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15 UNITED STATES DISTRICT COURT  
16 EASTERN DISTRICT OF WASHINGTON

17 SULEIMAN ABDULLAH SALIM,  
18 *et al.*,  
19 Plaintiffs,

20 v.

21 JAMES E. MITCHELL and JOHN  
22 JESSEN,  
23 Defendants.

No. 2:15-CV-286-JLQ

STATUS REPORT ADDRESSING  
DOCUMENT PRODUCTION AND  
STATEMENT BY THE UNITED  
STATES ADDRESSING  
REDACTIONS TO DOCUMENTS  
PRODUCED IN RESPONSE TO  
DEFENDANTS' SUBPOENAS

26 GOVT'S STATUS REPORT AND STATEMENT RE: DISCOVERY

1 In accordance with the Court's October 4, 2016 Order (ECF No. 31), the  
2 United States of America ("Government") respectfully submits this status report  
3 addressing the production of documents in response to Defendants' subpoenas to  
4 the Central Intelligence Agency ("CIA") and Department of Justice ("DOJ"), as  
5 well as a statement addressing the rules and guidelines the Government is  
6 employing for the redaction of documents.

7 **A. Status Report and Statement Addressing DOJ Document Production**

8 Defendants and the Government have agreed that the DOJ subpoena may be  
9 limited to require only the production of the final legal advice that the DOJ  
10 provided about the CIA's former detention and interrogation program. *See* Oct. 4  
11 Order at 3. The Government focused its search for responsive documents in the  
12 possession of DOJ's Office of Legal Counsel (OLC). OLC exercises the Attorney  
13 General's authority under the Judiciary Act of 1789 to provide controlling legal  
14 advice to the President and all Executive Branch agencies on questions of law that  
15 are centrally important to the functioning of the Government. Following the  
16 attacks of September 11, 2001, OLC provided final legal advice to various  
17 Executive Branch agencies regarding a range of complex and novel national  
18 security legal issues. Documents pertaining to OLC's legal advice on these issues  
19 have previously been the subject of requests under the Freedom of Information Act  
20 (FOIA), 5 U.S.C. § 552 *et seq.*, requests and related litigation since at least 2004.  
21 *See, e.g., ACLU et. al. v. Dep't of Defense et. al.*, 04-CV-4151 (S.D.N.Y.); *Amnesty*  
22 *Int'l USA et al., v. CIA et al.*, 07-CV-5435 (S.D.N.Y.).

23 The Government searched and reviewed OLC's production files in these  
24 FOIA cases for final legal advice about the CIA program, which had already been  
25 declassified and produced in connection with the FOIA cases. This approach  
26 expedited production of responsive documents to Defendants and also avoided the

1 burdens and time associated with re-reviewing and re-processing documents that  
2 had already been authorized for public release. The Government identified 60  
3 responsive documents, totaling approximately 900 pages, and produced them to  
4 Defendants on August 31, 2016. These documents include final memoranda and  
5 letters that CIA and OLC exchanged regarding various legal aspects of the  
6 detention and interrogation program, including OLC's legal analysis of specific  
7 enhanced interrogation techniques; congressional testimony from senior OLC  
8 officials about the program; internal indices and lists of OLC opinions about the  
9 program. Additionally, the Government produced two internal DOJ reports  
10 regarding the legal advice that OLC provided about the CIA program that the  
11 Government obtained from DOJ's Office of Information Policy and Office of  
12 Professional Responsibility.

13 Because these documents were produced in connection with earlier FOIA  
14 requests and related litigation, the documents were redacted in accordance with the  
15 rules and guidelines governing the FOIA, which authorizes the redaction and  
16 withholding of information falling into one of nine exemptions or one of three  
17 special law enforcement record exclusions. *See* 5 U.S.C. § 552(b), (c). The 60  
18 DOJ documents produced to Defendants contain redactions of information falling  
19 within one or more of the following FOIA Exemptions:

- 20 • Exemption 1 protects from disclosure information “specifically authorized  
21 under criteria established by an Executive order to be kept secret in the  
22 interest of national defense or foreign policy” and “properly classified  
23 pursuant to such Executive order.” 5 U.S.C. § 552(b)(1).
- 24 • Exemption 3 protects from disclosure information that is prohibited from  
25 disclosure by another federal statute. 5 U.S.C. § 552(b)(3). Here, the  
26 withholding statutes include the National Security Act of 1947 (NSA Act),

1 50 U.S.C. § 3024, and the Central Intelligence Agency Act of 1949 (CIA  
2 Act), 50 U.S.C. § 3507.

