

[ORAL ARGUMENT NOT YET SCHEDULED]

**11-5320**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

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AMERICAN CIVIL LIBERTIES UNION and  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

*Plaintiffs-Appellants,*

v.

CENTRAL INTELLIGENCE AGENCY,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
No. 1:10-cv-00436-RMC  
(Rosemary M. Collyer, J.)

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**JOINT APPENDIX**

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March 15, 2012

Counsel for Plaintiffs-Appellants

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APPEAL, CLOSED, TYPE-I

**U.S. District Court  
District of Columbia (Washington, DC)  
CIVIL DOCKET FOR CASE #: 1:10-cv-00436-RMC**

AMERICAN CIVIL LIBERTIES UNION et al v.  
DEPARTMENT OF JUSTICE et al  
Assigned to: Judge Rosemary M. Collyer  
Case in other court: USCA, 11-05320  
Cause: 05:552 Freedom of Information Act

Date Filed: 03/16/2010  
Date Terminated: 11/29/2011  
Jury Demand: None  
Nature of Suit: 895 Freedom of Information Act  
Jurisdiction: U.S. Government Defendant

**Plaintiff**

**AMERICAN CIVIL LIBERTIES  
UNION**

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Date Filed	#	Docket Text
03/16/2010	<u>1</u>	COMPLAINT against DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE ( Filing fee \$ 350, receipt number 4616028263) filed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION. (Attachments: # <u>1</u> Civil Cover Sheet)(rdj) (Entered: 03/16/2010)
03/16/2010		SUMMONS (5) Issued as to DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE, U.S. Attorney and U.S. Attorney General (rdj) (Entered: 03/16/2010)
03/17/2010	<u>2</u>	SUMMONS Returned Executed as to US Attorney, served on 3/16/2010, answer due 4/15/2010. (Spitzer, Arthur) Modified on 3/17/2010 to edit the parties (dr). (Entered: 03/17/2010)
03/26/2010	<u>3</u>	NOTICE of Appearance by Amy E. Powell on behalf of DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 03/26/2010)
04/02/2010	<u>4</u>	SUMMONS Returned Executed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION. DEPARTMENT OF JUSTICE served on 3/22/2010, answer due 4/21/2010. (Spitzer, Arthur) (Entered: 04/02/2010)
04/02/2010	<u>5</u>	SUMMONS Returned Executed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION. DEPARTMENT OF DEFENSE served on 3/29/2010, answer due 4/28/2010. (Spitzer, Arthur) (Entered: 04/02/2010)
04/02/2010	<u>6</u>	SUMMONS Returned Executed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION. DEPARTMENT OF STATE served on 3/24/2010, answer due 4/23/2010. (Spitzer, Arthur) (Entered: 04/02/2010)
04/02/2010	<u>7</u>	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on Attorney General. Date of Service Upon Attorney General 03/22/2010. (Spitzer, Arthur) (Entered: 04/02/2010)

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04/09/2010	<u>8</u>	Unopposed MOTION for Extension of Time to File Answer by DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 04/09/2010)
04/12/2010		MINUTE ORDER granting <u>8</u> Defendants' Unopposed Motion for Extension of Time to Answer. Defendants shall file their answer or otherwise respond to the complaint no later than May 6, 2010. Signed by Judge Rosemary M. Collyer on 4/12/10. (lcrmc2) (Entered: 04/12/2010)
04/12/2010		Set/Reset Deadlines/Hearings: Answer to complaint due by 5/6/2010. (cdw) (Entered: 04/13/2010)
05/04/2010	<u>9</u>	Unopposed MOTION for Extension of Time to File Answer by DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 05/04/2010)
05/05/2010		MINUTE ORDER granting <u>9</u> Defendants' Unopposed Motion for Extension of Time to Answer. Defendants shall file an Answer or otherwise respond to the Complaint no later than May 19, 2010. If Plaintiffs file an amended Complaint on or before May 19, 2010, Defendants will then have fourteen (14) days from the filing of the amended Complaint to file an Answer or otherwise respond to the amended Complaint. Signed by Judge Rosemary M. Collyer on 5/5/2010. (lcrmc2) (Entered: 05/05/2010)
05/05/2010		Set/Reset Deadlines/Hearings: Answer to complaint due by 5/19/2010. (cdw) (Entered: 05/05/2010)
05/14/2010	<u>10</u>	Joint MOTION to Amend/Correct Order on Motion for Extension of Time to Answer, by DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 05/14/2010)
05/14/2010		MINUTE ORDER granting <u>10</u> Defendants' Unopposed Motion for an Extension of Time. Plaintiffs will, if they determine it necessary, file an amended complaint no later than June 1, 2010. If Plaintiffs file an amended complaint, Defendants shall file an answer or other response no later than June 15, 2010. If Plaintiffs do not file an amended complaint by June 1, 2010, Defendants shall file an answer or other response to the complaint no later than June 4, 2010. Signed by Judge Rosemary M. Collyer on 5/14/2010. (lcrmc2) (Entered: 05/14/2010)
06/01/2010	<u>11</u>	AMENDED COMPLAINT against DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY filed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION.(znmw, ) (Entered: 06/02/2010)
06/15/2010	<u>12</u>	ANSWER to <u>11</u> Amended Complaint by CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. Related document: <u>11</u> Amended Complaint filed by AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION. (Powell, Amy) (Entered: 06/15/2010)



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06/16/2010		MINUTE ORDER requiring the parties to file a joint proposed dispositive motion briefing schedule no later than July 1, 2010. Signed by Judge Rosemary M. Collyer on 6/16/2010. (lcrmc2) (Entered: 06/16/2010)
06/16/2010		Set/Reset Deadlines/Hearings: Joint Proposed Dispositive Motion Briefing Schedule due by 7/1/2010. (cdw) (Entered: 06/22/2010)
07/01/2010	<u>13</u>	STATUS REPORT <i>Proposed Briefing Schedule, jointly filed</i> by CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. (Powell, Amy) (Entered: 07/01/2010)
07/01/2010		MINUTE ORDER. The parties shall file a joint status report by no later than July 16, 2010, to inform the Court as to the Defendants' search for and production of documents responsive to the Plaintiffs' FOIA request. Defendant CIA shall file a motion for summary judgment by no later than October 1, 2010. Plaintiffs shall file an opposition by no later than November 1, 2010. Defendant CIA may file a reply by no later than December 1, 2010. The parties are advised that no extensions of time will be granted. Signed by Judge Rosemary M. Collyer on 7/1/2010. (lcrmc2) (Entered: 07/01/2010)
07/16/2010	<u>14</u>	STATUS REPORT, <i>jointly filed, with proposed order</i> by CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. (Powell, Amy) (Entered: 07/16/2010)
07/28/2010		MINUTE ORDER. The Court approves the proposed schedule detailed in the parties' Joint Status Report [Dkt. # 14] and hereby ORDERS that the parties file a joint status report by no later than December 6, 2010. Defendant Department of Justice shall complete its search for responsive records by no later than September 14, 2010. Department of Justice and the Plaintiffs shall then confer and notify the Court of the proposed production schedule. Defendant Department of State shall complete its search for responsive records by no later than October 14, 2010 and shall begin a rolling production of responsive records to the Plaintiffs by no later than November 24, 2010. Defendant Department of Defense shall complete all searches for responsive records by November 15, 2010. Signed by Judge Rosemary M. Collyer on 7/28/2010. (lcrmc2) Modified on 7/30/2010 (cdw). (Entered: 07/28/2010)
10/01/2010	<u>15</u>	MOTION for Summary Judgment by CENTRAL INTELLIGENCE AGENCY (Attachments: # <u>1</u> Declaration of Mary Ellen Cole, # <u>2</u> Exhibits A - E to Declaration of Mary Ellen Cole, # <u>3</u> Text of Proposed Order)(Powell, Amy) (Entered: 10/01/2010)
10/15/2010	<u>16</u>	MOTION for Leave to File Amicus Brief by WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Proposed 7.1, # <u>3</u> Proposed Amici Curiae)(rdj) (Entered: 10/15/2010)
10/19/2010	<u>17</u>	NOTICE of Consent to Motion for Leave to File Amicus Brief by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION re <u>16</u> MOTION for Leave to File (Spitzer, Arthur) (Entered: 10/19/2010)

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10/19/2010		MINUTE ORDER granting <u>16</u> Washington Legal Foundation and the Allied Educational Foundation's consent motion for leave to file amicus curiae brief. Signed by Judge Rosemary M. Collyer on 10/19/2010. (lcrmc2) (Entered: 10/19/2010)
10/19/2010	<u>18</u>	AMICUS BRIEF by ALLIED EDUCATIONAL FOUNDATION, WASHINGTON LEGAL FOUNDATION. (rdj) (Entered: 10/19/2010)
10/19/2010	<u>19</u>	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by ALLIED EDUCATIONAL FOUNDATION, WASHINGTON LEGAL FOUNDATION identifying Corporate Parent NONE for ALLIED EDUCATIONAL FOUNDATION, WASHINGTON LEGAL FOUNDATION. (rdj) (Entered: 10/19/2010)
11/01/2010	<u>20</u>	Memorandum in opposition to re <u>15</u> MOTION for Summary Judgment by <i>Defendant CIA</i> , filed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, (Attachments: # <u>1</u> Declaration of Alexander Abdo, # <u>2</u> Text of Proposed Order)(Spitzer, Arthur) (Entered: 11/01/2010)
11/01/2010	<u>21</u>	Cross MOTION for Partial Summary Judgment <i>against Defendant CIA</i> , by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION (Attachments: # <u>1</u> Declaration of Alexander Abdo, # <u>2</u> Text of Proposed Order)(Spitzer, Arthur) (Entered: 11/01/2010)
11/30/2010	<u>22</u>	REPLY to opposition to motion re <u>15</u> MOTION for Summary Judgment filed by CENTRAL INTELLIGENCE AGENCY. (Powell, Amy) (Entered: 11/30/2010)
11/30/2010	<u>23</u>	Memorandum in opposition to re <u>21</u> Cross MOTION for Partial Summary Judgment <i>against Defendant CIA</i> , filed by CENTRAL INTELLIGENCE AGENCY. (Powell, Amy) (Entered: 11/30/2010)
12/01/2010		MINUTE ORDER. Plaintiffs may file a reply in support of the cross-motion for partial summary judgment against Defendant CIA <u>21</u> by no later than December 17, 2010. Signed by Judge Rosemary M. Collyer on 12/1/2010. (lcrmc2) (Entered: 12/01/2010)
12/01/2010		Set/Reset Deadlines: Reply in support of the cross-motion for partial summary judgment due by 12/17/2010. (tcb) (Entered: 12/01/2010)
12/06/2010	<u>24</u>	STATUS REPORT ( <i>JOINT</i> ) by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. (Attachments: # <u>1</u> Text of Proposed Order) (Spitzer, Arthur) (Entered: 12/06/2010)
12/07/2010		MINUTE ORDER. Pursuant to the joint status report <u>24</u> , the parties, with the exception of Defendant Central Intelligence Agency, are ORDERED to file a joint status report by no later than January 21, 2011. The status report shall inform the Court of the progress of production and propose a mutually agreeable production schedule. Defendants shall continue with production on a rolling basis to the fullest extent possible. Signed by Judge Rosemary M. Collyer on 12/7/2010. (lcrmc2) (Entered: 12/07/2010)
12/07/2010		Set/Reset Deadlines/Hearings: Joint Status Report due by 1/21/2011. (cdw) (Entered: 12/07/2010)

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		12/08/2010)
12/17/2010	<u>25</u>	REPLY to opposition to motion re <u>21</u> Cross MOTION for Partial Summary Judgment <i>against Defendant CIA</i> , filed by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION. (Spitzer, Arthur) (Entered: 12/17/2010)
01/21/2011	<u>26</u>	STATUS REPORT by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. (Attachments: # <u>1</u> Text of Proposed Order)(Spitzer, Arthur) (Entered: 01/21/2011)
01/26/2011	<u>27</u>	SCHEDULING ORDER: Counsel will meet and confer, and the parties will file a Status Report with the Court on July 15, 2011, informing the Court as to the status of production, and, if the parties can reach agreement, setting out a mutually agreeable briefing schedule. See order for further details. Signed by Judge Rosemary M. Collyer on January 24, 2011. (cdw) (Entered: 01/27/2011)
03/29/2011	<u>28</u>	NOTICE OF SUPPLEMENTAL AUTHORITY by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION (Attachments: # <u>1</u> Exhibit Newsweek article)(Spitzer, Arthur) (Entered: 03/29/2011)
05/12/2011	<u>29</u>	Unopposed MOTION for Extension of Time to <i>complete FOIA processing</i> by CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 05/12/2011)
05/12/2011		MINUTE ORDER granting <u>29</u> Defendant Department of Defense's unopposed motion for an extension of time. The Court's January 24, 2011 Scheduling Order <u>27</u> is MODIFIED as follows: Defendant Department of Defense shall use its best efforts to complete processing by May 20, 2011. Signed by Judge Rosemary M. Collyer on 5/12/2011. (lcrmc2) (Entered: 05/12/2011)
06/28/2011	<u>30</u>	Unopposed MOTION for Extension of Time to <i>complete FOIA processing</i> by CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 06/28/2011)
06/28/2011		MINUTE ORDER granting <u>30</u> Defendants' consent motion for an extension of time. The Court's January 24, 2011 Scheduling Order <u>27</u> is MODIFIED as follows: Defendant Department of State shall use best efforts to complete processing by July 14, 2011. The parties shall then meet and confer and file a joint status report by July 29, 2011, indicating the status of production and proposing a mutually agreeable briefing schedule. Signed by Judge Rosemary M. Collyer on 6/28/2011. (lcrmc2) (Entered: 06/28/2011)
06/28/2011		Set/Reset Deadlines/Hearings: Joint Status Report due by 7/29/2011. (cdw) (Entered: 06/30/2011)
07/26/2011	<u>31</u>	Consent MOTION for Extension of Time to File <i>joint status report and proposed</i>

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		<i>briefing schedule</i> by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION (Attachments: # <u>1</u> Text of Proposed Order) (Spitzer, Arthur) (Entered: 07/26/2011)
07/26/2011		MINUTE ORDER granting <u>31</u> Plaintiffs' Motion for Extension of Time. By no later than August 12, 2011, the parties shall file a joint status report proposing a mutually agreeable briefing schedule. Signed by Judge Rosemary M. Collyer on 7/26/2011. (lcrmc2) (Entered: 07/26/2011)
07/26/2011		Set/Reset Deadlines/Hearings: Joint Status Report due by 8/12/2011. (cdw) (Entered: 07/29/2011)
08/12/2011	<u>32</u>	STATUS REPORT , <i>filed jointly</i> by CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. (Attachments: # <u>1</u> Text of Proposed Order)(Powell, Amy) (Entered: 08/12/2011)
08/16/2011	<u>33</u>	ORDER directing the parties to file a Status Report with the Court by 10/26/2011. See order for further details. Signed by Judge Rosemary M. Collyer on August 15, 2011. (cdw) (Entered: 08/16/2011)
09/09/2011	<u>34</u>	MEMORANDUM OPINION. Signed by Judge Rosemary M. Collyer on 9/9/2011. (lcrmc2) (Entered: 09/09/2011)
09/09/2011	<u>35</u>	ORDER granting <u>15</u> defendant Central Intelligence Agency's motion for summary judgment and denying <u>21</u> Plaintiffs' motion for partial summary judgment against the Central Intelligence Agency. Accordingly, the Central Intelligence Agency is hereby DISMISSED as a defendant. Signed by Judge Rosemary M. Collyer on 9/9/2011. (lcrmc2) (Entered: 09/09/2011)
09/09/2011	<u>36</u>	Unopposed MOTION for Extension of Time to <i>Produce Draft Vaughn Indices</i> by DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE (Powell, Amy) (Entered: 09/09/2011)
09/12/2011		MINUTE ORDER granting <u>36</u> defendants' consent motion for an extension of time. The Court's August 15, 2011 Scheduling Order <u>33</u> is modified as follows: By no later than September 16, 2011, defendant Department of Defense shall provide Plaintiffs a draft Vaughn index and defendant Department of State shall provide Plaintiffs a partial draft Vaughn index. All other deadlines remain the same. Signed by Judge Rosemary M. Collyer on 9/12/2011. (lcrmc2) (Entered: 09/12/2011)
10/11/2011	<u>37</u>	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Nathan Freed Wessler, :Firm- American Civil Liberties Union Foundation, :Address- 125 Broad Street, NY NY 10004. Phone No. - (212) 519-7847. Fax No. - 212-549-2651 by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION (Attachments: # <u>1</u> Declaration of Nathan Freed Wessler, # <u>2</u> Text of Proposed Order)(Spitzer, Arthur) (Entered: 10/11/2011)
10/13/2011		MINUTE ORDER granting <u>37</u> Motion for Leave to Appear Pro Hac Vice. Signed by Judge Rosemary M. Collyer on 10/13/2011. (lcrmc2) (Entered: 10/13/2011)

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10/26/2011	<u>38</u>	STIPULATION of Dismissal as to <i>Department of Defense, Department of Justice, and Department of State</i> , by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE. (Spitzer, Arthur) (Entered: 10/26/2011)
11/09/2011	<u>39</u>	NOTICE OF APPEAL as to <u>35</u> Order on Motion for Summary Judgment, Order on Motion for Partial Summary Judgment,, by AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION. Filing fee \$ 455, receipt number 0090-2728622. Fee Status: Fee Paid. Parties have been notified. (Spitzer, Arthur) (Entered: 11/09/2011)
11/10/2011	<u>40</u>	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re <u>39</u> Notice of Appeal. (rdj) (Entered: 11/10/2011)
11/18/2011		USCA Case Number 11-5320 for <u>39</u> Notice of Appeal, filed by AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION. (rdj) (Entered: 11/18/2011)

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UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION  
125 Broad Street  
New York, NY 10004,

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
125 Broad Street  
New York, NY 10004,

Plaintiffs,

v.

No. 10-cv-0436 (RMC)

DEPARTMENT OF JUSTICE  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001,

DEPARTMENT OF DEFENSE  
1400 Defense Pentagon  
Washington, DC 20301-1400,

DEPARTMENT OF STATE  
2201 C Street, N.W.  
Washington, DC 20520,

CENTRAL INTELLIGENCE AGENCY  
Washington, D.C. 20505,

Defendants.

**AMENDED COMPLAINT FOR INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking the immediate processing and release of agency records requested by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively “ACLU”) from

Defendants U.S. Department of Justice (“DOJ”), U.S. Department of Defense (“DOD”), U.S. Department of State (“DOS”), and the Central Intelligence Agency (“CIA”).

2. Plaintiffs submitted a FOIA request (“the Request”) to the DOD, CIA, DOS, DOJ, and one specific component of the DOJ—the Office of Legal Counsel (“OLC”)—requesting the release of records relating to the use of unmanned aerial vehicles—commonly known as “drones”—for the purpose of targeting and killing individuals since September 11, 2001. The Request was submitted to all agencies on January 13, 2010.

3. Although more than four months have elapsed since the Request was filed, none of the defendant agencies has released any record in response to the Request. Nor has any defendant provided Plaintiffs with a processing schedule. The defendants have provided inconsistent responses to Plaintiffs’ application for expedited processing, for a fee limitation on the basis of Plaintiffs’ status as representatives of the news media, and for a fee waiver on the basis that disclosure is in the public interest.

4. Plaintiffs now ask this Court to order the Defendants immediately to process all records responsive to the Request and to enjoin the Defendants from charging the Plaintiffs fees for processing the Request.

#### **Jurisdiction and Venue**

5. This Court has both subject matter jurisdiction of the FOIA claim and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

6. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

### **Parties**

7. Plaintiff American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization with more than 500,000 members dedicated to the constitutional principles of liberty and equality. The ACLU is committed to ensuring that the American government acts in compliance with the Constitution and laws, including its international legal obligations. The ACLU is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties and human rights.

8. Plaintiff American Civil Liberties Union Foundation is a separate § 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties.

9. Defendant DOD is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

10. Defendant DOJ is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). The OLC is a component of the DOJ.

11. Defendant DOS is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

12. Defendant CIA is a Department of the Executive Branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).



### **Factual Background.**

13. Since at least 2002, the United States government has used unmanned aerial vehicles to conduct “targeted killings” overseas. Many of the drone strikes have taken place on *bona fide* battlefields—for example, in Afghanistan. In 2002, however, the U.S. conducted a drone strike in Yemen that killed several individuals including a U.S. citizen. According to news reports, the frequency of drone strikes has increased significantly over the last few years, and in particular in the last year. Unofficial estimates of the number and rate of civilian casualties in drone strikes vary significantly, from a rate of less than 10% to a rate of more than 90%.

### FOIA Request

14. On January 13, 2010, the ACLU submitted a FOIA Request for records relating to the use of unmanned aerial vehicles by the CIA and the Armed Forces for the purpose of killing targeted individuals. The Request was submitted to the designated FOIA offices of the DOD, CIA, DOS, DOJ, and OLC.

