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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE EASTERN DISTRICT OF WASHINGTON**

15
16 In Re Application of ZAYN AL-
17 ABIDIN MUHAMMAD HUSAYN
18 (Abu Zubaydah) and JOSEPH
19 MARGULIES,
20
21 Petitioners

Misc. Case No. _____

**DECLARATION OF JOSEPH
MARGULIES IN SUPPORT OF
PETITIONERS' EX PARTE
APPLICATION FOR DISCOVERY
ORDER PURSUANT TO 28 U.S.C. §
1782 IN AID OF FOREIGN
PROCEEDING**

23 I, Joseph Margulies, do hereby make this declaration pursuant to 28
24 U.S.C. § 1746 supporting the Application of Zayn Al-Abidin Muhammad
25 Husayn ("Abu Zubaydah") and Joseph Margulies for a discovery order pursuant
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28 **DECLARATION OF
JOSEPH MARGULIES**

1 to 28 U.S.C. § 1782(a) in aid of a foreign proceeding (“the Application”). On
2 the basis of my personal knowledge and my review of publicly available
3 information, I state as follows.
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5 **Background**

6 1. I am a United States citizen and serve as counsel to Abu Zubaydah.
7 Since 2002, I have represented in various capacities prisoners captured and held
8 by the United States in its prosecution of the so-called “war on terror.” For
9 instance, I served as counsel of record in *Rasul v. Bush*, 542 U.S. 466 (2004),
10 which concerned the habeas corpus rights of detainees at the U.S. naval base in
11 Guantánamo Bay; and in *Munaf v. Geren*, 553 U.S. 674 (2008), which
12 concerned the habeas rights of prisoners held by the U.S. military in Iraq. I
13 currently serve as Professor of Law and Government at Cornell University.
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17 2. I have served as counsel to Abu Zubaydah since 2008. In that role,
18 I have been granted top secret security clearance and “read into” the U.S.
19 Government’s enhanced interrogation program with regard to its treatment of
20 Abu Zubaydah. Nothing in this declaration discloses anything told to me by
21 Abu Zubaydah unless it is already a matter of public record or has been
22 specifically cleared for release by the United States Government.
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1 3. Together with my Polish co-counsel, Bartłomiej Jankowski, and
2 certain humanitarian organizations, I filed an application (analogous to a
3 criminal complaint) with the Polish Prosecutor's office on Abu Zubaydah's
4 behalf in December 2010, complaining of Polish officials' complicity in his
5 maltreatment (described *infra*); filed an application against the Polish
6 government in the European Court of Human Rights on Abu Zubaydah's behalf
7 in March 2013, again seeking to hold the Polish government accountable; and
8 continue to represent Abu Zubaydah as the victim of crimes currently under
9 investigation by the Organized Crimes Division of the Regional Public
10 Prosecutor's office in Kraków, Poland.

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14 4. The instant Application seeks discovery to aid that ongoing
15 criminal investigation, which regards the complicity of the Polish Government
16 and Polish officials in the illegal detention and torture of Abu Zubaydah and
17 others on Polish territory.
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20 5. Abu Zubaydah is a stateless Palestinian currently held in the
21 United States prison at Guantánamo Bay, Cuba. He was captured in Pakistan in
22 March 2002 by U.S. and Pakistani agents and held as a suspected terrorist. As
23 set out in an August 1, 2002 Memorandum from Jay S. Bybee, Assistant
24 Attorney General, Office of Legal Counsel, to John Rizzo, Acting General
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1 Counsel of the Central Intelligence Agency, regarding Interrogation of al Qaeda
2 Operative (“OLC Memorandum”), from which true and correct excerpts are
3 appended hereto as Exhibit A, the U.S. Government initially alleged that Abu
4 Zubaydah was the third- or fourth-ranking member of al Qaeda and had a role
5 in every major al Qaeda terrorist operation, including as a planner of the attacks
6 on September 11, 2001.¹ Ex. A at 5.² However, a Senate Select Committee on
7 Intelligence Study on the Central Intelligence Agency’s Detention and
8 Interrogation Program, updated on December 13, 2012 and declassified for
9 publication on December 3, 2014 (“Senate Select Committee Report”), found
10 these allegations to be baseless. True and correct excerpts of the Senate Select
11 Committee Report are attached hereto as Exhibit B.

