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18 UNITED STATES DISTRICT COURT  
19 EASTERN DISTRICT OF WASHINGTON

20 JAMES E. MITCHELL and  
21 JOHN "BRUCE" JESSEN

22 Petitioners,

23 v.

24 UNITED STATES OF  
25 AMERICA,

26 Respondent.

No. 16-MC-0036-JLQ

UNITED STATES' OPPOSITION  
TO DEFENDANTS' MOTION TO  
COMPEL PRODUCTION OF  
UNREDACTED DOCUMENTS

Oral Argument To Be Decided  
Pursuant To Court's Nov. 2 Order

Related Case: No. CV-15-0286-JLQ

1 The United States of America (“Government”) opposes Petitioners’  
2 (Defendants in related case No. CV-15-0286-JLQ) motion to compel production  
3 of unredacted documents.

4 Although styled as a motion to compel, Defendants’ motion is really a  
5 motion for reconsideration of decisions the Court made during the September 29,  
6 2016 hearing and in the October 4, 2016 Order (ECF No. 31). Defendants’ current  
7 motion is a rehash of the same arguments they presented in their first motion to  
8 compel (ECF No. 1), which sought the same relief Defendants again seek here,  
9 namely the production of documents in unredacted form. Defendants’ current  
10 motion offers nothing new that would warrant reconsideration of the Court’s prior  
11 decisions that the Government is authorized to produce documents in redacted  
12 form and that formal privilege assertions are not required at this time.

13 Given the expedited schedule established by the Court, the Government’s  
14 efforts have been focused on providing Defendants with as many responsive  
15 documents as possible, as soon as possible. By contrast, Defendants’ efforts are  
16 focused on delay and revisiting the same issues that the Court has already decided.  
17 Indeed, the relief requested in Defendants’ motion would effectively slow this  
18 case to standstill by requiring the Government to assert, and the Court to  
19 adjudicate, formal privilege claims for every redaction in every document  
20 produced in this case. Defendants’ scorched earth approach is unreasonable, seeks  
21 to impose an undue burden, and should not be accepted by the Court.

22 Instead, the Court should continue along the prudent though demanding  
23 course it established just a few weeks ago, which will enable the Government to  
24 focus its resources on document production by the December 20 deadline, rather  
25 than the assertion of privileges over redactions to documents that Defendants  
26 have made no effort to demonstrate are material to this case.

1 Respondents acknowledge that there will likely be disputes over privilege  
2 that the Court will need to adjudicate. But given the reality of the deadlines  
3 established by Court's schedule, the goal of the pretrial process at this stage  
4 should be to narrow and minimize those disputes and then present to the Court  
5 only those disputes that cannot be resolved through meaningful conferral and that  
6 are truly material to the case. Defendants' overbroad approach of asking for  
7 every document in unredacted form and then challenging every redaction, no  
8 matter how immaterial, is contrary to a common sense and practical approach to  
9 moving this case forward in a timely manner.

### 10 ARGUMENT

#### 11 **A. Defendants' Motion Improperly Seeks Reconsideration of Issues** 12 **the Court Has Already Decided.**

13 The Court has previously considered and rejected Defendants' request  
14 for the Government to produce documents in unredacted form. Defendants'  
15 first motion to compel asked the Court to "compel the CIA and DOJ to produce  
16 all documents responsive to the Subpoenas issued by Defendants in unredacted  
17 format by the date set forth in the attached proposed order, except documents  
18 purportedly subject to the attorney/client privilege and/or constituting work  
19 product." *See* Defs' Motion to Compel at 8 (ECF No. 1). The Court received  
20 extensive briefing and argument on this issue, *see* ECF Nos. 1, 19, 23, and  
21 addressed it during the September 29, 2016 hearing. *See* Transcript at 5:8-6:15,  
22 22:15-24:7 (Sept. 29, 2016).

23 The Court rejected Defendants' position and concluded that it would  
24 "allow the government to continue to file [documents] in redacted format,  
25 including that agreement between the parties for the delivery of the final legal  
26 advice, concerning the CIA's former detention and interrogation program." *See*  
*id.* at 23:12-15; *see also id.* 25:3-5 (authorizing production of documents in  
GOVT'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL - 2

1 “redacted form”); 37:16-18 (documents may be produced in “redacted format”).  
2 Additionally, the Court concluded “that, at this stage of the proceedings, [it]  
3 would not require the government to formally assert privileges with respect to  
4 redacted information in the documents.” *See id.* at 37:19-22; *see also* 24:3-4  
5 (same).

