for purposes of Section 1782.

B. Petitioners are "interested persons" under the statute.

The Supreme Court has held that the term "interested person" in the statute is broad, encompassing any

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[3] While the Ninth Circuit does not appear to have addressed whether a litigant is "found in" a federal court district for purposes of Section 1782 in circumstances like Mr. Mitchell's, the Second Circuit has analogized the "found in" requirement to the requirement of personal jurisdiction, remarking that "the question of what it means to be found in a particular locale is already the subject of well-settled case law on territorial jurisdiction." *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002). Given that Section 1782 "is simply a discovery mechanism and does not subject a person to liability," the court determined that the requirements for subjecting an individual to a Section 1782 order were not more stringent than those required to subject to an individual to civil suit. *Id.*; *cf. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998) (emphasis in original) ("[A] person who is subjected to *liability* by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.").

individual who "possesses a reasonable interest in obtaining judicial assistance." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256-57 (2004) (citation and alteration omitted). This includes a complainant before a foreign commission who "has the right to submit information . . . and may proceed to court if the Commission discontinues the investigation or dismisses the Complaint." *Id.*

Here, Abu Zubaydah is the complaining victim in a criminal investigation. He has significant procedural rights in that investigation, including the right to submit evidence. Margulies Decl. ¶ 35. In short, Petitioners are precisely the types of interested persons contemplated in the statute and in the Supreme Court's *Intel* opinion.

C. <u>The requested discovery is for use in a criminal investigation before a foreign tribunal.</u>

"Proceedings" qualifying for issuance of a discovery order under Section 1782 specifically include "criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a). Adjudicatory proceedings need not be imminent or pending "for an applicant to invoke § 1782(a) successfully." *Intel*, 542 U.S. at 253. Indeed, as the legislative history shows, "[T]he [district] court[s] have discretion to grant assistance when proceedings are pending before investigation magistrates in foreign countries." S. Rep. No. 1580, at 7, U.S. Code Cong. & Admin. News 1964, pp. 3782, 9788.

The discovery requested in this Application falls squarely within the statute's purview. It is sought in furtherance of an ongoing criminal investigation by prosecutorial authorities in Kraków, Poland. The scope of

that investigation extends to all Polish officials who were in any way involved in facilitating or permitting the existence and operation of the CIA black site in Poland. Margulies Decl. ¶ 34.

The requested discovery, which is related to Respondents' interactions with Polish officials and knowledge of Polish official actions, will be shared with Polish prosecutors "for use" in that criminal investigation. Margulies Decl. ¶ 38. Official government reports and Respondents' own admissions illustrate their central role in the implementation and oversight of that same torture program, which was conducted on Polish soil. Margulies Decl. ¶¶ 12-15. The information in Respondents' possession would be not only relevant, but essential to the progress of the Polish investigation.

Other efforts to obtain evidence regarding official conduct towards Abu Zubaydah have been substantially impeded. The U.S. government has rejected multiple mutual legal assistance requests lodged by the Polish government under the 2006 U.S.-Poland Mutual Legal Assistance Agreement, and signaled that it would ignore further requests relating to the same subject matter. Margulies Decl. ¶ 39.

D. The Application should be granted in the exercise of the Court's discretion.

Where, as here, Section 1782's threshold requirements are met, the decision whether to grant the application rests within the district court's discretion. The Supreme Court has articulated several factors for a court to consider in determining whether to grant an application, including (1) whether the person from whom

discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal and proceedings, and the receptivity of the foreign government, court, or agency to the assistance of the U.S. federal courts; (3) whether the application conceals an attempt to circumvent foreign proof-gathering restrictions or other public policies; and (4) whether the discovery would be unduly intrusive or burdensome. *Intel*, 542 U.S. at 264-66. All of these factors weigh in favor of granting this Application.

First, Respondents are not participants in the underlying foreign proceeding, and Polish authorities have no independent means of securing their cooperation.

Second, the Polish Prosecutor's office has invited counsel for Abu Zubaydah to submit evidence, negating any concern that the Polish government is unreceptive to the Court's assistance. Margulies Decl. ¶ 35.

Third, the Application does not seek to circumvent proof-gathering restrictions, but rather to fill a gap in foreign discovery devices—a goal firmly in line with the statute's overarching purpose of "providing efficient means of assistance to participants in international litigation in our federal courts." *Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992).

Finally, the discovery sought is restricted to Respondents' oral testimony and documents within their personal possession, and is not unduly intrusive or burdensome. This is especially so in light of the potential benefit to Petitioners and the Polish prosecutorial authorities from the requested discovery. The Polish investigation represents a government's historic effort to ensure its sovereign

accountability, and the accountability of individuals purporting to act on its behalf, for gross violations of international humanitarian law. Moreover, notwithstanding their own role in the events under investigation, Respondents are not and cannot be charged in those proceedings. The relatively *de minimis* burden on Respondents' resources and time is an insufficient basis for declining to aid the investigation's critical truth-seeking mission.

CONCLUSION

WHEREFORE, Petitioners respectfully request the Court grant Petitioners leave to serve Respondents Mitchell and Jessen with the subpoenas attached to this Application.

Dated: May 22, 2017

Respectfully submitted,

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APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

Civil Action No. 2:17-cv-00171-JLQ

IN RE APPLICATION OF ZAYN AL-ABIDIN MUHAMMAD HUSAYN (ABU ZUBAYDAH) AND JOSEPH MARGULIES, PETITIONERS

Filed: Oct. 24, 2017

DECLARATION AND FORMAL CLAIM OF STATE SECRETS AND STATUTORY PRIVILEGES BY MICHAEL POMPEO, DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY

I, MICHAEL POMPEO, hereby declare and state:

1. I continue to serve as the Director of the Central Intelligence Agency ("CIA" or "Agency"). For background and biographical information, I respectfully refer the Court to my declaration, dated March 2, 2017, that was submitted to this Court in a separate civil suit that two former CIA detainees (Sulieman Abdullah Salim and Mohamed Ahmed Ben Soud) and the personal representative of a deceased former CIA detainee (Gul Rahman) filed against Dr. James Mitchell ("Mitchell") and Dr. Bruce Jessen ("Jessen"), two former contractors employed by the CIA to assist in the interrogation of detainees. My prior declaration is attached as Exhibit A and incorporated herein by reference.