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16 6. Abu Zubaydah was imprisoned *incommunicado* by the CIA for
17 more than four years after his capture. During this time, he was imprisoned in
18 various “black sites,” secret detention centers in foreign countries that operated
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21 ¹ The memorandum may also be seen in full at [http://media.luxmedia.com/aclu/
22 olc_08012002_bybee.pdf](http://media.luxmedia.com/aclu/olc_08012002_bybee.pdf).

23 ² All page number references are to the Exhibit page number located at the
24 bottom left of the document, rather than the document’s original pagination.
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1 beyond the reach of humanitarian organizations, and putatively beyond the
2 reach of U.S. law. *See Abu Zubaydah v. Poland*, No. 7511/13, § 85 (E.C.H.R.
3 2014); a true and correct copy of excerpts from the court's opinion is attached
4 as Exhibit C.
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6 **Abu Zubaydah's detention and torture³**

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8 7. One black site in which Abu Zubaydah was detained was located
9 in Stare Kiejkuty, Poland. Abu Zubaydah was held there from December 5,
10 2002 until September 22, 2003. Ex. C §§ 92-100.
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12 8. While in detention, Abu Zubaydah was subjected to all manner of
13 torture, euphemistically renamed, "enhanced interrogation techniques." When
14 visited by humanitarian agencies, Abu Zubaydah reported he had been
15 subjected to all twelve of the documented, U.S. Government-authorized
16 "enhancements." *See* International Committee of the Red Cross Report on the
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19 ³ I describe the allegations regarding Abu Zubaydah's detention and torture to
20 give factual context for the investigation that prosecutorial authorities in
21 Poland are conducting regarding the complicity of Polish officials in these
22 unlawful acts, and to show the relevance to that investigation of information
23 in the possession of Respondents Mitchell and Jessen.
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1 Treatment of Fourteen “High Value Detainees” in CIA Custody (February
2 2007) at 2-3 (documenting the techniques), true and correct excerpts of which
3 are attached hereto as Exhibit D.
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5 9. The Senate Select Committee Report made extensive findings
6 about Abu Zubaydah’s torture. According to the report, throughout his
7 interrogation Abu Zubaydah frequently cried, begged, pleaded, whimpered, and
8 became hysterical and distressed to the level that he was unable to effectively
9 communicate. Ex. B at 15. He became compliant to the extent that when an
10 interrogator so much as raised his eyebrow, without instructions, Abu Zubaydah
11 walked over to a table to be waterboarded. *Id.* at 16. When the interrogator
12 snapped his fingers, Abu Zubaydah would lie flat on the waterboard. *Id.*
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16 10. The Senate Select Committee Report also describes how his
17 interrogators told Abu Zubaydah that the only way he would leave the facility
18 was in a coffin-shaped confinement box (*id.* at 15), a threat they were prepared
19 to carry out, having decided that “the interrogation process takes precedence
20 over preventative medical procedures.” *Id.* at 12. Abu Zubaydah was to “remain
21 incommunicado for the remainder of his life”; in the case of death, he was to be
22 cremated. *Id.*
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1 11. This Application seeks documents and information in the
2 possession of James Elmer Mitchell and John “Bruce” Jessen. Mitchell and
3 Jessen, referred to in the Senate Select Committee Report as “SWIGERT” and
4 “DUNBAR,” respectively, were the architects of the CIA interrogation program
5 carried out at the Poland black site, which is referred to in the Report as
6 “DETENTION SITE BLUE.” *Id.* at 6, 8-10, 17.
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9 12. Mitchell is a U.S. citizen and a psychologist. *See Salim v. Mitchell*,
10 No. 2:15-CV-286-JLQ (E.D. Wash.), Compl. ¶ 12; Def.’s Am. Answer ¶ 12,
11 from which true and correct excerpts are attached hereto as Exhibit E. Mitchell
12 was the chief psychologist at the U.S. Air Force Survival, Evasion, Resistance
13 and Escape (“SERE”) training program at Fairchild Air Force Base,
14 Washington. *Id.*; Ex. B at 21. From 2001 to 2005, Respondent Mitchell worked
15 as an independent contractor for the CIA. Ex. E, Compl. ¶ 12; Def.’s Am.
16 Answer ¶ 12. From 2005 to 2009, Mitchell was CEO of a company he co-
17 founded with Jessen, called Mitchell, Jessen & Associates, with headquarters
18 and offices in Spokane, Washington. *Id.* Mitchell is a defendant in ongoing civil
19 proceedings in this judicial district, and as shown by his motion to dismiss the
20 complaint in that action (a true and correct copy of which is attached hereto as
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1 Exhibit G), he did not dispute the court's personal jurisdiction over him in that
2 matter.
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4 13. Jessen is also a U.S. citizen and psychologist. Ex. E, Compl. ¶ 13;
5 Def.'s Am. Answer ¶ 13. He was chief psychologist at the Department of
6 Defense Joint Personnel Recovery Agency, which oversees the U.S. military's
7 SERE training programs. *Id.* From 2002 to 2005, Jessen worked as an
8 independent contractor for the CIA. *Id.* From 2005 to 2009, Jessen was
9 president of Mitchel, Jessen & Associates, headquartered in Spokane,
10 Washington. *Id.*
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13 14. In July 2002, the CIA contracted with Jessen on Mitchell's
14 recommendation. *Id.*, Compl. ¶ 42, Def.'s Am. Answer ¶ 42.
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16 15. Respondents Mitchell and Jessen have both admitted to having
17 personally waterboarded and otherwise tortured Abu Zubaydah. *Id.*, Compl. ¶¶
18 47-52, Def.'s Am. Answer ¶¶ 47-52.
19

