

1 CHAD A. READLER  
Acting Assistant Attorney General

2  
3 JOSEPH H. HARRINGTON  
Acting United States Attorney

4  
5 TERRY M. HENRY  
Assistant Branch Director

6  
7 ANDREW I. WARDEN (IN Bar No. 23840-49)  
Senior Trial Counsel  
8 United States Department of Justice  
9 Civil Division, Federal Programs Branch  
20 Massachusetts Avenue NW  
10 Washington, D.C. 20530  
11 Tel: (202) 616-5084  
12 Fax: (202) 616-8470  
E-Mail: andrew.warden@usdoj.gov

13 Attorneys for the United States of America  
14

15 UNITED STATES DISTRICT COURT  
16 EASTERN DISTRICT OF WASHINGTON

17  
18 IN RE APPLICATION OF ZAYN AL-  
19 ABIDIN MUHAMMAD HUSAYN  
20 (ABU ZUBAYDAH) and JOSEPH  
21 MARGULIES  
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No. 17-CV-171-JLQ

STATEMENT OF INTEREST OF  
THE UNITED STATES

**INTRODUCTION**

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2 Pursuant to 28 U.S.C. § 517, the United States of America submits this Statement  
3 of Interest to advise the Court of the United States’ interest in this case.

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5 The United States has actively participated in two pending cases in this District  
6 related to the discovery of information concerning the Central Intelligence Agency’s  
7 (CIA) former detention and interrogation program. *See Salim v. Mitchell*, Case No. 15-  
8 CV-286 (JLQ); *Mitchell v. United States*, 16-MC-36 (JLQ). This case is another action  
9 that seeks the disclosure of alleged information about the CIA’s former program. Here,  
10 Abu Zubaydah, a former detainee in that program, has filed an *ex parte* application  
11 pursuant to 28 U.S.C. § 1782, seeking the Court’s authorization to serve deposition and  
12 document subpoenas on Dr. James Mitchell and Dr. John “Bruce” Jessen, two  
13 psychologists who worked as independent contractors for the CIA in the former  
14 program and who are defendants in *Salim*. *See* Application (ECF No. 1). Zubaydah  
15 seeks a broad range of information from Dr. Mitchell and Dr. Jessen about the CIA’s  
16 alleged detention and interrogation activities allegedly occurring in Poland, as well as  
17 information about Poland’s alleged participation in those alleged activities. *See id.*, Ex.  
18 1-4. Zubaydah asserts that the purpose of his subpoenas is to provide the requested  
19 information to prosecutors in Poland for use in a Polish criminal investigation regarding  
20 the CIA’s alleged detention activities in Poland. *See id.* at 7-10.

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22 The United States has a substantial interest in the proper construction of 28  
23 U.S.C. § 1782, which at the request of interested persons authorizes federal district  
24 courts to provide foreign tribunals with assistance in obtaining evidence for use in  
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1 foreign proceedings. The United States utilizes Section 1782 on behalf of foreign  
2 tribunals when compelling evidence requested through letters rogatory and letters of  
3 request. *See, e.g., In re Letter Rogatory from the First Court, Caracas*, 42 F.3d 308,  
4 309 (5th Cir. 1995). The Department of Justice’s Office of Foreign Litigation, in its  
5 capacity as the United States Central Authority under the Convention of 18 March 1970  
6 on the Taking of Evidence Abroad in Civil and Commercial Matters, 23 U.S.T. 2555  
7 (1968), relies upon Section 1782 to obtain orders from district courts requiring the  
8 production of evidence for use in foreign civil litigation. *See* 28 C.F.R. § 0.49. The  
9 United States has also utilized Section 1782 to execute requests from foreign  
10 governments for witnesses or evidence in criminal matters under Mutual Legal  
11 Assistance Treaties (“MLATs”). *See, e.g., In re Commissioner’s Subpoenas*, 325 F.3d  
12 1287, 1290-1291 (11th Cir. 2003).<sup>1</sup> Accordingly, the United States has a significant  
13 interest in the proper application of Section 1782, which plays an important role in  
14 facilitating international judicial cooperation, resolving foreign disputes, and fostering  
15 international comity.  
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20 In furtherance of these interests, the United States opposes Zubaydah’s Section  
21 1782 Application in this case. Zubaydah has invoked the statute in an attempt to obtain  
22 U.S. Government intelligence information allegedly within the knowledge or possession  
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25 <sup>1</sup> Since 2009, the Department of Justice has typically used the Foreign Evidence  
26 Request Efficiency Act of 2009, 18 U.S.C. § 3512, to implement requests from foreign  
27 governments in criminal matters for evidence not in the control of the United States.  
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1 of former Government contractors for the purpose of providing that alleged information  
2 to prosecutors of a foreign government. Zubaydah's application is inconsistent with  
3 Section 1782's purpose and seeks to circumvent established treaty procedures that  
4 provide foreign governments with the ability to seek evidence within the United States  
5 for their criminal investigations. Here, the governments of the United States and Poland  
6 have agreed to an MLAT specifically providing for the exchange of evidence for  
7 criminal investigations. Poland has invoked the treaty on multiple occasions since 2009  
8 to seek information for its criminal investigation into alleged CIA activities in Poland,  
9 and the United States has denied those requests in accordance with the terms of the  
10 treaty. Accordingly, the Court should deny Zubaydah's attempt to use Section 1782 to  
11 circumvent the treaty. Zubaydah should not be permitted to obtain evidence through  
12 this Court for the potential use by the Polish Government that Poland is not legally  
13 authorized to receive under the treaty.  
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17 In the event, however, the Court grants Zubaydah's application, the Government  
18 requests that the Court establish a return date for the subpoenas at least 60 days after  
19 service in order to give the United States sufficient time to consider whether to assert  
20 any applicable privileges over the alleged requested information, including potentially  
21 the state secrets privilege, and to file any appropriate motions with the Court. The CIA  
22 has a strong interest in protecting any classified, protected, or privileged information  
23 from disclosure and, given the subject matter at issue in Zubaydah's proposed  
24 subpoenas, the Government has an interest in preventing Dr. Mitchell and Dr. Jessen  
25 from confirming or denying Zubaydah's allegations to the extent any such responses  
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1 would harm the national security or foreign relations of the United States.