6 The Court’s October 4 Order confirmed these rulings. The Court held  
7 that “[t]he Government may continue to produce documents with redactions.”  
8 *See* Oct. 4 Order at 9; *see also id.* at 5 (“producing [the documents] with  
9 redactions during discovery is appropriate.”). The Court also decided that it  
10 would neither require formal privilege assertions nor “a formal privilege log at  
11 this time.” *Id.* at 5-6.

12 Defendants’ current motion makes no effort to address these prior  
13 rulings, let alone explain why they warrant reconsideration under the proper  
14 standard of review. *See Kirby v. City of E. Wenatchee*, No. 12-CV-190-JLQ,  
15 2013 WL 2396008, at \*1 (E.D. Wash. May 31, 2013). The motion is merely an  
16 attempt to have a “second bite at the apple,” and to “re-hash arguments the court  
17 has already thought through.” *Salazar v. Monaco Enterprises, Inc.*, No. 2:12-  
18 CV-00186-LRS, 2015 WL 8773279, at \*1 (E.D. Wash. Dec. 14, 2015).

19 Indeed, Defendants have presented no new evidence or legal arguments  
20 that the Court did not already consider when it issued its decisions on these  
21 issues just a few weeks ago. Rather, Defendants’ motion is simply more of the  
22 same, and recycles the same complaints about the redactions to the same two  
23 documents that the Court specifically required the Government to address. For  
24 these two documents, Defs’ Exs. 1 & 3, the Government has provided  
25 Defendants and the Court with a detailed explanation of the factual and legal  
26 basis for the redactions. *See* Gov’t Status Report Addressing Document

1 Production at 8-9 (ECF No. 85 in No. CV-15-0286-JLQ) (Gov't Status Report).  
2 Nothing more should be required at this time.

3 Notably, one purported new document that Defendants bring to the  
4 Court's attention in their motion is one they incorrectly attribute to the  
5 Government's production effort. Defendants complain about the redactions to  
6 Defs' Ex. 2 as being based upon the Freedom of Information Act (FOIA), but  
7 they mistakenly represent that this document was produced by the Government  
8 in this case. *See* Defs' Mot. at 7 n.2. In fact, the document bears the bates  
9 stamp of the Plaintiffs, not the Government, and appears to be a CIA document  
10 Plaintiffs obtained through a FOIA request and then produced to Defendants.

11 Similarly, Defendants question the redactions to a report written by  
12 Defendants providing Defendants' views on an Al-Qaida training manual  
13 containing instructions on how to resist interrogation. *See* Defs' Mot. at 9-10.  
14 Even setting aside the questionable materiality of this generalized report, which  
15 was written before the CIA program at issue began, as well as the fact that it  
16 does not address the program and does not discuss any specific detainee,  
17 Defendants could have brought their specific concerns with this document to  
18 Government's attention in an effort to narrow the issues rather than filing a  
19 motion raising their complaints with the Court in the first instance.

20 The fact that Defendants have chosen to highlight these two documents  
21 in their motion, one the Government never produced and another that has little  
22 relevance to the issues in this case, underscores Defendants' blunderbuss  
23 approach to resolving the document redaction issues. The first option should  
24 not be filing motions with the Court raising complaints about specific  
25 redactions to documents that Defendants have not raised with the Government  
26 or conferred with the Government about in any meaningful way. Rather,

1 Defendants should be required to identify specific documents material to their  
2 case that they have questions about, and then the Government can attempt to  
3 address those issues in an effort to narrow the scope and number of disputes  
4 that need to be presented to the Court. The Court should not countenance  
5 Defendants' legally and practically unsupportable demand that the Government  
6 must be forced to choose between producing every document in unredacted  
7 form or else asserting formal privileges over every redaction in every document  
8 without regard to the materiality of the document to this case. Defendants'  
9 motion provides no support for this extreme position, and the Court should,  
10 once again, reject this request.

11 **B. The Government Has Appropriately Explained The Bases For Its**  
12 **Redactions.**

13 In accordance with the Court's October 4 Order, the Government filed a  
14 detailed status report explaining the legal basis for the redactions in the  
15 documents, as well as the categories of information that are redacted. *See Gov't*  
16 *Status Report*. Most of Defendants' motion is spent asserting generalized  
17 complaints about the Government's Status Report, but Defendants criticisms  
18 lack merit. *See Defs' Mot.* at 3-8.