20 16. Mitchell and Jessen are named in the Senate Select Committee
21 Report (referred to as "SWIGERT" and "DUNBAR") as individuals who
22 personally visited and carried out interrogations at the black site in Poland. Ex.
23 B at 17-18. Mitchell and Jessen's design, implementation of, and personal
24 participation in the CIA torture program have been well documented. Ex. E,
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1 Compl. ¶¶ 24, 32, 34, 38-43, 47-52; Def.'s Am. Answer ¶¶ 24, 32, 34, 38-43,
2 47-52.
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4 17. Official and public government reports documenting Respondents'
5 role in the "enhanced interrogation" of Abu Zubaydah include: CIA Office of
6 Inspector General Special Review of Counterterrorism Detention and
7 Interrogation Activities (Sept. 2001 – Oct. 2003) (May 7, 2004); the Senate
8 Committee on Armed Services Inquiry into the Treatment of Detainees in U.S.
9 Custody (Nov. 20, 2008); the report of the Department of Justice's Office of
10 Professional Responsibility Investigation into the Office of Legal Counsel's
11 Memoranda Concerning Issues Relating to the Central Intelligence Agency's
12 Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July
13 2009); the CIA's June 2013 Response to the Senate Select Committee on
14 Intelligence's Study on the Former Detention and Interrogation Program (June
15 27, 2013); and the Executive Summary of the Senate Select Committee Report,
16 which was publicly released on December 9, 2014.
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21 18. The Senate Select Committee Report reveals that before the CIA
22 conducted an assessment of Abu Zubaydah's level of cooperation, it contracted
23 with Respondent Mitchell to "provide real-time recommendations to overcome
24 Abu Zubaydah's resistance to interrogation." Ex. B at 3. That same day,
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1 Mitchell, “who had never conducted an actual interrogation, encouraged the
2 CIA to focus on developing ‘learned helplessness’ in CIA detainees.” *Id.* at 21-
3 22. On the mistaken assumption that Abu Zubaydah was withholding
4 information, Mitchell recommended that Abu Zubaydah be “kept in an all-white
5 room that was lit 24 hours a day, that Abu Zubaydah not be provided any
6 amenities, that his sleep be disrupted, that loud noise be constantly fed into his
7 cell, and that only a small number of people interact with him.” *Id.* at 6. The
8 CIA ultimately adopted this recommendation. In early April 2002, CIA
9 Headquarters sent Mitchell to “Detention Site Green” to consult on the
10 psychological aspects of Abu Zubaydah’s interrogation. Ex. E, Def.’s Am.
11 Answer ¶ 34.

