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

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	NO. 16-MC-0036-JLQ **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL AND IN OPPOSITION TO THE UNITED STATES' CROSS-MOTION TO QUASH** MOTION HEARING: SEPTEMBER 29, 2016 AT 1:30 PM RELATED CASE: NO: 2:15-CV-0286-JLQ

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I. INTRODUCTION[1]

The Federal Rules of Civil Procedure "strongly favor full discovery." *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994). This "strong favor" is evident in Rule 26(b)(1)'s description of the appropriate scope of discovery:

> . . . any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). The document requests contained within the Subpoenas served upon the CIA and the DOJ (collective, the "Requests") seek documents that fall squarely within this described scope. Yet, the Government contends that it should not be obligated to produce documents responsive to the Requests because the production burden is simply too great.

But, in calculating this purported unsurmountable burden, the Government not only ignores Defendants' entitlement to a broad scope of discovery, but seeks to improperly minimize the source and breadth of the claims advanced against

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[1] Defendants note that the Government appears to have attempted to circumvent the Court's page limitation by including more than the maximum 280 words/page permitted by the Local Rules in its Opposition ("Opp'n").

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1 Defendants. The Government has seemingly forgotten that this is no ordinary
2 case. Rather, the claims asserted against Defendants arise from Defendants'
3 claimed participation in the CIA's Enhanced Interrogation Program (the
4 "Program")—a Program heavily analyzed and scrutinized by a Committee of the
5 United States Senate. These claims are based upon both (1) Defendants claimed
6 direct involvement with some or all of Plaintiffs and (2) Defendants' claimed
7 material involvement in designing the Program. Not surprisingly, then, the
8 Government possesses a significant volume of directly relevant evidence—much
9 of which is within the Government's exclusive control.
10 Additionally, the Government complains of a burden that it could have
11 lessened or avoided altogether. Despite receiving notice of this litigation last
12 October and expressly acknowledging in April that it would be a primary source
13 of discovery, the record is devoid of any indication that the Government began
14 searching (its searchable database) for relevant documents until May—when the
15 Court ordered the production of Defendants' contracts with the CIA (and at that
16 point only for such contracts). The record also lacks an explanation as to why it
17 believes it can now assert the challenges that its record retention and review
18 protocol apparently presents in light of this action's current deadlines—when it
19 agreed (without objection) to those deadlines during the Court's July 8
20 Scheduling Conference, at the time knowing full well the discovery that the
21 Requests sought. And, in any event, it is beyond dispute that the Government is
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solely responsible for any claimed shortcomings in the searchability of its record retention system (a system created "to facilitate investigations into the [CIA's] former detention and interrogation program."), Opp'n at 7, or any claimed burden associated with its review protocol.

In this context, the Government's efforts to produce responsive documents becomes even more uninspiring. Indeed, in the three months since Defendants' service of the Subpoenas, the CIA and DOJ have produced 80 documents, only 20 of which were not previously released to the public. And even though these newly released documents are highly relevant to this action (and contradict certain critical aspects of Plaintiffs' claims and the SSCI Report upon which those claims are primarily founded) the Government nevertheless wants to deny Defendants any further documents because of the burden it has brought on itself and has the sole ability to control.

In short, the Government simply has not met its burden warranting quashing the Subpoenas, nor has it met its burden warranting further limitation of Defendants' narrowly-tailored Requests.

II. ARGUMENT

A. Applicable Legal Standard

It is axiomatic that parties may use subpoenas to obtain discoverable information in the possession of third parties, including the Government. Fed. R. Civ. P. 45; *see Exxon Shipping Co.*, 34 F.3d at 779-80. And while the Ninth