15. The Request seeks a variety of records relating to the use of unmanned aerial vehicles to conduct targeted killings, including the legal basis for the strikes and any legal limits on who may be targeted; where targeted drone strikes can occur; civilian casualties; which agencies or other non-governmental entities may be involved in conducting targeted killings; how the results of individual drone strikes are assessed after the fact; who may operate and direct targeted killing strikes; and how those involved in operating the program are supervised, overseen or disciplined.

16. Plaintiffs sought expedited processing of the Request on the grounds that there is a “compelling need” for these records because the information requested is

urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Plaintiffs also sought expedited processing on the grounds that the records sought relate to a “breaking news story of general public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”); 32 C.F.R. § 1900.34(c)(2) (providing for expedited processing when “the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity”).

17. Plaintiffs sought a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 28 C.F.R. § 16.11(k); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

18. Plaintiffs also sought a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and that the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii); *see also* 22 C.F.R. §§ 171.11(o), 171.15(c); 28 C.F.R. § 16.11(b)(6), (c), (d)(1); 32 C.F.R. § 286.28(e)(7); 32 C.F.R. §§ 1900.02(h)(3), 1900.13(i)(2).

The Government's Response to the Request

19. Although the Request has been pending for more than four months, no records have been produced. The DOD, DOJ, and DOJ have not provided any basis for withholding responsive records. The CIA has responded only by refusing to confirm or deny whether any responsive records exist.

20. By letter dated January 29, 2010 the DOD acknowledged receipt of the Request, but denied Plaintiffs' application for expedited processing and also denied Plaintiffs' application for waiver of search and review fees on the basis of "news media" requester status.

21. In the same letter the DOD deferred its decision on Plaintiffs' application for a "public interest" fee waiver, stating that it would decide the issue only after "a search for responsive records has been conducted and the volume and nature of responsive records have been determined" and that it would base its decision on the results of that search, rather than on the face of the Request. DOD indicated that it would only conduct a two-hour search for records for this purpose, unless Plaintiff agreed in advance to pay for additional search time.

22. On March 11, 2010, Plaintiffs notified the DOD that it objected to the proposed manner of determining Plaintiffs' entitlement to a public interest fee waiver. Plaintiffs nevertheless indicated that in the event the DOD refused to determine the fee waiver on the face of the Request, Plaintiffs were willing to commit \$200 to cover search fees, in order to permit the DOD to base its public interest fee waiver decision on the basis of more than two hours of searching. Plaintiffs reserved the right, however, to

appeal or apply for judicial review of both the process employed for determining the fee waiver, and any adverse determination on the issue.

23. On March 12, 2010, Plaintiff timely filed an administrative appeal of DOD's denial of news media requester status and of DOD's proposed procedure for determining the public interest fee waiver question. Plaintiff urged the appellate authority to grant news media requester status and also to grant the public interest fee waiver based on an examination of the contents of the Request. By letter dated March 26, 2010 – after the present lawsuit was filed naming DOD as a defendant – DOD denied Plaintiff's appeal in full, confirming the initial decisions to reject Plaintiff's request for news media requester status and to defer Plaintiff's fee waiver request until the search for documents is completed.

24. No further response or correspondence has been received from the DOD. No records responsive to the Request have been released by the DOD, nor has the DOD indicated that it has begun searching for or processing responsive records.

25. By letter dated January 29, 2010, the CIA acknowledged receipt of the Request but denied Plaintiffs' request for expedited processing. The CIA did not address Plaintiffs' request for a public interest fee waiver or limitation of fees based on news media requester status.

26. By letter dated March 9, 2010, the CIA stated that the Request "is denied pursuant to FOIA exemptions (b)(1) and (b)(3) on the grounds that the "fact of the existence or nonexistence of requested records is currently and properly classified and is intelligences sources and methods that is protected from disclosure by section 6 of the

CIA Act of 1949, as amended.” The letter stated that this was the CIA’s “final response” to the Request, subject to appeal to the Agency Release Panel.

27. On April 22, 2010, Plaintiff timely filed an administrative appeal of CIA’s refusal to confirm or deny the existence of any records responsive to the Request. Plaintiff urged the appellate authority to reconsider its blanket refusal to process the request.

28. By letter dated May 6, 2010, the CIA acknowledged receipt of the appeal on April 23, 2010, but indicated that “it [is] unlikely that we can respond within 20 working days,” as required by 5 U.S.C. § 552(a)(6)(A)(ii). More than twenty days have elapsed since the appeal was received by the CIA and the CIA has not yet determined the appeal.

29. By letter dated February 3, 2010, the DOJ acknowledged receipt of the Request and informed the Plaintiff that the Request had been forwarded by the “receipt and referral unit” of the DOJ to the FBI, because it had determined that the FBI was the “component[] most likely to have the records” requested. The Request was forwarded to the FBI on February 3, 2010. By letter dated February 26, 2010, the FBI indicated that it had conducted a search of its Central Records System and was unable to find any responsive documents. The FBI’s letter indicated that it regarded the request for fee waivers and expedited processing moot. The FBI is not a defendant in this action.

30. By letter dated February 4, 2010, the OLC acknowledged receipt of the Request and granted Plaintiffs’ application for expedited processing, on the grounds that the Request involved “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public

confidence.” 28 C.F.R. § 16.5(d)(1)(iv). The OLC did not make a decision on Plaintiff’s application for a public interest fee waiver or limitation of fees based on news media requester status, indicating that a decision on these issues would be made “after [OLC] determine[s] whether or not fees will be assessed for this request.” No further response or correspondence has been received from the OLC.

31. By letter dated April 22, 2010 – after the present lawsuit was filed naming DOS as a defendant – DOS acknowledged receipt of the Request, granted Plaintiff’s application for expedited processing, and indicated that it would begin processing the Request. The letter also stated that it would “defer our decision to grant or deny [Plaintiff’s] request for a fee waiver until we are able to determine whether the disclosure of any documents responsive to your request is in the public interest.” DOS has not offered any response to Plaintiff’s request for news media requester status. No further response or correspondence has been received from DOS.

32. Although more than four months have elapsed since the Request was submitted, no records responsive to the Request have been released by any of the Defendants. None of the defendants in this action, with the exception of DOS, have indicated that they have even begun searching for or processing responsive records.

33. Events since the filing of the Request have only served to highlight the importance and urgency of the Request. On February 3, 2010, Director of National Intelligence Dennis Blair confirmed, in public remarks at an open session of the Intelligence Committee of the House of Representatives, that the United States operates a program to target and kill individuals abroad. He further confirmed that this program can involve “direct action [that] involve[s] killing an American.” Investigative news reports

suggest that at least three U.S. citizens are on a list of individuals who can be targeted and killed, using drones or other means.

#### **Causes of Action**

34. Defendants' failure to make a reasonable effort to search for records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3), and Defendants' corresponding regulations.

35. Defendants' failure to promptly make available the records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendants' corresponding regulations.

36. The failure of Defendants DOD and CIA to grant Plaintiffs' request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.

37. Defendants' failure to grant Plaintiffs' request for a limitation of fees violates FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II), and Defendants' corresponding regulations.

38. Defendants' failure to grant Plaintiffs' request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and Defendants' corresponding regulations.

### Requested Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Order Defendants immediately to process all records responsive to the Request;
- B. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;
- C. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and
- D. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

*Arthur B. Spitzer*

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*Counsel for Plaintiffs*

Dated: June 1, 2010



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION,  
et al.,

Plaintiffs,

v.

Case No. 1:10-CV-00436-RMC

DEPARTMENT OF JUSTICE, et al.,

Defendants.

DECLARATION OF MARY ELLEN COLE  
INFORMATION REVIEW OFFICER  
NATIONAL CLANDESTINE SERVICE  
CENTRAL INTELLIGENCE AGENCY

I. INTRODUCTION

I, MARY ELLEN COLE, hereby declare and state:

1. I am the Information Review Officer ("IRO") for the National Clandestine Service ("NCS") of the Central Intelligence Agency ("CIA"). I was appointed to this position in June 2010. I have held operational and managerial positions in the CIA since 1979.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities. As the IRO for the NCS, I am authorized to assess the current, proper classification of CIA information based on the classification criteria of Executive Order 13526 and applicable CIA regulations. As the IRO, I am

responsible for the classification review of documents and information originated by the NCS or otherwise implicating NCS interests, including documents which may be the subject of court proceedings or public requests for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. As part of my official duties, I ensure that any determinations regarding the public release or withholding of any such documents or information are proper and do not jeopardize the national security by disclosing classified NCS intelligence methods, operational targets, or activities or endanger NCS personnel, facilities, or sources.

3. As a senior CIA official and under a written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification and declassification decisions.

4. I am submitting this declaration in support of the CIA's motion for summary judgment in this proceeding. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

5. Plaintiffs' FOIA request seeks ten categories of records "pertaining to the use of unmanned aerial vehicles ('UAVs') - commonly referred to as 'drones'... - by the CIA and the Armed Forces for the purposes of killing targeted individuals." As an original classification authority for the CIA, I have determined that the CIA can neither confirm nor deny the existence or nonexistence of responsive records because the existence or nonexistence of any such records is a currently and properly classified fact that is exempt from release under FOIA exemptions (b) (1) and (b) (3). Official CIA acknowledgement of the existence or nonexistence of the requested records would reveal information that concerns intelligence activities, intelligences sources and methods, and U.S. foreign relations and foreign activities, the disclosure of which reasonably could be expected to cause damage to the national security of the United States. I explain the basis for this determination, commonly referred to as a Glomar response,<sup>1</sup> in Part III.

6. This declaration will explain, to the greatest extent possible on the public record,<sup>2</sup> the basis for the CIA's Glomar response to Plaintiffs' FOIA request and to identify the

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<sup>1</sup> The origins of the Glomar response trace back to this Circuit's decision in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning CIA's reported contacts with the media regarding Howard Hughes' ship, the "Hughes Glomar Explorer."

<sup>2</sup> If the Court desires, the CIA is prepared to supplement this unclassified declaration with a classified declaration containing additional information that the CIA cannot file on the public record.

applicable FOIA exemptions that support the Glomar response in this case.

## II. PLAINTIFFS' FOIA REQUEST

7. In a letter to the CIA's Information and Privacy Coordinator dated 13 January 2010,<sup>3</sup> Plaintiffs submitted a FOIA request seeking "records pertaining to the use of unmanned aerial vehicles ('UAVs') - commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper - by the CIA and the Armed Forces for the purposes of killing targeted individuals." The request refers to this subject as "drone strikes" for short, a term I will use for convenience in this declaration while not confirming or denying the CIA's involvement or interest in such drone strikes. According to Plaintiffs' Amended Complaint, Plaintiffs submitted identical FOIA requests to the Department of Defense ("DOD"), the Department of State ("State"), the Department of Justice ("DOJ"), and DOJ's Office of Legal Counsel ("OLC") on the same day. A true and correct copy of the 13 January 2010 letter is attached as Exhibit A.

8. By letter dated 9 March 2010, the CIA issued a final response to Plaintiffs' request stating that "[i]n accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to [Plaintiffs'] request," citing FOIA

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<sup>3</sup> The letter is misdated as 13 January 2009.

exemptions (b)(1) and (b)(3) and "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." The CIA informed Plaintiffs that they had a right to appeal the finding to the Agency Release Panel, the body within the CIA that considers FOIA appeals. A true and correct copy of the CIA's 9 March 2010 letter is attached as Exhibit B.

9. By letter dated 22 April 2010, Plaintiffs appealed the CIA's final response. A true and correct copy of the 22 April 2010 letter is attached as Exhibit C.

10. By letter dated 6 May 2010, the CIA acknowledged receipt of counsel for Plaintiffs' letter challenging the CIA's Glomar response. The CIA accepted Plaintiffs' appeal and noted that arrangements would be made for its consideration by the appropriate members of the Agency Release Panel. A true and correct copy of the CIA's 6 May 2010 letter is attached as Exhibit D.

11. While this appeal was pending, Plaintiffs filed an Amended Complaint in this matter on 1 June 2010, which added the CIA as a co-defendant to their previously-filed lawsuit against DOD, State, and OLC. As a result of the filing of the Amended Complaint, and pursuant to its FOIA regulations at 32 C.F.R. §

1900.42(c), the CIA terminated the administrative appeal proceedings on 14 June 2010. A true and correct copy of the CIA's 14 June 2010 letter is attached as Exhibit E.

### III. THE CIA'S GLOMAR DETERMINATION

12. The CIA has invoked the Glomar response in this case because confirming or denying the existence or nonexistence of CIA records responsive to Plaintiffs' FOIA request would reveal classified information that is protected from disclosure by statute. An official CIA acknowledgement that confirms or denies the existence or nonexistence of records responsive to Plaintiffs' FOIA request would reveal, among other things, whether or not the CIA is involved in drone strikes or at least has an intelligence interest in drone strikes. As discussed below, such a response would implicate information concerning clandestine intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities. The CIA's only course of action is to invoke a Glomar response by stating that it can neither confirm nor deny the existence or nonexistence of the requested records.

13. The CIA is charged with carrying out a number of important functions on behalf of the United States, which include, among other activities, collecting and analyzing foreign intelligence and counterintelligence. A defining characteristic of the CIA's intelligence activities is that they

are typically carried out through clandestine means, and therefore they must remain secret in order to be effective. In the context of FOIA, this means that the CIA must carefully evaluate whether its response to a particular FOIA request could jeopardize the clandestine nature of its intelligence activities or otherwise reveal previously undisclosed information about its sources, capabilities, authorities, interests, strengths, weaknesses, resources, etc.

14. In a typical scenario, a FOIA requester submits a request to the CIA for information on a particular subject and the CIA conducts a search of non-exempt records and advises whether responsive records were located. If records are located, the CIA provides non-exempt records or reasonably segregable non-exempt portions of records and withholds the remaining exempt records and exempt portions of records. In this typical circumstance, the CIA's response - either to provide or not provide the records sought - actually confirms the existence or nonexistence of CIA records related to the subject of the request. Such confirmation may pose no harm to the national security or clandestine intelligence activities because the response focuses on releasing or withholding specific substantive information. In those circumstances, the fact that the CIA possesses or does not possess records is not itself a classified fact.

15. In the present situation, however, the CIA asserted a Glomar response to Plaintiffs' request because the existence or nonexistence of CIA records responsive to this request is a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security. What is classified is not just individual records themselves on a document-by-document basis, but also the mere fact of whether or not the CIA possesses responsive records that pertain to drone strikes.

16. To illustrate, consider a FOIA request for all records within the CIA's possession regarding a specific clandestine technology. The CIA's acknowledgement of responsive records, even if the CIA withheld the records pursuant to a FOIA exemption, would reveal that the CIA has an interest in this clandestine technology and may be employing the technology. Moreover, if CIA were required to provide information about the number and nature of the responsive records it withheld (including the dates, authors, recipients, and general subject matter of each record), as is typically required in FOIA litigation, the CIA's response would reveal additional information about the depth and breadth of the CIA's interest in or use of that technology.

17. Conversely, if the CIA were to confirm that no responsive records existed, that fact would tend to reveal that



the CIA does not have an interest in or is not able to use the technology at issue. That fact could be extremely valuable to the targets of CIA intelligence efforts, who could carry out their activities with the knowledge that the CIA would be unable to monitor their activities using that particular technology.

18. To be credible and effective, the CIA must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including instances in which the CIA does not possess records responsive to a particular request. If the CIA were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist. This practice would reveal the very information that the CIA must protect in the interest of national security.

19. In this case, Plaintiffs seek ten categories of records concerning the use of drones "by the CIA and the Armed Forces for the purposes of killing targeted individuals." Hypothetically, if the CIA were to respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least had an intelligence interest in drone strikes - perhaps by providing supporting intelligence, as an example. In either case, such a response would reveal a specific clandestine

intelligence activity or interest of the CIA, and it would provide confirmation that the CIA had the capability and resources to be involved in these specific activities - all facts that are protected from disclosure by Executive Order 13526 and statute.

20. Still further, if the CIA were to admit having responsive records but withhold them under a FOIA exemption, normally it would be required to create an index that revealed the number and nature of those withheld records (including their date, authors, recipients, and general subject matter). This disclosure would reveal additional information about the depth and breadth of the CIA's involvement, or interest, in drone strikes. If, for instance, the CIA possessed 10,000 responsive records, that might indicate a significant CIA involvement or interest in drone strikes whereas 10 responsive records might indicate minimal involvement or interest. Similarly, disclosing the dates of the responsive records would provide a timeline of the CIA's activities that could provide a roadmap to when and where the CIA is operating or not operating.

21. On the other hand, if the CIA were to respond by admitting that it did not possess any responsive records, it would indicate that the CIA had no involvement or interest in drone strikes. Such a response would reveal sensitive information about the CIA's capabilities, interests, and

resources that is protected from disclosure by Executive Order 13526 and statute.

22. As each of the ten categories of records requested by Plaintiffs relate to the topic of drone strikes in some manner, a response other than a Glomar would implicate all of the concerns outlined above. For illustration purposes, however, I will address some of the categories individually.

- Category No. 1 seeks records regarding the legal basis for drone strikes. Whether or not the CIA possesses legal opinions concerning drone strikes would itself be classified because the answer provides information about the types of intelligence activities in which the CIA may be involved or interested.
- Category No. 3 requests records concerning "selection of human targets for drone strikes ..." If the CIA were required to confirm or deny the existence or nonexistence of such records, the response would reveal whether or not the CIA was specifically involved in target selection, which would itself be a classified fact as the CIA has never officially acknowledged whether or not it is involved in drone strikes.
- Category No. 5 seeks records concerning "after the fact" evaluations or assessments of individual drone

strikes. Confirming or denying the existence or nonexistence of such records would reveal a classified fact - i.e., specific intelligence collection activities and interests of the CIA, or lack thereof.

- Category No. 10 requests records regarding the "training, supervision, oversight, or discipline of UAV operators and other individuals involved in the decision to execute a targeted killing using a drone." If the CIA were to respond with anything other than a Glomar, it would unquestionably reveal whether or not the CIA was involved in drone strike operations, which is a classified fact.

23. Two categories that merit additional attention are Category No. 2, which seeks records concerning any "agreements, understandings, cooperation, or coordination between the U.S. and the governments of Afghanistan, Pakistan," or other countries concerning drone strikes, and Category No. 1.B, which requests records relating to the potential involvement of foreign governments, including the government of Pakistan, in drone strikes. Responding to these requests with anything other than a Glomar would reveal not only whether or not the CIA plays a role in drone strikes, but also whether or not foreign governments are involved in drone strikes in some manner. This

fact also is protected from disclosure by Executive Order 13526 and statute.

24. Under any of these scenarios, the CIA's confirmation or denial that it does or does not possess responsive records regarding drone strikes reasonably could be expected to cause damage to national security. It would greatly benefit hostile groups, including terrorist organizations, to know with certainty in what intelligence activities the CIA is or is not engaged or in what the CIA is or is not interested. To reveal such information would provide valuable insight into the CIA's capabilities, interests and resources that our enemies could use to reduce the effectiveness of CIA's intelligence operations.

25. The CIA's admission or denial that it does or does not possess responsive records reasonably could be expected to cause damage to the national security by negatively impacting U.S. foreign relations. Any response by the CIA that could be seen as a confirmation of its alleged involvement in drone strikes could raise questions with other countries about whether the CIA is operating clandestinely inside their borders, which in turn could cause those countries to respond in ways that would damage U.S. national interests. Moreover, as noted, some of the individual categories of requested records specifically concern the potential involvement of foreign governments in drone strikes. If the CIA is forced to acknowledge the existence or

nonexistence of records responsive to a request concerning the assistance of a foreign liaison partner, such acknowledgement would be seen as a tacit confirmation or denial of a clandestine foreign intelligence relationship and/or the involvement of a foreign government in a clandestine activity. When foreign governments cooperate with the CIA, most of them require the CIA to keep the fact of their cooperation in the strictest confidence. Any violation of this confidence could weaken, or even sever, the relationship between the CIA and its foreign intelligence partners, thus degrading the CIA's ability to combat hostile threats abroad. Given the sensitivity of these foreign relationships and their importance to the national security, Plaintiffs' request reflects precisely the situation in which CIA finds it necessary to assert a Glomar response.

26. In sum, for the CIA to officially confirm or deny the existence or nonexistence of the requested records would reveal classified national security information that concerns intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities. I have determined that such a revelation could be expected to cause damage to U.S. national security. As discussed below, I have determined that the fact of the existence or nonexistence of records responsive to Plaintiffs' FOIA request is currently and

properly classified and exempt from release under FOIA exemptions (b) (1) and (b) (3).

#### IV. APPLICATION OF FOIA EXEMPTIONS

##### A. FOIA Exemption (b) (1)

27. FOIA exemption (b) (1) provides that FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b) (1).

28. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

29. Furthermore, section 3.6(a) of Executive Order 13526 specifically states that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Executive Order 13526 therefore explicitly authorizes precisely the type of response that the CIA has provided to Plaintiffs in this case.