2. The purpose of this declaration is to assert, in my capacity as the Director of the CIA, a formal claim of the state secrets privilege, as well as statutory privileges discussed below, to protect the national security of the United States. The statements made herein are based on my personal knowledge, on information provided to me in my official capacity, and on my evaluation of that information. The judgments expressed in this declaration are my own. I do not assert the state secrets privilege lightly, nor do I assert the privilege to conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment to a person, organization, or agency, or to prevent or delay the release of information that does not require protection in the interest of the national security. Rather, I assert this privilege after careful and personal consideration of this matter 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.[1]

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[1] The current basis for classification of national security information is found in Executive Order 13526. In accordance with section 1.3(a)(2) of the Executive Order, the President designated the Director of the CIA as an official who may classify information up to the TOP SECRET level. *See* 70 Fed. Reg. 21,609 (Apr. 21, 2005). Part I of the Executive Order authorizes an Original Classification Authority to classify information owned, produced, or controlled by the United States government if it could reasonably be expected to cause damage to the national security and pertains to one or more specific categories, to include intelligence activities, intelligence sources and methods, foreign government information and foreign activities of the United States. Section 1.2 of the Executive Order permits information to be classified at one of three classification levels depending upon the reasonable likelihood of damage to the national se-

3. In addition to asserting the state secrets privilege, I am also asserting statutory privileges under the National Security Act of 1947 ("The National Security Act") and the Central Intelligence Agency Act of 1949 ("the CIA Act"). Section 102A(i)(1) of the National Security Act provides that the DNI "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). Pursuant to this section of the National Security Act, and consistent with Section 1.6(d) of Executive Order 12333 and guidance from the DNI, the CIA is required to protect intelligence sources and methods from unauthorized disclosure. In addition, Section 6 of the CIA Act provides that the CIA shall be exempted from the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA. 50 U.S.C. § 3507.

4. Through the exercise of my official duties I have become familiar with the Ex Parte Application for Discovery (the "Application") filed by Abu Zubaydah ("Zubaydah") and his counsel, Joseph Margulies (together, "Petitioners"). I understand that this matter traces its origins to an action Zubaydah filed for damages against the Republic of Poland in the European Court of Human Rights. I understand that Zubaydah was successful in that action, and was awarded a monetary judgment against the Polish Government. I further understand that, as a result of that court's determination that the Polish Government had not conducted a

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curity from unauthorized disclosure: CONFIDENTIAL for damage; SECRET for serious damage; and TOP SECRET for exceptionally grave damage.

full and proper investigation into alleged violations of law that resulted from Poland's alleged participation in the CIA's former detention and interrogation program (the "program"), the Polish criminal investigation has been reopened. To assist the Polish investigation, I understand that pursuant to 28 U.S.C. 1782(a) Petitioners seek discovery in the form of records and depositions from Mitchell and Jessen about Zubaydah's alleged detention in Poland. I also understand that Petitioners' Application and the subpoenas served on Mitchell and Jessen are predicated entirely on allegations that the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government.

5. As explained below, I am submitting this declaration and formally asserting the state secrets and statutory privileges in support of the Department of Justice's motion to quash the discovery requests in their entirety because Mitchell and Jessen cannot produce documents or answer any deposition questions that would tend to confirm or deny whether or not the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government. The specific foreign countries where the CIA operated detention facilities and the foreign governments that clandestinely assisted the CIA program are classified at the TOP SECRET level, and it is my judgment that allowing Mitchell and Jessen to respond to the subpoenas reasonably could be expected to cause serious, and in many instances, exceptionally grave damage to U.S. national security.

6. In the prior lawsuit against Mitchell and Jessen, which was recently dismissed after the parties entered

into a settlement agreement, I understand that the Court upheld my assertion of the state secrets and other statutory privileges to protect against the unauthorized disclosure of specific categories of classified national security information concerning the CIA's former detention and interrogation program. In particular, I asserted the state secrets and other statutory privileges to protect seven categories of information:

- Information that could identify individuals involved in the 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; and
- Information concerning the CIA's internal structure and administration.

7. Petitioners' discovery requests in this case implicate these same seven categories of classified information and would require Mitchell and Jessen to answer questions or produce documents that would tend to confirm or deny whether or not they have information about

these categories as they pertain to whether or not the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government. Accordingly, for a detailed explanation of these categories of classified information and why they must be protected, I respectfully refer the Court to my prior declaration, which I reaffirm for purposes of this case.

8. Petitioner's requested discovery cannot proceed in this case because the central issue that underlies this entire matter—whether or not the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish Government—remains a classified fact that cannot be divulged without risking significant damage to the national security. In their Ex Parte Application for Discovery, filed in May 2017, Petitioners make clear that this case is all about Poland and the alleged existence of a clandestine CIA detention facility in that country. I understand that Petitioners state, "The Polish criminal investigation is charged with examining whether Polish officials violated domestic law by opening, operating, and conspiring with the United States to detain and mistreat prisoners, including Abu Zubaydah." (ECF No. 1, p. 7) In addition, "Petitioners expect [Mitchell and Jessen] to have relevant documents and personal knowledge regarding the identities of Polish officials complicit in the establishment and operation of the black site and the nature of their activities." (*Id.* at 9). Petitioners spell out:

> Specifically, [Mitchell and Jessen] are in a position to describe or produce evidence relating to the following: the crimes committed against Abu Zubaydah on Polish soil; the identities of all perpetrators of

> those crimes; the presence of Polish officials at the facility in general, and during the commission of the various crimes; agreements between Polish and U.S. officials; the identities of other witnesses to the crimes against Abu Zubaydah; contracts or other agreements between the two governments regarding interrogations of Abu Zubaydah and other victims of crimes in Poland; knowledge or documentation of the day-to-day operation of the black site, including the provision of daily necessities such as food, water, medicine, etc.; interaction with the community surrounding the black site; flight arrival and departure operations; upkeep and provision of the black site grounds; and any interaction those working on the black site may have had with the local population.