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1 Circuit has acknowledged that the Government has an interest in ensuring that
2 subpoenas are not improperly used to divert Government resources "to the
3 detriment of the smooth functioning of the government operations," it has surely
4 not suggested that the Government may never be burdened with subpoena
5 compliance. *Id.* at 779. Rather, the Ninth Circuit has explained that the
6 Government's interest should be considered within the context of other factors—
7 such as the importance of the evidence sought and the parties' access to relevant
8 information. *Id.* at 780 (explaining discovery of agency documents should be
9 limited if "desired discovery is relatively unimportant when compared to the
10 government interest in conserving scarce government resources").
11 Here, the Government's interest pales in comparison to Defendants' need.
12 Defendants seek evidence in the exclusive control of the Government, and they
13 need this evidence to defend themselves against claims predicated entirely upon
14 Defendants' work with the CIA—claims for which the Government itself is
15 immune. But, despite employing Defendants for years, the Government now
16 claims the burden associated with producing evidence critical to Defendants'
17 defense is too great, even when that evidence cannot be obtained from any other
18 source. Absent cooperation from the Government, whether voluntary or as
19 compelled by the Court, typical and appropriate discovery simply cannot occur.
20 And absent such discovery, Defendants will improperly be forced to rely on
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1 highly redacted public versions of documents, which the Government admits
2 represent only a fraction of information existing relevant to this action.
3 Application of governing law to this situation establishes that Defendants
4 should be afforded the documents sought by their Subpoenas. Moreover, it
5 establishes that the Government should be required to formally assert a privilege
6 for all the responsive information that it has withheld, or intends to withhold,
7 from disclosure.
8
9 **B. The Subpoenas Seek Relevant Documents Needed For <u>Defendants' Defense</u>**

10 Three months since the Subpoenas issuance, Defendants have received
11 only 80 documents from the Government. *See* Declaration of Ann E. Querns,
12 Esquire ("Querns Decl.") submitted herewith, ¶ 10, **Ex. HH**. Four of these
13 documents—Defendants' contracts with the Government —were produced
14 pursuant to this Court's Order prior to the Subpoenas issuance. ECF No. 45. The
15 remaining documents were produced as follows:

16 • On August 31—two months after the Subpoenas issuance—the
17 Government searched its admittedly public files and produced 60 documents
18 (approximately 900 pages) that had previously been released by the DOJ pursuant
19 to FOIA requests. Opp'n at Ex. 11. Many of these documents contain significant
20 and material redactions. *Id.* All the redactions are apparently based on FOIA
21 exemptions and no privilege has been asserted for these documents. *Id.*
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- On September 2, the Government produced 12 documents (approximately 27 pages) not previously released. Opp'n at Ex. 12. All of the documents contain material redactions and one document was withheld in full. *Id.* No privilege has been asserted for these documents.
- On September 16, the Government produced one document (two pages) not previously released. Opp'n at Ex. 19. The document contains material redactions and no privilege has been asserted for the document.
- On September 20, the Government produced one document (one page) not previously released. Querns Decl., **Ex. FF**. The document was a supplement to the Government's production of contracts with Defendants.
- On September 20, the Government produced two documents (eight pages) not previously released. Querns Decl., **Ex. GG**. The documents are responsive to the Subpoena served upon the CIA. The documents contain material redactions and no privilege has been asserted for the documents.

Put differently, since this action's inception almost one year ago, the Government has produced only 20 documents (no more than 200 pages) not previously publicly available.[2] And, although the vast majority of the documents produced to date (900 pages) were admittedly produced from public files, the

[2] Defendants attach a chart of the 80 documents that the Government has produced to Defendants to date with details the date of production, bates range, public availability, and responsiveness. Querns Decl., **Ex. HH**.

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Government still took two months to produce them. Moreover, almost all these documents contain material redactions and one document has been entirely withheld—even though the Government has not asserted any privileges.

For its part, the Government does not argue that the documents sought by the Subpoenas are irrelevant. And, a review of the 20 recently released documents shows why. Not only are the documents highly relevant to the claims and defenses in this action, but they also contradict certain critical assertions in Plaintiffs' Complaint and the SSCI Report on which it is based. Specifically, a review of U.S. Bates #001099-1100 discloses additional facts directly related to Defendants' initial involvement and role in the Program, and indicates that Defendants were merely asked to make suggestions regarding Abu Zubaydah's interrogation. *Compare*, Querns Decl., **Ex. EE**, *with* Compl. ¶ 1 (alleging that Defendants "designed" the Program). Moreover, a brief review of U.S. Bates #001109-1108 discloses these documents' direct relevance to the claims and defenses in this action. Querns Decl., **Exs. FF & GG.**