30. Consistent with sections 1.1(a) and 3.6(a) of Executive Order 13526, and as described below, I have determined that the existence or nonexistence of the requested records is a properly classified fact that concerns sections 1.4(c) ("intelligence activities . . . [and] intelligence sources or methods") and 1.4(d) ("foreign relations or foreign activities of the United States"). This fact constitutes information that is owned by and under the control of the U.S. Government, the unauthorized disclosure of which reasonably could be expected to result in damage to national security.

31. My determination that the existence or nonexistence of the requested records is classified has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.



**1. Intelligence Activities**

32. Clandestine intelligence activities lie at the heart of the CIA's mission. As previously described, an acknowledgment of information regarding specific intelligence activities can reveal the CIA's specific intelligence capabilities, authorities, interests, and resources. Terrorist organizations, foreign intelligence services, and other hostile groups use this information to thwart CIA activities and attack the United States and its interests. These parties search continually for information regarding the activities of the CIA and are able to gather information from myriad sources, analyze this information, and devise ways to defeat the CIA activities from seemingly disparate pieces of information. In this case, as detailed in Part III, acknowledging the existence or nonexistence of the requested records reasonably could be expected to cause damage to the national security by disclosing whether or not the CIA is engaged in or otherwise interested in clandestine intelligence activities related to drone strikes.

**2. Intelligence Sources and Methods**

33. For the same reasons, the existence or non-existence of records responsive to Plaintiffs' requests also implicates intelligence sources and methods; disclosure of this information likewise reasonably can be expected to cause damage to national security. Intelligence sources and methods are the basic

practices and procedures used by the CIA to accomplish its mission. They can include human assets, foreign liaison relationships, sophisticated technological devices, collection activities, cover mechanisms, and other sensitive intelligence tools. As articulated in Part III, to confirm or deny that the CIA possesses records responsive to Plaintiffs' request could risk the disclosure of the existence or nonexistence of several potential intelligence sources and methods, including the CIA's possible relationships with foreign liaison partners relating to drone strikes, any CIA interest in drone strikes, and the CIA's capabilities relating to that particular device.

34. Intelligence sources and methods must be protected from disclosure in every situation where a certain intelligence capability, technique, or interest is unknown to those groups that could take countermeasures to nullify its effectiveness. Clandestine intelligence techniques, capabilities, or devices are valuable only so long as they remain unknown and unsuspected. Once an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use by the CIA is seriously jeopardized.

35. The CIA must do more than prevent explicit references to an intelligence source or method; it must also prevent indirect references to such a source or method. One vehicle for gathering information about the CIA capabilities is by reviewing

officially-released information. We know that terrorist organizations and other hostile groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the CIA's collection efforts. Thus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data.

### **3. Foreign Relations and Foreign Activities of the United States**

36. Responding to Plaintiffs' FOIA request with anything other than a Glomar response also would reveal information concerning U.S. foreign relations and foreign activities, the disclosure of which reasonably can be expected to cause damage to the national security. As an initial matter, because CIA's operations are conducted almost exclusively overseas or otherwise concern foreign intelligence matters, they generally are U.S. "foreign" activities by definition. In this case, that means that information concerning the CIA's involvement in drone strikes, if such information existed, would concern a potential foreign activity that would fall within section 1.4(d) of Executive Order 13526.

37. As described in Section III, to confirm or deny the existence of responsive records also could reveal information

that would negatively impact the foreign relations of the United States. In carrying out its legally authorized intelligence activities, the CIA engages in activities that, if known by foreign nations, reasonably could be expected to cause damage to U.S. relations with affected or interested nations. Although it is generally known that the CIA conducts clandestine intelligence operations, identifying an interest in a particular matter or publicly disclosing a particular intelligence activity could cause the affected or interested foreign government to respond in ways that would damage U.S. national interests. An official acknowledgement that the CIA possesses the requested information could be construed by a foreign government, whether friend or foe, to mean that the CIA has operated undetected within that country's borders or has undertaken certain intelligence operations against its residents. Such a perception could adversely affect U.S. foreign relations with that nation.

38. U.S. foreign relations are further implicated by the categories of the FOIA request that specifically concern the potential involvement of foreign countries in drone strikes. If the CIA is required to deny the existence of such records, it would have the same impact on foreign relations as described in the preceding paragraph. If the CIA is required to confirm the existence of such records, it could be interpreted by some to

mean that certain foreign liaison partners of the CIA are involved in drone strikes, which could have political implications in those countries and also make them less willing to cooperate with the CIA in the future.

**B. FOIA Exemption (b) (3)**

39. FOIA exemption (b) (3) provides that FOIA does not apply to matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

5 U.S.C. § 552(b) (3).

40. Section 102A(i) (1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i) (1) (the "National Security Act"), provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b) (3). Under the direction of the DNI pursuant to section 102A, and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods

from unauthorized disclosure.<sup>4</sup> Parts III and IV(A) of this declaration demonstrate that acknowledging the existence or nonexistence of the requested records would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect.

41. Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g (the "CIA Act"), provides that the CIA shall be exempted from the provisions of "any other law" (in this case, FOIA) which requires the publication or disclosure of, *inter alia*, the "functions" of the CIA. Accordingly, under section 6, the CIA is exempt from disclosing information relating to its core functions - which plainly include clandestine intelligence activities, intelligence sources and methods and foreign liaison relationships. The CIA Act therefore constitutes a federal statute which "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As this declaration has explained in detail, acknowledging the existence or nonexistence of the requested records would require

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<sup>4</sup> Section 1.6(d) of Executive Order 12333, as amended, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C.A. § 401 note at 25 (West Supp. 2009), and as amended by Executive Order 13470, 73 Fed. Reg. 45,323 (July 30, 2008) requires the Director of the Central Intelligence Agency to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI] [.]"

the CIA to disclose information about its core functions, an outcome the CIA Act expressly prohibits.

42. Given that Plaintiffs' request falls within the ambit of both the National Security Act and the CIA Act, revealing the existence or nonexistence of the requested records is a classified fact that is exempt from disclosure under FOIA exemption (b)(3). In contrast to Executive Order 13526, these statutes do not require the CIA to identify and describe the damage to the national security that reasonably could be expected to result should the CIA confirm or deny the existence or nonexistence of records responsive to Plaintiffs' FOIA request. Nonetheless, I refer the Court to the paragraphs above for a description of the damage to the national security should anything other than a Glomar response be required of the CIA in this case. FOIA exemptions (b)(1) and (b)(3) thus apply independently and co-extensively to Plaintiffs' request.

**V. THE ABSENCE OF AUTHORIZED OFFICIAL DISCLOSURES**

43. In their administrative appeal, Plaintiffs reference a number of statements of current and former U.S. Government officials, news reports, and other publicly available information to support their argument that the CIA has "waived [its] ability to invoke a Glomar response..." Contrary to Plaintiffs' suggestion, no authorized CIA or Executive Branch official has disclosed whether or not the CIA possesses records

regarding drone strikes or whether or not the CIA is involved in drone strikes or has an interest in drone strikes. These news reports largely amount to media speculation and conjecture by individuals who do not have the authority to make an official and documented disclosure on behalf of the CIA.

44. Indeed, many of the statements cited by Plaintiffs are either unsourced or come from former government officials or anonymous individuals. These statements do not constitute officially authorized disclosures by the CIA. If the CIA was precluded from issuing a Glomar response to FOIA requests as a result of such non-authoritative statements, the U.S. Government's ability to protect classified information would be eviscerated, thereby causing significant and far reaching damage to the U.S. national security.

45. Pages 3-4 of Plaintiffs' administrative appeal also cite several statements from the CIA Director and the Director of National Intelligence (DNI) to support their argument that the CIA has waived its right to invoke the Glomar response. I have reviewed these statements. In none of the statements did the CIA Director or the DNI acknowledge whether or not the CIA possesses responsive records regarding drone strikes - the relevant inquiry here. Nor did they acknowledge whether or not the CIA is involved in drone strikes or has an intelligence interest in drone strikes. When focusing on what the CIA



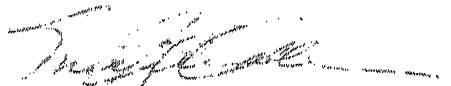
Director and DNI specifically said in these remarks, it is apparent that these two officials made no admissions that would imperil the CIA's ability to invoke a Glomar response.

VI. CONCLUSION

46. In this case the existence or nonexistence of the requested records is itself a properly classified fact and is so intricately intertwined with intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities that this fact must remain classified. Accordingly, I have determined the only appropriate response is for the CIA to neither confirm nor deny the existence of the requested records under FOIA exemptions (b)(1) and (b)(3).

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 30<sup>th</sup> day of September 2010.



Mary Ellen Cole  
Information Review Officer  
Central Intelligence Agency

# Exhibit A

NATIONAL SECURITY PROJECT



January 13, 2009

Director, Freedom of Information and Security Review  
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Washington, D.C. 20301-1155

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Office of Information Programs and Services  
A/GIS/IPS/RL  
U.S. Department of State  
Washington, D.C. 20522-8100

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/  
Expedited Processing Requested

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, and the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General's

Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sep. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").<sup>1</sup>

This Request seeks records pertaining to the use of unmanned aerial vehicles ("UAVs")—commonly referred to as "drones" and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals. In particular, we seek information about the legal basis in domestic, foreign, and international law for the use of drones to conduct targeted killings. We request information regarding the rules and standards that the Armed Forces and the CIA use to determine when and where these weapons may be used, the targets that they may be used against, and the processes in place to decide whether their use is legally permissible in particular circumstances, especially in the face of anticipated civilian casualties. We also seek information about how these rules and standards are implemented and enforced. We request information about how the consequences of drone strikes are assessed, including methods for determining the number of civilian and non-civilian casualties. Finally, we request information about the frequency of drone strikes and the number of individuals—Al Qaeda, Afghan Taliban, other targeted individuals, innocent civilians, or otherwise—who have been killed or injured in these operations.

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According to recent investigative reports, over the past year the United States has greatly increased the frequency with which it has attempted targeted killings using UAVs. See, e.g., James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009), [http://www.newamerica.net/publications/policy/revenge\\_drones](http://www.newamerica.net/publications/policy/revenge_drones); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15.

<sup>1</sup> The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices including, among others, those pertaining to the detention, treatment, and process afforded suspected terrorists; domestic surveillance programs; racial and religious discrimination and profiling; and the human cost of the wars in Iraq and Afghanistan and other counterterrorism operations.

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Some of these strikes are reportedly occurring outside conventional battlefields. Strikes have been reported not only in Afghanistan and Iraq—present theaters of war—but also in countries where the United States is not at war, including Pakistan and Yemen. See Scott Shane, *C.I.A. Drone Use is Set to Expand inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1 (“For the first time in history, a civilian intelligence agency is using robots to carry out a military mission, selecting people for killing in a country where the United States is not officially at war.”); Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15; Greg Miller, *Drones Based in Pakistan*, L.A. Times, Feb. 13, 2001, at 3; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16.

The use of drones to target individuals far from any battlefield or active theater of war dates back several years, and has resulted in the killing of at least one American citizen. In November 2002, the United States fired a Hellfire missile from a Predator drone in Yemen, killing six men travelling in a car. The apparent target of the strike was a Yemeni suspect in the October 2000 bombing of the USS Cole. See James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16.; Howard Witt, *U.S.: Killing of al Qaeda Suspects Was Lawful*, Chi. Trib., Nov. 24, 2002, at 1. The strike also killed an American citizen, Ahmed Hijazi, also known as Kamal Derwish. Mr. Hijazi had recently been identified as a suspect wanted for questioning in an ongoing terrorism prosecution in federal court in Buffalo, New York. See John Kifner & Marc Santora, *U.S. Names 7th Man in Qaeda Cell Near Buffalo and Calls His Role Pivotal*, N.Y. Times, Sep. 18, 2002, at A19; Greg Miller & Josh Meyer, *U.S. Citizen Killed by C.I.A. May Have Led Buffalo Cell*, Orlando Sentinel, Nov. 9, 2002, at A3. See generally Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at 11 (recounting the story of the Buffalo terrorism trial).

Reports suggest that the targets of drone strikes are not limited to members of al Qaeda in Afghanistan or the Afghan Taliban. Rather, the scope of the drone program appears to have expanded to include the targeted killing of members of Pakistani insurgent groups; individuals selected as targets by the Pakistani government and others. In Afghanistan, targeting authority seems to extend to Afghan drug kingpins.

See, e.g., James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Craig Whitlock, *Afghans Oppose U.S. Hit List of Drug Traffickers*, Wash. Post., Oct. 24, 2009; James Risen, *Drug Chieftains Tied to Taliban are U.S. Targets*, N.Y. Times, Aug. 10, 2009, at A1. The limits on who may be killed in this manner are unknown, and may in some circumstances permit the targeting of American citizens. See John J. Lumpkin, *CIA Can Kill Americans in al Qaeda*, Chi. Trib., Dec. 4, 2002, at 19 ("U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA . . . when other options are unavailable."). There is significant concern that drones may be used to target individuals who are not legitimate military targets under domestic or international law. See generally Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010.

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Reports also suggest that in addition to Air Force and Special Forces personnel, non-military personnel including CIA agents are making targeting decisions, piloting drones, and firing missiles. Defense contractors also appear to be playing an important role in the drone program. See Leon Panetta, Director, Central Intelligence Agency, Remarks at the Pacific Council on International Policy (May 18, 2009) (discussing drone strikes in Pakistan); James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009. It appears, therefore, that lethal force is being exercised by individuals who are not in the military chain of command, are not subject to military rules and discipline, and do not operate under any other public system of accountability or oversight.

Perhaps the greatest public concern regarding the use of drones to execute targeted killings, however, is that their use may have resulted in an intolerably high proportion of civilian casualties. Without official sources of information, current estimates of the number and proportion of civilians killed vary widely. See David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13 (reporting that up to 98% of deaths are civilians); Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009 (suggesting that 10 civilians are killed for each militant); Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009) (reporting, based on a review of publicly available sources, that between 31 and 33 percent of those killed are civilians); Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1 (reporting on the estimates of civilian casualties offered by non-governmental analysts,

as contrasted with the estimate of an anonymous government official, who cited a figure of approximately 20 total civilians deaths); *Over 700 Killed in 44 Drone Strikes in 2009*, Dawn (Pakistan), Jan. 2, 2010 (reporting that Pakistani authorities believe 90% of those killed in drone strikes in 2009 were civilians); Leon Panetta, Director, Central Intelligence Agency, Remarks at the Pacific Council on International Policy (May 18, 2009) (describing drone strikes as involving “a minimum of collateral damage”).

Despite all of these concerns, the parameters of the program and the legal basis for using drones to execute targeted killings remain almost entirely obscure. It is unclear who may be targeted by a drone strike, how targets are selected, what the geographical or territorial limits of the targeted killing program are, how civilian casualties are minimized, and who is making operational decisions about particular strikes. The public also has little information about any internal accountability mechanisms by which laws and rules governing targeted killings are enforced. Nor does the public have reliable information about who has been killed, how many civilians have been killed, and how this information is verified, if at all. Without this information the public is unable to make an informed judgment about the use of drones to conduct targeted killings, which “represents a radically new and geographically unbounded use of state-sanctioned lethal force.” Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009. We make the following requests for information in hopes of filling that void.

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#### I. Requested Records

1. All records created after September 11, 2001 pertaining to the legal basis in domestic, foreign and international law upon which unmanned aerial vehicles (“UAVs” or “drones”) can be used to execute targeted killings (“drone strikes”), including but not limited to records regarding:
  - A. who may be targeted by a drone strike (e.g. members of al Qaeda in Afghanistan or the Afghan Taliban; individuals who merely “support,” but are not part of these two groups; individuals who belong to other organizations or groups; individuals involved in the Afghan drug trade);
  - B. whether drones may be used against individuals who are selected or nominated as targets by a foreign government, including the Government of Pakistan;
  - C. limits on civilian casualties, or measures that must or should be taken to minimize civilian casualties;

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- D. the verification, both in advance of a drone strike and following it, of the identity and status or affiliation of individuals killed (e.g. whether killed persons were members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the drug trade, innocent civilians, etc.);
  - E. where, geographically or territorially, drones may be used to execute targeted killings and whether they may be used outside Afghanistan and Iraq and, if so, under what conditions or restrictions;
  - F. whether drones can be used by the CIA or other government agencies aside from the Armed Forces in order to execute targeted killings; and, if such use is permitted, in what circumstances and under what conditions; and
  - G. whether and to what extent government contractors can be involved in planning or providing support for, or executing a targeted killing using a drone.
2. All records created after September 11, 2001 pertaining to agreements, understandings, cooperation or coordination between the U.S. and the governments of Afghanistan, Pakistan, or any other country regarding the use of drones to effect targeted killings in the territory of those countries, including but not limited to records regarding:
- A. the selection of targets for drone strikes, or the determination as to whether a particular strike should be carried out; and
  - B. the limits on the use of drone strikes in Afghanistan, Pakistan or other countries, including geographical or territorial limitations, limitations on who may be targeted, measures that must be taken to limit civilian casualties, or measures that must be taken to assess the number of casualties and to determine the identity and status or affiliation of individuals killed.
3. All records created after September 11, 2001 pertaining to the selection of human targets for drone strikes and any limits on who may be targeted by a drone strike.
4. All records created after September 11, 2001 pertaining to civilian casualties in drone strikes, including but not limited to measures regarding the determination of the likelihood of civilian casualties,



measures to limit civilian casualties, and guidelines about when drone strikes may be carried out despite a likelihood of civilian casualties.

5. All records created after September 11, 2001 pertaining to the assessment or evaluation of individual drone strikes after the fact, including but not limited to records regarding:
  - A. how the number of casualties of particular drone strikes is determined;
  - B. how the identity of individuals killed in drone strikes is determined;
  - C. how the status and affiliation of individuals killed in drone strikes is determined, i.e. whether individuals killed were members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the drug trade, innocent civilians, or any other status or affiliation; and
  - D. the assessment of the performance of UAV operators and others involved in executing a targeting killing using a drone.
6. All records created after September 11, 2001, pertaining to any geographical or territorial limits on the use of UAVs to kill targeted individuals.
7. All records created after September 11, 2001, including logs, charts, or lists, pertaining to the number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike.
8. All records created after September 11, 2001, including logs, charts or lists, pertaining to the number, identity, status, and affiliation of individuals killed in drone strikes, including but not limited to records regarding:
  - A. the number (including estimates) of individuals killed in each drone strike;
  - B. the number (including estimates) of individuals of each particular status or affiliation killed in each drone strike, (e.g. members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the Afghan drug trade, civilians,

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members of some other group, etc.), including the number of individuals of unknown status or affiliation killed in each strike.

C. the total number (including estimates) of individuals killed in drone strikes since September 11, 2001 and the total number (including estimates) of individuals of each particular status or affiliation killed, including those whose status or affiliation is unknown.

9. All records created after September 11, 2001 pertaining to who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings, including but not limited to any records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel in the use of UAVs for the purpose of executing targeted killings.

10. All records created after September 11, 2001 pertaining to the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone, including but not limited to CIA personnel, government contractors, and military personnel.<sup>2</sup>

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## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need" for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a "breaking news story of general

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<sup>2</sup> To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on June 22, 2006 to the Department of Defense, the Chief of Naval Operations, the Commandant of the Marine Corps and the U.S. Army, the ACLU is not seeking those records here. The ACLU has worded these requests as precisely and narrowly as possible given the public interest in the topic and given the limited information the ACLU has about the nature of responsive documents in the agencies' possession. It may, of course, be possible to sharpen or narrow the requests further with input from the agencies about the nature and volume of documents responsive to these requests. The ACLU is willing to do so in the context of good faith discussions with each agency, so as to eliminate unnecessary administrative burdens and to focus agency efforts on the substance of these requests.

public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

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The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU’s “Torture FOIA” webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. *See Jameel Jaffer & Amrit Singh, Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to

subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>3</sup>

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Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's use of unmanned aerial vehicles to target and kill individuals in Afghanistan, Pakistan and elsewhere, including individuals who are not members of either al Qaeda or the Afghan Taliban, and who may not be proper military targets. The records sought will help determine what the government's asserted legal basis for these targeted killings is, whether they comply with domestic and international law, how many innocent civilians have been killed, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about drone attacks in Afghanistan, Pakistan and elsewhere. *See, e.g.,* Joshua Partlow, *Drones In More Use in Afghanistan*, Wash. Post, Jan. 12, 2010; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; *Officials: Alleged US Missiles Kill 2 in Pakistan*, Assoc. Press, Nov. 4, 2009; David Rhode, *Held by the Taliban: A Drone Strike and Dwindling Hope*, N. Y. Times, Oct. 21, 2009, at A1; Declan Walsh, *In Pakistan, US drone strike on Taliban kills 12*, Guardian, Apr. 2, 2009; Tim Reid, *U.S. Continues with Airstrikes*, Times (U.K.), Jan. 24, 2009; James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1.

The Obama administration's increased reliance on the use of drones to execute targeted killings in Pakistan has served to spark widespread and increasing media interest in, and public concern about, this practice. *See, e.g.,* James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8,

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<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

2010; Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Bill Roggio and Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, The Long War Journal (July 21, 2009); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15.