12 19. On April 15, 2002, Abu Zubaydah was removed from his hospital
13 bed (where he had been cooperating with FBI Agents, Ex. B at 4-5), stripped
14 naked, and transferred to a purposely cold, halogen-lit cell, where he was kept
15 in solitary confinement for two to three weeks. *Id.* at 7. Blasting music was
16 played all through the night to prevent sleep and enhance his sense of
17 hopelessness. *Id.*

1 20. In July 2002, Jessen joined Mitchell as a CIA contractor; together,
2 they convinced Justice Department lawyers to authorize specific coercive
3 methods for use on Abu Zubaydah. *Id* at 10-11; Ex. E, Def.'s Am. Answer ¶ 42.

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5 21. The OLC Memorandum described these approved methods as
6 follows: (1) the attention grasp, which involved “grasping the individual with
7 both hands, one hand on each side of the collar opening, in a controlled and
8 quick motion”; (2) walling, where the interrogator “quickly and firmly pushes
9 the individual into the wall”; (3) facial hold, used “to hold the head immobile.
10 One open palm is placed on either side of the individual's face”; (4) facial slap,
11 wherein “the interrogator slaps the individual’s face with fingers slightly
12 spread” in order to “induce shock, surprise, and/or humiliation”; (5) cramped
13 confinement, which involved “the placement of the individual in a confined
14 space, the dimensions of which restrict the individual’s movement. The
15 confined space is usually dark”; (6) wall standing, which is “used to induce
16 muscle fatigue” and involved forcing the detainee to stand “about four to five
17 feet from a wall” with his arms stretched out in front of him and his fingers
18 resting on the wall; (7) stress positions, which are “designed to produce the
19 physical discomfort associated with muscle fatigue”; (8) sleep deprivation for
20 up to “eleven days at a time” (9) waterboarding, in which “the individual is
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1 bound securely to an inclined bench ... A cloth is placed over the forehead and
2 eyes. Water is then applied to the cloth,” after which, “the cloth is lowered until
3 it covers both the nose and mouth”; the resulting restriction of air flow
4 “produces the perception of incipient panic, i.e., the perception of drowning”;
5 and (10) placement “in a cramped confinement box with an insect” to prey on
6 Abu Zubaydah’s fear of insects. Ex. A at 1-4.

9 22. Other methods proposed by Mitchell, but not discussed in the
10 August 2002 OLC Memorandum, include the use of diapers, unchanged for
11 days, to “cause humiliation” and “induce a sense of helplessness” (Ex. B at 10,
12 19-20); and mock burial (Ex. B at 10).

14 23. On August 4, 2002, directly following a 47-day isolation period,
15 Abu Zubaydah was placed in what Mitchell and Jessen termed the “aggressive
16 phase” of his treatment. Ex. B at 13-14. At Respondents’ behest, Abu Zubaydah
17 was subjected to confinement in coffin-like boxes; repeated beatings;
18 starvation; excruciating stress positions; extreme cold; prolonged sleep
19 deprivation; and waterboarding. *Id.* at 13-15. Between interrogations, he was
20 left alone in a stress position, left on the waterboard with a cloth over his face,
21 or locked in one of two confinement boxes, spending a total of 266 hours (11
22 days, 2 hours) in the large (coffin size) confinement box and 29 hours in a small
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1 confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a
2 height of 2.5 feet. *Id.*

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4 24. As a result of the torture and ill-treatment to which Abu Zubaydah
5 has been subjected, he suffers from serious mental and physical health
6 problems. He has permanent brain damage and physical impairments. He
7 suffers from debilitating headaches and an excruciating sensitivity to sound.
8 Between 2008 and 2011 alone, he experienced more than 300 seizures. At some
9 point during his captivity, the CIA removed his left eye.
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12 **Respondents Mitchell and Jessen in Poland**