C. The Compliance Period Is Reasonable Given the Government's Actions, Inactions, and Representations to the Court

Despite acknowledging the relevance of the documents sought by the Subpoenas, the Government contends that they nevertheless "must" be quashed because inadequate compliance time was afforded. Opp'n at 23. Setting aside that this argument is a red herring as the Government has still not complied with

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1 the Subpoenas in any meaningful way, the Government's own actions, inaction,
2 and representations to the Court undercut its complaints.
3 As noted above, the Government has known this action existed for almost a
4 year. For much, if not all, of this time, it has also known that it would be a
5 primary source of discovery. Indeed, since filing its Statement of Interest in this
6 action in April, the Government has been representing its awareness to the Parties
7 and the Court. ECF No. 33. It is this recognition that resulted in the Parties and
8 the Government entering into the Joint Stipulation filed in May—a Stipulation
9 that specifically serves to protect the Government's interest in many respects.
10 ECF No. 47. Separately, in advancing this argument, the Government ignores
11 that it was specifically told no later than June 3 of the documents Defendants
12 were seeking. Decl. of Brian S. Paszamant filed concurrent with Defendants
13 Motion to Compel ("Paszamant Decl."), ¶ 3. In short, even though the
14 Government was aware that the Parties would be looking to it for significant
15 discovery well before the Subpoenas were issued in late June, the record is devoid
16 of any indication that the Government took steps to prepare for such discovery.
17 Moreover, Defendants did not move to enforce the Subpoenas until almost
18 two months after service, when the Government still would not provide a date
19 certain for production. *Id.* ¶¶ 12-25. At that point, Defendants could not continue
20 to wait for the Government to potentially produce documents at some unknown
21 future date, particularly when this Court has cautioned that it would not permit
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1 the Government to delay this case and would promptly deal with any discovery
2 issue. July 8, 2016 Hr'g Tr. 23:13-23:20 ("[I]f there's an issue, get it timely
3 noted in a motion . . . I'm not going to let the Government delay this case, and
4 I'm not going to let defendants delay this case because they say, well, there's
5 classified information that . . . issue[] need[s] to be resolved.").
6 Additionally, the Government should not now be heard to complain about
7 compliance timing in light of its representations to this Court. During this
8 Court's July 8 Scheduling Conference, the Court asked Mr. Warden whether the
9 proposed February 2017 discovery deadline was acceptable, to which Mr.
10 Warden replied: "The dates you've set, your Honor, are acceptable to the
11 Government." July 8, 2016 Hr'g Tr. 16:14-16:20. At the time of that conference,
12 the Government already possessed the Subpoenas. Paszamant Decl. ¶¶ 5-7. And,
13 although the Government had previously advised Defendants that providing
14 discovery would be difficult, Defendants reasonably assumed based upon Mr.
15 Warden's representation to the Court that any such issues had been adequately
16 resolved. Of course, if the Government believed that compliance with the
17 Subpoenas could potentially take several hundred weeks (as it now claims), it was
18 surely incumbent upon the Government to advise the Court. But, the Government
19 opted to remain silent, and it should not now be able to rely upon the deadlines
20 applicable to this action as a shield justifying its nondisclosure of admittedly
21 relevant discovery.
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D. The Subpoenas Are Narrowly Tailored to Seek Documents Relevant to this Action

The Government claims the Subpoenas are "sweeping" simply because they contain thirty requests for documents created over the 15-year period that is relevant to this action. Opp'n at 17. In reality, the Subpoenas are not overbroad, but are instead narrowly tailored in time, scope, and content to seek only those documents directly relevant to Defendants' defenses to Plaintiffs' claims.

1. The Subpoenas Are Narrowly Tailored to the Relevant Period

The Government argues that the Subpoenas' temporal restriction, September 11, 2001 through the present, is overbroad because: (1) Plaintiff Rahman died in 2002 and Plaintiffs Soud and Salim were released from CIA custody in 2004; and (2) the DOJ authorized the interrogation techniques in August 2002. Opp'n at 17; 24-25. Thus, the Government concludes that any interrogation reports related to Plaintiffs would have been generated during or near the time of Plaintiffs' detention and any documents related to the development of the Program would have been generated before the DOJ authorized the interrogation techniques. *Id.* On this basis, the Government argues the Subpoenas should be limited to documents created during Plaintiffs' detention and to documents created between March and August 2002 (when the CIA's Program was, according to the Government, being created). *Id.* at 24-25.