## 2 **BACKGROUND**

3 Abu Zubaydah is a “terrorist leader” who was a “longtime ally of Osama bin  
4 Laden, operated terrorist training camps in Afghanistan and led a force that engaged in  
5 hostilities against U.S. and Coalition forces” following the attacks of September 11,  
6 2001. *Ali v. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013); *Barhoumi v. Obama*, 609  
7 F.3d 416, 418, 423 (D.C. Cir. 2010). Zubaydah was captured in Pakistan in March  
8 2002 following a firefight. *See* Statement by the White House Press Secretary (Apr. 2,  
9 2002), 2002 WL 485428 (Apr. 2, 2002). He was initially detained by the CIA as part of  
10 the Agency’s former detention and interrogation program. *See* President Discusses  
11 Creation of Military Commissions to Try Suspected Terrorists, 2006 WL 2556600  
12 (Sept. 6, 2006). Since 2006, he has been detained by the Department of Defense at the  
13 United States Naval Station, Guantanamo Bay, Cuba. *See id.*

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17 Zubaydah has filed various lawsuits in domestic and international courts related  
18 to his detention. *See Husayn v. Mattis*, 08-CV-1360 (EGS) (D.D.C.) (habeas corpus  
19 action); *Zubaydah v. Lithuania*, No. 46454/11 (Eur. Ct. H.R.) (damages action). As  
20 relevant here, in January 2013, Zubaydah filed a complaint against the Government of  
21 Poland in the European Court of Human Rights (ECHR) alleging violations of the  
22 European Convention on Human Rights based on Poland’s alleged assistance to the  
23 CIA’s former detention and interrogation program. One of the issues considered by the  
24 ECHR was whether Poland had conducted an effective investigation into Zubaydah’s  
25 allegations of mistreatment in accordance with Article 13 of the Convention. *See*

1 Declaration of Andrew Warden, Ex. 1, *Zubaydah v. Poland* (Eur. Ct. H.R.) (App. No.  
2 7511/13) ¶ 535 (hereinafter *Zubaydah*). In response to *Zubaydah*'s petition, Poland  
3 notified the ECHR that it had opened a criminal investigation in March 2008 focusing  
4 on potential violations of Polish law by Polish officials, and explained the efforts it had  
5 undertaken to pursue the investigation. *See id.* ¶¶ 126-134.  
6

