UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	MISC NO.:
RELATED CASE: SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	EASTERN DISTRICT OF WASHINGTON NO. 2:15-CV-286

PETITIONERS' MOTION TO COMPEL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45(d)(2)(B)(i)

Petitioners James Elmer Mitchell and John "Bruce" Jessen, by and through their undersigned counsel, hereby move this Court to compel Respondent, the United States of America, to produce information responsive to subpoenas served by Petitioners, pursuant to Federal Rule of Civil Procedure 45(d)(2)(B)(i). In

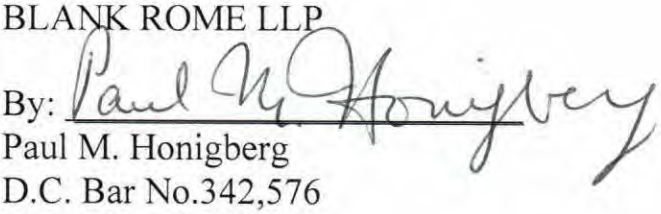
support of this Motion to Compel, Petitioners rely upon and incorporate the attached Memorandum of Law.

Pursuant to Local Rule 7(m), Petitioners' counsel discussed this Motion to Compel via email with counsel for the United States in a good-faith effort to determine whether there is any opposition to the relief sought and to narrow the areas of disagreement. Nevertheless, the United States is opposed to this Motion.

Respectfully submitted,

BLANK ROME LLP

Dated: August 22, 2016

By: 

Paul M. Honigberg
D.C. Bar No.342,576
Henry F. Schuelke III
D.C. Bar No. 91579
Blank Rome LLP
1825 Eye Street NW
Suite 1200
Washington, DC 20006
Honigberg@blankrome.com
hschuelke@blankrome.com

Attorneys for Petitioners Mitchell and Jessen

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondents.	MISC NO.:
RELATED CASE: SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	EASTERN DISTRICT OF WASHINGTON NO. 2:15-CV-286

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION TO COMPEL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 45(d)(2)(B)(i)

Petitioners, who are Defendants James Elmer Mitchell and John "Bruce" Jessen (collectively, "Defendants") in the action of *Salim et. al v. Mitchell et al*, currently pending in the Eastern District of Washington, No. 2:15-CV-286-JLQ, move this Court to compel Respondents, the United States Central Intelligence Agency ("CIA") and the United States Department of Justice ("DOJ") (collectively, "Government"), to produce documents pursuant Federal Rule of Civil Procedure 45(d)(2)(B)(i).

I. INTRODUCTION

Plaintiffs Suleiman Abdulla Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah, on behalf of Gul Rahman, (collectively, "Plaintiffs") have brought suit against Defendants in the United States District Court for the Eastern District of Washington for actions that Defendants purportedly took while contractors for the CIA. Specifically, Plaintiffs allege that Defendants designed, implemented, and participated in the CIA's former detention and interrogation program. According to Plaintiffs, they were subjected to this program when they were detained by the CIA in connection with the United States' War on Terror in the aftermath of the September 11th attacks. Plaintiffs' claim that Defendants' actions violated the law of nations, and thus they can be held personally liable under the Alien Tort Statute, 28 U.S.C. § 1350, for compensatory and punitive damages.

To defend against these claims, in late June, Defendants issued subpoenas, via *Touhy* requests to the CIA and DOJ for documents critical to their defense. But, despite many weeks of meeting and conferring, the Government has not yet produced a single document in response to the subpoenas or even provided a date certain on which it expects to produce responsive documents. Although the Government continues to represent that it is committed to providing Defendants necessary, discoverable information, it has also lodged unfounded objections to the subpoenas and indicated that it intends to withhold plainly discoverable information without properly asserting privileges. Given the deadlines applicable to this action, Defendants unfortunately can no longer wait for the Government to potentially produce relevant documents someday, and are thus compelled to seek relief from the Court as set forth in the proposed order accompanying this Motion.

II. FACTUAL BACKGROUND

A. Pertinent Procedural History

Plaintiffs' commenced this action on October 13, 2015 before the United States District Court for the Eastern District of Washington. Wash. ECF No. 1, attached hereto as **Exhibit 1**. The action is assigned to the Honorable Justin L. Quackenbush. Defendants filed a motion to dismiss on January 8, 2016. Wash. ECF No. 27. On April 8, 2016, the United States of America filed a Statement of Interest to "advise the Court of the United States' interest in the discovery issues presented in this case." Wash. ECF No. 33, attached hereto as **Exhibit 2**. The twenty-page Statement of Interest outlines the complex issues purportedly

confronting the Government given the subject matter of Plaintiffs' claims and the claimed sensitive, or classified, nature of relevant information in the Government's possession or otherwise. *See id.*

On April 22, 2016, the Washington Court heard from the parties with respect to Defendants' motion to dismiss and preliminary discovery issues. Wash. ECF No. 38. Counsel for the Government, Andrew I. Warden, appeared at the hearing and advised that "[T]he government's position would be, if the government believes that the disclosure of the information is contrary to the national security interest, we would have to consider the assertion of the State secrets privilege." Apr. 22, 2016 Hr'g Tr. at 77:6-77:16, attached hereto as **Exhibit 3**. Throughout the hearing, the Washington Court advised that the action would be proceeding into discovery and informed the parties and Mr. Warden that it was expected that the Government would cooperate in discovery. The Washington Court stated, "I want you to know that, if there are government reports out there about what took place in the, 'enhanced interrogation' of those plaintiffs, they're going to be produced under whatever restrictions I need to impose." *Id.* at 75:18-75:22. The Washington Court also made clear that the parties should promptly bring discovery issues to its attention: "[i]f you, whether it be a party or the Department of Justice, that you represent, the United States, want to object, then present the objections and I'll rule upon it." *Id.* at 78:7-78:11. On April 28, 2016, Defendants motion to dismiss was denied and discovery formally commenced. Wash. ECF No. 40.

On May 23, 2016, Plaintiffs, Defendants, and the Government submitted a

stipulation regarding discovery that set out certain parameters for how discovery should proceed. Wash. ECF No. 47, attached hereto as **Exhibit 4**. The stipulation specifically indicates that the Government would be a primary source of discovery and that all requests for discovery from the Government should be submitted to Mr. Warden pursuant to the procedures outlined in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951). *Id.*

B. The Subpoenas at Issue and the Scheduling Conference Before the Washington Court

As early as June 3, 2016, Defendants alerted the Government as to the types of documents they planned to seek in discovery. Decl. of Brian S. Paszamant in Support of Motion to Compel ("Paszamant Decl."), ¶ 3, **Exhibit A**. Then, on June 27 and 28, 2016, pursuant to 5 U.S.C. § 301, Defendants issued subpoenas to the CIA and DOJ, respectively, through the procedures outlined in *Touhy*, 340 U.S. at 468 (collectively, "Subpoenas") (Paszamant Decl. ¶¶ 5-7, **Exhibits B and D**.) The Subpoenas formally request that CIA and/or DOJ produce approximately 30 categories of documents, categories that Defendants had previously identified as areas where discovery was necessary.[1] *See id.* At the time, the Government was asked for an estimate as to when production in response to the Subpoenas would commence, but the Government was unable to provide an estimate. *Id.* ¶¶ 6-8, **Exhibits C and E**.

[1] Pursuant to Federal Rule of Civil Procedure 45(c), the Subpoenas listed the place of production in Washington, D.C. Paszamant Decl. **Exhibits B and D.**

On July 8, 2016, the Washington Court held a telephonic scheduling conference. Wash. ECF No. 58. During the conference, the Court set a discovery deadline of February 17, 2017, with interim deadlines starting November 21, 2016 for Plaintiffs to submit a list of expert witnesses, all expert reports, and a final list of trial witnesses. Wash. ECF No. 59 ¶¶ 4-5, attached hereto as **Exhibit 5**. The Washington Court specifically asked Mr. Warden if the Government had any issues with the dates proposed to be set, and the Government said, "[t]he dates you've set, your Honor, are acceptable to the Government." July 8, 2016 Hr'g Tr. 16:17-16:20, attached hereto as **Exhibit 6**. The Court then reiterated that any discovery issues should be promptly brought to its attention because it is "not going to delay this case at the instance of the Government." *Id.* at 22:17-22:18. Defendants also specifically asked if the Court would potentially order the Government to respond to *Touhy* requests within a certain timeframe and the Court responded:

> Well, the case is assigned to me. I'll decide the issues . . . as they arise. And, if there's an issue, get it timely noted in a motion or other filing; and I'll give the Government a reasonable period of time. I'm not going to let the Government delay this case, and I'm not going to let defendants delay this case because they say, well, there's classified information that . . . issue[] need[s] to be resolved.

Id. at 23:13-23:20.

Immediately following the telephone conference, the Government indicated to Defendants that it was developing a plan to respond to the Subpoenas, but provided no further details concerning such plan. Paszamant Decl. ¶ 12, **Exhibit**

G. In the weeks that followed, Defendants' counsel and the Government's counsel engaged in various meet and confer efforts, including telephone calls, an in-person meeting, and the exchange of written correspondence, both emails and letters. *Id.* ¶¶ 13-25, **Exhibits H-O**. All these communications followed the same pattern: the Government claiming that it wants to provide Defendants with information, but is unsure how it can provide such information or when. *See id.*

The Government has repeatedly claimed that the Subpoenas place a significant burden on it, a burden apparently attributable to the need to review requested documents containing information that may be considered "classified". *Id.* ¶¶ 4, 9, 13-14, 16, 21, **Exhibits A, F, H-J, M-N**. And, in many of the communications the Government indicated that it hoped, in the near future, to provide an estimate as to when production of documents would commence. *Id.* ¶¶ 14, 16, 21, 24, **Exhibits H-J, M-N**. But, to date, Defendants have not received any documents responsive to the Subpoenas nor an estimated production date.

In the midst of the aforementioned meet and confer efforts, the Government also asserted formal objections to the Subpoenas. *Id.* ¶ 16, **Exhibits I and J**. Specifically, the Government objected to the Subpoenas under Executive Orders 12333, 13470, 12958, the National Security Act, the CIA Act, the Intelligence Identities Protection Act, the Privacy Act, the Trade Secrets Act, the Deliberative Process Privilege, the Confidential Informant Privilege, the Law Enforcement Privilege, the Attorney Client and Attorney Work Product Privilege, and the State Secret Privilege. *Id.* Additionally, the Government claimed the Subpoenas were

overbroad, vague, duplicative, and unduly burdensome. *Id.*

Defendants responded to the Government's objections by explaining why many of the objections advanced were not applicable in the context of this action—or were not objections at all—and that under the Federal Rules of Civil Procedure the privileges advanced needed to be formally invoked to shield documents from production—and that they had not been. *Id.* ¶¶ 17-20, **Exhibits K and L**. And, in an effort to reduce the burden claimed by the Government and thereby amicably resolve the situation, Defendants: (1) agreed to significantly narrow many of the Subpoenas' requests; and (2) provided the Government with a proffer as to why the documents encompassed by each of the now-narrowed requests is relevant to the claims and defenses at issue in this action and thus discoverable. *Id.*

The Government thereafter advised that it would stand on its objections, and reiterated its belief that the scope of discovery sought by Defendants is "incompatible with the discovery timeframe established by the Court." *Id.* ¶ 22, **Exhibits M and N**. The Government also urged Defendants to adopt "alternative and creative options" that would enable the CIA to "meaningfully respond" to Defendants' discovery needs. *Id.* Most recently, the Government asked Defendants to forego document production in lieu of an affidavit from an anonymous Rule 30(b)(6) witness followed by a deposition from that witness based upon answers to submitted written questions. *Id.* ¶¶ 23-25, **Exhibit O**. Defendants have declined the Government's most recent proposal, in part, because of the uncertain evidentiary value of such an affidavit and deposition. *Id.* ¶¶ 26-28,

Exhibits O and P.

Because Defendants and the Government appear to have reached an impasse regarding the production of documents in response to the Subpoenas, Defendants are forced to turn to the Court for assistance.

III. ISSUE PRESENTED

1. Should the Court compel the CIA and DOJ to produce all documents responsive to the Subpoenas issued by Defendants in un-redacted format by the date set forth in the attached proposed order, except documents purportedly subject to the attorney/client privilege and/or constituting work product?

2. Should the Court compel the CIA and DOJ to provide Defendants with a privilege log identifying those documents withheld from production as purportedly subject to the attorney/client privilege and/or constituting work product?

IV. EVIDENCE RELIED UPON

Defendants rely upon the Paszamant Declaration filed in support of this Motion, with its attached exhibits, and the pleadings and filings herein.

V. AUTHORITY AND ARGUMENT

Federal Rule of Civil Procedure 45 permits district courts to issue subpoenas seeking documents and testimony to government agencies that are not parties to an action. Fed. R. Civ. Pro. 45; *see Yousuf v. Samantar*, 451 F.3d 248, 257 (D.C. Cir. 2006). Under the Federal Housekeeping Statute, 5 U.S.C. § 301, however, any party issuing a subpoenas to a federal agency must first comply with the specific agency's regulations concerning the production of documents and testimony

through so-called *Touhy* requests. *In re Boeh*, 25 F.3d 761, 766 (9th Cir. 1994) (citing *United States ex rel. Touhy*, 340 U.S. at 468). Once an agency has made a final decision that it will not comply with the subpoena, the court can review the agency's decision, *see* 5 U.S.C. § 704, and compel compliance, *Exxon Shipping Co.*, 34 F.3d 774, 780 (9th Cir. 1994). "[A] challenge to an agency's refusal to comply with a Rule 45 subpoena should proceed . . . as a Rule 45 motion to compel." *Watts v. S.E.C.*, 482 F.3d 501, 506 (D.C. Cir. 2007). And Rule 45, as amended on December 1, 2013, mandates that any motion to compel be brought in the court of the district where compliance is required.

The Federal Rules of Civil Procedure apply to "discovery requests made against government agencies, whether or not the United States is a party to the underlying action." *Exxon*, 34 F.3d at 780. "Under the balancing test authorized by the rules, courts can ensure that the unique interests of the government are adequately considered" while also protecting the litigant's right to "every man's evidence." *Id.* at 779-80. Here, the Government should be compelled to comply with the non-narrowed requests within the Subpoenas because Defendants' need for the requested evidence outweighs any burden on the Government and because the Government can assert common-law privileges, if applicable, to prevent disclosure of protected information.

A. The Subpoenas Are Not Unduly Burdensome

In assessing the burden of a discovery request on the Government, the D.C. Circuit instructs that the factors identified in Federal Rule of Civil Procedure 26—

such as the relevance, importance, access, resources, expense, and benefit—should be considered. *Watts*, 482 F.3d at 506; *see also Exxon*, 34 F.3d at 780. A subpoena is unduly burdensome where it seeks to compel production of documents regarding topics unrelated to or beyond the scope of litigation. *See Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 813–14 (9th Cir. 2003).

In this case, Defendants have sought to limit the burden the Subpoenas may place on the Government. Defendants have submitted requests limited in scope and time seeking documents directly relevant to the claims and defenses at issue in this action. Indeed, Defendants have repeatedly advised the Government of the specific relevance of the documents sought by each request, and have explained how some of the documents sought could be case or claim dispositive. Paszamant Decl. ¶ 17-20, 25-26, **Exhibits K, L, O**. Perhaps of equal importance, Defendants cannot obtain the evidence sought from any other source because it all remains within the Government's custody and the Government has even thus far prohibited Defendants from using certain relevant information that they may possess because of the Government's position that it is classified. Thus, any burden on the Government is greatly outweighed by Defendants' need for the requested documents, as Defendants will be unable to fully and fairly defend themselves absent such information.

Moreover, if the Government wishes to have the Subpoenas quashed, it bears the burden of persuasion. *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 766 (D.C. Cir. 1965); *Goodman v. United States*, 369 F.2d 166,

169 (9th Cir. 1966). As such, it must do more than simply state that the Subpoenas are unduly burdensome and continuously delay production, perhaps in the hope that discovery will end before production is required. *See Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404-05 (D.C. Cir. 1984); *Goodman*, 369 F.2d at 169. Here, the Government has claimed that the Subpoenas are burdensome because it will have to conduct numerous searches of "potentially many different record systems" to located documents and then will need to review "this potentially voluminous collection of information." Paszamant Decl. ¶¶ 17-20, **Exhibits K and L.** But, volume alone is not determinative, especially when the documents sought are organized such that they can be systematically searched. *U.S. De"t of the Treasury v. Pension Benefit Guar. Corp.*, 301 F.R.D. 20, 28 (D.D.C. 2014); *see Northrop Corp.*, 751 F.2d at 404. Here, the Government simply has not met its burden to establish the Subpoena is unduly burdensome, and it should be ordered to produce the requested documents.

B. The Government's Remaining Objections Are Unfounded and the Privileges that It Advances Must Be Formally Invoked

The Government has raised many objections to the Subpoenas. Of these, many are entirely meritless.[2] The remaining objections all rest on an assertion of

[2] The following "objections" are not applicable in the context of civil discovery or can be circumvented with an appropriate protective order: Executive Orders 12333, 13470, 12958, the National Security Act, the CIA Act, the Intelligence Identities Protection Act, the Privacy Act, and the Trade Secrets Act. Defendants' counsel explained this to the Government's counsel during meet and

various privileges, many of which Defendants can overcome by a showing of need. *See Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003) (deliberative process privilege not absolute); *Perez v. Blue Mountain Farms*, No. 2:13-CV-5081-RMP, 2015 WL 11112414, at *2 (E.D. Wash. Aug. 10, 2015) (confidential informant and law enforcement privilege not absolute). Still, the Government has not yet established that any of the privileges advanced actually apply to the information sought by Defendants. And, under Rule 45, the Government cannot withhold subpoenaed information under the claim of privilege unless it "expressly makes[s] the claim" and "describe[s] the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim." Fed. R. Civ. P. 45(2)(A).

Rule 45 applies equally to all privileges, including the state secrets privilege. Indeed, in *Northrop.*, 751 F.2d at 395, the Court specifically rejected the Department of State's attempt to claim documents were protected by the state secrets privilege before they were reviewed and without a formal invocation of that privilege from the head of the agency.[3] In that case, the State Department was not a party, but McDonnell Douglas claimed that the United States' actions caused it to breach the terms of a contract and violate antitrust laws, which were the subjects of

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confer efforts, and asked to be provided with contrary authority if possessed by the Government. Paszamant Decl. ¶ 16, **Exhibits I and J.** No contrary authority has been provided.

[3] To be invoked, the state secrets privilege requires: (1) a formal claim of privilege; (2) lodged by the head of the department which has control over the matters; (3) after actual personal consideration by that officer. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

the suit. *Northrop.*, 751 F.2d at 397. To prove its defense, McDonnell Douglas subpoenaed the State Department seeking documents, some of which it was contended were classified. *Id.* The State Department objected to the subpoena as unduly burdensome because of the significant man hours needed to search for responsive documents and because many of the responsive documents were purportedly classified and subject to the state secrets privilege. *Id.* at 403. The D.C. Circuit held that the district court improperly quashed the subpoena, explaining that the State Department was required to either formally invoke the state secret privilege—and demonstrate the applicability of the privilege—or produce the documents. *Id.* at 403-05. It explained that without first retrieving and examining the documents at issue, it was "premature for State to assert or even insinuate a claim of the state secrets privilege." *Id.* at 404.

The same reasoning applies here. The Government cannot rely on the state secrets or other privileges to shield disclosure without first demonstrating that those privileges are applicable (and invoking them as necessary). *Goodman*, 369 F.2d at 169 (holding the government cannot "allude[] to a claim of privilege which it might invoke" as a reason to quash a subpoena). And, the Government surely cannot determine the applicability of those privileges until it has first gathered and examined the relevant documents, and then invoked the claimed privilege(s).

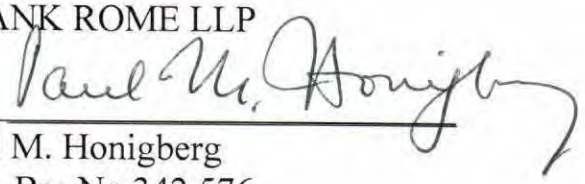
VI. CONCLUSION

For the foregoing reasons, Defendants request that the Court grant their Motion to Compel and enter the attached proposed Order.

Respectfully submitted,

BLANK ROME LLP

Dated: August 22, 2016

By: 

Paul M. Honigberg
D.C. Bar No.342,576
Henry F. Schuelke III
D.C. Bar No. 91579
Blank Rome LLP
1825 Eye Street NW
Suite 1200
Washington, DC 20006
Honigberg@blankrome.com
hschuelke@blankrome.com

Attorneys for Petitioners Mitchell and Jessen

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of August, 2016, I filed the foregoing document with the Clerk of Court and served copies of such filing via first-class mail to the following:

Andrew L. Warden
Andrew.Warden@usdoj.gov
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530

Emily Chiang
echiang@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Ave, Suite 630
Seattle, WA 98164

Steven M. Watt
swatt@aclu.org
Dror Ladin
dladin@aclu.org
Hina Shamsi
hshamsi@aclu.org
Jameel Jaffer
jjaffer@aclu.org
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

Paul Hoffman
hoffpaul@aol.com
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291

By *s/ Ann Querns*
Ann Querns

EXHIBIT "1"

La Rond Baker, WSBA No. 43610
lbaker@aclu-wa.org
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Phone: 206-624-2184

Steven M. Watt (*pro hac vice* pending)
Dror Ladin (*pro hac vice* pending)
Hina Shamsi (*pro hac vice* pending)
Jameel Jaffer (*pro hac vice* pending)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004

Paul Hoffman (*pro hac vice* pending)
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN),

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Defendants.

Civil Action No.
2:15-CV-286-JLQ

COMPLAINT AND DEMAND FOR JURY TRIAL

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Seattle, WA 98164
(206) 624-2184

I. INTRODUCTION

1. Defendants James Elmer Mitchell and John "Bruce" Jessen are psychologists who designed, implemented, and personally administered an experimental torture program for the U.S. Central Intelligence Agency ("CIA").

2. To create a torture program with a scientific veneer, Defendants drew on experiments from the 1960s in which researchers taught dogs "helplessness" by subjecting them to uncontrollable pain. Defendants theorized that if human beings were subjected to systematic abuse, the victims would become helpless and unable to resist an interrogator's demand for information. The CIA adopted Defendants' approach and paid Defendants to devise, supervise, refine, and evaluate the resulting torture program. With Defendants' support, the CIA sought and obtained authorization from U.S. government agencies and officials for use of torture and cruel methods, and, over time, for the program's continuation and expansion.

3. Plaintiffs Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud were kidnapped by the CIA and tortured and experimented upon in accordance with Defendants' protocols. They were subjected to

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solitary confinement; extreme darkness, cold, and noise; repeated beatings; starvation; excruciatingly painful stress positions; prolonged sleep deprivation; confinement in coffin-like boxes; and water torture. Plaintiffs Salim and Ben Soud suffered lasting psychological and physical damage from this torture. Gul Rahman was tortured in many of the same ways, including after Defendant Jessen trained and supervised CIA personnel to apply these methods. Shortly after that training, Mr. Rahman died as a result of hypothermia caused by his exposure to extreme cold, exacerbated by dehydration, lack of food, and his immobility in a stress position. His family has never been officially notified of his death and his body never returned to them.

4. Plaintiffs Salim, Ben Soud, and Mr. Obaid Ullah on behalf of Mr. Rahman's estate bring this action against Defendants for their commission of torture, cruel, inhuman, and degrading treatment; non-consensual human experimentation; and war crimes, all of which violate well-established norms of customary international law.

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(206) 624-2184

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1332 (diversity jurisdiction); and 28 U.S.C. § 1350 (Alien Tort Statute).

6. This Court has personal jurisdiction over Defendant John "Bruce" Jessen because he is domiciled in Spokane, Washington.

7. This Court has personal jurisdiction over Defendant James Elmer Mitchell because these causes of action arise from or are connected with his extensive business activities and residence in Washington State.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b)(3).

III. PARTIES

9. Plaintiff Suleiman Abdullah Salim is a Tanzanian citizen. In March 2003, the CIA and Kenyan Security Forces captured Mr. Salim in Somalia, where he was working as a fisherman and trader, and rendered him to Kenya. From there the CIA rendered Mr. Salim to an Agency prison in Afghanistan, referred to in an official U.S. government report as COBALT. Mr. Salim was held at COBALT from March 2003 until May 2003. He was then transferred to a second

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(206) 624-2184

CIA prison in Afghanistan, referred to as the "Salt Pit," where he was held for 14 months. In July 2004, Mr. Salim was transferred from the custody of the CIA to the custody of the U.S. military and held at a prison at Bagram Air Force Base in Afghanistan for four years. He was released from U.S. custody on August 17, 2008 and given a memorandum from the U.S. Department of Defense stating that he "has been determined to pose no threat to the United States Armed Forces or its interests in Afghanistan." The U.S. government has never charged Mr. Salim with any crime. He currently lives in Zanzibar with his wife and their three-year-old daughter.

10. Plaintiff Mohamed Ahmed Ben Soud (formerly Mohamed Shoroeiya, Abd al-Karim) is a Libyan citizen. In April 2003, U.S. and Pakistani forces captured Mr. Ben Soud in Pakistan, where he was living in exile from Muammar Gaddafi's regime. The CIA rendered him to COBALT. Mr. Ben Soud was held at COBALT for a year, until April 2004. He was then transferred to a second CIA prison, where he was held for 16 months, until August 2005. The U.S. government has never charged Mr. Ben Soud with any crime. In August 2005, the CIA rendered Mr. Ben Soud to Libya, where he was imprisoned by

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(206) 624-2184

Gaddafi's regime for over five years. Mr. Ben Soud was released from prison on February 16, 2011, following the overthrow of Gaddafi. Mr. Ben Soud lives in Misrata, Libya, with his wife and their three children.

11. Plaintiff Obaid Ullah is an Afghan citizen and the personal representative of the estate of Gul Rahman. Mr. Rahman was also an Afghan citizen. In 2002, Mr. Rahman and his family were living as refugees in the Shamshato Refugee Camp, Peshawar, Pakistan. On or around November 5, 2002, the CIA captured Mr. Rahman in Islamabad, Pakistan, where he had gone for a medical checkup, and rendered him to COBALT. On November 20, 2002, Mr. Rahman was tortured to death. Mr. Rahman is survived by his wife and four daughters.

12. Defendant James Elmer Mitchell is a U.S. citizen and a psychologist. Defendant Mitchell was the chief psychologist at the U.S. Air Force Survival, Evasion, Resistance and Escape ("SERE") training program, Fairchild Air Force Base, Washington. From 2001 to 2005, Defendant Mitchell worked as an independent contractor for the CIA. From 2005 to 2009, Defendant Mitchell was the Chief Executive Officer of a

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company he co-founded, Mitchell, Jessen & Associates, with corporate headquarters and offices in Spokane, Washington, through which he worked under contract to the CIA.

13. Defendant John "Bruce" Jessen is a U.S. citizen and a psychologist. Defendant Jessen was the chief psychologist for the Department of Defense Joint Personnel Recovery Agency, which oversees all four of the SERE training programs, serving there until 2002. From 2002 to 2005, Defendant Jessen worked as an independent contractor for the CIA. From 2005 to 2009, Defendant Jessen was the President of a company he co-founded, Mitchell, Jessen & Associates, with corporate headquarters and offices in Spokane, Washington, through which he worked under contract to the CIA.

IV. LEGAL FRAMEWORK

14. The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, enacted in 1789, permits non-citizens to bring suit in U.S. courts for violations of the law of nations or a treaty of the United States. Under the ATS, federal courts are authorized to recognize a common law cause of action for violations of clearly defined, widely accepted human rights norms. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The ATS extends

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jurisdiction to federal courts to adjudicate non-citizens' claims for violation of those international law norms when the claims "touch and concern the territory of the United States." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

15. Defendants' conduct described herein constitutes (1) torture and cruel, inhuman, and degrading treatment; (2) non-consensual human experimentation; and (3) war crimes, all of which are violations of "specific, universal, and obligatory" international law norms, as evidenced by numerous binding international treaties, declarations, and other international law instruments. *Sosa*, 542 U.S. at 732. Accordingly, Defendants' conduct is actionable under the ATS.

16. Defendants Mitchell and Jessen are liable because they directly violated these prohibitions while acting under color of law.

17. Defendants Mitchell and Jessen are also liable because they conspired with the CIA in violating these international law norms, or committed those violations as part of a joint criminal enterprise with the Agency, and aided and abetted the CIA in their commission.

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18. This Court has jurisdiction under the ATS to adjudicate Plaintiffs' claims because they touch and concern the territory of the United States. For example:

- Defendants Mitchell and Jessen are U.S. citizens;
- Defendants Mitchell and Jessen are domiciled in the United States;
- Defendants Mitchell and Jessen devised their torture plan in the United States;
- Defendants Mitchell and Jessen supervised their plan's implementation from the United States, including pursuant to contracts they executed with the CIA in the United States;
- Defendants Mitchell and Jessen participated in and oversaw Plaintiffs' torture and cruel, inhuman, and degrading treatment; non-consensual human experimentation; and war crimes while Plaintiffs were held in the custody and control of the CIA in detention facilities operated by the U.S. government.

19. Congress's express intent in enacting the ATS was to give non-citizens access to U.S. courts to hold U.S. citizens accountable for violations of international law norms that "touch and concern" the United States, as Defendants' actions do.

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V. FACTUAL ALLEGATIONS

GENERAL FACTS

20. Defendants' design and implementation of, and personal participation in, the experimental CIA torture program is documented in, *inter alia*, official government reports, Congressional testimony, Defendant Mitchell's own public admissions, and investigative reports by the media and non-governmental organizations. Official and public government reports documenting Defendants' role include the CIA's June 2013 Response to the Senate Select Committee on Intelligence's Study on the Former Detention and Interrogation Program (June 27, 2013) ("CIA June 2013 Response"); CIA Office of Inspector General Special Review of Counterterrorism Detention and Interrogation Activities (Sept. 2001 – Oct. 2003) (May 7, 2004) ("CIA OIG Report"); the Senate Committee on Armed Services Inquiry into the Treatment of Detainees in U.S. Custody (Nov. 20, 2008) ("SASC Report"); and the report of the Department of Justice's Office of Professional Responsibility Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central

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Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 2009).

21. Defendants' central role in devising and administering the CIA's torture program is also detailed in the Executive Summary of the Senate Select Committee on Intelligence ("SSCI") *Study of the CIA's Detention and Interrogation Program* ("SSCI Report"), which was publicly released on December 9, 2014. The report also identifies Plaintiffs by name as three of the 39 named victims and survivors of Defendants' "enhanced interrogation techniques." The SSCI Report "is the most comprehensive review ever conducted" of the CIA's detention and interrogation program, and is based on six million pages of material, including "CIA operational cables, reports, memoranda, intelligence products, and numerous interviews conducted of CIA personnel by various entities within the CIA…as well as internal email and other communications." SSCI Report 9.

Defendants Devise a Torture Program for the CIA.

22. Defendants Mitchell and Jessen laid the foundations for the CIA's use of torture in or around December 2001 when, at the request of the Agency, they collaborated in reviewing a document known as the

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"Manchester Manual." The Manual was found by the Manchester (England) Metropolitan Police during a search of an alleged al-Qa'ida member's home. The CIA assessed the Manchester Manual to be an al-Qa'ida document that included strategies to resist interrogation.

23. The CIA requested Defendant Mitchell's review of the Manchester Manual. Defendant Mitchell collaborated with Defendant Jessen to provide the review, even though neither Mitchell nor Jessen "had experience as an interrogator, nor did either have specialized knowledge of al-Qa'ida, a background in terrorism, or any relevant regional, cultural, or linguistic expertise." SSCI Report 21. The Agency thought Defendants had expertise in "non-standard means of interrogation." SSCI Report 32 n. 138 (citing CIA June 2013 Response 49). It conducted no research on the theory and practice of traditional, non-coercive interrogation methods.

24. Defendants Mitchell and Jessen produced a white paper for the CIA entitled *Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective*. In it, Defendants told the CIA that the Manchester Manual was evidence that al-Qa'ida members were trained to resist

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interrogation, elaborated on their purported resistance capabilities, and proposed countermeasures that could be employed to defeat that resistance. SASC Report 7.

25. Defendants proposed a pseudoscientific theory of countering resistance that justified the use of torture and other forms of cruel, inhuman, and degrading treatment. Their theory relied on the work of psychologist Dr. Martin Seligman, who in the 1960s pioneered studies on a concept called "learned helplessness." In his experiments, Dr. Seligman restrained dogs and subjected them to random and repeated electric shocks. Dogs that could not control or influence their suffering in any way "learned" to become helpless, collapsing into a state of passivity. Dr. Seligman found that if a researcher inflicted uncontrollable pain on a dog for a long enough period, the animal abandoned any attempt to escape its confinement or avoid further pain, even if given the opportunity.

26. Defendants hypothesized that they could "counter" any resistance to interrogation on the part of detainees by inducing the same state of "learned helplessness" in humans that Seligman had induced in dogs. They proposed that interrogators induce "learned helplessness" in

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people suspected of withholding information by confining them under physically and psychologically abusive conditions and further abusing them using coercive techniques. Defendants theorized that detainees would become passive, compliant, and unable to resist their interrogators' demands for information.

27. Defendants subsequently devised and proposed coercive methods and conditions of detention that bore a distant resemblance to training techniques they had used as instructors in the SERE training programs. As part of the SERE program, military personnel volunteer for training to resist abusive interrogation in the event of capture by an enemy that does not abide by the Geneva Conventions and other international laws prohibiting torture and other forms of cruel, inhuman, or degrading treatment. Defendants, who had no experience with real-life interrogations, relied on their experience with SERE training at Fairchild Air Force Base to create and justify the torture program.

28. All SERE training programs incorporate strict physical and psychological safeguards to protect students from harm, including "medical and psychological screening for students, interventions by trained psychologists during training, and code words to ensure that

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students can stop the application of a technique at any time should the need arise." SASC Report xxvi. A declassified version of the SERE training manual specifically requires that "[m]aximum effort will be made to ensure that the students do not develop a sense of 'learned helplessness'" during training.

29. Because Defendants' very purpose was to induce "learned helplessness," the abusive methods that they devised and proposed to apply to CIA prisoners incorporated none of the SERE-school controls.

30. Defendants' hypothesis became the basis for the experimental tortures that they and the CIA inflicted on prisoners. In a memorandum dated December 30, 2004, the CIA confirmed to the Department of Justice Office of Legal Counsel ("OLC") that "[t]he goal of interrogation is to create a sense of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner. . . . it is important to demonstrate to the [detainee] that he has no control over basic human needs." Defendants' experimental "learned helplessness" model remained a key feature of the CIA's

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torture program from its inception to its end in 2009. SSCI Report 484–487.

Defendants test, apply, and refine torture.

31. In late March 2002, the CIA and Pakistani government authorities captured Zayn al-Abidin Muhammad Husayn, also known as Abu Zubaydah. The CIA rendered Abu Zubaydah to Thailand. Initially Abu Zubaydah was hospitalized for serious gunshot wounds to his thigh, groin, and stomach sustained during his capture, and from April 15, 2002, he was held at a CIA black-site prison referred to as GREEN in the SSCI Report.

32. Before the CIA conducted any meaningful assessment of Abu Zubaydah's level of cooperation, on April 1, 2002, it contracted with Defendant Mitchell to "provide real-time recommendations to overcome Abu Zubaydah's resistance to interrogation." SSCI Report 26. That same evening, Mitchell, "who had never conducted an actual interrogation, encouraged the CIA to focus on developing 'learned helplessness' in CIA detainees." SSCI Report 463–464.

33. Even as Mitchell and the CIA were considering Abu Zubaydah's torture, FBI agents with interrogation experience and Arabic language

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skills were interviewing him in the hospital using non-coercive, rapport-building interrogation methods. "Abu Zubaydah confirmed his identity to the FBI officers, informed the FBI officers he wanted to cooperate, and provided background information on his activities." SSCI Report 25. FBI agents continued to obtain information from Abu Zubaydah while he was hospitalized. FBI agents assisted in Abu Zubaydah's medical care and remained at his bedside to establish trust and rapport.

34. On the assumption that Abu Zubaydah was withholding information, Mitchell recommended that Abu Zubaydah be "kept in an all-white room that was lit 24 hours a day, that Abu Zubaydah not be provided any amenities, that his sleep be disrupted, that loud noise be constantly fed into his cell, and that only a small number of people interact with him." SSCI Report 26. The CIA ultimately adopted this recommendation. In early April 2002, CIA Headquarters sent Mitchell to GREEN to consult on the psychological aspects of Abu Zubaydah's interrogation.

35. In the first two weeks of April 2002, an interagency conflict developed between the CIA and FBI over whether Abu Zubaydah should be

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tortured. "In a message to FBI Headquarters, an FBI special agent wrote that the CIA psychologists had acquired 'tremendous influence.'" SSCI Report 27. The conflict was resolved when the White House transferred full responsibility for Abu Zubaydah's continued interrogation to the CIA.

36. Once in control of the interrogation, Defendant Mitchell seized the opportunity to test Defendants' theory on Abu Zubaydah. Defendants would go on to document their methods meticulously.

Phase I: "Setting the conditions" for "learned helplessness"

37. While Abu Zubaydah was still hospitalized, Mitchell and the rest of the CIA interrogation team implemented their "new interrogation program." SSCI Report 27.

38. The program began by setting abusive conditions that were specifically intended to "enhance[] the strategic interrogation process" through "psychological disorientation," and to increase Abu Zubaydah's "sense of learned helplessness." SSCI Report 26 n. 94. On April 15, 2002, pursuant to Defendant Mitchell's scripted plan, Abu Zubaydah was sedated and moved from the hospital where he was still recovering from his injuries to a tiny cell in GREEN. He was stripped naked and

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held in solitary confinement. His cell was brightly lit with four halogen lights 24 hours a day. The cell's temperature was kept extremely cold and he was constantly bombarded with either loud rock music or discordant noise. Throughout, he was kept shackled to one of two chairs in his cell, and only unchained long enough to let him use the toilet, which was a bucket in the cell. His diet was restricted to minimal sustenance. He was continuously deprived of sleep; whenever he started to fall asleep, one of his guards sprayed water in his face to wake him. He was continually and repeatedly interrogated while held under these conditions for the next two to three weeks.

39. At the end of April 2002, assessing Abu Zubaydah to still be uncooperative, Defendant Mitchell and the rest of the CIA interrogation team at GREEN provided CIA Headquarters with three strategies for obtaining information from him. CIA Headquarters chose the most coercive option, which had been proposed by Mitchell.

40. In early June 2002, Defendant Mitchell and the other members of the CIA interrogation team at GREEN proposed that Abu Zubaydah be subjected to several weeks of isolation, in part to keep him "off-balance" and so the interrogation team could discuss the "endgame"

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for him with CIA Headquarters. SSCI Report 30. CIA Headquarters agreed and Abu Zubaydah was held in complete isolation without being asked any questions for 47 days, from June 18 to August 4, 2002.

Phase II: "Aggressive phase" of torture and cruel, inhuman, and degrading treatment

41. In July 2002, Defendant Mitchell and the CIA assessed Abu Zubaydah as "uncooperative," and decided that additional coercive measures were required for him to become "compliant" and reveal the information the CIA believed he was withholding. SSCI Report 31. Based in part on a psychological evaluation Defendant Mitchell conducted of Abu Zubaydah, Defendant Mitchell proposed a new "aggressive phase" of Abu Zubaydah's torture during which he would be subjected to a regime of 12 highly coercive methods that Defendants had devised. SSCI Report 42.

42. Also in July 2002, on Defendant Mitchell's recommendation, the CIA contracted with Defendant Jessen to join Defendant Mitchell to assist him in testing and developing the Defendants' theory on Abu Zubaydah.

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43. Working with the CIA, Defendants helped convince Justice Department lawyers to authorize specific coercive methods that Mitchell had initially proposed for use on Abu Zubaydah. These methods included: (1) the attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) waterboard, (10) use of diapers, (11) use of (non-stinging) insects, and (12) mock burial. SSCI Report 31–32. The CIA agreed to propose all but the "mock burial" technique to the Attorney General and OLC.

44. On July 24, 2002, the Attorney General gave his verbal approval to all of the proposed methods except the waterboard. Defendants and the CIA interrogation team stated that they would not proceed until the Attorney General also approved use of the waterboard. Defendants asserted that the waterboard was an "absolutely convincing technique," necessary for use on Abu Zubaydah. SSCI Report 36. On July 26, 2002, the Attorney General approved the use of the waterboard.

45. On August 1, 2002, OLC authorized the use of every method the CIA proposed, except that it did not address the diapering technique. The methods OLC authorized, together with others that were subsequently

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devised, developed and refined by Mitchell and Jessen, were referred to as "enhanced interrogation techniques."

46. On August 4, 2002, Defendants Mitchell and Jessen began what they and the CIA referred to as the "aggressive phase" of Abu Zubaydah's torture. Defendants personally conducted or oversaw this phase, subjecting Abu Zubaydah to a combination of the 10 coercive methods on a near 24-hour basis until August 23, 2004. The abusive "conditions" of Abu Zubaydah's detention—combining prolonged solitary confinement, sensory bombardment by light and sound, use of extreme temperature, nudity, sleep deprivation and dietary restrictions—remained in place for the duration of this phase.

47. At approximately 11:50 a.m. on August 4, security personnel entered Abu Zubaydah's cell, shackled and hooded him, and removed his towel, leaving him naked. Without asking any questions, Mitchell and Jessen then placed a rolled towel around his neck like a collar and slammed him against a concrete wall. They removed his hood and performed an "attention grab" on him, directing his face toward a coffin-like box. SSCI Report 41.

48. Defendants Mitchell and Jessen subjected Abu Zubaydah to "cramped

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confinement" in two boxes that they had designed. Defendants forced Abu Zubaydah inside the larger of the two boxes, which was coffin-sized, for several hours before forcing him inside the second, significantly smaller, box, which measured 2.5 foot square and 21 inches deep. In the smaller box, Zubaydah was made to squat in a fetal position, reopening the stomach wounds he had sustained at the time of his capture. When Abu Zubaydah was inside each box, a heavy cloth was draped over the outside to block any light, increase the temperature inside, and restrict the air supply.

49. Once Abu Zubaydah was removed from the smaller confinement box, Defendants Mitchell and Jessen again subjected him to repeated wall slamming. In between, they shouted questions at him, demanding information on terrorist operations planned against the United States. SSCI Report 41. Each time Abu Zubaydah denied having the information, Defendants beat him severely around his face and torso, using the facial slap, abdominal slap and facial grab techniques. Defendants repeatedly employed this routine for some six and a half hours on the first day of the "aggressive phase."

50. At approximately 6:20 p.m. on the first day, Defendants Mitchell and

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Jessen introduced the "waterboard" into the regimen. Defendants conducted two to four waterboard sessions daily in this same manner. In total they waterboarded Abu Zubaydah 83 times in August 2002 alone.

51. Over approximately three subsequent weeks, Defendants Mitchell and Jessen continued to subject Abu Zubaydah to walling, facial and abdominal slaps, the facial hold, stress positions, cramped confinement in stress positions (in the large and small boxes), prolonged sleep deprivation, and waterboarding repeatedly and in varying combinations on a near 24-hour basis.

52. During this period and as a result of Defendants' methods, Abu Zubaydah, "cried," "begged," "pleaded," "whimpered," became "hysterical" and "distressed to the level that he was unable to effectively communicate." He became "compliant" to the extent that when an interrogator "raised his eyebrow, without instructions," Abu Zubaydah "slowly walked on his own to the water table and sat down." When the interrogator "'snapped his fingers twice,' Abu Zubaydah would lie flat on the waterboard." SSCI Report 42–43.

53. In an email dated August 21, 2002, discussing their waterboarding of

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Abu Zubaydah, Defendants wrote, "As for our buddy; he capitulated the first time. We chose to expose him over and over until we had a high degree of confidence he wouldn't hold back. He said he was ready to talk during the first exposure." SSCI Report 471 n. 2578.

54. Some contemporary CIA observers of Defendants' methods were "disturbed" by what they saw and concerned about consequences. A few days into the "aggressive phase," "[s]everal on the team [were] profoundly affected . . . some to the point of tears and choking up." SSCI Report 44. Others were concerned that Abu Zubaydah would die from Defendants' methods, and videotaped his interrogation in an attempt to protect themselves from legal liability. The CIA later destroyed those tapes.

55. On August 23, 2002, the "aggressive phase" of Abu Zubaydah's torture stopped. Defendants told the CIA it was a "success" because they could "confidently assess that he does not/not possess undisclosed threat information, or intelligence that could prevent a terrorist event." SSCI Report 46. Defendants explained: "Our goal was to reach the stage where we have broken any will or ability of subject to resist or deny providing us information (intelligence) to which he had access."

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Id.

56. Defendants recommended to the CIA that "'the aggressive phase . . . should be used as a template for future interrogation of high value captives.'" SSCI Report 46. Presumably referring to themselves, Defendants recommended that psychologists "'familiar with interrogation, exploitation and resistance to interrogation should shape compliance of high value captives prior to debriefing by substantive experts.'" *Id.*

57. Using their torture of Abu Zubaydah as a model, Defendants developed a phased program to induce "learned helplessness" in CIA captives through the infliction of severe physical and mental pain and suffering. Defendants "largely devised the CIA enhanced interrogation techniques," SSCI 471 n.2578, including by designing instruments of torture such as confinement boxes. They standardized, refined and recalibrated their methods over time.

58. Defendants and the CIA collaborated in applying their coercive methods to varying degrees as they deemed necessary for individual prisoners. In the phased program, Defendants designated coercive conditions and methods as either "standard"/"conditioning" or

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"enhanced"/"aggressive," depending on the perceived degree of physical or psychological coercion applied to prisoners.

59. Defendants' first phase "set the conditions" for inducing a state of "learned helplessness" in CIA captives. Abusive "conditions" in this phase began as soon as persons were captured and rendered by the CIA to its black site prisons. Conditions during rendition included sensory manipulation and humiliation to create "significant apprehension" and "dread." Memorandum from CIA to OLC, Background Paper on CIA's Combined Use of Interrogation Techniques (Dec. 30, 2004). This "conditioning" phase was continued once captives were imprisoned at CIA black sites. Prisoners there were subjected to some or all of: solitary confinement; constant extreme light or darkness; the perpetual loud playing of music or white noise; extreme temperatures; forced nudity or dressing solely in diapers; restrictions on food and water; shackling in painful stress positions; and prolonged sleep deprivation. Some or all of these confinement conditions remained in place for the duration of prisoners' confinement and interrogation, including during any second "aggressive" phase of interrogation and after.