The Government's reasoning is flawed. As Defendants explained in their meet and confer letters, they are entitled to discover documents generated after

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1 Plaintiffs' release or death, to the extent that those documents pertain to the
2 claims and defenses at issue in this action. Paszamant Decl., **Ex. K** at 5-6; **Ex. L**
3 at 6. Similarly, Defendants are entitled to discover documents showing the role
4 Defendants played in the development of the interrogation techniques and/or the
5 Program, irrespective of when those documents were generated, provided that
6 those documents bear on the claims and defenses at issue in this action. *Id.*

7 In fact, the Government has already produced documents that conclusively
8 demonstrate the error in its reasoning. For instance, documents produced related
9 to the death of Plaintiff Rahman were all generated after his death. Querns Decl.,
10 **Ex. DD** at U.S. Bates #001054-67. Likewise, many documents related to the
11 approval of the Program or specific techniques were generated well after August
12 2002. Querns Decl., **Ex. CC** at U.S. Bates #000485, 000511, 000491-510 (letters
13 and memoranda confirming the legality of specific interrogation techniques dated
14 after August 2002). Even more, one of the more recently produced documents,
15 titled "Incipiency of CTC/RDG Enhanced Interrogation Techniques and
16 Program", is dated April 11, 2007. Querns Decl., **Ex. EE** at U.S. Bates #001099-
17 1100. This document plainly sheds direct light on how the Program was
18 developed, even though it was purportedly created in 2007. *Id.*[3]
19

20 [3] The SSCI Report that forms the primary basis for Plaintiffs' claims was
21 approved December 13, 2012. Compl. ¶ 21. Under the Government's proffered
22 temporal limitation it would not be obligated to produce this document.

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Had the Government's current reasoning been applied to the limited productions made to date, Defendants would not have received relevant and important documents falling outside the "relevant time-period", as now arbitrarily defined by the Government. Thus, the proposed narrowing will not "show how the techniques were developed and then how they were applied . . . to Plaintiffs," as the Government claims. Opp'n at 25. To the contrary, much relevant evidence will be withheld, inappropriately constraining Defendants' defense.

2. The Subpoenas Are Narrowly Tailored in Scope and Subject

The Government contends that the scope and subject matters covered by the Subpoenas are "massively overbroad" to the "extreme." Opp'n at 18-19. Initially, the Government takes issue with the Subpoenas' requests as broadly worded to seek any documents "identifying or describing" or "relating to" "vague topics." Opp'n at 18. But, the Government fails to mention that Defendants clarified and withdrew their use of the phrase "relating to" in almost all the Requests, after the Government perceived the language as problematic (and limited the requests in other ways as well). Paszamant Decl., **Exs. K & L** at AA.

Further, in their meet and confer letters, Defendants explained how each of the Requests is narrowly tailored to seek certain relevant information. *Id.* For instance, Plaintiffs seek to hold Defendants liable for their role in "designing" the Program and Defendants seek to defend themselves based, in part, on their actions being entirely within the "scope" of the Government's direction.

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1 Therefore, the Subpoenas' requests seeking documents "identifying and/or
2 discussing the design of the Program and/or the Program's intended or actual
3 scope" are, in fact, narrowly tailored to the claims and defenses at issue.
4 Paszamant Decl., **Exs. K & L** at AA, Request 2. Other of the Subpoenas'
5 requests are similarly narrowly tailored. For example, the Subpoenas' Requests 6
6 does not seek all communications between Defendants and the CIA, but only
7 those communications specifically related to the "design, structure, purpose,
8 approval, or scope of the Program; or . . . Plaintiffs." *Id.* at Request 6.
9 Rather than respond to Defendants' meet and confer letters and the
10 relevancy explanations contained therein, the Government instead resorts to
11 grossly mischaracterizing the Subpoenas' scope. Specifically, the Government
12 claims that the Subpoenas seek documents about every facet of the Program.
13 However, a review of the actual Requests discloses otherwise.
14 For example, Defendants do not seek information about the treatment of all
15 detainees held in United States' custody after September 11, 2001. Opp'n at 20
16 (referencing Requests 20-23). Rather, Defendants in one request seek "all
17 documents relating to any **unauthorized interrogation techniques conducted,**
18 **applied, or approved *by Defendants*** during or in connection with a detainee
19 interrogation", Paszamant Decl., **Exs. K & L** at AA, Request 20 (emphasis
20 added), and, in other requests seek documents "identifying and/or discussing"
21 Defendants' involvement in the capture, rendition, and/or interrogation of Abu
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1 Zubaydah and Ridha al-Najjar. *Id.* at Requests 21-22. Moreover, Defendants
2 explained why these requested documents are relevant to the claims and defenses
3 at issue in this action.