(*Id.* at 9-10). Petitioners conclude, "[Mitchell and Jessen's] production of documents and testimony would aid the Polish prosecutors in their understanding of Polish civilian and governmental complicity in the operation of Detention Site Blue." (*Id.* at 10). In short, this whole matter and Petitioners' attempt to obtain discovery is predicated on the allegation that the CIA operated a clandestine detention facility in Poland and/or conducted detention and interrogation operations with the assistance of the Polish Government. Whether or not such a facility existed and whether or not the Polish Government provided assistance to the CIA remain classified facts that cannot be disclosed without significant harm to the national security.

9. As explained in paragraphs 23-29 of my prior declaration, two of the categories of information about the CIA's former detention and interrogation program that remain classified at the TOP SECRET level and

protected from disclosure under the state secrets privilege and the National Security Act of 1947 are (a) information regarding foreign government cooperation, and (b) information pertaining to the operation or location of any clandestine overseas CIA station, base, or detention facility. Mitchell and Jessen cannot respond to Petitioners' subpoenas without either confirming or denying the existence or nonexistence of a clandestine CIA detention facility in Poland. Either way, Mitchell and Jessen's response would reveal classified information about whether or not the Polish government clandestinely assisted the CIA, and whether or not the CIA operated a clandestine detention facility in Poland.

10. My prior declaration explained the harms to U.S. national security that reasonably could be expected to result from the disclosure of classified information regarding whether or not the Polish government clandestinely assisted the CIA and whether or not the CIA operated a clandestine detention facility in Poland. Indeed, these harms would apply to disclosure of classified information about any of the foreign governments that the CIA partnered with during the operation of the former detention and interrogation program. As incorporated and reaffirmed again here, every day, across the globe, the CIA is engaged in counterterrorism operations and intelligence collection activities to keep our country and our citizens safe. Foreign liaison services are vital to our world-wide efforts to collect intelligence and thwart terrorist attacks. Those services serve as a force multiplier by directing their resources at common goals we share in counterterrorism operations and intelligence gathering. Because foreign intelligence services serve as a direct source of intelligence and act as partners in joint operations, such services are a critical

intelligence source, and the CIA's relationship with them is an intelligence method that must be protected.

11. Publicly disclosing the existence of a clandestine intelligence relationship or the extent to which a foreign government is covertly cooperating or sharing intelligence with the CIA is likely to have serious negative consequences for any liaison assistance the CIA may receive from that country. As a clandestine intelligence service, the CIA has a duty to maintain the secrecy of its liaison relationships. Disclosure of the clandestine relationship is a breach of the trust on which the relationship is based, and can lead to a less robust relationship or even a termination of the relationship altogether. This damage to a liaison relationship is likely to compromise the CIA's ability to obtain critical intelligence information from the country's intelligence service or secure cooperation from the country in current and future high-risk counterterrorism operations. For example, disclosing the existence of a clandestine intelligence relationship or the extent to which a foreign government is covertly cooperating with and sharing intelligence with CIA could embarrass the foreign government or aggravate internal political dissent in that country. This, in turn, would make the country less likely to share intelligence with the CIA or assist the CIA with its operations.

12. Additionally, one predictable response to disclosing information about a clandestine liaison relationship is for the foreign government to publicly distance itself from the U.S. Government or CIA, or take other measures to reduce the effectiveness of the CIA. For example, a country could demand that the CIA remove

one or more officers from country and/or harass CIA officers. This could complicate CIA intelligence operations, possibly shutting down or curtailing operations, resulting in a reduction or elimination of intelligence.

13. More broadly, if the CIA appears unable or unwilling to keep its clandestine liaison relationships secret, relationships with other foreign intelligence or security services could be jeopardized as well. It is critical that the CIA preserve the confidentiality of its liaison relationships in order demonstrate to partner governments that the CIA can be trusted to maintain the secrecy of these agreements. For example, when trying to work with foreign intelligence services in the present day, the CIA needs them to have confidence that we will not acknowledge our coordinated clandestine activities. If governments or intelligence services become distrustful of the CIA's ability to maintain the confidentiality of these arrangements, they will understandably be reluctant to cooperate with the CIA if they believe the CIA would disclose the arrangement. The loss of trusted intelligence partners, and the intelligence information and operational support they can provide, would have significant harmful effects on the national security.

14. Disclosing classified information pertaining to countries and foreign services that clandestinely assisted the CIA would also increase the risk that terrorists or other bad actors would target those countries with acts of extreme violence. Terrorist organizations, in particular, often seek to plan attacks in locations that U.S. Government personnel are perceived to frequent. Public disclosure of the fact that the CIA has a liaison

relationship with a given country increases the likelihood of an attack in that location.

15. Disclosing the location of CIA stations, bases, and detention facilities can have similar negative repercussions. The fact that the CIA has covert overseas facilities is UNCLASSIFIED. The specific locations, however, are generally classified SECRET, and information pertaining to the locations of specific former detention facilities is TOP SECRET. Acknowledging the location of covert facilities can endanger the physical safety of covert CIA officers who work at those locations by, among other things, significantly increasing the likelihood that those locations could be targeted for terrorist attacks. Such official acknowledgments are also reasonably likely to cause complications for host countries, given that official acknowledgment of CIA facilities within their borders could incite a backlash from elements of their citizenry. Public embarrassment for the host country could have a negative impact on the CIA's relationship with the host country, to include curtailed intelligence sharing and cooperation that would greatly diminish the CIA's overseas intelligence collection, which in turn would diminish the quality of Agency intelligence assessments for senior U.S. policymakers. Further, confirming the location of covert CIA overseas facilities signals to adversaries where the CIA has an interest and conducts operations, thus providing those entities with valuable information that they could utilize to thwart the CIA's intelligence mission.

