EXHIBIT 4

U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, D.C. 20530

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July 19, 2016

VIA EMAIL

Brian S. Paszamant
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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.

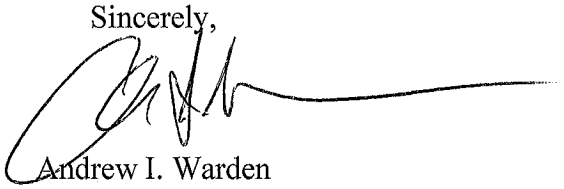
The foregoing objections and examples of objectionable aspects of the requests are not exclusive and we reserve the right to assert further objections in response to the subpoena as appropriate, including that the Court lacks jurisdiction over this case.

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,



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