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60. The conditions at COBALT, where all three Plaintiffs were held, conformed to Defendants' first phase. In April 2003, the CIA's chief of interrogations explained that COBALT was "good for interrogations because it is the closest thing he has seen to a dungeon, facilitating the displacement of detainee expectations." SSCI Report 50 n.240. "[D]etainees were kept in total darkness. The guards monitored detainees using headlamps and loud music was played constantly in the facility. While in their cells, detainees were shackled to the wall and given buckets for human waste." SSCI Report 49. A CIA interrogator at COBALT during that time stated that detainees "'literally looked like a dog that had been kenneled.' When the doors to their cells were opened, 'they cowered.'" SSCI Report 50 n.240.

61. If Defendants and the CIA assessed a prisoner as "resistant" after the first phase, they progressed to the second, the "aggressive phase," and used some or all of the coercive methods Defendants had initially tested on Abu Zubaydah. These methods were applied repeatedly, in combination, and in escalating fashion, until Defendants and the CIA assessed a prisoner psychologically broken.

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62. Defendants trained and supervised CIA personnel in applying their phased torture program. For example, in November 2002, Defendant Jessen traveled to COBALT for approximately a week to assess the "resistance" of prisoners to interrogation and determine whether they should be subjected to the "aggressive phase" of the program. While there, he instructed and trained CIA personnel in assessing prisoners' "resistance" and in using coercion on them. Among the CIA personnel Jessen trained and supervised was the officer then in charge of COBALT, referred to in the SSCI Report as "CIA Officer 1."

63. Together with the CIA, Defendants supervised and oversaw the implementation of Defendants' experiment. Because the program's underlying theories had never been tested on actual prisoners before, Defendants and the CIA experimented on individual prisoners to assess whether: (1) they had been tortured long enough to induce a state of "learned helplessness" or additional torture was necessary; (2) certain combinations and sequences of torture techniques were most effective at overcoming "resistance"; and (3) prisoners became fully compliant with their interrogators' demands once they had been reduced to a state of learned helplessness.

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64. Defendants' role in assessing and evaluating their torture experiment gave rise to significant conflicts of interest. In January 2003, CIA personnel expressed concerns over Defendants' financial and ethical conflicts of interest in employing coercive methods, assessing their "effectiveness," and being paid for both. They observed that "the same individuals applied an EIT [Enhanced Interrogation Technique], judged both its effectiveness and detainee resilience, and implicitly proposed continued use of the technique—at a daily compensation" of $1,800 a day, "or four times that of interrogators who could not use the technique." SSCI Report 66. The CIA has since acknowledged that "the Agency erred in permitting [the Defendants] to assess the effectiveness of enhanced techniques. They should not have been considered for such a role given their financial interest in continued contracts from CIA." CIA June 2013 Response 49.

65. On May 31, 2015, Defendant Mitchell confirmed in an email to the law firm Sidley Austin that he and Defendant Jessen were never fully able to assess the effectiveness of their theory and coercive methods. Their contract was terminated, he stated, before they were able "to find

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and pay an independent researcher, not involved with the program," to make a final assessment.

66. Defendants were compensated for and profited from their work with and on behalf of the CIA. From 2001 to 2005, as independent contractors to the CIA, Mitchell and Jessen each received $1,800 per-day, tax free, amounting to $1.5 million and $1.1 million respectively.

67. In 2005, as the number of detainees in CIA custody grew, Defendants formed a company, Mitchell, Jessen & Associates, with corporate headquarters and offices in Spokane, Washington, to meet the CIA's increasing need for their services. Under Defendants' direction and control, Mitchell, Jessen & Associates provided security teams for renditions, interrogators, facilities, training, operational psychologists, de-briefers, and security personnel at all CIA detention sites. By April 2007, 11 out of 13 interrogators (85%) used by the CIA were directly employed by Mitchell, Jessen & Associates. As of July 2007, the company had between 55 and 60 employees.

68. Until the termination of its contract by the CIA in 2010, the Agency paid Mitchell, Jessen & Associates $81 million to implement and assist in rendition and coercive interrogation of CIA prisoners.

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69. Defendants and the CIA continued to use the phased torture program's most "aggressive" techniques until November 8, 2007. Defendants and the CIA subjected at least 119 individuals to either the partial or full phased program.

70. Plaintiffs are among 39 individuals who were experimented on and subjected by Defendants and the CIA to the most coercive methods of torture.

SPECIFIC ALLEGATIONS BY PLAINTIFFS

Suleiman Abdullah Salim

71. Suleiman Abdullah Salim was born in Stone Town, Zanzibar, Tanzania in 1972. Mr. Salim left high school early to fish and trade around the Swahili coast. In 2003, Mr. Salim settled in Mogadishu, Somalia, and in March that year he married a Somali woman, Magida.

72. On or around March 15, 2003, agents from the CIA and the Kenyan National Intelligence Service abducted Mr. Salim in Mogadishu. He was rendered to Nairobi, Kenya, where he was secretly detained and interrogated on a daily basis for some eight days by Kenyan authorities. On or around March 23, 2003, Mr. Salim was transferred to the exclusive custody and control of U.S. officials. Mr. Salim's

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detention in Kenya and subsequent transfer to U.S. custody is confirmed in public statements made at the time by Kenya's then-national security chief, Chris Murungaru.

73. The CIA rendered Mr. Salim to its COBALT black site prison in three stages: from Kenya to a U.S. Air Base in Bossasso, Somalia; from Bossasso to Djibouti; and, on or around March 26, 2003, from Djibouti to COBALT.

74. During Mr. Salim's custody by the CIA, he was experimented upon and subjected to a regimen of torture and cruel, inhuman, and degrading treatment in accordance with the phased torture program that Defendants Mitchell and Jessen designed, supervised, and implemented. Mr. Salim suffered coercion and abuse during his rendition; torture, cruel, inhuman, and degrading treatment during his confinement; and further torture and abuse through the application of at least 8 of the 10 coercive methods Defendants devised for the torture program: prolonged sleep deprivation (seating and standing), walling, stress positions, facial slaps, abdominal slaps, dietary manipulation, facial holds, and cramped confinement (large and small boxes). In addition, Mr. Salim was subjected to prolonged nudity and

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to water dousing that approximated waterboarding. He was also strapped to a waterboard and threatened with waterboarding. Some of these methods were used on Mr. Salim repeatedly and in combination.

Phase I: "Setting the conditions" for "learned helplessness"

75. The CIA began its torture of Mr. Salim during his rendition, subjecting him to severe physical and mental pain and suffering through humiliation, extreme sensory deprivation, and other forms of abusive treatment, in accordance with Defendant Mitchell and Jessen's specifications. CIA personnel first cut Mr. Salim's clothes from his body. Once he was naked, they forcibly inserted an object into his anus, causing him excruciating pain. They photographed him; Mr. Salim could sense the flash of a camera. He was then dressed in a diaper, a pair of trousers, and a short-sleeved shirt. CIA personnel stuffed earplugs in his ears, placed a hood over his head, and over those, placed a pair of goggles and headphones. They cuffed and shackled him. Disorientated and terrified, Mr. Salim was shoved aboard a small aircraft, chained to the floor between two guards, and flown some eight or more hours.

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76. Upon landing, CIA personnel unchained Mr. Salim, forced him off the plane, and threw him into the back of a truck. He was pinned to the floor on his stomach—with someone's knee pressing into the small of his back—and driven a short distance down a bumpy dirt track road. Two large men then removed him from the truck and marched into a nearby building, which was the CIA's COBALT prison.

77. Mr. Salim was detained at COBALT for approximately five weeks. He was shackled, handcuffed, blindfolded, and in headphones when he first entered COBALT. His sense of smell was immediately flooded with an overpowering stench that reminded Mr. Salim of rotting seaweed. After his headphones, hood, and earplugs were removed, he was overwhelmed by ear-splitting noise: loud western pop-music sometimes interrupted by a mixture of cacophonous sounds like yowling and the clanging of bells. Mr. Salim could also make out the sounds of voices speaking in different languages, including English, Kiswahili, and Somali. He heard phrases such as, "*there's no God, no God, no God*." Even once his blindfold was removed, Mr. Salim could not see—the entire building was pitch black, though he sensed it was large and cavernous. Mr. Salim and other CIA prisoners came to call

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COBALT "The Darkness."

78. The putrid smell, crashing noises and loud music, and pitch blackness at COBALT remained constant for the entire five weeks of Mr. Salim's imprisonment. The smell and the noise were at their most intense in Mr. Salim's cell. The only time the noise and music let up—and then only very briefly—was when the tracks changed or when the system malfunctioned. The only light Mr. Salim saw was from the flashlights used by his guards and the dim lights and spotlights used in the rooms where he was interrogated.

79. Upon arrival, guards marched Mr. Salim to a tiny, damp, and frigid concrete cell, which was about eight feet high, seven feet long, and three feet wide. It was pitch black and empty except for a rug on the floor. Mr. Salim had no bed or blanket, despite the cold, and no bathroom or washing facilities. On one of the walls there was a small, rusty metal hoop. The guards chained Mr. Salim's arms and legs to the hoop, with his arms outstretched and at eye level. The only position he could adopt was a squatting position that very quickly became uncomfortable and extremely painful, and kept him from sleeping.

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80. For approximately a week, Mr. Salim was kept in the dark in his frigid cell, continually chained to the wall in an excruciating stress position, deprived of sleep, food, and water, and subjected to deafening noise and a nauseating stench. He was in constant fear.

81. The first sustenance Mr. Salim received was approximately two days after his arrival, when guards gave him a small piece of bread in a watery, tasteless broth and a large bottle of water. The guards briefly unchained him to allow him to eat. This was also the first time that Mr. Salim was permitted to use the metal bucket that the guards placed in his cell as a toilet. Before this, Mr. Salim urinated and defecated in his diaper and the clothes in which he had been rendered from Somalia.

82. For his entire time in COBALT, Mr. Salim was deprived of food and given the same meal—a small chunk of bread in a watery broth—only once every other day. He was given a single bottle of water every day to be used both for drinking and hygiene.

83. The only time Mr. Salim left his cell during the first week or so in COBALT was about two days after his arrival, when two guards took him to meet with a man whom Mr. Salim assumed to be a doctor or

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nurse. Mr. Salim was blindfolded for the duration of the visit and the man never introduced himself. The man conducted a general medical examination, weighing Mr. Salim and palpating various parts of his body. He paid particular attention to Mr. Salim's broken nose and fingers—sustained during his abduction in Mogadishu about two weeks before. After taking an X-ray of Mr. Salim's hand, the man told Mr. Salim that his fingers were broken, put them in a cast, and gave Mr. Salim a painkiller. Mr. Salim was provided with painkillers on a daily basis thereafter. He did not take them, however, and instead secreted them in his clothing or in his cell. Mr. Salim had become so distressed and desperate that he had begun to contemplate suicide. He thought that once he had enough painkillers he could use them to kill himself.

Phase II: "Aggressive phase" of torture and cruel, inhuman, and degrading treatment

84. Two or three days after his medical examination, Mr. Salim's torture increased in severity. To Mr. Salim, it seemed that the man who had examined him had given the go-ahead for more abuse.

85. Before implementation of the "aggressive phase," Mr. Salim had not been questioned. Mr. Salim was one of "[a]t least 6 detainees [who]

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were stripped and shackled nude, placed in the standing position for sleep deprivation, or subjected to other CIA enhanced interrogation techniques prior to being questioned by an interrogator in 2003." SSCI Report 77 n. 409.

86. For the next two or three weeks, Mr. Salim was subjected to greater humiliation, prolonged periods of sleep deprivation, repeated dousing in extremely cold water in a manner that approximated waterboarding, beatings, attention grabs, forceful slaps to the face and body, cramped confinement in two boxes—one coffin-sized and the other significantly smaller—and prolonged nudity. He was also strapped to a waterboard and threatened with waterboarding.

87. On the first day, two guards dressed entirely in black came to Mr. Salim's cell. Working by flashlight, they unchained Mr. Salim from the wall of his cell, cuffed his hands and shackled his legs, marched him to a large, dimly-lit room, and sat him down in a chair. Mr. Salim was surrounded by eight or nine men, all but one of whom wore black hats, masks, and overalls. The unmasked man seemed to be the leader. Mr. Salim later learned he was called "Viram." Viram silently approached Mr. Salim with an electric razor in one hand. He began to

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shave Mr. Salim's head, and after one swipe passed the razor to one of the masked men. Each of the masked men took a turn with the razor, shaving Mr. Salim until he was bald and removing all his facial hair. The entire episode left Mr. Salim deeply humiliated, degraded, and terrified of what would happen next.

88. The two guards who had brought Mr. Salim into the room then forced Mr. Salim to stand, removed his handcuffs and shackles, and ripped the clothes from his body. Once he was naked, they cuffed and shackled Mr. Salim again and laid him down in the center of a large plastic sheet that covered part of the floor. A thin film of ice-cold water covered the surface of the plastic sheet. Using a large jug, two men repeatedly doused Mr. Salim in gallons of ice-cold water. The water was so cold it left Mr. Salim breathless. In between the water dousing, the two men kicked and slapped Mr. Salim on the stomach or face and shouted at him in English. After some 20 or 30 minutes of this water torture, the men pulled up the corners of the freezing cold sheet and rolled Mr. Salim inside. Covered in the plastic sheet, Mr. Salim was left to shiver violently in the cold for some 10 or 15 minutes.

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89. Mr. Salim was then taken into another room where two guards forcibly restrained him and a spotlight was aimed directly in his face. A third unmasked man then shouted at Mr. Salim in English while another man translated into Somali. Mr. Salim had a limited grasp of English but knew Somali fairly well. The interrogator demanded personal background information from Mr. Salim and asked what Mr. Salim had being doing in Somalia and who he knew there. The interrogator listed names of people and asked Mr. Salim if he knew any of them. Mr. Salim answered truthfully that he was a trader doing business in Somalia; that he had recently married a woman from there; and that he only knew one person from the interrogator's list of names, and only because he had bought a boat from that person. The interrogation team changed two times during the "aggressive phase." Throughout Mr. Salim's interrogation and the entire time he spent in U.S. custody, he was asked the same questions and he provided the same truthful responses.

90. After roughly half an hour, Mr. Salim was taken back into the first room. His head was covered in a cloth bag, and he was again placed in the middle of the plastic sheet. His two interrogators repeated the ice-

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cold water dousing, but this time the cloth bag clung to Mr. Salim's face, suffocating him. Mr. Salim felt like he was drowning. His heart felt as if it was beating out of his chest. He was paralyzed with cold. This water dousing session ended like the first: the men rolled Mr. Salim in the plastic sheet so he felt "like a corpse" and left him in the cold for around 15 minutes before he was dragged once again to the second room for interrogation. The water torture sessions followed by interrogation continued in this same manner for hours.

91. After the last water-torture session ended that first day, Mr. Salim's interrogators showed him a small wooden box, measuring about three square feet. There were holes on one side and another was hinged with a lock and padlock. Naked, chained, and shackled, Mr. Salim was stuffed inside the box and it was locked shut. The space was pitch black, and so small that Mr. Salim had to crouch over on his knees. The box smelled rancid. Mr. Salim was locked in the box for what he estimates was half an hour, though it felt much longer.

92. Mr. Salim vomited in pain and fear while he was inside the small cramped confinement box. Interrogators used this technique on him only on the first day, but they threatened to use it on him on a number

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of other occasions during interrogations at COBALT. At one time they stuffed him inside the box for a short period without locking the door. Even the threat of this technique filled Mr. Salim with dread.

93. Immediately after the first cramped confinement session, Mr. Salim was interrogated again.

94. At the end of this first day of "aggressive" torture, Mr. Salim was taken back to his cell by two guards and again put in a painful stress position. The guards chained him, naked, to the metal ring in the wall but now used a slightly longer length on the leg and arm chains, which allowed Mr. Salim to sit on the floor of his cell instead of squatting. It was still extremely painful, however, and coupled with the constant loud music and cold, Mr. Salim was unable to sleep.

95. For the duration of this "aggressive phase," Mr. Salim was kept naked. The only time he was given clothing was during a few of his interrogation sessions. Mr. Salim did not understand why he was given clothing for these sessions, nor why he was stripped afterwards.

96. On the second day of the "aggressive" phase, Mr. Salim was again subjected to repeated and hours-long water torture and interrogation sessions.

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97. After the last water torture session ended on the second day, Mr. Salim was taken to a room in which a wooden wall had been constructed. The lead interrogator placed a foam collar, attached to a leash, around Mr. Salim's neck. Using the leash, the interrogator threw Mr. Salim against the wooden wall. Mr. Salim crashed into the wall, and as he rebounded, the interrogator struck Mr. Salim in the stomach. The interrogator repeated this procedure several times, shouting at Mr. Salim as he propelled Mr. Salim against the wall and beat him.

98. After the walling ended, Mr. Salim was interrogated again. Immediately after the interrogation, he was forced into a tall, thin, coffin-like box. The box was just wide and high enough to accommodate a fully grown adult with arms stretched over their head. Once crammed inside, Mr. Salim's hands were chained above his head to a thin metal rod that ran the width of the box. The door of the box was then closed and Mr. Salim was left in darkness, with music blasting at him in the box from all angles.

99. After two or three hours in the tall box, Mr. Salim was removed and taken to an interrogation room. Interrogators then shone a spotlight in his face and bombarded him with the same questions they had asked

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the day before. Once this interrogation session ended, guards took Mr. Salim back to his cell and chained him by his legs and arms to the iron ring in the wall. He was left overnight in pain, naked, cold, and unable to sleep.

100. Mr. Salim was subjected to water torture and interrogation sessions for two more days. On the third day, after one of the water torture sessions ended and before the interrogation session began, one interrogator attached a chain with a large ball at the end around Mr. Salim's waist and made him drag it around the perimeter of the room—naked with a hood over his head—for thirty minutes, until he collapsed with exhaustion, weakened by hunger and the water torture.

101. On the fourth and final day of Mr. Salim's water torture, at the end of one of the sessions, interrogators strapped his hands and feet to a pivoted, wooden board—a water board—and threatened to waterboard him, but instead spun him around 360 degrees several times.

102. Around the beginning of the third week of Mr. Salim's detention at COBALT, sometime after the water torture sessions had ended, Mr. Salim was subjected to prolonged standing sleep deprivation in a new painful stress position. Two guards took Mr. Salim from his cell to a

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small, pitch-black room. Working by flashlight, the guards chained Mr. Salim's arms above his head to a metal rod that ran the width of the small room and positioned him so that the balls of his feet barely touched the floor. Mr. Salim was left hanging, naked, in the darkness, barraged with ear-splitting music. During this entire period, Mr. Salim was given no food and only sips of water. He remained suspended from the ceiling without interruption, including when he relieved himself. The only time he was taken down was for interrogation. On occasion, he started to drift into sleep but immediately jolted awake from the excruciating pain that shot through his arms and shoulders as they momentarily supported his full body weight. Mr. Salim was subjected to this form of standing sleep deprivation for what seemed to him four or five days.

103. As a result of the prolonged standing sleep deprivation, Mr. Salim's back and shoulders ached and his arms felt as if they had become dislocated. Both Mr. Salim's legs were swollen and there was a sickening smell from beneath the plaster cast on his hand. A large cut had also opened on the same hand. Once the technique stopped and Mr. Salim was taken back to his cell, a male doctor or nurse came to

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treat Mr. Salim, doing nothing for his swollen legs but removing the cast from his fingers and attempting to straighten them. He also bathed Mr. Salim's wound and re-bandaged his fingers.

104. Two or three weeks after the "aggressive phase" had begun, Mr. Salim's interrogators assessed him "broken" and "cooperative" and stopped it.

105. During the fourth or fifth week of Mr. Salim's detention at COBALT, a man Mr. Salim had never seen before administered what Mr. Salim believes was a polygraph test. He started by asking Mr. Salim a series of questions that Mr. Salim thought bizarre—Are the lights on or off? What time of day is it?—as well as the same questions previous interrogators had shouted at him. Mr. Salim answered in his limited English, providing the same truthful answers as before.

106. Sometime after this polygraph test, guards took Mr. Salim from his cell, blindfolded him, strapped him to a stretcher, and wheeled him to a dimly lit room. There he received three very painful injections in his arm. Mr. Salim was not told what these injections were for, and he did not consent to them. From under his blindfold, Mr. Salim could see that he was hooked up to some kind of a computer screen or monitor.

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After the injections were administered Mr. Salim felt drowsy, like a drunken person, and his face went numb, as if he'd been slapped very hard. The next thing Mr. Salim was aware of was waking up in his cell, chained to the wall. He has no recollection of what happened to him in the intervening period, or how long the period lasted.

107. In approximately his fourth or fifth week at COBALT, Mr. Salim become so hopeless and despondent that he decided to kill himself by taking the painkillers he had stockpiled in his cell. As he began to take the pills, however, guards stormed into his cell and stopped him.

108. Immediately after Mr. Salim's failed suicide attempt, CIA personnel transferred him from COBALT to another CIA black-site prison. Two or three guards restrained him and another dressed him in shorts and a t-shirt, cuffed his hands, and shackled his legs. A guard stuffed plugs in his ears, placed a hood over his head, and placed goggles and headphones over the hood. Mr. Salim was then dragged into the back of a vehicle. He was driven a short distance, some 15 or 20 minutes, to an underground prison that Mr. Salim later learned was known as the "Salt Pit."

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109. The CIA held Mr. Salim incommunicado and in solitary confinement in the "Salt Pit" for 14 months. The Agency did not interrogate him during that time, although the FBI did. On about seven occasions, two individuals who represented themselves as agents of the FBI, one male and the other female, came to talk to him. The male agent called himself "Mike," and spoke to Mr. Salim in Kiswahili. Mike asked Mr. Salim the same questions that he had been asked in COBALT, and Mr. Salim again gave the same truthful responses.

110. The only other visitor Mr. Salim had during his time in the "Salt Pit" was one of his interrogators from COBALT. The interrogator brought fruit and nuts for Mr. Salim, said he had been forced to torture Mr. Salim, apologized, and asked for Mr. Salim's forgiveness.

111. In approximately July 2004, Mr. Salim was transferred to the custody of the U.S. military and held at a prison at the Bagram Air Force Base, a thirty-minute helicopter ride away. For over four years, Mr. Salim was detained at Bagram, where his prisoner number was 1075. Throughout, Mr. Salim was held in solitary confinement in a series of small cages in a large, hanger-type building. Bright lights remained on constantly. He never saw daylight.

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112. On August 17, 2008, a representative of the International Committee of the Red Cross ("ICRC") told Mr. Salim that he was to be released. The ICRC gave Mr. Salim a memorandum from the U.S. Department of Defense confirming his detention by the "United States/Coalition Forces," certifying his release, and stating that Mr. Salim "has been determined to pose no threat to the United States Armed Forces or its interests in Afghanistan." The memo also stated that there were no charges pending against Mr. Salim.

113. The ICRC arranged to fly Mr. Salim to Dubai, and from there to Dar es Salaam and on to his home and family in Zanzibar.

114. Upon Mr. Salim's return, he made repeated efforts to find his wife, with whom he had lost all contact during his incommunicado detention. He has never been able to find her. Mr. Salim now lives with his second wife, whom he married in 2011, their three-year-old daughter, and his extended family.

115. Mr. Salim continues to suffer acute physical injuries from torture. He experiences debilitating pain in his jaw and teeth, making it difficult to eat solid foods. His senses of taste and smell are impaired. He suffers

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severe pain in his back, shoulders, and legs. The chronic pain makes it extremely difficult for Mr. Salim to work or perform other activities.

116. Mr. Salim also suffers severe and lasting psychological injuries from torture. His injuries include frequent nightmares and terrifying flashbacks to his time in COBALT and, during daytime, frequent spells of dizziness and confusion. A forensic examination conducted after his release confirms many other symptoms of post-traumatic stress disorder, including intrusive recollections, avoidance/emotional numbing, hyper-arousal symptoms, and major depression.

Mohamed Ahmed Ben Soud (formerly Mohamed Shoroeiya, Abd al-Karim)

117. Plaintiff Mohamed Ahmed Ben Soud is a Libyan citizen, born in Misrata in 1969. In 1991, Mr. Ben Soud fled Libya, fearing persecution for his opposition to Muammar Gadaffi's regime. In exile, Mr. Ben Soud later joined a group opposed to the Gadaffi government, the Libyan Islamic Fighting Group. He resided temporarily in a number of countries before settling in Pakistan. In April 2003, he was living in the city of Peshawar with his wife, whom he married in 2000, and their nine-month old daughter.

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118. On April 3, 2003, Mr. Ben Soud was arrested during a raid on his home by U.S. and Pakistani forces. During the raid, Mr. Ben Soud was shot in the left leg. The gunshot shattered a bone.

119. Mr. Ben Soud was detained, interrogated and abused for two weeks by Pakistani and U.S. officials. At one point, a doctor x-rayed his injured leg and fitted it with a plaster cast. The interrogators questioned Mr. Ben Soud about his knowledge of terrorism threats against the United States and his connections with al-Qa'ida. Mr. Ben Soud explained truthfully that he had no knowledge of any terrorism plans against the United States and no connection with al-Qa'ida. Mr. Ben Soud was repeatedly asked these same questions during his time in U.S. custody.

120. On April 18, Mr. Ben Soud's U.S. interrogators told him that he was being uncooperative and that they were going to send him to a place where he would be made to cooperate. That night, Mr. Ben Soud was blindfolded and handcuffed and driven some forty minutes to an airport. The CIA rendered Mr. Ben Soud to its black-site prison, COBALT.

121. During Mr. Ben Soud's imprisonment by the CIA, Mr. Ben Soud was experimented upon and subjected to and regimen of torture and cruel,

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inhuman, and degrading treatment in accordance with the phased torture program that Defendants Mitchell and Jessen designed, supervised and implemented. He suffered coercion and abuse during his rendition; torture and cruel, inhuman and degrading treatment during his confinement and further torture and abuse through the application of 9 of the 10 coercive methods Defendants devised for the torture program: prolonged sleep deprivation (seating and standing), walling, stress positions, the facial slap, abdominal slap, dietary manipulation, the facial hold, cramped confinement (large and small boxes), and a form of waterboarding. In addition, he was subjected to prolonged nudity and water dousing that approximated waterboarding. Some of these methods were used on him repeatedly and in combination.

Phase I: "Setting the conditions" for "learned helplessness"

122. The CIA began its torture of Mr. Ben Soud during its rendition of him to COBALT by subjecting him to severe physical and mental pain and suffering through humiliation, extreme sensory deprivation, and other forms of abusive treatment in accordance with Defendant Mitchell and Jessen's specifications. Mr. Ben Soud's blindfold was removed, and

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he saw he was surrounded by five or six men, all dressed in black and wearing masks so that only their eyes were visible. A strong light was shone directly into his face. CIA personnel cut his clothes from his body. Once Mr. Ben Soud was naked, one of the men conducted what appeared to be a medical examination, checking his anus, eyes, ears, nose and throat. He was then dressed in a diaper, a pair of trousers and a short-sleeved shirt. The men handcuffed Mr. Ben Soud and chained his cuffs to a belly chain. They shackled his legs together and fastened them to the same belly chain. They stuffed earplugs into his ears and taped cotton pads over his eyes. They covered his head with a hood and placed headphones over the hood and his ears. Deafened, blinded, and terrified, Mr. Ben Soud was forced up a set of stairs and into what he sensed was an aircraft. Once inside, he was chained to one of the seats, and flown for what seemed like an hour, although it was difficult for him to gauge time given his disorientation and sensory deprivation.

123. After landing, Mr. Ben Soud was removed from the plane and thrown into the back of a truck. He landed on top of another prisoner. The vehicle drove a short distance, arriving at a hangar-type building,

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which was COBALT. Mr. Ben Soud was removed from the back of the truck and hoisted onto someone's shoulder.

124. Inside COBALT, Mr. Ben Soud's headphones, hood, earplugs, and blindfold were removed. CIA personnel sat him on an old ammunition box at a table with two spotlights aimed directly at his face. Across the table from him stood a middle-aged woman whom he identified from her accent as American. Two guards stood behind him, one on each side. Through a translator, the woman shouted at him that he was a prisoner of the CIA, that human rights ended on September 11, and that no laws applied in this prison. She asked him no questions.

125. Guided by flashlights, two guards then took Mr. Ben Soud to a small, concrete, pitch-black, windowless cell measuring approximately 13 feet high by 10 feet long, with a steel door and tiny barred ventilation slot. There was a metal ring attached to one wall. A small metal bucket served as a toilet. There were no washing facilities, only a liter-sized water bottle that was filled every morning but was sufficient only for drinking. There was no bed, just two thin blankets, one of which Mr. Ben Soud used to sleep on and the other he used as a cover,

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although the cover did little to keep him warm during the winter months.

126. In the cell, the CIA guards removed Mr. Ben Soud's handcuffs and belly chain, his clothing and his diaper, but left the shackles around his ankles. The whole procedure was precise and well-practiced, seeming almost scientific to Mr. Ben Soud. Mr. Ben Soud was left naked.

127. Mr. Ben Soud was kept naked for more than a month. At what he estimated was the end of May, he was provided with clothing for the first time, a light pair of trousers and a t-shirt, but both were cut-up oddly, missing a leg or a sleeve.

128. Throughout his time in COBALT, Mr. Ben Soud was bombarded by Western music. The music was played at ear-splitting levels and filled the entire building. It only ever stopped very briefly as the tracks changed or when the system malfunctioned. Mr. Ben Soud's cell was kept pitch black, and stank. At first, the stench came chiefly from the toilet bucket, but eventually also from Mr. Ben Soud, who was not permitted to wash for five months nor cut his hair, beard or nails. The smell in his cell was so bad that the guards wore masks when they came to take him to interrogation.

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129. Mr. Ben Soud was subjected to food deprivation and dietary manipulation throughout his year-long detention at COBALT. In the first five months, from April until September 2003, Mr. Ben Soud was provided one meal a day, and occasionally two meals. These meals consisted of rice or bread and beans. After five months, meals were provided on a more regular basis, but the nutritional quality remained low. Mr. Ben Soud was weighed by a medic when he first arrived at COBALT and again three months later. In this period he lost nearly 49 pounds, falling from 187 pounds to 139 pounds.

130. Throughout Mr. Ben Soud's imprisonment at COBALT he was subjected to sleep deprivation, able to sleep only for minutes at a time because of painful stress positions, constant blaring music, and guards banging loudly on the door of his cell every hour or so. In the first few months at COBALT, Mr. Ben Soud was continually placed in one of three painful seated stress positions: he was kept chained to the ring on his cell wall by one wrist; both wrists; or by the wrists and both legs. The seated positions were, "[t]o accommodate [Mr. Ben Soud's] injuries . . . rather than being shackled standing during sleep deprivation, [he should] be 'seated, secured to a cell wall, with

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intermittent disruptions of normal sleeping patterns." SSCI Report 492 n.2675. Once medics removed the cast from his injured leg, Mr. Ben Soud was subjected to standing sleep deprivation. Guards would take him from his cell and force him to march around the prison naked, "'15 minutes every half-hour through the night and into the morning.'" SSCI Report 492. This caused Mr. Ben Soud excruciating pain in his leg.

131. For Mr. Ben Soud, the prolonged sleep deprivation was the worst form of torture that he had to endure. It drove him close to madness.

132. During the first two weeks of Mr. Ben Soud's detention at COBALT, he was interrogated on a regular basis. Mr. Ben Soud was cuffed, shackled and naked, with a spotlight aimed in his face, and two interrogators took turns questioning him. In addition to the questions he had been asked in Pakistan, the interrogators asked Mr. Ben Soud whether he knew certain individuals, including Osama Bin Laden, Abu Faraj al Libi, and Abu Leith al-Libi. Mr. Ben Soud answered truthfully that he knew of them but only from reports in the media. In response to the questions he had also been asked in Pakistan, Mr. Ben Soud gave the same truthful answers as before: he had no connections with

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al Qa'ida and he was neither involved in nor knew of any terrorism plots against the United States.

Phase II: "Aggressive phase" of torture and cruel, inhuman, and degrading treatment

133. It was difficult for Mr. Ben Soud to have a firm sense of time—the differences between day and night were almost imperceptible—but he estimates that roughly two weeks after he arrived at COBALT his torture increased in severity with the introduction of new methods.

134. The "aggressive phase" of Mr. Ben Soud's torture lasted for about four or five weeks. During this phase, Mr. Ben Soud saw Defendant Mitchell three times in COBALT: at least twice while being subjected to water torture, where Mitchell appeared to be observing and supervising the proceedings, and once at the end of the "aggressive phase."

135. The "aggressive phase" was conducted by two separate interrogation teams. Each team tortured Mr. Ben Soud for approximately two weeks. The first team was comprised of a male lead interrogator and four assistants, both men and women. The second team was comprised of two male lead interrogators and four or five male and female assistants.

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136. The first interrogation team subjected Mr. Ben Soud to repeated walling sessions, abdominal slaps, and water torture sessions, often in combination on the same day for over a two-week period.

137. During wall slamming sessions the lead interrogator placed a foam collar around Mr. Ben Soud's neck and then slapped him firmly, first in the face and then in the stomach, before throwing him against a wooden wall. Interrogators repeated walling and slaps for 20 or 30 minutes before taking Mr. Ben Soud to be interrogated in another room, and then back again for another session. As the sessions continued they became increasingly painful. The noise of Mr. Ben Soud hitting the wall was also extremely loud and terrifying to him. When back in his cell, Mr. Ben Soud could hear others also being subjected to walling, even above the noise of the music.

138. About a week after his first wall slamming session, Mr. Ben Soud's interrogators started to combine walling with water torture. On the first day of his water torture, two guards took Mr. Ben Soud from his cell to a room where the interrogation team and some others were waiting. A large plastic sheet covered part of the floor. Guards forced Mr. Ben Soud, naked, into the center of the plastic sheet. With his

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hands cuffed at the wrists, they forced his arms over his head. On the lead interrogator's word, four of the assistants pulled up the four corners of the sheet to form a shallow basin. They then threw buckets of ice-cold water over Mr. Ben Soud's face and body until he was partially submerged in the ice-cold water. The water seemed to have been treated with some substance and clung to Mr. Ben Soud's body like a gel. It was so cold he shook violently. A person whom Mr. Ben Soud took to be a doctor monitored the proceedings, periodically checking Mr. Ben Soud's vital signs. When the doctor decided that Mr. Ben Soud's temperature was dangerously low, he would give instructions for warm water to be thrown over him until Mr. Ben Soud's temperature raised modestly. The water torture sessions lasted about half an hour to forty minutes, sometimes longer. After each ended, Mr. Ben Soud was taken naked and shivering to another room and interrogated. This process was repeated multiple times.

139. After the first water torture session, the cast on Mr. Ben Soud's leg began to disintegrate. The same doctor who had monitored his temperature examined the plaster. In the next session, the doctor tried to protect the plaster by covering it in a plastic bag before the water

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was applied, in accordance with guidance in a CIA cable: "For water dousing, [Mr. Ben Soud's] injured leg[] would be 'wrapped in plastic.'" SSCI Report 492 n.2675. When this proved ineffective, however, the doctor later designed and fitted Mr. Ben Soud with a cast that could be easily removed during water torture sessions.

140. After approximately two weeks, the lead interrogator told Mr. Ben Soud that he was not being cooperative and that another team of interrogators would be taking over to make Mr. Ben Soud cooperate. Before leaving, he provided Mr. Ben Soud with a pair of trousers and a t-shirt.

141. For the next two to three weeks, a second interrogation team took over and subjected Mr. Ben Soud to a combination of walling, water torture, cramped confinement in large and small boxes, prolonged standing sleep deprivation and a form of waterboarding, while threatening him with additional abuses. The new team stripped Mr. Ben Soud of the clothing he had briefly possessed; he was kept naked for the duration of this period.

142. The walling and accompanying physical beatings were more severe than those conducted by the first team. The water torture sessions also

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increased in intensity because interrogators covered Mr. Ben Soud's head with a hood before pouring ice-water over him. The addition of the hood caused Mr. Ben Soud to choke and suffocate. He felt like he was drowning.

143. Mr. Ben Soud's interrogators also placed him in a narrow, coffin-like box which was approximately 1.5 ft. wide and tall enough for him to stand with his hands chained above his head in a painful position. Speakers were located on both sides of the box at the level of his ears. Once inside, loud Western rock music was turned full volume through the speakers. Mr. Ben Soud was forced into this box for forty-five minutes, and found it unbearable. After using this technique on him once, interrogators threatened him with it again if he did not cooperate.

144. Interrogators also forced Mr. Ben Soud into a smaller wooden box, measuring approximately 3 feet by 3 feet. The box had a series of small holes on each side. Once squeezed inside, the box was locked and Mr. Ben Soud was left there for some forty-five minutes. Again, Mr. Ben Soud found this experience unbearable. He was subjected to this method once, but interrogators threatened Mr. Ben Soud with its use on numerous other occasions.

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145. During this same period, for one and a half days, Mr. Ben Soud was hung naked from a metal rod by his arms. He was positioned with his arms over his head and so that the balls of his feet—including the foot of his broken leg—were barely able to touch the ground. If he loosened his arms, they felt like they would come out of their sockets. It was impossible for Mr. Ben Soud to sleep. The room was small and pitch-black except for a tiny blinking red light level with his head. As he was being strung up he could see blood-smeared walls by the light of the guards' flashlights. Loud Western music was blasted into the room for the duration of his suspension from the ceiling. After a very short time, alone in that room and unable to sleep, Mr. Ben Soud began to hallucinate and slowly became hysterical. After a day and a half, the guards released him and brought him to see a doctor, who examined his legs. They had become engorged and swollen with fluid, his broken leg especially. Both limbs were excruciatingly painful. Mr. Ben Soud was unable to walk and had to be carried by the guards to the examination room for treatment.

146. On one occasion, Mr. Ben Soud was subjected to a form of waterboarding. He was strapped to a wooden board that could spin

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around 360 degrees. His interrogators spun him around on this board with a hood over his head covering his nose and mouth. While strapped to the board with his head lower than his feet, his interrogators poured buckets of cold water him. While they did not pour water directly over his mouth and nose, they threatened to do so if he did not cooperate.

147. After two to three weeks, the interrogation team assessed Mr. Ben Soud as "broken" and "cooperative," and stopped the "aggressive phase" of his torture.

148. From around June 2003 through April 2004, Mr. Ben Soud continued to be subjected to solitary confinement, other forms of extreme sensory deprivation, including being kept in the dark and bombarded with high decibel music, painful stress positions and prolonged sleep deprivation.

149. During this period, there was also a change in the personnel conducting his interrogations, which now consisted only of questioning. These sessions occurred on a daily basis, but towards the end of Mr. Ben Soud's time in COBALT they became less regular.

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150. On September 3, 2003, Mr. Ben Soud was taken outside, into the daylight. It was the first time he had seen the sun in over four months. He knew the exact date because he spoke with an American man at this time and noticed the date and time on his wrist watch. Seeing the date allowed Mr. Ben Soud to calculate the time he had spent in COBALT. He then kept a tally of the days moving forward using paper and a pen that his captors provided to him.

151. On April 25, 2004, Mr. Ben Soud was transferred to another CIA black site prison referred to in the SSCI Report as ORANGE, where he was detained and interrogated for a further year and four months. Mr. Ben Soud was held in secret, in solitary confinement and chained to the wall of his cell when he was not being interrogated.

152. On August 22, 2004, the CIA rendered Mr. Ben Soud from ORANGE to Gaddafi's government in Libya.

153. In Libya, Mr. Ben Soud was handed over to Libyan officials. He was detained pending a show trial and sentenced to life imprisonment on July 20, 2006. He was released February 16, 2011, a day after the uprising that led to the overthrow of the Gaddafi regime.

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154. Mr. Ben Soud lives in Misrata together with his wife and their three children. He continues to suffer physically and psychologically from the tortures he endured when he was a subject of Mitchell and Jessen's experimental program. He experiences pain in his left leg in particular and is unable to walk on it for any length of time. A CIA cable from May, 2003 "stated that, even given the best prognosis, [Mr. Ben Soud] would have arthritis and limitation of motion for the rest of his life." SSCI Report 492. He has been diagnosed with rheumatism in his knees and back and has been prescribed medication for the pain. Mr. Ben Soud has also been receiving on-going treatment for hearing loss in both ears, and hears a continuous ringing sound. He has also lost his sense of taste and smell. He continues to suffer deep psychological harm.

Gul Rahman

155. Gul Rahman was born in Afghanistan in the 1970s. He married there and he and his wife had four daughters. In 2001, the family fled Afghanistan to Pakistan to escape the armed conflict after the U.S.-led invasion. They lived together as refugees in the Shamshatoo refugee

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camp located on the outskirts of Peshawar, in Pakistan. Mr. Rahman earned a living selling wood to the other Shamshatoo camp refugees.

156. On October 28, 2002, Mr. Rahman, who suffered from allergies, went to Islamabad for a medical checkup. He stayed the night in Islamabad with an old friend and former employer, Dr. Ghairat Baheer. While living in Afghanistan before 2001, Mr. Rahman had [periodically] worked as a driver for Dr. Baheer, who was a physician and leader of Hezb-e-Islami, a group formed in opposition to the Communist Government of Afghanistan.

157. In the early hours of October 29, 2002, Dr. Baheer's home in Islamabad was raided in a joint U.S./Pakistani operation. Mr. Rahman was taken captive, together with Dr. Baheer, two guards and a cook. All of them were detained at a facility in Islamabad for about a week.

158. On or around November 5, 2002, Mr. Rahman was rendered by the CIA from Pakistan to the CIA's black-site COBALT prison.

159. During Mr. Rahman's custody by the CIA, he was experimented on and subjected to a regime of torture and abuse in accordance with the phased program Defendants Mitchell and Jessen designed, supervised and implemented. Mr. Rahman suffered abuse and coercion during his

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rendition; torture and cruel, inhuman, and degrading treatment during his confinement; and further torture and abuse through the application of at least 6 of the 10 coercive techniques Defendants devised for the torture program: facial holds, insult slaps, abdominal slaps, stress positions, dietary manipulation, and prolonged sleep deprivation. Mr. Rahman was also subjected to prolonged nudity and water dousing. Some of these coercive methods were used on Mr. Rahman repeatedly and in combination.

160. In November 2002, Defendant Jessen conducted a psychological evaluation of Mr. Rahman at COBALT "to determine which CIA enhanced interrogation techniques should be used on him" to counter perceived resistance. SSCI Report 497. Defendant Jessen concluded that Mr. Rahman was resistant and that further torture would be required to "break" his will and render him compliant. Defendant Jessen directly participated in the more "aggressive phase" of Mr. Rahman's torture, with the assistance of an individual identified in the SSCI Report as CIA Officer 1. Both Jessen and CIA Officer 1 tortured Mr. Rahman. The abuses to which Jessen and CIA Officer 1 subjected Mr. Rahman included "48 hours of sleep deprivation, auditory

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overload, total darkness, isolation, a cold shower and rough treatment" SSCI Report 54.

161. Defendant Jessen also oversaw and encouraged Mr. Rahman's continued torture by the other CIA agents and guards Jessen was training. Those methods included "rough takedown"/"hard takedown," which "was done for shock and psychological impact and signaled the transition to another phase of the interrogation." CIA OIG Report at 77. Defendant Jessen described the technique as a "thoroughly planned and rehearsed" form of severe physical and psychological abuse that when performed on Mr. Rahman resulted in abrasions to his face, legs, and hands from his being slapped, punched and dragged naked, hooded and bound over the concrete and dirt floors of COBALT. Defendant Jessen explained that after the technique was used, "interrogators should speak to the prisoner to give them something to think about." SSCI Report at 56 n. 278.

162. Before Defendant Jessen departed COBALT, he proposed that the CIA continue its torture of detainees using the methods he and Defendant Mitchell had devised for the agency "and offered suggestions to [CIA OFFICER 1], the site manager, on the use of such techniques." SSCI

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Report 54. After Defendant Jessen's departure, CIA interrogators continued to use many of those same methods on Mr. Rahman. "Rahman was placed back under the cold water by the guards at [CIA Officer 1]'s direction. Rahman was so cold that he could barely utter his alias . . . the entire process lasted no more than 20 minutes. It was intended to lower Rahman's resistance and was not for hygienic reasons. At the conclusion of the shower, Rahman was moved to one of the four sleep deprivation cells where he was left shivering for hours or overnight with his hand chained over his head." SSCI Report at 63 n.314.

163. On November 19, 2002, CIA Officer 1 assessed Mr. Rahman as still uncooperative, and ordered him to be shackled in a painful stress position that required Mr. Rahman to kneel on the bare concrete floor of his cell with his hands chained above his head. CIA Officer 1 also ordered Mr. Rahman to be stripped of his clothes, except for a sweatshirt, as punishment for a perceived lack of cooperation during an earlier torture session. CIA Officer 1 ordered Mr. Rahman to be left partially nude and in a stress position overnight, when the temperatures were known to dip below 36 degrees Fahrenheit.

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164. On November 20, 2002, guards found Mr. Rahman dead in his cell. An autopsy report and internal CIA review found that Mr. Rahman likely died from hypothermia caused "in part from being forced to sit on the bare concrete floor without pants," with the contributing factors of "dehydration, lack of food, and immobility due to 'short chaining.'" SSCI Report at 54–55 n. 272.

165. The CIA and the CIA Office of the Inspector General completed reports on Mr. Rahman's death on January 28, 2003 and April 27, 2003, respectively. Mr. Rahman's death was also examined by the CIA Inspector General in a report on the CIA's detention and interrogation activities from September 2001 to October 2003, dated May 7, 2004. No one was held accountable for Mr. Rahman's death or the torture that caused it.

166. In March 2003, CIA Officer 1 was recommended for a "cash award" for his "consistently superior work" and remained in charge of the COBALT facility until July 2003. SSCI Report 55.

167. The CIA covered up Mr. Rahman's death until 2010, when the Associated Press reported on the story. Mr. Rahman's wife and four

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daughters have never been officially notified of Mr. Rahman's death, nor has his body ever been returned to them for a dignified burial.

VI. CAUSES OF ACTION

First Claim for Relief

Alien Tort Statute: Torture and Other Cruel, Inhuman, and Degrading Treatment

168. Defendants Mitchell and Jessen tortured Plaintiffs and subjected them to other forms of cruel, inhuman and degrading treatment under color of law in that they intentionally inflicted severe physical and mental pain or suffering on each of the Plaintiffs, for the purposes of obtaining information or a confession, punishing them, and/or intimidating or coercing them, and that they did so at the instigation of or with the consent or acquiescence of public officials or other persons acting in an official capacity.

169. Defendants are directly liable because they designed, developed, and implemented a program for the CIA intended to inflict physical and mental pain and suffering on Plaintiffs, and because Plaintiffs were tortured and subjected to cruel, inhuman, and degrading treatment as a consequence of their inclusion in that program.