16. There has been much public speculation about which countries and services assisted the CIA's former detention and interrogation program, but the CIA, as it

must, has steadfastly refused to confirm or deny the accuracy of such speculation. Indeed, the CIA has never officially acknowledged whether or not any particular foreign country hosted a clandestine CIA detention facility as part of the Agency's former detention and interrogation program. For instance, the 2014 Senate Select Committee on Intelligence report on the CIA's former detention and interrogation program intentionally refers in code to detention facilities such as "Detention Site Blue," "Detention Site Cobalt," and "Detention Site Black," rather than by their geographic location. Similarly, the names of specific countries are identified in the report as "Country [Redacted]."

17. Here, I understand that the media, nongovernmental organizations, and former Polish government officials have publicly alleged that the CIA operated a detention facility in Poland. These allegations do not constitute an official acknowledgment by the CIA, and whether or not the CIA operated a clandestine detention facility in any specific location, including Poland, remains a classified fact. Further, these allegations do not undermine the harms to the national security discussed above that reasonably could be expected to result from Mitchell or Jessen confirming or denying, explicitly or in connection with document production, whether or not the CIA conducted detention and interrogation operations in Poland and/or with the assistance of the Polish government. As explained in my prior declaration, the concept of official acknowledgment is important to the protection of the CIA's intelligence mission. While the CIA obviously cannot control what former foreign government officials might choose to say publicly for their own reasons, the CIA cannot officially acknow-

ledge allegations that would confirm or deny the existence of a classified intelligence relationship with a foreign government. The absence of official confirmation from the CIA leaves an important element of doubt about the veracity of the information and, thus, carries with it an additional layer of confidentiality. That protection would be lost, however, if the CIA were forced to confirm or deny the accuracy of speculation or unofficial disclosures, including allegations by former government officials. Unofficial allegations may not be sufficient to motivate hostile entities or foreign governments to take action against the CIA in the same manner and with the same intensity as would an official acknowledgment by the CIA. By contrast, these entities could not ignore, dismiss, or downplay an official acknowledgment by the CIA.

18. I also understand that the regional prosecutor's office in Krakow, Poland, has an open criminal investigation into alleged CIA detention activities in Poland. Even in situations when former officials with a foreign government make allegations about CIA activities or certain components of a foreign government attempt to take action in response to alleged intelligence activities with the CIA, there is still harm to the national security that would result were the CIA to confirm or deny the nature of the alleged activities. The CIA's ability to maintain a cooperative and productive intelligence relationship with foreign intelligence and security services is separate from whatever activities may be undertaken by other elements of that government or former officials no longer connected with the government. Relationships with these intelligence and security services are extremely sensitive and based on mutual trust that the classified existence and nature of the relationship will

not be disclosed. Therefore, it is of the utmost importance that the CIA not take any action that could jeopardize these clandestine relationships, lest the CIA lose the ability to receive critical intelligence and operational support from these foreign intelligence services, as well as from other current or potential intelligence partners, as discussed in this declaration. The resulting damage to the national security from reduced or terminated intelligence sharing relationships could be severe.

19. Although much information about the former detention and interrogation program has been declassified, the CIA has not wavered in its commitment to protecting the location of detention facilities and the identity of foreign partners who stepped forward in the aftermath of the 9/11 attacks to join the fight against al-Qa'ida. It is critical that the CIA maintain its commitment of confidentiality to these countries. Our foreign partners must be able to trust our ability to honor our pledge to keep any clandestine cooperation with the CIA a secret even when time passes, media leaks occur, or the political and public opinion winds change in those foreign countries. For instance, when trying to convince foreign intelligence services to work with us in the present day, CIA needs them to have confidence that years down the line we will continue to stand firm in safeguarding any coordinated clandestine activities even if new political parties or officials come to power in those foreign countries that want to publicly atone or exact revenge for the alleged misdeeds of their predecessors. The CIA's ability to maintain and develop relationships with foreign intelligence services depends on steadfast adherence to this commitment.

20. For the reasons set forth herein, I am asserting the state secrets and related statutory privileges in support of the Department of Justice's motion to quash Petitioners' subpoenas in their entirety and to prevent the disclosure of sensitive national security information, described above, that is implicated by this matter.

21. Should the Court require additional information concerning any aspect of my claim of privilege, I respectfully request an opportunity to provide such additional information prior to the entry of any ruling regarding my privilege claims.

* * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this [24th] day of [October], 2017.

/s/ MICHAEL POMPEO
MICHAEL POMPEO
Director
Central Intelligence Agency

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

Civil Action No. 16-MC-0036-JLQ

JAMES E. MITCHELL AND JOHN JESSEN, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

Dated: Mar. 2, 2017

DECLARATION AND FORMAL CLAIM OF STATE SECRETS AND STATUTORY PRIVILEGES BY MICHAEL POMPEO, DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY

I, MICHAEL POMPEO, hereby declare and state:

1. I am the Director of the Central Intelligence Agency ("CIA" or "Agency"). In my capacity as Director, I lead the CIA and manage intelligence collection, analysis, covert action, counterintelligence, and liaison relationships with foreign intelligence services. I have held this position since January 23, 2017. Before becoming Director, I served for six years as U.S. Representative for the 4th District of Kansas. While a member of Congress, I served on the House Permanent Select Committee on Intelligence and the House Select Committee on Benghazi, as well as the Energy and Commerce Committee. I graduated in 1986 from the United States

Military Academy at West Point and served as an Army officer for five years. After leaving active duty, I graduated from Harvard Law School and then joined the law firm of Williams & Connolly in Washington, D.C. I subsequently returned to Kansas, where I ran two small businesses prior to joining Congress in 2011.

2. The purpose of this declaration is to assert, in my capacity as the Director of the CIA, a formal claim of the state secrets privilege, as well as statutory privileges discussed below, to protect the national security of the United States. The statements made herein are based on my personal knowledge, on information provided to me in my official capacity, and on my evaluation of that information. The judgments expressed in this declaration are my own.