7 As part of its submission to the ECHR, Poland explained that it submitted  
8 multiple requests for legal assistance to the United States in accordance with the MLAT  
9 between United States and Poland. *See id.* ¶ 132. The U.S.-Poland MLAT was signed  
10 by representatives of both countries on July 10, 1996, and following the advice and  
11 consent by the Senate in 1998, entered into force on September 17, 1999. *See Treaty*  
12 *Between the United States of America and the Republic of Poland on Mutual Legal*  
13 *Assistance in Criminal Matters*, Treaty Doc. 105-12, 1996 WL 905552 (U.S-Poland  
14 MLAT).<sup>2</sup> As with other MLATs, the treaty is "self-executing"; it "required no  
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18 <sup>2</sup> The United States has entered into more than fifty bilateral MLATs with other  
19 countries. For additional information about MLATs generally and their proliferation in  
20 recent years, *see In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634  
21 F.3d 557, 563-64 (9th Cir. 2011). In 2003, United States and Poland agreed to modify  
22 and supplement some of the original provisions of the 1999 U.S-Poland MLAT. *See*  
23 *Mutual Legal Assistance Agreement with the European Union*, Treaty Doc. No. 109-13,  
24 2003 WL 25297816 at \*187-199, Annex Treaty Between the United States of America  
25 and the Republic of Poland on Mutual Legal Assistance in Criminal Matters.  
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1 implementing legislation to take effect within the United States”; and it “stands on the  
2 same footing as a federal statute.” *See Bellevue*, 634 F.3d at 568. Pursuant to the  
3 treaty, the United States and Poland undertake to provide a variety of forms of  
4 assistance to each other in connection with the investigation and prosecution of criminal  
5 acts. *See U.S.-Poland MLAT*. The treaty designates a “Central Authority” from each  
6 country “to make and receive requests pursuant to th[e] Treaty.” *See id.*, art. 2. The  
7 Attorney General has delegated the Central Authority functions to the Department of  
8 Justice’s Office of International Affairs. *See Delegation of Authority Concerning*  
9 *Mutual Legal Assistance*, 82 Fed. Reg. 10546-01 (Feb. 14, 2017). The treaty provides  
10 the Central Authority with exclusive authority over MLAT requests and sets forth  
11 certain conditions under which the Central Authority “may deny assistance,” including  
12 that “the execution of the request would prejudice the security or similar essential  
13 interests of the Requested State.” *See U.S.-Poland MLAT*, art. 3(1)(c). Poland’s  
14 submission to the ECHR explained that the United States Central Authority did not  
15 grant any of Poland’s MLAT requests related to its investigation of alleged CIA  
16 activities in Poland, including on the basis that the requests would prejudice the security  
17 or essential interests of the United States. *See Zubaydah* ¶¶ 132, 143.

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22 On July 24, 2014, the ECHR issued a 225-page decision concluding, among other  
23 things, that Poland failed to conduct an effective investigation into Zubaydah’s  
24 allegations. *See id.* ¶¶ 534-45. After the ECHR judgment became final, Zubaydah’s  
25 case was transferred to the Committee of Ministers of the Council of Europe, the  
26 governing European entity that supervises the execution of judgments issued by the  
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1 ECHR. *See* Supervision of Execution of Judgments of the European Court of Human  
2 Rights, [www.coe.int/en/web/cm/execution-judgments](http://www.coe.int/en/web/cm/execution-judgments). Since that time, Poland has filed  
3 a series of reports with the Committee explaining the remedial measures Poland has  
4 undertaken to comply with the ECHR's judgment to investigate Zubaydah's allegations  
5 of mistreatment. In May 2015, Poland filed a report explaining that it had submitted six  
6 applications for assistance under the MLAT, but the United States Central Authority  
7 refused to grant the requests. *See* Warden Decl., Ex. 2, Communication From the  
8 Authorities Concerning the Al Nashiri and Abu Zubaydah Cases Against Poland (App.  
9 Nos. 28761/11 & 7511/13) (May 15, 2015). The report further explained that the issue  
10 of the United States' cooperation with Poland's criminal investigation had been the  
11 subject of discussions among high ranking officials of both governments, including the  
12 Attorney General of the United States and the Assistant Secretary of State for European  
13 and Eurasian Affairs. *See id.* at 3.

