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16 UNITED STATES DISTRICT COURT  
17 EASTERN DISTRICT OF WASHINGTON

18  
19 IN RE APPLICATION OF ZAYN AL-  
20 ABIDIN MUHAMMAD HUSAYN  
21 (ABU ZUBAYDAH) and JOSEPH  
22 MARGULIES

No. 17-CV-171-JLQ

UNITED STATES' MOTION TO  
INTERVENE

Hearing Date: Nov. 28, 2017 at 10 a.m.  
With Oral Argument By Telephone

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UNITED STATES' MOTION TO INTERVENE

**INTRODUCTION**

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2 Pursuant to Federal Rule of Civil Procedure 24(a), the United States of America  
3 moves the Court for leave to intervene as of right for the purpose of asserting the state  
4 secrets and related statutory privileges in support of a motion for a protective order and  
5 a motion to quash the subpoenas that Petitioner Abu Zubaydah served on Respondents  
6 Dr. James Mitchell and Dr. John “Bruce” Jessen.  
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8 This case is an action that seeks the disclosure of alleged information about the  
9 CIA’s former detention and interrogation program. Abu Zubaydah, a former detainee  
10 in that program, has obtained authorization from this Court, pursuant to 28 U.S.C.  
11 § 1782, to serve deposition and document subpoenas on Dr. James Mitchell and Dr.  
12 John “Bruce” Jessen, two psychologists who worked as independent contractors for the  
13 CIA in the Agency’s former program. *See* Order Granting Application for Discovery  
14 (ECF No. 23). Zubaydah seeks a broad range of information from Dr. Mitchell and Dr.  
15 Jessen about the CIA’s alleged detention and interrogation activities allegedly occurring  
16 in Poland, as well as information about Poland’s alleged participation in those alleged  
17 activities. *See* Application (ECF No. 1). As explained in the United States’  
18 accompanying motion to quash and motion for a protective order, the information that  
19 Abu Zubaydah seeks is protected from disclosure by the state secrets and related  
20 statutory privileges. Accordingly, the United States respectfully requests that it be  
21 permitted to intervene to assert these privileges and seek to quash the subpoenas and  
22 move for a protective order.  
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**ARGUMENT**

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2 The United States is entitled to intervene as of right pursuant to Rule 24(a).  
3 Indeed, courts have routinely granted motions to intervene by the United States in order  
4 to assert the state secrets privilege. *See, e.g., Crater Corp. v. Lucent Techs., Inc.*, 423  
5 F.3d 1260, 1263 (Fed. Cir. 2005); *DTM Research, L.L.C. v. AT & T Corp.*, 245 F.3d  
6 327, 330 (4th Cir. 2001); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546  
7 (2d Cir. 1991); *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1133 (N.D.  
8 Cal. 2008); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006).  
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10 A potential intervenor must meet four requirements to satisfy Rule 24(a): “(1) the  
11 application for intervention must be timely; (2) the applicant must have a ‘significantly  
12 protectable’ interest relating to the property or transaction that is the subject of the  
13 action; (3) the applicant must be so situated that the disposition of the action may, as a  
14 practical matter, impair or impede the applicant’s ability to protect that interest; and (4)  
15 the applicant’s interest must not be adequately represented by the existing parties in the  
16 lawsuit.” *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir.  
17 2001) (citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 836 (9th  
18 Cir. 1996)). The Court of Appeals generally construes Rule 24(a) “liberally in favor of  
19 potential intervenors.” *Id.*; *see also United States v. Alisal Water Corp.*, 370 F.3d 915,  
20 919 (9th Cir. 2004) (“[T]he requirements for intervention are broadly interpreted in  
21 favor of intervention”). Here, the United States meets all of the requirements for  
22 intervention.  
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27 First, the United States’ motion to intervene is timely within the meaning of Rule  
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1 24. The Court's September 7, 2017 Order granting Abu Zubaydah's application to serve  
2 the subpoenas emphasized that "[a]ddressing the issues of classification and privilege is  
3 premature at this time," and the Court established a schedule requiring the filing of any  
4 motions to quash or motions for a protective order within 21 days after service of the  
5 subpoenas. *See* ECF No. 23 at 6-8. Abu Zubaydah served his subpoenas on October 4,  
6 2017, thus the motion deadline is October 25, 2017. *See* Proof of Service of Subpoenas  
7 (ECF No. 24). The United States has complied with this deadline, and under these  
8 circumstances there can be no dispute that intervention is timely. *See United States v.*  
9 *Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004) ("Timeliness is a flexible concept;  
10 its determination is left to the district court's discretion.").  
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13       Second, the United States has a significant interest relating to the subject matter of  
14 this action. This case involves allegations concerning clandestine intelligence activities  
15 allegedly conducted by the CIA in Poland. The United States has asserted the state  
16 secrets privilege and related statutory privileges in this matter, and is hereby moving to  
17 intervene for the purpose of seeking a protective order and moving to quash the  
18 subpoenas. Because this action seeks the disclosure of information over which the  
19 United States has asserted the state secrets privilege and related statutory privileges, the  
20 United States' interest satisfies requirements of Rule 24(a). *See Mohamed*, 539 F. Supp.  
21 2d at 1133 (granting intervention where "the United States has an important interest in  
22 this action because it involves activities allegedly overseen by the CIA").  
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25       Third, the United States' national security interests will be significantly and  
26 practically impaired if intervention is not granted. Absent the United States'  
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1 intervention, further proceedings in this matter risk the disclosure of classified national  
2 security information that is subject to the state secrets privilege, and the United States  
3 must be allowed to protect this information. *See id.* (“If the United States were not  
4 allowed to intervene, its interest in maintaining state secrets could be harmed”);  
5 *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992) (“A government  
6 department may intervene in litigation to which it is not a party and assert the [state  
7 secrets] privilege, thereby preventing either party in the litigation from obtaining  
8 sensitive government information in discovery.”)