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News stories and investigative reports have also suggested that drone attacks are being used outside Iraq and Afghanistan, in places where there is no active war. *See, e.g.*, Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15. Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1.

These reports have instigated serious concerns that the geographically unbounded use of drones to execute targeted killings is contrary to domestic and international law and may amount to illegal state-sanctioned extrajudicial killing. *See, e.g.*, Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009).

News reports also suggest that drones are not only being used to target members of al Qaeda or the Afghan Taliban, but also Afghan drug lords, Pakistani insurgents, and others identified as enemies of the Pakistani government. *See, e.g.*, James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Craig Whitlock, *Afghans oppose U.S. hit list of drug traffickers*, Wash. Post., Oct. 24, 2009.

Such reports have caused public concern that the expansion of the range of permissible targets allows the extrajudicial killing of individuals properly regarded as criminal suspects rather than military targets. Commentators have suggested that these strikes may not comply with

domestic or international law, and that they open up significant possibilities for abuse. *See, e.g.*, Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Interview with Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, DemocracyNow! (Oct. 28, 2009); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009); U.N. General Assembly, Social, Humanitarian and Cultural Affairs Committee, Statement by Prof. Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions (Oct. 27, 2009).

Several reports have been published estimating the number of civilian casualties that have resulted from drone strikes, and the proportion of civilian casualties in relation to targeted individuals. These estimates vary widely. *See* Bill Roggio and Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, The Long War Journal (July 21, 2009); Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and Pakistan*, at 17-20 Center for New American Security (June 2009); Over 700 Killed in 44 Drone Strikes in 2009, Dawn (Pakistan), Jan. 2, 2010.

These reports have created a significant concern that the number of civilian casualties is simply too high. One British jurist has gone as far as to suggest that UAVs should perhaps be banned as an instrument of war. *See* Murray Wardop, *Unmanned Drones Could be Banned, Says Senior Judge*, London Daily Telegraph, July 6, 2009. Others, however, suggest that the proportion of casualties in fact compares favorably to other weapons. *See, e.g.*, Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.

A public debate has also emerged about the wisdom of using drones to carry out targeted killings. Experts and commentators from diverse backgrounds have expressed concerns that the use of drones in Afghanistan and Pakistan—and especially the high number of civilian casualties—are creating widespread hostility to the United States in the local populations, are providing hostile organizations with a powerful propaganda tool, and are therefore contributing to the growth of such organizations. *See, e.g.*, Rafia Zakaria, *Drones and Suicide Attacks*, Dawn (Pakistan), Oct. 14, 2009; David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and*

*Pakistan*, 17-20 Center for New American Security (June 2009); Peter W. Singer, *Attack of the Military Drones*, Brookings Institution, June 27, 2009; Declaration of Gen. David Petraeus, Appendix to the Petition for a Writ of Certiorari at 191a, *U.S. Dep't of Defense v. American Civil Liberties Union*, No. 09-160 (U.S. filed Aug. 7, 2009) (“Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties.”).

Other commentators contend that the use of drones for targeted killings is a useful counterterrorism tactic. *See, e.g.*, Peter Bergen and Katherine Tiedemann, *Pakistan drone war takes a toll on militants -- and civilians*, CNN.com, Oct. 29, 2009; Daniel Byman, *Do Targeted Killings Work?*, *Foreign Policy*, July 14, 2009; Daniel Byman, *Taliban vs. Predator: Are Targeted Killings Inside Pakistan a Good Idea?*, *Foreign Affairs*, Mar. 18, 2009; Editorial, *Predators and Civilians*, *Wall St. J.*, July 13, 2009, at A12.

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The public is unable to engage meaningfully with or to assess these policy and legal debates because there is a paucity of reliable information about the scope of the drone program, its legal underpinnings, and its results. While there are differing opinions as to whether and how drones should be used for targeted killings, commentators on all sides agree that the government should release to the public more details about the operation of this program and its legal underpinnings. *See, e.g.*, Jane Mayer, *The Predator War*, *The New Yorker*, Oct. 26, 2009; Editorial, *Predators and Civilians*, *Wall St. J.*, July 14, 2009, at A12 (“We’d also say that the Obama Administration—which, to its credit, has stepped up the use of Predators—should make public the kind of information we’ve seen.”); Roger Cohen, *Of Fruit Flies and Drones*, *Int’l Herald Trib.*, Nov. 13, 2009, at 9 (“The Obama administration should not be targeting people for killing without some public debate about how such targets are selected, what the grounds are in the laws of war, and what agencies are involved. Right now there’s an accountability void.”); Interview with Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, DemocracyNow! (Oct. 28, 2009); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009); Michele Nichols, *U.N. Envoy Slams U.S. for Unanswered Drone Questions*, *Reuters*, Oct. 27, 2009.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the use of UAVs to execute targeted killings. *See* 22 C.F.R. § 171.17(a)(1); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

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We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 22 C.F.R. 171.15(c); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004)



(finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.<sup>4</sup>

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

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If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

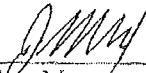
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<sup>4</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Jonathan Manes  
National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,



Jonathan Manes  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 519-7847  
Fax: (212) 549-2654

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# Exhibit B

Central Intelligence Agency



Washington, D.C. 20505

9 March 2010

Mr. Jonathan Manes  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Reference: F-2010-00498

Dear Mr. Manes:

This is a final response to your 13 January 2009 [sic] Freedom of Information Act (FOIA) request for "records pertaining to the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals."

In accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3). I have enclosed an explanation of these exemptions for your reference and retention. As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 45 days from the date of this letter. Please include the basis of your appeal.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson  
Information and Privacy Coordinator

Enclosure

### Explanation of Exemptions

#### Freedom of Information Act:

- (b)(1) exempts from disclosure information currently and properly classified, pursuant to an Executive Order;
- (b)(2) exempts from disclosure information, which pertains solely to the internal personnel rules and practices of the Agency;
- (b)(3) exempts from disclosure information that another federal statute protects, provided that the other federal statute either requires that the matters be withheld, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. The (b)(3) statutes upon which the CIA relies include, but are not limited to, the CIA Act of 1949;
- (b)(4) exempts from disclosure trade secrets and commercial or financial information that is obtained from a person and that is privileged or confidential;
- (b)(5) exempts from disclosure inter-and intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) exempts from disclosure information from personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy;
- (b)(7) exempts from disclosure information compiled for law enforcement purposes to the extent that the production of the information (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source or, in the case of information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger any individual's life or physical safety;
- (b)(8) exempts from disclosure information contained in reports or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for regulating or supervising financial institutions; and
- (b)(9) exempts from disclosure geological and geophysical information and data, including maps, concerning wells.

January 2007

# Exhibit C

NATIONAL SECURITY PROJECT



Apr. 22, 2010

Agency Release Panel  
c/o Delores M. Nelson, Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

**Re: FOIA Appeal, Reference # F-2010-00498**

Dear Ms. Nelson,

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
212.549.2500  
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**OFFICERS AND DIRECTORS**  
SUSAN N. BERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") write to appeal the Central Intelligence Agency's ("CIA") refusal to confirm or deny the existence or nonexistence of records requested by Freedom of Information Act request number F-2010-00498 ("Request"). The Request seeks records pertaining to the use of unmanned aerial vehicles – commonly known as drones – by the CIA and the armed forces for the purpose of killing targeted individuals. *See* Ex. A (FOIA Request of January 13, 2010<sup>1</sup>). The CIA's letter refusing to confirm or deny the existence or nonexistence of responsive records ("Response Letter") is dated March 9, 2010. *See* Ex. B (Response Letter). The ACLU respectfully requests reconsideration of this determination and the processing and release of records responsive to the Request.

The ACLU has requested the release of 10 distinct categories of information pertaining to a widely reported program in which the CIA and other agencies use drones to conduct targeted killings of individuals. In outline, the Request seeks information about the legal basis for, and limits on, the program; basic information about the strikes, including the number of civilians and non-civilians killed; and information about how the program is overseen and supervised internally. The FOIA office denied the ACLU's FOIA request with a "Glomar" response. The response letter stated, in conclusory terms, that "the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request [because t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." Ex. B.

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<sup>1</sup> Note that the FOIA Request was incorrectly dated – the date was rendered January 13, 2009 instead of 2010.

The Glomar response provided here is far too sweeping and categorical. Under the Freedom of Information Act (“FOIA”), an agency may invoke the “Glomar” response – refusing to confirm or deny the existence of requested records – only if the very fact of existence or nonexistence of the records is itself properly classified under FOIA exemption (b)(1), properly withheld pursuant to statute under exemption (b)(3), or properly subject to another FOIA exemption. *Philippi v. CIA* (“*Philippi I*”), 546 F.2d 1009 (D.C. Cir. 1976); Exec. Order No. 12,958, § 3.6(a), as amended by Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). It is unlikely in the extreme that that merely confirming or denying the existence of particular records pertaining to the use of drones to conduct targeted killing would reveal a classified fact or intelligence sources or methods.

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The Response Letter fails adequately to justify the sweeping and categorical Glomar response. The Response Letter does not explain the basis for invoking the Glomar response beyond the conclusory statement that “[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by [statute].” Ex. B. The Response Letter does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal a classified fact. The Response Letter does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal an intelligence source or method. The Response Letter does not explain how the requested records even *relate* to intelligence sources or methods. Most importantly, the Response Letter makes no attempt to distinguish between the ten distinct categories of information contained in the ACLU’s Request or to explain why confirming or denying *any particular category* of requested records would reveal a classified fact or intelligence sources and methods. The summary and categorical justification provided in the Response Letter is not an adequate justification for denying the ACLU’s FOIA request *in toto*. See *Riquelme v. C.I.A.*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) (“[A] Glomar response does not . . . relieve [an] agency of its burden of proof.” (citing *Philippi I*, 546 F.2d at 1013)).

The sweeping Glomar response provided in the Response Letter is particularly inappropriate because the government has acknowledged facts at issue in the Request. The CIA’s use of drones to conduct targeted killings in Pakistan – and, on at least one occasion, in Yemen – are by no means a secret. Previous government acknowledgement of information sought in a FOIA request waives an otherwise valid Glomar claim under Exemptions 1 and 3. *Wolf v. C.I.A.*, 473 F.3d 370, 378 (D.C. Cir. 2007) (“[W]hen information has been officially acknowledged, its disclosure may be compelled even over an agency’s otherwise valid exemption claim.”) (internal quotation marks omitted) (citing *Fitzgibbon v. C.I.A.*,



911 F.2d 755, 765 (D.C. Cir. 1990)). Thus, the government may not refuse to confirm or deny the existence of records that detail information previously disclosed. *Id.*

CIA Director Leon Panetta has publicly discussed the CIA's drone operations in Pakistan on several occasions. As far back as February 2009, Mr. Panetta responded to "questions about CIA missile attacks, launched from unmanned Predator aircraft" by stating that "[n]othing has changed our efforts to go after terrorists, and nothing will change those efforts." Karen DeYoung & Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says*, Wash. Post, Feb. 29, 2009. He described CIA "efforts . . . to destabilize al Qaeda and destroy its leadership" as "successful." *Id.*

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On March 18, 2009 at a public engagement, the CIA Director responded to a question about drone strikes in Pakistan. Mr. Panetta noted that he could not "go into particulars" about the drone strikes, but proceeded to do just that, acknowledging their existence by stating that "these operations have been very effective" and going on to discuss their targeting precision by distinguishing "plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage," from drone attacks which "involve[] a minimum of collateral damage." Remarks of the Director of Central Intelligence, Leon E. Panetta, at the Pacific Council on International Policy (Mar. 18, 2009).<sup>2</sup> The necessary implication of his acknowledgement of "collateral damage" is that CIA drones are being used to deploy lethal weapons. His remarks further acknowledged that drones were being used to kill individual targets, specifically, targets in the "al-Qaeda leadership." *Id.* Indeed, Mr. Panetta was surprisingly frank, describing the strikes as "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership." *Id.* These remarks squarely acknowledge that the CIA is engaged in drone strikes that are within the scope of the FOIA Request.

Mr. Panetta has continued to acknowledge that the CIA is involved in targeted killing operations. In a recent interview with journalists, Mr. Panetta described the drone strikes in Pakistan as "the most aggressive operation that CIA has been involved in in our history." Peter Finn & Joby Warrick *Al-Qaida Crippled As Leaders Stay In Hiding, CIA Chief Says*, Wash. Post, Mar. 17, 2010. Referring to the drone/targeted killing program he stated that "[i]hose operations are seriously disrupting al-Qaida" and that "we really do have them on the run." *Id.* In response to a question about the suicide bombing in southern Afghanistan that killed several CIA officials, Mr. Panetta again acknowledged the CIA's use of lethal force in the region: "You can't just conduct the kind of aggressive

<sup>2</sup> <https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html>.

operations we are conducting against the enemy and not expect that they are not going to try to retaliate.” Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010. These statements clearly and unmistakably reveal that the CIA is involved in the use of drones to conduct targeted killings.

Mr. Panetta has gone so far as to acknowledge specific CIA strikes, commenting, with respect to the killing of an al Qaeda suspect in a March 8 drone strike, that the death sent a “very important signal that they are not going to be able to hide in urban areas.” Peter Finn & Joby Warrick *Al-Qaida Crippled As Leaders Stay In Hiding, CIA Chief Says*, Wash. Post, Mar. 17, 2010. Mr. Panetta even confirmed the identity of the al Qaeda suspect that was killed. Siobhan Gorman & Jonathan Weisman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010.

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If there remained any doubt as to the CIA’s involvement in drone strikes and targeted killings, Mr. Panetta put it to rest when he publicly acknowledged that he personally authorizes every strike, making the decisions regarding whom to target and kill. See Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010 (““Any time you make decisions on life and death, I don’t take that lightly. That’s a serious decision,” [Panetta] said. ‘And yet, I also feel very comfortable with making those decisions because I know I’m dealing with people who threaten the safety of this country and are prepared to attack us at any moment.’”). One could hardly imagine a clearer acknowledgement of CIA involvement in drone strikes and targeted killings than a statement by its Director acknowledging that he “make[s] decisions on life and death.”

The Director of National Intelligence (“DNI”) – the “head of the intelligence community,” 50 U.S.C. § 403 – has also acknowledged the targeted killing program in public remarks. In public testimony before the House Intelligence Committee, he stated that “[w]e take direct action against terrorists in the intelligence community.” He went on to explain that such “direct action” can “involve killing an American.” Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, Wash. Post, Feb. 4, 2010. Not only did he confirm the existence of the targeted killing program, and that U.S. citizens may be its targets, but he also publicly stated some of the criteria that are used to pick targets. *Id.* (“The director of national intelligence said the factors that ‘primarily’ weigh on the decision to target an American include ‘whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans.’”). These matters fall squarely within the scope of our Request, which seeks, among other information, records relating to who may be targeted.

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Given all this official confirmation and commentary on CIA drone strikes by the CIA Director and the DNI, the CIA's Glomar response is utterly unsupportable. The CIA cannot refuse to confirm or deny the existence of responsive records even as its director and the DNI acknowledge the program, comment on it, and discuss its details. The CIA's involvement in drone strike/targeted killing operations is now not simply an open secret; in light of all these public comments, it is no secret at all. The sweeping and categorical Glomar response provided in the Response Letter cannot survive in the face of these official public disclosures. See *Wolf*, 473 F.3d at 378. The above public acknowledgements are specific and relevant to the records requested here and therefore waive any FOIA exemptions that might otherwise have applied. The fact of the existence or non-existence of responsive records is not—or is no longer—properly classified, nor can it be regarded as “intelligence sources and methods” exempt from disclosure under the Section 6 of the CIA Act of 1949. FOIA exemptions 1 and 3 – the only exemptions upon which CIA bases its Glomar response – are therefore inapplicable. The official acknowledgements from the CIA Director and the DNI have long since eliminated the option of responding to our FOIA Request with a Glomar response on those grounds.

That a Glomar response is inappropriate becomes even clearer when one considers that the public statements of the CIA Director and the DNI do not simply waive Exemptions 1 and 3, but affirmatively demonstrate the existence of records responsive to the Request. Any speaking notes, memos, or other documents prepared in anticipation of the CIA Director's public remarks or interviews are responsive to the Request. Furthermore, the CIA Director's acknowledgement that he personally signs off on the selection of targets indicates the existence of documents relating to those actions – analytical memoranda, signed orders, legal guidance, etc. Likewise, briefing notes or memoranda prepared for the DNI in advance of his congressional testimony are responsive documents. His confirmation that “we get specific permission” if “direct action will involve killing an American” demonstrates the existence of records regarding the targeting of particular individuals, and legal guidance regarding the procedures and standards that govern the decision to hunt and kill a U.S. citizen.

The CIA's obligation under the FOIA is to disclose such documents or to explain why they must be withheld. The CIA is “not exempted from responding to a FOIA request.” *ACLU v. Dep't of Def.*, 396 F. Supp. 2d 459, 462 (S.D.N.Y. 2005). The CIA cannot simply evade its FOIA obligations by asserting that it cannot confirm or deny the existence or non-existence of records, when that assertion is contradicted by the most senior officials of the intelligence community. The public

remarks of the CIA Director and the DNI demonstrate the existence of responsive documents, contrary to the CIA's Glomar response.

In addition to the statements of the CIA Director and the DNI, intelligence officials and other government sources have on numerous occasions disclosed to the press details about specific CIA drone strikes in Pakistan. These intelligence officials and government sources have disclosed details about particular CIA drone strikes, including in several cases facts about where the strike occurred, how many people were killed, who was killed, and whether there were any civilians killed. As a consequence of all of these disclosures, there is now substantial information about the subject matter of the ACLU's Request in the public domain.

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In assessing whether information is properly classified and thus properly withheld under Exemption (b)(1), courts take into account whether the information is already in the public domain. *See, e.g., Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) (“[S]uppression of ‘already well publicized’ information would normally ‘frustrate the pressing policies of the Act without even arguably advancing countervailing considerations.’”) (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 831-32 (D.C.Cir.1979)). When extensive information about the subject of a FOIA request is already in the public domain, courts require a “specific explanation . . . of why formal release of information already in the public domain threatens the national security.” *Id.* at 10. Here, it is difficult to fathom how confirming or denying the existence of records that discuss matters already reported in the press and available to the public (and, in large part, officially acknowledged) would in any way threaten national security.

The CIA's use of drones to conduct targeted killing is widely known and has been reported numerous times in press accounts and investigative reports, as noted in the Request. *See* Ex. A. at 4, 11 (citing James Kitfield, *Wanted: Dead*, *Nat'l J.*, Jan. 8, 2010; Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, *N.Y. Times*, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, *The New Yorker*, Oct. 26, 2009; Jeremy Scahill, *The Secret War in Pakistan*, *The Nation*, Nov. 23, 2009). Since the Request was filed, information about the CIA's program has continued to be disclosed in the press. *See infra* (citing selected articles from among the large amount of press coverage). An ongoing analysis based on the best publicly-available data reports that there have been 31 CIA-operated drone strikes in Pakistan thus far in 2010 and that those strikes have resulted in deaths numbering between 151 and 262, of which approximately 14% were not militants. *See* Peter Bergen & Katherine Tiedemann *The Year of the Drone: Online Database*, <http://counterterrorism.newamerica.net/drones> (last updated Apr. 16,

2010); Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010* (Feb. 24, 2010).

Intelligence officials have confirmed to reporters details about particular strikes. For example, intelligence officials confirmed that a strike occurred on Sunday, March 21, 2010 “in the Datta Khel area of North Waziristan” and that the strike was conducted by “drones [which] fired three missiles.” *Officials: U.S. Missiles Kill 4 in Pakistan*, Assoc. Press, Mar. 21, 2010. An intelligence official confirmed the March 8, 2010 death of a senior Al Qaeda commander by drone strike “in Miram Shah in North Waziristan.” David Sanger, *Drone Said to Kill a Leader of Al Qaeda*, N.Y. Times, Mar. 17, 2010 at A10. Intelligence officials also confirmed another strike in Pakistan the same day in another town in North Waziristan, which reportedly hit a vehicle carrying insurgents. Associated Press, *Pakistan: Drone Strikes Reported*, N.Y. Times, Mar. 17, 2010, at A5. Two intelligence officials and a military official confirmed another drone strike on March 27, 2010 “in the village of Hurmaz in North Waziristan.” *U.S. Missiles Blamed in 4 Deaths*, Assoc. Press, Mar. 28, 2010. Additionally, an American official stated that there were “strong indications” that a drone strike had killed an Al Qaeda member in western Pakistan on December 11, 2009. Mark Mazzetti and Souad Mekhennet, *Qaeda Planner in Pakistan Killed by Drone*, N.Y. Times, Dec. 11, 2009 at A8.