17 In its most recent submission to the Committee, filed in March 2017, Poland  
18 described with additional specificity the various MLAT requests it had submitted to the  
19 United States since 2009, and the United States' denial of those requests. *See* Warden  
20 Decl., Ex. 3, Updated Action Plan from Poland Concerning the Al Nashiri and Abu  
21 Zubaydah Cases Against Poland (App. Nos. 28761/11 & 7511/13) (Mar. 23, 2017).  
22 Poland also represented that it intended to engage with Zubaydah's lawyers concerning  
23 alternative ways to obtain evidence for the pending investigation, which Polish  
24 prosecutors have extended until September 11, 2017. *See id.* at 16, 22.  
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**ARGUMENT**

**I. The Court Should Exercise Its Discretion To Deny Zubaydah’s Section 1782 Application.**

To grant an application under 28 U.S.C. § 1782, the Court must conclude that the moving party has satisfied both statutory and discretionary factors. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260-65 (2004). As relevant here, Section 1782 provides:

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

Although the United States does not contest that Zubaydah, as opposed to his co-Petitioner, has satisfied the minimum statutory elements, that is only the beginning of the analysis.<sup>3</sup> The Court has substantial discretion to deny a Section 1782 request and,

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<sup>3</sup> The United States does not challenge Zubaydah’s status as an “interested person” with standing to invoke Section 1782, based on the United States’ understanding that Zubaydah has been granted “injured person” status by the Polish Government under Poland’s Code of Criminal Procedure, which grants injured persons various procedural and participatory rights in pending criminal investigations. By contrast, the United States is unaware of, and the record does not contain, a separate factual basis to

1 as explained below, the Court should exercise that discretion to deny Zubaydah's  
2 sweeping discovery requests in this case. *See Intel*, 542 U.S. at 264-65.

3 "[A] district court is not required to grant a § 1782(a) discovery application  
4 simply because it has the authority to do so." *Intel*, 542 U.S. at 264. "The absolute  
5 requirements under § 1782 are only part of the story," and "courts have stressed that,  
6 even if those requirements are met, a district court still retains the discretion to deny a  
7 request." *Bellevue*, 634 F.3d at 563. Indeed, "Congress gave the federal district courts  
8 broad discretion to determine whether, and to what extent, to honor a request for  
9 assistance under 28 U.S.C. § 1782." *Four Pillars Enters. Co. v. Avery Dennison Corp.*,  
10 308 F.3d 1075, 1078 (9th Cir. 2002). In *Intel*, the Supreme Court identified four  
11 "factors that bear consideration in ruling on a § 1782(a) request[:]"  
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- 13 1. Whether "the person from whom discovery is sought is a participant in the  
14 foreign proceeding";
- 15 2. "[T]he nature of the foreign tribunal, the character of the proceedings  
16 underway abroad, and the receptivity of the foreign government or the court  
17 or agency abroad to U.S. federal-court judicial assistance";
- 18 3. Whether the request "conceals an attempt to circumvent foreign proof-  
19 gathering restrictions or other policies of a foreign country or the United  
20 States";
- 21 4. Whether the request is "unduly intrusive or burdensome."

22 *Intel*, 542 U.S. 264-65. Courts generally consider all four *Intel* factors, but the weight  
23 of one factor alone is sufficient to deny a Section 1782 application. *See In re Fischer*  
24 *Advanced Composite Components AG*, 2008 WL 5210839, at \*3 (W.D. Wash. Dec. 11,  
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27 conclude that Joseph Margulies, Zubaydah's attorney and co-petitioner on the  
28 application, meets the "interested person" standard. *See Intel*, 542 U.S. at 256-57.

1 2008). This case presents a situation in which the Government’s significant interests in  
2 the third factor justify denial of the application, as Zubaydah seeks “to circumvent  
3 foreign proof-gathering restrictions or other policies of a foreign country or the United  
4 States.” *Intel*, U.S. at 265.

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6 Here, where the Executive and Legislative Branches have ratified a treaty, to  
7 which Poland has agreed, that enables Poland to obtain evidence within the United  
8 States for its criminal investigations, Zubaydah should not be permitted to use Section  
9 1782 to circumvent it. The United States Central Authority has denied Poland’s  
10 repeated MLAT requests for assistance in connection with its pending criminal  
11 investigation regarding alleged CIA activities, and Section 1782 should not be utilized  
12 as a judicial appeal mechanism for private parties to seek, purportedly for the use by  
13 foreign governments, U.S. Government information allegedly in the possession of  
14 Government contractors that foreign governments were unable to obtain directly  
15 through a request to the United States in accordance with a governing treaty. Use of  
16 Section 1782 in this fashion is contrary to the purpose and policy goals underlying the  
17 statute and the MLAT. Further, the Court should not set an adverse precedent that  
18 would encourage other litigants to utilize Section 1782 as a way to circumvent  
19 established treaty procedures that the United States relies upon to provide judicial  
20 assistance directly to foreign governments.