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170. Defendants are also liable because they conspired and/or acted together in a joint criminal enterprise with agents of the United States in Plaintiffs' torture and cruel, inhuman and degrading treatment. Defendants entered into an agreement with agents of the United States to design and implement a program of torture and cruel, inhuman, and degrading treatment for the CIA and Plaintiffs suffered severe physical and mental pain and suffering as a consequence of their inclusion in that program. Defendants participated in or committed wrongful acts in furtherance of the conspiracy, resulting in injury to Plaintiffs.

171. Defendants are also liable because they aided and abetted Plaintiffs' torture and cruel, inhuman, and degrading treatment by agents of the United States. Defendants intended to cause Plaintiffs severe physical and mental pain and suffering. Defendants controlled and profited from Plaintiffs' pain and suffering. Torture and cruel, inhuman, and degrading treatment were an inextricable and purposeful component in every aspect of Defendants' program. Defendants provided substantial practical assistance to agents of the United States, resulting in Plaintiffs' torture and cruel, inhuman, and degrading treatment.

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172. Defendants' acts and omissions caused Plaintiffs to suffer damages, including severe physical, mental, and emotional pain and suffering.

173. Defendants' acts or omissions were deliberate, willful, intentional, wanton, malicious, oppressive, and in conscious disregard for Plaintiffs' rights under international and U.S. law and should be punished by an award of punitive damages in an amount to be determined at trial.

Second Claim for Relief

Alien Tort Statute: Non-Consensual Human Experimentation

174. Defendants Mitchell and Jessen experimented on Plaintiffs under color of law and without Plaintiffs' consent. Specifically, Plaintiffs were forced to be part of the test of Defendants' experimental theory that prisoners could be reduced through abusive treatment to a state of "learned helplessness" and thereby rendered passive, compliant, and unable to resist their interrogators' demands for information. As part of this experiment, Defendants implemented an experimental protocol that required assessments of whether (1) prisoners had been tortured long enough to induce a state of "learned helplessness" or additional torture was necessary; (2) certain combinations and sequences of

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torture techniques were most effective at overcoming "resistance"; and (3) whether detainees became fully compliant with interrogators' demands once they had been reduced to a state of learned helplessness.

175. Defendants are directly liable because they experimented on Plaintiffs by seeking to induce in them a state of "learned helplessness" to break their will by means of torture and cruel, inhuman, and degrading treatment. Defendants monitored, recalibrated, and refined their experiment based on their assessment of Plaintiffs' and other prisoners' physical and psychological reactions to torture and cruel, inhuman, and degrading treatment.

176. Defendants are also liable because they conspired and/or acted together in a joint criminal enterprise with agents of the United States in conducting their experiments on Plaintiffs without their consent. Defendants conspired with agents of the United States to experiment on Plaintiffs by torturing and subjecting them to cruel, inhuman, and degrading treatment and by monitoring, recalibrating, and refining their experiment based on their assessment of Plaintiffs' and other prisoners' physical and psychological reactions to their torture and cruel, inhuman, and degrading treatment. Defendants participated in

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or committed wrongful acts in furtherance of said conspiracy and/or joint criminal enterprise, resulting in injury to Plaintiffs.

177. Defendants are also liable because they aided and abetted agents of the United States to experiment on Plaintiffs without their consent. They controlled and directly profited from those experiments. Non-consensual human experimentation was an inextricable and purposeful component in every aspect of Defendants' program. Defendants provided substantial practical assistance to U.S. government officials in experimenting on Plaintiffs, resulting in Plaintiffs' becoming subjects of non-consensual human experimentation, and resulting in their physical pain and mental suffering, as a consequence.

178. Defendants' acts and omissions caused Plaintiffs to suffer damages, including severe physical, mental, and emotional pain and suffering.

179. Defendants' acts or omissions were deliberate, willful, intentional, wanton, malicious, and oppressive, and in conscious disregard for Plaintiffs' rights under international and U.S. law prohibiting non-consensual human experimentation and should be punished by an award of punitive damages in an amount to be determined at trial.

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Third Claim for Relief

Alien Tort Statute: War Crimes

180. Plaintiffs were subjected to war crimes of torture, cruel treatment and other "outrages upon personal dignity," and "medical and scientific experimentation" without their consent in the context of an international armed conflict.

181. Mitchell and Jessen are directly liable for these war crimes. Defendants designed, developed, and implemented a program intended to inflict physical pain and mental suffering on Plaintiffs. Plaintiffs were tortured and cruelly treated as a consequence of their inclusion in that program. Defendants also experimented on Plaintiffs without their consent by attempting to induce in them a state of "learned helplessness" to break their wills by torturing and cruelly-treating them, and by monitoring, recalibrating, and refining their mistreatment based on their assessment of Plaintiffs' and other prisoners' physical and psychological reactions to torture and cruel treatment.

182. Mitchell and Jessen are also liable because they conspired and/or entered into a joint criminal enterprise with agents of the United States in the commission of these war crimes: (1) *Torture and cruel*

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treatment: Defendants entered into an agreement with agents of the United States to design and implement a program for the CIA intended to inflict physical and mental suffering on Plaintiffs. Plaintiffs were tortured and cruelly treated within that program. Defendants participated in or committed wrongful acts in furtherance of said conspiracy and/or joint criminal enterprise, resulting in injury to Plaintiffs. (2) *Non-consensual medical and scientific human experimentation*: Defendants conspired or entered into a joint criminal enterprise with agents of the United States to experiment on Plaintiffs without their consent by abusing them to induce a state of "learned helplessness." Defendants and agents of the United States experimented on Plaintiffs by torturing and cruelly treating them, and monitoring and assessing their physical and psychological reactions to that torture and cruel treatment. Defendants participated in or committed wrongful acts in furtherance of said conspiracy and/or joint criminal enterprise, resulting in injury to Plaintiffs.

183. Defendants Mitchell and Jessen are also liable because they aided and abetted agents of the United States in the commission of these war crimes: (1) *Torture and cruel treatment*: Defendants intended to inflict

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(206) 624-2184

physical and mental pain and suffering on Plaintiffs. They controlled and directly benefited from Plaintiffs' torture and cruel treatment. Torture and cruelty were an inextricable and purposeful component in every aspect of the CIA's torture program. Defendants' provided substantial practical assistance to agents of the U.S. government in carrying out that program, resulting in Plaintiffs' torture and cruel treatment. (2) *Non-consensual medical and scientific human experimentation*: Defendants aided and abetted agents of the United States in experimenting on Plaintiffs without their consent. They controlled and directly benefited from those experiments. Non-consensual medical and scientific experimentation was an inextricable and purposeful component in every aspect of the CIA's torture program. Mitchell and Jessen provided substantial practical assistance to U.S. government officials in experimenting on Plaintiffs resulting in Plaintiffs' being experimented on without their consent and their torture and cruel treatment.

184. Defendants' acts and omissions described herein caused Plaintiffs to suffer damages, including severe physical, mental and emotional pain and suffering.

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(206) 624-2184

185. Defendants' acts or omissions were deliberate, willful, intentional, wanton, malicious, oppressive, and in conscious disregard for Plaintiffs' rights under international and U.S. law prohibiting war crimes and should be punished by an award of punitive damages in an amount to be determined at trial.

VII. REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court grant the following relief:

A. compensatory damages in an amount to be proven at trial, but in an amount over $75,000;

B. punitive and exemplary damages in an amount to be proven at trial;

C. reasonable attorneys' fees and costs of suit; and

D. such other relief as the Court deems just and proper.

VIII. JURY TRIAL DEMAND

Plaintiffs demand a jury trial on all issues so triable.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

Dated: October 13, 2015

Respectfully submitted,

s/ La Rond Baker

Steven M. Watt (*pro hac vice* pending)
swatt@aclu.org
Dror Ladin (*pro hac vice* pending)
dladin@aclu.org
Hina Shamsi (*pro hac vice* pending)
hshamsi@aclu.org
Jameel Jaffer (*pro hac vice* pending)
jjaffer@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: 212-519-7870

Paul Hoffman (*pro hac vice* pending)
Hoffpaul@aol.com
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291
Phone: 310-396-0731

La Rond Baker, WSBA No. 43610
lbaker@aclu-wa.org
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Phone: 206.624.2184

EXHIBIT "2"

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

ANDREW I. WARDEN (IN Bar No. 23840-49)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, *et al.*,

Plaintiffs,

v.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

No. 2:15-CV-286-JLQ

STATEMENT OF INTEREST OF THE UNITED STATES

Motion Hearing:
April 22, 2016 at 9:00 a.m.
Spokane, Washington

INTRODUCTION

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

BACKGROUND

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

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. A submission by the United States pursuant to this provision does not constitute intervention under Rule 24 of the Federal Rules of Civil Procedure.

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

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

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

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

DISCUSSION

The United States respectfully requests that that the Court consider the interests of the United States when formulating a discovery plan and schedule in this case. This case presents a complex situation in which Defendants likely have in their knowledge or possession information that is classified, or which could tend to reveal

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

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

concerning the interrogation techniques and conditions of confinement applied to detainees in the detention and interrogation program, including Plaintiffs, is no longer classified.

Although certain categories of information about the detention and interrogation program have been declassified by the Executive Branch, other categories of information about the program remain classified and were redacted from the Executive Summary due to the damage to national security that reasonably could be expected to result from the disclosure of that information. *See* Executive Order 13526, Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009). In connection with the ongoing military commission prosecution against the five former CIA detainees accused of committing the attacks on September 11, 2001, the Government has explained that these categories include, but are not limited to: names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of detainees or specific dates regarding the same; the locations of detention sites (including the name of any country in which the detention site was allegedly located); any foreign intelligence service's involvement in the detainees' capture, transfer, detention, or interrogation; and information that would reveal details surrounding the capture of detainees other than the location and date. *See* Government's Mot. to Amend Protective Order, *United States v. Mohammed et al.*, Dkt No. AE 013RRR (U.S. Mil. Comm. Jan. 30, 2015), at www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013RRR(Gov)).pdf

The discovery requests in this case are likely to center on the operational details and internal workings of the detention and interrogation program. While the United States possesses classified information about the program, this case also presents an additional complicating factor from a discovery perspective because Defendants, by virtue of their role as CIA contractors in the program, also likely have in their knowledge and possession information belonging to the United States that is classified, or which could tend to reveal classified information, that they are prohibited from disclosing.[2] Defendants signed nondisclosure agreements with the United States that prohibit them from disclosing classified information without authorization from the United States. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 155 (1989) (per curiam) ("As a condition of obtaining access to classified information, employees in the Executive Branch are required to sign 'nondislosure agreements' that detail the employees' obligation of confidentiality and provide for penalties in the event of unauthorized disclosure."); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (stating that the CIA's non-disclosure agreement is an "entirely appropriate exercise of the CIA Director's statutory mandate to protect intelligence sources and methods from unauthorized disclosure") (internal quotations omitted). Further, various federal regulations and laws prohibit unauthorized disclosure of classified information. *See, e.g.*, 18 U.S.C. §§ 793-94; 18 U.S.C. § 798;

[2] The fact that Defendants served as CIA contractors in the detention and interrogation program is unclassified.

50 U.S.C. § 3121; Executive Order 13526. Nonetheless, this information could be the subject of discovery requests from Plaintiffs or otherwise may be called for pursuant to Fed. R. Civ. P. 26(a)(1)(A) (initial disclosures), or be relevant to certain defenses Defendants may affirmatively raise. *See, e.g.*, Detainee Treatment Act of 2005, 10 U.S.C. § 801, stat. note § 1004 (establishing a defense in any civil action for Government agents engaged in interrogation or detention practices that were officially authorized and determined to be lawful at the time they were conducted). Further, Defendants' view of whether the information they may have in their knowledge or possession is now declassified, following public release of the Executive Summary, may not be accurate or consistent with determinations made by the Executive Branch with regard to such information, and as a result, a risk exists that classified information could inadvertently be disclosed by Defendants in this litigation.

In the event discovery proceeds through this complicated landscape, including in the form of party discovery or disclosures from Defendants, important interests of the United States would be implicated. The United States has a strong interest, of course, in protecting its classified, sensitive, or privileged information from disclosure. *See* Fed. R. Civ. P. 45(d)(3)(A)(iii); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994). Indeed, the CIA has "sweeping" and "broad power to protect the secrecy and integrity of the intelligence process" in furtherance of the national security. *CIA v. Sims*, 471 U.S. 159, 169-170 (1985); *see Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007); *see also* 50 U.S.C. § 3024(i)(1)

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

Further, any decision by the Government to consider the release of intelligence information requires careful scrutiny, sometimes by multiple Government agencies. This is especially so where the significance of one item of information frequently depends upon knowledge of other items of information, the value of which cannot be appropriately considered without knowledge of the entire landscape. As the Supreme Court explained in *Sims*, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." 471 U.S. at 178 (internal citations and quotations omitted). Accordingly, the process by which the Government evaluates and responds to requests for disclosure of information related to the detention and interrogation program is highly exacting and is essential in order to deny hostile adversaries the ability to piece together bits of information that may reveal

information that remains classified. This process is certainly not typical for discovery in an ordinary civil matter.

In the event a party is dissatisfied with the Government's decisions regarding the disclosure of privileged or classified information and moves to compel access to or disclosure of such information, the Government would need sufficient time to consider whether invocation of privilege, including the state secrets privilege, would be appropriate to prevent the disclosure of the requested information. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077-84 (9th Cir. 2010) (en banc). The Supreme Court has long recognized the Government's ability to protect state secrets from disclosure in the context of civil discovery. *United States v. Reynolds*, 345 U.S. 1 (1953); *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011). The privilege allows the Government to prevent the disclosure of national security information that would otherwise be discoverable in civil litigation, where there is a "reasonable danger that compulsion of the evidence will expose [state secrets] which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10.[3] Any decision concerning whether, when, or to what extent this privilege should

[3] The privilege, where it applies, is absolute and cannot be overcome by the perceived need of a litigant to access or use the information at issue. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("Once the privilege is properly invoked, and the court is satisfied as to the danger of divulging state secrets, the privilege is

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

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

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

government departments or agencies specifying "(i) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; [and] (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm." *Id.* at 2. The Department of Justice will only defend an assertion of the privilege in court with the personal approval of the Attorney General following review and recommendations from a committee of senior Department of Justice officials. *Id*. at 3. The Court of Appeals has emphasized the importance of this guidance. *See Mohamed*, 614 F.3d at 1080 ("Although *Reynolds* does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged."). Given the highly significant determinations that must be made in deciding whether to assert the state secrets privilege, the Government has a strong interest in ensuring that adequate time is provided so that senior Executive Branch officials can carefully consider whether the privilege should be asserted without rushing to a hasty or inaccurate decision.

In light of these unique circumstances, this case is likely to require special procedures to protect against the disclosure of classified or privileged information belonging to the United States during party discovery, and for litigating any disputes over whether such information may be disclosed. Consequently, the United States recommends that any discovery plan entered in this case include certain special

procedures that would enable the Government to have the opportunity to review any proposed disclosure of information by Defendants during party discovery for classified or privileged information and, if necessary, to take steps to protect against disclosure. Absent such procedures, there exists a risk of unauthorized disclosure of the United States' classified or privileged information.[4]

In an effort to reach consensus on this issue, undersigned counsel for the United States has initiated discussions with the attorneys for both Plaintiffs and Defendants regarding proposed protective measures for inclusion in the discovery plan. Among the protective measures under consideration and discussion are identifying those subject areas related to the detention and interrogation program that have been declassified and those that have not, thereby enabling the parties to tailor the litigation and discovery in this case, if appropriate, to information that has been declassified and would not implicate the United States' national security interests; permitting attorneys from the Department of Justice to attend depositions and assert objections where

[4] In describing these special procedures the United States does not waive any privileges, arguments, or defenses that it may assert to prevent disclosure of privileged information. Rather, the goal of these procedures is to provide a mechanism for the United States to assert any appropriate objections to prevent the unauthorized disclosure of privileged information and to streamline, or make as efficient as possible, any contested litigation over access to such information.

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

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

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

stage of proceedings, when the Government has not yet been served with any discovery requests, and no contested litigation is imminent, the Government does not know precisely how the discovery process against the United States will unfold, although each of the various interests discussed above would be implicated in such discovery. Where it is not a party to a suit, the United States has a strong interest in avoiding the unreasonable diversion of the Government's national security resources to satisfy the discovery demands of the parties. *See Exxon Shipping Co.*, 34 F.3d at 779 ("We acknowledge the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations."). In all events, the Government has a significant interest in ensuring that any third-party discovery proceeds in an efficient manner without the litigation itself imposing undue burdens on any agency carrying out a national security mission. To that end, because the United States is not a party to this case, the first step to either party in this case seeking information from the United States is for the requesting litigant to submit a so-called *Touhy* (*United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) request under the relevant agencies' governing regulations, describing the information sought so that the agency can properly consider the request. *See, e.g.*, 32 C.F.R. § 1905.4(c)-(d) (CIA)*; see also In re Boeh*, 25 F.3d 761, 763-64 (9th Cir. 1994); *Exxon Shipping*

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compiling their report about the detention and interrogation program. *See* Executive Summary Foreword at 4.

Co., 34 F.3d at 780 n. 11 ("Because [5 U.S.C.] § 301 provides authority for agency heads to issue rules of procedure in dealing with requests for information and testimony, an agency head will still be making the decisions on whether to comply with such requests in the first instance [prior to court review]."). As explained above, given the potential volume and complex nature of the information that is likely to be sought in this case, the Government likely will need a substantial amount of time to identify any responsive information and then determine whether and to what extent that information can be provided or whether it must object to disclosure and, if necessary, assert privilege in response to a demand for the information. In the event a decision is made to produce responsive material, the production process is likely to require additional time because the intelligence information at issue here would be required to undergo a careful review, perhaps by multiple agencies, to ensure only unclassified and non-privileged information is released.

Finally, given the Government's compelling interest in protecting classified and other sensitive or privileged information from unauthorized disclosure, the Government opposes any suggestion to create special procedures that would permit the parties or their counsel to access classified information, such as by granting private attorneys security clearances and establishing secure facilities for the exchange, storage, and review of classified information by the parties. As the Court of Appeals has recognized, "[t]he decision to grant or revoke a security clearance is committed to the discretion of the President by law." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th

Cir. 1990). There is no statutory authority that would permit or require such access in this context. For example, the Classified Information Procedures Act, 18 U.S.C. app. 3 ("CIPA"), is inapplicable in civil cases. *See* CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) ("An act to provide certain pretrial, trial and appellate procedures for criminal cases involving classified information."); *see also id.* § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."). Indeed, the application of CIPA to civil litigation would be an impermissible construction of that statute, distorting both its language and legislative rationale and ignoring the distinction between criminal and civil litigation. Unlike criminal prosecutions, where a prosecutor can choose to cease prosecution rather than disclose classified information to a criminal defendant, in civil litigation like this when a litigant seeks classified information, the Government has no ultimate control over the continuation of the case. *See Reynolds*, 345 U.S. at 12. Accordingly, it would be inappropriate in this case to attempt to devise CIPA-like procedures that would require the Government to provide private parties with access to classified or otherwise protected national security information in the context of a civil damages action, particularly one in which the Government is not a party. *See Mohamed*, 614 F.3d at 1089 (upholding privilege assertion over classified information "no matter what protective procedures the district court might employ"); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (holding that the

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

CONCLUSION

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

Dated: April 8, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Dror Ladin:
Dladin@aclu.Org

Hina Shamsi:
Hshamsi@aclu.Org

Jameel Jaffer:
Jjaffer@aclu.Org

La Rond Baker:
Lbaker@aclu-Wa.Org

Paul L Hoffman:
Hoffpaul@aol.Com

Steven Watt:
Swatt@aclu.Org

Attorneys for Plaintiffs

Brian Paszamant:
Paszamant@blankrome.Com

Henry Schuelke, III:
Hschuelke@blankrome.Com

James Smith:
Smith-Jt@blankrome.Com

Christopher Tompkins:
Ctompkins@bpmlaw.Com

Attorneys for Defendants

/s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
Attorney for the United States of America

EXHIBIT "3"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal Representative of GUL RAHMAN),

Plaintiffs,

Versus

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN,

Defendants.

No. CV-15-296-JLQ
April 22, 2016
Spokane, Washington

Pages 1 - 90

TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS

BEFORE THE HONORABLE JUSTIN L. QUACKENBUSH

APPEARANCES:

For the Plaintiff:

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION
BY: La Rond Baker
Attorney at Law
901 Fifth Avenue, Suite 630
Seattle, WA 98164

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
BY: Dror Ladin
Steven M. Watt
Hina Shamsi
Attorneys at Law
125 Broad Street, 18th Floor
New York, New York 10004

MR. WARDEN: Well, yes, and we had to address that.

For example, they had requested several internal -- let's just take it in a hypothetical -- there were questions, there were requests for government documents that the government had in its possession, interrogation reports, and the like, things like that.

The government had --

THE COURT: How about --

MR. WARDEN: -- to review all that and determine what of it could be declassified and then produced --

10:36AM

THE COURT: How about the reports that were written concerning the interrogation of the plaintiffs?

MR. WARDEN: Yes, we would have to, if requests were made for that information, we would have to collect all that, review it, and determine what could be produced, consistent with national security, yes.

THE COURT: Well, I'll make that determination.

I, my -- I want you to know that, if there are government reports out there about what took place in the, "enhanced interrogation" of these plaintiffs, they're going to be produced under whatever restriction I need to impose. And that's why I'm --

10:36AM

MR. WARDEN: Sure.

THE COURT: -- asking you whether that happened in Al Shimari.

resource --

MR. WARDEN: Yes, yes.

THE COURT: -- that apparently exists in the Administrative Office.

MR. WARDEN: Well, sure.

But the government's position would be, if the government believes that the disclosure of the information is contrary to the national security interests, we would have to consider the assertion of the State secrets privilege.

10:38AM That removes the information from the Court all together, it does not go to the parties or anybody and it's just out.

Now we're, I think, a long way from that.

THE COURT: I'll make that decision, not, not the CIA.

MR. WARDEN: Absolutely. The Court has a role to play in any State secrets assertion.

But we're, I think what we should focus on today is, to the extent the Court wants to direct the parties to start jurisdictional discovery on the political question issue, I

10:39AM think guidance from the Court to, frankly, to narrow any issues of disputes, so we're not back here on discovery issues, to help out --

THE COURT: Well I --

MR. WARDEN: -- the parties and the Court, so we know where to go and what we can produce, and then we can start that

process.

THE COURT: The options that are before the Court are, commence discovery. That could include all discovery.

That could include the depositions of the defendants, the document demands, the depositions of the plaintiffs, and the decedent's family and heirs.

It seems to me that this case is in that posture where I should say, commence the discovery.

If you, whether it be a party or the Department of 10:40AM Justice, that you represent, the United States, want to object, then present the objection and I'll rule upon it.

That's why we have Courts, to make those decisions.

MR. WARDEN: Absolutely, Your Honor.

We, we agree with that. I think though, if, to the extent the Court is still focused on the political question issue, rather than opening the discovery up to a very broad set of discovery that could pose burdens on the government to focus on the --

THE COURT: I'm currently disposed to open it up to 10:40AM the commencement of discovery.

MR. WARDEN: If, if that is, if that is --

THE COURT: So I just want the input from --

MR. WARDEN: Yes.

THE COURT: -- the Justice Department --

MR. WARDEN: Yes.

that's why we have separate branches of government, counsel.

MR. WARDEN: No, absolutely.

THE COURT: And when there's a disagreement as to whether or not the government should furnish a document, that's why we have the Judiciary to make those calls.

MR. WARDEN: Absolutely, Your Honor. We completely agree with that.

And just to play this out, should we get an Touhy request, we will have to respond to it, we will produce a response.

10:45AM

If one of the parties is dissatisfied with our response, then there could be motions to compel.

We would have arguments, every side would, on whether it's relevant or burdensome or subject to protection --

THE COURT: How much of that took place in Al Shimari?

MR. WARDEN: There was a fair amount of litigation --

THE COURT: Was there --

MR. WARDEN: -- over discovery issues.

There were motions to compel related to documents.

10:45AM

There were motions to compel related to depositions of military interrogators. It involved multiple agencies. Litigation involving the Department of Defense, I believe the Department of Homeland Security.

I think all of which is to say, if discovery opens in this case it's going to be an, I think, a fairly lengthy and

EXHIBIT “4”

The Honorable Justin L. Quackenbush

Christopher W. Tompkins, WSBA #11686
Betts Patterson & Mines, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
Telephone: 206-292-9988

BLANK ROME LLP
Henry F. Schuelke III (admitted *pro hac vice*)
HSchuelke@blankrome.com
600 New Hampshire Ave NW
Washington, DC 20037

James T. Smith (admitted *pro hac vice*)
Smith-jt@blankrome.com
Brian S. Paszamant (admitted *pro hac vice*)
Paszamant@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103Attorneys for
Defendants Mitchell and Jessen

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

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-CV-286-JLQ STIPULATION RE DISCOVERY

The Court has ordered the parties to propose a plan "concerning both the procedure for discovery and scope." ECF No. 40 at 18. In response to that order, Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah (as personal representative of Gul Rahman) ("Plaintiffs"), Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants"), and the United States (collectively "the Parties"), through their respective counsel of record, stipulate:

Procedural Background

1. This case involves allegations of torture and abuse by three former detainees in the Central Intelligence Agency's ("CIA") former detention and interrogation program. The plaintiffs allege that the two defendants in the case (James Mitchell and John "Bruce" Jessen) were contractors for the CIA and, in that capacity, designed, implemented, and participated in the detention and interrogation program.

2. The United States has filed a Statement of Interest with respect to its interest in the potential for disclosure of information which implicates privileged or classified information or may otherwise impact national security.

3. Defendants moved to dismiss Plaintiffs' complaint *inter alia* for lack of subject-matter jurisdiction based on the political question doctrine and for derivative sovereign immunity ("Defendants' Motion"). Defendants' Motion was argued on April 22, 2016.

4. The Court denied Defendants' Motion. The Court instructed the Parties to propose a plan "concerning both the procedure for discovery and scope" by May 23, 2016. ECF No. 40 at 18–19.

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

Discovery

5. Discovery shall focus on (1) the roles of Defendants and others in designing, promoting, and implementing the methods alleged in the Complaint, as related to Plaintiffs, including whether Defendants "merely acted at the direction of the Government, within the scope of their authority, and that such authority was legally and validly conferred," ECF No. 40 at 14; and (2) Plaintiffs' detention, rendition, interrogation and alleged resulting injuries.

6. A primary source for this Discovery will be the United States. Such information shall be requested from the United States through *Touhy* (*United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951)) requests or such other procedure as the Parties may agree. *Touhy* requests directed to the Central Intelligence Agency and Department of Justice shall be served on counsel for the United States, who will communicate the requests to the appropriate agency contacts. In the event a party intends to submit a *Touhy* request to an agency of the United States other than the Central Intelligence Agency or Department of Justice, the party shall notify counsel for the United States, who will confer with the agency and inform the requesting party whether counsel for the United States will accept service on behalf of the agency. Upon request from a party, counsel for the United States will confer with the appropriate agency contacts and provide the requesting party with information regarding the status of any pending *Touhy* requests.

Classified Information and National Security

7. The United States asserts that Defendants possess information which is considered classified by the United States. In addition, the United States asserts that Defendants are subject to non-disclosure agreements related to their

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consulting work in connection with the former detention and interrogation program. Defendants assert that they must be able to share all information and fully confer with their counsel about their consulting work in connection with the former detention and interrogation program, including all aspects of their involvement and participation, and have a Constitutional right to do so.

8. Defendants assert that the United States must take action necessary to permit Defendants to share all information and fully confer with their counsel about their consulting work in connection with the former detention and interrogation program, which may include providing security clearances to Defendants' counsel or other actions which will enable Defendants to confer fully with their counsel. The United States has provided Defendants with classification guidance regarding the categories of information Defendants may share with their attorneys consistent with Defendants' non-disclosure agreements. The guidance explains, among other things, the categories of unclassified information concerning the CIA's former detention and interrogation program that Defendants may share with their attorneys. One of Defendants' attorneys has previously been granted a Top Secret security clearance to assist the Defendants in other matters, and the United States will consider requests by Defendants' attorneys for additional security clearances upon request, including an explanation why additional attorneys require security clearances and access to classified information.

9. The United States asserts that, although various categories of information related to the former detention and interrogation program have been declassified, other categories of information or documents that may or may not be relevant to the claims and defenses of the parties to this litigation are currently and

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properly classified pursuant to Executive Order 13526, Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009), and otherwise protected from disclosure. The United States further asserts that the disclosure of such information or documents reasonably could be expected to cause serious and in some cases exceptionally grave damage to the national security of the United States. The United States therefore reserves its right to object or to seek appropriate protections to prevent the disclosure of such information in the event it is sought by Plaintiff or Defendants in this case.

10. The following is a list of categories of information that the United States asserts is classified national security information related to the former detention and interrogation program, and therefore may not be the subject of discovery in this matter:

a. Identities of current or former CIA employees or contractors involved in the detention and interrogation program (*e.g.*, names, pseudonyms, physical descriptions, or other identifying information), with the exception of any current or former CIA employee or contractor whom the United States has officially acknowledged as associated with the detention and interrogation program.

b. The locations of CIA Stations and Bases, including facilities or detention sites used by the CIA as part of the detention and interrogation program, including the name of any country or city in which the detention site was located or information about the operation of the facility that would tend to reveal its location.

c. Identities of any foreign intelligence service, including its personnel or agents, involved in the detention and interrogation program or the

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capture, rendition, detention, or interrogation of detainees in the detention and interrogation program.

d. Identities of human intelligence sources who assisted the CIA in executing or administering the detention and interrogation program (*e.g.*, names, pseudonyms, physical descriptions, or other identifying information).

e. The content and source of information provided to detainees in the detention and interrogation program during the course of interrogations, debriefings, and interviews.

f. Names, code words, or other identifiers used in the detention and interrogation program to refer to individuals, detainees, CIA stations or bases, or CIA detention facilities.

g. Information regarding the questions posed to detainees in CIA or foreign liaison debriefing or interrogation sessions and the answers the detainees provided, including the intelligence requirements or gaps that the CIA or foreign liaison services sought to fill by questioning the detainees.

h. Information regarding the capture of detainees in the detention and interrogation program, including any involvement by a foreign liaison services.

i. Information regarding the transfer or rendition of a detainee to the extent that information would reveal a foreign liaison service's involvement in the operation or the location of the operation, including the length of any trips and the arrival, departure, layover, and final destination locations involved in the transfer.

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j. Dissemination-control information, including routing and administrative information, contained within documents that the CIA uses to track and control information.

k. Information regarding the nature of any alleged classified work performed by defendants as part of non-detention and interrogation related contracts with the CIA.

11. The United States acknowledges that the following categories of detention and interrogation program information are not classified and may be the subject of discovery, subject to appropriate objection:

a. The fact that the detention and interrogation program was a covert action program authorized by the President of the United States, and that the detention and interrogation program was authorized by a Memorandum of Notification issued by the President on September 17, 2001.

b. The names and descriptions of authorized enhanced interrogation techniques that were used in connection with the detention and interrogation program, and the specified parameters within which the interrogation techniques could be applied.

c. The authorized enhanced interrogation techniques as applied to the 119 individuals, including Plaintiffs, as described in Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody.

d. Information regarding the conditions of confinement as applied to the 119 individuals, including Plaintiffs, mentioned in

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Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody.

e. Information regarding the treatment of the 119 individuals, including Plaintiffs, mentioned in Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody, including the application of authorized enhanced interrogation techniques on the individuals.

f. Information regarding the conditions of confinement or treatment during the transfer or rendition of the 119 individuals, including Plaintiffs, mentioned in Appendix of the Executive Summary officially acknowledged to have been in CIA custody.

g. Allegations of torture, abuse, or mistreatment by the 119 individuals, including Plaintiffs, mentioned in Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody.

12. Defendants recognize the national security concerns and non-disclosure concerns expressed by the United States, and agree to explore ways in which information relevant to the claims or defenses asserted can be provided subject to the limitations expressed by the United States, including redaction of documents, the use of pseudonyms, or other methods. However, Defendants reserve the right to seek production of documents and information which the United States asserts are classified or subject to Defendants' non-disclosure agreements should Defendants and the United States not be able to reach agreement on ways in which discoverable information can be provided subject to the limitations expressed by the United States. The United States reserves its

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right to object or to seek appropriate protections to prevent the disclosure of classified, protected, or privileged information, or information subject to Defendants' non-disclosure agreements, in the event it is sought by Plaintiffs or Defendants in this case.

13. Plaintiffs assert that this litigation may proceed without the categories of information identified by the government in paragraph 10, none of which, Plaintiffs assert, is necessary to resolution of this lawsuit. Plaintiffs do not agree with the United States that all such information is properly classified. Plaintiffs specifically disagree that their own thoughts, memories, and experiences, which arise from their personal and involuntary subjection to the CIA's detention and interrogation program, may be lawfully classified or suppressed. Because Plaintiffs assert the categories of information identified by the government in paragraph 10 are unnecessary to this litigation, Plaintiffs agree to the government's restriction on using or seeking those categories of information as part of this lawsuit. Should Plaintiffs' assessment of the need in this litigation for information identified in paragraph 10 change, Plaintiffs will seek modification of this stipulation in accordance with the procedures set forth in paragraph 18.

14. Plaintiffs and Defendants agree to serve the United States with a copy of all notices of deposition and to inform the attorneys for the United States regarding the scheduling of any depositions. Attorneys for the United States and representatives from appropriate Government agencies may attend all depositions and proceedings in this case and may make objections they deem necessary to prevent the unauthorized disclosure of privileged or classified information. If an attorney for the United States asserts an

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objection to prevent the disclosure of classified, protected, or privileged information, or information subject to Defendants' non-closure agreements, the witness shall be precluded from responding to any question to which objection is made pending further order of the Court.

15. In the event the United States asserts an objection during a deposition or proceeding based on privilege or classification that precludes a witness from responding to a question, the United States and the party requesting the information shall meet and confer after the deposition or proceeding to discuss whether the requesting party intends to pursue access to the information and, if so, whether the information can be provided in an alternative form that would resolve the United States' privilege or classification objection. In the event the United States and requesting party are unable to reach an agreement on providing the requested information in an alternative form, the proper procedural vehicle for the requesting party to seek judicial relief is a motion to compel pursuant to Federal Rule of Civil Procedure 37.

16. Defendants acknowledge that they possess information which the United States contends is classified and/or subject to non-disclosure agreements with the CIA. If Defendants intend to file any pleading or serve any discovery response which contains information they reasonably believe the United States would contend is classified and/or subject to a non-disclosure obligation, Defendants shall provide the pleading or discovery response to the United States for review prior to service or filing. Defendants' disclosure of information to the United States pursuant to this review procedure shall not be deemed to waive any claim Defendants may have that the information submitted is subject to the work product protection or

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attorney-client privilege, or estop Defendants from designating the information submitted as subject to the work product protection or attorney-client privilege at a later date. The United States agrees to review the information submitted by Defendants in a reasonable period of time, recognizing that the time required for review will vary depending a variety of factors, including the volume and complexity of the information submitted as well as any upcoming litigation deadlines. In the event the United States has not completed its review within ten (10) business days, the United States shall provide Defendants with an estimated time for completion.

17. In the event information submitted by the Defendants to the United States for review is necessary for a filing or discovery response imposed by this Court or the Federal Rules of Civil Procedure, and such information is undergoing review by the United States at the time Defendants' filing or discovery response is due, Defendants' filing or discovery obligation shall be tolled during the period of time while the United States reviews Defendants' submission.

18. Any Party may seek modification of any aspect of this Stipulation by agreement of all parties, or, failing agreement, by motion to the Court.

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

DATED this 23rd day of May, 2016.

ACLU OF WASHINGTON FOUNDATION

By *s/ LaRond Baker*
LaRond Baker, WSBA #43610
lbaker@aclu-wa.org
901 Fifth Ave, Suite 630
Seattle WA 98164

Steven M. Watt, admitted *pro hac vice*
swatt@aclu.org
Dror Ladin, admitted *pro hac vice*
dladin@aclu.org
Hina Shamsi, admitted *pro hac vice*
hshamsi@aclu.org
Jameel Jaffer, admitted *pro hac vice*
jjaffer@aclu.org
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

Paul Hoffman
hoffpaul@aol.com
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291

Attorneys for Plaintiffs

BETTS, PATTERSON & MINES P.S.

By */s Christopher W. Tompkins*
Christopher W. Tompkins, WSBA #11686
Betts, Patterson & Mines, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
E-mail: ctompkins@bpmlaw.com

Henry F. Schuelke III, *pro hac vice*
hschuelke@blankrome.com
Blank Rome LLP
600 New Hampshire Ave NW
Washington, DC 20037

James T. Smith, *pro hac vice*
smith-jt@blankrome.com
Brian S. Paszamant, *pro hac vice*
paszamant@blankrome.com
Blank Rome LLP
130 N 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Steven M. Watt, admitted *pro hac vice*
swatt@aclu.org
Dror Ladin, admitted *pro hac vice*
dladin@aclu.org
Hina Shamsi, admitted *pro hac vice*
hshamsi@aclu.org
Jameel Jaffer, admitted *pro hac vice*
jjaffer@aclu.org
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

LaRond Baker
lbaker@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Ave, Suite 630
Seattle, WA 98164

Andrew L. Warden
andrew.warden@usdoj.gov
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave NW
Washington, DC 20530

Paul Hoffman
hoffpaul@aol.com
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291

By *s/ Karen Pritchard*
Karen Pritchard

EXHIBIT “5”

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, et al.,

Plaintiffs,

vs.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

No. CV-15-0286-JLQ

SCHEDULING ORDER

The court held a telephonic Scheduling Conference on July 8, 2016. Hina Shamsi, Emily Chiang, Steven Watt, and Dror Ladin appeared for Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah, with Mr. Ladin taking the lead on argument. James Smith, Brian Paszamant, Henry Schuelke, III, and Christopher Tompkins appeared for Defendants James Mitchell and John Jessen, with Mr. Tompkins taking the lead on argument. Department of Justice attorney Andrew Warden participated in the interest of the United States. This Opinion memorializes and supplements the court's oral ruling

IT IS HEREBY ORDERED:

1. **Rule 26 provisions regarding discovery, including the initial disclosure requirements, shall apply in this matter to include all ongoing discovery, subject to the dates specified in this Order. Counsel are reminded that the court views Rule 26 liberally and the parties have an obligation to disclose the good and the bad and observe an 'open file' policy with the exception of privileged materials. Violations of Rule 26 and the spirit of open discovery will result in the imposition of appropriate sanctions, including, but not limited to, the preclusion of the introduction of evidence not timely disclosed.**

2. The parties informed the court that Rule 26(a)(1) initial disclosures had already been exchanged.

3. Defense counsel expressed some concern that discovery may involve classified information. Plaintiffs' counsel does not anticipate that the discovery process is likely to involve classified information. The court discussed with counsel, including Mr. Warden, how classified information may be handled if present in this case, including possible submission to the court *in camera* and/or the use of a classified information security officer. If discovery issues arise, the parties may bring them promptly to the attention of the court by appropriate motion, and may request expedited hearing pursuant to Local Rule 7.1(h).

4. Any motion to amend pleadings or add named parties shall be filed and served no later than **November 1, 2016.**

5. Plaintiffs shall file and serve a list of expert witnesses if any, and serve Rule 26(a)(2) expert reports, on or before **November 21, 2016.** Defendants shall file and serve a list of expert witnesses if any, and serve Rule 26(a)(2) expert reports, on or before **December 12, 2016.** Any rebuttal experts shall be disclosed, and reports provided, on or before **December 30, 2016.**

6. Plaintiffs shall file and serve a final list of trial witnesses on or before **November 21, 2016.** Defendants shall file and serve a final list of trial witnesses on or before **December 12, 2016.** These lists shall contain the name, address and a summary of each witness's direct and foreseeable rebuttal testimony. Only listed witnesses may testify. These lists shall not be supplemented without leave of court to prevent manifest injustice. The party and/or attorney listing a witness who is not called to testify shall pay the discovery costs on the uncalled witnesses, including attorney fees, subject to review by the court to prevent a manifest injustice.

7. All discovery shall be completed on or before **February 17, 2017.** Interrogatories, requests for admission/production, etc. must be served sufficiently early that all responses are due before the discovery deadline. Any motion to compel discovery

shall be filed, served and heard on or before the discovery deadline.

8. All dispositive motions shall be filed and served on or before **March 31, 2017.** Response and reply briefing shall be filed and served in accordance with Local Rule 7.1. Oral argument, if requested, shall be scheduled by contacting the court's Judicial Assistant, Lee Ann Mauk, at 509-458-5280. Counsel are advised that they need not await the deadline to file a dispositive motion and should keep in mind that the date of hearing on a dispositive motion must be at least 50 days after the motion's filing per Local Rule 7.1(h)(2)(B).

9. The parties shall file no further discovery except those portions necessary to support motions.

10. Exhibit lists shall be filed and served and exhibits made available for inspection (or copies provided) on or before **May 1, 2017.** The exhibits shall not be filed. Objections to exhibits shall be filed and served on or before **May 22, 2017**, and shall be heard at the pretrial conference. All exhibits shall be pre-marked: Plaintiffs shall use numbers 1-499; Defendants shall use numbers 500 et seq.

11. Designation of substantive, as opposed to impeachment, deposition testimony of witnesses who will be unavailable to give live testimony at trial, shall be by highlighting in blue and served, **not filed**, on or before **May 1, 2017.** Cross-designations by highlighting in yellow shall be served, **not filed**, on or before **May 15, 2017.** Objections to any designated deposition testimony shall be **filed and served** on or before **May 22, 2017**, and shall be heard at the pretrial conference.

12. All unresolved substantive or evidentiary issues which may foreseeably arise during trial shall be addressed by motions in limine to be served and filed not later than **May 1, 2017**, and shall be heard and resolved at the pretrial conference.

13. Trial briefs, requested jury instructions, and requested jury voir dire shall be filed and served on or before **May 22, 2017.**

14. The pretrial conference will be held in Spokane, Washington on **June 9, 2017 at 10:00 a.m.** All unresolved motions and objections will be heard at the pretrial

conference. If an agreed pretrial order has been lodged, counsel need not appear at the pretrial conference unless unresolved motions or objections exist.

15. The jury trial shall commence at **9:00 a.m.**, on **June 26, 2017**, in Spokane, Washington.

16. The dates set by the court herein were set after consultation with counsel and with counsel's agreement. Scheduled dates will not be changed except after the granting of a motion to prevent manifest injustice.

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

DATED this 8th day of July, 2016.

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

EXHIBIT "6"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, and OBAID ULLAH, as personal representative of Gul Rahman, Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	Case No. 2:15-CV-00286-JLQ July 8, 2016 Spokane, Washington Telephonic Scheduling Conference Pages 1 - 27

BEFORE THE HONORABLE JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs:
Mr. Dror Ladin
Ms. Hina Shamsi
Mr. Steven M. Watt
Attorneys at Law
125 Broad Street, 17th Floor
New York, New York 10004

Ms. Emily Chiang
Attorney at Law
901 5th Avenue, Suite 630
Seattle, Washington 98164

For the Defendants:
Mr. Christopher W. Tompkins
Attorney at Law
701 Pike Street, Suite 1400
Seattle, Washington 98101-3927

Mr. James T. Smith
Mr. Brian S. Paszamant
Attorneys at Law
One Logan Square
130 North 18th Street
Philadelphia, Pennsylvania 19103

Mr. Henry F. Schuelke, III
Attorney at Law
600 New Hampshire Avenue NW
Washington, DC 20037

APPEARANCES (continued):

For Interested Party:

United States of America — Mr. Andrew I. Warden, Assistant U.S. Attorney, 20 Massachusetts Avenue NW, Washington, DC 20530

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Official Court Reporter: Ronelle F. Corbey, RPR, CRR, CCR, United States District Courthouse, P.O. Box 700, Spokane, Washington 99210, (509) 458-5283

Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

(Court convened on July 8, 2016, at 10:35 a.m.)

THE COURT: All right. Mr. Ladin, you're on for the plaintiff?

MR. LADIN: Yes.

THE COURT: And you have co-counsel, but you're taking the lead?

MR. LADIN: That's correct.

THE COURT: And Mr. Tompkins for the defendants?

MR. TOMPKINS: Yes, your Honor.

THE COURT: You're taking the lead?

MR. TOMPKINS: Yes, sir.

THE COURT: Mr. Warden, you're on listening to keep us out of trouble with the Government. Is that right?

MR. WARDEN: Yes, your Honor.

THE COURT: I understand this infamous contract that's so secret was finally disclosed as of July 1st?

MR. WARDEN: That is correct, your Honor. We --

THE COURT: Who's the contract with?

MR. WARDEN: I'm sorry. I didn't catch get your question.

THE COURT: Who's the contract with?

MR. WARDEN: The contracts we produced are between Mr. Mitchell and Jessen and the United States Government.

THE COURT: But by --

(Interruption by the reporter)

THE COURT: Oh, Mr. Warden, you said that?

MR. WARDEN: Yes.

THE COURT: Let me explain to you what we do on telephone conferences. Unless I'm asking for a certain person to speak -- and I assume the person taking the lead for that party is speaking -- you need to identify yourself.

Let me tell you, Mr. Tompkins, about how much trouble the defendants are in procedurally.

MR. TOMPKINS: All right, your Honor.

THE COURT: Procedurally. My order, ECF No. 51, of June 6th noted that the parties' Motion to Establish Case Management Procedures did not set forth any proposed dates or expected time frame for discovery. My order, Mr. Tompkins, said, "the parties shall" -- and I emphasize "shall" -- "file (jointly or individually) proposed dates for the following:" And I set forth all of those dates.

Despite this order, the defendants, in their response, state that the Court's "requested." You changed my order from directing to requested dates and then proceed to inform me that, due to the Government's role in discovery, they cannot provide any dates.

The net result of all that, Mr. Tompkins, is that you have not complied with the Court Order and you have not provided proposed dates; and, therefore, I'm going to conduct this scheduling order using the plaintiffs' proposed dates; and they

have complied with the Court Order and provided suggested dates.

I will -- there were no dates suggested, Mr. Ladin, for the 26(a)1 initial disclosures. Do you have any suggestion on that? That's usually something that we do up front and --

MR. LADIN: Your Honor, the parties have exchanged initial disclosures already.

THE COURT: All right. I'll make that note. I will set a deadline to amend pleadings and join parties. Mr. Ladin, you proposed December 20th. I want that moved up; and I'm going to move that up because, if we get additional parties in, I don't delay trial dates just because of the additional parties. So I propose to move that date from your request of December 20th to November 1st. Any comment on that, Mr. Ladin?

MR. LADIN: That's fine with plaintiffs, your Honor.

THE COURT: Mr. Tompkins?

MR. TOMPKINS: No comment, your Honor.

THE COURT: All right. I'll set that date.