4 At bottom, read literally the Subpoenas' Requests seek a narrow category
5 of documents specific to the issues at hand. To the extent a Request seeks
6 documents pertaining to a detainee other than Plaintiffs, the request is narrowed
7 by Defendants' involvement (which is directly relevant). Paszamant Decl., **Exs.**
8 **K & L** at AA, Request 20-22. And to the extent a Request seeks documents
9 pertaining to actions taken by Government officials with respect to the Program,
10 those documents are directly relevant to Plaintiffs' claims that Defendants
11 conspired with the Government. Thus, the Government's claim that these
12 individuals "have no connection whatsoever to the claims at issue in this case"
13 rings hollow. Opp'n at 20.

14 Finally, based upon its misconstruction of the Requests, the Government
15 proposes that its production be initially constrained to only those documents cited
16 in the footnotes of the SSCI Report. Opp'n at 24. If governed by a different
17 scheduling order, such a proposal might have some nominal viability. But with
18 just over four months left in discovery, this proposal is unworkable. To date, the
19 Government has produced only two documents cited in the SSCI Report. Thus, if
20 the Government is permitted to delay any further production until after it
21 produces the remaining documents cited by the SSCI Report, it will be months—
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1 at best—before Defendants receive additional, admittedly relevant documents.
2 Meanwhile, discovery will continue and Defendants will be forced to conduct
3 depositions without critical documents, and may not even receive additional
4 documents before the close of discovery. The Government has not provided a
5 compelling reason to place Defendants in such a prejudiced position, especially
6 when it affirmatively consented to the current scheduling order.[4]

7 **3. The Court Did Not Limit Discovery**

8 The Government repeatedly suggests that the Court has limited discovery
9 to only certain topics. Opp'n 3, 20, 25 (citing ECF No. 51). This is incorrect.
10 On June 15, 2016, the Court ruled on Defendants' Unopposed Motion to
11 establish Case Management Procedures. In that motion, Defendants had sought
12 to have discovery limited to certain topics initially, and in response the Court
13 stated that "[t]he parties have agreed, at least initially, to limit the scope of
14
15

16 [4] Setting aside the scheduling issues created by the Government's proposal,
17 it is unclear how this proposal would limit the Government's burden. Documents
18 produced to date indicate that not all relevant documents are cited in the SSCI
19 Report. Querns Decl., **Ex. EE** at U.S. Bates #001099-1100 (highly relevant
20 "Incipiency of CTC/RDG EIT Program" document not cited in SSCI Report).
21 Thus, the Government would ultimately be required to bear the claimed burden of
22 producing additional documents after the initial production of the SSCI Report documents.

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1 discovery, . . . the court will adopt the parties' agreement as to the scope of
2 discovery, subject to revision upon further Order of the court." ECF No. 51 at 2.
3 On July 8, the Court altered that ruling, authorizing discovery consistent with
4 Rule 26 and setting dates for, *inter alia*, the close of all discovery. ECF No. 59.
5
6 **E. The Subpoenas Do Not Create an Undue Burden and Any Burden Is Entirely of the Government's Own Creation**