21 Notably, Zubaydah does not cite any authority to support his proposed use of  
22 Section 1782. Indeed, courts have rejected similar attempts by alleged victims of  
23 foreign crimes to use Section 1782 to act as private investigators on behalf of foreign  
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1 governments to circumvent MLATs. In *Matter of Application of O2CNI Co., Ltd.*, 2013  
2 WL 4442288 (N.D. Cal. Aug. 15, 2013), the court denied a Section 1782 application by  
3 a South Korean company based on the *Intel* factors and concluded that the corporation  
4 was seeking to evade the MLAT process. *See id.* at \*6-9. The court remarked that the  
5 case presented an “unusual effort” by a private corporation to act as “an investigator for  
6 the Korean authorities.” *Id.* at 6. The Court emphasized that the proper course was for  
7 the South Korean Government to seek information for its criminal investigation directly  
8 through the MLAT between the United States and South Korea. *Id.* at \*6, 8 (“O2CNI  
9 wants to act as investigator for the Korean authorities against the entities that it wants  
10 the Korean authorities to charge. If Korean authorities want more information from the  
11 respondents, they can use the MLAT process. . . .”)

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15 Similarly, in *Lazaridis v. Int’l Ctr. for Missing & Exploited Children, Inc.*, 760 F.  
16 Supp. 2d 109, 112 (D.D.C. 2011), a private party filed an application under Section  
17 1782 in order to provide evidence to Greek investigative authorities for purposes of a  
18 criminal prosecution in Greece. In denying the application based on *Intel*’s  
19 discretionary factors, the court relied upon the fact that the Greek government could  
20 seek evidence located within the United States by issuing letters rogatory or by  
21 submitting a request through the U.S.-Greece MLAT. *Id.* at 115.

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24 Other courts have also recognized that Section 1782 should not be utilized as a  
25 way to circumvent established methods of fact-gathering available to foreign litigants.  
26 *See Al Fayed v. United States*, 210 F.3d 421, 423-25 (4th Cir. 2000) (affirming denial of  
27 Section 1782 application and noting attempt to sidestep the Freedom of Information  
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1 Act); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999)  
2 (rejecting a Section 1782 application that attempted to circumvent an arbitration  
3 agreement, concluding that “[r]esort to § 1782 in the teeth of [an arbitration agreement]  
4 suggests a party’s attempt to manipulate United States court processes for tactical  
5 advantage”); *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1042  
6 (N.D. Cal. 2016) (concluding that the petitioner’s effort to use Section 1782 “to do an  
7 end run around” existing procedures for evidence collection in South Korea creates  
8 “real concerns” that “weigh against granting the applications”); *In re Application of*  
9 *OOO Promnefstroy for an Order to Conduct Discovery for Use in a Foreign*  
10 *Proceeding*, 2009 WL 3335608, at \*10 (S.D.N.Y. Oct. 15, 2009) (“Put simply, this  
11 Court would not provide ‘efficient means of assistance’ to litigants by giving parties an  
12 incentive, after losing in their original requests for information in the foreign tribunal, to  
13 rush to the United States in hopes of obtaining a second bite at the apple. . . . [O]rdering  
14 the discovery would not encourage foreign countries by example, unless that example is  
15 to aid litigants in circumventing the judicial systems of foreign countries.”).<sup>4</sup>  
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22 <sup>4</sup> Although some courts have granted Section 1782 applications in the context of foreign  
23 criminal proceedings, those cases involved different situations in which the applicant  
24 was a foreign defendant, not a non-litigant seeking to act as a proxy for a foreign  
25 government, *see Weber v. Finker*, 554 F.3d 1379 (11th Cir. 2009), or did not raise  
26 concerns about circumventing the MLAT process, *see In re Application for an Order*  
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1 Indeed, it is well established that MLATs provide a means by which governments  
2 exchange information for purposes of international criminal investigations and private  
3 parties, such as Zubaydah, cannot enforce MLATs or compel the Government to invoke  
4 MLATs on their behalf. *See, e.g., United States v. Sedaghaty*, 728 F.3d 885, 917 (9th  
5 Cir. 2013); *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001).  
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7 The corollary is also true: private parties should not be permitted to seek disclosure of  
8 U.S. Government information purportedly on behalf of a foreign government that the  
9 foreign government could not itself obtain through an MLAT request. *Cf. Bellevue*, 634  
10 F.3d at 571 (holding that U.S.-Russia MLAT supersedes substantive aspects of Section  
11 1782). Otherwise, Section 1782 would be transformed into a judicial appeal  
12 mechanism for private parties, acting purportedly on behalf of foreign governments, to  
13 seek judicial review of the Executive Branch’s MLAT denials. *Cf. In re Request from*  
14 *United Kingdom Pursuant to Treaty Between Gov’t of U.S. & Gov’t of United Kingdom*  
15 *on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 685 F.3d 1, 9  
16 (1st Cir. 2012) (“a federal court has no subject matter jurisdiction to entertain a claim  
17 for judicial review of the Attorney General’s actions pursuant to the [MLAT].”).  
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21 Here, the United States and Poland have agreed in the MLAT to provide a variety  
22 of forms of assistance to each other in connection with the investigation and prosecution  
23 of criminal acts, except where there is a basis in the treaty to deny the request for  
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*Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings*, 773  
27 F.3d 456, 457 (2d Cir. 2014).  
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1 assistance. The United States has denied Poland's requests for assistance with its  
2 criminal investigation in accordance with the provisions of the treaty. *See Zubaydah* ¶¶  
3 132, 143; Warden Decl., Ex. 3 at 17-19. This decision represents the considered  
4 judgment of the Executive Branch made under treaty terms approved by the Senate, to  
5 which Poland has agreed. Accordingly, there is no basis for the Court to extend its  
6 discretionary assistance to Zubaydah under Section 1782 when doing so would  
7 circumvent the law and policies embedded in the MLAT, as approved and implemented  
8 by the Executive and Legislative Branches of the United States.  
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11 Even if the Court considers the other *Intel* factors, those factors also favor denial  
12 of Zubaydah's application. As to the first factor – whether “the person from whom  
13 discovery is sought is a participant in the foreign proceeding” – the Supreme Court has  
14 explained that the need for Section 1782 aid is “not as apparent” when the evidence is  
15 available to the foreign tribunal. *See Intel*, 542 U.S. at 264. Although Dr. Mitchell and  
16 Dr. Jessen are not formal “participants” in the underlying Polish criminal investigation,  
17 the MLAT provides the Government of Poland with a legal procedure through which it  
18 can request documents and testimony from them, through the United States. *See*  
19 *O2CNI Co.*, 2013 WL 4442288 at \*6 (first *Intel* factor “weighs in favor of letting the  
20 evidence in th[e] case develop through the criminal authorities investigating it”). *Cf. In*  
21 *re Judicial Assistance Pursuant to 28 U.S.C. 1782 by Macquarie Bank Ltd.*, 2015 WL  
22 3439103, at \*6 (D. Nev. May 28, 2015) (“Although the case law at times refers to  
23 whether the ‘person’ is within the foreign tribunal's jurisdictional reach, the key issue is  
24 whether the material is obtainable through the foreign proceeding.”). Consequently,  
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1 this case does not present a situation in which Poland is without legal recourse to seek  
2 information from the United States for its investigation absent Section 1782 aid.