Now, the next dates that are set in a scheduling order are the list of trial witnesses; and I call it the final list of trial witnesses. But let me explain to you my procedure. I set early dates for filing that final list of trial witnesses so that discovery can proceed in a timely and orderly basis and be completed by the date that I'm going to set, which is going to be February 17th of 2017.

You suggest, Mr. Ladin, the final list of trial witnesses

of May 25; and I can understand that you assumed that that was just notice for trial. But that's not the reason I set that date. I set that date well in advance of the discovery cutoff so that discovery can be timely completed.

Now, having in mind, Mr. Ladin, that I'm setting the discovery cutoff February 17th of 2017, I want your list of trial witnesses -- final list of trial witnesses -- well in advance of that date. As far in advance of that date as you're comfortable. Usually what I do is set the date for the plaintiffs' list of trial witnesses and, then, about 20 days thereafter the defendants' list.

So, having in mind the discovery cutoff in this case of February 17th and here we are in July of '16, how far in advance of that discovery cutoff, Mr. Ladin, do you propose that I set that witness list cutoff?

MR. LADIN: Your Honor, would a month before the discovery cutoff be too late?

THE COURT: Let me tell you my problem with that; and we'll be talking about expert witness reports, also. My problem with only a month is that, then, ten days prior to the cutoff date you get the defendants' list. Now, obviously, you'll be discovering witnesses through pretrial discovery proceedings; but the -- to say only 30 days prior to the discovery cutoff, this leads us into, then, motions to extend. And that's -- that's the trouble I have with a 30-day --

Now, if -- if there's a valid reason, Mr. Ladin, for your not being able to get that final list in sometime in mid-January, then I have to adjust these other dates -- the following dates and maybe even the trial date because I want discovery done well in advance of the dispositive motion cutoff date.

So speak now, Mr. Ladin.

MR. LADIN: Your Honor, may I have -- might I just have one minute to consult with my co-counsel? Or less than a minute. Just a few seconds?

THE COURT: Go ahead.

MR. LADIN: Thank you, your Honor.

(Discussion off the record)

MR. LADIN: Your Honor, plaintiffs would propose, then, a trial list to be given just before Thanksgiving.

THE COURT: That's not -- I don't have such a date available.

MR. LADIN: To, perhaps, November --

THE COURT: I don't have a November trial date. I'm in other Districts in November.

MR. LADIN: I see, your Honor. Not to move the trial date. I'm sorry. To -- to -- just for our proposed witness list.

THE COURT: Oh, you were talking about 2016.

MR. LADIN: Yes, your Honor.

THE COURT: Oh, I thought you were proposing to move the trial date in -- let's go back. You gave me a date of just before Thanksgiving of this year, which would --

MR. LADIN: Yes, your Honor.

THE COURT: -- which would be November 21st for the plaintiffs and December 9th for the defendants.

What say you to that, Mr. Tompkins?

MR. TOMPKINS: I wonder -- your Honor, I heard the Court say, generally, 20 days. I wonder if we might have until Monday the 12th. We will lose the Thanksgiving --

THE COURT: Okay.

MR. TOMPKINS: -- weekend.

THE COURT: Okay.

MR. TOMPKINS: But, otherwise, I heard the Court's comment about general practice and will not seek to change it.

THE COURT: I've been able to make it this far following these rules, Mr. Tompkins. Let me --

MR. TOMPKINS: That's one of the reasons I didn't seek to change it except to ask for the Monday, your Honor.

THE COURT: All right. Let me talk with you, while we're talking about witness lists -- expert witness reports. Now, with this much time in advance and -- and experts are the bane of judges like me who move cases along, or try to. It's always the expert, the doctor, is not available on -- for various reasons.

Let me just suggest that I include that those dates, November 21st and December 12th, as the cutoff dates for furnishing expert reports. And the experts' names and everything, of course, have to be in the trial witness list. Obviously, through other discovery procedures in advance of that, you can learn of any expert witnesses and request earlier expert witness reports. I'm just talking now about a cutoff date for the expert witnesses' reports.

What do you think about using those same cutoff dates, Mr. Ladin, November 21st and December 12th?

MR. LADIN: That's acceptable for plaintiff.

THE COURT: Mr. Tompkins?

MR. TOMPKINS: Your Honor, given that that has been added into the mix, I am going to ask you to extend the time slightly because we'll need to be preparing reports, potentially, in response to reports we first see on November 21st.

THE COURT: Well -- but you can learn of the plaintiffs' experts well in advance through discovery. This doesn't mean they're not to furnish in response to discovery requests. This is just a --

MR. TOMPKINS: Your Honor --

THE COURT: Go ahead.

MR. TOMPKINS: I'm sorry. I didn't mean to interrupt.

THE COURT: Go ahead.

MR. TOMPKINS: This is Chris -- Chris Tompkins, for the reporter; and I have not litigated with these attorneys, but I have experience with attorneys who would respond to discovery requests saying that such and such is their expert and he or she has not yet completed a report and it will be provided in accordance with -- with the deadlines.

But what I am asking, your Honor, is whether we could have 30 days instead of the 20 that we talked about before --

THE COURT: And --

MR. TOMPKINS: -- which would be a not atypical time for responsive expert reports in my experience.

THE COURT: And, Mr. Tompkins, when I see those types of responses, if they're unreasonable, if I sense any effort to delay the case, all you have to do is file a motion; and I'll promptly resolve it.

MR. TOMPKINS: All right.

THE COURT: So I'll set those same dates for expert witness reports.

Now, let's start talking about exhibit lists. How much of a paper chase is this case, Mr. Ladin? I sense it isn't a big paper chase case.

MR. LADIN: Your Honor, this case is extraordinary in that there's already a very, very developed public factual record. So the -- the plaintiffs don't believe that there is need for extensive paper discovery in this case given the

well-developed factual record.

THE COURT: Okay. Let me give you Exhibit List 1 to 499 with the caution don't use them unless you need to. Start your exhibit list now so that you are using the same numbers in discovery that you would at trial. That avoids that damnable problem that arises when we have different numbers.

And the defendants, 500 *et seq*. Are those adequate numbers?

MR. LADIN: As far as plaintiffs are concerned, yes, your Honor.

THE COURT: All right. Then --

MR. TOMPKINS: This is Chris Tompkins, your Honor. I think that will be fine.

THE COURT: Well, particularly since you have the benefit of the *et sequitur*.

MR. TOMPKINS: Yes.

THE COURT: That final list of trial witnesses -- oh, I'm sorry. Well, I'll finish with that -- to be served and filed on or before May 1st. Any objections to exhibits, May 22nd. Those will be heard at the pretrial conference, which is going to be June 9th of '17.

I got so tied up with the discovery cutoff dates that I failed to give that infamous dispositive motion cutoff date. As the defense has evidenced already in this case, the timely filing of dispositive motions is appropriate; well in advance of

the cutoff date.

Now, I do set a cutoff date just so that we don't get late filings. Unfortunately, we all came out of the same mold when we got that paper saying we could be a lawyer, or maybe even a judge; and we tend to wait until those cutoff dates are upon us before we take the action that could be required earlier. That's why I stress that, if you have dispositive motions -- and this case clearly will have dispositive motions other than the ones we've already ruled on, I'm going to set the cutoff date of March 30th of 2017.

Now, as I think you all know, my judicial assistant in my Spokane chambers is Lee Ann Mauk. And, to set motions for hearing -- and you must set them for hearing when you file them -- you call Ms. Mauk and get a date either for a hearing without oral argument or, if you're requesting oral argument, she'll find a date for you. So that dispositive motion cutoff is March 30th.

And I've given you the exhibit list and the objections. The trial date is June 26th; pretrial conference, June 9th; requested jury instructions, requested jury voir dire, and trial briefs, May 22nd. If there are unresolved and foreseeable substantive or evidentiary issues that would arise at trial, I want them addressed in advance by May 1st of '17; and those will be heard at the pretrial conference.

If you propose to use any deposition testimony in lieu of

the attendance of an unavailable witness, the proponent designates in blue not later than May 1st. The responding parties' cross designations in yellow by May 15th. Any objections to designated deposition testimony not later than May 22nd. Those will be heard at the pretrial conference on June 9th of 2017.

This case is staffed by Attorney Jeremy Johnson, who is the career staff attorney here in my Spokane chambers. If you have procedural questions as opposed to substantive questions, you can talk to Mr. Johnson or Ms. Mauk, the judicial assistant.

Jeremy, have I missed any dates?

LAW CLERK JEREMY JOHNSON: No, Judge.

THE COURT: All right. Let me hear from you on these dates, Mr. Ladin.

MR. LADIN: Your Honor, these dates are acceptable to the plaintiffs.

THE COURT: Okay. And, Mr. Tompkins?

MR. TOMPKINS: Yes, your Honor, those dates will be fine.

THE COURT: Okay. Let me ask you where you are with the Government and what difficulties the Government, if any, has created. They, of course, have an interest both monetary and otherwise. As I recall, and now that you have the contract, I assume the contract includes an indemnification provision, does it, Mr. Ladin? Or have you looked?

MR. LADIN: Your Honor, there is -- there is a provision for indemnification. Plaintiffs are not aware of whether it is enforced for this litigation.

THE COURT: What's the defense -- Mr. Tompkins, what's your position or if you're prepared to take one?

MR. TOMPKINS: On the issue of indemnification, your Honor?

THE COURT: Yes.

MR. TOMPKINS: Well, I will say, your Honor, Mr. Smith and I have been in trial in another matter during the period that the contracts were produced; and I have not done more than glance through them. There is an indemnity provision. I do not know whether it applies to all of the potential claims in this matter and am not prepared to take a position on that lest I make a mistake.

THE COURT: Is the contract in the name of the United States of America and does it identify any of these infamous agencies, such as, the judiciary, the CIA, the NSA? What is -- what does the contract say, Mr. Tompkins, if you've can --

MR. TOMPKINS: Well, your Honor, the -- I'm sorry.

THE COURT: Go ahead. Go ahead.

MR. TOMPKINS: There are -- the United States has produced about a hundred pages of documents as the contracts. To the extent I've had a chance to review them, they refer to the sponsor or the contracting officer; but there is a reference

to termination may be made by the director of Central Intelligence Agency or his designee. So I'm not prepared and I just have not had the chance to review them to that extent to -- to specifically say; but, clearly, the -- there's a reference to issuance by the contracting team. And we are not confident that the materials produced are actually all of the contractual agreements that were in place, and we've raised that issue with Mr. Warden; and he is, as I understand it, trying to confirm whether that is the case.

So I see that one of the contracts, at least, is indicated as being signed by the United States Government.

THE COURT: And who on behalf of the Government?

MR. TOMPKINS: Well, it just says, "Contracting Officer" and the name has been redacted.

THE COURT: Okay. And is that -- can you tell -- the CIA and NSA -- when -- I assume the Government has checked me out to make sure that my top secret clearance of almost 70 years ago is still valid, so I have no hesitancy in discussing these. But I assure you, when I had top secret clearance, there wasn't any CIA or NSA. When we went into Incheon and Wonsan Harbor, the destroyer I was running, as a junior officer I might say, we didn't have any CIA or NSA. We had the Department of the Navy and the Commander in Chief, who was at that time a fellow by the name of Harry Truman; and we had Douglas MacArthur calling the shots.

So I don't know if we're going to get into any discussions as to classified information. I don't even know if they still have the classifications that I understood. We started with "Restricted," went to "Confidential," went to "Secret," and, then, "Top Secret." Do they still have those, Mr. Warden?

MR. WARDEN: Yes, your Honor. There are currently three levels of classification.

THE COURT: Well, which one did they delete?

MR. WARDEN: From the contracts?

THE COURT: No. You say that there's three levels.

MR. WARDEN: Three levels. There's "Confidential," "Secret," and "Top Secret."

THE COURT: Oh, they did away with "Restricted."

MR. WARDEN: That's not currently a classification.

THE COURT: Okay.

MR. WARDEN: Correct.

THE COURT: All right. Do you want to speak to any of these dates, Mr. Warden?

MR. WARDEN: The dates you've set, your Honor, are acceptable to the Government.

THE COURT: Okay. Well, if you run into matters that need my attention, just -- I try to stay on top of these cases and move them along. You can call either Ms. Mauk or Mr. Johnson, Jeremy Johnson; and we'll accommodate you.

MR. TOMPKINS: Your Honor, this is Chris Tompkins.

May I ask a question in follow-up on that?

THE COURT: Sure.

MR. TOMPKINS: Does that include if we have a discovery dispute either in a deposition or on written discovery responses? Is the Court receptive to informal contact in attempts at informal resolution, or does the Court prefer that we proceed by formal motion?

THE COURT: This is so interesting, Mr. Tompkins. My staff is laughing -- the staff here in Spokane. This very morning, for the first time in my 37 years on this job, I have ordered lawyers into court for a hearing on a discovery dispute; and I -- it's so uncommon that we're not very good at it. But I'm ordering attorneys from all over the country into court on a discovery dispute that sometimes, I think, when I have set such matters, has resulted in resolution of them; but, if you do have a major discovery problem, I'll accommodate you.

MR. TOMPKINS: All right. And, your Honor, if I may ask one more question. Chris Tompkins, again, for the reporter. It's interesting that the Court mentioned the classified information issue because there is -- there are problems related to that, and I think we reference them in our -- in our noncomplying submission. And let me just note that it was not our intent to either rephrase the Court's directive or to not be in compliance, but I understand the point that the Court made.

But, your Honor, much of the -- of the documentation that

the defendants are going to need to address their defense of the case will come from the United States. Much of it, I think it's become clear from our communications with Mr. Warden, will be classified, either in whole or in part, as we get at the question of what was the defendants' role in designing the program and at whose direction they acted and with whose authority did they proceed.

And a related issue is that the United States has taken the position that our clients are in possession of classified information; that -- that the recent disclosures in the press have not changed the outline or the scope of what is or is not classified; that determining what is classified is complex and may depend on context and involve subtle nuances and distinctions and cautioned our clients not to disclose such information to counsel who don't have Top Secret classifi -- clearances.

Now, Mr. Schuelke has such a clearance, your Honor; but the other three defense counsel do not. And, so, as a result, the Court will recall that we requested an extension of time to answer the Complaint because we weren't able to confer with our clients on some of the allegations; and we're still in a posture where we cannot conduct a complete interview of our clients about the activities at issue in this case.

THE COURT: Well, how about Mr. Schuelke conducting that interview?

MR. TOMPKINS: Well, Mr. Schuelke can conduct that interview, your Honor; but, then, he could not share the information learned with the rest of us.

THE COURT: Let me ask --

MR. TOMPKINS: We've asked --

THE COURT: Mr. Tompkins --

MR. TOMPKINS: We've asked -- I'm sorry, your Honor.

THE COURT: This brings to mind a letter I got from the Federal Judicial Center when this case was assigned to me about some infamous organization within the Federal Judicial Center. And, even though I served on the United States Conference Committee in Washington, DC, the administrative body of both the Federal Judicial Center and the Administrative Office of the Courts, I was unaware that there were some -- there is some organization in the Federal Judicial Center that deals with classified information.

Have you read the Federal Judicial Center brochure on keeping government secrets, Mr. Tompkins?

MR. TOMPKINS: I have not, your Honor.

THE COURT: How about you, Mr. Ladin?

MR. LADIN: I have not seen that, your Honor.

THE COURT: It's not -- it's not a classified document. What about you, Mr. Warden? I assume you're familiar with it.

MR. WARDEN: I'm not sure I'm familiar -- this is

Andrew Warden. I'm not sure I'm familiar with the specific brochure you're -- you're speaking of.

THE COURT: Well, it's two publications: One in 2011, 2013. And one of them is entitled a *Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers*, who, apparently, are part of the Federal Judicial Center.

Have you ever dealt with one of those people, Mr. Warden?

MR. WARDEN: Yes, your Honor. The Classified Information Security Officers are actually, technically, part of the Department of Justice. They're an office within the Department of Justice that does assist with classified information filings in cases all across the country. And, so, they are personnel who do assist courts/judges to the extent cases involve classified information, criminal matters as well as sometimes civil matters, should classified information need to be produced to the Court, typically in an ex parte setting.

THE COURT: Well, apparently, they become advisors to the Court. And the conclusion in one of these books says, "... classified information securities (sic) officers" -- and this is the first time I've ever heard of them -- "help the courts meet their obligations to the parties and the government."

I guess my -- since neither Mr. Ladin or Mr. Warden (sic) are familiar with that process, do you think that this is a case

that could utilize one of those people? One or more of them, Mr. Warden?

MR. WARDEN: Again, Andrew Warden here. In the event there would need to be some disclosure to the Court of classified information, again, likely in an ex parte setting, then the court security officers would facilitate that role. For example, those officers would bring the classified information to the Court, work with the Court and its staff to arrange for appropriate storage and handling of the information; and that is, essentially, their role and -- and function.

THE COURT: How about the -- how about the court staff in the classification? Maybe there's more than I want to know. I -- I have had some experience with a case where we had a vault in the basement and limited access, and is this a case where there's going to be a suggestion -- and I don't want to delay this case if we need to get some security clearance for my staff. Is this a case where maybe it's -- if it's the judge's eyes only, it isn't a problem. But anyone have any view on whether or not there's going to be an occasion of someone saying, "Well, this is classified. You can't show it to your staff."

How about you, Mr. Tompkins? Do you foresee that?

MR. TOMPKINS: Your Honor, I certainly foresee that classified information is going to play a role and probably a large role in this litigation. And I, frankly, have very real

concerns about what information we're going to be able to receive and what we might be able to do with it if we receive it. How that might play into information being put before the Court, I can't say at this point. I could envision motions to require the United States to respond to *Touhy* requests or to set a timeline for them to respond and that might bring such information before the Court, but I'm not certain at the moment how that might play out.

THE COURT: Well, it may well be that there's classified information that the Government says it's classified and I would, then, enter an order saying, therefore, it will be furnished only to the Court; and, then, I would hear from the Government as to why it should not be furnished to the parties.

I just don't want to delay this with all this classification. You know, if it's confidential, that's different than being secret or top secret I think.

But I'm just not going to delay this case at the instance of the Government that's got a -- both, as I say, I sense a monetary and other interest in the outcome of this case.

MR. TOMPKINS: Your Honor, this is Chris Tompkins. May I ask a question related to what the Court just said?

THE COURT: Sure.

MR. TOMPKINS: One of the issues that we have, your Honor -- and it's not an issue with Mr. Warden, but it is an issue with the agencies on whose behalf -- or may be an issue

with the agencies on whose behalf he's appearing. We have -- we have served *Touhy* requests, and -- and I understand that the process involves review to identify potentially responsive documents and, then, review for actual responsiveness and classification. We don't know at the moment how long the Government is going to claim that that requires on any individual request.

Does the Court take the position that it would be able to order the Government to respond within a defined period of time if -- if there is an issue? Or that the Court is -- is in a position to address disputes as to whether a response is appropriate or -- or not?

THE COURT: Well, the case is assigned to me. I'll decide the issues, Mr. Tompkins, as they arise. And, if there's an issue, get it timely noted in a motion or other filing; and I'll give the Government a reasonable period of time. I'm not going to let the Government delay this case, and I'm not going to let the defendants delay this case because they say, well, there's classified information that need -- issues that need to be resolved. So --

MR. TOMPKINS: I appreciate -- I'm sorry. I didn't mean to interrupt.

THE COURT: That's all right. I'll -- I'll make myself available.

MR. TOMPKINS: All right. And, as a related issue,

your Honor, if we can't reach some accommodation with the Government on this classified information issue and, in particular, on our ability to interact with our clients, would the Court -- would we need to bring that to the Court with a motion? Or is there some other procedure that the Court would like --

THE COURT: No, I --

MR. TOMPKINS: -- us to file in order to speed the process? We would be interested in your guidance.

THE COURT: No, I want it by motion; and I often hear matters on an expedited basis. If you want an expedited hearing, just call Ms. Mauk; and she'll find a time for you.

MR. TOMPKINS: All right. Your Honor, would -- would the Court discuss a schedule for such a motion on this call or would that be beyond the scope of where you are prepared to go?

THE COURT: Well, if you have a motion you want to file, get it filed and request expedited hearing.

MR. TOMPKINS: All right. We'll do that.

THE COURT: All right. All right. Anything else?

MR. WARDEN: Andrew Warden from the Government, your Honor. To answer a couple of the questions you had -- you had imposed, I didn't want to interject with Mr. Tompkins. I think you had asked with respect to your law clerk or court staff being in a position to view classified information. Anyone who views classified information would need to have an appropriate

security clearance. So we can potentially contact the court security officers and be about starting that process for one of your law clerks to the extent, you know, that you want us --

THE COURT: I'm not going to put him -- I'm not going to put Mr. Johnson through that unless it's required. It may be that I will view it as the Court's eyes only.

MR. WARDEN: Very well. Very well. Our goal here, your Honor, from the Government's perspective, is to attempt to litigate this case without getting into classified information. Obviously, that involves a very burdensome, potentially time-consuming process should we have to litigate issues related to access of classified information.

THE COURT: Yeah. I'm not going to delay this case because of that. I'll address those issues promptly.

MR. WARDEN: Very good.

THE COURT: All right. We'll enter this order and send it out. Anything else?

MR. TOMPKINS: Thank you, your Honor.

THE COURT: Any other questions? Any other comments, Mr. Ladin? You've been very quiet.

MR. LADIN: Your Honor, plaintiffs have no objections to any -- any aspect of your order. We appreciate it.

THE COURT: Or any comments on all this discussion that's gone on with Mr. Tompkins and Mr. Warden?

MR. LADIN: Just that plaintiffs don't believe that

litigation of this case will necessarily involve a great deal of classified information in light of how much has already been declassified.

THE COURT: Well, that was my impression; but I'll await any specific motion.

All right. We'll send you out the order. Thanks.

MR. TOMPKINS: Thank you, your Honor.

MR. LADIN: Thank you, your Honor.

MR. WARDEN: Thank you.

THE COURT: Um-hum, thank you.

(Court adjourned at 11:16 a.m.)

C E R T I F I C A T E

I, RONELLE F. CORBEY, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Spokane, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 13th day of July, 2016.

RONELLE F. CORBEY, RPR, CSR, CRR
Official Court Reporter for the
U.S. District Court for the
Eastern District of Washington in
Spokane County, Washington

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	MISC NO.:
RELATED CASE: SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	EASTERN DISTRICT OF WASHINGTON NO. 2:15-CV-286

DECLARATION OF BRIAN S. PASZAMANT IN SUPPORT OF PETITIONERS' MOTION TO COMPEL

I, Brian S. Paszamant, hereby certify under penalty of perjury, that the following is true and correct and within my personal knowledge:

1. I am over the age of 18, have personal knowledge of all facts contained in this declaration, and am competent to testify as a witness to those facts.

2. I am one of the attorneys representing Defendants, James Elmer Mitchell and John "Bruce" Jessen (collectively, "Defendants") in the action of *Salim et al v. Mitchell et al*, pending in the Eastern District of Washington, No. 2:15-CV-286-JLQ (the "Action").

3. On June 3, 2016, I sent an email to Andrew Warden from the United States Department of Justice, Civil Division, Federal Programs Branch, who represents the interests of the United States—both the Central Intelligence Agency ("CIA") and Department of Justice ("DOJ") (collectively, the "Government")—in the Action. The email, provided at the Government's request, attached a list of subject matters claimed by the Government to be classified on which Defendants anticipated needing discovery as well as an explanation why discovery with regard to each such topic was needed. A copy of the email chain with Mr. Warden that

began on June 3, 2016 and ended June 27, 2016, without attachments, is attached hereto as **Exhibit A**.

4. On June 27, 2016, Mr. Warden responded to my June 3, 2016 email indicating that the list of topics was helpful to the Government in preparing for Defendants forthcoming *Touhy* requests and that the Government had been actively examining whether it could provide Defendants, in an unclassified manner, some of the information Defendants were seeking "whether through documents, declaration, or otherwise." Mr. Warden also indicated that the Government was unwilling to issue security clearances to me, or other members of Defendants' legal team that did not otherwise already have such clearance. *See* **Exhibit A**.

5. On June 28, 2016, pursuant to 5 U.S.C. § 301, Defendants served a *Touhy* request upon the CIA by way of Mr. Warden, who had requested Defendants to proceed by Touhy request and agreed to accept service on the CIA's behalf ("CIA *Touhy* Request"). The CIA Touhy Request contained a subpoena for production of documents ("CIA Subpoena"). A copy of the CIA *Touhy* Request is attached hereto as **Exhibit B**.

6. In a June 28, 2016 email exchange with Mr. Warden regarding the CIA *Touhy* Request, I asked Mr. Warden to provide an estimate of how long it

would take the CIA to comply with the request. Mr. Warden was unable to provide an estimate at that time. A copy of the June 28, 2016 email is attached hereto as **Exhibit C**.

7. On June 29, 2016, pursuant to 5 U.S.C. § 301, Defendants served a *Touhy* request upon the DOJ by way of Mr. Warden, who had who had requested Defendants to proceed by Touhy request and agreed to accept service on the DOJ's behalf ("DOJ *Touhy* Request"). The DOJ Touhy Request contained a subpoena for production of documents ("DOJ Subpoena"). A copy of the DOJ *Touhy* Request is attached hereto as **Exhibit D**.

8. In a June 29, 2016 email exchange with Mr. Warden regarding the DOJ *Touhy* Request, I asked Mr. Warden to provide an estimate of how long it would take the DOJ to comply with the request. Mr. Warden was unable to provide an estimate at that time. A copy of the June 29, 2016 email is attached hereto as **Exhibit E**.

9. On July 1, 2016, Mr. Warden emailed me and other counsel of record. Attached to Mr. Warden's email were redacted copies of Defendants' contracts associated with Defendants' work relating to the CIA's former detention and interrogation program. A copy of the email chain with Mr. Warden that began on

July 1, 2016 and ended on July 7, 2016, without attachments, is attached hereto as **Exhibit F**.

10. In a July 7, 2016 email exchange, Mr. Warden indicated that Defendants' contracts produced by the Government did not include internal CIA documentation contained within Defendants' CIA contract files. In response, I asked Mr. Warden when the Government anticipated producing those additional contract file documents, as those documents would be encompassed by the pending CIA *Touhy* Request. Mr. Warden has not responded to my email. *See* **Exhibit F**.

11. On July 8, 2016, the Court held a telephonic scheduling conference. All counsel of record, including Mr. Warden, participated in the conference. At the conference, the Court set a discovery deadline of February 17, 2017. Mr. Warden did not object to this deadline when asked by the Court. *See* ECF Nos. 58, 59.

12. Following the telephone conference with the Court, Mr. Warden sent an email to Defendants' counsel indicating that the Government would send written objections to the CIA and DOJ *Touhy* Requests and the corresponding subpoenas (collectively, the "Touhy Requests") on or before July 19, 2016. Mr. Warden also advised that the Government was "continuing [its] efforts to develop a plan for responding to [Defendants'] document requests," and he asked to have a

call with Defendants' counsel "[i]n light of the deadlines set by the Court today" so that agreement could be reached "regarding document production within the discovery timeframe set by the Court." A copy of the July 8, 2016 email is attached hereto as **Exhibit G**.

13. Defendants' counsel and Mr. Warden scheduled a call for July 13, 2016. In advance of the call, on July 12, 2016, Mr. Warden emailed Defendants' counsel with an informal update on the initial efforts of the CIA and DOJ to search for and produce documents in response to the *Touhy* Requests. This update detailed certain of the Government's search efforts, and indicated that the CIA would prioritize search efforts for documents responsive to Requests 29, 12, 15, 17, 18, 19, 20, 23, 24, 25, 26, and 27 of the CIA *Touhy* Request. A copy of the July 12, 2016 email is attached hereto as **Exhibit H**.

14. Mr. Warden indicated that he remained unable to provide any information as to when Defendants could anticipate receiving responsive documents, even on a rolling basis, apparently because of various factors that influence the timing of production. And, he advised that the Government would "likely be in a better position to provide [Defendants] with an initial estimate as searches are completed in the coming weeks," and explained that Defendants should expect it to take the Government "several months" to produce documents.

Mr. Warden noted that "the CIA required approximately three months to process approximately 50 documents cited in the Executive Summary report in response to a Freedom of Information Act request by the ACLU." Mr. Warden also reiterated that the Government would not be granting Defendants' counsel security clearance. *Id.*

15. On July 13, 2016, I participated in a telephone conference with Mr. Warden to discuss the Government's response to the *Touhy* Requests. During that conference we discussed the matters identified in Mr. Warden's July 12, 2016 email, and I again suggested that perhaps the CIA and/or the DOJ could begin producing documents on a rolling basis so as to keep the requested production moving. I also advised Mr. Warden that in terms of prioritizing the CIA's and/or DOJ's productions, Defendants were most interested in those documents responsive to the *Touhy* Requests that would establish the command and control structure of the CIA's former detention and interrogation program and where Defendants fit within that structure. Mr. Warden advised that he would consider these issues.

16. On July 19, 2016, the Government, through Mr. Warden, sent two letters containing formal objections to the *Touhy* Requests. Copies of the July 19, 2016 letters are attached hereto as **Exhibits I** and **J**, respectively.

17. On July 27, 2016, I responded to the Government's letter containing objections to the CIA *Touhy* Request, explaining that, in Defendants' opinion, many of the objections raised by the CIA were unfounded, and I requested that the CIA provide Defendants with legal authority, if any, to support many of the objections that it had advanced. A copy of the July 27, 2016 letter, with attachment, is attached hereto as **Exhibit K**.

18. Further, I agreed to narrow certain of the requests in light of the CIA's claim that the CIA *Touhy* Request as initially drafted was unduly burdensome, and provided an explanation why the documents sought in the now-narrowed remaining requests were relevant to the claims and defenses at issue in the Action. *Id.*

19. On August 1, 2016, I responded to the Government's letter containing objections to the DOJ *Touhy* Request, explaining that, in Defendants' opinion, many of the objections raised by the DOJ were unfounded, and I requested that the DOJ provide Defendants with legal authority, if any, to support many of the objections that it had advanced. A copy of the August 1, 2016 Letter, with attachment, is attached hereto as **Exhibit L**.

20. Further, I agreed to narrow certain of the requests in light of the DOJ's claim that the DOJ *Touhy* Request as initially drafted was unduly

burdensome, and provided an explanation why the documents sought in the now-narrowed remaining requests were relevant to the claims and defenses at issue in the Action. *Id.*

21. On August 2 and 4, 2016, the Government replied to my letters of July 27 and August 1, respectively. In these replies Mr. Warden indicated that the Government was undertaking diligent efforts to respond to the *Touhy* Requests, and had completed searches and identified documents responsive to certain of the requests. But, he also advised that because the documents that had been located may contain information considered classified, the Government remained unable to provide them to Defendants until appropriate reviews had been completed. Mr. Warden indicated that he "anticipate[d] being able to provide [Defendants] with an estimated production date for this first batch of document next week." Copies of the August 2 and 4, 2016 letters are attached hereto as **Exhibits M** and **N**, respectively.

22. Mr. Warden also advised that "[i]n [the Government's] view the extensive scope of discovery you are contemplating in this case is incompatible with the discovery timeframe established by the Court", and explained that because of the Court's deadlines, Defendants should again consider narrowing the scope of

discovery or adopt "alternative and creative options" that would make it feasible so that "the CIA can meaningfully respond" to Defendants' discovery needs. *Id.*

23. In an effort to discuss "alternative and creative" solutions to the Government's production issues, on August 8, 2016, my colleague, Henry F. Schuelke III, and I met with Mr. Warden and his colleagues at the DOJ. At that meeting, Mr. Warden proposed that, in lieu of responding to the *Touhy* Requests by producing some or all of the requested documents, the Government was considering whether it might instead provide: (a) an affidavit from a CIA FRCP 30(b)(6) witness using a pseudonym; and (b) a FRCP 30(b)(6) deposition from that same witness based upon answers to submitted written questions.

24. Mr. Schuelke and I advised that we would consider Mr. Warden's proposal and inquired when we might expect to receive a draft affidavit for consideration. Mr. Warden was unable at the time to provide an estimated date. Mr. Warden also remained unable to update us as to when Defendants could expect to receive the first set of documents responsive to the pending, narrowed *Touhy* Requests.

25. In an effort of continued cooperation and with an eye toward assisting the CIA and DOJ in understanding those subject matters, Mr. Schuelke and I also agreed to provide Mr. Warden with a list of subject matters upon which

Defendants believe they need discovery, in the form of testimony, documents, or both. It was contemplated that provision of this list would allow the Government to consider the identified subject matters and determine how to best provide Defendants' with the needed information in the least burdensome manner.

26. On August 8, 2016, I sent Mr. Warden the list discussed during the in-person meeting. I also advised Mr. Warden of Defendants' evidentiary-based concerns with the Government's proposed FRCP 30(b)(6) alternative procedure, and asked Mr. Warden to provide me with any authority that he may have to alleviate such concerns. A copy of the email chain with Warden that began on August 8, 2016 and ended on August 9, 2016, with attachment, is attached hereto as **Exhibit O**.

27. On August 9, 2016, Mr. Warden replied to my August 8, 2016 email indicating that he would give some thought to the evidentiary concerns that I raised. *See* **Exhibit O**.

28. On August 15, 2016, I emailed Mr. Warden. In that email, I advised Mr. Warden that based upon preliminary research, Defendants perceived significant evidentiary issues associated with the Government's proposed 30(b)(6) alternative and that, therefore, Defendants were unable to accept that alternative absent the Government providing legal authority to substantiate the viability of that

alternative. I also reiterated that the documents requested in the now-narrowed *Touhy* Requests were imperative to Defendants' defense. Finally, I reiterated that Defendants remained committed to amicably resolving discovery issues with the Government and limiting the burden imposed on the Government, but that without achieving a mutually agreeable resolution by mid-day August 18, Defendants' would be forced to seek relief from the Court. A copy of the August 15, 2016 email is attached hereto as **Exhibit P**.

Brian S. Paszamant /kcs
Brian S. Paszamant

Executed this 22th day of August, 2016.

Exhibit A

Paszamant, Brian

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>
Sent: Monday, June 27, 2016 10:37 AM
To: Paszamant, Brian
Cc: Schuelke III, Henry F.; Chris Tompkins
Subject: RE: Salim/Mitchell (Classified Subject Matters of Which Defendants Desire Discovery)

Brian:

Thanks again for sending the document summarizing the classified information you believe you need for your defense in this case.

We understand the document to be an outline of the general categories of potentially classified information your team wants to elicit from the Defendants (i.e., Messrs. Mitchell & Jessen) and the United States Government in discovery. With respect to eliciting the categories of information in the document from your clients, we have provided you with classification guidance that details the categories of unclassified information Defendants may share with you consistent with Defendants' non-disclosure agreements. We can confirm for you that this guidance remains accurate and that the recent disclosures of information about the CIA's former detention and interrogation program in response to Freedom of Information Act requests are consistent with this guidance.

We recognize that the classification guidance we sent you was necessarily categorical, and we understand that it may not answer every question Defendants may have about whether they may share specific information with you. Indeed, determining whether certain information about the CIA's former detention and interrogation program remains classified and, if so, at what level, is complex and often depends on the context in which the information is presented as well subtle nuances and distinctions. In order to be as helpful and cooperative as we can to enable your clients to speak with you, consistent with our duty to protect classified information from unauthorized disclosure, we are willing to provide Messrs. Mitchell & Jessen with a point of contact in the CIA who can answer specific questions they may have about the classification of specific information they want to disclose to you.

In response to your requests for security clearances from the Government in order to talk to Defendants about classified information, the Government has considered your request and has decided that it will not issue security clearances to you for purposes of litigating this case. In our view the accommodations we have provided will enable Defendants to obtain clarity on the classification of any information they wish to disclose to you at an unclassified level consistent with their non-disclosure agreements. We cannot agree to the disclosure of classified information, whether from Defendants or the United States, in the context of this case.

Security clearances are not typically granted to private attorneys in civil matters, particularly in connection with private litigation where the Government is not a party and access to classified information would not assist a governmental function, as required by Executive Order 13526. Allowing private attorneys access to and use of classified information creates an unacceptable risk of inadvertent disclosure of classified information. The risk of harm from such disclosure is heightened in this case given the sensitivity of the classified information concerning the CIA's former detention and interrogation program. Further, processing the type of Top Secret security clearances that would be required for this litigation would impose an undue burden on the Government. In addition to the cost and burden of conducting potentially lengthy background investigations, there is also the significant cost and burden associated with creating the legally required infrastructure for you to create, handle, and store classified information. For example, notes and other potentially privileged materials would have to be stored in Government Secure Compartmented Information Facilities and documents would need to be created on specialized computer equipment. The Government does not provide these resources to private litigants given the significant burdens they would impose.

With respect to eliciting information from the Government, the document you sent us is helpful for us as we begin planning for the discovery phase of this case and any forthcoming Touhy requests. Indeed, we have actively been examining whether and how we could provide you, in an unclassified manner and without undue burden, some of the information you are seeking, whether through documents, declarations, or otherwise. As we continue to work through these issues, we think it would be productive to engage in further discussions with you about the specific information you expect to request so we can attempt to reach consensus on our production of responsive information.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Warden, Andrew (CIV)
Sent: Friday, June 17, 2016 2:52 PM
To: 'Paszamant, Brian'
Cc: Schuelke III, Henry F.; Chris Tompkins
Subject: RE: Salim/Mitchell (Classified Subject Matters of Which Defendants Desire Discovery)

Brian:

Thanks for following up. Your requests have not fallen off our radar and I anticipate having a response for your next week.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Friday, June 17, 2016 12:48 PM
To: Warden, Andrew (CIV)
Cc: Schuelke III, Henry F.; Chris Tompkins
Subject: RE: Salim/Mitchell (Classified Subject Matters of Which Defendants Desire Discovery)

Andrew,

I suspect that by now you have had an opportunity to review the Court's June 15 Order, and noted the discussion therein concerning that which remains classified or has been declassified. We have also seen that as recently as yesterday additional information concerning the CIA's interrogation program has been declassified and publicly released. Could you please advise how, if at all, these developments, and any related developments, impact the list previously provided to us that identifies those subject matters that the Government claims remain classified?

Also, it has been about two weeks since we provided to you the requested list of those subject matters claimed to be classified for which we seek disclosure (and our reasons for needing disclosure), and a little longer since we discussed with you our request to have security clearances granted to me, and my co-counsel, Jim Smith and Chris Tompkins. Could you please advise where these things stand? As you no doubt saw in the Court's June 15 Order, the Court has required us to submit proposed case management deadlines no later than June 30. In the event that has not been an agreement, or at least significant movement prior to the required submission, we will likely have no choice but to address this issue in our submission as well as at the contemplated telephonic scheduling conference thereafter.

We look forward to hearing from you.

Brian

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

From: Warden, Andrew (CIV) [mailto:Andrew.Warden@usdoj.gov]
Sent: Friday, June 3, 2016 2:26 PM
To: Paszamant, Brian <Paszamant@BlankRome.com>
Cc: Schuelke III, Henry F. <HSchuelke@BlankRome.com>; Chris Tompkins <ctompkins@bpmlaw.com>
Subject: RE: Salim/Mitchell (Classified Subject Matters of Which Defendants Desire Discovery)

Brian:

Thanks very much. We'll review here and get back to you.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Friday, June 03, 2016 8:38 AM
To: Warden, Andrew (CIV)
Cc: Schuelke III, Henry F.; Chris Tompkins
Subject: Salim/Mitchell (Classified Subject Matters of Which Defendants Desire Discovery)

Andrew,

I hope that you had a nice long weekend. Following our discussion last week, my colleagues and I have spent some time considering what discovery, if any, we currently anticipate needing with regard to the subject matters that you have identified as remaining classified.

Attached for your consideration is a document listing those subject matters and briefly articulating the reason(s) behind the anticipated need. As you will see, in an effort to streamline the process, we have grafted such subject matters immediately below your formulation of those subject matters that the U.S. considers classified. Please note that our list of necessary subject matters may be supplemented as we continue to analyze our defense.

We look forward to hearing from you in terms of those subject matters that we have identified in the attached.

Brian

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

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Exhibit B

BETTS, PATTERSON & MINES P.S.
Christopher W. Tompkins (WSBA #11686)
CTompkins@bpmlaw.com
701 Pike Street, Suite 1400
Seattle, WA 98101-3927

BLANK ROME LLP
Henry F. Schuelke III (admitted *pro hac vice*)
HSchuelke@blankrome.com
600 New Hampshire Ave NW
Washington, DC 20037

James T. Smith (admitted *pro hac vice*)
Smith-jt@blankrome.com
Brian S. Paszamant (admitted *pro hac vice*)
Paszamant@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

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

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-CV-286-JLQ **AFFIDAVIT OF BRIAN S. PASZAMANT**

AFFIDAVIT OF BRIAN S. PASZAMANT

I, Brian S. Paszamant, hereby certify under penalty of perjury, that the following is true and correct and within my personal knowledge:

1. I am over the age of 18, have personal knowledge of all facts contained in this affidavit and am competent to testify as a witness to those facts.

2. I am an attorney admitted to practice in the Commonwealth of Pennsylvania and the State of New Jersey. I am a partner with the law firm of Blank Rome LLP.

3. I am one of the attorneys representing Defendants, Dr. James Mitchell and Dr. John "Bruce" Jessen (collectively, the "Defendants") in connection with the above-captioned action. I have been admitted *pro hac vice* to the United States District Court for the Eastern District of Washington for the purpose of representing Defendants in this litigation.

4. This action has been brought by three foreign nationals (the "Plaintiffs") who allege that they were detained by the United States government in connection with the United States' War on Terror in the aftermath of the September 11th attacks. Plaintiffs are seeking damages related to their alleged treatment in the Central Intelligence Agency's (the "CIA") former detention and interrogation program. Plaintiffs allege that Defendants worked as contractors for the CIA and, in that capacity, designed, implemented, and participated in the detention and interrogation program. Plaintiffs raise multiple claims for claimed violations of international law pursuant to the Alien Tort Statute and seek compensatory, punitive and exemplary damages.

5. Neither the United States nor the CIA is a party to this action.

6. While Defendants believe that this action is without merit, the action is proceeding through discovery. The United States has submitted a Statement of Interest, pursuant to 28 U.S.C. § 517, to advise the Court of the United States' interest in such discovery (the "Statement of Interest"). A copy of the Statement of Interest is attached hereto as **Exhibit 1**.

7. The Statement of Interest specifically provides that "because the United States is not a party to this case, the first step to either party in this case seeking information from the United States is for the requesting litigant to submit a so-called *Touhy* (*United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) request under the relevant agencies' governing regulations, describing the information sought so that the agency can properly consider the request." Statement of Interest at 15.

8. On May 23, 2016, the parties to the action and the United States jointly filed a "Joint Stipulation re: Discovery" in connection with the action (the "Joint Stipulation"). A copy of the Joint Stipulation is attached hereto as **Exhibit 2**.

9. The Joint Stipulation—the product of extensive negotiations between the Parties and the United States—includes a brief factual and procedural background, outlines generally the subject matters of information potentially relevant to this action which remain classified or have been declassified, and establishes certain procedures to enable the United States to protect

information that it contends remain classified. *Id.* For instance, the Joint Stipulation recognizes the Parties' and the United States' acknowledgement that discovery in this action will focus on Defendants' roles and authority in designing, promoting and implementing the methods alleged in Plaintiffs' Complaint, as well as Plaintiffs' rendition, interrogation and alleged resulting injuries, *id.* ¶ 1, that a primary source of this information will be the United States, *id.* ¶ 6, and that discovery from the United States will be secured through so-called *Touhy* requests served upon counsel for the United States, Andrew Warden. *Id.*

10. In an effort to defend themselves, Defendants have served a subpoena on the CIA to produce documents that Defendants believe will show that Plaintiffs' allegations are meritless. A copy of the subpoena is attached hereto as **Exhibit 3**.

11. The information that is requested pursuant to the enclosed subpoena is critical to the defense of Plaintiffs' allegations because, among other things, it will enable Defendants to demonstrate the following:

a. Defendants' role in the CIA's detention and interrogation program, framework and implementation.

b. That Defendants' actions/inactions were within the scope of legally and validly conferred authority.

c. That even assuming, *arguendo*, that Defendants' actions/inactions somehow fell outside the scope of legally and validly conferred authority, their actions/inactions were nevertheless known to and approved by individuals possessing higher authority.

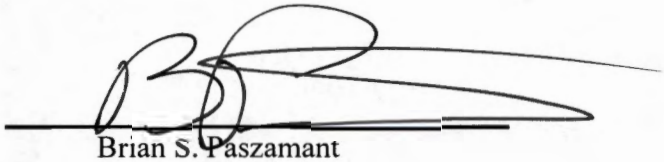
d. That whatever improper actions/inactions, if any, were taken (or not taken) vis-à-vis one or more Plaintiffs is not capable of being attributable to Defendants' direct involvement.

e. That Defendants were not present for any interrogation of two of the three Plaintiffs and had only minor involvement with regard to Gul Rahman, whose executor is the third Plaintiff.

f. That Defendants' actions/inactions did not cause, directly or indirectly, Plaintiffs' alleged injuries.

12. I present this affidavit and the accompanying subpoena in accordance with *Touhy* and the regulations promulgated thereunder for submitting a request for information to the CIA, 36 CFR 1012.5, as well as the pursuant to the procedure contemplated by the Joint Stipulation.

13. To the extent responsive information is considered by the United States to be privileged or classified, appropriate redactions, or document-handling protocols, can protect the United States and the CIA while at the same time affording Defendants information essential to mount their defense to Plaintiffs' allegations.



Brian S. Paszamant

STATE OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

On June 28 2016 before me, Brian S. Paszamant, personally appeared _____, proved to me on the basis of satisfactory evidence to be the person(s) whose name is subscribed to the within Affidavit and acknowledged to me that he/she executed the same in his/her authorized capacity, and who, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit subscribed by him/her, and that the matters stated herein are true to the best of his/her information, knowledge and belief.

I certify under PENALTY OF PERJURY under the law of the Commonwealth of Pennsylvania that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____(Notary Seal)
Signature of Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
DREW KARLBERG, Notary Public
City of Philadelphia, Phila. County
My Commission Expires April 3, 2017

EXHIBIT 1

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

ANDREW I. WARDEN (IN Bar No. 23840-49)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, *et al.*,

Plaintiffs,

v.

JAMES E. MITCHELL and JOHN JESSEN,

Defendants.

No. 2:15-CV-286-JLQ

STATEMENT OF INTEREST OF THE UNITED STATES

Motion Hearing:
April 22, 2016 at 9:00 a.m.
Spokane, Washington

INTRODUCTION

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

BACKGROUND

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

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. A submission by the United States pursuant to this provision does not constitute intervention under Rule 24 of the Federal Rules of Civil Procedure.