7 As detailed above, Defendants have sought to limit the Government's
8 burden by narrowly tailoring the Subpoenas' Requests to seek only relevant
9 information. Nevertheless, the Government complains mightily about the
10 apparent difficulties associated with searching for and reviewing the relevant
11 documents sought. Opp'n at 7-11. But, in so complaining, the Government
12 overlooks that its own conduct created this situation. Surely, the Government
13 should not be entitled to point to a situation entirely of its own making to sidestep
14 the discovery obligations uniformly imposed on all third-parties, or to demand
15 Defendants accept unrealistic alternatives for the documents Defendants need to
16 properly defend themselves.
17 **1. The Government Created Its Own Burden**

18 As explained above, the Government early on acknowledged that it would
19 be a primary source of discovery for this action. Nevertheless, the Government
20 did not begin looking for the contracts between Defendants and the Government
21 until after the Court ordered their disclosure on May 12, 2016. ECF No. 45 at 2.
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1 Now, almost three months after service of the Subpoenas, Defendants and the
2 Court are learning that a searchable database—a system created "to facilitate
3 investigations into the [CIA's] former detention and interrogation program"—
4 containing thousands of relevant documents existed all along. Opp'n at 7.
5 Surely, the Government should have conducted searches on this database months
6 ago (well before the Subpoenas' issuance) when it knew discovery was imminent,
7 and had it done so, these searches would have limited the burden the Government
8 now faces in having to locate and review documents within limited time—a
9 primary source of the claimed burden. At the very least, earlier searches would
10 have enabled the Government to inform the Court of the volume and logistics so
11 that discovery might have been scheduled in a way to potentially lessen the
12 Government's burden.
13 Rather than admit fault, the Government instead blames Defendants
14 because Defendants failed to convince the Court to adopt a scheduling order that
15 would have provided soft deadlines to accommodate the Government. But in so
16 doing, the Government again ignores its own actions. Most obviously, the
17 Government agreed to the current Scheduling Order. July 8, 2016 Hr'g Tr.
18 16:14-16:20 (Mr. Warden: "[t]he dates you've set, your Honor, are acceptable to
19 the Government."). Additionally, the Government did not mention during the
20 Scheduling Conference that it had located 35,000 relevant documents in its
21 possession (responsive to the Subpoenas) or that each of these documents would
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apparently have to undergo multiple time-consuming reviews before production, even though the Court made clear that it would not allow the Government to delay this action. July 8, 2016 Hr'g Tr. 22:17-19. The Court may certainly have found such information relevant. What the Government now calls a "failed litigation strategy" by Defendants is more aptly labeled a material omission by the Government.

Finally, contending that it cannot produce all relevant documents within the Court's deadlines, the Government points to the claimed volume of documents and complexity of its collection and review processes as claimed justification for the Subpoenas' quashing. But, volume is not determinative when records can be systematically searched, as is the case with the CIA's RIDNet database. *U.S. Dep't of the Trasurey v. Pension Benefit Guar. Corp.*, 301 F.R.D. 20, 28 (D.D.C. 2014); Opp'n at 7-8. The claimed complexity of the Government's collection and review process, requiring, *inter alia*, the Government to eliminate duplicates and verify names, also should not weigh against Defendants who have established the relevance of, and their need for, the evidence sought. *See Brooks v. Macy's, Inc.*, 2011 WL 1793345, at *4 (S.D.N.Y. May 6, 2011) ("the burden that results from disorganized record-keeping does not excuse a party from producing relevant documents"); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) ("To allow a defendant whose business generates massive records to

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1 frustrate discovery by creating an inadequate filing system, and then claiming
2 undue burden, would defeat the purposes of the discovery rules.").
3 In the end, the burdens of which the Government complains are entirely of
4 the Government's own making and/or lie within the Government's exclusive
5 control. The Government should not be permitted to hide behind such actions
6 and/or shortcomings to thwart Defendants' access to critically relevant
7 information, some of which is exclusively within the Government's possession.[5]
8 **2. The Government's Proposed Alternatives Are Inadequate**
9 The Government proposes that in lieu of producing the relevant documents
10 Defendants instead explore various alternative discovery methods. But, even
11 setting aside that the Federal Rules do not mandate that Defendants secure
12 discovery through some method other than subpoena, none of the proffered
13 alternatives afford Defendants the information they require to defend themselves.
14 First, were Defendants to seek admissions from Plaintiffs, such an effort
15 would not eliminate Defendants' need for the Government's documents. Opp'n
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18 [5] To date, the Government has produced only 20 documents that were not
19 otherwise publicly available. Despite this modest production, each such
20 document has provided significant information not mentioned in the SSCI Report.
21 By extension then, the information contained within the additional 35,000
22 documents within the Government's possession will also most definitely provide
useful information about the Program and Defendants role in it.