3 Moreover, it bears emphasizing that the alleged information sought in this case is  
4 *U.S. Government information* that Dr. Mitchell and Jessen allegedly acquired while  
5 working as contractors for the CIA. *See Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*,  
6 376 F.3d 79, 85 (2d Cir. 2004) (concluding that a Section 1782 application should be  
7 evaluated from the perspective of the entity that owns the information). Indeed, any  
8 issue over access to such alleged information is between the United States and Poland.  
9 Accordingly, the Court should to defer to the MLAT and other traditional diplomatic  
10 processes available to resolve this government-to-government matter, rather than inject  
11 itself into the issue of Poland's access to alleged U.S. Government information through  
12 Zubaydah's private litigation effort against Dr. Mitchell and Dr. Jessen. *Cf. Patterson*  
13 *v. Wagner*, 785 F.3d 1277, 1285 (9th Cir. 2015) (treaties "establish a diplomatic conflict  
14 resolution scheme with no role for the judiciary"); *Mitchell v. Laird*, 488 F.2d 611, 616  
15 (D.C. Cir. 1973) (courts should respect "the delicacies of diplomatic negotiation" and  
16 "the inevitable bargaining for the best solution of an international conflict").  
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21 As to the second factor, the nature and status of the ongoing criminal  
22 investigative proceedings in Poland weigh against granting Zubaydah's application.  
23 Poland has sought legal assistance from the United States in accordance with the MLAT  
24 process on multiple occasions, and those requests have all been denied. Thus,  
25 regardless whether Poland supports Zubaydah's effort to circumvent those prior  
26 decisions, the Court should not exercise its discretionary authority in a manner that  
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1 would conflict with the decision of the Executive Branch as to the appropriate manner  
2 in which alleged U.S. Government information, even if in the possession of  
3 Government contractors, is provided to foreign governments for the purpose of foreign  
4 criminal investigations.