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

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

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

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

DISCUSSION

The United States respectfully requests that that the Court consider the interests of the United States when formulating a discovery plan and schedule in this case. This case presents a complex situation in which Defendants likely have in their knowledge or possession information that is classified, or which could tend to reveal

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

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

concerning the interrogation techniques and conditions of confinement applied to detainees in the detention and interrogation program, including Plaintiffs, is no longer classified.

Although certain categories of information about the detention and interrogation program have been declassified by the Executive Branch, other categories of information about the program remain classified and were redacted from the Executive Summary due to the damage to national security that reasonably could be expected to result from the disclosure of that information. *See* Executive Order 13526, Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009). In connection with the ongoing military commission prosecution against the five former CIA detainees accused of committing the attacks on September 11, 2001, the Government has explained that these categories include, but are not limited to: names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of detainees or specific dates regarding the same; the locations of detention sites (including the name of any country in which the detention site was allegedly located); any foreign intelligence service's involvement in the detainees' capture, transfer, detention, or interrogation; and information that would reveal details surrounding the capture of detainees other than the location and date. *See* Government's Mot. to Amend Protective Order, *United States v. Mohammed et al.*, Dkt No. AE 013RRR (U.S. Mil. Comm. Jan. 30, 2015), at www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013RRR(Gov)).pdf

The discovery requests in this case are likely to center on the operational details and internal workings of the detention and interrogation program. While the United States possesses classified information about the program, this case also presents an additional complicating factor from a discovery perspective because Defendants, by virtue of their role as CIA contractors in the program, also likely have in their knowledge and possession information belonging to the United States that is classified, or which could tend to reveal classified information, that they are prohibited from disclosing.[2] Defendants signed nondisclosure agreements with the United States that prohibit them from disclosing classified information without authorization from the United States. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 155 (1989) (per curiam) ("As a condition of obtaining access to classified information, employees in the Executive Branch are required to sign 'nondislosure agreements' that detail the employees' obligation of confidentiality and provide for penalties in the event of unauthorized disclosure."); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (stating that the CIA's non-disclosure agreement is an "entirely appropriate exercise of the CIA Director's statutory mandate to protect intelligence sources and methods from unauthorized disclosure") (internal quotations omitted). Further, various federal regulations and laws prohibit unauthorized disclosure of classified information. *See, e.g.*, 18 U.S.C. §§ 793-94; 18 U.S.C. § 798;

[2] The fact that Defendants served as CIA contractors in the detention and interrogation program is unclassified.

50 U.S.C. § 3121; Executive Order 13526. Nonetheless, this information could be the subject of discovery requests from Plaintiffs or otherwise may be called for pursuant to Fed. R. Civ. P. 26(a)(1)(A) (initial disclosures), or be relevant to certain defenses Defendants may affirmatively raise. *See, e.g.*, Detainee Treatment Act of 2005, 10 U.S.C. § 801, stat. note § 1004 (establishing a defense in any civil action for Government agents engaged in interrogation or detention practices that were officially authorized and determined to be lawful at the time they were conducted). Further, Defendants' view of whether the information they may have in their knowledge or possession is now declassified, following public release of the Executive Summary, may not be accurate or consistent with determinations made by the Executive Branch with regard to such information, and as a result, a risk exists that classified information could inadvertently be disclosed by Defendants in this litigation.

In the event discovery proceeds through this complicated landscape, including in the form of party discovery or disclosures from Defendants, important interests of the United States would be implicated. The United States has a strong interest, of course, in protecting its classified, sensitive, or privileged information from disclosure. *See* Fed. R. Civ. P. 45(d)(3)(A)(iii); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 780 (9th Cir. 1994). Indeed, the CIA has "sweeping" and "broad power to protect the secrecy and integrity of the intelligence process" in furtherance of the national security. *CIA v. Sims*, 471 U.S. 159, 169-170 (1985); *see Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007); *see also* 50 U.S.C. § 3024(i)(1)

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

Further, any decision by the Government to consider the release of intelligence information requires careful scrutiny, sometimes by multiple Government agencies. This is especially so where the significance of one item of information frequently depends upon knowledge of other items of information, the value of which cannot be appropriately considered without knowledge of the entire landscape. As the Supreme Court explained in *Sims*, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." 471 U.S. at 178 (internal citations and quotations omitted). Accordingly, the process by which the Government evaluates and responds to requests for disclosure of information related to the detention and interrogation program is highly exacting and is essential in order to deny hostile adversaries the ability to piece together bits of information that may reveal

information that remains classified. This process is certainly not typical for discovery in an ordinary civil matter.

In the event a party is dissatisfied with the Government's decisions regarding the disclosure of privileged or classified information and moves to compel access to or disclosure of such information, the Government would need sufficient time to consider whether invocation of privilege, including the state secrets privilege, would be appropriate to prevent the disclosure of the requested information. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077-84 (9th Cir. 2010) (en banc). The Supreme Court has long recognized the Government's ability to protect state secrets from disclosure in the context of civil discovery. *United States v. Reynolds*, 345 U.S. 1 (1953); *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011). The privilege allows the Government to prevent the disclosure of national security information that would otherwise be discoverable in civil litigation, where there is a "reasonable danger that compulsion of the evidence will expose [state secrets] which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10.[3] Any decision concerning whether, when, or to what extent this privilege should

[3] The privilege, where it applies, is absolute and cannot be overcome by the perceived need of a litigant to access or use the information at issue. *See Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) ("Once the privilege is properly invoked, and the court is satisfied as to the danger of divulging state secrets, the privilege is

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

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

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

government departments or agencies specifying "(i) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; [and] (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm." *Id.* at 2. The Department of Justice will only defend an assertion of the privilege in court with the personal approval of the Attorney General following review and recommendations from a committee of senior Department of Justice officials. *Id.* at 3. The Court of Appeals has emphasized the importance of this guidance. *See Mohamed*, 614 F.3d at 1080 ("Although *Reynolds* does not require review and approval by the Attorney General when a different agency head has control of the matter, such additional review by the executive branch's chief lawyer is appropriate and to be encouraged."). Given the highly significant determinations that must be made in deciding whether to assert the state secrets privilege, the Government has a strong interest in ensuring that adequate time is provided so that senior Executive Branch officials can carefully consider whether the privilege should be asserted without rushing to a hasty or inaccurate decision.

In light of these unique circumstances, this case is likely to require special procedures to protect against the disclosure of classified or privileged information belonging to the United States during party discovery, and for litigating any disputes over whether such information may be disclosed. Consequently, the United States recommends that any discovery plan entered in this case include certain special

procedures that would enable the Government to have the opportunity to review any proposed disclosure of information by Defendants during party discovery for classified or privileged information and, if necessary, to take steps to protect against disclosure. Absent such procedures, there exists a risk of unauthorized disclosure of the United States' classified or privileged information.[4]

In an effort to reach consensus on this issue, undersigned counsel for the United States has initiated discussions with the attorneys for both Plaintiffs and Defendants regarding proposed protective measures for inclusion in the discovery plan. Among the protective measures under consideration and discussion are identifying those subject areas related to the detention and interrogation program that have been declassified and those that have not, thereby enabling the parties to tailor the litigation and discovery in this case, if appropriate, to information that has been declassified and would not implicate the United States' national security interests; permitting attorneys from the Department of Justice to attend depositions and assert objections where

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[4] In describing these special procedures the United States does not waive any privileges, arguments, or defenses that it may assert to prevent disclosure of privileged information. Rather, the goal of these procedures is to provide a mechanism for the United States to assert any appropriate objections to prevent the unauthorized disclosure of privileged information and to streamline, or make as efficient as possible, any contested litigation over access to such information.

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

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

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

stage of proceedings, when the Government has not yet been served with any discovery requests, and no contested litigation is imminent, the Government does not know precisely how the discovery process against the United States will unfold, although each of the various interests discussed above would be implicated in such discovery. Where it is not a party to a suit, the United States has a strong interest in avoiding the unreasonable diversion of the Government's national security resources to satisfy the discovery demands of the parties. *See Exxon Shipping Co.*, 34 F.3d at 779 ("We acknowledge the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations."). In all events, the Government has a significant interest in ensuring that any third-party discovery proceeds in an efficient manner without the litigation itself imposing undue burdens on any agency carrying out a national security mission. To that end, because the United States is not a party to this case, the first step to either party in this case seeking information from the United States is for the requesting litigant to submit a so-called *Touhy* (*United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951)) request under the relevant agencies' governing regulations, describing the information sought so that the agency can properly consider the request. *See, e.g.*, 32 C.F.R. § 1905.4(c)-(d) (CIA); *see also In re Boeh*, 25 F.3d 761, 763-64 (9th Cir. 1994); *Exxon Shipping*

compiling their report about the detention and interrogation program. *See* Executive Summary Foreword at 4.

Co., 34 F.3d at 780 n. 11 ("Because [5 U.S.C.] § 301 provides authority for agency heads to issue rules of procedure in dealing with requests for information and testimony, an agency head will still be making the decisions on whether to comply with such requests in the first instance [prior to court review]."). As explained above, given the potential volume and complex nature of the information that is likely to be sought in this case, the Government likely will need a substantial amount of time to identify any responsive information and then determine whether and to what extent that information can be provided or whether it must object to disclosure and, if necessary, assert privilege in response to a demand for the information. In the event a decision is made to produce responsive material, the production process is likely to require additional time because the intelligence information at issue here would be required to undergo a careful review, perhaps by multiple agencies, to ensure only unclassified and non-privileged information is released.

Finally, given the Government's compelling interest in protecting classified and other sensitive or privileged information from unauthorized disclosure, the Government opposes any suggestion to create special procedures that would permit the parties or their counsel to access classified information, such as by granting private attorneys security clearances and establishing secure facilities for the exchange, storage, and review of classified information by the parties. As the Court of Appeals has recognized, "[t]he decision to grant or revoke a security clearance is committed to the discretion of the President by law." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th

Cir. 1990). There is no statutory authority that would permit or require such access in this context. For example, the Classified Information Procedures Act, 18 U.S.C. app. 3 ("CIPA"), is inapplicable in civil cases. *See* CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) ("An act to provide certain pretrial, trial and appellate procedures for criminal cases involving classified information."); *see also id.* § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."). Indeed, the application of CIPA to civil litigation would be an impermissible construction of that statute, distorting both its language and legislative rationale and ignoring the distinction between criminal and civil litigation. Unlike criminal prosecutions, where a prosecutor can choose to cease prosecution rather than disclose classified information to a criminal defendant, in civil litigation like this when a litigant seeks classified information, the Government has no ultimate control over the continuation of the case. *See Reynolds*, 345 U.S. at 12. Accordingly, it would be inappropriate in this case to attempt to devise CIPA-like procedures that would require the Government to provide private parties with access to classified or otherwise protected national security information in the context of a civil damages action, particularly one in which the Government is not a party. *See Mohamed*, 614 F.3d at 1089 (upholding privilege assertion over classified information "no matter what protective procedures the district court might employ"); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (holding that the

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

CONCLUSION

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

Dated: April 8, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice

Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Dror Ladin:
Dladin@aclu.Org

Hina Shamsi:
Hshamsi@aclu.Org

Jameel Jaffer:
Jjaffer@aclu.Org

La Rond Baker:
Lbaker@aclu-Wa.Org

Paul L Hoffman:
Hoffpaul@aol.Com

Steven Watt:
Swatt@aclu.Org

Attorneys for Plaintiffs

Brian Paszamant:
Paszamant@blankrome.Com

Henry Schuelke, III:
Hschuelke@blankrome.Com

James Smith:
Smith-Jt@blankrome.Com

Christopher Tompkins:
Ctompkins@bpmlaw.Com

Attorneys for Defendants

/s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
Attorney for the United States of America

EXHIBIT 2

The Honorable Justin L. Quackenbush

Christopher W. Tompkins, WSBA #11686
Betts Patterson & Mines, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
Telephone: 206-292-9988

BLANK ROME LLP
Henry F. Schuelke III (admitted *pro hac vice*)
HSchuelke@blankrome.com
600 New Hampshire Ave NW
Washington, DC 20037

James T. Smith (admitted *pro hac vice*)
Smith-jt@blankrome.com
Brian S. Paszamant (admitted *pro hac vice*)
Paszamant@blankrome.com
One Logan Square, 130 N. 18th Street
Philadelphia, PA 19103Attorneys for
Defendants Mitchell and Jessen

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

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	NO. 2:15-CV-286-JLQ STIPULATION RE DISCOVERY

The Court has ordered the parties to propose a plan "concerning both the procedure for discovery and scope." ECF No. 40 at 18. In response to that order, Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah (as personal representative of Gul Rahman) ("Plaintiffs"), Defendants James Elmer Mitchell and John "Bruce" Jessen ("Defendants"), and the United States (collectively "the Parties"), through their respective counsel of record, stipulate:

Procedural Background

1. This case involves allegations of torture and abuse by three former detainees in the Central Intelligence Agency's ("CIA") former detention and interrogation program. The plaintiffs allege that the two defendants in the case (James Mitchell and John "Bruce" Jessen) were contractors for the CIA and, in that capacity, designed, implemented, and participated in the detention and interrogation program.

2. The United States has filed a Statement of Interest with respect to its interest in the potential for disclosure of information which implicates privileged or classified information or may otherwise impact national security.

3. Defendants moved to dismiss Plaintiffs' complaint *inter alia* for lack of subject-matter jurisdiction based on the political question doctrine and for derivative sovereign immunity ("Defendants' Motion"). Defendants' Motion was argued on April 22, 2016.

4. The Court denied Defendants' Motion. The Court instructed the Parties to propose a plan "concerning both the procedure for discovery and scope" by May 23, 2016. ECF No. 40 at 18–19.

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

Discovery

5. Discovery shall focus on (1) the roles of Defendants and others in designing, promoting, and implementing the methods alleged in the Complaint, as related to Plaintiffs, including whether Defendants "merely acted at the direction of the Government, within the scope of their authority, and that such authority was legally and validly conferred," ECF No. 40 at 14; and (2) Plaintiffs' detention, rendition, interrogation and alleged resulting injuries.

6. A primary source for this Discovery will be the United States. Such information shall be requested from the United States through *Touhy* (*United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951)) requests or such other procedure as the Parties may agree. *Touhy* requests directed to the Central Intelligence Agency and Department of Justice shall be served on counsel for the United States, who will communicate the requests to the appropriate agency contacts. In the event a party intends to submit a *Touhy* request to an agency of the United States other than the Central Intelligence Agency or Department of Justice, the party shall notify counsel for the United States, who will confer with the agency and inform the requesting party whether counsel for the United States will accept service on behalf of the agency. Upon request from a party, counsel for the United States will confer with the appropriate agency contacts and provide the requesting party with information regarding the status of any pending *Touhy* requests.

Classified Information and National Security

7. The United States asserts that Defendants possess information which is considered classified by the United States. In addition, the United States asserts that Defendants are subject to non-disclosure agreements related to their

Betts
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Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

consulting work in connection with the former detention and interrogation program. Defendants assert that they must be able to share all information and fully confer with their counsel about their consulting work in connection with the former detention and interrogation program, including all aspects of their involvement and participation, and have a Constitutional right to do so.

8. Defendants assert that the United States must take action necessary to permit Defendants to share all information and fully confer with their counsel about their consulting work in connection with the former detention and interrogation program, which may include providing security clearances to Defendants' counsel or other actions which will enable Defendants to confer fully with their counsel. The United States has provided Defendants with classification guidance regarding the categories of information Defendants may share with their attorneys consistent with Defendants' non-disclosure agreements. The guidance explains, among other things, the categories of unclassified information concerning the CIA's former detention and interrogation program that Defendants may share with their attorneys. One of Defendants' attorneys has previously been granted a Top Secret security clearance to assist the Defendants in other matters, and the United States will consider requests by Defendants' attorneys for additional security clearances upon request, including an explanation why additional attorneys require security clearances and access to classified information.

9. The United States asserts that, although various categories of information related to the former detention and interrogation program have been declassified, other categories of information or documents that may or may not be relevant to the claims and defenses of the parties to this litigation are currently and

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(206) 292-9988

properly classified pursuant to Executive Order 13526, Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009), and otherwise protected from disclosure. The United States further asserts that the disclosure of such information or documents reasonably could be expected to cause serious and in some cases exceptionally grave damage to the national security of the United States. The United States therefore reserves its right to object or to seek appropriate protections to prevent the disclosure of such information in the event it is sought by Plaintiff or Defendants in this case.

10. The following is a list of categories of information that the United States asserts is classified national security information related to the former detention and interrogation program, and therefore may not be the subject of discovery in this matter:

a. Identities of current or former CIA employees or contractors involved in the detention and interrogation program (*e.g.*, names, pseudonyms, physical descriptions, or other identifying information), with the exception of any current or former CIA employee or contractor whom the United States has officially acknowledged as associated with the detention and interrogation program.

b. The locations of CIA Stations and Bases, including facilities or detention sites used by the CIA as part of the detention and interrogation program, including the name of any country or city in which the detention site was located or information about the operation of the facility that would tend to reveal its location.

c. Identities of any foreign intelligence service, including its personnel or agents, involved in the detention and interrogation program or the

Betts
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One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

capture, rendition, detention, or interrogation of detainees in the detention and interrogation program.

d. Identities of human intelligence sources who assisted the CIA in executing or administering the detention and interrogation program *(e.g.,* names, pseudonyms, physical descriptions, or other identifying information).

e. The content and source of information provided to detainees in the detention and interrogation program during the course of interrogations, debriefings, and interviews.

f. Names, code words, or other identifiers used in the detention and interrogation program to refer to individuals, detainees, CIA stations or bases, or CIA detention facilities.

g. Information regarding the questions posed to detainees in CIA or foreign liaison debriefing or interrogation sessions and the answers the detainees provided, including the intelligence requirements or gaps that the CIA or foreign liaison services sought to fill by questioning the detainees.

h. Information regarding the capture of detainees in the detention and interrogation program, including any involvement by a foreign liaison services.

i. Information regarding the transfer or rendition of a detainee to the extent that information would reveal a foreign liaison service's involvement in the operation or the location of the operation, including the length of any trips and the arrival, departure, layover, and final destination locations involved in the transfer.

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701 Pike Street
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(206) 292-9988

j. Dissemination-control information, including routing and administrative information, contained within documents that the CIA uses to track and control information.

k. Information regarding the nature of any alleged classified work performed by defendants as part of non-detention and interrogation related contracts with the CIA.

11. The United States acknowledges that the following categories of detention and interrogation program information are not classified and may be the subject of discovery, subject to appropriate objection:

a. The fact that the detention and interrogation program was a covert action program authorized by the President of the United States, and that the detention and interrogation program was authorized by a Memorandum of Notification issued by the President on September 17, 2001.

b. The names and descriptions of authorized enhanced interrogation techniques that were used in connection with the detention and interrogation program, and the specified parameters within which the interrogation techniques could be applied.

c. The authorized enhanced interrogation techniques as applied to the 119 individuals, including Plaintiffs, as described in Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody.

d. Information regarding the conditions of confinement as applied to the 119 individuals, including Plaintiffs, mentioned in

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Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody.

e. Information regarding the treatment of the 119 individuals, including Plaintiffs, mentioned in Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody, including the application of authorized enhanced interrogation techniques on the individuals.

f. Information regarding the conditions of confinement or treatment during the transfer or rendition of the 119 individuals, including Plaintiffs, mentioned in Appendix of the Executive Summary officially acknowledged to have been in CIA custody.

g. Allegations of torture, abuse, or mistreatment by the 119 individuals, including Plaintiffs, mentioned in Appendix 2 of the Executive Summary officially acknowledged to have been in CIA custody.

12. Defendants recognize the national security concerns and non-disclosure concerns expressed by the United States, and agree to explore ways in which information relevant to the claims or defenses asserted can be provided subject to the limitations expressed by the United States, including redaction of documents, the use of pseudonyms, or other methods. However, Defendants reserve the right to seek production of documents and information which the United States asserts are classified or subject to Defendants' non-disclosure agreements should Defendants and the United States not be able to reach agreement on ways in which discoverable information can be provided subject to the limitations expressed by the United States. The United States reserves its

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

right to object or to seek appropriate protections to prevent the disclosure of classified, protected, or privileged information, or information subject to Defendants' non-disclosure agreements, in the event it is sought by Plaintiffs or Defendants in this case.

13. Plaintiffs assert that this litigation may proceed without the categories of information identified by the government in paragraph 10, none of which, Plaintiffs assert, is necessary to resolution of this lawsuit. Plaintiffs do not agree with the United States that all such information is properly classified. Plaintiffs specifically disagree that their own thoughts, memories, and experiences, which arise from their personal and involuntary subjection to the CIA's detention and interrogation program, may be lawfully classified or suppressed. Because Plaintiffs assert the categories of information identified by the government in paragraph 10 are unnecessary to this litigation, Plaintiffs agree to the government's restriction on using or seeking those categories of information as part of this lawsuit. Should Plaintiffs' assessment of the need in this litigation for information identified in paragraph 10 change, Plaintiffs will seek modification of this stipulation in accordance with the procedures set forth in paragraph 18.

14. Plaintiffs and Defendants agree to serve the United States with a copy of all notices of deposition and to inform the attorneys for the United States regarding the scheduling of any depositions. Attorneys for the United States and representatives from appropriate Government agencies may attend all depositions and proceedings in this case and may make objections they deem necessary to prevent the unauthorized disclosure of privileged or classified information. If an attorney for the United States asserts an

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

objection to prevent the disclosure of classified, protected, or privileged information, or information subject to Defendants' non-closure agreements, the witness shall be precluded from responding to any question to which objection is made pending further order of the Court.

15. In the event the United States asserts an objection during a deposition or proceeding based on privilege or classification that precludes a witness from responding to a question, the United States and the party requesting the information shall meet and confer after the deposition or proceeding to discuss whether the requesting party intends to pursue access to the information and, if so, whether the information can be provided in an alternative form that would resolve the United States' privilege or classification objection. In the event the United States and requesting party are unable to reach an agreement on providing the requested information in an alternative form, the proper procedural vehicle for the requesting party to seek judicial relief is a motion to compel pursuant to Federal Rule of Civil Procedure 37.

16. Defendants acknowledge that they possess information which the United States contends is classified and/or subject to non-disclosure agreements with the CIA. If Defendants intend to file any pleading or serve any discovery response which contains information they reasonably believe the United States would contend is classified and/or subject to a non-disclosure obligation, Defendants shall provide the pleading or discovery response to the United States for review prior to service or filing. Defendants' disclosure of information to the United States pursuant to this review procedure shall not be deemed to waive any claim Defendants may have that the information submitted is subject to the work product protection or

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

attorney-client privilege, or estop Defendants from designating the information submitted as subject to the work product protection or attorney-client privilege at a later date. The United States agrees to review the information submitted by Defendants in a reasonable period of time, recognizing that the time required for review will vary depending a variety of factors, including the volume and complexity of the information submitted as well as any upcoming litigation deadlines. In the event the United States has not completed its review within ten (10) business days, the United States shall provide Defendants with an estimated time for completion.

17. In the event information submitted by the Defendants to the United States for review is necessary for a filing or discovery response imposed by this Court or the Federal Rules of Civil Procedure, and such information is undergoing review by the United States at the time Defendants' filing or discovery response is due, Defendants' filing or discovery obligation shall be tolled during the period of time while the United States reviews Defendants' submission.

18. Any Party may seek modification of any aspect of this Stipulation by agreement of all parties, or, failing agreement, by motion to the Court.

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

DATED this 23rd day of May, 2016.

ACLU OF WASHINGTON FOUNDATION

By *s/ LaRond Baker*
LaRond Baker, WSBA #43610
lbaker@aclu-wa.org
901 Fifth Ave, Suite 630
Seattle WA 98164

Steven M. Watt, admitted *pro hac vice*
swatt@aclu.org
Dror Ladin, admitted *pro hac vice*
dladin@aclu.org
Hina Shamsi, admitted *pro hac vice*
hshamsi@aclu.org
Jameel Jaffer, admitted *pro hac vice*
jjaffer@aclu.org
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

Paul Hoffman
hoffpaul@aol.com
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291

Attorneys for Plaintiffs

BETTS, PATTERSON & MINES P.S.

By */s Christopher W. Tompkins*
Christopher W. Tompkins, WSBA #11686
Betts, Patterson & Mines, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle WA 98101-3927
Telephone: (206) 292-9988
Facsimile: (206) 343-7053
E-mail: ctompkins@bpmlaw.com

Henry F. Schuelke III, *pro hac vice*
hschuelke@blankrome.com
Blank Rome LLP
600 New Hampshire Ave NW
Washington, DC 20037

James T. Smith, *pro hac vice*
smith-jt@blankrome.com
Brian S. Paszamant, *pro hac vice*
paszamant@blankrome.com
Blank Rome LLP
130 N 18th Street
Philadelphia, PA 19103

Attorneys for Defendants Mitchell and Jessen

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MICHAEL C. ORMSBY
United States Attorney

TERRY M. HENRY
Assistant Branch Director

s/ Andrew I. Warden
ANDREW I. WARDEN
Indiana Bar No. 23840-49
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530
Tel: (202) 616-5084
Fax: (202) 616-8470
andrew.warden@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of May, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Steven M. Watt, admitted *pro hac vice*
swatt@aclu.org
Dror Ladin, admitted *pro hac vice*
dladin@aclu.org
Hina Shamsi, admitted *pro hac vice*
hshamsi@aclu.org
Jameel Jaffer, admitted *pro hac vice*
jjaffer@aclu.org
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10007

LaRond Baker
lbaker@aclu-wa.org
ACLU of Washington Foundation
901 Fifth Ave, Suite 630
Seattle, WA 98164

Andrew L. Warden
andrew.warden@usdoj.gov
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave NW
Washington, DC 20530

Paul Hoffman
hoffpaul@aol.com
Schonbrun Seplow Harris & Hoffman, LLP
723 Ocean Front Walk, Suite 100
Venice, CA 90291

By *s/ Karen Pritchard*
Karen Pritchard

EXHIBIT 3

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

Suleiman Abdulah Salim, et. al.
Plaintiff
v.
James Elmer Mitchell and John "Bruce" Jessen
Defendant

Civil Action No. 2:15-CV-286-JLQ

(If the action is pending in another district, state where:

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Central Intelligence Agency

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attachment 1.

Place:	Date and Time:
Blank Rome LLP 600 New Hampshire Ave, NW Washington, D.C. 20037	08/01/2016 10:00 am

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 06/28/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Defendants, James Elmer Mitchell and John "Bruce" Jesssen, who issues or requests this subpoena, are:

Brian Paszamant
1 Logan Square, 130 North 18th Street, Philadelphia, PA 19103-6998
Telephone: (215) 569-5791 Email: Paszamant@blankrome.com

Civil Action No. 2:15-CV-286-JLQ

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

ATTACHMENT 1

DEFINITIONS AND INSTRUCTIONS

1. "The Defendants" refers to Dr. James Elmer Mitchell and Dr. John "Bruce" Jessen.

2. "You" and "Your" refer to the Central Intelligence Agency and each and every parent or affiliated organization subsidiary organization, agency, or unit; directors, officers, employees, attorneys, agents, servants, consultants to, contractors to, or representatives thereof.

3. "CIA" refers to the Central Intelligence Agency.

4. "Named Plaintiffs" shall mean any and all persons identified as plaintiffs in the Complaint, including:

Suleiman Abdullah Salim
Mohamed Ahmed Ben Soud (also formerly known as Mohamed Shoroeiya, Abd al-Karim)
Gul Rahman
Obaid Ullah (or "Ullah") as the personal representative of Gul Rahman's Estate

5. "Zubaydah" refers to Zayn al-Abidin Muhammad Husayn, also known as Abu Zubaydah

6. "Program" shall mean the CIA's detention and interrogation program in connection with the detention and interrogation of foreign nationals in the aftermath of September 11, 2001.

7. "Detainee" means any foreign national taken into custody by Coalition Forces, the United States, or any agency thereof, in connection with the United States' War on Terror following the attacks on September 11, 2001.

8. "CTC" refers to the CIA's Counterterrorism Center.

9. CIA's CTC Renditions Group refers to the CIA's Counterterrorism Center's Renditions Group. It is also known as the "Renditions Group," the "Renditions and Detainees Group," the "Renditions, Detentions and Interrogations Group," and by the initials, "RDI" and "RDG."

10. "SSCI Report" refers to the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program.

11. The singular shall be construed to include the plural, and vice versa, to make the request inclusive rather than exclusive.

12. The use of any verb tense shall be considered to include within its meaning all other tenses of the verb so used to make the request inclusive rather than exclusive.

13. The term "interrogation" means any process of interviewing or questioning of a detainee for the purpose of obtaining information.

14. The terms "any," "all," and "each" shall be interchangeable as necessary to call for the broadest possible response.

15. The conjunctions "and" and "or" shall be individually interpreted in every instance to mean "and/or" and shall not be interpreted disjunctively to exclude any document otherwise within the scope of any request.

16. A document that "refers" or "relates" to a specified subject matter shall include any document that constitutes, embodies, reflects, identifies, refers to, comments on, responds to, describes, analyzes, or contains information concerning, or is in any way pertinent to that subject matter.

17. Each specification with respect to production of documents should be construed independently and not by reference to any other request herein for purposes of limitation.

18. Unless otherwise indicated, the time period covered by these requests is September 11, 2001 to the present.

19. If any document requested was formerly in your possession, custody, or control and has been lost or destroyed, or has ceased to be within your control, submit in lieu of each such document a written statement which (a) describes in detail the nature of the document and its contents, (b) identifies the person who prepared or authorized the document, and if applicable, the person(s) to whom the document was sent, and (c) specifies the date on which the document was lost or destroyed, and if destroyed, the contents and the identity of the person requesting and performing the destruction.

20. Each document requested herein shall be deemed to call for the production of the original document or documents. If the original is not available, then a copy shall be produced. In addition, any copy of a document shall be produced if it differs in any respect from the original.

21. To the extent that you consider any of the following document requests objectionable, respond to each part thereof as is not objectionable in your view, and separately identify that part of the request that you find objectionable and state the grounds for each such objection.

22. Any privilege objection which you raise should be confined to that portion of the document request for which you make such a claim and shall not excuse you from otherwise responding to the request to the fullest extent possible consistent with preserving your claim of privilege.

23. If you object to any document request on grounds of privilege, identify each document with respect to which privilege is claimed, and provide the reason for withholding; a statement of facts constituting the basis for any claim of privilege or other ground of non-production; and a brief description of the document, including:

(a) the date of the document;

(b) the name of its author, authors, or individual preparing and identification by employment and title of each such person;

(c) the name of each person who was sent or has had access to, or custody of the document, together with an identification of each such person;

(d) the numbered request to which the document relates; and

(e) in the case of any document relating in any way to a meeting or conversation, identification of such meeting or conversation.

24. Documents are to be produced for inspection and copying as they are kept in the usual course of business, or organized and labeled to correspond with the categories in this request, but all documents shall be produced in accordance with a single approach.

25. In seeking information to respond to this request, you are required to examine all possible forms of storing verbal or numerical information, and your examination may not be limited to paper or other forms of "hard copy" records. In searching for non-paper sources of information, you are required to search computer or other electronic or optical forms of information storage formats.

26. "Document" is defined in the broadest terms permitted by the Federal Rules of Civil Procedure, and means, without limitation, any writings, drawings, graphs, charts, photographs, audio or phono records, and other data compilations from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form, including all drafts and non-identical copies of documents in the possession, custody, or control of Plaintiffs or their agents, employees, attorneys, investigators, or consultants.

27. The term "identity" with respect to any person means that person's full name, any alias(es), current address, phone number(s), and email address, and current work assignment and location.

28. The term "thing" is defined in the broadest terms permitted by the Federal Rules of Civil Procedure and means, without limitation, any prototype, model, specimen, commercially manufactured item or other tangible thing.

29. "Communication" means any written or oral statements, discussions, conversations, speeches, meetings, remarks, questions, answers, panel discussions and symposia, including, but not limited to, communications and statements that are face-to-face and those that are transmitted by writing or by media such as intercoms, telephones, including cellular phones,

computers, television and/or radio. "Communication" includes all transfer of information by and between any natural persons or business, corporate, governmental, or other organizational entities, or by and between representatives, employees, agents, brokers, and/or servants of any natural person or business, corporate, governmental, or other organizational entity.

30. "Person" means any natural person, any business entity (including but not limited to any partnership, firm, sole proprietorship, joint venture, association (including unincorporated associations), cooperative, trust, or corporation), or any governmental entity or department, agency, bureau, or political subdivision thereof.

31. "Privilege" as used in this document request is defined as incorporating the attorney-client privilege, any other statutory or non-statutory privileges.

REQUESTS

1. All documents relating to any contract or employment agreement entered into between one or both Defendants and the CIA related to the Program.

2. All documents relating to the design of the Program and/or the Program's intended or actual scope, including the identity of the persons who formally approved the Program's design and the basis for approval(s).

3. All documents identifying those involved in any way in the Program's design and/or the roles played by such individuals.

4. All documents relating to the structure of the Program, including the identity of the persons who formally approved the Program's structure and the basis for approval(s).

5. All documents identifying or describing those individuals for whom the Program was designed and/or intended.

6. All communications between one or both Defendants and the CIA concerning the Program.

7. All documents identifying or describing the location of a facility(ies) where any Plaintiff was detained and/or interrogated to the extent that it discloses the extent to which any

Defendant was present at such facility(ies) when any Plaintiff was in such facility(ies) or when any Plaintiff was subjected to interrogation.

8. All documents relating to:

(a) the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

(b) what Defendants were told concerning the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

(c) the scope and/or limits of one or both Defendants' authority in connection with designing, promoting, implementing and/or operating the Program;

(d) what Defendants were told concerning the scope and/or limits of his/their authority in connection with designing, promoting, implementing and/or operating the Program;

(e) the legality and/or approval of one or both Defendants' actions, contemplated actions and/or inactions in connection with the Program;

(f) what Defendants were told concerning the legality and/or approval of his/their actions, contemplated actions and/or inactions in connection with the Program;

(g) one or both Defendants' ability to refuse to comply with any action requested of him/them; and

(h) what Defendants were told concerning his/their ability to refuse to comply with any action requested of him/them.

9. All documents relating to the persons to whom Defendants reported or who controlled, requested and/or directed Defendants' activities, including the persons' names, titles and duties.

10. All documents relating to the persons in the chain of command who approved the Program and Defendants' role in the Program, including the persons' names, titles and duties.

11. All documents relating to the persons who knew of and/or approved the activities of one or both Defendants, including the persons' names, titles and duties.

12. All documents relating to the handling or treatment of any Plaintiff by one or both Defendants.

13. All documents relating to the handling or treatment of any Plaintiff by an individual other than one or both Defendants.

14. All documents relating to the operation of the facility(ies) where any Plaintiff or Defendant was located to the extent that they disclose: (1) information concerning what was or was not done to or for any Plaintiff by any Defendant; (2) what any Defendant was (or was not) permitted to do vis-à-vis any Plaintiff and why; and/or (3) what was done to any Plaintiff and why.

15. All documents relating to any Defendant's involvement, if any, in any Plaintiff's capture or rendition.

16. All documents relating to the involvement of any individual(s) other than one or both Defendants involvement in any Plaintiff's capture or rendition.

17. All documents concerning the means of each Plaintiff's capture and rendition, including physical and/or emotional techniques used and any injuries (physical and/or emotional) sustained (or thought to have been sustained) during such capture and/or rendition.

18. All documents relating to what was done, physically or emotionally, to any Plaintiff during any debriefing and/or interrogation session and the roles played by Defendants and/or others in such activities.

19. All documents relating to any written or verbal assessments or evaluations conducted by Defendants of detainee interrogations performed within the Program.

20. All documents relating to any unauthorized interrogation techniques conducted, applied or approved by Defendants during or in connection with a detainee interrogation.

21. All documents relating to one or both Defendants' involvement, if any, in Zubaydah's capture, rendition and/or interrogation.

22. All documents relating to one or both Defendants' involvement, if any, in Ridha al-Najjar's capture, rendition and/or interrogation.

23. All documents relating to Defendants' communications with the Chief of Base concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

24. All documents relating to Defendants' communications with any persons at CIA headquarters concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

25. All documents relating to Defendants' communications with CIA's inspector general, director of operations or any internal board or committee concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

26. Any reports prepared by the CIA's inspector general, director of operations or any internal board or committee in connection with a review of the circumstances of Plaintiff Rahman's death, including, but not limited to, the CIA's inspector general's report titled "Special Review of Counterterrorism Detention and Interrogation Activities."

27. All documents related to Defendants' role or participation in any CIA interrogator training courses conducted by the CIA's CTC Renditions Group.

28. The identities of the persons who led CIA interrogator training courses beginning in August 2002 through February 2011.

29. The following documents or papers referenced in the SSCI Report [where applicable, the location of the reference to the document in the SSCI Report is included in brackets]:

a. An undated paper authored by Defendants titled "*Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective*"

b. [FN 125 in SSCI Report] April 30, 2002 @ 12:02:47 PM email exchange with subject "Turning Up the Heat in the AZ Interrogations"

c. [FN 136 in SSCI Report] July 8, 2002 @ 4:15:15 PM email from __ to __ with subject: "Description of Physical Pressure"

d. [FNs 140-142 in SSCI Report] July 8, 2002 email from __ to __ subject: EYES ONLY-DRAFT

e. [FN 162 in SSCI Report] July 26, 2002 email from __ to Jose Rodriguez with subject: "EYES ONLY – Where we stand re: Abu Zubaydah"

f. [FN 137 in SSCI Report]: ALEC ____ (051724Z JUL 02)

g. [FN 250 in SSCI Report]: ALEC ___ (162135Z JUL 02)

h. [FN 257 in SSCI Report]: ____ 25107 (260903Z JUL 02)

i. [FN 2578 in SSCI Report]: _____ 10604 (091624Z AUG 02); _____ 10607 (100335Z AUG 02); August 21, 2002 email from ____ re: "[SWIGERT and DUNBAR]

j. [FN 2332 in SSCI Report]: ____ (251609Z AUG 02)1

k. [FN 326 in SSCI Report]: DIRECTOR _____ (301835Z JAN 03)

l. All cables and documents listed in FN 612 of SSCI Report

m. [FN 596 in SSCI Report]: January 28, 2003 Memorandum for Deputy Director of Operations, subject: "Death Investigation – Gul Rahman"

n. [FN 2676 in SSCI Report]: 37121 (221703Z APR 03), 37152 (231424Z APR 03)

o. [FN 2677 in SSCI Report]: 37202 (250948Z APR 03), 37508 (021305Z MAY 03)

p. [FN 659 in SSCI Report]: 38262 (150541Z MAY 03), 38161 (131326Z MAY 03)

q. [FN 664 in SSCI Report]: 38365 (170652Z MAY 03)

r. [FN 583 of SSCI Report]: _____ 39042 (_____ MAY 03); ___ 38596 (201220Z MAY 03); _____ 39582 (041743Z JUN 03); _____ 38557 (191641Z MAY 03); _____ 38597 (201225Z MAY 03); _____ 39101 _____ MAY 03)

s. All cables and documents listed in FNs 596, 603 and 607 of SSCI Report

t. [FNs 323 and 328 in SSCI Report]: June 16, 2003 emails to __ from __ re: "RDG Tasking for IC Psychologists DUNBAR and SWIGERT"

u. [FN 631 of the SSCI Report]: ____ 1271____ AUG 03; ____1267 ____ AUG 03

v. [FN 738 in SSCI Report]: May 12, 2004, Memorandum for Deputy Director for Operations from _____, Chief, Information Operations Center, and Henry Crumpton, Chief, National Resources Division via Associate Director of Operations, with the subject line "Operational Review of CIA Detainee Program"

w. [FN 609 of SSCI Report]: April 7, 2005, Briefing for Blue Ribbon Panel, CIA Rendition, Detention, and Interrogation Programs

x. [FN 2711 in SSCI Report]: April 27, 2005 CIA Inspector General, Report of Investigation, Death of Detainee (2003-7402-IG)

y. [FN 1028 in SSCI Report]: Name: Author Letter to __, attn.: DUNBAR and SWIGERT from __, Contracting Officer, re: "Confirmation of Verbal Authorization to Proceed Not to Exceed (ATP/NTE)"

z. [FN 1028 in SSCI Report]: Name: Author: March 2, 2005 email from __ to __ subject: "Next Contractual Steps with SWIGERT and DUNBAR"

aa. [FN 1028 in SSCI Report]: Name: Author: March 18, 2005 Letter from __, Chief, to __ re: "Letter Contract ___

bb. [FN 1029 in SSCI Report]: Name: Author: June 17, 2005 @ 11:08:22 email from __ to __ subject: "PCS CTC officer to __"

cc. [FN 1029 in SSCI Report]: Name: Author: July 12, 2005 @ 10:25:48 am email re: "Justification Date: 28 February 2006, Justification for other than Full and Open Competition, Contractor"

dd. [FN 1032 in SSCI Report]: March 15, 2006 "DO/CTC__/RDG Projected Staff & Contractors"

ee. [FN 994 in SSCI Report]: June 22, 2007 email to Jose Rodriguez and John Rizzo re: EIT Briefing for SecState"

ff. [FN 227 in SSCI Report]: "Memorandum for Executive Director from ___, from Deputy Director of Science and Technology re: Report and Recommendations of the Special Accountability Board Regarding the Death of Afghan Detainee Gul Rahman"

gg. [FN 37 in SSCI Report]: February 10, 2006, Memorandum for ___ CIA OFFICER, CounterTerrorist Center, National Clandestine Service, from Executive Director re: Accountability Decision

hh. [FN 873 in SSCI Report]: Report of Audit, CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification, Report No. 2005-0017-AS (6/14/06)

ii. Cables referenced in FNs 269 and 270 of the SSCI Report

jj. [FN 981 in SSCI Report]: CIA Comments on the February 2007 ICRC Report on Treatment of Fourteen "High Value Detainees" in CIA Custody

kk. Detainee Review for Suleiman Abdullah

ll. [FN 612 in SSCI Report]: ____ 387821, 38583

Exhibit C

Paszamant, Brian

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>
Sent: Tuesday, June 28, 2016 11:53 AM
To: Paszamant, Brian
Cc: Smith, James; Schuelke III, Henry F.; Chris Tompkins; Dror Ladin; Steven Watt; hoffpaul@aol.com; Jameel Jaffer; echiang@aclu-wa.org; Hina Shamsi
Subject: RE: Salim/Mitchell (Defendants' Touhy Request to CIA)

Brian:

Thanks. In accordance with our stipulation, I'll accept service on behalf of CIA. I'll need time here to confer with CIA on its response and I'll get back to you.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Tuesday, June 28, 2016 10:16 AM
To: Warden, Andrew (CIV)
Cc: Smith, James; Schuelke III, Henry F.; Chris Tompkins; Dror Ladin; Steven Watt; hoffpaul@aol.com; Jameel Jaffer; echiang@aclu-wa.org; Hina Shamsi
Subject: Salim/Mitchell (Defendants' Touhy Request to CIA)

Andrew,

Pursuant to paragraph 6 of the Stipulation re: Discovery filed in the above-referenced action, attached is Defendants' first *Touhy* request to the CIA. A copy will follow by regular mail. Could you please provide an estimate of how long it will take the CIA to comply with this *Touhy* request when you are able?

BP

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

****

Exhibit D

BLANK ROME LLP
COUNSELORS AT LAW

Phone: (215) 569-5791
Fax: (215) 832-5791
Email: Paszamant@BlankRome.com

June 29, 2016

VIA FEDERAL EXPRESS

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Request for Documents, *Salim v. Mitchell,* Civil Action No. 2:15-CV-286-JLQ (E.D. Wash.)

Dear Mr. Warden:

I represent Dr. James Mitchell and Dr. Bruce Jessen (the "Defendants") in the above-referenced action. I write to make a request for documents in the possession of the U.S. Department of Justice ("DOJ"), pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and the applicable governing regulation to submit a *Touhy* request, 28 C.F.R. Part 16, Subpart B.

Background

This action has been brought by three foreign nationals (the "Plaintiffs") who allege that they were detained by the United States government in connection with the United States' War on Terror in the aftermath of the September 11th attacks. Plaintiffs are seeking damages related to their alleged treatment in the Central Intelligence Agency's (the "CIA") former detention and interrogation program. Plaintiffs allege that Defendants worked as contractors for the CIA and, in that capacity, designed, implemented, and participated in the detention and interrogation program. Plaintiffs raise multiple claims for claimed violations of international law pursuant to the Alien Tort Statute and seek compensatory, punitive and exemplary damages.

While Defendants believe that Plaintiffs' allegations are without merit, the action is proceeding through discovery. The United States is not a party to this action; nevertheless, it has

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submitted a Statement of Interest, pursuant to 28 U.S.C. § 517, to advise the Court of its interest in such discovery (the "Statement of Interest"). The Statement of Interest specifically provides that any requests for information from the United States be submitted pursuant to a *Touhy* request under the relevant agencies' governing regulations.

Moreover, on May 23, 2016, the parties to the action and the United States jointly filed a "Joint Stipulation re: Discovery" in connection with the action (the "Joint Stipulation"). The Joint Stipulation includes a brief factual and procedural background, outlines generally the subject matters of information potentially relevant to this action which remain classified or have been declassified, and establishes certain procedures to enable the United States to protect information that it contends remain classified. The Joint Stipulation further recognizes the Parties' and the United States' acknowledgement that discovery in this action will focus on Defendants' roles and authority in designing, promoting and implementing the methods alleged in Plaintiffs' Complaint, as well as Plaintiffs' rendition, interrogation and alleged resulting injuries.

Requested Information

The enclosed subpoena requests DOJ to produce certain documents that Defendants believe will show that Plaintiffs' allegations are meritless. Among other things, the requested information will enable Defendants to demonstrate the following:

a. Defendants' role in the CIA's detention and interrogation program, framework and implementation.
b. That Defendants' actions/inactions were within the scope of legally and validly conferred authority.
c. That even assuming, arguendo, that Defendants' actions/inactions somehow fell outside the scope of legally and validly conferred authority, their actions/inactions were nevertheless known to and approved by individuals possessing higher authority.
d. That whatever improper actions/inactions, if any, were taken (or not taken) vis-à-vis one or more Plaintiffs is not capable of being attributable to Defendants' direct involvement.
e. That Defendants were not present for any interrogation of two of the three Plaintiffs and had only minor involvement with regard to Gul Rahman, whose executor is the third Plaintiff.

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f. That Defendants' actions/inactions did not cause, directly or indirectly, Plaintiffs' alleged injuries.

I believe that this request complies with all relevant regulations and will not impose an undue burden on DOJ. I am available to answer any questions you may have.

Thank you for your time and attention to this matter.

Sincerely,

Brian S. Paszamant

Enclosure

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Washington

Suleiman Abdulah Salim, et. al.
Plaintiff
v.
James Elmer Mitchell and John "Bruce" Jessen
Defendant

Civil Action No. 2:15-CV-286-JLQ

(If the action is pending in another district, state where:

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: U.S. Department of Justice

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attachment 1.