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1 at 21. For instance, an admission by Plaintiffs that Defendants did not have direct
2 contact with one or more Plaintiffs would do nothing to establish: (1) whether the
3 Program was actually applied to Plaintiffs; or (2) more importantly, whether
4 Defendants assisted in the Program's design at the Government's direction
5 pursuant to valid and legal authority. Put differently, the Government overlooks
6 Plaintiffs' claims relating to the Program's design, as well as of conspiracy and
7 aiding and abetting.

8 Second, collection of the publicly available documents cited by the
9 Government does not eliminate Defendants' need for the discovery sought.
10 Opp'n at 22. Defendants have already collected and reviewed all of the
11 referenced information, including the entire 100,000 pages of documents
12 contained on Plaintiffs counsel's "torture database." Querns Decl. ¶ 3. While
13 many of these documents are relevant, most contain material redactions that, as
14 explained in Defendants' meet and confer letters, do not apply to this case where
15 FOIA exemptions are inapplicable. Paszamant Decl., **Ex. K** at 2.

16 Third, the Government's suggestion that an anonymous 30(b)(6) deposition
17 by written questions could substitute Defendants' need for relevant documents
18 simply ignores the value of such evidence. In an August 26, 2016 email,
19 Defendants' counsel explained that under the Federal Rules of Evidence, it was
20 possible that very little, if any, of the information obtained during an anonymous
21 30(b)(6) deposition would be admissible. Querns Decl., **Exhibit BB** (citing
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Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 435 (5th Cir. 2006); *Kress v. Price Waterhouse Coopers*, No. 08-0965, 2012 WL 1991951, at *3 n.2 (E.D. Cal. June 4, 2012)).

Finally, under all of these alternatives, Defendants still will not receive documents that this Court previously told the Government it should produce. During the April 22, 2016 hearing, in addressing the Government, the Court stated, "I want you to know that, if there are government reports out there about what took place in the, 'enhanced interrogation' of these plaintiffs, they're going to be produced under whatever restrictions I need to impose." Apr. 22, 2016 Hr'g Tr. 75:18-17:21. With the alternatives proposed by the Government, Defendnats would not receive these reports.

F. <u>The Government Must Formally Assert Privileges Now</u>

The Government claims that formal invocation of privilege is currently "premature" and "hypothetical" because the Government is not seeking to have the Subpoenas quashed in their entirety based on privilege. Opp'n at 27. In other words, the Government claims that applicable law contemplates a two-step process. During the first step (and in response to an initial motion), the Court merely determines whether the Subpoenas should be quashed as overbroad and/or unduly burdensome. Then, during a second step (and in response to a second motion), the Court assesses the propriety of any privilege objections. This is not the law, and would further delay appropriate discovery in this action.