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11 Fourth, the United States’ interest is not adequately represented by the parties to  
12 this case. The intervenor’s burden of showing that the existing parties may not  
13 adequately represent its interest is “minimal,” and the potential intervenor “need only  
14 show that representation of its interests by existing parties ‘may be’ inadequate.”  
15 *Southwest Ctr. for Biological Diversity*, 268 F.3d at 822-23. Here, the United States has  
16 a significant interest that Respondents Mitchell and Jessen cannot adequately represent  
17 because only the United States has the ability to assert the state secrets privilege.<sup>1</sup> *See*

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20 <sup>1</sup> Even though the United States is not a respondent to the subpoenas, the United States  
21 has standing to seek to quash the subpoenas and to seek a protective order to prevent the  
22 disclosure of the United States’ privileged information allegedly in the knowledge or  
23 possession of Dr. Mitchell and Dr. Jessen. *See, e.g., Hawaii Reg’l Council of*  
24 *Carpenters v. Yoshimura*, No. CV 16-00198 ACK-KSC, 2017 WL 738554, at \*2 (D.  
25 Haw. Feb. 17, 2017) (a party has standing to quash a subpoena served upon a  
26 respondent where the party asserts a claim of privilege relating to the information being  
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1 *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (“The privilege belongs to the  
2 government and must be asserted by it; it can neither be claimed nor waived by a private  
3 party”). Thus, only the United States is in a position to protect against the disclosure of  
4 information over which it has asserted the state secrets privilege, and the United States is  
5 the only entity properly positioned to explain to the Court why disclosure of the  
6 information requested in Abu Zubaydah’s subpoenas risks harm to the national security.  
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8 **CONCLUSION**

9 For the reasons stated above, the United States respectfully requests that the Court  
10 grant its motion to intervene pursuant to Rule 24(a).<sup>2</sup> A proposed order is attached.  
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22 sought from the respondent); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965,  
23 973–74 (C.D. Cal. 2010) (same).

24 <sup>2</sup> Rule 24(c) requires that a motion to intervene be accompanied by a pleading setting  
25 forth the claim or defense for which intervention is sought. The interests of the United  
26 States are explained more fully in accompanying the motion to quash and motion for a  
27 protective order. This submission fulfills Rule 24(c)’s requirement.  
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1 Dated: October 24, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 24, 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:

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