- 3 • Exemption 5 protects from disclosure information “normally privileged in  
4 the civil discovery context.” *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S.  
5 132, 149 (1975); *see* 5 U.S.C. § 552(b)(5).
- 6 • Exemption 6 protects information about individuals in “personnel and  
7 medical files and similar files” when the disclosure of such information  
8 “would constitute a clearly unwarranted invasion of personal privacy.”  
9 5 U.S.C. § 552(b)(6).
- 10 • Exemption 7 protects “records or information compiled for law enforcement  
11 purposes” that fall within one of six specifically enumerated categories.  
12 5 U.S.C. § 552(b)(7).

13 With respect to information withheld as properly classified under Exemption  
14 1, the 60 DOJ documents produced in this case were reviewed and processed for  
15 release under the FOIA at various points in time over the last decade pursuant to  
16 the governing classification guidance in existence at the time of the review.  
17 Accordingly, some documents were processed for release under the current  
18 classification guidance governing the former detention and interrogation program,  
19 which is now in effect following the public release of the Senate Select Committee  
20 on Intelligence’s (SSCI) Executive Summary Report. Other documents were  
21 reviewed and redacted according to previous classification guidance about the  
22 program then in effect at the time of the review. The primary OLC memoranda  
23 that provide legal advice regarding the application of specific enhanced  
24 interrogation techniques utilized by the CIA during the former detention and  
25 interrogation program were reviewed under the current classification guidance.

1 The categories of information redacted from the 60 DOJ documents pursuant  
2 to the FOIA exemptions consist of:

- 3 • Names and identifying information of certain CIA, DOJ, and military  
4 personnel;
- 5 • Information regarding the location of CIA detention facilities and identifying  
6 information about those facilities to include physical and operational  
7 descriptions;
- 8 • Codenames for classified CIA intelligence programs;
- 9 • Description and discussion of the President's classified September 17, 2001  
10 covert action Memorandum of Notification regarding the CIA program;
- 11 • Specific dates of capture, movement, detention, and interrogations of  
12 detainees at CIA detention facilities;
- 13 • Intelligence information collected about detainees and provided by detainees  
14 during interrogations;
- 15 • Methods and techniques of intelligence gathering;
- 16 • Information about the CIA's foreign liaison relationships and activities in  
17 foreign countries;
- 18 • Information about the status and interrogations of certain detainees in CIA  
19 custody;
- 20 • Intelligence information regarding the threat posed by Al-Qaeda and its  
21 affiliates;
- 22 • Internal Executive Branch deliberations regarding the preparation of the  
23 OLC's legal advice about the CIA's former detention and interrogation  
24 program;
- 25 • Internal Executive Branch deliberations regarding interrogations and  
26 treatment of detainees in the custody of the Department of Defense;

- 1 • Internal Executive Branch deliberations regarding the transfer of detainees  
2 from CIA to Department of Defense custody;
- 3 • Internal Executive Branch deliberations regarding potential prosecution  
4 related to detainee treatment.

5 **B. Status Report and Statement Addressing CIA Document Production**

6 As of the date of this filing, the CIA has produced 30 documents totaling  
7 approximately 575 pages. These documents, which have been produced on a  
8 rolling basis, provide Defendants with a wide range of detailed information about  
9 the operation of the former detention and interrogation program, including:

- 10 • The CIA Inspector General's lengthy report from 2004 about the operation  
11 of the former detention and interrogation program from 2001 to 2003. This  
12 report includes detailed information about the development and design of the  
13 program; the capture and detention of Abu Zubaydah; the development and  
14 application of the enhanced interrogation techniques; detention and  
15 interrogation operations at the COBALT facility where Plaintiffs were  
16 detained; and the circumstances surrounding the death of Plaintiff Gul  
17 Rahman.
- 18 • The CIA Inspector General's report from 2005 about the death of Gul  
19 Rahman. This report contains information about Rahman's capture,  
20 rendition, interrogation and detention; the policies governing interrogation  
21 and detention at the COBALT facility; the roles Defendants played during  
22 the interrogations of Gul Rahman; and a detailed accounting of the three  
23 days prior to Rahman's death.
- 24 • The CIA Deputy Director for Operations' report from January 2003 about  
25 the death of Gul Rahman. This report summarizes an internal CIA  
26 investigation conducted immediately following Rahman's death, including

1 interviews with on-site personnel and a review of relevant documents about  
2 Rahman's capture, rendition, interrogation and detention.

- 3 • The contracts governing Defendants' work on the CIA's former detention  
4 and interrogation program during the time of Plaintiffs' detention by the CIA  
5 (2001-2004).
- 6 • Interrogation reports and internal CIA operational cables about Plaintiff  
7 Rahman's capture, detention, rendition, and interrogation from the time of  
8 his capture to the time of his death.
- 9 • Summaries of interviews of on-site personnel who were present at the  
10 detention facility when Plaintiff Rahman died, including of Defendant  
11 Jessen, conducted in connection with the CIA's January 2003 internal  
12 investigation into the death of Rahman.
- 13 • Documents explaining Defendants' role in developing and designing the  
14 enhanced interrogation techniques used in the former detention and  
15 interrogation program.

16 With respect to the rules and guidelines for the redaction of information  
17 related to the former detention an interrogation program, the CIA is reviewing the  
18 documents for classified information consistent with Executive Order 13526,  
19 Classified National Security Information, 75 Fed. Reg. 707 (Dec. 29, 2009)  
20 (governing classification of information generally), and the classification guidance  
21 governing the program that was issued after the release of the SSCI Executive  
22 Summary report. A copy of that classification guidance, which has been provided  
23 to Defendants, is attached as Exhibit 1. The guidance lists general categories of  
24 information about the program that remain classified, as well as categories of  
25 information that are currently unclassified. The CIA is also reviewing documents  
26 for redaction under the rules and standards governing application of various

1 common law and statutory privileges, such as the NSA Act, the CIA Act, the  
2 deliberative process privilege, the attorney-client privilege, and the state secrets  
3 privilege. Additionally, in the event information in a CIA document implicates an  
4 equity of another federal agency, the CIA consults with that other agency regarding  
5 the information at issue and the need for protection of that information consistent  
6 with that agency's policies.

7 The specific categories of factual information redacted from the CIA  
8 documents produced to date in this case include:

- 9 • Names and identifying information of CIA and military personnel;
- 10 • Information regarding the location of CIA detention facilities and identifying  
11 information about those facilities to include physical and operational  
12 descriptions;
- 13 • Codenames for classified CIA intelligence programs;
- 14 • Specific dates of capture, movement, detention, and interrogations of  
15 detainees at CIA detention facilities;
- 16 • Information about travel to and from CIA detention facilities that would tend  
17 to reveal the location of the facilities;
- 18 • Information about the routing and recipients of CIA operational cables;
- 19 • Intelligence information collected about detainees and provided by detainees  
20 during interrogations;
- 21 • Sources, methods and techniques of intelligence gathering;
- 22 • Information about the CIA's foreign liaison relationships and activities in  
23 foreign countries
- 24 • Information about the status and interrogations of certain detainees in CIA  
25 custody;
- 26



- 1 • Internal Executive Branch deliberations regarding interrogations and  
2 treatment of detainees in CIA custody.

3 **C. Basis For Redactions To Specific CIA Documents Referenced By**  
4 **Defendants During The September 29, 2016 Telephonic Hearing**

5 In accordance with the Court's October 4 Order, the Government hereby  
6 provides the basis for the redactions to the two specific CIA documents referenced  
7 by Defendants during the September 29, 2016 telephonic hearing.