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Details about particular drone strikes have also been widely reported in other press accounts. For example, there was extensive reporting about a strike on Thursday, February 18. The person killed in the strike – Mohammad Haqqani, the younger brother of a leading Taliban militant – was identified, as was the location of the strike: Dande Darpakhel, in North Waziristan. Pir Zubair Shah, *Missile Strike Kills Brother of Militant in Pakistan*, N.Y. Times, Feb. 20, 2010. Eyewitnesses at the scene of Mohammad Haqqani’s death provided additional details. A Pakistani government supporter reported seeing “two drones, one going in one direction, one in another direction” before seeing two blasts hit Mr. Haqqani’s car. Jane Perlez and Pir Zubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, N.Y. Times, Apr. 4, 2010 at A1. Other drone strikes have also received coverage in the foreign press. *See, e.g., Three militants killed in US drone attack in Pakistan*, Press Tr. of India, Apr. 12, 2010 (reporting that three militants were killed in a drone strike in the Boya area of North Waziristan);<sup>3</sup> *Drone strike kills four Pakistan ‘militants’*, BBC, Apr. 16, 2010 (reporting that at least four people had been killed in a drone strike in North Waziristan, and quoting an official as saying, “Missiles hit a car carrying militants and as soon as other people

<sup>3</sup> Available at: [http://www.dnaindia.com/world/report\\_three-militants-killed-in-us-drone-attack-in-pakistan\\_1370656](http://www.dnaindia.com/world/report_three-militants-killed-in-us-drone-attack-in-pakistan_1370656)

rushed in to help, more missiles were fired by drones”);<sup>4</sup> S.H. Khan, *US missiles kill six militants in Pakistan: officials*, AFP, Mar. 30, 2010 (quoting a Pakistani intelligence official as stating that “a US drone attack targeted a compound and that six militants were reported to have been killed”).<sup>5</sup>

The August 5, 2009 drone strike that killed Baitullah Mehsud has been described with remarkable and uncommon detail. *See, e.g.*, Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009, at 36. The specific sequence of events within the CIA that led to the strike were recounted in a recent article:

On the morning of Aug. 5, CIA Director Leon Panetta was informed that Baitullah Mehsud was about to reach his father-in-law's home. Mehsud would be in the open, minimizing the risk that civilians would be injured or killed. Panetta authorized the strike, according to a senior intelligence official who described the sequence of events.

Some hours later, officials at CIA headquarters in Langley identified Mehsud on a feed from the Predator's camera. He was seen resting on the roof of the house, hooked up to a drip to palliate a kidney problem. He was not alone.

Panetta was pulled out of a White House meeting and told that Mehsud's wife was also on the rooftop, giving her husband a massage. Mehsud, implicated in suicide bombings and the assassination of former Pakistani Prime Minister Benazir Bhutto, was a major target. Panetta told his officers to take the shot. Mehsud and his wife were killed.

Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010.

More recently, there have been numerous reports about the CIA's efforts to hunt and kill, using drones, those responsible for the December 30, 2009 suicide bombing attack near Khost, Afghanistan that killed seven CIA employees. *See, e.g.*, Siobhan Gorman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010, at A6; Scott Shane and Eric Schmitt, *C.I.A. Deaths Prompt Surge in U.S. Drone Strikes*, N.Y. Times, Jan. 22, 2010 at A1 (quoting a CIA officer as vowing to “avenge” the

<sup>4</sup> Available at: [http://news.bbc.co.uk/2/hi/south\\_asia/8625034.stm](http://news.bbc.co.uk/2/hi/south_asia/8625034.stm)

<sup>5</sup> Available at: <http://www.google.com/hostednews/afp/article/ALeqM5iXKDw0vWQomHE9ISJeMypJ45pgOA>

Khost attack); David E. Sanger, *Drone Said to Kill a Leader of Al Qaeda*, N.Y. Times, Mar. 17, 2010 at A10 (speaking about a drone strike that killed an Al Qaeda leader and quoting a senior intelligence official as asserting that “the deaths [of CIA officers in the December 30, 2009 Khost bombing] would be ‘avenged through successful, aggressive counterterrorism operations’”); Jane Perlez and Pir Zubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, N.Y. Times, Apr. 4, 2010 at A1; Haq Nawaz Khan & Pamela Constable, *Pakistani Taliban Leader's Death Would be 'Fatal Blow' for Group*, Wash. Post, Feb. 2, 2010; Alex Rodriguez, *Pakistani Taliban Says Leader Dead*, LA Times, Feb. 10, 2010; Assoc. Press, *U.S. Drone Strike Kills 20, Pakistan Says*, Boston Globe, Jan. 18, 2010, at 3; Andrew Buncombe, *US strikes back with drone attack on leader of Taliban*, Independent (U.K.), Jan. 15, 2010.

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U.S. Intelligence officials were quoted in the press discussing the recent decision to add Anwar al-Awlaki, a U.S. citizen, to the list of individuals that the CIA is authorized to target and kill, potentially using drones. See, e.g., David S. Cloud, *U.S. Citizen Anwar Awlaki Added to CIA Target List*, LA Times, Apr. 6, 2010 (“[T]he Obama administration has authorized the capture or killing of a U.S.-born Muslim cleric who is believed to be in Yemen, U.S. officials said.”); Scott Shane, *U.S. approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 7, 2010, at A12; Greg Miller, *Muslim Cleric Aulagi is First U.S. Citizen on List of Those CIA is Allowed to Kill*, Wash. Post, Apr. 7, 2010; Greg Miller, *Muslim Cleric Is First U.S. Citizen On List of Those CIA Is Allowed to Kill*, Wash. Post, Apr. 7, 2010; David Williams, *Obama authorises targeted killing of radical American Muslim cleric who inspired Christmas Day bomber*, Daily Mail (U.K.), Apr. 7, 2010.<sup>6</sup> The existence of CIA deliberations on whether to add Mr. Awlaki to the CIA’s kill list have also been disclosed to the press. See, e.g., Keith Johnson, *US Cleric Backing Jihad*, Wall St. J., Mar. 26, 2010; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, LA Times, Jan. 31, 2010. As far back as 2002, intelligence officials were publicly disclosing the fact that the CIA reserves the right to target and kill U.S. citizens. See, e.g., John J. Lumpkin, *CIA Can Kill Americans in al Qaeda*, Chi. Trib., Dec. 4, 2002, at 19 (“U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA . . . when other options are unavailable.”).

As recounted in the Request, the CIA’s role in a 2002 drone strike/targeted killing in Yemen has also been widely reported. In that case, a CIA drone fired a missile at a car, killing all of its passengers. Among those killed was Kamal Derwish (aka Ahmed Hijazi) a U.S. citizen who had been subpoenaed in connection with the criminal prosecution of the “Lackawanna Six” in Buffalo, New York. See James

<sup>6</sup> Available at: <http://www.dailymail.co.uk/news/worldnews/article-1264117/Obama-authorises-killing-radical-Muslim-cleric-Anwar-al-Awlaki.html>

Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16; John Kifner & Marc Santora, *U.S. Names 7th Man in Qaeda Cell Near Buffalo and Calls His Role Pivotal*, N.Y. Times, Sep. 18, 2002, at A19; Greg Miller & Josh Meyer, *U.S. Citizen Killed by C.I.A. May Have Led Buffalo Cell*, Orlando Sentinel, Nov. 9, 2002, at A3; Knut Royce, *CIA Target Tied to Sleeper Cell: Alleged Ringleader Among Those Slain in Yemen Missile Attack*, Toronto Star, Nov. 9, 2002, at A22; John J. Lumpkin, *American Killed in Yemen Strike Id'd*, Assoc. Press, Nov. 12, 2002; Phil Hirschkom & Susan Candiotti, *Buffalo Defendants Appeal Bail Decision*, CNN.com, Dec. 30, 2002;<sup>7</sup> See generally Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at 11.

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Intelligence officials have also been cited describing the standards and procedures that are used in order to authorize a CIA targeted killing using drones. See, e.g., Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, LA Times, Jan. 31, 2010; Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010 ("Panetta authorizes every strike, sometimes reversing his decision or reauthorizing a target if the situation on the ground changes, according to current and former senior intelligence officials. 'He asks a lot of questions about the target, the intelligence picture, potential collateral damage, women and children in the vicinity,' said the senior intelligence official."). The Legal Advisor to the Department of State recently gave a speech that confirmed the existence of targeted operations and provided an outline of part of the legal basis for the targeted killing program. See Harold Hongju Koh, Legal Advisor, US Dep't of State, *The Obama Administration and International Law*, Speech to the Annual Meeting of the Am. Soc'y of Int'l L., Mar. 25, 2010 ("Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise.")<sup>8</sup>

The drone strikes have been the subject of intense public debate and comment, much of which proceeds on the understanding that the CIA is involved in these strikes. See, e.g., Editorial, *Defending Drones: The Law of War and the Right to Self-Defense*, Wash. Post, Apr. 13, 2010; Micah Zenko, *Demystifying the Drone Strikes*, Wash. Indep., Apr. 2, 2010 ("After a half-decade and some 125 unmanned U.S. drone strikes in Pakistan, it is remarkable that the Obama administration maintains the false notion that such operations remain secret and are therefore beyond

<sup>7</sup> Available at: <http://archives.cnn.com/2002/LAW/12/30/buffalo.defendants/>

<sup>8</sup> Available at: <http://www.state.gov/s/l/releases/remarks/139119.htm>



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public debate.”); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, Wash. Post, Mar. 12, 2010 (“In our current armed conflicts, there are two U.S. drone offensives. One is conducted by our armed forces, the other by the CIA. . . . Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities.”); Rafia Zakaria, *Drones and Suicide Attacks*, Dawn (Pakistan), Oct. 14, 2009; David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and Pakistan*, 17-20 Center for New American Security (June 2009); Peter W. Singer, *Attack of the Military Drones*, Brookings Institution, June 27, 2009; Declaration of Gen. David Petraeus, Appendix to the Petition for a Writ of Certiorari at 191a, *U.S. Dep't of Defense v. American Civil Liberties Union*, No. 09-160 (U.S. filed Aug. 7, 2009) (“Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties.”); Peter Bergen and Katherine Tiedemann, *Pakistan drone war takes a toll on militants -- and civilians*, CNN.com, Oct. 29, 2009; Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Daniel Byman, *Taliban vs. Predator: Are Targeted Killings Inside Pakistan a Good Idea?*, Foreign Affairs, Mar. 18, 2009; Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Editorial, *Obama's Secret Shame*, Wash. Times, Apr. 20, 2010; Roger Cohen, Op-ed., *An Eye for An Eye*, Int'l Herald Trib. Feb. 12, 2010;<sup>9</sup> Robert Wright, *The Price of Assassination*, N.Y. Times, April 13, 2010.<sup>10</sup>

In light of all of these official disclosures and other publicly available information about the CIA's use of drones, it is inconceivable that the fact of the existence or non-existence of *any* records responsive to *any* aspect of the Request is properly classified and withheld under Exemption 1 or is “intelligence sources and methods” properly withheld under Exemption 3. These disclosures have waived the CIA's ability to invoke a Glomar response and demonstrate the existence of responsive records. *See supra* pp. 1-11. Furthermore, “suppress[ing this] ‘already well publicized’ information would . . . ‘frustrate the pressing policies of the [FOIA] without even arguably advancing countervailing considerations.’” *Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 831-32 (D.C.Cir.1979)). The CIA's invocation of

<sup>9</sup> Available at: <http://www.nytimes.com/2010/02/26/opinion/26iht-edcohen.html/>

<sup>10</sup> Available at: <http://opinionator.blogs.nytimes.com/2010/04/13/title-2/>

Exemption 1 and Exemption 3 to support its Glomar response is therefore untenable.

Additionally, the CIA lacks any basis to invoke Exemption 3 in response to the subject matter of the Request. The Response Letter cites Section 6 of the CIA Act of 1949 as authority to withhold “intelligence sources and methods” under Exemption 3. The records responsive to this Request, however, do not constitute “intelligence sources and methods.” In *CIA v. Sims*, 471 U.S. 159 (1985), the Supreme Court adopted a common-sense understanding of the statutory power to protect “intelligence sources and methods,” remarking that “Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence.” 471 U.S. at 170-71. The Court quoted with approval the definition of “foreign intelligence” provided by General Vandenberg, the director of the CIA’s immediate predecessor: “foreign intelligence [gathering] consists of securing all possible data pertaining to foreign governments or the national defense and security of the United States.” *Id.* at 170 (quoting *National Defense Establishment: Hearings on S. 758 before the Senate Committee on Armed Services*, 80th Cong., 1st Sess., 497 (1947) (Senate Hearings)).

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The Request does not seek any information about “intelligence sources and methods,” but rather about a *killing* program. Basic information about the scope, limits, oversight, and legal basis of this killing program cannot sensibly be described as “intelligence sources or methods.” Using drones to conduct targeted killings simply has nothing to do with “securing . . . data pertaining to foreign governments or . . . national defense and security.” 471 U.S. at 170 (emphasis added) (internal quotation omitted). To the contrary, the CIA drone/targeted killing program is concerned with *killing* individuals who might otherwise have been potential sources of intelligence.<sup>11</sup> Information about a CIA targeted killing program therefore simply falls outside the scope of “intelligence sources and methods” as set out in *Sims*. Nor is the ACLU aware of any other case in which information about a CIA killing program have been regarded as “intelligence sources and methods.”

To the extent that some documents encompassed by the Request would actually reveal “intelligence sources and methods,” portions of those particular documents may well be withholdable under Exemption 3. But the protection afforded to particular records regarding “intelligence sources and methods” cannot justify a blanket Glomar response and does

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<sup>11</sup> Indeed, one criticism of targeted killing programs is that they *frustrate* intelligence-gathering efforts by eliminating rich sources of information about the enemy. See Karen DeYoung and Joby Warrick, *U.S. emphasizes targeted killings over captures*, Wash. Post, Feb. 14, 2010, available at <http://www.msnbc.msn.com/id/35391753>.

not permit the CIA's to avoid its obligation to search for responsive records and to release all of those records (or to explain why particular documents must be withheld). The subject of the Request is a program of targeted killing, not intelligence-gathering. As such, most, if not all, of the records sought would not disclose intelligence sources or methods, but only basic information about the scope, limits, oversight, legal basis, and consequences of this targeted killing program.

For the foregoing reasons, we respectfully request that you reconsider the decision to neither confirm nor deny the existence or nonexistence of any records responsive to the Request and that you release records responsive to the Request. We look forward to your prompt response.

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Sincerely,



Jonathan Manes  
Legal Fellow  
American Civil Liberties Union Foundation

Encl.

[Attached Exhibits Intentionally Omitted]

# Exhibit D

May 6, 2010 Central Intelligence Agency



Washington, D.C. 20505

Mr. Jonathan Manes  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Reference: F-2010-00498

Dear Mr. Manes:

We received your 22 April 2010 facsimile on 23 April 2010 appealing our 9 March 2010 final response to your Freedom of Information Act (FOIA) request for **“records pertaining to the use of unmanned aerial vehicles (‘UAV’)--commonly referred to as ‘drones’ and including the MQ-1 Predator and MQ-9 Reaper--by the CIA and the Armed Forces for the purpose of killing targeted individuals.”** Specifically, you appealed our determination that we can neither confirm nor deny the existence or nonexistence of records responsive to your request on the basis of FOIA exemptions (b)(1) and (b)(3).

Your appeal has been accepted and arrangements will be made for its consideration by the appropriate members of the Agency Release Panel. You will be advised of the determinations made.

In order to afford requesters the most equitable treatment possible, we have adopted the policy of handling appeals on a first-received, first-out basis. Despite our best efforts, the large number of appeals that CIA receives has created unavoidable processing delays making it unlikely that we can respond within 20 working days. In view of this, some delay in our reply must be expected, but every reasonable effort will be made to respond as soon as possible.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson  
Information and Privacy Coordinator

# Exhibit E

Central Intelligence Agency



Washington, D.C. 20505

June 14, 2010

Mr. Jonathan Manes  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Reference: F-2010-00498, *American Civil Liberties Union Foundation v. Central Intelligence Agency, et. al.*

Dear Mr. Manes:

This letter further addresses your 22 April 2010 facsimile in which you appealed our 9 March 2010 final response to your Freedom of Information Act (FOIA) request for "records pertaining to the use of unmanned aerial vehicles ('UAV') – commonly referred to as 'drones' and including the MA-1 Predator and MQ-9 Reaper – by the CIA and the Armed Forces for the purpose of killing targeted individuals." Specifically, you appealed our determination that we can neither confirm nor deny the existence or nonexistence of records responsive to your request on the basis of FOIA exemptions (b)(1) and (b)(3).

Prior to a final appellate determination by the CIA's Agency Release Panel (ARP), on 1 June 2010, you filed the referenced litigation against the CIA. Based on the Agency's FOIA regulations governing exceptions to the right of administrative appeal set forth in part 1900.42(c) of title 32 of the Code of Federal Regulations, the ARP will take no further action regarding your 22 April 2010 administrative appeal, which is now the subject of pending litigation in federal court.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson  
Information and Privacy Coordinator



**UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA**

AMERICAN CIVIL LIBERTIES UNION and  
 AMERICAN CIVIL LIBERTIES UNION  
 FOUNDATION

Plaintiffs,

v.

DEPARTMENT OF JUSTICE,  
 DEPARTMENT OF DEFENSE,  
 DEPARTMENT OF STATE, and CENTRAL  
 INTELLIGENCE AGENCY,

Defendants.

No. 1:10-CV-436  
 Judge Rosemary M. Collyer

**DECLARATION OF ALEXANDER A. ABDO**

I, Alexander A. Abdo, hereby declare and state as follows:

1. I am an attorney at the American Civil Liberties Union Foundation, and I am co-counsel for Plaintiffs in this case.

2. Attached hereto are true and correct copies of the following:

<u>Document</u>	<u>Exhibit</u>
Plaintiffs' Freedom of Information Act Request (Jan. 13, 2009) .....	A
Leon E. Panetta, Director's Remarks at the Pacific Council on International Policy (May 18, 2009).....	B
Peter Finn & Joby Warrick, <i>Al-Qaida Crippled as Leaders Stay in Hiding, CIA Chief Says</i> , Wash. Post, Mar. 17, 2010 .....	C
Siobhan Gorman & Jonathan Weisman, <i>Drone Kills Suspect in CIA Suicide Bombing</i> , Wall St. J., Mar. 18, 2010.....	D
<i>Jake Tapper Interviews CIA Director Leon Panetta</i> , ABC News, June 27, 2010 .....	E

Eric Schmitt, *American Strike Is Said to Kill a Top Qaeda Leader*,  
 N.Y. Times, May 31, 2010 ..... F

Justin Fishel, *CIA Drone Strike Kills Al-Qaeda #3*, FOX News,  
 June 1, 2010 ..... G

Press Briefing by Press Secretary Robert Gibbs, White House  
 (June 1, 2010)..... H

*Am. Civil Liberties Union v. Dep’t of Def.*, No. 1:04-CV-4151  
 (S.D.N.Y. Dec. 29, 2009) (dkt. no. 398) (transcript attached)..... I

Greg Miller, *CIA Using Military Drones in Pakistan*, Wash. Post,  
 Oct. 3, 2010..... J

Mark Mazzetti & Eric Schmitt, *C.I.A. Steps Up Drone Attacks on  
 Taliban in Pakistan*, N.Y. Times, Sept. 27, 2010 ..... K

David S. Cloud, *U.S. Citizen Anwar Awlaki Added to CIA Target  
 List*, L.A. Times, Apr. 6, 2010 ..... L

Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of  
 Those CIA Is Allowed to Kill*, Wash. Post, Apr. 7, 2010 ..... M

Greg Miller, *U.S. Citizen in CIA’s Cross Hairs*, L.A. Times, Jan.  
 31, 2010..... N

John J. Lumpkin, *Bush Order: CIA Can Kill Americans in Al  
 Qaeda*, Chi. Trib., Dec. 4, 2002..... O

Editorial, *Lethal Force Under Law*, N.Y. Times, Oct. 10, 2010 ..... P

Julian E. Barnes & Adam Entous, *Wider Role for CIA Sought*,  
 Wall St. J., Oct. 23, 2010 ..... Q

Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in  
 Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010 ..... R

Peter Finn & Joby Warrick, *Panetta Wins Friends But also Critics  
 with Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010 ..... S

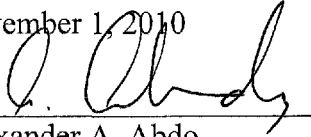
Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009 ..... T

Scott Shane, *U.S. Approves Targeted Killing of American Cleric*,  
 N.Y. Times, Apr. 6, 2010..... U

Harold Hongju Koh, Legal Adviser, U.S. Department of State, *The  
 Obama Administration and International Law*, Mar. 25, 2010 ..... V

3. Pursuant to 28 U.S.C. § 1746, I hereby declare and state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

November 1, 2010



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Alexander A. Abdo

# Exhibit A



January 13, 2009

Director, Freedom of Information and Security Review  
Department of Defense  
1155 Defense Pentagon, Room 2C757  
Washington, D.C. 20301-1155

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, D.C. 20530-0001

Bette Farris, Supervisory Paralegal  
Office of Legal Counsel  
Department of Justice  
Room 5515, 950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

Information and Privacy Coordinator  
Central Intelligence Agency  
Washington, D.C. 20505

Office of Information Programs and Services  
A/GIS/IPS/RL  
U.S. Department of State  
Washington, D.C. 20522-8100

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/  
Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, and the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General's

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

RICHARD ZACKS  
TREASURER

Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sep. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the “ACLU”).<sup>1</sup>

This Request seeks records pertaining to the use of unmanned aerial vehicles (“UAVs”)—commonly referred to as “drones” and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals. In particular, we seek information about the legal basis in domestic, foreign, and international law for the use of drones to conduct targeted killings. We request information regarding the rules and standards that the Armed Forces and the CIA use to determine when and where these weapons may be used, the targets that they may be used against, and the processes in place to decide whether their use is legally permissible in particular circumstances, especially in the face of anticipated civilian casualties. We also seek information about how these rules and standards are implemented and enforced. We request information about how the consequences of drone strikes are assessed, including methods for determining the number of civilian and non-civilian casualties. Finally, we request information about the frequency of drone strikes and the number of individuals—Al Qaeda, Afghan Taliban, other targeted individuals, innocent civilians, or otherwise—who have been killed or injured in these operations.