19 First, Defendants question the legal validity of the classification guidance  
20 the Government has produced in this case explaining the categories of  
21 information that currently remain classified related to the CIA's program. *See*  
22 *id.* at 3-4. The President's Article II Commander-in-Chief powers include the  
23 "authority to classify and control access to information bearing on national  
24 security," which the President has delegated to Executive Branch agencies  
25 through a series of Executive Orders. *Dep't of Navy v. Egan*, 484 U.S. 518,  
26 527-28 (1988). The current Executive Order governing the protection of

1 classified information specifically identifies the general categories of  
2 information subject to classification and also authorizes Government agencies  
3 to establish classification guidance that identify specific criteria for the  
4 classification of information that requires protection. *See* Executive Order  
5 13526, Classified National Security Information, 75 Fed. Reg. 707, 709, 712,  
6 725-76 (Dec. 29, 2009) (“Heads of agencies that originate or handle classified  
7 information shall . . . provide guidance to personnel on proper classification as  
8 needed.”). Indeed, courts have relied upon classification guides when  
9 considering whether information is properly classified. *See, e.g., Wilson v.*  
10 *McConnell*, 501 F. Supp. 2d 545, 553 (S.D.N.Y. 2007). Thus, contrary to  
11 Defendants’ claims, the classification guidance the Government has produced  
12 in this case is legally well-established and appropriate. Moreover, it was  
13 provided in this case in a practical attempt to help guide the discovery efforts  
14 of the parties in order to avoid, where possible, inadvertent or unnecessary  
15 forays into topics that remain classified or subject to a State Secrets Privilege  
16 assertion, and to help narrow issues that might arise in that regard.

17 Second, Defendants take issue with the fact that the Department of  
18 Justice (DOJ) documents produced in response to Defendants’ subpoena to DOJ  
19 contain redactions in accordance with the FOIA. *See* Defs’ Mot. at 4-6. The  
20 Government agrees with Defendants that as a general matter the FOIA’s  
21 statutory exemptions do not necessarily justify withholdings in the context of  
22 civil discovery. Accordingly, in the event of any contested litigation over  
23 redactions originally taken pursuant to the FOIA, the Government would have  
24 to justify the redactions based on the applicable discovery privilege or  
25 protection, such as those underlying the specific FOIA redaction at issue. *Cf.*

1 *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800-804 (1984) (FOIA  
2 incorporates statutory and common law discovery privileges).

3 More broadly, however, Defendants' criticism of the Government's  
4 production of the DOJ FOIA documents misses the mark. In recognition of the  
5 Court's expedited schedule, the Government produced the FOIA versions of  
6 these documents that had already been approved for public release in order to  
7 expedite production and to provide Defendants with responsive documents as  
8 fast as possible. Contrary to Defendants' suggestion, the purpose was not to  
9 use the FOIA to redact more information than would ordinarily be permitted  
10 under civil discovery standards. Rather, it was to provide Defendants with the  
11 information they sought from DOJ as quickly as possible; the documents  
12 already approved for release under FOIA were able to be produced immediately  
13 to Defendants without the need for a new, civil-discovery-based re-review prior  
14 to production. *See Gov't Status Report* at 1-5.

15 As stated above, the proper solution to Defendants' concerns about the  
16 redactions in these documents is to confer with the Government about specific  
17 documents and redactions, and attempt to narrow the areas of dispute. On the  
18 whole, the DOJ documents are lightly redacted and the key legal advice,  
19 including the specific interrogation techniques DOJ concluded were legal, is  
20 visible in the documents. *See, e.g.*, Govt's Ex. 1 (legal opinion authorizing use  
21 of 10 enhanced interrogation techniques on Abu Zuhaydah). Other than to  
22 delay this case, the Government is at a loss to understand why Defendants want  
23 to waste limited party, Government, and judicial resources litigating non-  
24 material redactions in the DOJ documents, even if taken under the FOIA, that  
25 have no relevance to this case.