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1 In advancing its argument, the Government misunderstands *Northrop*
2 *Corp. v. McDonnel Douglas Corp.*, 751 F.2d 395, 404 (D.C. Cir. 1984). In that
3 case, the Department of State sought to have a third-party subpoena quashed
4 because it was unduly burdensome. *Id.* at 404. The burden stemmed from the
5 underlying information being classified and thus, likely privileged under the state
6 secret privilege. *Id.* at 404-05. Essentially, the Department of State sought to
7 avoid the burden of reviewing all the responsive information simply to assert
8 privilege. *Id.* The Circuit Court found the Department of State had not met its
9 burden of proving that the subpoena was oppressive and vacated the lower court's
10 order quashing the subpoena. *Id.* at 406-08.
11 Here, the Government is making the same argument made by the
12 Department of State: the Government faces an undue burden because the
13 Subpoenas seek a large volume of national security documents that will take
14 significant time and resources to review, and the Government does not want to
15 undertake that review to determine if they contain sensitive classified
16 information. Opp'n at 20. Instead, it wants the Court to limit the scope of the
17 Subpoenas at the outset. *Id.* at 21. But, as the *Northrop Corp.* court explained,
18 the Government's contemplated approach is improper because the Government
19 must do more than make blanket representations that many of the documents
20 sought contain sensitive information. Rather, to quash the Subpoenas, the
21 Government must make a specific showing of the likely quantity of classified
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1 information and actually assert privilege over the information, so that the court
2 can fully assess the burden of full compliance. *Northrop Corp.*, 751 F. 2d at 406.
3 To date, the Government has not made such a specific showing, but merely
4 suggests that all 35,000 documents responsive to the Subpoenas may contain
5 national security secrets that cannot be released without careful and painstaking
6 review. Curiously though, the Government has apparently not reviewed any of
7 the 35,000 documents to confirm their contents. The Government has also not
8 provided details necessary to assess its actual burden. For example, the
9 Government has provided no indication as to how many of the documents refer to
10 Defendants, to Plaintiffs, to an alias of Plaintiffs, or to all of the above. Nor has it
11 provided any information about the potential volume of duplicates, which the
12 Government admits exist.[6] Opp'n at 9. Without even this basic information, the
13 Court cannot assess the realistic burden faced by the Government. Put simply,
14 the Government is seeking to have the Subpoenas quashed merely because the
15 information sought by Defendants is likely to contain classified information—this
16 exact tactic was properly rejected in *Northrop Corp*.
17 The Government's desire to implement a two-step process is infirm and
18 unnecessary for an additional reason: the Government should not be permitted to
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20 [6] If RDINet contains a duplicate of every responsive document, the
21 universe of documents is actually 17,500—a significant difference from 35,000,
22 significantly limiting the Government's burden.

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1 delay its assertion of privilege when it has already withheld information from the
2 documents it has produced (presumably because of privilege).[7] Indeed, even if
3 the Court narrows the scope of the Subpoenas, the Government will still have to
4 account for the information that it has already withheld. Moreover, given that
5 each of these documents has apparently gone through multiple line-by-line
6 reviews before production, the Government should have no trouble complying
7 with Rule 45 by "expressly mak[ing] the claim" of privilege and "describing the
8 nature of withheld documents . . ." now. Fed. R. Civ. P. 45(e)(2)(A).[8]
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10 [7] Most of the documents produced with redactions to date involve Plaintiff
11 Rahman or the DOJ's final legal advice regarding the Program. *See e.g.*, Querns
12 Decl., **Ex. DD**. The Government has suggested that Defendants discovery on
13 those topics be limited to the documents Defendants have received. Opp'n at 26.
14 But, Defendants cannot agree to this when they have not received un-redacted
15 versions of the documents and no privilege has been formally asserted to justify
16 the redactions.

16 Similarly, the Government has indicated its plans to re-review certain
17 information released pursuant to FOIA requests to determine if further
18 information can be released. Opp'n at 7. If this re-review results in continued
19 withholding of information, a privilege must be asserted.

20 [8] Rule 26(b)(1) identifies additional factors that should be considered when
21 assessing the propriety of discovery sought: (1) the importance of the issues at
22 stake; (2) the parties' relative access to the relevant information; (3) the parties'

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III. CONCLUSION

Defendants request that the Court grant their Motion to Compel and deny the Government's Motion to Quash.

DATED this 22nd day of September, 2016.

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resources; and (4) the importance of the discovery in resolving the issues. Here, these factors weigh in Defendants' favor. The importance of the issues in question is beyond assail; a Committee of the U.S. Senate has spent countless hours and resources assessing the Program. Additionally, the Government cannot contend that Defendants otherwise have access to all of the information sought by the Subpoenas, as evidenced by the documents recently released that were previously within the Government's exclusive possession. It is plain that the Government's resources are immense, and it is entirely within the Government's control whether to deploy those resources to create or overcome burdens. Finally, there is no question that the relevant documents sought by the Subpoenas will play an important role in resolving the issues germane to this litigation, as evidenced already by the nominal amount of documents produced.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 22nd day of September, 2016, I electronically

3 filed the foregoing document with the Clerk of Court using the CM/ECF system

4 which will send notification of such filing to the following:

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