3. As Director of the CIA, I am charged with (1) collecting intelligence through human sources and by other appropriate means; (2) correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence; (3) providing overall direction for and coordination of the collection of national intelligence outside the United States through human sources and, in coordination with other elements of the United States Government, ensuring that the most effective use is made of authorized collection resources and that appropriate account is taken of the risks to the United States and those involved in such collection; and (4) performing such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence ("DNI") may direct. *See* 50 U.S.C. § 3036(d)(1)-(4). A more detailed statement of Director

and CIA authorities is set forth in sections 1.6 and 1.7 of Executive Order 12333, as amended.

4. The current basis for classification of national security information is found in Executive Order 13526. In accordance with section 1.3(a)(2) of the Executive Order, the President designated the Director of the CIA as an official who may classify information up to the TOP SECRET level. *See* 70 Fed. Reg. 21, 609 (Apr. 21, 2005). Part I of the Executive Order authorizes an Original Classification Authority to classify information owned, produced, or controlled by the United States government if it could reasonably be expected to cause damage to the national security and pertains to one or more specific categories, to include intelligence activities, intelligence sources and methods, foreign government information and foreign activities of the United States. Section 1.2 of the Executive Order permits information to be classified at one of three classification levels depending upon the reasonable likelihood of damage to the national security from unauthorized' disclosure: CONFIDENTIAL for damage; SECRET for serious damage; and TOP SECRET for exceptionally grave damage.

CIA'S FORMER DETENTION & INTERROGATION PROGRAM

5. On 17 September 2001, President George W. Bush signed a Memorandum of Notification authorizing the CIA to undertake operations designed to capture and detain persons who posed a continuing, serious threat of violence or death to U.S. persons and interests or who were planning terrorist activities. Pursuant to that Presidential grant of authority, the CIA developed what

is now referred to as the CIA's former detention and interrogation program ("the program"). The focus of the program was to collect intelligence from High Value Detainees ("HVDs"), i.e., senior al-Qaida members and other terrorists thought to have knowledge of active terrorist plots to murder American citizens.

6. Through the exercise of my official duties, I have become familiar with this civil litigation brought by two former CIA detainees and the personal representative of a deceased former CIA detainee. I understand that the two defendants in this matter, Dr. James Mitchell and Dr. Bruce Jessen, were contractors employed by the CIA to assist the CIA in interrogating CIA detainees. I further understand that this lawsuit is based on the interrogation-related work that Doctors Mitchell and Jessen performed for the CIA.

PRIVILEGED INFORMATION

7. State Secrets Privilege: I am submitting this declaration to formally assert the state secrets privilege in my capacity as head of the CIA after careful and personal consideration of the matter. I hereby assert the privilege to protect against the unauthorized disclosure of specific categories of classified national security information, further described below, that have been implicated in discovery in this case. I do not assert the state secrets privilege lightly, nor do I assert the privilege to conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment to a person, organization, or agency, or to prevent or delay the release of information that does not require protection in the interest of the national security. Rather, I assert this privilege 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.

8. Statutory Privileges: In addition to asserting the state secrets privilege, I am also asserting statutory privileges under the National Security Act of 1947 ("The National Security Act") and the Central Intelligence Agency Act of 1949 ("the CIA Act"). Section 102A(i)(1) of the National Security Act provides that the DNI "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). Pursuant to this section of the National Security Act, and consistent with Section 1.6(d) of Executive Order 12333 and guidance from the DNI, the CIA is required to protect intelligence sources and methods from unauthorized disclosure. In addition, Section 6 of the CIA Act provides that the CIA shall be exempted from the provisions of any other law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA. 50 U.S.C. § 3507.

9. I am asserting the state secrets and statutory privileges to prevent the unauthorized disclosure of information that would reveal, or tend to reveal, sensitive national security information related to CIA employees, intelligence sources and methods and intelligence activities, as described in the categories below. The disclosure of this information reasonably could be expected to cause serious, and in many instances, exceptionally grave damage to the national security.

10. Over time, certain information about the program has been officially declassified and publicly released, such as in the Executive Summary to the Senate Select Committee on Intelligence's report that has been

declassified in part, redacted, and publicly released. For example, the enhanced interrogation techniques employed with respect to specific detainees in the program, and their conditions of confinement, are no longer classified. Nonetheless, many details surrounding the program remain highly classified due to the damage to national security that reasonably could be expected to result from disclosure of that information. For this reason, the CIA has withheld or objected to the disclosure of certain information implicated in discovery in this case.

11. Below are categories of information[1] that have been implicated by discovery in this matter, whether by document production or deposition, and over which I am asserting the state secrets and statutory privileges in this case:

- Information that could identify individuals involved in the 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;

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[1] The Agency has, after careful deliberation, declassified and officially acknowledged certain discrete facts within these categories, such as specific facts concerning the defendants' role in the program. My privilege assertion does not cover declassified information that is now officially acknowledged.

- 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 and administration.

12. In preparation for my assertion of the state secrets and statutory privileges over the above categories of information, all of the disputed documents (172 total documents) containing privileged information were made available to me for review in unredacted form. I have personally reviewed a representative sample of these documents that contain information in each of the above categories. In addition, I have reviewed the appendix attached to my declaration—which was prepared by individuals assisting in this case who I understand have reviewed the unredacted versions of every document produced in this case—that explains with additional specificity the information withheld or redacted from the documents that remain in dispute. I have also discussed the details of the documents and information sought in this case with knowledgeable members of my staff and attorneys with the CIA Office of General Counsel, to ensure that the bases for the privilege assertions set forth in this declaration are appropriate.

INFORMATION THAT COULD IDENTIFY INDIVIDUALS INVOLVED IN THE PROGRAM

13. As discussed further below, the TOP SECRET information implicated in discovery in this case is generally for program-related information, and is based primarily on the need for the CIA to keep its commitment or duty of confidentiality to its officers, agents, assets, and foreign liaison officers who assisted the CIA in program-related activities. Simply put, a clandestine intelligence service needs to maintain secrecy for much of what it does. If the Agency breaks its promises of confidentiality, the people and organizations we rely upon to accomplish our mission will be less likely to trust us, and less inclined to work with us when we need their assistance in the future. This is particularly true in the counterterrorism arena, which has higher risk operations and necessitates closer cooperation with foreign partners to protect against the loss of innocent lives from terrorist attacks world-wide.