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6 The final *Intel* factor also favors denial of Zubaydah's application because the  
7 subpoena is "unduly intrusive or burdensome." *Intel*, 542 U.S. at 264. Zubaydah's  
8 proposed subpoenas are very broad in scope, as they seek "all documents, memoranda,  
9 and correspondence" as well as deposition testimony in 13 expansive categories related  
10 to alleged CIA detention and interrogation activities in Poland. *See* Application (ECF  
11 No. 1), Ex. 1-4. The categories include alleged correspondence between U.S. and  
12 Polish officials, documents allegedly generated by Polish officials, and go so far as to  
13 include information about water and electricity systems in Poland. *See id.* In effect,  
14 Zubaydah wants this Court to adjudicate whether Polish prosecutors should have access  
15 to alleged U.S. Government information as well as information allegedly created by, or  
16 related to the activities of, other components of the Polish Government. This is a matter  
17 for the Polish Government to resolve internally and through its diplomatic discussions  
18 with the United States. Section 1782 is not a device for fishing expeditions by private  
19 parties purporting to act as private investigators for foreign governments. *See United*  
20 *States v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor*  
21 *Gen. of the Russian Fed'n*, 235 F.3d 1200, 1205-06 (9th Cir. 2000).

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26 Further, because Zubaydah seeks alleged intelligence and foreign relations  
27 information, the United States would, in all likelihood, have to expend substantial  
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1 resources as part of the rigorous process necessary to evaluate and obtain approval to  
2 assert potential privileges, including the state secrets privilege. As this Court is aware,  
3 the complex discovery process and litigation in the *Salim* and *Mitchell* cases was time-  
4 consuming, burdensome, and ultimately culminated in the Court upholding the United  
5 States' assertion of the state secrets privilege. *See Mitchell*, Order Re: Third and Fourth  
6 Motions To Compel (ECF No 91). Without confirming or denying whether or not  
7 responsive records exist, should Zubaydah's subpoenas issue, this case would likely  
8 involve a substantial commitment of time and resources by the United States, including  
9 at the highest levels of the CIA and Department of Justice, to address any potential  
10 privilege issues. The burden on the United States associated with litigating access to  
11 alleged national security and foreign relations information weighs in favor of denying  
12 Zubaydah's application. *See Andover Healthcare, Inc. v. 3M Co.*, 817 F.3d 621, 623-24  
13 (8th Cir. 2016) (sensitive information sought in Section 1782 application "weighed  
14 heavily against ordering discovery"); *Al Fayed*, 210 F.3d at 425 ("Congress's salutary  
15 purposes in enacting § 1782 simply do not anticipate the issuance of a subpoena for  
16 documents whose disclosure would be likely to harm the national security.").

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21 In addition, Zubaydah's application would disserve Section 1782's "twin aims of  
22 providing efficient assistance to participants in international litigation and encouraging  
23 foreign countries by example to provide similar assistance to our courts." *Intel*, 542  
24 U.S. at 252. The first aim, providing efficient assistance, would not be furthered  
25 because it is more efficient to allow Poland, the entity actually conducting the criminal  
26 investigation, to attempt to collect the evidence that it believes it needs directly from the  
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1 United States using the established procedures that Poland has agreed to under the  
2 MLAT. Allowing Zubaydah to rely upon Section 1782 in the fashion he proposes  
3 would conflict with this well-established treaty scheme.

4         The second aim of Section 1782, to encourage foreign countries to provide  
5 similar assistance to U.S. courts, also would not be served by granting Zubaydah's  
6 application. It is unlikely that granting the application here would set an example that  
7 would encourage other foreign governments to grant similar assistance to U.S. litigants  
8 seeking sensitive intelligence information in foreign courts. *See Al Fayed*, 210 F.3d at  
9 424. Moreover, Zubaydah's application undermines the interests of international  
10 comity and parity by encouraging other governments to circumvent established  
11 government-to-government methods of obtaining evidence for foreign criminal  
12 investigations and to seek evidence through indirect private proxies in U.S. courts.  
13 Rather than further international cooperation, granting the application here would create  
14 a troubling precedent incentivizing parties to contravene the MLAT process and disturb  
15 the very structure of international agreements established to facilitate foreign evidence  
16 gathering in criminal investigations. Such a result would effectively grant foreign law  
17 enforcement, acting through private proxies, a means to circumvent the MLAT process  
18 with which the United States is obliged to comply. This result has the potential to  
19 harm, not promote, foreign relations in the context of international criminal matters.  
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1           **II. If The Court Grants Zubaydah’s Application, It Should Establish A**  
2           **Schedule That Provides the United States With Sufficient Time To**  
3           **Assert Any Applicable Privileges.**