Place:	Date and Time:
Blank Rome LLP 600 New Hampshire Ave, NW Washington, D.C. 20037	08/01/2016 10:00 am

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 06/29/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Defendants
James Elmer Mitchell and John "Bruce" Jesssen, who issues or requests this subpoena, are:

Brian Paszamant
1 Logan Square, 130 North 18th Street, Philadelphia, PA 19103-6998
Telephone: (215) 569-5791 Email: Paszamant@blankrome.com

Civil Action No. 2:15-CV-286-JLQ

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

ATTACHMENT 1

DEFINITIONS AND INSTRUCTIONS

1. "The Defendants" refers to Dr. James Elmer Mitchell and Dr. John "Bruce" Jessen.

2. "You" and "Your" refer to the U.S. Department of Justice and each and every parent or affiliated organization subsidiary organization, agency, or unit; directors, officers, employees, attorneys, agents, servants, consultants to, contractors to, or representatives thereof.

3. "DOJ" refers to the U.S. Department of Justice.

4. "CIA" shall refer to the Central Intelligence Agency.

5. "Named Plaintiffs" shall mean any and all persons identified as plaintiffs in the Complaint, including:

Suleiman Abdullah Salim
Mohamed Ahmed Ben Soud (also formerly known as Mohamed Shoroeiya, Abd al-Karim)
Gul Rahman
Obaid Ullah (or "Ullah") as the personal representative of Gul Rahman's Estate

6. "Zubaydah" refers to Zayn al-Abidin Muhammad Husayn, also known as Abu Zubaydah

7. "Program" shall mean the CIA's detention and interrogation program in connection with the detention and interrogation of foreign nationals in the aftermath of September 11, 2001.

8. "Detainee" means any foreign national taken into custody by Coalition Forces, the United States, or any agency thereof, in connection with the United States' War on Terror following the attacks on September 11, 2001.

9. "CTC" refers to the CIA's Counterterrorism Center.

10. CIA's CTC Renditions Group refers to the CIA's Counterterrorism Center's Renditions Group. It is also known as the "Renditions Group," the "Renditions and Detainees Group," the "Renditions, Detentions and Interrogations Group," and by the initials, "RDI" and "RDG."

11. "SSCI Report" refers to the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program.

12. The term "interrogation" means any process of interviewing or questioning of a detainee for the purpose of obtaining information.

13. The singular shall be construed to include the plural, and vice versa, to make the request inclusive rather than exclusive.

14. The use of any verb tense shall be considered to include within its meaning all other tenses of the verb so used to make the request inclusive rather than exclusive.

15. The terms "any," "all," and "each" shall be interchangeable as necessary to call for the broadest possible response.

16. The conjunctions "and" and "or" shall be individually interpreted in every instance to mean "and/or" and shall not be interpreted disjunctively to exclude any document otherwise within the scope of any request.

17. A document that "refers" or "relates" to a specified subject matter shall include any document that constitutes, embodies, reflects, identifies, refers to, comments on, responds to, describes, analyzes, or contains information concerning, or is in any way pertinent to that subject matter.

18. Each specification with respect to production of documents should be construed independently and not by reference to any other request herein for purposes of limitation.

19. Unless otherwise indicated, the time period covered by these requests is September 11, 2001 to the present.

20. If any document requested was formerly in your possession, custody, or control and has been lost or destroyed, or has ceased to be within your control, submit in lieu of each such document a written statement which (a) describes in detail the nature of the document and its contents, (b) identifies the person who prepared or authorized the document, and if applicable, the person(s) to whom the document was sent, and (c) specifies the date on which the document was lost or destroyed, and if destroyed, the contents and the identity of the person requesting and performing the destruction.

21. Each document requested herein shall be deemed to call for the production of the original document or documents. If the original is not available, then a copy shall be produced. In addition, any copy of a document shall be produced if it differs in any respect from the original.

22. To the extent that you consider any of the following document requests objectionable, respond to each part thereof as is not objectionable in your view, and separately identify that part of the request that you find objectionable and state the grounds for each such objection.

23. Any privilege objection which you raise should be confined to that portion of the document request for which you make such a claim and shall not excuse you from otherwise responding to the request to the fullest extent possible consistent with preserving your claim of privilege.

24. If you object to any document request on grounds of privilege, identify each document with respect to which privilege is claimed, and provide the reason for withholding; a statement of facts constituting the basis for any claim of privilege or other ground of non-production; and a brief description of the document, including:

(a) the date of the document;

(b) the name of its author, authors, or individual preparing and identification by employment and title of each such person;

(c) the name of each person who was sent or has had access to, or custody of the document, together with an identification of each such person;

(d) the numbered request to which the document relates; and

(e) in the case of any document relating in any way to a meeting or conversation, identification of such meeting or conversation.

25. Documents are to be produced for inspection and copying as they are kept in the usual course of business, or organized and labeled to correspond with the categories in this request, but all documents shall be produced in accordance with a single approach.

26. In seeking information to respond to this request, you are required to examine all possible forms of storing verbal or numerical information, and your examination may not be limited to paper or other forms of "hard copy" records. In searching for non-paper sources of information, you are required to search computer or other electronic or optical forms of information storage formats.

27. "Document" is defined in the broadest terms permitted by the Federal Rules of Civil Procedure, and means, without limitation, any writings, drawings, graphs, charts, photographs, audio or phono records, and other data compilations from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form, including all drafts and non-identical copies of documents in the possession, custody, or control of Plaintiffs or their agents, employees, attorneys, investigators, or consultants.

28. The term "identity" with respect to any person means that person's full name, any alias(es), current address, phone number(s), and email address, and current work assignment and location.

29. The term "thing" is defined in the broadest terms permitted by the Federal Rules of Civil Procedure and means, without limitation, any prototype, model, specimen, commercially manufactured item or other tangible thing.

30. "Communication" means any written or oral statements, discussions, conversations, speeches, meetings, remarks, questions, answers, panel discussions and symposia, including, but not limited to, communications and statements that are face-to-face and those that are transmitted by writing or by media such as intercoms, telephones, including cellular phones,

computers, television and/or radio. "Communication" includes all transfer of information by and between any natural persons or business, corporate, governmental, or other organizational entities, or by and between representatives, employees, agents, brokers, and/or servants of any natural person or business, corporate, governmental, or other organizational entity.

31. "Person" means any natural person, any business entity (including but not limited to any partnership, firm, sole proprietorship, joint venture, association (including unincorporated associations), cooperative, trust, or corporation), or any governmental entity or department, agency, bureau, or political subdivision thereof.

32. "Privilege" as used in this document request is defined as incorporating the attorney-client privilege, any other statutory or non-statutory privileges.

REQUESTS

1. All documents relating to any contract or employment agreement entered into between one or both Defendants and the CIA related to the Program.

2. All documents relating to the design and/or approval of the Program, including documents relating to the Program's intended or actual scope, the identity of the persons who formally approved the Program's design and the basis for approval(s).

3. All documents identifying those involved in any way in the Program's design and/or the roles played by such individuals.

4. All documents relating to the structure of the Program, including the identity of the persons who formally approved the Program's structure and the basis for approval(s).

5. All documents identifying or describing those individuals for whom the Program was designed and/or intended.

6. All documents relating to specific interrogation methods or techniques proposed to or considered by DOJ in connection with the Program.

7. All documents relating to the approval by DOJ of specific interrogation methods or techniques in connection with the Program.

8. All communications between one or both Defendants and the CIA or DOJ concerning the Program.

9. All documents identifying or describing the location of a facility(ies) where any Plaintiff was detained and/or interrogated to the extent that it discloses the extent to which any Defendant was present at such facility(ies) when any Plaintiff was in such facility(ies) or when any Plaintiff was subjected to interrogation.

10. All documents relating to:

(a) the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

(b) what Defendants were told concerning the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

(c) the scope and/or limits of one or both Defendants' authority in connection with designing, promoting, implementing and/or operating the Program;

(d) what Defendants were told concerning the scope and/or limits of his/their authority in connection with designing, promoting, implementing and/or operating the Program;

(e) the legality and/or approval of one or both Defendants' actions, contemplated actions and/or inactions in connection with the Program;

(f) what Defendants were told concerning the legality and/or approval of his/their actions, contemplated actions and/or inactions in connection with the Program;

(g) one or both Defendants' ability to refuse to comply with any action requested of him/them; and

(h) what Defendants were told concerning his/their ability to refuse to comply with any action requested of him/them.

11. All documents relating to the persons to whom Defendants reported or who controlled, requested and/or directed Defendants' activities, including the persons' names, titles and duties.

12. All documents relating to the persons in the chain of command who approved the Program and Defendants' role in the Program, including the persons' names, titles and duties.

13. All documents relating to the persons who knew of and/or approved the activities of one or both Defendants, including the persons' names, titles and duties.

14. All documents relating to the handling or treatment of any Plaintiff by one or both Defendants.

15. All documents relating to the handling or treatment of any Plaintiff by an individual other than one or both Defendants.

16. All documents relating to the operation of the facility(ies) where any Plaintiff or Defendant was located to the extent that they disclose: (1) information concerning what was or was not done to or for any Plaintiff by any Defendant; (2) what any Defendant was (or was not) permitted to do vis-à-vis any Plaintiff and why; and/or (3) what was done to any Plaintiff and why.

17. All documents relating to any Defendant's involvement, if any, in any Plaintiff's capture or rendition.

18. All documents relating to the involvement of any individual(s) other than one or both Defendants involvement in any Plaintiff's capture or rendition.

19. All documents concerning the means of each Plaintiff's capture and rendition, including physical and/or emotional techniques used and any injuries (physical and/or emotional) sustained (or thought to have been sustained) during such capture and/or rendition.

20. All documents relating to what was done, physically or emotionally, to any Plaintiff during any debriefing and/or interrogation session and the roles played by Defendants and/or others in such activities.

21. All documents relating to any written or verbal assessments or evaluations conducted by Defendants of detainee interrogations performed within the Program.

22. All documents relating to any unauthorized interrogation techniques conducted, applied or approved by Defendants during or in connection with a detainee interrogation.

23. All documents relating to one or both Defendants' involvement, if any, in Zubaydah's capture, rendition and/or interrogation.

24. All documents relating to one or both Defendants' involvement, if any, in Ridha al-Najjar's capture, rendition and/or interrogation.

25. All documents relating to Defendants' communications with the Chief of Base concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

26. All documents relating to Defendants' communications with any persons at CIA headquarters concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

27. All documents relating to Defendants' communications with CIA's inspector general, director of operations or any internal board or committee concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

28. Any reports prepared by the CIA's inspector general, director of operations or any internal board or committee in connection with a review of the circumstances of Plaintiff Rahman's death, including, but not limited to, the CIA's inspector general's report titled "Special Review of Counterterrorism Detention and Interrogation Activities."

29. All documents related to Defendants' role or participation in any CIA interrogator training courses conducted by the CIA's CTC Renditions Group.

30. The identities of the persons who led CIA interrogator training courses beginning in August 2002 through February 2011.

31. The following documents or papers referenced in the SSCI Report [where applicable, the location of the reference to the document in the SSCI Report is included in brackets]:

a. An undated paper authored by Defendants titled "*Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective*"

b. [FN 125 in SSCI Report] April 30, 2002 @ 12:02:47 PM email exchange with subject "Turning Up the Heat in the AZ Interrogations"

c. [FN 136 in SSCI Report] July 8, 2002 @ 4:15:15 PM email from __ to __ with subject: "Description of Physical Pressure"

d. [FNs 140-142 in SSCI Report] July 8, 2002 email from __ to __ subject: EYES ONLY-DRAFT

e. [FN 162 in SSCI Report] July 26, 2002 email from __ to Jose Rodriguez with subject: "EYES ONLY – Where we stand re: Abu Zubaydah"

f. [FN 137 in SSCI Report]: ALEC ____ (051724Z JUL 02)

g. [FN 250 in SSCI Report]: ALEC ___ (162135Z JUL 02)

h. [FN 257 in SSCI Report]: ____ 25107 (260903Z JUL 02)

i. [FN 2578 in SSCI Report]: _____ 10604 (091624Z AUG 02); _____ 10607 (100335Z AUG 02); August 21, 2002 email from ____ re: "[SWIGERT and DUNBAR]

j. [FN 2332 in SSCI Report]: ____ (251609Z AUG 02)1

k. [FN 326 in SSCI Report]: DIRECTOR _____ (301835Z JAN 03)

l. All cables and documents listed in FN 612 of SSCI Report

m. [FN 596 in SSCI Report]: January 28, 2003 Memorandum for Deputy Director of Operations, subject: "Death Investigation – Gul Rahman"

n. [FN 2676 in SSCI Report]: 37121 (221703Z APR 03), 37152 (231424Z APR 03)

o. [FN 2677 in SSCI Report]: 37202 (250948Z APR 03), 37508 (021305Z MAY 03)

p. [FN 659 in SSCI Report]: 38262 (150541Z MAY 03), 38161 (131326Z MAY 03)

q. [FN 664 in SSCI Report]: 38365 (170652Z MAY 03)

r. [FN 583 of SSCI Report]: _____ 39042 (_____ MAY 03); ___ 38596 (201220Z MAY 03); _____ 39582 (041743Z JUN 03); _____ 38557 (191641Z MAY 03); _____ 38597 (201225Z MAY 03); _____ 39101 _____ MAY 03)

s. All cables and documents listed in FNs 596, 603 and 607 of SSCI Report

t. [FNs 323 and 328 in SSCI Report]: June 16, 2003 emails to __ from __ re: "RDG Tasking for IC Psychologists DUNBAR and SWIGERT"

u. [FN 631 of the SSCI Report]: ____ 1271____ AUG 03; ____1267 ____ AUG 03

v. [FN 738 in SSCI Report]: May 12, 2004, Memorandum for Deputy Director for Operations from _____, Chief, Information Operations Center, and Henry Crumpton, Chief, National Resources Division via Associate Director of Operations, with the subject line "Operational Review of CIA Detainee Program"

w. [FN 609 of SSCI Report]: April 7, 2005, Briefing for Blue Ribbon Panel, CIA Rendition, Detention, and Interrogation Programs

x. [FN 2711 in SSCI Report]: April 27, 2005 CIA Inspector General, Report of Investigation, Death of Detainee (2003-7402-IG)

y. [FN 1028 in SSCI Report]: Name: Author Letter to __, attn.: DUNBAR and SWIGERT from __, Contracting Officer, re: "Confirmation of Verbal Authorization to Proceed Not to Exceed (ATP/NTE)"

z. [FN 1028 in SSCI Report]: Name: Author: March 2, 2005 email from __ to __ subject: "Next Contractual Steps with SWIGERT and DUNBAR"

aa. [FN 1028 in SSCI Report]: Name: Author: March 18, 2005 Letter from __, Chief, to __ re: "Letter Contract ___

bb. [FN 1029 in SSCI Report]: Name: Author: June 17, 2005 @ 11:08:22 email from __ to __ subject: "PCS CTC officer to __"

cc. [FN 1029 in SSCI Report]: Name: Author: July 12, 2005 @ 10:25:48 am email re: "Justification Date: 28 February 2006, Justification for other than Full and Open Competition, Contractor"

dd. [FN 1032 in SSCI Report]: March 15, 2006 "DO/CTC__/RDG Projected Staff & Contractors"

ee. [FN 994 in SSCI Report]: June 22, 2007 email to Jose Rodriguez and John Rizzo re: EIT Briefing for SecState"

ff. [FN 227 in SSCI Report]: "Memorandum for Executive Director from ___, from Deputy Director of Science and Technology re: Report and Recommendations of the Special Accountability Board Regarding the Death of Afghan Detainee Gul Rahman"

gg. [FN 37 in SSCI Report]: February 10, 2006, Memorandum for ___ CIA OFFICER, CounterTerrorist Center, National Clandestine Service, from Executive Director re: Accountability Decision

hh. [FN 873 in SSCI Report]: Report of Audit, CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification, Report No. 2005-0017-AS (6/14/06)

ii. Cables referenced in FNs 269 and 270 of the SSCI Report

jj. [FN 981 in SSCI Report]: CIA Comments on the February 2007 ICRC Report on Treatment of Fourteen "High Value Detainees" in CIA Custody

kk. Detainee Review for Suleiman Abdullah

ll. [FN 612 in SSCI Report]: ____ 387821, 38583

Exhibit E

Paszamant, Brian

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>
Sent: Wednesday, June 29, 2016 6:08 PM
To: Paszamant, Brian
Cc: Smith, James; Schuelke III, Henry F.; Chris Tompkins; Dror Ladin; Steven Watt; hoffpaul@aol.com; Jameel Jaffer; echiang@aclu-wa.org; Hina Shamsi
Subject: RE: Salim/Mitchell (Defendants' Touhy Request to DOJ)

Brian:

Thanks. I have received your request and I'll get back to you.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Wednesday, June 29, 2016 1:25 PM
To: Warden, Andrew (CIV)
Cc: Smith, James; Schuelke III, Henry F.; Chris Tompkins; Dror Ladin; Steven Watt; hoffpaul@aol.com; Jameel Jaffer; echiang@aclu-wa.org; Hina Shamsi
Subject: Salim/Mitchell (Defendants' Touhy Request to DOJ)

Andrew,

Pursuant to paragraph 6 of the Stipulation re: Discovery filed in the above-referenced action, attached is Defendants' first *Touhy* request to the DOJ. A copy will follow by regular mail. Could you please provide an estimate of how long it will take the DOJ to comply with this *Touhy* request when you are able?

BP

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

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Exhibit F

Paszamant, Brian

From: Paszamant, Brian
Sent: Thursday, July 7, 2016 8:45 PM
To: 'Warden, Andrew (CIV)'
Cc: Schuelke III, Henry F.; Smith, James; Chris Tompkins; Rosenthal, Jeffrey
Subject: RE: Salim v. Mitchell - Contracts

Andrew,

Thank you for the clarification. We would like a copy of the additional materials contained in the contract files that you reference below. It would seem to us that such materials would be encompassed within the *Touhy* request that we previously served upon the CIA. If you believe otherwise and would prefer a new *Touhy* request specifically seeking these materials, please advise, and we will prepare and serve such a request.

Thank you in advance.

Brian

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

From: Warden, Andrew (CIV) [mailto:Andrew.Warden@usdoj.gov]
Sent: Thursday, July 7, 2016 5:09 PM
To: Paszamant, Brian
Cc: Schuelke III, Henry F.; Smith, James; Chris Tompkins; Rosenthal, Jeffrey
Subject: RE: Salim v. Mitchell - Contracts

Brian:

Thanks for following up. The CIA conducted a reasonable search of its contract records to locate the contracts governing Messrs. Mitchell and Jessen's work on the CIA's former detention and interrogation program during the time of Plaintiffs' detention by the CIA. This process included, among other things, a search of multiple offices within CIA that handle contract and procurement matters. The potentially relevant documents collected as a result of this search process totaled several hundred pages, as stated in the Government's May 23, 2016 filing. As the documents were reviewed, the CIA identified that the documents included both the actual contracts and internal CIA documentation in the contract files. The CIA's review process, therefore, sought to determine which documents constituted the actual contracts as opposed to documents that were part of the CIA's own internal agency files, but not part of the contracts. Once the actual contracts were identified, the CIA had the contracts reviewed for classification, redacted where appropriate, and then produced to you.

In response to your email below regarding Mr. Mitchell's assertion about the existence of a handwritten contract, the CIA is currently in the process of conducting a follow-up inquiry about that potential document. I anticipating having more information for you next week.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Tuesday, July 05, 2016 11:20 AM
To: Warden, Andrew (CIV)
Cc: Schuelke III, Henry F.; Smith, James; Chris Tompkins; Rosenthal, Jeffrey
Subject: RE: Salim v. Mitchell - Contracts

Andrew,

Thank you. In the government's 5/23 filing, the government advised that my clients' contracts with the CIA totaled several hundred pages. What you produced on Friday totals about 100 pages. Also, my client, Jim Mitchell, advises that one of his earlier contracts with the CIA was handwritten. This contract does not appear to be contained within Friday's production. Is there additional production of contracts forthcoming?

BP

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

From: Warden, Andrew (CIV) [mailto:Andrew.Warden@usdoj.gov]
Sent: Friday, July 1, 2016 3:06 PM
To: ctompkins@bpmlaw.com; Schuelke III, Henry F. <HSchuelke@BlankRome.com>; Smith, James <Smith-jt@BlankRome.com>; Paszamant, Brian <Paszamant@BlankRome.com>; echiang@aclu-wa.org; swatt@aclu.org; dladin@aclu.org; hshamsi@aclu.org; jjaffer@aclu.org; hoffpaul@aol.com
Subject: Salim v. Mitchell - Contracts

Dear Counsel:

Please find attached copies of the contracts governing Messrs. Mitchell and Jessen's work on the CIA's former detention and interrogation program during the time of Plaintiffs' detention by the CIA. The contracts, as redacted, are unclassified and approved for public release. There are no restrictions on their distribution.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

****

Exhibit G

Paszamant, Brian

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>
Sent: Friday, July 8, 2016 4:14 PM
To: Paszamant, Brian
Cc: Schuelke III, Henry F.; Smith, James; Chris Tompkins; Rosenthal, Jeffrey
Subject: Salim - Subpoena/Touhy Follow-Up

Brian:

Following up on the subpoenas and Touhy requests for documents that you sent last week to DoJ and CIA, I am writing to seek your agreement that the Government may send any written objections to the subpoenas under Rule 45 on or before July 19, 2016. Although we intend to send an objection letter to the subpoenas in order to preserve any objections we may have, we emphasize that we are continuing our efforts to develop a plan for responding to your document requests. In light of the deadlines set by the Court today, I think it would be beneficial to have discussion with you and your team next week in a cooperative effort to seek agreement regarding document production within the discovery timeframe set by the Court.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

Exhibit H

Paszamant, Brian

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>
Sent: Tuesday, July 12, 2016 4:36 PM
To: Paszamant, Brian
Cc: Schuelke III, Henry F.; Smith, James; Chris Tompkins; Rosenthal, Jeffrey
Subject: RE: Salim - Subpoena/Touhy Follow-Up

Brian:

In advance of our phone call on Wednesday morning, I'm writing to give you an informal update on the initial efforts of CIA and DOJ to search for and produce documents in response to the *Touhy* requests and subpoenas you served on June 28 and 29, 2016, respectively. This is without prejudice to any written objections to the subpoenas under Rule 45 that we will serve on or before July 19, 2016, but is intended to give you some initial thoughts on what we believe may be an appropriate way ahead with respect to some of the information you seek.

The CIA request generally seeks "all documents" in possession of the CIA in 28 different categories since September 11, 2001, as well as approximately 70 specific documents cited in Senate Select Committee on Intelligence's (SSCI) Executive Summary report on the CIA's former detention and interrogation program. As a non-party to the case, the CIA is concerned about the scope and breadth of the document requests, including, among other things, the time and burden required to conduct appropriate searches for the documents, to review the documents for relevance, to undertake privilege and classification reviews, and the risks of inadvertent disclosure of classified or privileged information in connection with this review and production process. At the same time, the CIA wants to work with you in a cooperative manner and its goal is to supply, to the extent feasible, the information Defendants need to litigate this case in an unclassified manner and without compromising national security interests or imposing an undue burden on the CIA.

Since receiving your *Touhy* request and subpoena, the CIA has actively been exploring ways to meet this goal with respect to your document requests. Specifically, the CIA has begun its search for documents with request #29, the request for specific documents cited in the Executive Summary report, with one exception. Document "KK" titled "Detainee Review for Suleiman Abdullah" is not part of the SSCI Executive Summary; rather it is part of the SSCI's Full Report, which is a congressional record. We believe request #29 is an appropriate place to begin because it is narrowly tailored to seek specific documents that likely can be located without imposing an undue burden, although the CIA reserves all rights to withhold these documents, including on the grounds of undue burden. We also believe the documents in this request represent an appropriate sampling of CIA documents both in form (*e.g.*, formal reports, emails, cables) and in subject matter (detainee information, program development, legal authorizations) related to the CIA's former detention and interrogation program. Therefore, any responsive documents we produce in response to request #29 will likely provide you with a representative sample of the type of information we are able to provide at an unclassified level in response to other requests for similar information and will help inform how best to proceed with respect to other requests.

In addition to request #29, the CIA also intends to prioritize searches for documents responsive to document request numbers: 12, 15, 17, 18, 19, 20, 23, 24, 25, 26, and 27, subject to appropriate objections. We have chosen to prioritize these searches based on the anticipated feasibility of conducting searches for this information as well as the anticipated volume of documents responsive to these requests. Again, CIA reserves all rights to withhold any documents responsive to these requests, including on the grounds of undue burden.

At this time we are not in a position to provide an estimate with respect to timing for production of documents responsive to these requests. The timing of production depends on a number of factors, including the volume and complexity of responsive information to be reviewed. We will likely be in a better position to provide you with an initial estimate as searches are completed in the coming weeks. As a comparison, however, the CIA required approximately three months to process approximately 50 documents cited in the Executive Summary report in response to a Freedom of Information Act request by the ACLU. The time required to process the 12 above-described requests, which seek 70 documents cited in the Executive Summary as well additional categories of documents, is also likely to require several months.

With respect to the *Touhy* request and subpoena you served on DOJ, we have similar concerns about the breadth of your 31 document requests and the burdens associated with responding to them. We have, however, reviewed the

requests carefully and we have identified that 28 of the 31 requests to DOJ are also included in the CIA request and appear more properly directly to CIA. Accordingly, DOJ has chosen to prioritize its efforts on the three DOJ-specific document requests (#6-8). To that end, we are in the process of identifying final legal advice that DOJ's Office of Legal Counsel issued to CIA regarding the legality of CIA's detention and interrogation program. Once we have a better idea of the volume and type of documents at issue, we'll provide you with an estimated date for production. DOJ also reserves all rights to withhold any documents responsive to these requests, including on the grounds of undue burden.

Finally, in response to your question below regarding security clearances, the Government's position remains the same as explained in my June 27, 2016 e-mail.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Friday, July 08, 2016 4:26 PM
To: Warden, Andrew (CIV)
Cc: Schuelke III, Henry F.; Smith, James; Chris Tompkins; Rosenthal, Jeffrey
Subject: RE: Salim - Subpoena/Touhy Follow-Up

Andrew,

Thank you for the email. We think that a call early next week is a good idea. We can be available before 11 a.m. East Coast time on Tuesday or before 10:30 a.m. East Coast time on Wednesday. How does your schedule look? Also, to the extent that you are able to serve any written objections before July 19, it would be appreciated.

Also, you have previously informed us that: (1) the government will take no steps to secure security clearance for Jim Smith, Chris Tompkins or me; (2) our clients are unable to share with me, Jim or Chris classified information that we believe relevant; and (3) Hank Schuelke, who possesses applicable security clearance and is therefore entitled to discuss classified information with our clients under certain circumstances, is unable to share such information with me, Jim or Chris. When we speak next week we would like to discuss with you whether, in light of today's conference, this remains the government's position.

BP

Brian S. Paszamant | Blank Rome LLP
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

From: Warden, Andrew (CIV) [mailto:Andrew.Warden@usdoj.gov]
Sent: Friday, July 8, 2016 4:14 PM
To: Paszamant, Brian <Paszamant@BlankRome.com>
Cc: Schuelke III, Henry F. <HSchuelke@BlankRome.com>; Smith, James <Smith-jt@BlankRome.com>; Chris Tompkins <ctompkins@bpmlaw.com>; Rosenthal, Jeffrey <Rosenthal-J@BlankRome.com>
Subject: Salim - Subpoena/Touhy Follow-Up

Brian:

Following up on the subpoenas and Touhy requests for documents that you sent last week to DoJ and CIA, I am writing to seek your agreement that the Government may send any written objections to the subpoenas under Rule 45 on or before

July 19, 2016. Although we intend to send an objection letter to the subpoenas in order to preserve any objections we may have, we emphasize that we are continuing our efforts to develop a plan for responding to your document requests. In light of the deadlines set by the Court today, I think it would be beneficial to have discussion with you and your team next week in a cooperative effort to seek agreement regarding document production within the discovery timeframe set by the Court.

Best,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

Exhibit I

U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, D.C. 20530

Andrew I. Warden
Senior Trial Counsel

Tel: (202) 616-5084
Andrew.Warden@usdoj.gov

July 19, 2016

VIA EMAIL

Brian S. Paszamant
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Email: Paszamant@BlankRome.com

RE: *Salim et al. v. Mitchell et. al.*, No. 2:15-CV-286-JLQ
Central Intelligence Agency Subpoena

Dear Brian:

I write on behalf of the Central Intelligence Agency ("CIA" or "Agency") in response to the non-party subpoena issued by you in the above-referenced action, requesting that the CIA produce 29 categories of documents on or before August 1, 2016. In accordance with our stipulation governing discovery procedures, I agreed to accept service of the subpoena on behalf of the CIA on June 28, 2016. You and I also agreed that CIA's objections to the subpoena were due on or before July 19, 2016. Pursuant to Federal Rule of Civil Procedure 45(d)(2)(B), the CIA objects to the production called for in the subpoena for the following reasons.

First, requests for production of documents from the CIA are governed by the agency's regulations found at 32 C.P.R. Part 1905. *See United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Where, as here, the United States is not a party to the litigation in which information is being sought, the CIA's regulations prohibit its employees from producing Agency documents or information without prior authorization from the proper agency official. *See* 32 C.P.R. § 1905.1; 3(a). Your *Touhy* request is currently under consideration and, subject to the objections expressed in this letter, the Agency is currently undertaking diligent efforts aimed at responding to your subpoena as explained in my July 12, 2016 email. As of the date of this letter, however, no final authorization decision has been made.

Second, given the breadth and nature of the requests for production, the requested documents likely include classified information and/or information protected by law from disclosure by, among other things, Executive Orders 12333, 13470, 12958, and 13526; the Intelligence Identities Protection Act,

50 U.S. C. § 3121; the National Security Act, 50 U.S.C. § 3024; the CIA Act, 50 U.S.C. § 3507, and the state secrets privilege. *See* Fed. R. Civ. P. 45(d)(3)(A)(iii). For example, the subpoena seeks identities, names, titles, and duties of various CIA personnel who participated in the former detention and interrogation program. *See, e.g.*, Requests #9-11, 28. This information, on its face, would implicate information protected by the CIA Act, which exempts the Agency from any requirement to disclose "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. The Intelligence Identities Protection Act further prevents the disclosure of the identities of covert intelligence officers. 50 U.S.C. § 3121. Additionally, the subpoena is broad enough to require likely disclosure of other categories of classified information, such as any foreign intelligence service's involvement in the Plaintiffs' capture, transfer, detention, or interrogation as well as any locations where the Plaintiffs were detained. *See, e.g.*, Requests #7, 13-14, 16. Notably, the Government has previously provided you with a description of categories of information related to the Agency's former detention and interrogation program that remain classified, but your subpoena nonetheless seeks access to information within the categories we have identified as properly classified. *See* Classification Guidance (May 20, 2016).

Third, the request for documents is massively overbroad, and compliance would impose an undue burden on the CIA. *See* Fed. R. Civ. P. 45(d)(1), (3)(A)(iv). Indeed, the subpoena seeks, *inter alia*, "all documents relating to" 28 broad categories of information in the possession of the entire CIA without limitation over a 15 year period. These requests are facially overbroad and appear to require wide-ranging and unduly burdensome searches of the CIA's record systems from the time of the attacks of September 11, 2001 to the present. For example, the subpoena includes sweeping requests for overly broad subjects, such as all documents relating to the treatment of the Plaintiffs by persons other than the Defendants (#13) and all communications between Defendants and the CIA concerning the former detention and interrogation program (#6). Further, the requests cover an overly broad time frame, from September 11, 2001 to the present, even though Plaintiffs concede in their Complaint that their detention by the CIA ended in 2004. The request also defines the term "detainee" to include any detainee in United States custody at any location since September 11, 2001. *See* Definition & Instruction #7. As such, documents about detainee operations worldwide would appear to fall within the scope of your request. This overbreadth is magnified by the use of vague terms throughout the document request such documents "relating to" various categories of information. The subpoena, therefore, imposes an undue burden and purports to require production of a wide swath of overbroad material with no appropriate connection or relevance to this case.

To comply with broad and sweeping requests, at least as stated in the subpoena, the Agency would have to conduct costly and time- and resource-consuming searches for documents in various formats in potentially many different record systems of multiple CIA components, simply to locate potentially responsive material. Even the process of identifying appropriate document repositories and gaining access to those information systems to conduct litigation-related searches is likely to be unduly burdensome given the fact that CIA information is typically classified and compartmented to protect national security, which can prevent the type of broad assemblage of information the subpoenas seek. And even assuming appropriate access to record systems could be obtained, significant time and effort would likely be required to prepare this potentially broad collection of documents for the litigation-related searches you request, such as converting documents to text-searchable form and assembling documents in an appropriately searchable database.

Even in situations where such burdens were not applicable, that would not alleviate CIA's serious concerns about the burden of responding to the subpoena. That is because collection of responsive materials is only one aspect of the process. Review and processing of responsive material - much of which may need to be redacted prior to production, if the material can be produced at all - is expected to place a significant burden on CIA resources. After conducting appropriate searches, a potentially time- and resource-consuming process in itself, the Agency would then have to review this potentially voluminous collection of information for responsiveness and relevance to your requests. With respect to any responsive documents, as well as the approximately 70 specific documents cited in the Senate Select Committee on Intelligence's ("SSCI") Executive Summary report that are requested, given the potential sensitivity of the information contained within such documents, the Agency would then have to undertake a painstaking and exacting review process, likely across multiple offices within the CIA and possibly other Executive Branch agencies, to protect any privileged, protected, or classified information from improper disclosure. This process of line-by-line review and redaction, which is necessitated by the Government's responsibility to ensure that "information bearing on national security" is appropriately protected from harmful disclosure, *see Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), is likely to be complex, time-consuming, and unduly burdensome to the CIA given the volume, sources, and sensitivity of the information the documents contain. Moreover, this entire production process risks the inadvertent disclosure of classified information and has the potential to divert national security personnel from their critical mission-related duties and inappropriately commandeer them into discovery production for purposes of a private lawsuit in which the Government is not a party. In the end, even if there were some relevant, non-privileged, unclassified information that might lawfully be disclosed in response to your requests at the conclusion of this burdensome process, its value to the litigation would be far surpassed by the burden on the Agency to identify and produce it. *See* Fed. R. Civ. P. 26(b)(1), (b)(2)(C)(iii).

The subpoena is also unreasonably cumulative or duplicative and seeks information that is otherwise available from other sources that are more convenient, less burdensome, and/or less expensive, further exacerbating the undue burden. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). Many of the requests seek information that would be expected to be substantially duplicative of information contained in publicly released reports and documents about the CIA's former detention and interrogation program. For example, the CIA has publicly released multiple reports from its Office of Inspector General addressing the former detention and interrogation program generally as well as the treatment of Gul Rahman. The document requests, however, take no account of these prior releases and make no effort to reduce the undue burden on CIA by narrowly tailoring the requests to independently relevant information not otherwise available in the public reports. *See* Fed. R. Civ. P. 45(d)(1). Further, to require CIA to conduct duplicate searches and reprocess material it has already produced for public release would impose an undue burden on the agency.

Fourth, the subpoena "fails to allow reasonable time to comply." Fed. R. Civ. P. 45(d)(3)(A)(i). The subpoena was served on June 28, 2016, and requests production of documents by the morning of August 1, 2016. Given the breadth of the subpoena and the sensitivity of the information requested, approximately one calendar month does not provide sufficient time for the CIA to complete the document review process described above, including locating responsive materials, reviewing them to determine if they are protected by privilege or other bases for withholding, and producing any

appropriate, nonprivileged materials.

Fifth, the subpoena seeks information of questionable relevance to the above-referenced action. Although you have attached an affidavit to the subpoena in which you purport to explain the general relevancy of the subpoena to the underlying litigation, you make no effort to explain why individual categories of requested documents are relevant; and in many instances, the relevancy is not apparent on the face of the subpoena and is outside of the scope of discovery authorized by the Court's June 15, 2016 Order. For example, the subpoena seeks information about the treatment and interrogation of detainees other than the Plaintiffs. *See* Requests #20-22. Documents describing the treatment of detainees other than Plaintiffs, however, appear to have no relevance to the claims or defenses in this case and any need for them is certainly not proportional to the burden their production would impose upon the Agency.

Sixth, the requested documents are likely protected by one or more of the following privileges and protections, in addition to the state secrets privilege discussed above: deliberative process privilege, attorney-client privilege, attorney work product doctrine, confidential informant privilege, or law enforcement privilege, among others. Given the breadth and type of information sought in the requests, it is likely that such privileged and protected information would be implicated. Indeed, the subpoena on its face calls for material that is protected by the deliberative process privilege, as it seeks "all drafts" of the documents requested. *See* Definition & Instruction #26. Further, the request for documents relating to the legality of Defendants' actions, contemplated actions, or inaction appears to implicate attorney-client privilege. *See* Request #8.

Seventh, the request may also encompass confidential personal or business information protected by statute prohibiting disclosure of the information except on certain conditions. In particular, the Privacy Act, 5 U.S.C. § 552a, protects information about an individual that is contained within an agency system of records. Some of the documents requested may also contain information that would be subject to the Trade Secrets Act, 18 U.S.C. § 1905.

Eighth, CIA objects to the "definitions and instructions" section of the document request as vague, overbroad, unduly burdensome, and not authorized by law. For example, the instructions define the CIA to include any "affiliated organization" as well as "consultants" and "contractors." *See* Definitions & Instructions # 2-3. This request is vague and overbroad and potentially requires searches of federal agencies other than CIA. If Defendants need access to information that is in the possession of other organizations, it should seek that material directly from those entities. Also, as noted above, the instructions also define the scope of the document request in an unduly burdensome manner to include all documents from September 11, 2001 to the present for any detainee held by the United States at any location worldwide. Additionally, CIA objects to the instructions in the subpoena that direct it to provide specific information about each document withheld as privileged by the return date of the subpoena. *See* Definitions & Instructions # 21-23. This purported requirement exceeds Defendants' legal entitlement under the Federal Rules. CIA further objects to the instructions in the subpoena that purport to require specific details about each document that was formerly, but is no longer, within its control. *See* Definitions & Instructions #19. Similarly, CIA objects to the requirement that responsive documents be produced as originals rather than copies, as well as the requirement that all copies be produced where they "differ[] in any respect from the original,"

particularly when no material differences exist. *See* Definitions & Instructions # 20.

The foregoing objections and examples of objectionable aspects of the requests are not exclusive and we reserve the right to assert further objections in response to the subpoena as appropriate, including that the Court lacks jurisdiction over this case.

For all of these reasons, CIA objects to the subpoena and will not produce the requested documents at the date, time, and place specified on the subpoena. We emphasize, however, that CIA has not made a final decision on your request pursuant to its *Touhy* regulations, and we are continuing our efforts to identify documents in response to your requests in accordance with my July 12, 2016 email. And without waiving any of the foregoing objections, we stand willing to work with you to narrow the subpoena in order to facilitate production of a more focused and limited set of information. Indeed, in our view a cooperative effort to narrow the subpoena is the only feasible way that CIA can meaningfully respond to your document requests within the discovery timeframe established by the Court in this case.

We are hopeful that informal negotiations may resolve many of the serious concerns articulated herein and allow CIA to produce a manageable amount of relevant material without imposing an undue burden on the agency and impinging on important national security interests. To the extent that this proves impossible, however, CIA stands by the objections raised herein.

Please feel free to call me if you would like to discuss further.

Sincerely,

Andrew I. Warden

CC: Henry Schuelke, III: Hschuelke@blankrome.com
James Smith: Smith-Jt@blankrome.com
Christopher Tompkins: Ctompkins@bpmlaw.com
Jeffrey Rosenthal: Rosenthal-J@BlankRome.com

Exhibit J

U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, D.C. 20530

Andrew I. Warden
Senior Trial Counsel

Tel: (202) 616-5084
Andrew.Warden@usdoj.gov

July 19, 2016

VIA EMAIL

Brian S. Paszamant
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Email: Paszamant@BlankRome.com

RE: *Salim et al. v. Mitchell et. al.*, No. 2:15-CV-286-JLQ
Department of Justice Subpoena

Dear Brian:

I write on behalf of the Department of Justice ("DOJ" or "Department") in response to the non-party subpoena issued by you in the above-referenced action, requesting that DOJ produce 31 categories of documents on or before August 1, 2016. In accordance with our stipulation governing discovery procedures, I agreed to accept service of the subpoena on behalf of DOJ on June 29, 2016. You and I also agreed that DOJ's objections to the subpoena were due on or before July 19, 2016. Pursuant to Federal Rule of Civil Procedure 45(d)(2)(B), DOJ objects to the production called for in the subpoena for the following reasons.

First, requests for production of documents from DOJ are governed by the Department's regulations found at 32 C.F.R. §§ 16.21 *et seq*. *See United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Where, as here, the United States is not a party to the litigation in which information is being sought, DOJ's regulations prohibit its employees from producing documents without prior authorization from the proper agency official. *See* 32 C.F.R. § 16.22(a). Your *Touhy* request is currently under consideration and, subject to the objections expressed in this letter, DOJ is currently undertaking diligent efforts aimed at responding to your subpoena as explained in my July 12, 2016 email. As of the date of this letter, however, no final authorization decision has been made.

Second, given the breadth and nature of the requests for production, the requested documents likely include classified information and/or information protected by law from disclosure by, among other things, Executive Orders 12333, 13470, 12958, and 13526; the Intelligence Identities Protection Act,

50 U.S. C. § 3121; the National Security Act, 50 U.S.C. § 3024; the Central Intelligence Agency (CIA) Act, 50 U.S.C. § 3507, and the state secrets privilege. *See* Fed. R. Civ. P. 45(d)(3)(A)(iii). For example, the subpoena seeks from DOJ identities, names, titles, and duties of various CIA personnel who participated in the former detention and interrogation program. *See, e.g.*, Requests #11-13, 30. This information, on its face, would implicate information protected by the CIA Act, which exempts the CIA from any requirement to disclose "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. The Intelligence Identities Protection Act further prevents the disclosure of the identities of covert intelligence officers. 50 U.S.C. § 3121. Additionally, the subpoena is broad enough to require likely disclosure of other categories of classified information, such as any foreign intelligence service's involvement in the Plaintiffs' capture, transfer, detention, or interrogation as well as any locations where the Plaintiffs were detained. *See, e.g.*, Requests #9, 15-16, 18. Notably, the Government has previously provided you with a description of categories of information related to the CIA's former detention and interrogation program that remain classified, but your subpoena nonetheless seeks access to information within the categories we have identified as properly classified. *See* Classification Guidance (May 20, 2016).

Third, the request for documents is massively overbroad, and compliance would impose an undue burden on the CIA. *See* Fed. R. Civ. P. 45(d)(1), (3)(A)(iv). Indeed, the subpoena seeks, *inter alia*, "all documents relating to" 31 broad categories of information in the possession of the entire DOJ without limitation over a 15 year period. These requests are facially overbroad and appear to require wide-ranging and unduly burdensome searches of DoJ's document collection, to include litigation and investigation files, from the time of the attacks of September 11, 2001 to the present. For example, the subpoena includes sweeping requests for overly broad subjects, such as all documents relating to the treatment of the Plaintiffs by persons other than the Defendants (#15) and all communications between Defendants and the CIA or DOJ concerning the former detention and interrogation program (#8). Further, the requests cover an overly broad time frame, from September 11, 2001 to the present, even though Plaintiffs concede in their Complaint that their detention by the CIA ended in 2004. The request also defines the term "detainee" to include any detainee in United States custody at any location since September 11, 2001. *See* Definition & Instruction #8. As such, documents about detainee operations worldwide would appear to fall within the scope of your request. This overbreadth is magnified by the use of vague terms throughout the document request such documents "relating to" various categories of information. The subpoena, therefore, imposes an undue burden and purports to require production of a wide swath of overbroad material with no appropriate connection or relevance to this case.

To comply with broad and sweeping requests, at least as stated in the subpoena, DOJ would have to conduct costly and time- and resource-consuming searches for documents in various formats in potentially many different record systems of multiple DOJ components, simply to locate potentially responsive material. Even the process of identifying appropriate document repositories and gaining access to those information systems to conduct litigation-related searches is likely to be unduly burdensome given the likelihood that much of the information is classified and compartmented to protect national security, which can prevent the type of broad assemblage of information the subpoenas seek. And even assuming appropriate access to record systems could be obtained, significant time and effort would likely be required to prepare this potentially broad collection of documents for the

litigation-related searches you request, such as converting documents to text-searchable form and assembling documents in an appropriately searchable database.

Even in situations where such burdens were not applicable, that would not alleviate DOJ's serious concerns about the burden of responding to the subpoena. That is because collection of responsive materials is only one aspect of the process. Review and processing of responsive material - much of which may need to be redacted prior to production, if the material can be produced at all - is expected to place a significant burden on DOJ and other agency equity-holder resources. After conducting appropriate searches, a potentially time- and resource-consuming process in itself, DOJ would then have to review this potentially voluminous collection of information for responsiveness and relevance to your requests. With respect to any responsive documents, as well as the approximately 70 specific documents cited in the Senate Select Committee on Intelligence's ("SSCI") Executive Summary report that are requested, given the potential sensitivity of the information contained within such documents, DOJ would then have to undertake a painstaking and exacting review process, likely across multiple offices within DOJ, as well as the CIA and possibly other Executive Branch agencies, to protect any privileged, protected, or classified information from improper disclosure. This process of line-by-line review and redaction, which is necessitated by the Government's responsibility to ensure that "information bearing on national security" is appropriately protected from harmful disclosure, *see Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988), is likely to be complex, time-consuming, and unduly burdensome given the volume, sources, and sensitivity of the information the documents contain. Moreover, this entire production process risks the inadvertent disclosure of classified information and has the potential to divert DOJ attorneys, law enforcement, and national security personnel from their regular duties and inappropriately commandeer them into discovery production for purposes of a private lawsuit in which the Government is not a party. In the end, even if there were some relevant, non-privileged, unclassified information that might lawfully be disclosed in response to your requests at the conclusion of this burdensome process, its value to the litigation would be far surpassed by the burden on DOJ and other agencies to identify and produce it. *See* Fed. R. Civ. P. 26(b)(1), (b)(2)(C)(iii).