8 First, Defendants identified a CIA document titled "Summary and  
9 Reflections of Chief of Medical Services on OMS Participation in the RDI  
10 Program." *See* Gov't Exhibit 2; *see* Transcript of Motion Hearing at 14; 3-8 (Sept.  
11 29, 2016) at 21. This document is 89 pages and stamped "DRAFT" on every page.  
12 Because of its draft status, the document was redacted in order to protect pre-  
13 decisional intra-agency deliberations protected by the deliberative process  
14 privilege. *See, e.g., Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1089,  
15 1094-95 (9th Cir. 1997) (listing draft documents among the type of documents  
16 covered by the deliberative process privilege). The document also contains  
17 redactions to information falling within the categories of CIA information listed  
18 *supra* at page 7, that is classified under Executive Order 13526; protected from  
19 disclosure by the NSA and CIA Acts; or subject to an assertion of the state secrets  
20 privilege.

21 In an effort to provide Defendants with as much information as possible,  
22 however, the Government agreed to waive any deliberative process protections  
23 over information in the document discussing Defendants' role in the former  
24 detention and interrogation program. Thus, portions of the document that discuss  
25 Defendants are unredacted and provide material information about Defendants'  
26 involvement in the development of the program, the interrogations of Abu

1 Zubaydah, and the interrogation of Plaintiff Gul Rahman. *See* Gov't Ex. 2 at 11-  
2 16, 28-34, 41, 45-46.

3 Second, Defendants identified Exhibit DD to the Declaration of Ann Querns,  
4 which was attached as an exhibit to Defendants' reply memorandum in support of  
5 their motion to compel. *See* ECF No. 24-3, attached hereto as Gov't Exhibit 3;  
6 Transcript at 40:5-7. This exhibit consists of a collection of six separate CIA  
7 operational cables dated November 2002 about the rendition, detention,  
8 interrogation, and death of Plaintiff Gul Rahman. *See id.* The documents contain  
9 redactions to information falling within the categories of CIA information listed  
10 *supra* at page 7, that is classified under Executive Order 13526; protected from  
11 disclosure by the NSA and CIA Acts; or subject to an assertion of the state secrets  
12 privilege.

13 Although classified and privileged information is redacted from these  
14 documents, the CIA has taken the unique step of providing unclassified substitutes  
15 for certain redacted information in order to provide Defendants with as much  
16 responsive information as possible. For example, in places where Drs. Mitchell  
17 and Jessen are identified by codewords, those codewords have been redacted from  
18 the documents, but the CIA has substituted Drs. Mitchell and Jessen's true names  
19 at the appropriate places where the codewords appear. Similarly, the codename for  
20 the detention facility where Gul Rahman was detained at the time of his death is  
21 redacted, but the CIA has substituted the name COBALT, which is the name given  
22 to the detention facility in the public version of the SSCI Executive Summary.  
23 These unclassified substitutions, therefore, disclose the key information about  
24 Defendants' roles and responsibilities in the detention of Gul Rahman as  
25 memorialized in the contemporaneous operational CIA documents generated  
26 during the time of Rahman's detention.

1           **D. Production of Additional CIA Documents**

2           The CIA is continuing to move forward with additional document  
3 productions in accordance with the Court's October 4, 2016 Order and the  
4 comments made by the Court during the September 29, 2016 telephonic hearing.  
5 Based on the Court's statements during the hearing that Defendants should file a  
6 motion based on the enemy combatant jurisdictional defense, 28 U.S.C.  
7 § 2241(e)(2), as soon as reasonable, *see* Transcript at 21:9-20, the Government and  
8 Defendants conferred soon after the hearing, and the Government agreed to initiate  
9 searches for documents bearing on the enemy combatant issue. With respect to  
10 Plaintiff Gul Rahman, the Government already has provided Defendants with CIA  
11 documents that describe Gul Rahman as an enemy combatant and explain the  
12 factual basis for his capture and detention. The Government has also identified  
13 additional documents potentially bearing on the enemy combatant issue for  
14 Plaintiffs Salim and Ben Soud, and those documents are currently undergoing  
15 classification review by the CIA.