4           In the event the Court authorizes Zubaydah to serve his discovery subpoenas on  
5 Dr. Mitchell and Dr. Jessen, the United States requests that the Court set a return date  
6 for the subpoenas at least 60 days after service in order to provide the United States  
7 sufficient time to consider whether to assert any applicable privileges over the alleged  
8 information, including potentially the state secrets privilege, and to file any appropriate  
9 motions with the Court. *See In re Application of Rainsy*, 2017 WL 528476, at \*3 (N.D.  
10 Cal. Feb. 9, 2017) (conditioning grant of Section 1782 subpoena application on  
11 extended return date to provide party with sufficient time to contest subpoena).  
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13           Section 1782 provides that “[a] person may not be compelled to give his  
14 testimony or statement or to produce a document or other thing in violation of any  
15 legally applicable privilege.” Here, the United States has a compelling interest in  
16 protecting its classified, sensitive, or privileged information from disclosure, which  
17 includes preventing Dr. Mitchell and Dr. Jessen from confirming or denying allegations  
18 that would tend to disclose classified information. *See, e.g., Dep’t of Navy v. Egan*, 484  
19 U.S. 518, 527 (1988); *Minier v. CIA*, 88 F.3d 796, 800-02 (9th Cir. 1996).  
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22           Given the potential sensitivity of the alleged diplomatic and intelligence  
23 information that Zubaydah seeks in this case, the United States requests that the Court  
24 establish a return date for the subpoenas at least 60 days from the date of service to  
25 enable the United States to confer with counsel for Dr. Mitchell and Dr. Jessen and  
26 engage in the necessary intra- and inter-agency consultations to determine whether to  
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1 assert the state secrets privilege and present any appropriate motions to the Court. This  
2 request is not intended to prejudice any party, or to unnecessarily delay resolution of this  
3 case. Indeed, Zubaydah will not be prejudiced by this proposed date. The criminal  
4 investigation in Poland has been ongoing since 2008 and it has been extended multiple  
5 times. *See* Warden Decl., Ex. 3 at 3. Accordingly, there is no need for expedited  
6 resolution of these potential privilege issues.  
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8         By contrast, the invocation of the state secrets privilege is no ordinary or simple  
9 occurrence. The process for assessing whether the state secrets privilege can and should  
10 formally be invoked serves to ensure protection of the public's interest in national  
11 security, while at the same time avoiding the need for a rushed or less rigorous decision  
12 that could have lasting prejudicial effect on a litigant. *United States v. Reynolds*, 345  
13 U.S. 1 (1953), its progeny, and current Executive Branch policy demand that any  
14 determination as to whether the United States will invoke the state secrets privilege can  
15 be made only by senior officials of the Executive Branch after their personal  
16 consideration. *See Mitchell* (ECF No. 91) at 4-8. These multiple layers of review are  
17 meticulous and take a significant amount of time.  
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21         Accordingly, the requested 60-day return date is reasonable given the need to  
22 make a decision as to whether the invocation of the state secrets privilege is appropriate  
23 and to give senior officials appropriate time to consider the national security and  
24 diplomatic issues presented in this case. A 60-day return period will also provide  
25 flexibility to avoid time and resource conflicts with the pre-trial deadlines and trial  
26 schedule the Court has established in the *Salim* case. *See Salim* Order (ECF No. 187).  
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1 Dated: June 30, 2017

Respectfully submitted,

2 CHAD A. READLER  
3 Acting Assistant Attorney General

4 JOSEPH H. HARRINGTON  
5 Acting United States Attorney

6 TERRY M. HENRY  
7 Assistant Branch Director

8 s/ Andrew I. Warden

9 ANDREW I. WARDEN  
10 United States Department of Justice  
11 Civil Division, Federal Programs Branch  
12 20 Massachusetts Avenue NW  
13 Washington, D.C. 20530  
14 Tel: (202) 616-5084  
15 Fax: (202) 616-8470  
16 E-Mail: andrew.warden@usdoj.gov

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28 Attorneys for the United States of America

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 30, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Jerry Moberg:  
jmoberg@jmlawps.com

David Klein:  
David.Klein@pillsburylaw.com

John Chamberlain:  
John.Chamberlain@pillsburylaw.com

*Attorneys for Petitioners*

/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  
E-Mail: andrew.warden@usdoj.gov

Attorney for the United States of America