According to recent investigative reports, over the past year the United States has greatly increased the frequency with which it has attempted targeted killings using UAVs. *See, e.g.,* James Kitfield, *Wanted: Dead*, Nat’l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009), [http://www.newamerica.net/publications/policy/revenge\\_drones](http://www.newamerica.net/publications/policy/revenge_drones); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15.

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<sup>1</sup> The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices including, among others, those pertaining to the detention, treatment, and process afforded suspected terrorists; domestic surveillance programs; racial and religious discrimination and profiling; and the human cost of the wars in Iraq and Afghanistan and other counterterrorism operations.

Some of these strikes are reportedly occurring outside conventional battlefields. Strikes have been reported not only in Afghanistan and Iraq—present theaters of war—but also in countries where the United States is not at war, including Pakistan and Yemen. See Scott Shane, *C.I.A. Drone Use is Set to Expand inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1 (“For the first time in history, a civilian intelligence agency is using robots to carry out a military mission, selecting people for killing in a country where the United States is not officially at war.”); Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15; Greg Miller, *Drones Based in Pakistan*, L.A. Times, Feb. 13, 2001, at 3; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16.

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The use of drones to target individuals far from any battlefield or active theater of war dates back several years, and has resulted in the killing of at least one American citizen. In November 2002, the United States fired a Hellfire missile from a Predator drone in Yemen, killing six men travelling in a car. The apparent target of the strike was a Yemeni suspect in the October 2000 bombing of the USS Cole. See James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16.; Howard Witt, *U.S.: Killing of al Qaeda Suspects Was Lawful*, Chi. Trib., Nov. 24, 2002, at 1. The strike also killed an American citizen, Ahmed Hijazi, also known as Kamal Derwish. Mr. Hijazi had recently been identified as a suspect wanted for questioning in an ongoing terrorism prosecution in federal court in Buffalo, New York. See John Kifner & Marc Santora, *U.S. Names 7th Man in Qaeda Cell Near Buffalo and Calls His Role Pivotal*, N.Y. Times, Sep. 18, 2002, at A19; Greg Miller & Josh Meyer, *U.S. Citizen Killed by C.I.A. May Have Led Buffalo Cell*, Orlando Sentinel, Nov. 9, 2002, at A3. See generally Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at 11 (recounting the story of the Buffalo terrorism trial).

Reports suggest that the targets of drone strikes are not limited to members of al Qaeda in Afghanistan or the Afghan Taliban. Rather, the scope of the drone program appears to have expanded to include the targeted killing of members of Pakistani insurgent groups, individuals selected as targets by the Pakistani government and others. In Afghanistan, targeting authority seems to extend to Afghan drug kingpins.

See, e.g., James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Craig Whitlock, *Afghans Oppose U.S. Hit List of Drug Traffickers*, Wash. Post., Oct. 24, 2009; James Risen, *Drug Chieftains Tied to Taliban are U.S. Targets*, N.Y. Times, Aug. 10, 2009, at A1. The limits on who may be killed in this manner are unknown, and may in some circumstances permit the targeting of American citizens. See John J. Lumpkin, *CIA Can Kill Americans in al Qaeda*, Chi. Trib., Dec. 4, 2002, at 19 ("U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA . . . when other options are unavailable."). There is significant concern that drones may be used to target individuals who are not legitimate military targets under domestic or international law. See generally Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010.

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Reports also suggest that in addition to Air Force and Special Forces personnel, non-military personnel including CIA agents are making targeting decisions, piloting drones, and firing missiles. Defense contractors also appear to be playing an important role in the drone program. See Leon Panetta, Director, Central Intelligence Agency, Remarks at the Pacific Council on International Policy (May 18, 2009) (discussing drone strikes in Pakistan); James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009. It appears, therefore, that lethal force is being exercised by individuals who are not in the military chain of command, are not subject to military rules and discipline, and do not operate under any other public system of accountability or oversight.

Perhaps the greatest public concern regarding the use of drones to execute targeted killings, however, is that their use may have resulted in an intolerably high proportion of civilian casualties. Without official sources of information, current estimates of the number and proportion of civilians killed vary widely. See David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13 (reporting that up to 98% of deaths are civilians); Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009 (suggesting that 10 civilians are killed for each militant); Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009) (reporting, based on a review of publicly available sources, that between 31 and 33 percent of those killed are civilians); Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1 (reporting on the estimates of civilian casualties offered by non-governmental analysts,



as contrasted with the estimate of an anonymous government official, who cited a figure of approximately 20 total civilians deaths); *Over 700 Killed in 44 Drone Strikes in 2009*, Dawn (Pakistan), Jan. 2, 2010 (reporting that Pakistani authorities believe 90% of those killed in drone strikes in 2009 were civilians); Leon Panetta, Director, Central Intelligence Agency, Remarks at the Pacific Council on International Policy (May 18, 2009) (describing drone strikes as involving “a minimum of collateral damage”).

Despite all of these concerns, the parameters of the program and the legal basis for using drones to execute targeted killings remain almost entirely obscure. It is unclear who may be targeted by a drone strike, how targets are selected, what the geographical or territorial limits of the targeted killing program are, how civilian casualties are minimized, and who is making operational decisions about particular strikes. The public also has little information about any internal accountability mechanisms by which laws and rules governing targeted killings are enforced. Nor does the public have reliable information about who has been killed, how many civilians have been killed, and how this information is verified, if at all. Without this information the public is unable to make an informed judgment about the use of drones to conduct targeted killings, which “represents a radically new and geographically unbounded use of state-sanctioned lethal force.” Jane Mayer, *The Predator War*, *The New Yorker*, Oct. 26, 2009. We make the following requests for information in hopes of filling that void.

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### I. Requested Records

1. All records created after September 11, 2001 pertaining to the legal basis in domestic, foreign and international law upon which unmanned aerial vehicles (“UAVs” or “drones”) can be used to execute targeted killings (“drone strikes”), including but not limited to records regarding:
  - A. who may be targeted by a drone strike (e.g. members of al Qaeda in Afghanistan or the Afghan Taliban; individuals who merely “support,” but are not part of these two groups; individuals who belong to other organizations or groups; individuals involved in the Afghan drug trade);
  - B. whether drones may be used against individuals who are selected or nominated as targets by a foreign government, including the Government of Pakistan;
  - C. limits on civilian casualties, or measures that must or should be taken to minimize civilian casualties;

- D. the verification, both in advance of a drone strike and following it, of the identity and status or affiliation of individuals killed (e.g. whether killed persons were members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the drug trade, innocent civilians, etc.);
- E. where, geographically or territorially, drones may be used to execute targeted killings and whether they may be used outside Afghanistan and Iraq and, if so, under what conditions or restrictions;
- F. whether drones can be used by the CIA or other government agencies aside from the Armed Forces in order to execute targeted killings; and, if such use is permitted, in what circumstances and under what conditions; and
- G. whether and to what extent government contractors can be involved in planning or providing support for, or executing a targeted killing using a drone.

- 2. All records created after September 11, 2001 pertaining to agreements, understandings, cooperation or coordination between the U.S. and the governments of Afghanistan, Pakistan, or any other country regarding the use of drones to effect targeted killings in the territory of those countries, including but not limited to records regarding:
  - A. the selection of targets for drone strikes, or the determination as to whether a particular strike should be carried out; and
  - B. the limits on the use of drone strikes in Afghanistan, Pakistan or other countries, including geographical or territorial limitations, limitations on who may be targeted, measures that must be taken to limit civilian casualties, or measures that must be taken to assess the number of casualties and to determine the identity and status or affiliation of individuals killed.
- 3. All records created after September 11, 2001 pertaining to the selection of human targets for drone strikes and any limits on who may be targeted by a drone strike.
- 4. All records created after September 11, 2001 pertaining to civilian casualties in drone strikes, including but not limited to measures regarding the determination of the likelihood of civilian casualties,

measures to limit civilian casualties, and guidelines about when drone strikes may be carried out despite a likelihood of civilian casualties.

5. All records created after September 11, 2001 pertaining to the assessment or evaluation of individual drone strikes after the fact, including but not limited to records regarding:
  - A. how the number of casualties of particular drone strikes is determined;
  - B. how the identity of individuals killed in drone strikes is determined;
  - C. how the status and affiliation of individuals killed in drone strikes is determined, i.e. whether individuals killed were members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the drug trade, innocent civilians, or any other status or affiliation; and
  - D. the assessment of the performance of UAV operators and others involved in executing a targeting killing using a drone.
6. All records created after September 11, 2001, pertaining to any geographical or territorial limits on the use of UAVs to kill targeted individuals.
7. All records created after September 11, 2001, including logs, charts, or lists, pertaining to the number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike.
8. All records created after September 11, 2001, including logs, charts or lists, pertaining to the number, identity, status, and affiliation of individuals killed in drone strikes, including but not limited to records regarding:
  - A. the number (including estimates) of individuals killed in each drone strike;
  - B. the number (including estimates) of individuals of each particular status or affiliation killed in each drone strike, (e.g. members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the Afghan drug trade, civilians,

members of some other group, etc.), including the number of individuals of unknown status or affiliation killed in each strike.

C. the total number (including estimates) of individuals killed in drone strikes since September 11, 2001 and the total number (including estimates) of individuals of each particular status or affiliation killed, including those whose status or affiliation is unknown.

9. All records created after September 11, 2001 pertaining to who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings, including but not limited to any records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel in the use of UAVs for the purpose of executing targeted killings.
10. All records created after September 11, 2001 pertaining to the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone, including but not limited to CIA personnel, government contractors, and military personnel.<sup>2</sup>

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## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general

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<sup>2</sup> To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on June 22, 2006 to the Department of Defense, the Chief of Naval Operations, the Commandant of the Marine Corps and the U.S. Army, the ACLU is not seeking those records here. The ACLU has worded these requests as precisely and narrowly as possible given the public interest in the topic and given the limited information the ACLU has about the nature of responsive documents in the agencies’ possession. It may, of course, be possible to sharpen or narrow the requests further with input from the agencies about the nature and volume of documents responsive to these requests. The ACLU is willing to do so in the context of good faith discussions with each agency, so as to eliminate unnecessary administrative burdens and to focus agency efforts on the substance of these requests.

public interest.” 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU’s “Torture FOIA” webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU’s FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. *See* Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to

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subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>3</sup>

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's use of unmanned aerial vehicles to target and kill individuals in Afghanistan, Pakistan and elsewhere, including individuals who are not members of either al Qaeda or the Afghan Taliban, and who may not be proper military targets. The records sought will help determine what the government's asserted legal basis for these targeted killings is, whether they comply with domestic and international law, how many innocent civilians have been killed, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about drone attacks in Afghanistan, Pakistan and elsewhere. *See, e.g.*, Joshua Partlow, *Drones In More Use in Afghanistan*, Wash. Post, Jan. 12, 2010; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; *Officials: Alleged US Missiles Kill 2 in Pakistan*, Assoc. Press, Nov. 4, 2009; David Rhode, *Held by the Taliban: A Drone Strike and Dwindling Hope*, N. Y. Times, Oct. 21, 2009, at A1; Declan Walsh, *In Pakistan, US drone strike on Taliban kills 12*, Guardian, Apr. 2, 2009; Tim Reid, *U.S. Continues with Airstrikes*, Times (U.K.), Jan. 24, 2009; James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1.

The Obama administration's increased reliance on the use of drones to execute targeted killings in Pakistan has served to spark widespread and increasing media interest in, and public concern about, this practice. *See, e.g.*, James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8,

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<sup>3</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

2010; Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Bill Roggio and Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, The Long War Journal (July 21, 2009); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15.

News stories and investigative reports have also suggested that drone attacks are being used outside Iraq and Afghanistan, in places where there is no active war. *See, e.g.*, Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15. Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1.

These reports have instigated serious concerns that the geographically unbounded use of drones to execute targeted killings is contrary to domestic and international law and may amount to illegal state-sanctioned extrajudicial killing. *See, e.g.*, Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009).

News reports also suggest that drones are not only being used to target members of al Qaeda or the Afghan Taliban, but also Afghan drug lords, Pakistani insurgents, and others identified as enemies of the Pakistani government. *See, e.g.*, James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Craig Whitlock, *Afghans oppose U.S. hit list of drug traffickers*, Wash. Post., Oct. 24, 2009.

Such reports have caused public concern that the expansion of the range of permissible targets allows the extrajudicial killing of individuals properly regarded as criminal suspects rather than military targets. Commentators have suggested that these strikes may not comply with

domestic or international law, and that they open up significant possibilities for abuse. *See, e.g.*, Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Interview with Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, DemocracyNow! (Oct. 28, 2009); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009); U.N. General Assembly, Social, Humanitarian and Cultural Affairs Committee, Statement by Prof. Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions (Oct. 27, 2009).

Several reports have been published estimating the number of civilian casualties that have resulted from drone strikes, and the proportion of civilian casualties in relation to targeted individuals. These estimates vary widely. *See* Bill Roggio and Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, The Long War Journal (July 21, 2009); Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and Pakistan*, at 17-20 Center for New American Security (June 2009); Over 700 Killed in 44 Drone Strikes in 2009, Dawn (Pakistan), Jan. 2, 2010.

These reports have created a significant concern that the number of civilian casualties is simply too high. One British jurist has gone as far as to suggest that UAVs should perhaps be banned as an instrument of war. *See* Murray Wardop, *Unmanned Drones Could be Banned, Says Senior Judge*, London Daily Telegraph, July 6, 2009. Others, however, suggest that the proportion of casualties in fact compares favorably to other weapons. *See, e.g.*, Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.

A public debate has also emerged about the wisdom of using drones to carry out targeted killings. Experts and commentators from diverse backgrounds have expressed concerns that the use of drones in Afghanistan and Pakistan—and especially the high number of civilian casualties—are creating widespread hostility to the United States in the local populations, are providing hostile organizations with a powerful propaganda tool, and are therefore contributing to the growth of such organizations. *See, e.g.*, Rafia Zakaria, *Drones and Suicide Attacks*, Dawn (Pakistan), Oct. 14, 2009; David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and*



*Pakistan*, 17-20 Center for New American Security (June 2009); Peter W. Singer, *Attack of the Military Drones*, Brookings Institution, June 27, 2009; Declaration of Gen. David Petraeus, Appendix to the Petition for a Writ of Certiorari at 191a, *U.S. Dep't of Defense v. American Civil Liberties Union*, No. 09-160 (U.S. filed Aug. 7, 2009) (“Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties.”).

Other commentators contend that the use of drones for targeted killings is a useful counterterrorism tactic. *See, e.g.*, Peter Bergen and Katherine Tiedemann, *Pakistan drone war takes a toll on militants -- and civilians*, CNN.com, Oct. 29, 2009; Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Daniel Byman, *Taliban vs. Predator: Are Targeted Killings Inside Pakistan a Good Idea?*, Foreign Affairs, Mar. 18, 2009; Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.

The public is unable to engage meaningfully with or to assess these policy and legal debates because there is a paucity of reliable information about the scope of the drone program, its legal underpinnings, and its results. While there are differing opinions as to whether and how drones should be used for targeted killings, commentators on all sides agree that the government should release to the public more details about the operation of this program and its legal underpinnings. *See, e.g.*, Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Editorial, *Predators and Civilians*, Wall St. J., July 14, 2009, at A12 (“We’d also say that the Obama Administration—which, to its credit, has stepped up the use of Predators—should make public the kind of information we’ve seen.”); Roger Cohen, *Of Fruit Flies and Drones*, Int’l Herald Trib., Nov. 13, 2009, at 9 (“The Obama administration should not be targeting people for killing without some public debate about how such targets are selected, what the grounds are in the laws of war, and what agencies are involved. Right now there’s an accountability void.”); Interview with Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, DemocracyNow! (Oct. 28, 2009); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009); Michele Nichols, *U.N. Envoy Slams U.S. for Unanswered Drone Questions*, Reuters, Oct. 27, 2009.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the use of UAVs to execute targeted killings. *See* 22 C.F.R. § 171.17(a)(1); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU’s commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that “disclosure, not secrecy, is the dominant objective of the Act,” but that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act”).

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 22 C.F.R. 171.15(c); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to “representatives of the news media”).

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004)

(finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.<sup>4</sup>

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

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<sup>4</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Jonathan Manes  
National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,



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AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

# Exhibit B

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Speeches & Testimony

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# Director's Remarks at the Pacific Council on International Policy

**Remarks of Director of Central Intelligence Agency, Leon E. Panetta,  
at the Pacific Council on International Policy**

**May 18, 2009**

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**DR. JERROLD GREEN, PRESIDENT OF THE PACIFIC COUNCIL ON INTERNATIONAL POLICY:** Our speaker's going to be introduced by Congresswoman Jane Harman, a very, very good friend of the Pacific Council. We're lucky to have a congressman — person — in our district who knows more about international affairs than almost anybody in the room, and intelligence issues, and others. She's a good friend, and we're always happy to have her.

So I'm going to give the microphone to Congresswoman Harman. She will introduce Leon Panetta.

We're going to run on a machine here because I promised the CIA we will get the director out in a timely way. So I am nothing if not efficient, particularly for them. So — (applause).

**REPRESENTATIVE JANE HARMAN (D-CA):** Good afternoon, everyone. I'm back. You will remember that just a few months ago Amy Zegart — sitting over there — and I did a little riff on homeland security and intelligence issues. We were the warm-up act for Leon Panetta, but who knew then?

Six weeks ago Leon and I spoke about his coming out to the best congressional district on earth. That's a little west of here. Thank you, all. (Applause.) And he is here because this morning we did a tour of some of the amazing technology that is produced in Southern California. For anyone who's missed it, it is best in class worldwide, and it has a huge role in keeping us safe. And so we were at several places this morning and we're going to several more this afternoon before heading back to Washington.

It is wonderful that Leon would take the time to come down here. But it does give me an opportunity not just to show off but also to show off about him. Let me make just a few points.

In the world, as we know — and I said this a few months ago — there are people who work for our Intelligence Community whose identities are not known, who right at this moment it's probably dark in the places I'm thinking of, are doing things that are incredibly personally

dangerous. They're doing those things so that we can learn about the plans and intentions of some who might try to harm us. And if anyone thinks this is a safe world, think again. It is not a safe world.

And I think no one has missed the lead story in the New York Times this morning about Pakistan adding to its nuclear arsenal. I think probably as bad a nightmare as what could happen with Iran might be a worse nightmare right now is what could happen in Pakistan if that state should fail. And I know that the Obama administration, most of us on the Hill, and surely our intelligence agencies are doing everything they can to make certain that Pakistan gets the right kinds of support in the nuclear arsenal, and those who would in other ways sell nuclear materials are kept from doing any of that. A bomb in the hands of the bad guys is a story we never want to read about.

So my thanks and my prayers go out to our Intelligence Community folks who are in harm's way now. And that is always on my mind.

Also on my mind is the kind of leadership we have in our Intelligence Community. Amy and I talked about that briefly a couple of months ago. It really matters who's in charge. And it really matters to me, and I hope to all of you, that Leon Panetta is now in charge of the Central Intelligence Agency.

Six months ago or so Sidney and I were in Monterey — beautiful Monterey, California — the other half, the less appealing half of the state, Leon. But we were at the Panetta Institute. It's a magnificent philanthropy that Leon and Sylvia have created. And I was there with Governor Schwarzenegger and several others receiving the annual bipartisan award. I really appreciated getting that.

And Leon and I were chatting about the Obama administration to-be. I think he didn't know at that point that the CIA was in his future. No, I'm sure he didn't know at that point; he's shaking his head. But six months later he's in the thick of it, and he's doing several things that I really commend.

One of them is he's providing a strong hand to support the people who work there and a vision of the values of the Agency and the values of the United States, which I think we would all share. That's number one.

Number two, very personal to me, he understands the importance of the separation of powers. And he is bringing respect to the relationship that the executive branch has with the Congress. In Leon's tenure — over eight terms in Congress, ending when he chaired the Budget Committee — he got it that Congress is an independent branch of government, performs valuable oversight, and needs to do that role if we are to make certain that our policies and practices follow the laws of the United States. And Leon got that then and gets it now, and I applaud some of the tough decisions that he's making.