1 Third, Defendants question the Government's reliance on the National  
2 Security Act of 1947 (NSA Act), 50 U.S.C. § 3024, and the Central Intelligence  
3 Agency Act of 1949 (CIA Act), 50 U.S.C. § 3507, as independent bases for the  
4 Government's redactions. *See* Defs' Mot. at 6-7. Contrary to Defendants  
5 position, "numerous courts have upheld the CIA's assertion of its statutory  
6 privilege in the context of civil discovery." *E.g., Kronisch v. United States*, No.  
7 83 CIV. 2458 (KMW), 1995 WL 303625, at \*8-9 (S.D.N.Y. May 18, 1995)  
8 (citing cases). These statutory privileges are neither qualified nor do they  
9 require a common law analog to apply in civil discovery context, although in  
10 practice the Government typically asserts them in connection with a formal  
11 assertion of the State Secrets Privilege. *See, e.g., Hepting v. AT & T Corp.*, 439  
12 F. Supp. 2d 974, 998 (N.D. Cal. 2006). Likewise, the State Secrets Privilege  
13 protects information properly classified by Executive Order. *See Halkin v.*  
14 *Helms*, 690 F.2d 977, 996 n.69 (D.C. Cir. 1982). Indeed, the State Secrets  
15 Privilege casts an even wider net and "applies regardless of whether the  
16 information has actually been classified pursuant to the substantive and  
17 procedural requirements of applicable statutes or executive order." *Id.*

18 Fourth, the Government has provided a detailed and appropriate  
19 explanation for the redactions to Defendants' Exhibit 3, as required by the  
20 Court's October 4 Order. *See* Gov't Status Report at 8-9. Although Defendants  
21 complain about lacking sufficient information to assess the Government's  
22 redactions, Defendants' motion makes clear that even if they had the  
23 information they seek, they have no interest in working with the Government  
24 to narrow the scope of the privilege disputes in the case. *See* Defs' Mot. at 7-  
25 8. This document, an 89-page narrative about the CIA's Office of Medical  
26 Services role in former detention and interrogation program, is a prime

1 example. The Government has provided Defendants with those portions of the  
2 document that discuss Defendants' involvement in the interrogations of Abu  
3 Zubaydah and Plaintiff Gul Rahman. *See* Defs' Ex. 3. Despite having this  
4 information, Defendants still want to challenge, and then have the Court  
5 adjudicate, the redactions to the remaining irrelevant portions of the document.  
6 That approach, particularly when applied to every redaction in every document,  
7 produced or to be produced, is unreasonable and incompatible with the Court's  
8 schedule.

9 **C. The Court Should Not Disrupt The Government's Ongoing**  
10 **Document Production Efforts By Granting Defendants' Request**  
11 **For Premature Privilege Assertions At This Time.**

12 To move this case forward in a speedy and efficient manner, the Court  
13 should not disrupt the document production plan it put in place just a few weeks  
14 ago in the October 4 Order. The Government's resources are focused on  
15 searching, reviewing, and producing responsive documents by the Court's  
16 December 20, 2016 deadline. The alternative plan that Defendants ask the  
17 Court to adopt would derail these efforts and require the Government to refocus  
18 its priorities on preparing formal privilege assertions prior to the completion of  
19 the document production and without any meaningful conferral that could  
20 minimize the number of disputed issues requiring the Court's attention. Indeed,  
21 many of the same resources at the CIA responsible for reviewing documents for  
22 production would also be required to assist in the preparation of formal  
23 privilege assertions. The focus of these resources at this stage of the case should  
24 be on reviewing documents for production, not on preparing premature  
25 privilege assertions that may turn out to be unnecessary or immaterial to this  
26 case.

1 Maintaining the current state of affairs will allow this case to move  
2 forward consistent with the Court's schedule and in a manner that should  
3 minimize the number of disputed privilege issues for the Court. The  
4 Government will continue to prioritize its review and production of documents  
5 responsive to the Court's October 4 Order. As documents are produced,  
6 Defendants should confer with the Government about specific documents that  
7 they believe are material to their defense and identify the redactions that they  
8 believe hinder their ability to utilize the documents. It cannot be that every  
9 redaction in every document is material to Defendants' case and warrants  
10 contested litigation requiring judicial resolution. Nor can it be that Defendants  
11 are unable to assess the documents, even in redacted form, and determine  
12 whether the redactions are important to their defense.

13 Defendants' litigate-first approach to the discovery issues in this case is  
14 neither an efficient nor productive way to move this case forward, especially on  
15 the present schedule. Granting Defendants' motion would disrupt the  
16 Government's production efforts and it would likely incentivize more  
17 potentially needless litigation that will only serve to delay this case. The Court  
18 has established a practical, albeit demanding, procedure for the way forward  
19 with respect to document production, and Defendants have offered no  
20 compelling reason to alter that approach.

### 21 **CONCLUSION**

22 For the reasons stated above, Defendants' motion should be denied. A  
23 proposed order is attached.

1 Dated: November 9, 2016

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 2016, 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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