14. Doctors Mitchell and Jessen have sought to discover the names and identifying information of individuals involved, or associated through their job duties with, the program, including current and former Agency officers who have never been officially acknowledged by the CIA as having had any role in, or association with, the program. These discovery efforts include seeking depositions of three individuals that defendants allege were involved in the program (James Cotsana, Gina Haspel, and John/Jane Doe) and document discovery that would identify individuals involved in the program.

15. The CIA does not ordinarily disclose the identity and Agency affiliation of its employees, regardless of whether or not they are under cover. Such employees

may have in the past served in sensitive positions or operations, may be doing so now, or may do so in the future. Accordingly, the CIA undertakes substantial efforts to protect its officers from exposure that could compromise their safety and the CIA's intelligence gathering mission.

16. With only a few exceptions, identifying information of individuals who worked in the program remains classified at the TOP SECRET level. Identifying information of individuals who did not work in the program, but were indirectly associated with the program through their job duties (*e.g.,* Inspector General investigators) remains classified SECRET. This is true regardless of an individual's status: employee, contractor, or agent; overt or covert; current or former/retired. The fact of whether or not any individual worked in, or was associated with, the program, if not previously officially acknowledged by the CIA, remains classified and is covered by my privilege assertion. In the few instances where the CIA has officially acknowledged that a specific CIA staff officer was involved in the program, it has exclusively been at the officer's request (although their request is not the deciding factor) and always after careful consideration and deliberation within the Executive Branch. To reveal the names of those individuals who worked in the program, or to officially acknowledge public speculation about which officers worked in the program, would confirm for the world which persons were, and in some cases still are, engaged in highly sensitive intelligence activities. Such official acknowledgment would likely jeopardize the safety of these officers and their families, and human intelligence sources who have met with these officers.

Indeed, there have been death threats and security incidents involving officers who have been alleged to have worked in the program. We owe it to our officers to protect their identities to keep them and their families safe.

17. In addition to the safety risks associated with officially acknowledging the identities of officers who worked in, or were associated with, the program, the Agency also has a particularly heightened duty to protect the identities of those dedicated civil servants who, at great personal sacrifice and risk, accepted difficult and dangerous job assignments in the aftermath of the terrorist attacks of September 11, 2001. Their country owes it to them to, at a minimum, continue to protect their identities and, if their names somehow surface in the public domain in a manner that links them to the program and where there has been no declassification and official acknowledgement, refuse to confirm or deny the accuracy of the allegation. If the CIA as an institution cannot honor this duty to its officers, future officers may be less willing to accept dangerous job assignments when their country needs them the most. Accordingly, the CIA cannot reveal the names of individuals that are redacted from the documents produced in this case, nor produce for deposition the officers alleged to have participated in the program.

18. I am aware that there has been public speculation about whether two of the named individuals sought to be deposed in this case (James Cotsana and Gina Haspel) were involved in the program. The CIA, however, has never officially acknowledged whether either individual was involved in the program. The concept of official acknowledgement is important to the protection

of the CIA's intelligence mission and its personnel. Public speculation about the identities of persons who worked in the program—whether through media reporting, books written by former CIA officers, reports from non-governmental organizations, or unauthorized disclosures by government employees—does not equate to declassification and official acknowledgement by the CIA. When unofficial disclosures occur, the CIA typically cannot officially acknowledge that classified information was disclosed, as the absence of official confirmation from the CIA leaves an important element of doubt about the veracity of the information and, thus, carries with it an additional layer of protection and confidentiality. That protection would be lost, however, if the government was forced to confirm or deny the accuracy of speculation or unofficial disclosures.

19. To protect the classified fact of whether or not the potential deponents had any role in the program, the Agency could not permit these individuals to answer any questions pertaining to the program. This is why my privilege assertion covers the depositions of current and former Agency officers who have never been officially acknowledged as having any affiliation with the program.

20. Although the CIA may have officially acknowledged that a specific person was a CIA officer, or even that an officer worked in the counterterrorism arena, that does not mean that the Agency has also acknowledged that the officer worked in any particular program, nor does it mean that the Agency has officially acknowledged details of that officer's work. For example, if the Agency declassified and officially acknowledged that a retired former officer worked in the counterterrorism

arena, that declassification and official acknowledgement would not extend to a declassification of any specific aspect of the officer's clandestine work, to include whether or not the officer worked in the program. Counterterrorism is a broad category, and the program was but one highly-compartmented aspect of the Agency's world-wide counterterrorism operations.

21. The protection of CIA officers is among the highest priorities I have as Director. As explained above, releasing the names of CIA officers who were part of the program, or officially acknowledging the veracity of information in the public domain about whether specific CIA officers were involved in the program, would likely lead to the harms I have discussed above. To consistently protect the classified fact of whether or not a specific person worked in, or was affiliated with, the program, the Agency must refuse to confirm or deny any and all allegations or public speculation that a specific individual had a role in the program. For all these reasons, information pertaining to the identities of officers who worked in the program or became affiliated with the program remains classified at the TOP SECRET or SECRET level and is covered by my state secrets privilege assertion.

22. In addition, information concerning the identity of individuals involved in the program is also protected from disclosure under the CIA Act of 1949, which protects from disclosure not only the names of personnel employed by the Agency but also information pertaining to their functions.

INFORMATION REGARDING FOREIGN GOVERNMENT COOPERATION WITH THE CIA

23. It is equally important for the Agency to protect from disclosure information concerning the foreign countries and foreign intelligence services that clandestinely assisted the CIA with any aspect of the program. To protect this category of TOP SECRET information from disclosure, the CIA must also protect related details, such as information pertaining to the travel of individuals who worked at the overseas facilities, and the names of foreign individuals who assisted with the facilities or with the program more broadly. As with the identities of personnel, there has been much speculation in the media about which countries and services assisted the CIA, but the CIA, as it must, has steadfastly refused to confirm or deny the accuracy of such speculation. Disclosing classified information pertaining to countries and foreign services that assisted the CIA would, among other things, increase the risk that terrorists or other bad actors would target those countries with acts of extreme violence.