The subpoena is also unreasonably cumulative or duplicative and seeks information that is otherwise available from other sources that are more convenient, less burdensome, and/or less expensive, further exacerbating the undue burden. *See* Fed. R. Civ. P. 26(b)(2)(C)(i). Many of the requests seek information that would be expected to be substantially duplicative of information contained in publicly released reports and documents about the CIA's former detention and interrogation program. For example, the CIA has publicly released multiple reports from its Office of Inspector General addressing the former detention and interrogation program generally as well as the treatment of Gul Rahman. Similarly, DOJ has publicly released many legal memoranda addressing the legality of the CIA's program. The document requests, however, take no account of these prior releases and make no effort to reduce the undue burden by narrowly tailoring the requests to independently relevant information not otherwise available in the public reports. *See* Fed. R. Civ. P. 45(d)(1). Further, to require DOJ to conduct duplicate searches and reprocess material it has already produced for public release would impose an undue burden on the agency.

Moreover, DOJ is not an appropriate source of third-party discovery for many of the document requests. There are no allegations in the Complaint that DOJ or its personnel were involved the

capture, detention, or interrogation of Plaintiffs. Nor is there any allegation that DOJ or its personnel had any contact or communication with Plaintiffs or Defendants during the period of Plaintiffs' detention by the CIA. Twenty-eight of the 31 requests (i.e., all requests other than #6-8) to DOJ are also included in the subpoena and *Touhy* request you sent to CIA on June 28, 2106, and these requests, which call for documents or information belonging to the CIA, are more properly directed to CIA. To the extent the same information might be contained in DOJ's files, it would be derivative and duplicative of CIA's information and, therefore, production would impose an undue burden on DOJ. Accordingly, CIA is most appropriate governmental department to be served with, and to respond as appropriate under law, to these requests.

Fourth, the subpoena "fails to allow reasonable time to comply." Fed. R. Civ. P. 45(d)(3)(A)(i). The subpoena was served on June 29, 2016, and requests production of documents by the morning of August 1, 2016. Given the breadth of the subpoena and the sensitivity of the information requested, approximately one calendar month does not provide sufficient time for DOJ to complete the document review process described above, including locating responsive materials, reviewing them to determine if they are protected by privilege or other bases for withholding, and producing any appropriate, nonprivileged materials.

Fifth, the subpoena seeks information of questionable relevance to the above-referenced action. Although you have attached an affidavit to the subpoena in which you purport to explain the general relevancy of the subpoena to the underlying litigation, you make no effort to explain why individual categories of requested documents are relevant; and in many instances, the relevancy is not apparent on the face of the subpoena and is outside of the scope of discovery authorized by the Court's June 15, 2016 Order. For example, the subpoena seeks information about the treatment and interrogation of detainees other than the Plaintiffs. *See* Requests #22-24. Documents describing the treatment of detainees other than Plaintiffs, however, appear to have no relevance to the claims or defenses in this case and any need for them is certainly not proportional to the burden their production would impose upon the Department.

Sixth, the requested documents are almost certainly protected by one or more of the following privileges and protections, in addition to the state secrets privilege discussed above: deliberative process privilege, attorney-client privilege, attorney work product doctrine, confidential informant privilege, law enforcement privilege, and Federal Rule of Criminal Procedure 6(e), among others. Given the breadth and type of information sought in the requests, it is likely that such privileged and protected information would be implicated. Indeed, the subpoena on its face calls for material that is protected by the deliberative process privilege, as it seeks "all drafts" of the documents requested. *See* Definition & Instruction #27. Further, the request for documents relating to the legality of Defendants' actions, contemplated actions, or inaction appears to implicate attorney-client privilege. *See* Requests #6-8, 10.

Seventh, the request may also encompass confidential personal or business information protected by statute prohibiting disclosure of the information except on certain conditions. In particular, the Privacy Act, 5 U.S.C. § 552a, protects information about an individual that is contained within an agency system of records. Some of the documents requested may also contain information that would be subject to the Trade Secrets Act, 18 U.S.C. § 1905.

Eighth, DOJ objects to the "definitions and instructions" section of the document request as vague, overbroad, unduly burdensome, and not authorized by law. For example, the instructions define DOJ to include any "affiliated organization" as well as "consultants" and "contractors." *See* Definitions & Instructions # 2-3. This request is vague and overbroad and potentially requires searches of federal agencies other than DOJ. If Defendants need access to information that is in the possession of other organizations, it should seek that material directly from those entities. Also, as noted above, the instructions also define the scope of the document request in an unduly burdensome manner to include all documents from September 11, 2001 to the present for any detainee held by the United States at any location worldwide. Additionally, DOJ objects to the instructions in the subpoena that direct it to provide specific information about each document withheld as privileged by the return date of the subpoena. *See* Definitions & Instructions # 22-24. This purported requirement exceeds Defendants' legal entitlement under the Federal Rules. DOJ further objects to the instructions in the subpoena that purport to require specific details about each document that was formerly, but is no longer, within its control. *See* Definitions & Instructions #20. Similarly, DOJ objects to the requirement that responsive documents be produced as originals rather than copies, as well as the requirement that all copies be produced where they "differ[] in any respect from the original," particularly when no material differences exist. *See* Definitions & Instructions # 21.

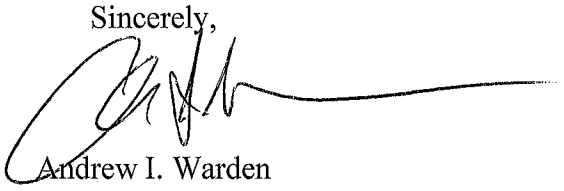
The foregoing objections and examples of objectionable aspects of the requests are not exclusive and we reserve the right to assert further objections in response to the subpoena as appropriate, including that the Court lacks jurisdiction over this case.

For all of these reasons, DOJ objects to the subpoena and will not produce the requested documents at the date, time, and place specified on the subpoena. We emphasize, however, that DOJ has not made a final decision on your request pursuant to its *Touhy* regulations, and we are continuing our efforts to identify documents in response to your requests in accordance with my July 12, 2016 email. And without waiving any of the foregoing objections, we stand willing to work with you to narrow the subpoena in order to facilitate production of a more focused and limited set of information. Indeed, in our view a cooperative effort to narrow the subpoena is the only feasible way that DOJ can meaningfully respond to your document requests within the discovery timeframe established by the Court in this case.

We are hopeful that informal negotiations may resolve many of the serious concerns articulated herein and allow DOJ to produce a manageable amount of relevant material without imposing an undue burden on the agency and impinging on important national security interests. To the extent that this proves impossible, however, DOJ stands by the objections raised herein.

Please feel free to call me if you would like to discuss further.

Sincerely,



Andrew I. Warden

CC: Henry Schuelke, III: Hschuelke@blankrome.com
James Smith: Smith-Jt@blankrome.com
Christopher Tompkins: Ctompkins@bpmlaw.com
Jeffrey Rosenthal: Rosenthal-J@BlankRome.com

Exhibit K

BLANK ROME LLP
COUNSELORS AT LAW

Phone: *(215) 569-5791*
Fax: *(215) 832-5791*
Email: *Paszamant@BlankRome.com*

July 27, 2016

VIA EMAIL

Andrew I. Warden
U.S. Department of Justice
Civil Division
Federal Programs Bench
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
andrew.warden@usdoj.gov

Re: ***Salim et al. v. Mitchell et al.*, No. 2:15-CV-286-JLQ Central Intelligence Agency Subpoena**

Dear Andrew:

We write to meet and confer concerning the Central Intelligence Agency's ("CIA") July 19, 2016 response to the non-party subpoena issued by our clients, James Elmer Mitchell and John "Bruce" Jessen, defendants in the above-referenced matter ("Defendants"), on June 28, 2016 (the "Subpoena"). We disagree that the Subpoena is "massively overbroad," duplicative, or seeks irrelevant or otherwise non-discoverable information. However, in an effort to address the issues you raise, we request that you provide us with clarification as to the asserted applicability of certain statutes and privileges that you have identified. Additionally, as detailed herein, we have identified certain aspects of the Subpoena that we can clarify and/or that we are amenable to narrowing in an effort to resolve some of the objections advanced in order to avoid unnecessary motion practice. Finally, please advise as to when the CIA anticipates that it will begin producing responsive document, whether on a "rolling basis" (as I have suggested) or otherwise and a compliant privilege log, in light of the relatively short deadlines imposed by the Court.

I. OBJECTIONS PURPORTEDLY BASED ON STATUTES AND PRIVILEGES

A. Information Allegedly Protected Under Executive Orders 12333, 13470, 12958; the National Security Act; the CIA Act; and/or the State Secret Privilege

The CIA asserts that the Subpoena seeks "documents likely [to] include classified information and/or information protected by law from disclosure by, among other things, Executive Orders 12333, 13470, 12958, and 13526; . . . the National Security Act, 50 U.S.C. § 3024; the CIA Act, 50 U.S.C. § 3507, and the states secret privilege", and objects to the production of requested information on such basis. (July 19 Ltr. at 1-2.)

Defendants recognize that the listed Executive Orders, the National Security Act, and the CIA Act together provide certain authority for the CIA's systematic classification and protection of certain information related to national security. Defendants also acknowledge that when information protected by these Orders or statutes is sought pursuant to the Freedom of Information Act ("FOIA"), the information sought is exempt from disclosure. *See* 5 U.S.C. § 552(b)(1) and (3). However, any such exemption is inapplicable here—in the context of civil discovery. Indeed, it is well-settled that documents that are exempt from FOIA disclosure "are not automatically privileged in civil discovery." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) (citing and quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984)). Therefore, the CIA is obligated to produce responsive documents that fall within the Executive Orders, the National Security Act, and/or the CIA Act, unless the CIA establishes that such documents are protected from disclosure pursuant to an applicable common-law privilege. Defendants request that the CIA withdraw its objections based upon the aforementioned Orders and/or statute, or provide us with authority establishing that such Orders and/or statute provide a basis to preclude or limit discovery in the present context.

Your assertion that the CIA previously provided Defendants with a description of subject matters related to the CIA's detention and interrogation program that it claims remain classified is inapposite. While Defendant's appreciate the guidance, such guidance does not render otherwise discoverable information non-discoverable. To the extent Defendants seek allegedly classified information that the CIA contends cannot be disclosed because of its importance in national security matters, the CIA has an option – it can avail itself of the state secret or other applicable privileges to prevent disclosure. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984) ("The privileges which State claims will protect many of the documents produced, the state secrets and deliberative process privileges, are narrowly drawn privileges which must be asserted according to clearly defined procedures."). The state secret

privilege requires the CIA to assert (1) a formal claim of privilege; (2) lodged by the head of the department which has control over the matter; (3) after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1 (1953) Until such a privilege is properly asserted, the Federal Rules of Civil Procedure enable Defendants to seek and attain all information that is relevant (or otherwise discoverable) to the claims brought against them or their defenses thereto. *See* Fed. R. Civ. Pro. 26(b). To the extent that the CIA has not yet properly invoked the state secret privilege, it is not able to withhold discoverable documents on this basis. Defendants request that the CIA promptly produce any otherwise discoverable documents contemplated to be withheld because they are asserted to contain classified information or pursuant to the state secret privilege.

B. The Intelligence Identities Protection Act

The CIA relies upon the Intelligence Identities Protection Act, 50 U.S.C. § 3121b, to withhold responsive documents that could disclose the identities of covert intelligence officers, as purportedly sought by the Subpoena's Requests #9-11; 28. Defendants do not understand the statute's applicability to the CIA in this case. The Identities Protection Act is "a purely criminal statute that only authorizes criminal prosecution of those who intentionally disclose the identity of a covert agent." *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008). We are not aware of any authority for the proposition that the statute limits the CIA's disclosure obligations pursuant to a court order or subpoena. To the extent that the CIA believes otherwise, please provide us with authority supporting the CIA's position.

C. The Privacy Act and the Trade Secrets Act

The CIA objects to the Subpoena to the extent that it seeks "confidential personal or business information" protected by the Privacy Act, 5 U.S.C. § 552a, or information protected by the Trade Secrets Act, 18 U.S.C. § 1905. (July 19 Ltr. at 4.) Please clarify how these statutes are applicable to this case, as neither appear to afford the CIA the right to withhold otherwise discoverable information.

The Privacy Act prohibits government agencies from disclosing records that an agency maintains within a "system of records"; 5 USC § 552a, i.e. a group of records from which information can be retrieved by the name of an individual or some other identifying feature. 5 USC § 552a(a)(5). But the Privacy Act contains a specific exception for the release of materials pursuant to the order of a court of competent jurisdiction. 5 U.S.C. § 552a(b)(11); *United States v. W.R. Grace*, 455 F. Supp. 2d 1140, 1147 (D. Mont. 2006) (Privacy Act did not obligate the Government to withhold documents responsive to the Court's discovery order). Thus, to the extent that information requested in the Subpoena falls within the scope of the Privacy Act, the

information can and must be disclosed in circumstances such as this—where a valid subpoena exists. Indeed, to secure discovery of materials potentially protected by the Privacy Act, Defendant must only follow the standard discovery process. *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987).

The same is true for information that falls within the Trade Secrets Act. This Act provides penalties for government employees who disclose, in a manner not authorized by law, any trade information that is revealed to the employee in performance of official duties. The Act is meant to prevent the discretionary release of certain types of business information in the possession of government employees. 18 U.S.C. § 1905. However, when the disclosure is authorized by law—as it would be here—the Act provides the CIA with no basis to withhold discoverable information. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1140, 1148 (D. Mont. 2006). To the extent that the CIA believes that Defendants misrepresent the scope or application of either of the foregoing Acts, please advise how and provide us with the authority supporting the CIA's position.

Finally, in an effort to alleviate any concerns that the CIA may have predicated upon one or both of the aforementioned Acts, Defendants would be amenable to entering into an appropriate confidentiality stipulation/proposed order. Please advise whether this is something you wish to explore and, if so, please propose a form of stipulated order for us to review.

D. The Deliberative Process, Confidential Informant, and Law Enforcement Privileges

The CIA identifies the deliberative process privilege, the confidential information privilege, and the law enforcement privilege as privileges that may apply to certain information sought by the Subpoena. (July 19 Ltr. at 4.) While Defendants acknowledge these privileges have been recognized by courts, each privilege must be invoked to shield disclosure of information -- something to Defendant's knowledge the CIA has not yet done.[1] Furthermore,

[1] To invoke the deliberative process privilege, a government must show that the information withheld is "predecisional" and "deliberative" in nature. *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). A subpoena that simply seeks "drafts" of documents from the government does not automatically implicate the deliberative process privilege, as your July 19 Letter suggests. To invoke the confidential informant privilege, the government must show the information withheld is a communication that will tend to reveal the identity of persons who furnish information to law enforcement officials. *Roviaro v. United States*, 353 U.S. 53, (1957). To invoke the law enforcement privilege, three requirements must be met: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*,

these privileges are not absolute and Defendants are entitled to an opportunity to explain why their need for the requested information should overcome any such invoked privilege which may be advanced. *See Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003) (deliberative process privilege not absolute); *Perez v. Blue Mountain Farms*, No. 2:13-CV-5081-RMP, 2015 WL 11112414, at *2 (E.D. Wash. Aug. 10, 2015) (confidential informant and law enforcement privilege not absolute).

Defendants have detailed below why the documents sought by the Subpoena's various requests (as modified in some instances) are directly relevant to the claims and defenses at issue in this action, and therefore discoverable. As such, please advise as soon as possible which, if any, of the aforementioned privileges the CIA has invoked in response to the Subpoena, and specifically, in response to which Request(s), so that Defendants may further assess the viability of the CIA's position.

E. Attorney Work Product and Attorney Client Privilege

The CIA claims that certain information sought by the Subpoena may be withheld pursuant to the attorney work product privilege and/or the attorney client privilege. Although Defendants, of course, recognize the existence of these privileges, they cannot simply accept the CIA's blanket assertion that they may serve to prevent disclosure of otherwise discoverable documents or information in this action. Should the CIA contend that one or both of the aforementioned privileges apply to preclude disclosure of otherwise responsive documents, Defendants look forward to receiving a privilege log containing detail sufficient to enable Defendants to properly assess the CIA's privilege assertion.

II. OBJECTIONS BASED ON ALLEGED OVERBREADTH, IRRELEVANCE, AND/OR VAGUENESS

A. Overbreadth Allegedly Based Upon Temporal Scope

The CIA objects to the Subpoena as "massively overbroad." (July 19 Ltr. at 2.) Specifically, the CIA claims that the temporal limitations of the Subpoena are excessive in that the Subpoena's temporal scope is September 11, 2001 until the present. But, the identified temporal scope is not overbroad considering the scope of Plaintiffs' claims. Specifically, Defendants requested and are entitled to discover documents dating back to September 11, 2001 because Plaintiffs' expressly assert that shortly after that date, Defendants designed and implemented a detention and interrogation program for the CIA's use on foreign nationals (the

856 F.2d 268, 271 (D.C. Cir. 1988) (citing *Black v. United States*, 564 F.2d 531, at 541-547 (D.C. Cir. 1977)).

"Program"). (*See* Compl. ¶ 22.) Similarly, Defendants requested and are entitled to discover documents generated through the present, despite Plaintiffs' earlier release, to the extent that such documents pertain to the claims and defenses at issue in this action. For example, a document detailing Plaintiff Rahman's detention and/or interrogation is no doubt discoverable irrespective of whether that document was generated years after his apparent death. Similarly, documents detailing Plaintiff Salim's detention and/or interrogation are no doubt discoverable irrespective of whether those documents were generated years after his release. Simply stated, the temporal scope of the Subpoena does not render it *ipso facto* overbroad.

Although Defendants are unable to limit the overall temporal scope of the Subpoena, they remain interested in exploring ways to limit the burden that their Subpoena places on the CIA. With this in mind and in an effort to reach an amicable resolution absent the need for the Court's intervention, Defendants have revisited the Subpoena's requests, and are amenable to revising certain requests, as detailed in the blacklined document attached to this letter as **Exhibit AA**. The attached document also identifies why the Subpoena's requests, particularly as modified, seek relevant and discoverable documents.

B. Relevance

The CIA next objects that the Subpoena seeks "information of questionable relevance." (July 19 Ltr. at 4.) The CIA claims that the relevance of each Requests is not apparent on its face. To ally the CIA's concerns, we have indicated the relevance of each Request in the attached **Exhibit AA**.

C. Objection Based Upon Compliance Timing

The CIA objects to the Subpoena to the extent it "fails to allow reasonable time to comply" because it requires the production of documents on August 1, 2016, 34 days after its issuance. (July 19 Ltr. at 3.) Unfortunately, given the Court's July 8, 2016 Scheduling Order, Defendants are not at liberty to permit the CIA months to identify and produce discoverable information; as you know, Defendants are obligated to serve a final list of trial witnesses by December 12, 2016 and all discovery must be completed by February 17, 2017. (ECF No. 59.) Notably, you posed no objection to those deadlines when participating in the telephonic hearing held by the Court despite being given the opportunity to do so. (*See* ECF No. 59.) Finally, it is a bit of a red herring for the CIA to advance an objection based on the Subpoena's response date when, to date, the CIA has not produced any documents pursuant to the Subpoena or even provided Defendants with a date on which it expects to begin production.

D. Objection Based Upon Alleged Vagueness

The CIA takes issue with certain terms as used or defined in the Subpoena as vague. (July 19 Ltr. at 2, 4.) For instance, the CIA takes issue with the term "relating to" as used in the Subpoena. In an effort to resolve this issue without the need for the Court's intervention, this verbiage applicable to the requests has been modified in attached **Exhibit AA**.

The CIA also objects to the term "CIA" as defined in the Subpoena to include "affiliated organization" and "consultants" and "contractors." The CIA finds this problematic because—as written—it potentially requires the CIA to obtain documents from other agencies. To be clear, Defendants seek documents from the CIA's affiliates, consultants, and/or contractors only to the extent that responsive documents lie within the CIA's possession, custody or control.

E. Objection Based Upon Alleged Duplication

The CIA claims that the Subpoena is "unreasonably cumulative or duplicative" and "seeks information that is otherwise available" from a less burdensome source because the CIA has previously publicly released certain relevant information. (July 19 Ltr. at 3.) Defendants do not seek to burden the CIA more than necessary, and have not ignored the existence of documents that have been previously released and are now held by third parties. Nevertheless, the prior public release of documents does not exempt the CIA from producing discoverable documents to Defendants. Moreover, Defendants assume (because the CIA has not specifically identified those documents to which it refers) that certain of these documents are the reports related to the treatment of Gul Rahman released pursuant to FOIA requests. But, these documents remain heavily redacted pursuant to FOIA exemptions that, as discussed above, are not applicable in this civil discovery context. Thus, these documents are not duplicative, as Defendants are entitled to un-redacted versions of these documents.

Finally, although we note your indication that the CIA has not made a "final decision" with regard to the Subpoena's requests, the CIA has advanced numerous objections (that are addressed herein). Unless promptly withdrawn, we will continue to consider those objections as the CIA's final position with regard to these matters.

BLANK ROME LLP
COUNSELORS AT LAW

We look forward to the CIA's commencement of document production in a material manner and to receiving your response to the other issues raised in this letter by no later than Tuesday, August 2. Your anticipated cooperation is greatly appreciated, and Defendants are hopeful that the discussion contained herein and in the attached, along with the concessions identified in the attached, will help facilitate the CIA's prompt compliance with the remaining Subpoena requests.

Very truly yours,

BRIAN S. PASZAMANT

Attachment
cc: Hank Schuelke, III, Esquire (via email)
James Smith, Esquire (via email)
Christopher Tompkins, Esquire (via email)
Jeffrey Rosenthal, Esquire (via email)

EXHIBIT AA

REQUESTS

1. All documents ~~**relating to**~~ **constituting, discussing and/or identifying the scope of** any contract or employment agreement entered into between one or both Defendants and the CIA related to the Program**, and/or one or both Defendants' performance pursuant to any such contract(s) or employment agreement(s).**

- Relevance: This information is relevant and discoverable in that it will inform the scope of Defendants' contractual relationship with the CIA, Defendants' performance pursuant to (or beyond) that relationship, and what Defendants, the CIA and/or others were communicating about such relationship and performance. This goes to the heart of Defendants' Political Question and/or Derivative Sovereign Immunity defenses among other things.

2. All documents ~~**relating to**~~ **identifying and/or discussing** the design of the Program and/or the Program's intended or actual scope, including the identity of the persons who formally approved the Program's design and the basis for approval(s).

- Relevance: Plaintiffs have advanced claims against Defendants predicated upon the allegation that one or both Defendants were instrumental in the Program's design and implementation such that Defendants are liable to Plaintiffs whether or not either Defendant ever saw one or more of the named Plaintiffs. This information is relevant and discoverable in that it will address the process and individuals involved in the Program's design and the role, if any, played by Defendants in such design. It is also relevant and discoverable as to how, if at all, the Program for which Defendants were asked to provide recommendations was

used beyond its approved and/or intended scope. Finally, information concerning who approved the Program and the basis for all such approvals is relevant and discoverable as to whether the requisite authority was validly sought and conferred.

3. All documents identifying those involved in any way in the Program's design and/or the roles played by such individuals.

- Relevance: Plaintiffs have advanced claims against Defendants predicated upon the allegation that one or both Defendants were instrumental in the Program's design and implementation such that Defendants are liable to Plaintiffs whether or not either Defendant ever saw one or more of the named Plaintiffs. This information is relevant and discoverable as to who besides Defendants was involved in making recommendations or otherwise designing the Program and the roles played by such individuals, a Program for which Defendants alone are sought to be held liable. Put differently, this information will address where Defendants fit within the constellation of individuals involved in the Program's design, and it is believed that this information will demonstrate that Defendants were merely minor participants in the Program's design.

4. All documents ~~**relating to**~~ **identifying or discussing** the structure of the Program, ~~**including the identity of**~~ **identifying** the persons who formally approved the Program's structure and ~~**the basis for approval(s)**~~**/or identifying or discussing the basis for approval(s).**

- Relevance: The information sought is relevant and discoverable as to how, if at all, any Program for which Defendants were provided recommendations was used beyond its approved and/or intended scope. Defendants should not be held liable

for actions taken by others that exceeded the approved and intended scope of any Program for which Defendants provided design recommendations. Additionally, information concerning who approved the Program and the basis for all such approvals is relevant and discoverable as to whether the requisite authority was validly sought and conferred.

5. All documents identifying or describing those individuals for whom the Program was designed and/or intended.

- Relevance: The information sought is relevant and discoverable in that it will inform how, if at all, any Program for which Defendants provided design recommendations was used beyond its approved and/or intended scope. Defendants should not be held liable for actions taken by others that exceeded the approved and intended scope of any Program for which Defendants provided design recommendations. Defendants believe that this may have occurred with regard to one or more of the named Plaintiffs and are entitled to discovery concerning this subject.

6. All communications between one or both Defendants and the CIA concerning ~~the Program~~**(a) the design, structure, purpose, approval or scope of the Program; or (b) Plaintiffs.**

- Relevance: Plaintiffs seek to hold Defendants liable for Defendants' alleged role in designing the Program as well as Defendants' alleged direct involvement with the Plaintiffs. As such, communications of the type identified are discoverable. Please also refer to the explanations above regarding the discoverability of

information concerning the Program's design, structure, purpose, approval and scope.

7. All documents identifying or describing the location of a facility(ies) where any Plaintiff was detained and/or interrogated to the extent that it discloses the extent to which any Defendant was present at such facility(ies) when any Plaintiff was in such facility(ies) or when any Plaintiff was subjected to interrogation.

- Relevance: Plaintiffs seek to hold Defendants liable for Defendants' alleged direct involvement with the Plaintiffs. The information sought is relevant and discoverable as to whether one or both Defendants was in the same location with any Plaintiff at the same time. One or both Defendant's absence from a location is relevant to the issue of whether one or both Defendants could have had any involvement with one or more of the Plaintiffs.

8. All documents ~~**relating to**~~**identifying and/or discussing**:

(a) the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

- Relevance: Plaintiffs claims are based in large part on the allegation that Defendants played a central role in the design, promotion, implementation and/or operation of the Program. Among other things, Plaintiffs allege that Defendants are liable to Plaintiffs because of Defendants' alleged active promotion of the Program. As such, the information sought is relevant and discoverable.

(b) what Defendants were told concerning the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

(c) the scope and/or limits of one or both Defendants' authority in connection with designing, promoting, implementing and/or operating the Program;

- Relevance: This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses.

(d) what Defendants were told concerning the scope and/or limits of his/their authority in connection with designing, promoting, implementing and/or operating the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

(e) the legality and/or approval of one or both Defendants' actions, contemplated actions and/or inactions in connection with the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

(f) what Defendants were told concerning the legality and/or approval of his/their actions, contemplated actions and/or inactions in connection with the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above. In addition, this information is relevant to Defendants' defense pursuant to the Detainee Treatment Act.

(g) one or both Defendants' ability to refuse to comply with any action requested of him/them; and

- Relevance: Plaintiffs' claims are predicated, in part, on the allegation that Defendants had the ability to control their activities performed in connection with the Program. The information sought is relevant in discoverable in that it will inform what ability, if any, Defendants had to control their activities performed in connection with the Program. Stated differently, it will inform who or what actually controlled the design and/or implementation of the Program.

(h) what Defendants were told concerning his/their ability to refuse to comply with any action requested of him/them.

- Relevance: This information is discoverable for the same reason as that set forth immediately above. In addition, this information is relevant to Defendants' defense pursuant to the Detainee Treatment Act.

9. All documents ~~relating to~~ identifying the persons to whom Defendants reported or who controlled, requested and/or directed Defendants' activities, including the persons' names, titles and duties.

- Relevance: This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses. This information is also relevant and discoverable as any such individuals will surely be able to provide discoverable information concerning what one or more of Defendants did (or did not do) in connection with the Program, e.g. their role, if any, in the Program's design and/or their involvement, if any, with respect to one or more of Plaintiffs.

10. All documents ~~relating to~~ identifying or discussing the persons in the chain of command who approved the Program and Defendants' role in the Program, including the persons' names, titles and duties.

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

11. All documents ~~relating to~~ identifying the persons who knew of and/or approved the activities of one or both Defendants, including the persons' names, titles and duties.

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

12. All documents relating to the handling or treatment of any Plaintiff by one or both Defendants.

- Relevance: Plaintiffs have alleged that Defendants are liable for their direct treatment of one or more of Plaintiffs. Thus, the information sought, relating to this very subject matter, is relevant and discoverable.

13. All documents relating to the handling or treatment of any Plaintiff by an individual other than one or both Defendants.

- Relevance: Plaintiffs have alleged that Defendants are liable for their direct treatment of one or more of Plaintiffs. To the extent that one or more Plaintiffs was handled or treated by an individual other than a Defendant, such information is plainly relevant and discoverable in that it may show, for instance, that certain alleged injuries were caused by someone other than Defendants.

14. All documents relating to the operation of the facility(ies) where any Plaintiff or Defendant was located to the extent that they disclose: (1) information concerning what was or was not done to or for any Plaintiff by any Defendant; (2) what any Defendant was (or was not) permitted to do vis-à-vis any Plaintiff and why; and/or (3) what was done to any Plaintiff and why.

- Relevance: This request seeking information concerning one or more Defendants involvement with one or more Plaintiff, if any, plainly seeks discoverable information. Moreover, to the extent that something was (or was not) done to any Plaintiff is discoverable in light of the claims advanced by Plaintiffs wherein they seek to impose liability upon Defendants for all things done to them.

15. All documents relating to any Defendant's involvement, if any, in any Plaintiff's capture or rendition.

- Relevance: One or more Plaintiffs allege that one or both Defendants was involved in their capture and/or rendition. Thus, Defendants are entitled to discovery bearing on this issue.

16. All documents relating to the involvement of any individual(s) other than one or both Defendants involvement in any Plaintiff's capture or rendition.

- Relevance: As explained above, in this action Plaintiffs seek to hold one or both Defendants liable for everything that happened (or did not happen) to them in connection with the Program. In light of Plaintiffs' position, Defendants are surely entitled to discover what things happened (or did not happen) to Plaintiffs with which Defendants had no involvement.

17. All documents concerning the means of each Plaintiff's capture and rendition, including physical and/or emotional techniques used and any injuries (physical and/or emotional) sustained (or thought to have been sustained) during such capture and/or rendition.

- Relevance: This information is discoverable for the same reasons as that set forth in response to the foregoing two requests.

18. All documents relating to what was done, physically or emotionally, to any Plaintiff during any debriefing and/or interrogation session and the roles played by Defendants and/or others in such activities.

- Relevance: As explained above, in this action Plaintiffs seek to hold one or both Defendants liable for everything that happened (or did not happen) to them in connection with the Program. In light of Plaintiffs' position, Defendants are

surely entitled to discover what things happened (or did not happen) to Plaintiffs, particularly to the extent that one or more of Defendants had a role in such activities.

~~19. All documents relating to any written or verbal assessments or evaluations conducted by Defendants of detainee interrogations performed within the Program.~~

20. All documents relating to any unauthorized interrogation techniques conducted, applied or approved by Defendants during or in connection with a detainee interrogation.

- Relevance: The information sought by this request is relevant and discoverable as to whether one or both Defendants operated at all times within the contours of the Program as directed and controlled by the CIA. This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses.

21. All documents ~~relating to~~ **identifying and/or discussing** one or both Defendants' involvement, if any, in Zubaydah's capture, rendition and/or interrogation.

- Relevance: Plaintiffs in essence allege that Defendants used the capture, rendition and interrogation of Zubaydah as a testing ground for their theories and methods **used in connection** with the Program. As such, information concerning what one or both Defendants did (or did not do) vis-à-vis Zubaydah is relevant and discoverable.

22. All documents relating to one or both Defendants' involvement, if any, in Ridha al-Najjar's capture, rendition and/or interrogation.

- Relevance: The information sought by this Request is relevant because al-Najjar was interrogated pursuant to a program separate from that which Plaintiffs' allege Defendants designed and implemented. Information that shows the existence of additional interrogation programs would tend to disprove Plaintiffs' allegations that Defendants were responsible for the implementation of the interrogation techniques used on Plaintiff and are thus be relevant and discoverable.

23. All documents ~~**relating to**~~ **constituting, identifying and/or discussing** Defendants' communications with the Chief of Base concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

- Relevance: As explained above, in this action Plaintiffs seek to hold one or both Defendants liable for everything that happened (or did not happen) to them in connection with the Program. As such, one or both Defendants communications with the Chief of Base, or information concerning those communications, pertaining to a named Plaintiff is relevant and discoverable.

24. All documents ~~**relating to**~~ **constituting, identifying and/or discussing** Defendants' communications with any persons at CIA headquarters concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

- Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above.

25. All documents ~~**relating to**~~ **constituting, identifying and/or discussing** Defendants' communications with CIA's inspector general, director of operations or any internal

board or committee concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

- Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above.

26. Any reports prepared by the CIA's inspector general, director of operations or any internal board or committee in connection with a review of the circumstances of Plaintiff Rahman's death, including, but not limited to, the CIA's inspector general's report titled "Special Review of Counterterrorism Detention and Interrogation Activities."

- Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above. The information sought by this request is also relevant and discoverable to the extent that it can inform what occurred (or did not) to Plaintiff Rahman and who did (or did not) perform such activities.

27. All documents **i**~~documen~~t**ifying** ~~**s related to**~~ **and/or discussing** Defendants' role or participation in any CIA interrogator training courses conducted by the CIA's CTC Renditions Group.

- Relevance: Plaintiffs allege that Defendants had an active role in training the CIA employees and/or agents that conducted Plaintiffs' renditions, detention and/or interrogations. As such, information bearing on what role, if any, one or both Defendants played in connection with such training is relevant and discoverable.

28. The identities of the persons who led CIA interrogator training courses beginning in August 2002 through February 2011.

- Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above. Moreover, to the extent that one or more of Plaintiffs was interrogated by an individual(s) that was trained by someone other than one or both Defendants it is surely relevant and discoverable in that it would disprove, or at least tend to disprove, certain of Plaintiffs' theories of liability.

29. The following documents or papers referenced in the SSCI Report [where applicable, the location of the reference to the document in the SSCI Report is included in brackets]:

- An undated paper authored by Defendants titled "*Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective*"
- [FN 125 in SSCI Report] April 30, 2002 @ 12:02:47 PM email exchange with subject "Turning Up the Heat in the AZ Interrogations"
- [FN 136 in SSCI Report] July 8, 2002 @ 4:15:15 PM email from __ to __ with subject: "Description of Physical Pressure"
- [FNs 140-142 in SSCI Report] July 8, 2002 email from __ to __ subject: EYES ONLY-DRAFT
- [FN 162 in SSCI Report] July 26, 2002 email from __ to Jose Rodriguez with subject: "EYES ONLY – Where we stand re: Abu Zubaydah"
- [FN 137 in SSCI Report]: ALEC ____ (051724Z JUL 02)
- [FN 250 in SSCI Report]: ALEC ___ (162135Z JUL 02)
- [FN 257 in SSCI Report]: ____ 25107 (260903Z JUL 02)
- [FN 2578 in SSCI Report]: _____ 10604 (091624Z AUG 02); _____ 10607 (100335Z AUG 02); August 21, 2002 email from ____ re: "[SWIGERT and DUNBAR]
- [FN 2332 in SSCI Report]: ____ (251609Z AUG 02)1

- [FN 326 in SSCI Report]: DIRECTOR _____ (301835Z JAN 03)
- All cables and documents listed in FN 612 of SSCI Report
- [FN 596 in SSCI Report]: January 28, 2003 Memorandum for Deputy Director of Operations, subject: "Death Investigation – Gul Rahman"
- [FN 2676 in SSCI Report]: 37121 (221703Z APR 03), 37152 (231424Z APR 03)
- [FN 2677 in SSCI Report]: 37202 (250948Z APR 03), 37508 (021305Z MAY 03)
- [FN 659 in SSCI Report]: 38262 (150541Z MAY 03), 38161 (131326Z MAY 03)
- [FN 664 in SSCI Report]: 38365 (170652Z MAY 03)
- [FN 583 of SSCI Report]: _____ 39042 (_____ MAY 03); ___ 38596 (201220Z MAY 03); _____ 39582 (041743Z JUN 03); _____ 38557 (191641Z MAY 03); _____ 38597 (201225Z MAY 03); _____ 39101 _____ MAY 03)
- All cables and documents listed in FNs 596, 603 and 607 of SSCI Report
- [FNs 323 and 328 in SSCI Report]: June 16, 2003 emails to __ from __ re: "RDG Tasking for IC Psychologists DUNBAR and SWIGERT"
- [FN 631 of the SSCI Report]: ____ 1271____ AUG 03; ____1267 ____ AUG 03
- [FN 738 in SSCI Report]: May 12, 2004, Memorandum for Deputy Director for Operations from _____, Chief, Information Operations Center, and Henry Crumpton, Chief, National Resources Division via Associate Director of Operations, with the subject line "Operational Review of CIA Detainee Program"
- [FN 609 of SSCI Report]: April 7, 2005, Briefing for Blue Ribbon Panel, CIA Rendition, Detention, and Interrogation Programs
- [FN 2711 in SSCI Report]: April 27, 2005 CIA Inspector General, Report of Investigation, Death of Detainee (2003-7402-IG)
- [FN 1028 in SSCI Report]: Name: Author Letter to __, attn.: DUNBAR and SWIGERT from __, Contracting Officer, re: "Confirmation of Verbal Authorization to Proceed Not to Exceed (ATP/NTE)"
- [FN 1028 in SSCI Report]: Name: Author: March 2, 2005 email from __ to __ subject: "Next Contractual Steps with SWIGERT and DUNBAR"

- [FN 1028 in SSCI Report]: Name: Author: March 18, 2005 Letter from __, Chief, to __ re: "Letter Contract ___
- [FN 1029 in SSCI Report]: Name: Author: June 17, 2005 @ 11:08:22 email from __ to __ subject: "PCS CTC officer to __"
- [FN 1029 in SSCI Report]: Name: Author: July 12, 2005 @ 10:25:48 am email re: "Justification Date: 28 February 2006, Justification for other than Full and Open Competition, Contractor"
- [FN 1032 in SSCI Report]: March 15, 2006 "DO/CTC__/RDG Projected Staff & Contractors"
- [FN 994 in SSCI Report]: June 22, 2007 email to Jose Rodriguez and John Rizzo re: EIT Briefing for SecState"
- [FN 227 in SSCI Report]: "Memorandum for Executive Director from ___, from Deputy Director of Science and Technology re: Report and Recommendations of the Special Accountability Board Regarding the Death of Afghan Detainee Gul Rahman"
- [FN 37 in SSCI Report]: February 10, 2006, Memorandum for ___ CIA OFFICER, CounterTerrorist Center, National Clandestine Service, from Executive Director re: Accountability Decision
- [FN 873 in SSCI Report]: Report of Audit, CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification, Report No. 2005-0017-AS (6/14/06)
- Cables referenced in FNs 269 and 270 of the SSCI Report
- [FN 981 in SSCI Report]: CIA Comments on the February 2007 ICRC Report on Treatment of Fourteen "High Value Detainees" in CIA Custody
- Detainee Review for Suleiman Abdullah
- [FN 612 in SSCI Report]: ____ 387821, 38583

Exhibit L

BLANK ROME LLP
COUNSELORS AT LAW

Phone: *(215) 569-5791*
Fax: *(215) 832-5791*
Email: *Paszamant@BlankRome.com*

August 1, 2016

VIA EMAIL

Andrew I. Warden
U.S. Department of Justice
Civil Division
Federal Programs Bench
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
andrew.warden@usdoj.gov

Re: ***Salim et al. v. Mitchell et al.*, No. 2:15-CV-286-JLQ Department of Justice Subpoena**

Dear Andrew:

We write to meet and confer concerning the Department of Justice's ("DOJ") July 19, 2016 response to the non-party subpoena issued by our clients, James Elmer Mitchell and John "Bruce" Jessen, defendants in the above-referenced matter ("Defendants"), on June 29, 2016 (the "Subpoena"). We disagree that the Subpoena is "massively overbroad," duplicative, or seeks irrelevant or otherwise non-discoverable information. However, in an effort to address the issues you raise, we request that you provide us with clarification as to the asserted applicability of certain statutes and privileges that you have identified. Additionally, as detailed herein, we have identified certain aspects of the Subpoena that we can clarify and/or that we are amenable to narrowing in an effort to resolve some of the objections advanced in order to avoid unnecessary motion practice. Finally, please advise as to when the DOJ anticipates that it will begin producing responsive document, whether on a "rolling basis" (as I have suggested) or otherwise and a compliant privilege log, in light of the relatively short deadlines imposed by the Court.

I. OBJECTIONS PURPORTEDLY BASED ON STATUTES AND PRIVILEGES

A. Information Allegedly Protected Under Executive Orders 12333, 13470, 12958; the National Security Act; the DOJ Act; and/or the State Secret Privilege

The DOJ asserts that the Subpoena seeks "documents likely [to] include classified information and/or information protected by law from disclosure by, among other things, Executive Orders 12333, 13470, 12958, and 13526; . . . the National Security Act, 50 U.S.C. § 3024; the DOJ Act, 50 U.S.C. § 3507, and the states secret privilege", and objects to the production of requested information on such basis. (July 19 Ltr. at 1-2.)

Defendants recognize that the listed Executive Orders, the National Security Act, and the CIA Act together provide certain authority for the CIA's systematic classification and protection of certain information related to national security. Defendants also acknowledge that when information protected by these Orders or statutes is sought pursuant to the Freedom of Information Act ("FOIA"), the information sought is exempt from disclosure. *See* 5 U.S.C. § 552(b)(1) and (3). However, any such exemption is inapplicable here—in the context of civil discovery. Indeed, it is well-settled that documents that are exempt from FOIA disclosure "are not automatically privileged in civil discovery." *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1185 (9th Cir. 2006) (citing and quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984)). Therefore, the DOJ is obligated to produce responsive documents that fall within the Executive Orders, the National Security Act, and/or the CIA Act, unless the DOJ establishes that such documents are protected from disclosure pursuant to an applicable common-law privilege. Defendants request that the DOJ withdraw its objections based upon the aforementioned Orders and/or statutes, or provide us with authority establishing that such Orders and/or statutes provide a basis to preclude or limit discovery in the present context.

Your assertion that the DOJ previously provided Defendants with a description of subject matters related to the CIA's detention and interrogation program that it claims remain classified is inapposite. While Defendant's appreciate the guidance, such guidance does not render otherwise discoverable information non-discoverable. To the extent Defendants seek allegedly classified information that the DOJ contends cannot be disclosed because of its importance in national security matters, the DOJ has an option – it can avail itself of the state secret or other applicable privileges to prevent disclosure. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984) ("The privileges which State claims will protect many of the documents produced, the state secrets and deliberative process privileges, are narrowly drawn privileges which must be asserted according to clearly defined procedures."). The state secret

privilege requires the DOJ to assert (1) a formal claim of privilege; (2) lodged by the head of the department which has control over the matter; (3) after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1 (1953) Until such a privilege is properly asserted, the Federal Rules of Civil Procedure enable Defendants to seek and attain all information that is relevant (or otherwise discoverable) to the claims brought against them or their defenses thereto. *See* Fed. R. Civ. Pro. 26(b). To the extent that the DOJ has not yet properly invoked the state secret privilege, it is not able to withhold discoverable documents on this basis. Defendants request that the DOJ promptly produce any otherwise discoverable documents contemplated to be withheld because they are asserted to contain classified information or pursuant to the state secret privilege.

B. The Intelligence Identities Protection Act

The DOJ relies upon the Intelligence Identities Protection Act, 50 U.S.C. § 3121b, to withhold responsive documents that could disclose the identities of covert intelligence officers, as purportedly sought by the Subpoena's Requests #9-11; 28. Defendants do not understand the statute's applicability to the DOJ in this case. The Identities Protection Act is "a purely criminal statute that only authorizes criminal prosecution of those who intentionally disclose the identity of a covert agent." *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008). We are not aware of any authority for the proposition that the statute limits the DOJ's disclosure obligations pursuant to a court order or subpoena. To the extent that the DOJ believes otherwise, please provide us with authority supporting the DOJ's position.

C. The Privacy Act and the Trade Secrets Act

The DOJ objects to the Subpoena to the extent that it seeks "confidential personal or business information" protected by the Privacy Act, 5 U.S.C. § 552a, or information protected by the Trade Secrets Act, 18 U.S.C. § 1905. (July 19 Ltr. at 4.) Please clarify how these statutes are applicable to this case, as neither appear to afford the DOJ the right to withhold otherwise discoverable information.

The Privacy Act prohibits government agencies from disclosing records that an agency maintains within a "system of records"; 5 USC § 552a, i.e. a group of records from which information can be retrieved by the name of an individual or some other identifying feature. 5 USC § 552a(a)(5). But the Privacy Act contains a specific exception for the release of materials pursuant to the order of a court of competent jurisdiction. 5 U.S.C. § 552a(b)(11); *United States v. W.R. Grace*, 455 F. Supp. 2d 1140, 1147 (D. Mont. 2006) (Privacy Act did not obligate the Government to withhold documents responsive to the Court's discovery order). Thus, to the extent that information requested in the Subpoena falls within the scope of the Privacy Act, the

information can and must be disclosed in circumstances such as this—where a valid subpoena exists. Indeed, to secure discovery of materials potentially protected by the Privacy Act, Defendant must only follow the standard discovery process. *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987).

The same is true for information that falls within the Trade Secrets Act. This Act provides penalties for government employees who disclose, in a manner not authorized by law, any trade information that is revealed to the employee in performance of official duties. The Act is meant to prevent the discretionary release of certain types of business information in the possession of government employees. 18 U.S.C. § 1905. However, when the disclosure is authorized by law—as it would be here—the Act provides the DOJ with no basis to withhold discoverable information. *See United States v. W.R. Grace*, 455 F. Supp. 2d 1140, 1148 (D. Mont. 2006). To the extent that the DOJ believes that Defendants misrepresent the scope or application of either of the foregoing Acts, please advise how and provide us with the authority supporting the DOJ's position.

Finally, in an effort to alleviate any concerns that the DOJ may have predicated upon one or both of the aforementioned Acts, Defendants would be amenable to entering into an appropriate confidentiality stipulation/proposed order. Please advise whether this is something you wish to explore and, if so, please propose a form of stipulated order for us to review.

D. The Deliberative Process, Confidential Informant, and Law Enforcement Privileges

The DOJ identifies the deliberative process privilege, the confidential information privilege, and the law enforcement privilege as privileges that may apply to certain information sought by the Subpoena. (July 19 Ltr. at 4.) While Defendants acknowledge these privileges have been recognized by courts, each privilege must be invoked to shield disclosure of information -- something to Defendant's knowledge the DOJ has not yet done.[1] Furthermore,

[1] To invoke the deliberative process privilege, a government must show that the information withheld is "predecisional" and "deliberative" in nature. *F.T.C. v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). A subpoena that simply seeks "drafts" of documents from the government does not automatically implicate the deliberative process privilege, as your July 19 Letter suggests. To invoke the confidential informant privilege, the government must show the information withheld is a communication that will tend to reveal the identity of persons who furnish information to law enforcement officials. *Roviaro v. United States*, 353 U.S. 53, (1957). To invoke the law enforcement privilege, three requirements must be met: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*,

these privileges are not absolute and Defendants are entitled to an opportunity to explain why their need for the requested information should overcome any such invoked privilege which may be advanced. *See Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003) (deliberative process privilege not absolute); *Perez v. Blue Mountain Farms*, No. 2:13-CV-5081-RMP, 2015 WL 11112414, at *2 (E.D. Wash. Aug. 10, 2015) (confidential informant and law enforcement privilege not absolute).