13 25. On December 5, 2002, Abu Zubaydah arrived at the CIA black site
14 in Stare Kiejkuty, Poland. Ex. C §§ 92-98. Polish officials at the highest level
15 authorized the establishment of the secret detention facility in Stare Kiejkuty for
16 use by the CIA. *Id.* §§ 245-46. Polish military intelligence officers penetrated
17 other Polish institutions and governmental agencies and neutralized normal
18 oversight and protection procedures, such as those routinely exercised by the
19 national Air Navigation, Border and Customs Services, and the procedural
20 protections of detainees applicable under Polish law. *Id.* §§ 250-55. They did
21 this despite widely available information indicating, at the relevant time, the
22 nature of violations occurring in the CIA-led rendition program.
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1 26. During the time that Abu Zubaydah was held captive in Poland,
2 Respondents traveled to the black site at least twice. Ex. B at 17-18. The Senate
3 Select Committee Report describes Mitchell and Jessen’s “frustra[tion] that
4 they kept beating Zubaydah up on the same question while getting the same
5 physiologic response from him.” *Id.* at 14 n. 188.
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8 27. The Senate Select Committee Report confirms Respondents’
9 consistent and overlapping presence at the detention site: beginning in January
10 2003, their travel to the black site included a visit in March 2003 to waterboard
11 detainee Khalid Sheik Muhammad and another as late as June 2003 to
12 interrogate and conduct psychological reviews of detainees. *Id.* at 17-18.
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15 28. CIA cables describing Abu Zubaydah’s detention and torture were
16 recently discovered in the case of *Salim v. Mitchell*, which is ongoing in this
17 district. These cables formed part of the source material for the Senate Select
18 Committee Report and confirm that report’s findings. True and correct copies
19 of some of these CIA cables are attached as Exhibit F. They describe how Abu
20 Zubaydah was kept in solitary confinement for 47 days during the “isolation
21 phase” (Ex. F at 3-5, 12-13, 38); how he was then moved to the “aggressive
22 phase,” which involved constant physical abuse, sleep deprivation,
23 waterboarding, and 18 hours per day in one of two confinement boxes (*id.* at
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1 32-36, 39-53); how it was determined Abu Zubaydah’s torture should be used
2 as template for future interrogations (*id.* at 21); and how, approximately one
3 year later, he was described as “helpful and cooperative” by Mitchell and
4 Jessen, and offered to assist in persuading other detainees to cooperate (*id.* at
5 54-55).
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8 29. The CIA cables confirm that Mitchell and Jessen participated in
9 the planning and implementation of Abu Zubaydah’s torture from the outset. *Id.*
10 at 1, 15, 25, 54, 58.
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12 30. Abu Zubaydah underwent a combination of the interrogation
13 methods described above on a near 24-hour basis for nineteen straight days. Ex.
14 B at 13. In total, Mitchell and Jessen waterboarded Abu Zubaydah 83 times in
15 one month alone. Respondent Mitchell commented in an email: “As for our
16 buddy [Abu Zubaydah]; he capitulated the first time. We chose to expose him
17 over and over until we had a high degree of confidence he wouldn’t hold back.
18 He said he was ready to talk during the first exposure.” *Id.* at 23 n. 2578.
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21 **Application to the European Court of Human Rights**
22 **and pending criminal investigation**

23 31. Together with my Polish co-counsel, Bartłomiej Jankowski, and
24 certain humanitarian organizations, in December 2010 I filed an application on
25 Abu Zubaydah’s behalf with the Prosecutor’s Office in Warsaw, who undertook
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1 an investigation. That investigation closed without any prosecutions or
2 convictions.

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4 32. In March 2013, co-counsel and I filed on Abu Zubaydah's behalf
5 an application in the European Court of Human Rights against the Republic of
6 Poland, alleging that Poland had violated the Convention for the Protection of
7 Human Rights and Fundamental Rights and failed to undertake a proper
8 investigation.