24. In addition to this very tangible terrorist threat, disclosing information pertaining to foreign countries and services that provided assistance to the CIA would, as discussed above, make those countries, and any country, less likely to assist the CIA with current and future high-risk counterterrorism operations. For example, disclosing the existence of a foreign intelligence relationship or the extent to which a foreign government is cooperating with and sharing intelligence with CIA could embarrass the foreign government or aggravate internal political dissent in that country. This could have

serious negative consequences for the foreign government, negatively impacting its diplomatic relations with the United States and damaging the CIA's liaison relationship. This, in turn, could lead to less intelligence sharing and fewer joint intelligence operations.

25. Every day, across the globe, the CIA is engaged in counterterrorism operations and intelligence collection activities to keep our country and our citizens safe. Foreign liaison services are instrumental in our worldwide efforts to collect intelligence and thwart terrorist attacks. Those services serve as a force multiplier by directing their resources at common goals we share in counterterrorism operations and intelligence gathering. Because foreign intelligence services serve as a direct source of intelligence and act as partners in joint operations, such services are a critical intelligence source, and the CIA's relationship with them is an intelligence method that must be protected. For all these reasons, information pertaining to the identities of foreign countries and foreign intelligence services that assisted the CIA in any aspect of the program remains classified at the TOP SECRET level and is covered by my state secrets privilege assertion. Such information is also protected from disclosure under the National Security Act of 1947 as those relationships constitute both intelligence sources and intelligence methods.

INFORMATION PERTAINING TO THE OPERATION OR LOCATION OF ANY CLANDESTINE CIA STATION, BASE OR DETENTION FACILITY

26. My privilege assertion also applies to the location of covert Agency facilities, to include former CIA detention facilities, CIA stations, and CIA bases, as well as classified information pertaining to the functioning of

these facilities. The fact that the CIA has covert overseas facilities is UNCLASSIFIED. The specific locations, however, are generally classified SECRET, and information pertaining to the locations of specific former detention facilities is TOP SECRET. 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. Acknowledging the location of such covert facilities can endanger the physical safety of covert CIA officers who work at those locations by, among other things, significantly increasing the likelihood that those facilities could be targeted for terrorist attacks.

27. Such official acknowledgments are also reasonably likely to cause complications for host countries, given that official acknowledgement of CIA facilities within their borders could incite a backlash from elements of their citizenry. Public embarrassment for the host country could have negative impact on the CIA's relationship with the host country, to include curtailed intelligence sharing and cooperation that would greatly diminish the CIA's overseas intelligence collection, which in turn would diminish the quality of Agency intelligence assessments for senior U.S. policymakers.

28. In addition to protecting the specific locations of CIA stations, bases, and former detention facilities, my privilege assertion also protects other classified information, including information concerning operational protocols for running clandestine overseas facilities, such as security measures, methods of communication, and operational duties and numbers of assigned personnel. These categories of information are classified SECRET because their unauthorized disclosure is reasonably likely to cause serious damage to national security.

The likely damage includes the harm from informing our adversaries of how we conduct our day-to-day intelligence business at clandestine overseas facilities, thereby enabling our adversaries to identify our clandestine facilities, officers, and operations, and to diminish their effectiveness by implementing countermeasures.

29. All of these categories of information related to the operation and location of overseas clandestine CIA facilities are also statutorily protected from disclosure under the National Security Act of 1947 as intelligence sources and methods, and to the extent that they pertain to CIA employees and their functions, also protected from disclosure under the CIA Act of 1949.

INFORMATION REGARDING THE CAPTURE AND/OR TRANSFER OF DETAINEES

30. My state secrets assertion also covers classified information regarding the capture and/or transfer of detainees in the program, other than information about their conditions of confinement or treatment. Details concerning how the CIA came to have detainees in its custody, and how it went about covertly moving detainees already in CIA custody also remains sensitive and classified SECRET or TOP SECRET. Among other things, such clandestine operations were often undertaken with the assistance of foreign partners with an understanding that those intelligence operations would remain secret. Even if conducted unilaterally, disclosing that the CIA operated within or through a foreign country without coordinating such moves in advance could upset foreign countries and needlessly result in curtailed intelligence relationships that we rely upon, par-

ticularly in the realm of counterterrorism. The operational protocols associated with capture and transfer missions also remain particularly sensitive and classified as this information would disclose aspects of the CIA's means of transportation, security measures, and targeting. The likely damage to national security from disclosure of this information includes providing foreign adversaries with valuable insights into the CIA's clandestine operations and protocols for foreign intelligence activities, thereby enabling those adversaries to thwart the effectiveness of our efforts by implementing specific countermeasures.

31. In addition to being classified, the sensitive program-related information concerning capture and/or transfer is also protected from disclosure by the National Security Act of 1947 as protected intelligence sources and methods, and to the extent such information pertains to CIA employees and their functions, is also protected from disclosure under the CIA Act of 1949.

INTELLIGENCE ABOUT DETAINEES AND TERRORIST ORGANIZATIONS, TO INCLUDE INTELLIGENCE OBTAINED OR DISCUSSED IN DEBRIEFING OR INTERROGATION SESSIONS

32. My state secrets privilege assertion also covers SECRET and TOP SECRET intelligence collected by the CIA about detainees and terrorist organizations, to include information regarding debriefing or interrogation sessions of detainees in the program. Details of debriefings and interrogations show the specifics of what intelligence the CIA was trying to collect from detainees, the CIA's analysis of available intelligence about the detainees and their terrorist organizations, and, be-

cause of the nature of questioning, also often reveals intelligence that the CIA had already collected. Information about debriefing or interrogation sessions includes strategies and actions that CIA personnel undertook (or planned to undertake) in response to information learned during debriefing or interrogation sessions. Such information remains sensitive and classified as it can help terrorist organizations piece together what we knew about them and when we knew it, which, in turn, would reveal our intelligence sources and methods. Even small details provide helpful information to our adversaries, enabling them to form a fuller picture of the CIA's sources, capabilities, and *modus operandi* that can be used to counter and diminish our intelligence collection efforts.