For anyone who doesn't know California, Leon, you need to know that he started his career with Tom Kuchel — maybe some of you did — as a Republican. He then eventually saw the light and came on over, served in Congress for the eight terms that I mentioned, was OMB director, Chief of Staff to President Clinton, and in the recent years has been living in paradise and promoting bipartisanship. He is the 19th director of the Central Intelligence Agency.

And I forgot one thing that he did before he assumed this role. That is, he co-chaired a commission formed by Governor Schwarzenegger to advise California on the round of BRAC

closures — the Base Realignment and — Base Realignment and — Closure Commission. I didn't want to mention that word because I wouldn't accept it. The largest issue in California — the largest potential closure was the Los Angeles Air Force Base, which Mel Levine will remember; he first told me about it. He said, Jane, it doesn't look like an Air Force base.

But it is in El Segundo, California, in the heart of my Congressional district, and it is the home of the Space and Missile System Center, which does procurement for missiles and satellites for our defense agencies. It is an economic engine for Southern California and had it realigned to Colorado or some other place, we would have lost a huge — the huge and impressive synergy between our aerospace base and this Air Force base that doesn't look like a base.

Leon was instrumental in figuring out how to fight to keep it here. Governor Schwarzenegger was enormously helpful, as was Congressman Jerry Lewis. But by a thread we persuaded then Defense Secretary Rumsfeld to keep it off the base closure list. And the result is what Leon saw this morning and what many of you know to be: true California excellence.

So in that spirit let me introduce to many good friends true California excellence, the 19th CIA director, Leon Panetta.

(Applause.)

**CIA DIRECTOR LEON E. PANETTA:** Thank you very much, Jane. And ladies and gentlemen, thank you for the opportunity to be able to be here with the Pacific Council.

I really appreciate this opportunity. I've had the opportunity to be here before, and I appreciate Jane urging that I do this again. And thank both Jerry Green and Warren Christopher for their leadership and their willingness to have me.

I want to pay particular tribute to Jerry Green and the leadership that he's provided here for the Pacific Council. I think it's been outstanding. This has really been a center for discussion and for understanding of the tough foreign policy issues that face the country and that face all of us.

And Warren Christopher, of course, has exercised tremendous leadership in dealing with the issues in foreign policy. I had the honor of working with Chris when he was Secretary of State and I was Chief of Staff and there really — when you think about the dedication to public service that's involved in the jobs in Washington, Warren Christopher is the quintessential example of public service for the sake of public service. He didn't bring any other agenda to the job he was in. His sole agenda was to serve the interests of this country; and I pay tribute to you, Chris, for that service.

And Jane, the leadership that she's provided on homeland security, on intelligence issues, she's been an outstanding member of the Congress. And I enjoyed having her lead me around these various facilities that we saw. She did that before when I was head of the BRAC commission. She was a lot more uptight doing it at that time because she wasn't sure what was going to happen. None of us were.

I went through a BRAC closure. As many of you know, I represented Fort Ord. Monterey, California and Fort Ord installation was one of the largest closures that took place. It's nothing pleasant to have to go through. And so I had the opportunity, having gone through it, to try to exercise hopefully some leadership in the effort to try to maintain those military



facilities that are important not only to California but more importantly to the country. And that's certainly true in this area.

The stuff I saw at Northrop Grumman, SpaceX, what I'm going to see at Boeing, this is really on the cutting edge of the future and the cutting edge of our ability to protect this nation. But more importantly, it introduces the kind of technological know-how that is going to be so important to our ability to continue to lead in the 21st century. So I'm really, really honored to do that.

I'm in California. I guess most importantly, thank you for getting back — me back — to my state. This is — it's a great state. As you know, I was born and raised in Monterey, son of immigrants from Italy. My dad was the 13th in his family and had a number of brothers who came here. Actually, I think one brother settled in Sheridan, Wyoming; another one settled here in California.

When my father came with my mother, supposed to visit your older brother first, and he did. And so they went to Sheridan, Wyoming to visit with his older brother. They spent one winter in Sheridan, Wyoming, and my mother suggested that it was time to visit the other brother in California, which I'm glad they did and finally wound up in Monterey. And that's where I was raised.

They had a restaurant in downtown Monterey during the war years and I — my earliest recollections were washing glasses in the back of that restaurant. They believed that child labor was a requirement in my family.

And they settled in Carmel Valley, which is where we live now with — our home is there. And had the honor of representing that area in the Congress. That's where we built our Institute for Public Policy.

And I have — I love this state. Worked with California Forward. The speaker here has now taken my job in helping to lead that effort and, man, do you have a hell of a lot of work to do here in California to try to get this state back on the right track.

And now I serve as Director of the CIA. It is one of the great challenges that I've faced throughout my career and it's — I've been in a lot of challenges, going back to being Director of the Office for Civil Rights during the days when we were pushing to desegregate the Southern school system. And then obviously as a member of Congress and as director of OMB, the challenge of facing at that time what kind of meager 2, 300 billion dollar deficit. We were able to deal with it and balance the budget.

Anyone remember balancing the federal budget? It was one of the great accomplishments, I thought, during that time, and I thought it would be something that would be with us into the future. That, unfortunately, did not happen. But it was a great challenge going through it. With the help of President Clinton and others in the Congress we were able to achieve that.

And then, obviously, as Chief of Staff to the president.

This job in particular represents some huge challenges, and it's really important to listen in this job. This is — generally throughout your political career you do a lot of talking. But in this job you've got to listen to a lot of people in order to really understand what's going on.

There's a great story I often tell of the Nobel Prize winner who was going throughout the

state of California giving exactly the same lecture on this very intricate area of physics. And same lecture. Chauffeur just kind of was driving him around, finally leaned back when they were heading towards the San Joaquin Valley and said, "You know, professor, I've heard that same lecture so many times, I actually think I could give it by memory myself."

So the professor said, "Why don't we do that? Why don't you put on my suit, I'll put on your chauffeur's uniform and you give the lecture?" So they did.

Chauffeur got up before a standing room audience, gave the lecture word for word, and got a standing ovation at the end of the lecture. And the professor dressed as the chauffeur sat in the audience and couldn't believe what had happened.

Then somebody raised their hand and said, "Professor, that was an outstanding lecture in a very intricate area. But I have some questions." And so he went into a three-paragraph question with some mathematical formulas and equations and finally said, "Now, what do you think about that?"

There was a long pause. The chauffeur dressed as a professor looked at him and said, "You know, that's the stupidest question I've ever heard. And just to show you how stupid it is, I'm going to have my chauffeur answer it out in the audience."

(Laughter.)

I'm finding that there a hell of a lot of chauffeurs — (laughter) — in the job that I'm in that you have to listen to and that you have to pay attention to. And there are chauffeurs in this audience who deal with a lot of the issues that I'm involved with. And we have to listen to all of that because there are a series of challenges that we confront.

The Central Intelligence Agency and the Pacific Council in many ways share a common goal. Both aim to better the understanding of the world that we live in and to try to help policymakers make the very difficult decisions that have to be made with that understanding; and in particular, the decisions that have to be made if we're going to protect our national security and if we're going to achieve those vital foreign policy goals that will protect our future.

I'm going to take a few minutes to discuss several of our most pressing foreign intelligence areas and priorities. And then obviously I'm happy to have a discussion with all of you about these and other issues.

As you know, my Agency's mission is as wide as the world. I just returned from visiting several of our stations abroad. Went to the war zone, started with India, then went to Afghanistan, and then Pakistan. Just came back from a trip to Iraq and also had the chance to visit in Israel and Jordan, as well as other areas.

When you visit stations abroad and see the role that is played by the people that are out there, you understand that the CIA in many ways is on the front line of the defense of this country. We are literally the point of the spear because the reality is that we could not accomplish much militarily — or for that matter from a foreign policy point of view — without having good intelligence, without knowing and understanding what's out there and what's involved. So intelligence is crucial to our ability to understand those issues. And the people that work for the CIA are very much on that front line and are really dedicating themselves to the effort to develop the kind of information that is crucial to policymakers in this country.

I realize that there are many that focus on the past. And I understand the reasons for that. And I don't deny Congress — as a creature of the Congress, I don't deny them the opportunity to learn the lessons from that period. I think it's important to learn those lessons so that we can move into the future. But in doing that we have to be very careful that we don't forget our responsibility to the present and to the future. We are a nation at war. We have to confront that reality every day. And while it's important to learn the lessons of the past, we must not do it in a way that sacrifices our capability to stay focused on the present, stay focused on the future, and stay focused on those who would threaten the United States of America.

Let me talk about some of the issues that we are working on. Fighting terrorism is obviously at the top of our agenda. Counterterrorism is CIA's primary mission. Al-Qaeda remains the most serious security threat that we face, most serious security threat to America and to U.S. interests and our allies overseas. Its leaders in Pakistan continue to plot against us. Its affiliates and followers in Iraq, North and East Africa, the Arabian Peninsula, and other countries continue to work to develop plans that threaten this country and that threaten the potential for our ability to survive. The main threats we face from al-Qaeda are to our homeland and the threats we face to the troops that are in the war zones throughout the world.

The President has basically said very clearly what our mission is, and he repeated it when he announced the Afghanistan-Pakistan policy. He said that our nation's primary objective is that we have to disrupt, dismantle, and defeat al-Qaeda and its extremist allies. That is the mission — the fundamental mission — that the CIA has.

Serious pressures have been brought to bear on al-Qaeda's leadership in Pakistan, particularly Pakistan's tribal areas — where they're located — in Waziristan and in the FATA. There is ample evidence that the strategy set by the President and his national security team is in fact working, and we do not expect to let up on that strategy.

I'm convinced that our efforts in that part of the world are seriously disrupting every operation that al-Qaeda's trying to conduct and is interfering with their ability to establish plans to come at this country. And we will continue that effort.

Al-Qaeda is known for seeking shelter, however, elsewhere. And so one of the dangers we confront is the fact that as we disrupt their operations in Pakistan and in the FATA, that they will ultimately seek other safe havens. Today Somalia and Yemen represent that potential as potential safe havens for al-Qaeda in the future. They also present a very high risk for terrorist attacks in that part of the world.

The continuing plotting by al-Qaeda, these individuals who are working continue to develop an agile and a persistent kind of effort to threaten this country. Disrupting the senior leadership in Pakistan is crucial, but it alone will not eliminate the danger. The goal must be to pursue al-Qaeda to every hiding place, to continue to disrupt their operations, and continue ultimately to work towards their destruction so that they do not represent a threat to this country or to our troops in the future. That's why CIA continues to work with partners across the world in intelligence, in law enforcement, and in military to understand and counter the constantly evolving threat, both tactically and strategically.

The war zones. We are involved obviously in the war zone areas directly. The thousands of U.S. servicemen and women engaging the enemy in Iraq and Afghanistan. Intelligence support to the military remains a top priority for the CIA.

I recently visited both countries, as I mentioned, and got a first-hand look at the situation on the ground. In Iraq, as security improves and as the military draws down, there remains a continuing focus for intelligence, the kind of intelligence that will focus on what al-Qaeda is doing, that will focus on other efforts to disrupt that country. So as the U.S. draws down on its military side, you can expect that we will continue to maintain a robust intelligence presence in Iraq in order to provide the kind of intelligence that will be necessary for Iraq to establish stability.

The threat of sectarianism remains very real as well, as does the potential for further al-Qaeda attacks. Al-Qaeda has moved principally to the area of Mosul. We've been able to go after them in most other areas, but they have a presence in Mosul. We are continuing to focus on that. The government is still trying to figure out how to govern and how to secure Iraq on its own.

Helping policymakers and military commanders manage these continuing challenges requires the best possible intelligence. In Afghanistan, the Taliban insurgency is spreading in a country with weak political institutions and a failing economy. Stabilizing the situation there requires not only a military surge, it will require from the United States a strong intelligence surge as well to be able to protect our coalition forces and to build the kind of durable peace that will be needed for the future.

The President is taking a comprehensive approach here. CIA will inform that approach at all levels of influence. Hard and soft power are being applied in Afghanistan, and it needs to be if we are to have a chance at being able to establish stability there.

On the larger global mission, even as CIA leads the fight against al-Qaeda and directs tremendous resources to the war zones, our attention has to be focused on other priorities as well. We cannot and we will not diminish that effort.

The threat posed by Iran has our full attention. This country is a destabilizing force in the Middle East, a region that needs just the opposite. As you know, the administration is moving towards a diplomatic effort, diplomatic engagement with Iran. But no one is naïve about the challenges that we confront. Tehran aspires to be the pre-eminent power in the area. Its nuclear program, meddling in Iraq, ties to Syria, support for Hamas and Hezbollah, all are connected to that aspiration. And it is no coincidence that as Iran works to expand its influence, it also seeks to limit the influence of the United States and our allies, particularly in that part of the world.

On the nuclear front, the judgment of the Intelligence Community is that Iran at a minimum is keeping open the option to develop deliverable nuclear weapons. Iran halted weaponization in 2003, but it continues to develop uranium enrichment technology and nuclear-capable ballistic missiles. And that represents a danger for the future.

Assessing Iran's intentions is a top priority. This is not an easy target in terms of being able to gather intelligence. It's a tough target. But just as important, we have to focus in order to develop an accurate picture of what's going on. What are its capabilities? And we are focused on that threat.

And while the Iranian nuclear program in and of itself is cause for significant concern, there also is a very real risk that other countries in the region will be tempted to follow suit. The last thing we need in the Middle East is a nuclear arms race.

Of course, no discussion of the dangers of nuclear proliferation is complete without mention of North Korea. Our intelligence agencies are all working together to try to assess that country's nuclear weapons program and its long-range missile capabilities. The country's interest in selling technology and expertise to anyone willing to pay the price is a very serious concern. Like Iran, North Korea is a tough target to penetrate for intelligence purposes, but we're making good progress. The fact is, we had good notice about the fact that they were going to deploy the Taepodong missile and knew pretty well within an hour when that was going to happen.

There also are legitimate questions being raised about the internal stability of North Korea, given Kim Jong-Il's health problems, uncertainty about succession, the weak economy, and the persistent food shortages. The result is that North Korea remains one of the most difficult and unpredictable threats that we face in that part of the world.

Finally, let me talk a little bit about CIA's role in national security. Paying attention to the security risks posed by these challenges — and of course many, many others — is the fundamental mission of the CIA. I've only scratched the surface today in the threats I've discussed. There are enduring threats that we also face, such as China and Russia, and priorities tied to current conditions, the potential impact of the drug war in Mexico, the swine flu, the global economic crisis, new openings with Cuba, global warming; all of these are areas that represent important intelligence gathering material that we have to have and present to opinion makers and policymakers.

In addition to shedding light on the recent and most pressing problems that we face, we know and understand the strategic landscape across the globe. We've got to understand the additional threats, whether they come from Latin America, from Africa, or from the Far East.

The key, it seems to me as Director of the CIA, is the responsibility we have to make sure that we are never surprised. That really is our fundamental responsibility to this country and to the world. To accomplish this very broad mission, CIA officers are on the front lines, as I said, in the war zones and beyond. They are identifying and confronting the full range of threats and opportunities facing our nation.

CIA's duty is not only to provide intelligence but to minimize the risk, as I said, for surprise. That means we must anticipate issues in areas of the world that represent potential threats. We have to be ahead of them and stay ahead.

After only a short time on this job, I can tell you that we have some of the finest, most skilled and professional and dedicated men and women that are serving this country. My job is to ensure that they have the resources and the authorities to accomplish that mission and they do it in full accord with the nation's laws and our values. I'm personally committed to that, as is everyone at CIA.

I've also indicated that in the training process there are a couple areas that I hope to stress. One is to increase the diversity of the people that are part of the CIA. We have got to reflect the face of the world at the CIA. And while there's been some progress in diversity, not enough has taken place. If we're going to deploy, if we're going to have people abroad, they have to have the same face and have the same understanding of the areas that they are seeking intelligence on.

In addition, they have to have better language training. I'm a believer that, frankly, without

language training it's very difficult to get the kind of intelligence that you need. You have to understand people. You have to understand their culture. And the key to doing that is language training. I hope we can reach a point, frankly, where every officer in the CIA is required to undergo language training of some kind. It is an essential key to being able to do their job.

I've had a good deal of exposure to the Agency's work in previous jobs, but not until I became Director did I finally appreciate the extent and the significance of what CIA does for our country. It is the most professional, as I said, the most effective organization that I've ever run — and I've had the honor of representing a lot of organizations throughout my career in government. It is full of people who are very silent in their work; they're called silent warriors. And they make real sacrifices for the country. There's a wall in the lobby of the Central Intelligence Agency in which there are stars representing those who have given their life for this country as members of the CIA. And many of their names are not known because they remain undercover. Now, that's the kind of sacrifice that's been involved. I'm honored to lead them and represent their work to the President, the Congress, and to groups like yours.

Let me make clear that although we are an intelligence agency, and although we have the obligation, obviously, to protect the nation through covert actions and covert operations, we are also an agency of the United States of America. And as such, we have to make clear that we will always uphold the Constitution and the values that are part of the United States of America. As the President has said — and I deeply believe — we do not have to make a choice between our values and our safety.

As I mentioned, I am the son of immigrants. And I used to ask my father, why would you travel thousands of miles to a strange country, no money, no skills, not knowing really what they were getting into? And my father said, the reason we did it is because my mother and I believed we could give our children a better life. And I think that's the American dream. That's what all of us want for our children and for their children is to ensure that they have a better life.

And I think the fundamental responsibility of the CIA — and for that matter, all of us — is to ensure that we do give our children that better life, that we protect the security of all Americans, and most importantly that we always protect a government of, by, and for all people.

Thank you very much.

(Applause.)

**DR. GREEN:** (Off mike) — has agreed to answer some questions. I promised he will be out of here at five minutes to 2:00, so I will be merciless in just cutting this off at the end.

First question, please, sir?

**Q:** (Off mike.) You mentioned — I don't think it's on. You mentioned — (inaudible, laughter.) My precious time is disappearing.

You mentioned that you believe the strategy in Pakistan is working — the President's strategy in Pakistan in the tribal regions, which is the drone — the remote drone strikes. You've seen the figures recently from David Kilcullen and others that the strikes have killed 14 midlevel operatives and 700 civilians in collateral damage. And his assessment as a

counterinsurgency expert is it's creating more anti-Americanism than it is disrupting al-Qaeda networks.

And then secondly, President Musharraf told me when he was in office that the Pakistan nukes are safer than those in the former Soviet Union. Do you agree with that? Safely guarded — more safely guarded?

**MR. PANETTA:** On the — are you hearing me okay? On the first issue, obviously because these are covert and secret operations I can't go into particulars. I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage. I know that some of the — sometimes the criticisms kind of sweep into other areas from either plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage. And sometimes I've found in discussing this that all of this is kind of mixed together. But I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership.

Secondly, with regards to Pakistan nuclear capability, obviously we do try to understand where all of these are located. We don't have, frankly, the intelligence to know where they all are located, but we do track the Pakistanis. And I think the President indicated this yesterday in an interview, that right now we are confident that the Pakistanis have a pretty secure approach to trying to protect these weapons. But it is something that we continue to watch because obviously the last thing we want is to have the Taliban have access to the nuclear weapons in Pakistan. We're fighting, obviously, that potential in Iran. We're fighting it elsewhere. The last thing we would want is to give al-Qaeda that potential. So we continue to watch that very closely.

**DR. GREEN:** Next question? Kimberly?

**Q:** Mr. Director, my name is Kimberly Marteau Emerson, and I am vice-chair of Human Rights Watch executive committee here in Southern California. I want to commend you on the closing of secret prisons and the change in interrogation rules on torture by the CIA. I think you're doing great work there, and I loved what you just said at the end about upholding American values and the Constitution.

I know you also said earlier that some people want to look back and not look forward. And I agree. We are in the middle of many crises, and it is really important to look forward and be present. However, if we don't draw a line in the sand now on past actions, what happens when the next CIA Director and President get in who actually carry the same policies and same ideals as the last eight years? We have not set any kind of precedent or laid down any kind — other than by example and by our current rules, to basically look at this issue and really have an open inquiry on it. And I'm not talking about accountability or prosecution; I'm talking about actually looking at whether it works or not so that we have a public accounting of that. What do you think?

**MR. PANETTA:** You know, I'm — as I said, I'm a creature of the Congress, and my view is that if Congress makes that decision to move forward on that kind of study then, as Director of the CIA, I'll do everything possible to cooperate with that effort. As you may know, the Intelligence Committee on the Senate side, under the chairmanship of Dianne Feinstein, is now conducting that kind of review. And they are going back over that material, and we have provided access to that material. We are working with their staff and working

with her and her co-chair to make sure that whatever questions they have, whatever information they would like to have, we will provide it to them, and obviously then they'll draw their own conclusions.

But my view is I'm not going to tell the Congress or anybody else what they should or shouldn't do with regards to this issue. I do believe it's important to learn the lessons from that period. I think that the study by the Intelligence Committee in the Senate will give us that opportunity. But I guess what I'm most concerned about is that this stuff doesn't become the kind of political issue that everything else becomes in Washington, D.C., where it becomes so divisive that it begins to interfere with the ability of these intelligence agencies to do our primary job, which is to focus on the threats that face us today and tomorrow.