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10 33. The court ultimately agreed that Poland's complicity in the
11 detention and torture on Polish soil of Abu Zubaydah and others had violated
12 the Convention. Ex. C at 13, Holdings 4-9. As a result, the court ordered Poland
13 to pay restitution to Abu Zubaydah (*id.* at 14, Holding 10), and after losing its
14 appeal of the court's judgment, Poland re-opened its criminal investigation into
15 any individuals who may have facilitated the existence or operation of the
16 Poland black site.

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19 34. The foreign proceeding underlying this Application is the Polish
20 criminal investigation, which is being conducted by the Organized Crimes
21 Division of the Regional Public Prosecutor's Office in Kraków. In charge of the
22 investigation are prosecutors Janusz Śliwa and Katarzyna Płończyk. The
23 investigation targets Polish officials who acted in excess of their authority as
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1 public officers between 2001 and 2005 with regard to the CIA “black site” in
2 Stare Kiejkuty, Poland. The scope of the investigation extends to any and all
3 Polish officers who were in any way involved in facilitating or permitting the
4 CIA black site to exist and operate in Poland.
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6 35. Abu Zubaydah has the right to submit evidence through counsel to
7 aid the investigation, and the Polish Prosecutor’s Office has invited counsel for
8 Abu Zubaydah to submit evidence on his behalf.
9

10 36. At present, Abu Zubaydah remains effectively *incommunicado* at
11 the U.S. Naval Base at Guantánamo Bay, Cuba, presenting an additional
12 obstacle to the collection of evidence in the Polish criminal investigation.
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14 37. Because of their central role in the interrogation program and their
15 presence at the Polish black site, Mitchell and Jessen have information that is
16 highly relevant to the ongoing criminal investigation. Specifically, Mitchell and
17 Jessen are in a position to describe or produce evidence relating to the
18 following: the crimes committed against Abu Zubaydah on Polish soil; the
19 perpetrators of those crimes; the presence of Polish officials at the facility in
20 general, and during the commission of the various crimes; agreements between
21 Polish and U.S. officials; the identities of other witnesses to the crimes against
22 Abu Zubaydah; contracts or other agreements between the two governments
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1 regarding interrogations of Abu Zubaydah and other victims of crimes in
2 Poland; knowledge or documentation of the day-to-day operations of the black
3 site, including but not limited to provision of daily necessities such as food,
4 water, electricity, medicine, etc.; interaction with the community surrounding
5 the black site; flight arrival and departure operations; upkeep and provision of
6 the black site grounds; and any interaction those working on the black site may
7 have had with the local population.
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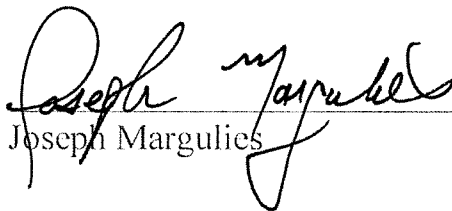
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11 38. Co-counsel and I intend to provide any relevant information
12 obtained from Respondents Mitchell and Jessen to Polish prosecutorial
13 authorities for use in the ongoing Polish criminal investigation and any resulting
14 trials.
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16 39. Other efforts to obtain the evidence sought in this Application have
17 been substantially impeded. The U.S. Government has rejected multiple mutual
18 legal assistance requests lodged by the Polish government under the 2006 U.S.-
19 Poland Mutual Legal Assistance Agreement, the most recent of which Poland
20 submitted on February 11, 2016. In a September 13, 2016 letter from Vaughn
21 A. Ary (then the Department of Justice's Director of the Office of International
22 Affairs) to Józef Gemra (then the Polish Prosecutor's Office's Director of the
23 Department of International Cooperation), the DOJ rejected this latest request
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1 and stated that the United States was “not in a position to respond to any further
2 requests regarding this subject matter.”
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5 I declare under penalty of perjury that the foregoing is true and correct.

6 Executed on: 5/17/17
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9 Joseph Margulies
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28 DECLARATION OF
JOSEPH MARGULIES