33. Additionally, even outside of the interrogation or debriefing context, the CIA collected a significant amount of intelligence about suspected terrorists and their organizations that is referred to and discussed in CIA documents implicated in discovery in this case. Revealing the content and sources of the CIA's intelligence collections on these individuals and organizations 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. Disclosure of that information would likely assist our adversaries in their efforts to counter CIA's intelligence collection, and in turn, diminish the quality of Agency intelligence assessments for senior U.S. policymakers, undermining our national security.

34. Intelligence collected about detainees and terrorist organizations, including the substance of debriefings or interrogation sessions, is also protected from

disclosure by the National Security Act of 1947 as disclosure of this information would reveal intelligence sources and methods, and to the extent such information pertains to CIA employees and their functions, is also protected from disclosure under the CIA Act of 1949.

INFORMATION CONCERNING CIA INTELLIGENCE SOURCES AND METHODS AS WELL AS SPECIFIC INTELLIGENCE OPERATIONS

35. Information withheld concerning CIA intelligence sources and methods as well as details of specific intelligence operations, is classified at least at the SECRET level and is also covered by my assertion of the state secrets privilege. To the extent such information reveals still classified program-related information, it is classified TOP SECRET.

36. To obtain intelligence, the CIA relies on a variety of types of intelligence sources, including human sources. Human sources can be expected to furnish information and provide assistance only when confident that they are protected from exposure by the absolute secrecy surrounding their relationship with CIA. In many cases, the very nature of the information or activity at issue necessarily tends to reveal the sources because of the limited number of individuals who have had access to that information or activity. The sensitive information in this category includes intelligence pertaining to specific terrorists that was obtained from multiple human sources. If any such identifying information is disclosed, the source may be vulnerable to discovery and harm, including harassment, retaliation, imprisonment, or death. Additionally, release of source-revealing information could seriously weaken the CIA's ability to recruit potential sources, who would understandably be

reluctant to cooperate with an intelligence service who may not be willing or able to protect their identity.

37. The CIA must also guard against the disclosure of the clandestine methods it uses to collect and analyze intelligence. Intelligence methods are the techniques and means by which an intelligence agency accomplishes its mission, to include how we train our officers to accomplish our mission and the classified internal regulations, approvals, and authorities that govern our conduct. This category of sensitive information must be protected from disclosure to prevent our adversaries from gaining valuable insight into the CIA's *modus operandi* and subsequently developing effective countermeasures to defeat or diminish our ability to gather intelligence.

38. Although it is widely acknowledged that the Agency undertakes clandestine operations in support of its mission, the CIA generally cannot confirm or deny the existence of specific intelligence operations. Although the existence of the former detention and interrogation program has been declassified and officially acknowledged, numerous other counterterrorism activities and operations remain classified, and disclosing details about these activities and operations could reasonably be expected to cause serious harm to national security. Sensitive information concerning clandestine CIA operations includes, in some instances, the specific dates and locations of operational activities. For example, providing the specific dates that CIA officers arrived in specific locations; engaged in certain actions; or captured or interrogated detainees could permit our adversaries to discover CIA overseas installations, the identities of covert CIA officers, and the identities of human sources.

The result would be increased physical danger to our officers, human sources, and facilities and diminished effectiveness of our intelligence operations. As discussed above, when our intelligence collection efforts are diminished, so too is our ability to provide U.S. policymakers with intelligence assessments to assist their decision making.

39. In addition to being subject to my state secrets privilege assertion, information pertaining to intelligence sources, methods, and activities is also protected from disclosure under the National Security Act of 1947, and to the extent that such information pertains to CIA employees and their functions, is also protected from disclosure under the CIA Act of 1949.

INFORMATION CONCERNING THE CIA'S INTERNAL STRUCTURE AND ADMINISTRATION

40. Lastly, my state secrets privilege assertion also covers other basic categories of sensitive and privileged information that pertain to the CIA's day-to-day operations. This includes information, classified at the SECRET level, about the CIA's internal structure and administration, such as human, financial, communication, and technological resources; specific code words, cryptonyms, and pseudonyms (an intelligence method used to obfuscate operations, sources, and true names of Agency officers); and classification and dissemination control markings, which are a form of intelligence method used to protect against unauthorized disclosures.

41. While not as sensitive as the other categories of information described above, this category of information remains classified because it covers a spectrum of granular details about the CIA's overseas clandestine

intelligence activities. Sensitive information in this category includes specific details of how CIA Headquarters communicates with CIA covert overseas facilities; how the CIA files, stores, and retrieves information; how various components within the CIA coordinate and interact with each other; and how the CIA compartments intelligence to protect against unauthorized disclosure. If such sensitive information were to be disclosed, our adversaries would gain knowledge about our clandestine activities that they would almost certainly use to harm our national security by reducing the effectiveness of our intelligence collections, and thereby depriving U.S. policymakers of more complete intelligence assessments to inform their decisions. Accordingly, the CIA must withhold a broad spectrum of information about how the CIA performs its mission, to include how operations are staffed, approved, and directed; how officers are trained; and how resources are allocated. The unauthorized disclosure of such information 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 human sources.

42. In addition to my state secrets assertion, information within this category is also protected from disclosure, to the extent it pertains to intelligence sources and methods, by the National Security Act of 1947, and to the extent it pertains to Agency personnel and their functions, by the CIA Act of 1949.

CONCLUSION

43. For the reasons set forth herein, I am asserting the state secrets and related statutory privileges to prevent the disclosure of sensitive national security infor-

mation, described above, that has been implicated in discovery in this case. Should the Court desire additional information concerning any aspect of my claim of privilege prior to entry of any ruling, I respectfully request an opportunity to address the matter further with the Court.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this [2nd] day of [March], 2017.

/s/ MICHAEL POMPEO
MICHAEL POMPEO
Director
Central Intelligence Agency

APPENDIX G

1. 28 U.S.C. 1782 provides:

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony

or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.