Defendants have detailed below why the documents sought by the Subpoena's various requests (as modified in some instances) are directly relevant to the claims and defenses at issue in this action, and therefore discoverable. As such, please advise as soon as possible which, if any, of the aforementioned privileges the DOJ has invoked in response to the Subpoena, and specifically, in response to which Request(s), so that Defendants may further assess the viability of the DOJ's position.

E. Attorney Work Product and Attorney Client Privilege

The DOJ claims that certain information sought by the Subpoena may be withheld pursuant to the attorney work product privilege and/or the attorney client privilege. Although Defendants, of course, recognize the existence of these privileges, they cannot simply accept the DOJ's blanket assertion that they may serve to prevent disclosure of otherwise discoverable documents or information in this action. Should the DOJ contend that one or both of the aforementioned privileges apply to preclude disclosure of otherwise responsive documents, Defendants look forward to receiving a privilege log containing detail sufficient to enable Defendants to properly assess the DOJ's privilege assertion.

F. Grand Jury Materials

The DOJ claims that the Subpoena seeks information that is protected from disclosure by Federal Rule of Criminal Procedure 6(e), which protects grand jury materials. If the requested documents that are, in fact, confidential grand jury materials, please provide sufficient information so that Defendants can lawfully seek access to such materials by as provided by Federal Rule of Criminal Procedure 6(e)(3)(G).

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856 F.2d 268, 271 (D.C. Cir. 1988) (citing *Black v. United States*, 564 F.2d 531, at 541-547 (D.C. Cir. 1977)).

II. OBJECTIONS BASED ON ALLEGED OVERBREADTH, IRRELEVANCE, AND/OR VAGUENESS

A. Overbreadth Allegedly Based Upon Temporal Scope

The DOJ objects to the Subpoena as "massively overbroad." (July 19 Ltr. at 2.) Specifically, the DOJ claims that the temporal limitations of the Subpoena are excessive in that the Subpoena's temporal scope is September 11, 2001 until the present. But, the identified temporal scope is not overbroad considering the scope of Plaintiffs' claims. Specifically, Defendants requested and are entitled to discover documents dating back to September 11, 2001 because Plaintiffs' expressly assert that shortly after that date, Defendants designed and implemented a detention and interrogation program for the DOJ's use on foreign nationals (the "Program"). (*See* Compl. ¶ 22.) Similarly, Defendants requested and are entitled to discover documents generated through the present, despite Plaintiffs' earlier release, to the extent that such documents pertain to the claims and defenses at issue in this action. For example, a document detailing Plaintiff Rahman's detention and/or interrogation is no doubt discoverable irrespective of whether that document was generated years after his apparent death. Similarly, documents detailing Plaintiff Salim's detention and/or interrogation are no doubt discoverable irrespective of whether those documents were generated years after his release. Simply stated, the temporal scope of the Subpoena does not render it *ipso facto* overbroad.

Although Defendants are unable to limit the overall temporal scope of the Subpoena, they remain interested in exploring ways to limit the burden that their Subpoena places on the DOJ. With this in mind and in an effort to reach an amicable resolution absent the need for the Court's intervention, Defendants have revisited the Subpoena's requests, and are amenable to revising certain requests, as detailed in the blacklined document attached to this letter as **Exhibit AA**. The attached document also identifies why the Subpoena's requests, particularly as modified, seek relevant and discoverable documents.

B. Relevance

The DOJ next objects that the Subpoena seeks "information of questionable relevance." (July 19 Ltr. at 4.) The DOJ claims that the relevance of each Requests is not apparent on its face. To ally the DOJ's concerns, we have indicated the relevance of each Request in the attached **Exhibit AA**.

C. Objection Based Upon Compliance Timing

The DOJ objects to the Subpoena to the extent it "fails to allow reasonable time to

comply" because it requires the production of documents on August 1, 2016, 33 days after its issuance. (July 19 Ltr. at 3.) Unfortunately, given the Court's July 8, 2016 Scheduling Order, Defendants are not at liberty to permit the DOJ months to identify and produce discoverable information; as you know, Defendants are obligated to serve a final list of trial witnesses by December 12, 2016 and all discovery must be completed by February 17, 2017. (ECF No. 59.) Notably, you posed no objection to those deadlines when participating in the telephonic hearing held by the Court despite being given the opportunity to do so. (*See* ECF No. 59.) Finally, it is a bit of a red herring for the DOJ to advance an objection based on the Subpoena's response date when, to date, the DOJ has not produced any documents pursuant to the Subpoena or even provided Defendants with a date on which it expects to begin production.

D. Objection Based Upon Alleged Vagueness

The DOJ takes issue with certain terms as used or defined in the Subpoena as vague. (July 19 Ltr. at 2, 4.) For instance, the DOJ takes issue with the term "relating to" as used in the Subpoena. In an effort to resolve this issue without the need for the Court's intervention, this verbiage applicable to the requests has been modified in attached **Exhibit AA**.

The DOJ also objects to the term "DOJ" as defined in the Subpoena to include "affiliated organization" and "consultants" and "contractors." The DOJ finds this problematic because—as written—it potentially requires the DOJ to obtain documents from other agencies. To be clear, Defendants seek documents from the DOJ's affiliates, consultants, and/or contractors only to the extent that responsive documents lie within the DOJ's possession, custody or control. Furthermore, to the extent a Request is more appropriately addressed to the CIA, Defendants will accept the requested documents from the CIA provided that the copy of the requested document(s) within the DOJ's possession is identical to that contained in the CIA's possession. Similar Requests were submitted to the CIA and DOJ only because Defendants simply have no way to know what agency possesses what relevant records.

E. Objection Based Upon Alleged Duplication

The DOJ claims that the Subpoena is "unreasonably cumulative or duplicative" and "seeks information that is otherwise available" from a less burdensome source because the DOJ has previously publicly released certain relevant information, including legal memoranda. (July 19 Ltr. at 3.) Defendants do not seek to burden the DOJ more than necessary, and have not ignored the existence of documents that have been previously released and are now held by third parties. Nevertheless, the prior public release of documents does not exempt the DOJ from producing discoverable documents to Defendants. Moreover, Defendants assume (because the DOJ has not specifically identified those documents to which it refers) that certain of these

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COUNSELORS AT LAW

documents are the legal memoranda approving certain interrogation techniques released pursuant to FOIA requests. But, some of these documents remain heavily redacted pursuant to FOIA exemptions that, as discussed above, are not applicable in this civil discovery context. Thus, these documents are not duplicative, as Defendants are entitled to un-redacted versions of these documents.

Finally, although we note your indication that the DOJ has not made a "final decision" with regard to the Subpoena's requests, the DOJ has advanced numerous objections (that are addressed herein). Unless promptly withdrawn, we will continue to consider those objections as the DOJ's final position with regard to these matters.

We look forward to the DOJ's commencement of document production in a material manner and to receiving your response to the other issues raised in this letter by no later than Thursday, August 4. Your anticipated cooperation is greatly appreciated, and Defendants are hopeful that the discussion contained herein and in the attached, along with the concessions identified in the attached, will help facilitate the DOJ's prompt compliance with the remaining Subpoena requests.

Very truly yours,

BRIAN S. PASZAMANT

Attachment
cc: Hank Schuelke, III, Esquire (via email)
James Smith, Esquire (via email)
Christopher Tompkins, Esquire (via email)
Jeffrey Rosenthal, Esquire (via email)

EXHIBIT AA

REQUESTS

1. All documents ~~**relating to**~~ **constituting, discussing and/or identifying the scope of** any contract or employment agreement entered into between one or both Defendants and the CIA related to the Program**, and/or one or both Defendants' performance pursuant to any such contract(s) or employment agreement(s).**

- Relevance: This information is relevant and discoverable in that it will inform the scope of Defendants' contractual relationship with the CIA, Defendants' performance pursuant to (or beyond) that relationship, and what Defendants, the CIA and/or others were communicating about such relationship and performance. This goes to the heart of Defendants' Political Question and/or Derivative Sovereign Immunity defenses among other things.

2. All documents ~~**relating to**~~ **identifying and/or discussing** the design and/or approval of the Program, including documents relating to the Program's intended or actual scope, the identity of the persons who formally approved the Program's design and the basis for approval(s).

- Relevance: Plaintiffs have advanced claims against Defendants predicated upon the allegation that one or both Defendants were instrumental in the Program's design and implementation such that Defendants are liable to Plaintiffs whether or not either Defendant ever saw one or more of the named Plaintiffs. This information is relevant and discoverable in that it will address the process and individuals involved in the Program's design and the role, if any, played by Defendants in such design. It is also relevant and discoverable as to how, if at all,

the Program for which Defendants were asked to provide recommendations was used beyond its approved and/or intended scope. Finally, information concerning who approved the Program and the basis for all such approvals is relevant and discoverable as to whether the requisite authority was validly sought and conferred.

3. All documents identifying those involved in any way in the Program's design and/or the roles played by such individuals.

- Relevance: Plaintiffs have advanced claims against Defendants predicated upon the allegation that one or both Defendants were instrumental in the Program's design and implementation such that Defendants are liable to Plaintiffs whether or not either Defendant ever saw one or more of the named Plaintiffs. This information is relevant and discoverable as to who besides Defendants was involved in making recommendations or otherwise designing the Program and the roles played by such individuals, a Program for which Defendants alone are sought to be held liable. Put differently, this information will address where Defendants fit within the constellation of individuals involved in the Program's design, and it is believed that this information will demonstrate that Defendants were merely minor participants in the Program's design.

4. All documents ~~**relating to**~~ **identifying or discussing** the structure of the Program, ~~**including the identity of**~~ **identifying** the persons who formally approved the Program's structure and ~~**the basis for approval(s)**~~**/or identifying or discussing the basis for approval(s).**

- Relevance: The information sought is relevant and discoverable as to how, if at all, any Program for which Defendants were provided recommendations was used

beyond its approved and/or intended scope. Defendants should not be held liable for actions taken by others that exceeded the approved and intended scope of any Program for which Defendants provided design recommendations. Additionally, information concerning who approved the Program and the basis for all such approvals is relevant and discoverable as to whether the requisite authority was validly sought and conferred.

5. All documents identifying or describing those individuals for whom the Program was designed and/or intended.

- Relevance: The information sought is relevant and discoverable in that it will inform how, if at all, any Program for which Defendants provided design recommendations was used beyond its approved and/or intended scope. Defendants should not be held liable for actions taken by others that exceeded the approved and intended scope of any Program for which Defendants provided design recommendations. Defendants believe that this may have occurred with regard to one or more of the named Plaintiffs and are entitled to discovery concerning this subject.

6. All documents ~~**relating to**~~ **identifying or discussing** specific interrogation methods or techniques proposed to or considered by DOJ in connection with the Program.

- Relevance: This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses. In addition, this information is relevant to Defendants' defense pursuant to the Detainee Treatment Act.

7. All documents ~~relating to~~ **identifying or discussing** the approval by DOJ of specific interrogation methods or techniques in connection with the Program.

- Relevance: This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses. In addition, this information is relevant to Defendants' defense pursuant to the Detainee Treatment Act.

8. All communications between one or both Defendants and the CIA or DOJ concerning ~~the Program~~**(a) the design, structure, purpose, approval or scope of the Program; or (b) Plaintiffs.**

- Relevance: Plaintiffs seek to hold Defendants liable for Defendants' alleged role in designing the Program as well as Defendants' alleged direct involvement with the Plaintiffs. As such, communications of the type identified are discoverable. Please also refer to the explanations above regarding the discoverability of information concerning the Program's design, structure, purpose, approval and scope.

9. All documents identifying or describing the location of a facility(ies) where any Plaintiff was detained and/or interrogated to the extent that it discloses the extent to which any Defendant was present at such facility(ies) when any Plaintiff was in such facility(ies) or when any Plaintiff was subjected to interrogation.

- Relevance: Plaintiffs seek to hold Defendants liable for Defendants' alleged direct involvement with the Plaintiffs. The information sought is relevant and discoverable as to whether one or both Defendants was in the same location with

any Plaintiff at the same time. One or both Defendant's absence from a location is relevant to the issue of whether one or both Defendants could have had any involvement with one or more of the Plaintiffs.

10. All documents ~~**relating to**~~**identifying and/or discussing**:

(a) the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

- Relevance: Plaintiffs claims are based in large part on the allegation that Defendants played a central role in the design, promotion, implementation and/or operation of the Program. Among other things, Plaintiffs allege that Defendants are liable to Plaintiffs because of Defendants' alleged active promotion of the Program. As such, the information sought is relevant and discoverable.

(b) what Defendants were told concerning the role that one or both Defendants was requested to play, or did play, with respect to the design, promotion, implementation and/or operation of the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

(c) the scope and/or limits of one or both Defendants' authority in connection with designing, promoting, implementing and/or operating the Program;

- Relevance: This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses.

(d) what Defendants were told concerning the scope and/or limits of his/their authority in connection with designing, promoting, implementing and/or operating the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

(e) the legality and/or approval of one or both Defendants' actions, contemplated actions and/or inactions in connection with the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

(f) what Defendants were told concerning the legality and/or approval of his/their actions, contemplated actions and/or inactions in connection with the Program;

- Relevance: This information is discoverable for the same reason as that set forth immediately above. In addition, this information is relevant to Defendants' defense pursuant to the Detainee Treatment Act.

(g) one or both Defendants' ability to refuse to comply with any action requested of him/them; and

- Relevance: Plaintiffs' claims are predicated, in part, on the allegation that Defendants had the ability to control their activities performed in connection with the Program. The information sought is relevant in discoverable in that it will inform what ability, if any, Defendants had to control their activities performed in connection with the Program. Stated differently, it will inform who or what actually controlled the design and/or implementation of the Program.

(h) what Defendants were told concerning his/their ability to refuse to comply with any action requested of him/them.

- Relevance: This information is discoverable for the same reason as that set forth immediately above. In addition, this information is relevant to Defendants' defense pursuant to the Detainee Treatment Act.

11. All documents ~~relating to~~ identifying the persons to whom Defendants reported or who controlled, requested and/or directed Defendants' activities, including the persons' names, titles and duties.

- Relevance: This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses. This information is also relevant and discoverable as any such individuals will surely be able to provide discoverable information concerning what one or more of Defendants did (or did not do) in connection with

the Program, e.g. their role, if any, in the Program's design and/or their involvement, if any, with respect to one or more of Plaintiffs.

12. All documents ~~relating to~~ **identifying or discussing** the persons in the chain of command who approved the Program and Defendants' role in the Program, including the persons' names, titles and duties.

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

13. All documents ~~relating to~~ **identifying** the persons who knew of and/or approved the activities of one or both Defendants, including the persons' names, titles and duties.

- Relevance: This information is discoverable for the same reason as that set forth immediately above.

14. All documents relating to the handling or treatment of any Plaintiff by one or both Defendants.

- Relevance: Plaintiffs have alleged that Defendants are liable for their direct treatment of one or more of Plaintiffs. Thus, the information sought, relating to this very subject matter, is relevant and discoverable.

15. All documents relating to the handling or treatment of any Plaintiff by an individual other than one or both Defendants.

- Relevance: Plaintiffs have alleged that Defendants are liable for their direct treatment of one or more of Plaintiffs. To the extent that one or more Plaintiffs was handled or treated by an individual other than a Defendant, such information is plainly relevant and discoverable in that it may show, for instance, that certain alleged injuries were caused by someone other than Defendants.

16. All documents relating to the operation of the facility(ies) where any Plaintiff or Defendant was located to the extent that they disclose: (1) information concerning what was or was not done to or for any Plaintiff by any Defendant; (2) what any Defendant was (or was not) permitted to do vis-à-vis any Plaintiff and why; and/or (3) what was done to any Plaintiff and why.

- Relevance: This request seeking information concerning one or more Defendants involvement with one or more Plaintiff, if any, plainly seeks discoverable information. Moreover, to the extent that something was (or was not) done to any Plaintiff is discoverable in light of the claims advanced by Plaintiffs wherein they seek to impose liability upon Defendants for all things done to them.

17. All documents relating to any Defendant's involvement, if any, in any Plaintiff's capture or rendition.

- Relevance: One or more Plaintiffs allege that one or both Defendants was involved in their capture and/or rendition. Thus, Defendants are entitled to discovery bearing on this issue.

18. All documents relating to the involvement of any individual(s) other than one or both Defendants involvement in any Plaintiff's capture or rendition.

- Relevance: As explained above, in this action Plaintiffs seek to hold one or both Defendants liable for everything that happened (or did not happen) to them in connection with the Program. In light of Plaintiffs' position, Defendants are surely entitled to discover what things happened (or did not happen) to Plaintiffs with which Defendants had no involvement.

19. All documents concerning the means of each Plaintiff's capture and rendition, including physical and/or emotional techniques used and any injuries (physical and/or emotional) sustained (or thought to have been sustained) during such capture and/or rendition.

- Relevance: This information is discoverable for the same reasons as that set forth in response to the foregoing two requests.

20. All documents relating to what was done, physically or emotionally, to any Plaintiff during any debriefing and/or interrogation session and the roles played by Defendants and/or others in such activities.

- Relevance: As explained above, in this action Plaintiffs seek to hold one or both Defendants liable for everything that happened (or did not happen) to them in connection with the Program. In light of Plaintiffs' position, Defendants are surely entitled to discover what things happened (or did not happen) to Plaintiffs, particularly to the extent that one or more of Defendants had a role in such activities.

~~**21. All documents relating to any written or verbal assessments or evaluations conducted by Defendants of detainee interrogations performed within the Program.**~~

22. All documents relating to any unauthorized interrogation techniques conducted, applied or approved by Defendants during or in connection with a detainee interrogation.

a. Relevance: The information sought by this request is relevant and discoverable as to whether one or both Defendants operated at all times within the contours of the Program as directed and controlled by the CIA. This information is relevant and discoverable in that it bears directly on whether one or both Defendants acted

within their validly conferred authority, a significant underpinning for their Political Question and Derivative Sovereign Immunity defenses.

23. All documents ~~relating to~~ **identifying and/or discussing** one or both Defendants' involvement, if any, in Zubaydah's capture, rendition and/or interrogation.

a. Relevance: Plaintiffs in essence allege that Defendants used the capture, rendition and interrogation of Zubaydah as a testing ground for their theories and methods used in connection with the Program. As such, information concerning what one or both Defendants did (or did not do) vis-à-vis Zubaydah is relevant and discoverable.

24. All documents relating to one or both Defendants' involvement, if any, in Ridha al-Najjar's capture, rendition and/or interrogation.

a. Relevance: The information sought by this Request is relevant because al-Najjar was interrogated pursuant to a program separate from that which Plaintiffs' allege Defendants designed and implemented. Information that shows the existence of additional interrogation programs would tend to disprove Plaintiffs' allegations that Defendants were responsible for the implementation of the interrogation techniques used on Plaintiff and are thus be relevant and discoverable.

25. All documents ~~relating to~~ **constituting, identifying and/or discussing** Defendants' communications with the Chief of Base concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

a. Relevance: As explained above, in this action Plaintiffs seek to hold one or both Defendants liable for everything that happened (or did not happen) to them in connection with the Program. As such, one or both Defendants communications

with the Chief of Base, or information concerning those communications, pertaining to a named Plaintiff is relevant and discoverable.

26. All documents ~~relating to~~ **constituting, identifying and/or discussing** Defendants' communications with any persons at CIA headquarters concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

a. Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above.

27. All documents ~~relating to~~ **constituting, identifying and/or discussing** Defendants' communications with CIA's inspector general, director of operations or any internal board or committee concerning Plaintiff Rahman including, but not limited to, communications concerning Plaintiff Rahman's treatment and condition.

a. Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above.

28. Any reports prepared by the CIA's inspector general, director of operations or any internal board or committee in connection with a review of the circumstances of Plaintiff Rahman's death, including, but not limited to, the CIA's inspector general's report titled "Special Review of Counterterrorism Detention and Interrogation Activities."

a. Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above. The information sought by this request is also relevant and discoverable to the extent that it can inform what occurred (or did not) to Plaintiff Rahman and who did (or did not) perform such activities.

29. All documents i~~docum~~entifying ~~s related to~~ and/or discussing Defendants' role or participation in any CIA interrogator training courses conducted by the CIA's CTC Renditions Group.

a. Relevance: Plaintiffs allege that Defendants had an active role in training the CIA employees and/or agents that conducted Plaintiffs' renditions, detention and/or interrogations. As such, information bearing on what role, if any, one or both Defendants played in connection with such training is relevant and discoverable.

30. The identities of the persons who led CIA interrogator training courses beginning in August 2002 through February 2011.

a. Relevance: This information is discoverable for the same reasons as that set forth in response to the request immediately above. Moreover, to the extent that one or more of Plaintiffs was interrogated by an individual(s) that was trained by someone other than one or both Defendants it is surely relevant and discoverable in that it would disprove, or at least tend to disprove, certain of Plaintiffs' theories of liability.

31. The following documents or papers referenced in the SSCI Report [where applicable, the location of the reference to the document in the SSCI Report is included in brackets]:

a. An undated paper authored by Defendants titled "*Recognizing and Developing Countermeasures to Al-Qa'ida Resistance to Interrogation Techniques: A Resistance Training Perspective*"

b. [FN 125 in SSCI Report] April 30, 2002 @ 12:02:47 PM email exchange with subject "Turning Up the Heat in the AZ Interrogations"

c. [FN 136 in SSCI Report] July 8, 2002 @ 4:15:15 PM email from __ to __ with subject: "Description of Physical Pressure"

d. [FNs 140-142 in SSCI Report] July 8, 2002 email from __ to __ subject: EYES ONLY-DRAFT

e. [FN 162 in SSCI Report] July 26, 2002 email from __ to Jose Rodriguez with subject: "EYES ONLY – Where we stand re: Abu Zubaydah"

f. [FN 137 in SSCI Report]: ALEC ____ (051724Z JUL 02)

g. [FN 250 in SSCI Report]: ALEC ___ (162135Z JUL 02)

h. [FN 257 in SSCI Report]: ____ 25107 (260903Z JUL 02)

i. [FN 2578 in SSCI Report]: _____ 10604 (091624Z AUG 02); _____ 10607 (100335Z AUG 02); August 21, 2002 email from ____ re: "[SWIGERT and DUNBAR]

j. [FN 2332 in SSCI Report]: ____ (251609Z AUG 02)1

k. [FN 326 in SSCI Report]: DIRECTOR _____ (301835Z JAN 03)

l. All cables and documents listed in FN 612 of SSCI Report

m. [FN 596 in SSCI Report]: January 28, 2003 Memorandum for Deputy Director of Operations, subject: "Death Investigation – Gul Rahman"

n. [FN 2676 in SSCI Report]: 37121 (221703Z APR 03), 37152 (231424Z APR 03)

o. [FN 2677 in SSCI Report]: 37202 (250948Z APR 03), 37508 (021305Z MAY 03)

p. [FN 659 in SSCI Report]: 38262 (150541Z MAY 03), 38161 (131326Z MAY 03)

q. [FN 664 in SSCI Report]: 38365 (170652Z MAY 03)

r. [FN 583 of SSCI Report]: _____ 39042 (_____ MAY 03); ___ 38596 (201220Z MAY 03); _____ 39582 (041743Z JUN 03); _____ 38557 (191641Z MAY 03); _____ 38597 (201225Z MAY 03); _____ 39101 _____ MAY 03)

s. All cables and documents listed in FNs 596, 603 and 607 of SSCI Report

t. [FNs 323 and 328 in SSCI Report]: June 16, 2003 emails to __ from __ re: "RDG Tasking for IC Psychologists DUNBAR and SWIGERT"

u. [FN 631 of the SSCI Report]: ____ 1271____ AUG 03; ____1267 ____ AUG 03

v. [FN 738 in SSCI Report]: May 12, 2004, Memorandum for Deputy Director for Operations from _____, Chief, Information Operations Center, and Henry Crumpton, Chief, National Resources Division via Associate Director of Operations, with the subject line "Operational Review of CIA Detainee Program"

w. [FN 609 of SSCI Report]: April 7, 2005, Briefing for Blue Ribbon Panel, CIA Rendition, Detention, and Interrogation Programs

x. [FN 2711 in SSCI Report]: April 27, 2005 CIA Inspector General, Report of Investigation, Death of Detainee (2003-7402-IG)

y. [FN 1028 in SSCI Report]: Name: Author Letter to __, attn.: DUNBAR and SWIGERT from __, Contracting Officer, re: "Confirmation of Verbal Authorization to Proceed Not to Exceed (ATP/NTE)"

z. [FN 1028 in SSCI Report]: Name: Author: March 2, 2005 email from __ to __ subject: "Next Contractual Steps with SWIGERT and DUNBAR"

aa. [FN 1028 in SSCI Report]: Name: Author: March 18, 2005 Letter from __, Chief, to __ re: "Letter Contract ___

bb. [FN 1029 in SSCI Report]: Name: Author: June 17, 2005 @ 11:08:22 email from __ to __ subject: "PCS CTC officer to __"

cc. [FN 1029 in SSCI Report]: Name: Author: July 12, 2005 @ 10:25:48 am email re: "Justification Date: 28 February 2006, Justification for other than Full and Open Competition, Contractor"

dd. [FN 1032 in SSCI Report]: March 15, 2006 "DO/CTC__/RDG Projected Staff & Contractors"

ee. [FN 994 in SSCI Report]: June 22, 2007 email to Jose Rodriguez and John Rizzo re: EIT Briefing for SecState"

ff. [FN 227 in SSCI Report]: "Memorandum for Executive Director from ___, from Deputy Director of Science and Technology re: Report and Recommendations of the Special Accountability Board Regarding the Death of Afghan Detainee Gul Rahman"

gg. [FN 37 in SSCI Report]: February 10, 2006, Memorandum for ___ CIA OFFICER, CounterTerrorist Center, National Clandestine Service, from Executive Director re: Accountability Decision

hh. [FN 873 in SSCI Report]: Report of Audit, CIA-controlled Detention Facilities Operated Under the 17 September 2001 Memorandum of Notification, Report No. 2005-0017-AS (6/14/06)

ii. Cables referenced in FNs 269 and 270 of the SSCI Report

jj. [FN 981 in SSCI Report]: CIA Comments on the February 2007 ICRC Report on Treatment of Fourteen "High Value Detainees" in CIA Custody

kk. Detainee Review for Suleiman Abdullah

ll. [FN 612 in SSCI Report]: ____ 387821, 38583

Exhibit M

U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, D.C. 20530

Andrew I. Warden
Senior Trial Counsel

Tel: (202) 616-5084
Andrew.Warden@usdoj.gov

August 2, 2016

VIA EMAIL

Brian S. Paszamant
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Email: Paszamant@BlankRome.com

RE: *Salim et al. v. Mitchell et. al.*, No. 2:15-CV-286-JLQ
Central Intelligence Agency Subpoena

Dear Brian:

I am writing in response to your July 27, 2016 letter, regarding the non-party subpoena for documents issued by you to the CIA in the above-referenced action.

As I explained in my July 12, 2016 email, the CIA is currently undertaking diligent efforts to respond to your subpoena. By way of update, the CIA has recently completed its search for documents identified in request #29, the request for specific documents cited in the Senate Select Committee on Intelligence's (SSCI) Executive Summary report.[1] This process resulted in the collection of approximately 70 documents totaling approximately 400 pages. We have begun our review of these documents, nearly all of which are marked as containing classified information.

In addition, the CIA has also recently completed electronic searches for documents referencing the Plaintiffs. The CIA focused its search for documents in, among other things, the Agency's RDInet database, which contains millions of highly classified and compartmented documents about the former detention and interrogation program. The SSCI staff used RDInet in searching for records cited in its report, and we believe RDInet is the most comprehensive and reasonably available source of potentially responsive documents in this case. Using names and known

1 As noted in my e-mail, the CIA has not searched for Document "KK" titled "Detainee Review for Suleiman Abdullah" because it is not part of the Executive Summary; rather it is part of the SSCI's Full Report, which is a congressional record.

aliases for the Plaintiffs, the CIA has identified several thousand potentially responsive documents. The initial phase of the review of this material, which remains ongoing, has been focused on identifying whether the documents refer to the Plaintiffs, as opposed to other individuals. This review is complicated by the fact that each Plaintiff has several Arabic names and aliases, some of which are quite common (*e.g.*, Salim Abdullah), thereby multiplying the number of documents that must be reviewed due to various spellings and transliterations of common Arabic names. Further, as noted in the SSCI report, two separate Afghan nationals with the name Gul Rahman were detained by CIA, *see* SSCI Executive Summary at 133 n.791, thus necessitating a careful review to determine whether the document refers to the Plaintiff in this case.

Further, the CIA has collected exhibits 1-50 cited in the Memorandum for Deputy Director of Operations, subject "Death Investigation – Gul Rahman" (January 28, 2002). *See* Documents Request #29(m). This investigation, which was conducted in the days immediately following the death of Gul Rahman, consisted of document collection as well as interviews of on-site personnel. Without waiving any of our objections to production, in our view the exhibits attached to this report constitute the most reasonably available and then-contemporaneous collection of source documents related to the treatment and cause of death of Gul Rahman. These 50 exhibits, marked as containing classified information, total approximately 150 pages.

The CIA has worked diligently over the past several weeks to gather a substantial volume of documents potentially responsive to many of your document requests. Given the large volume of this material, we anticipate that the review for relevance and responsiveness as well as the line-by-line review and redaction process to protect any privileged, protected, or classified information from improper disclosure is likely to be time- and resource-intensive, as explained in more detail in my July 19, 2016 letter.

In an effort to provide you with documents as soon as practicable, we expect to be able to provide you documents in appropriate batches as review and redaction are completed. We will prioritize review and production of an initial batch of approximately one dozen documents related to the detention and interrogation of Gul Rahman, and I anticipate being able to provide you with an estimated production date for this first batch of documents next week.

We have reviewed the objections and legal arguments raised in your July 27 letter, and we stand by the objections asserted in my July 19 letter. We believe it is premature at this stage to engage in extended discussions over the application of various privileges to hypothetical information. Further, because we are in the initial phase of discovery and our search and review efforts remain ongoing, a privilege log is not required at this time; indeed, it would be impossible to provide one. We also believe any discussions concerning application of any particular privilege or basis for withholding information is more appropriately addressed in the context of specific withholdings, that is, after documents are produced and you have had an opportunity to review them. We are prepared to meet and confer with you over any questions you may have following our production.

We appreciate your efforts to explain the relevance of your document requests and to narrow the scope of several of your requests. In our view, however, the principal modification you have made to many of your requests, which now seek "all documents identifying or discussing" various broad categories of information (instead of documents "relating" to those categories) does little to address the overbreadth concerns explained in my July 19 letter.

To take one practical example of our overbreadth concerns, we understand that an important factual point you want to establish in this case is that Messrs. Mitchell and Jessen had no contact with Plaintiffs Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud and played no role in their transfer, detention, and interrogations. In short, you are asking the CIA for information sufficient to prove a negative. To establish this point, you have essentially requested that the CIA produce every document in its possession about these two Plaintiffs (Requests #12-18), presumably in an effort to establish that Messrs. Mitchell and Jessen are not mentioned in these documents. In our view this approach is an overly burdensome and inefficient way to establish a relatively simple factual point. As noted above, we have conducted a reasonable search for documents about the Plaintiffs, and we are in the process of reviewing that material. In the event we locate no documents indicating Messrs. Mitchell and Jessen played a role in Plaintiff Salim or Ben Soud's transfer, detention, or interrogations, we do not believe the answer is for the CIA to process and produce a large and unduly burdensome volume of documents, many of which may not be useful to you at the end of the process given the CIA's position that the identities of CIA personnel (that is, those who had contact with Plaintiffs) would typically be classified and appropriately protected from disclosure. Rather, we believe the more efficient course of action would be better to discuss options for how a "no records" response could be conveyed to you consistent with your litigation needs.

In our view the extensive scope of discovery you are contemplating in this case is incompatible with the discovery timeframe established by the Court. We do not believe the solution to the Court's decision to adopt the ACLU's proposed discovery schedule is to compress your original discovery plan into a six-month period, thereby forcing non-parties like the CIA to shoulder an unreasonable and undue burden. Rather, a cooperative effort to narrow the scope of discovery, perhaps utilizing alternative and creative options like the approach discussed above, is the only feasible way that the CIA can meaningfully respond to your discovery needs within the Court's timeframe.

We would like to continue our cooperative dialogue with you in an effort to provide you with non-privileged, unclassified information that you may need to litigate this case appropriately, while avoiding an undue burden on the CIA. As we continue our efforts to review and process documents, we believe it would be productive to have more detailed discussions about the key litigation points you want to establish with the documents you have requested so that we can tailor our efforts and consider alternatives, to the extent we can, that may meet your needs consistent with our interests in avoiding an undue burden on CIA and preventing the disclosure of privileged, protected, or classified information.

As noted above, our efforts to process documents remain ongoing, and I will follow up with you once I have an estimated date for the initial production.

Sincerely,

Andrew I. Warden

CC: Henry Schuelke, III: Hschuelke@blankrome.com
James Smith: Smith-Jt@blankrome.com
Christopher Tompkins: Ctompkins@bpmlaw.com
Jeffrey Rosenthal: Rosenthal-J@BlankRome.com

Exhibit N

U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, D.C. 20530

Andrew I. Warden
Senior Trial Counsel

Tel: (202) 616-5084
Andrew.Warden@usdoj.gov

August 4, 2016

VIA EMAIL

Brian S. Paszamant
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Email: Paszamant@BlankRome.com

RE: *Salim et al. v. Mitchell et. al.*, No. 2:15-CV-286-JLQ
Department of Justice Subpoena

Dear Brian:

I am writing in response to your August 1, 2016 letter, regarding the non-party subpoena for documents issued by you to the Department of Justice ("DOJ") in the above-referenced action.

As I explained in my July 12, 2016 email, DOJ is currently undertaking appropriate efforts to respond to your subpoena. The subpoena generally seeks "all documents" in 31 various categories in DOJ's possession concerning the Central Intelligence Agency's (CIA) former detention and interrogation program. Based on our review of the subpoena, 28 of the 31 requests (*i.e.*, all requests other than #6-8) to DOJ are also included in the subpoena and *Touhy* request you sent to CIA on June 28, 2106. In our view these 28 requests, which call for documents or information belonging to the CIA, are more properly directed to CIA, as it was the government agency charged with operating the detention and interrogation program at issue in this case. In our view there is no need for both DOJ and CIA to conduct duplicate productions for the same documents and we appreciate the representation in your August 1 letter concerning this topic.

Because most of your document requests are more appropriately directed to CIA, DOJ has prioritized its efforts on three DOJ-specific document requests (#6-8) that generally seek documents related to the legality of the CIA's former detention and interrogation program. With respect to Request #8, which currently seeks communications between the Defendants and DOJ "concerning the design, structure, purpose, approval or scope of the Program," based on our inquires we have no reason to believe any responsive documents exist. We have seen no

evidence thus far in our search that officials at DOJ who were involved with providing CIA with legal advice regarding the program had any communications with Messrs. Mitchell and Jessen that would be responsive to Request #8. When we discussed this issue briefly during our telephone conversation on July 13, 2016, it was my understanding that you also are not aware of any communications between DOJ and Messrs. Mitchell and Jessen that would be responsive to this request.

As for Requests #6 and 7, we have focused our search on documents in the possession of DOJ's Office of Legal Counsel (OLC). OLC exercises the Attorney General's authority under the Judiciary Act of 1789 to provide controlling legal advice to the President and all Executive Branch agencies on questions of law that are centrally important to the functioning of the Government. Following the attacks of September 11, 2001, OLC provided final legal advice to various Executive Branch agencies regarding a range of complex and novel national security legal issues. Documents pertaining to OLC's legal advice on these issues have previously been the subject of Freedom of Information Act requests and related litigation. OLC has recently completed a reasonable search of its production files in these cases, resulting in the collection of potentially responsive documents to Requests #6 and 7. The volume of documents collected thus far totals approximately 5,000 pages. We are currently in the course of reviewing this material for final memoranda and letters from OLC to the CIA General Counsel's Office or to the White House Counsel's Office regarding the legality the CIA's former detention and interrogation program. I anticipate being able to provide you with an estimated production date for an initial batch of these documents next week.

We have reviewed the objections and legal arguments raised in your August 1 letter, and we stand by the objections asserted in my July 19 letter. We believe it is premature at this stage to engage in extended discussions over the application of various privileges to hypothetical information. Further, because we are in the initial phase of discovery and our search and review efforts remain ongoing, a privilege log is not required at this time; indeed, it would be impossible to provide one. We also believe any discussions concerning application of any particular privilege or basis for withholding information is more appropriately addressed in the context of specific withholdings, that is, after documents are produced and you have had an opportunity to review them. We are prepared to meet and confer with you over any questions you may have following our production.

We appreciate your efforts to explain the relevance of your document requests and to narrow the scope of several of your requests. In our view, however, the principal modification you have made to many of your requests, which now seek "all documents identifying or discussing" various broad categories of information (instead of documents "relating" to those categories) does little to address the overbreadth concerns explained in my July 19 letter.

In our view the extensive scope of discovery you are contemplating in this case is incompatible with the discovery timeframe established by the Court. We do not believe the solution to the Court's decision to adopt the ACLU's proposed discovery schedule is to compress your original discovery plan into a six-month period, thereby forcing non-parties like DOJ to shoulder an

unreasonable and undue burden. Rather, a cooperative effort to narrow the scope of discovery is the only feasible way that the Government can meaningfully respond to your discovery needs within the Court's timeframe.

We would like to continue our cooperative dialogue with you in an effort to provide you with non-privileged, unclassified information that you may need to litigate this case appropriately, while avoiding an undue burden on DOJ. As we continue forward in this case, we believe it would be productive to have more detailed discussions about the key litigation points you want to establish with the documents you have requested so that we can tailor our efforts and consider alternatives, to the extent we can, that may meet your needs consistent with our interests in avoiding an undue burden on DOJ and CIA and preventing the disclosure of privileged, protected, or classified information.

As explained above, our efforts to process documents remain ongoing, and I will follow up with you once I have an estimated date for the initial production of DOJ documents.

Sincerely,

Andrew I. Warden

CC: Henry Schuelke, III: Hschuelke@blankrome.com
James Smith: Smith-Jt@blankrome.com
Christopher Tompkins: Ctompkins@bpmlaw.com
Jeffrey Rosenthal: Rosenthal-J@BlankRome.com

Exhibit O

Cooper, Meredith

From: Warden, Andrew (CIV) <Andrew.Warden@usdoj.gov>
Sent: Tuesday, August 9, 2016 10:47 PM
To: Paszamant, Brian
Cc: Chris Tompkins; Schuelke III, Henry F.; Smith, James
Subject: RE: Requested Bullets

Brian:

It was nice to you meet you as well. Thanks for sending the bullet points. I'll confer with folks at the CIA and get back to you. We'll also give some thought to the legal issue you raise about the 30(b)(6) witness.

Thanks,
Andrew

Andrew I. Warden
U.S. Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 616-5084

From: Paszamant, Brian [mailto:Paszamant@BlankRome.com]
Sent: Monday, August 08, 2016 9:45 PM
To: Warden, Andrew (CIV)
Cc: Chris Tompkins; Schuelke III, Henry F.; Smith, James
Subject: Requested Bullets

Andrew,

It was nice meeting with you and your colleagues earlier today. Pursuant to your request attached are the bullets that we discussed during the meeting. We look forward to receiving some insight into whether our understanding of the situation as set forth in the bullets is accurate. Could you please advise when we might expect to receive such guidance?

Also, while we have not yet had an opportunity to fully consider the proposal that you floated concerning the 30(b)(6) declaration and subsequent 30(b)(6) deposition upon written questions, we are concerned about the evidentiary value of such items. Specifically, we are concerned that the Court may not credit these items for summary judgment purposes and otherwise because they are, by definition, not being provided based upon personal knowledge. Do you have any authority that you can share with us to alleviate this concern?

Thank you in advance.

BP

Brian S. Paszamant | **Blank Rome LLP**
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

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August 8, 2016 – DISCOVERY DESIRED FROM THE U.S.

I. THE CREATION OF THE CIA'S EIT PROGRAM

- Mitchell and Jessen's role/involvement in developing the EIT portion of the CIA's Rendition, Detention and Interrogation ("RDI") program – offering alternatives or suggestions for consideration which were accepted, rejected, or modified by the Agency and/or the Executive Branch.

- The Agency or other Executive Branch personnel obtained approval/permission for all EIT use. Mitchell and Jessen played no role in securing such approvals.

- EITs were initially developed for Abu Zabaydah, and then expanded to other high value detainees. Mitchell and Jessen did not suggest, support, or otherwise play any role in the use of EITs on plaintiffs or other non-high value detainees.

- Command and control of the EIT program resided in the Agency at all times. Mitchell and Jessen received instructions as to whom to interrogate; what information to seek; and what techniques were to be used (were permitted?) on any detainee. Neither Mitchell nor Jessen ever used an EIT technique that had not been previously authorized by the Agency.

- Information conveyed to Mitchell and Jessen about the approval of and legality of the EIT program, or the OLC determination of legality.

II. THE RENDITIONS OF SALIM, SOUD AND RAHMAN

- Neither Mitchell, Jessen, nor any affiliated individual or entity (other than the CIA) was involved in any way in the rendition of Salim, Soud or Rahman.

III. THE INTERROGATIONS OF SALIM, SOUD AND RAHMAN

- Neither Salim, Soud nor Rahman was within the scope of individuals for which the EIT program was intended or approved, i.e. none was a high value detainee

- The CIA exclusively determined where Salim and Soud were detained and the conditions of their detention, including how they would be clothed and the temperature of their confinement.

- Neither Mitchell nor Jessen was present for or involved in any way, including obtaining authorizations for, interrogations of Salim or Soud.

- The CIA exclusively determined what interrogation techniques to employ on Salim and Soud, and exclusively controlled the process for securing requisite approvals.

- CIA personnel exclusively controlled the interrogation process, determining, among other things, what interrogation methods would be used, how Salim and/or Soud would be clothed, whether Salim and/or Soud would be restrained, what questions would be asked, and what information would be sought from Salim and/or Soud.

- The CIA exclusively determined where Rahman was detained and the conditions of his detention, including how he would be clothed and the temperature of his confinement.

- The CIA exclusively determined what interrogation techniques to employ on Rahman, and exclusively controlled the process for securing requisite approvals.

- CIA personnel exclusively controlled the interrogation process, determining, among other things, what interrogation methods would be used, how Rahman would be clothed, whether Rahman would be restrained, what questions would be asked, and what information would be sought from Rahman.

- Mitchell was not present for, or involved in any way, including obtaining approval for, Rahman's interrogations.

- Mitchell and Jessen each expressed to CIA personnel concern for Rahman's condition and/or the conditions of his detention.

- On one or more occasions when Rahman was interrogated by CIA personnel, Jessen was present for the sole purpose of responding to questions posed by CIA and/or other individuals conducting the interrogation concerning (1) Rahman's "resistance posture" and (2) the potential effectiveness of contemplated interrogation techniques.

- Information conveyed to Jessen concerning Rahman's detention and/or interrogation/contemplated interrogation, including approvals for such methods.

IV. DEFENDANTS' INVOLVEMENT IN THE CREATION OF THE CIA'S RENDITION PROGRAM

- Neither Mitchell nor Jessen had any involvement in the creation or implementation of the rendition and/or detention aspects of the CIA's RDI program.

- Neither Mitchell nor Jessen had any involvement in the implementation of the CIA's RDI program.

Exhibit P

From: Paszamant, Brian
To: andrew.warden@usdoj.gov
Cc: Smith, James; Schuelke III, Henry F.; Chris Tompkins
Subject: Salim/Mitchell (Touhy Requests)
Date: Monday, August 15, 2016 4:51:36 PM

Andrew,

Hank (copied) and I have now had an opportunity to chat with our colleagues concerning the proposal that you conveyed to me and Hank last Monday when we met in D.C.: Defendants will forego, or extremely limit, the documents still sought by their pending *Touhy* requests to the CIA and DOJ in exchange for: (1) the CIA providing Defendants with the declaration of an unnamed CIA 30(b)(6) witness to support a motion for summary judgment and (2) the CIA subsequently providing that same witness for a deposition upon written questions. Unfortunately, Defendants are unable to accept this proposal for various reasons.

First, our preliminary research causes us significant concerns about the potential admissibility of the aforementioned declaration and/or deposition given its 30(b)(6) nature as well as its provision by an unnamed individual. Should you have authority for us to consider to assuage our concerns please forward it along as soon as possible. Further, as we explained during our meeting, Defendants believe that the documents requested by the pending, narrowed *Touhy* requests are vital to establishing numerous concepts central to our defense.

Although Defendants remain committed to attempting to amicably resolve with the Government issues related to discovery and otherwise, and to limit the burden placed on the Government in connection with this litigation, I write to advise that absent an agreement on an alternate proposal by midday this Thursday, Defendants will be forced to file a motion to compel: (1) production of all non-privileged documents responsive to Defendants pending, narrowed *Touhy* requests; and (2) production of a Fed.R.Civ.P privilege log. Should you have any questions or wish to discuss this matter further, please do not hesitate to contact me.

BP

Brian S. Paszamant | **Blank Rome LLP**
One Logan Square 130 North 18th Street | Philadelphia, PA 19103-6998
Phone: 215.569.5791 | Fax: 215.832.5791 | Email: Paszamant@BlankRome.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	MISC NO.:
RELATED CASE: SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (as personal representative of GUL RAHMAN), Plaintiffs, vs. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Defendants.	EASTERN DISTRICT OF WASHINGTON NO. 2:15-CV-286

ORDER

This matter came before the Court on Petitioner's Motion to Compel Pursuant to Federal Rule of Civil Procedure 45(d)(2)(B)(i). The Court having duly considered the matter, and good cause appearing therefor, it is hereby

ORDERED that Petitioners' Motion to Compel is GRANTED on all of the grounds set forth in support, and it is

FURTHER ORDERED that, Respondents, the Central Intelligence Agency and the United States Department of Justice shall produce to Petitioners within ten (10) days of the date of this Order:

(1) All documents responsive to the subpoenas issued by Petitioners on June 28 and 29, 2016, respectively, as modified by Petitioners (the "Subpoenas"); and

(2) A privilege log identifying all documents responsive to the Subpoenas withheld from production based upon the assertion of a common-law privilege.

DATED this _____ day of _____, 2016.

_____

J.