16           Additionally, the Government has been working diligently to create a search  
17 and production plan for the categories of CIA documents required to be produced  
18 pursuant to the Court's October 4 Order. As narrowed by the Court's Order and  
19 the Court's comments during the telephonic hearing, the Government understands  
20 its discovery obligations to require production of three categories of CIA  
21 documents:

- 22           1. Documents that reference one or both of the Defendants *and* at least one  
23           of the Plaintiffs. The date range for documents in this category is  
24           September 11, 2001 to the present. *See* Order at 4; Transcript at 37:13-  
25           15, 43:19-44:4, 46:11-19.

1 2. Documents that reference one or both of the Defendants *and* Abu  
2 Zubaydah. The date range for documents in this category is September  
3 11, 2001 to August 1, 2004. *See* Order at 4-5; Transcript at 33:11-17,  
4 34:8-10, 34:23-25, 43:19-44:4.

5 3. Documents that reference or describe the role Defendants played in the  
6 design and development of the former detention and interrogation  
7 program, not limited to references to the Plaintiffs or Abu Zubaydah.  
8 The date range for documents in this category is September 11, 2001 to  
9 August 1, 2004. *See* Order 4-5; Transcript at 45:4-8; 46:16-19; 48:19-20.

10 Because the common denominator in all three categories of these documents  
11 is Defendants, the CIA initiated searches within its RDINet database for  
12 documents containing references to Defendants, whether by true name, codename,  
13 or description. Based on the way in which Defendants are described and  
14 referenced in various documents produced thus far in this litigation, the CIA has  
15 advised that it conducted a search of the RDINet database for documents  
16 containing a variety of identifying terms, including “Jessen”; “Mitchell”; “Jim”;  
17 “Bruce”; “IC psychologists”; “SERE psychologists.” The CIA has advised that it  
18 has identified approximately 36,000 documents in response to this search.

19 To be sure, some of these documents are likely duplicates of one another or  
20 likely reference someone named “Jim” or “Bruce” other than the Defendants or fall  
21 outside the required date range, but the CIA has advised that there is no way to  
22 make those determinations technologically using the RDINet system. The system  
23 simply identifies documents containing the specific terms input by the user.

24 Therefore, the documents will have to be read and reviewed by security cleared  
25 CIA and DOJ personnel to determine whether they are, in fact, responsive to the  
26 three categories listed above. As the Government explained in the Declaration of

1 Antoinette Shiner submitted in support of the Government's opposition to  
2 Defendants' motion to compel, access to the RDINet database is limited to a small  
3 group of CIA personnel due to the highly classified and sensitive nature of the  
4 documents contained therein. *See* ECF No. 19, Gov't Ex. 13 ¶ 6-8 (Shiner  
5 Declaration). Therefore, in order to expedite review of the documents by a larger  
6 group of CIA and DOJ personnel, the documents must first be transferred from the  
7 decentralized and compartmented RDINet computer system to a separate classified  
8 CIA computer system that is accessible by more security-cleared personnel and is  
9 equipped to facilitate review of the documents for litigation purposes.

10 In light of the security and information technology features of the RDINet  
11 database, the CIA has advised that the documents must be transferred to the  
12 separate computer system individually. That is, the limited CIA personnel with  
13 access to RDINet must individually transfer each of the approximately 36,000  
14 documents one at a time. The CIA estimates that it can transfer approximately  
15 1,000 documents per work day, with transfers occurring on a rolling daily basis.  
16 However, the CIA has advised that it has encountered technological difficulties  
17 with the initial document transfers that may slow this estimated pace. The CIA has  
18 advised that it is actively working to correct these technological issues.

19 The Government intends to review the documents on a rolling basis as they  
20 are transferred, thus enabling the two processes to occur concurrently in order  
21 expedite review of the documents. The Government is also currently exploring the  
22 availability of additional information technology resources and software that would  
23 facilitate review of the documents on a faster timeframe, although the availability  
24 of those resources may be restricted or prohibitively time-consuming to install  
25 given the information security and system requirements of the CIA's classified  
26 computer network. As documents are identified as responsive, they will be

1 referred to the CIA on a rolling basis for classification and privilege review and, if  
2 appropriate, redaction. *See* Shiner Declaration ¶¶ 12-25 (describing burdens  
3 associated with classification review process). Documents cleared for production  
4 to Defendants will be produced on a rolling basis.

5  
6 Dated: October 11, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 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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