**DR. GREEN:** Next question. Sir, if you could identify yourself, please.

**Q:** My name is Arash Faran, and my question has to do with your comment about dismantling and defeating al-Qaeda around the world. And if you look at the example of Israel, you may argue Israel is engaged in some of the same tactics and some of the same battles as the United States. And one of the things you often see is as they take out terrorists and other people who are plotting against the country, often times there's a deep bench behind them. And year after year you often have leaders who rise out of nowhere who take their place.

As we engage and spend a lot of time and resources to fight that same battle, how can we — what more can we do so as that bench disappears, as we take out high-level operatives, there is no one standing behind them?

**MR. PANETTA:** Well, obviously that's — that has to be a concern. As we go after them, as we try to disrupt and dismantle their operations, we have to be concerned about how do we block them from moving to other areas, to finding new safe havens. And that's why I mentioned both Somalia and Yemen, because what happens is that in these countries that are — in terms of governing are not doing a very good job, that's probably the kindest I could say about it — the reality is that those become grounds for al-Qaeda to develop future efforts.

And I think what we have to do is we have always got to be one step ahead of them, which means we've got to backstop them. If they're going to go to Somalia, if they're going to go to Yemen, if they're going to go to other countries in the Middle East, we've got to be there and be ready to confront them there as well. We can't let them escape. We can't let them find hiding places.

And I do have to tell you that Israel is — you know, we have a close working relationship with Israel and working with them has been very helpful in terms of being able to identify these threats.

**DR. GREEN:** Mark Nathanson.

**Q:** Thank you. Leon, I wanted to ask you, now that you're the head of the CIA. There've been problems in the past with the CIA working with local law enforcement, such as in Southern California. For example, after 9/11, they wanted local law enforcement to investigate student visas that were over here, and there was over 5,000. And when local law enforcement asked the government for a priority as to them, they said, we can't give it to you because you aren't cleared.

So the question I have is how are you going to improve relations with local law



**MR. PANETTA:** Well, you know, I — let me first of all say from my own background, both as a member of Congress and then serving in a number of capacities, I think it is very important to develop a partnership here. We can't do this alone. The CIA can't do this alone. We have to work with the FBI. We have to work with the Homeland Security operation. We have to work with state government. We have to work with local government to develop the kind of partnership we need in order to meet these threats. You can't just do this at one level.

And so I'm a believer that, frankly, we need to sit down and work with local government and not just simply task them to do things that they can't deliver on, but work with them to try to make sure that we can achieve these goals working together.

I've mentioned this to the Director of National Intelligence as a priority. I think we have to share more of the intelligence we gather both with state and local governments so that they're aware of the threats that we're confronting. I think we have to develop the kind of communication that allows us to not only share information but to work together to confront these threats. It doesn't work — I'm just — I'm not a big believer of the federal government kind of walking in and telling people what to do and then getting the hell out of town. I don't think that works.

**Q:** Good afternoon. My name is Salam Al-Marayati. I'm with the Muslim Public Affairs Council.

The President said in a major speech in Istanbul that we — the United States — are not at war with Islam and that we must engage the Muslim world beyond counterterrorism. However, based on your speech and based on a number of activities, it still remains that the relationship is very tense, confrontational — at least, defined by confrontation — and there's really not much that is said in terms of other areas such as nonmilitary means to fight terrorism.

So could you expand on that and how engaging the Muslim world beyond this issue of terrorism could serve our national interests?

**MR. PANETTA:** I appreciate that question. Obviously our focus is on going after those who obviously are planning and involved with threats not only to our homeland but obviously are developing — those forces that are actually going in and confronting our military, particularly in Afghanistan and Iraq. And so that does remain a focus.

But clearly we can't — we cannot re-establish a relationship with the Muslim world on the basis of these kinds of operations alone. We have to look at a broader strategy of building that relationship. I mean, the place I see it most directly is obviously in these war areas, where in — whether it's Pakistan or whether it's Afghanistan, clearly we're going to confront the threats that are on the ground. Clearly we're going to obviously fight back when we're attacked and that needs to be done.

But if we're going to develop long-term stability, whether it's Pakistan or Afghanistan, we have got to be able to engage the tribal areas. We've got to work with them. It is about education. It is about food. It is about security. It is about trying to develop a relationship that gives them more responsibility to be able to care for them own and to be able to work to ensure that kind of stability.

On the broader picture, clearly what happens is people in al-Qaeda or other terrorist groups

feed on the frustration of people who feel they have no opportunity to be able to succeed. And so we have got to build a broader message with the United States of America, a broader message that reaches out to them and says we understand those problems. And we've got to show that we're willing to work to deal with those kinds of problems.

I think the President, by virtue of not only what he said in Turkey but what he's going to say in Egypt, is trying to build that relationship with the Muslim world. We cannot just win this militarily. We can only win it when we ultimately capture their hearts and minds as well.

**Q:** My name's Asef Mahmoud. I have like two questions. One is that intelligence supposed to be working with time ahead. And we have seen in this Pakistan/Afghanistan thing that we react only when things are already happening, just like the recent event in Swat. For last one year, Taliban, al-Qaeda has been moving to Swat. Everybody knew that people had been actually reporting this thing. And a few months ago the Sufi Muhammad — basically main person behind this — was in Pakistan in custody. Why could not remove at that time when the problem was not that bad and stop it there?

And second part is, is there a role of CIA to work not only to topple government or prevent national security but to change the view of the people? We are killing thousand or 2,000 but we are making millions of people our enemies. Right now the sympathy for Pakistan — for the Pakistanis for America is actually I think historically low, although America is trying to be a friend of Pakistan.

Thank you.

**MR. PANETTA:** Thank you very much. Let me deal with the second question first because in many ways it takes us back to the other problem. One of the challenges we face is that in confronting al-Qaeda and the Taliban and other terrorist groups that are within these tribal areas in Pakistan, that one of the things we have struggled to do is to make Pakistan recognize that they represent a threat to their stability.

Pakistan, as you know, their primary focus has always been on India and the threat from India, and that to a large extent these areas have been ignored. I mean, I remember talking to a — one of our people in Pakistan, and I said, can you give some sense of the history here and why that is? And he said whether it was the British Empire or whether it was the Pakistanis, that in many ways they treated these tribal areas like Indian reservations, that if — they kind of left them alone. If they raised hell, you send the cavalry in to basically deal with the problems. And then you go out and not pay much attention to them.

And so a consequence was that in many ways while we continue to say, look, there's a real threat here that we're confronting, that you have to view this as a common threat. It's not just the United States. It's not just Afghanistan. It's Pakistan. You know, when they blow up things in your streets, when they're — you know, when the Marriott is blown up, this is a threat to your stability.

If the Pakistanis recognize that as a real threat, then we can create the partnership we need in order to deal with it. Now, I think they're beginning to. There obviously are, as we speak, military operations going on in Swat and Buner and other areas. The key is not whether they simply go in and — you know, bring the tanks in and clear out the Taliban and then back out and allow the Taliban to go back in. They've got to clear these areas and hold them. That's very important if it's going to work. So it is extremely important for Pakistan to recognize the threat that it constitutes to their stability.

We had a trilateral meeting in Washington where the President engaged both President Zardari and President Karzai, and I engaged my intelligence counterparts at the same time. And I think as a result of that we began to develop some plans to confront this on a partnership basis, where they will provide that information, and we will share intelligence on these threats. And frankly, it's working. We're beginning to make that happen. And I do sense that President Zardari and the other leadership in Pakistan recognizes that they've got to do more to confront that issue.

Part of the reason for the Swat agreement, part of the reason for some of the deals that were made in those tribal areas really goes back to the history I talked about. They really thought they could cut a deal. If these areas could take care of themselves, they could get the hell out and not pay a lot of attention to them. I have to tell you, when I first came into office I sat down with the Pakistanis and I said, you have got to take a look at this because it is dangerous. And they said, no, we think we've — this is different. This isn't like the other agreements, and they won't fall apart. Well, they did. And I think they've learned a lesson from that, hopefully.

So I guess what I'm hoping for is that Pakistan recognizes the danger that is involved in dealing with these areas and the threat it constitutes to their stability. And I understand the concern about India. I understand the historical concern that's always been there. But I have to tell you that if they don't pay attention to these areas while they're worried about India, this threat could undermine the stability of the country, and that's why they have to face it.

**Q:** Thank you for your comments. I'm Nancy Aosse, head of International Medical Corps, an NGO based right here in Los Angeles. I just want to go back to your comment that you made earlier — that I really appreciated — about I guess the role of NGOs in civil society.

One of the concerns that we've had as an organization operating in Afghanistan and Pakistan and Somalia and Iraq all these years is that the interface for the local population, the people who form their opinions about our country certainly, is often the military because of these conflicts. Could you expand a little bit more about the role of civil society NGOs that they can play, especially during a time when people often just see people with guns and soldiers, et cetera, and get the wrong impression of what we're trying to do?

**MR. PANETTA:** Well, this is the great challenge in trying to deal with those areas and to try to bring stability to those areas. As I said, while I have tremendous respect for the military, while I have tremendous respect for our people in the work that we're doing, in the end none of this is going to work without the Afghanistan people themselves and the tribes — and I can apply that to Pakistan as well — but none of this is going to work unless they assume the responsibility they have to assume to try to deal with these issues as well. And that means that when it comes to providing food, when it comes to providing education, when it comes to providing infrastructure, we can provide the funds and the support systems, but it's the NGOs that are on the ground and that are working with them every day to try to advance that.

I do think that it's very important — for example, when the military goes out they ought to be able to, in Afghanistan, have an Afghan face with regards to their operations. That's really important. Same thing, frankly, is true in Pakistan, that there ought to be a face of the country that they're involved with.

Secondly, we have got to make the tribal leaders understand that — look, the reason the

Taliban is successful in those areas is because the Taliban comes in when there's a lot of disruption and they basically say, we can provide order. And that's what hurts us the most is that in the search for order, in the search for security, the Taliban represents that.

We've got to be able to obviously achieve security. But if you're going to achieve it, you've got to back it up with a system that provides and meets the needs of the people.

I remember when I was in Iraq for the first time with the Iraq Study Group there was a general there who basically sat down and said, you know, we're not going to win this war militarily, and we're only going to win it if we provide human needs: we provide jobs, we provide education, we provide infrastructure, water, sanitation, the kind of basics that people need. When we recognize that, then we'll begin to win.

And I think part of the surge effort that went into Iraq would not have worked if it was not complimented by other efforts, by the State Department, by the NGOs to fulfill those other needs. We've got to learn those lessons and apply them in Afghanistan and Pakistan if we're going to win.

**Q:** (Off mike.)

**MR. PANETTA:** Can I refer this question to your wife?

**Q:** Mr. Director, I hope you do recognize me. I am your chauffeur. (Laughter.) Very expensive chauffeur. And I assume that you will treat this question with appropriate respect for my role.

One of the great ironies in history is that both al-Qaeda and the Taliban are devoted to the destruction of modernity but nonetheless made remarkably effective use of modern digital technology. And it is my impression that the old CIA — that CIA that preceded you — somehow failed to recognize the asynchronous character of that threat.

Without revealing any of the algorithms, which I know you personally do create — (laughter) — could you reassure us that there is a sensitivity and awareness of the CIA today that the use of old analog responses to new asynchronous digital threats isn't likely to work very well?

**MR. PANETTA:** I'm going to have my chauffeur answer that question. (Laughter.) Sydney, you've introduced something that I have really, you know, in the time that I've been director of the CIA have recognized, that as we in this country try to stay on the cutting edge of technology and communications and internet activities and computers, our enemy does the same thing. And they are making use of it all the time, and they're making effective use of it.

We have developed, obviously, approaches to try to confront that. I mean, the whole area of cyber security is a huge threat to this country and to the world in ways that we haven't even begun to understand. I mean, shutting down the power grids, shutting down — I mean, the kind of introduction of worms that go into some of these systems that disrupt our computers or disrupt our connectivity, suddenly that kind of thing is becoming a very real threat, as other countries develop the capacity to be able to use that kind of technological weapon.

We have to be ahead of that. And I do have to kind of pay tribute to the NSA, which spends an awful lot of its time basically focusing on these issues in this area and has developed some absolutely fantastic technology to try to confront some of these potential threats for the

future. It's changing and being developed all the time; every day changes are taking place. We have got to make sure that we stay ahead of it. If we fall behind, any one of these areas could be extremely dangerous to us.

But what we're finding, for example, is that in the middle of the FATA, somebody using a computer. It happens. They're using cell phones. They're using other technology. Our ability to be able to have the intelligence to go after that capacity is what gives us our edge right now. We've got to continue to stay ahead of it because it is a rapidly changing threat.

**DR. GREEN:** We're on our last question. Quite appropriately, I'm going to turn to Professor Amy Zegart, who has written a book, which I wish I could give you a copy of, but I'm sure you've read. And Amy will have our final question.

**AMY ZEGART:** Nothing like being a "Z." Mr. Director, you've talked a lot today about external threats that the Agency confronts. I'd like to ask you to comment on a domestic challenge the Agency's been confronting very much in the headlines in the past of weeks, and that is its relationship with the Congress. You've played on both sides of that contact sport in your career. From where you sit now as CIA Director, what does good Congressional oversight look like to you? Do we have it? And if we don't, what kind of changes could Congress make that would enable you to do your job better?

**MR. PANETTA:** Thank you for that question because one of the things that I really want to do as Director of the CIA is to improve the relationship with the Congress and to make the Congress a partner in this effort. I mean, I realize that we've been through a rough period. And the problem with that is that when that relationship is not working, when the Congress and the CIA don't feel like they're partners in this effort, then frankly it hurts both. And more importantly, it hurts this country.

Congress does have a role to play. I am a believer — as I said, as a creature of the Congress — that Congress, under our checks and balances system, has a responsibility here. We're not the only ones that have the responsibility to protect the security of this country. The Congress has the responsibility to protect the security of this country.

When I first went back as a legislative assistant to Tom Kuchel, as Jane pointed out, you know, there are some people here that will remember, but it wasn't just Tom Kuchel. There were people like Jacob Javits and Clifford Case and Hugh Scott and George Aiken and Mark Hatfield and others on the Republican side who were working with people like Hubert Humphrey and Henry Jackson and others on the Democratic side. And yes, they were political. Yes, they had their politics. But, you know, when it came to the issues confronting this country, they did come together. And they worked together not only on national security issues; they worked together in domestic issues and laid the groundwork for a lot of what we continue to enjoy today. I'm a believer that that's the way our system works best.

There's been a lot of poison in the well in these last few years. And I think in 40 years that I've been in and out of Washington, I've never seen Washington as partisan as it is today. And I think we pay a price for that in terms of trying to deal with all the problems that face this country. And I feel it in particular when it comes to issues that we're involved with. My goal is to try to do everything I can to try to improve that relationship.

The Intelligence Community does have a responsibility to oversee our operations. And what I intend to so is to make sure that they are fully informed of what we're doing. I do not want to just do a Gang of Four briefing — in other words, just inform the leaders of the party. My

view is — and I said this at my confirmation hearings — I think it's very important to inform all the members of the Intelligence Committee about what's going on when we have to provide notification.

I'm going up tomorrow morning to meet with the Congressional group and just have coffee and talk about some of the issues that are involved with it. I think we ought to have more of those opportunities. Not in a hearing setting where everybody can kind of do "gotcha." I think I would rather operate on the basis of let's talk about it, tell me what your concerns are, I'll tell you what my concerns are, and do it in a way in which we can be honest with one another.

But I do believe in the responsibility of the Congress not only to oversee our operations but to share in the responsibility of making sure that we have the resources and capability to help protect this country. The only way that's going to work is if both parties are working in the same direction. If they start to use these issues as political clubs to beat each other up with, then that's when we not only pay a price, but this country pays a price.

**DR. GREEN:** Thank you so much.

(Applause.)

I want to thank all of you for coming. I want to thank Director Panetta for his comments. We all wish you well in your new assignment. And thank you all for coming.

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March 17, 2010

### Al-Qaida Crippled As Leaders Stay In Hiding, CIA Chief Says

Joby Warrick and Peter Finn

Relentless attacks against al-Qaida in the Pakistan tribal region appear to have driven Osama bin Laden and other top leaders deeper into hiding, leaving the organization rudderless and less capable of planning sophisticated operations, CIA Director Leon Panetta said Wednesday.

So profound is al-Qaida's disarray that one of its lieutenants, in a recently intercepted message, pleaded to bin Laden to come to the group's rescue and provide some leadership, Panetta told The Washington Post in an interview.

Panetta credited an increasingly aggressive campaign against al-Qaida and its Taliban allies, including more frequent strikes and better coordination with Pakistan, in a near-acknowledgment of the CIA's war against extremists in Pakistan. He called it "the most aggressive operation that CIA has been involved in in our history."

"Those operations are seriously disrupting al-Qaida," Panetta said. "It's pretty clear from all the intelligence we are getting that they are having a very difficult time putting together any kind of command and control, that they are scrambling. And that we really do have them on the run."

The comments came as a senior U.S. intelligence official revealed new details of a March 8 killing of a top al-Qaida commander in the militant stronghold of Miram Shah in North Waziristan, in Pakistan's autonomous tribal region. The al-Qaida official died in what local news reports described as a missile strike by a unmanned aerial vehicle. The CIA formally declines to acknowledge U.S. participation in such attacks inside Pakistani territory.

Hussein al-Yemeni, the man killed in the attack, was identified by an intelligence official as among al-Qaida's top 20 leaders and a participant in the planning for a Dec. 30 suicide bombing at a CIA base in the province of Khost in eastern Afghanistan.

Panetta's upbeat remarks during a 40-minute interview contrasted with recent U.S. intelligence assessments of continuing terrorist threats against the U.S. homeland, and in the wake of the suicide attack, in which a Jordanian double-agent was able to gain access to a CIA base and kill nine intelligence operatives.

Panetta acknowledged that al-Qaida was continuing to look for ways to kill Americans and was specifically seeking to recruit people who lacked criminal records or known ties to terrorist groups to carry out missions.

Still, the CIA under the Obama administration is "without question putting tremendous pressure on their operation," Panetta said. "The president gave us the mission to disrupt, dismantle and defeat al-Qaida and their military allies and I think that's what we are trying to do."

Counting the March 8 operation, the agency is believed to have mounted 22 such strikes this year, putting the CIA on course to exceed last year's roughly 53 strikes, a record. The March 8 event was believed to have been the first to occur in an urban area; the U.S. intelligence official familiar with the operation said the building targeted had housed "a large number of al-Qaida" fighters who were in the process of developing explosives. There were no other casualties, said the official, who spoke on the condition of anonymity because the agency's operations in the region



are classified.

Panetta, while declining to comment on the strike itself, said the death of the al-Qaida commander sent a "very important signal that they are not going to be able to hide in urban areas."

He also cited recent arrests of top Taliban figures — mostly notably Mullah Abdul Ghani Baradar, captured in Karachi on Feb. 8 — as tangible evidence of improving ties with Pakistan's intelligence service. He said Pakistan had given the CIA access to Baradar since his capture, and added, "we're getting intelligence" from the interrogation.

Panetta, who marked his first anniversary as CIA director last month, acknowledged that the agency did not know precisely where bin Laden and his top deputy, Ayman al-Zawahiri, are hiding, but he said agency officials believe the two are inside Pakistan, "either in the northern tribal areas or in North Waziristan, or somewhere in that vicinity."

While there have been no confirmed sightings of either man since 2003, the continued pressure increases the opportunities for catching one or both, he said. "We thought that the increased pressure would do one of two things: that it would either bring them out to try to exert some leadership in what is an organization in real trouble, or that they would go deeper into hiding," Panetta said. "And so far we think they are going deeper into hiding."

But Panetta also expressed concern about the proliferation of suspects, both domestic and foreign, who are primed to attack Western targets, but have no previous record. He pointed to Najibullah Zazi, the Afghan immigrant who targeted the New York subway system, and recently pleaded guilty to terrorism charges, and Umar Farouk Abdulmutallab, the Nigerian charged with attempting to detonate explosives on a commercial flight about to land in Detroit.

"How many other Zazis are there? The people who have a clean record who suddenly for some crazy reason decide to get involved with jihad," said Panetta. "The bomber in Detroit. This person suddenly goes off, has a U.S. visa, and within 30 days he's recruited to strap a bomb on and come to this country. What we are seeing is that they are now looking for those kind of clean credentials."

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Staff researcher Julie Tate contributed to this report.

bc-panetta

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ASIA NEWS | MARCH 18, 2010

# Drone Kills Suspect in CIA Suicide Bombing

Agency Hits Back After December Deaths of Seven Agents; Panetta and McChrystal See Pressure Rising on al Qaeda, Taliban

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By SIOBHAN GORMAN And JONATHAN WEISMAN



Associated Press

A U.S. Predator drone flies over the moon above Kandahar Air Field.

WASHINGTON—A Central Intelligence Agency drone strike last week killed a top al Qaeda trainer suspected of being involved in December's suicide bombing that killed seven CIA officers at a base in Afghanistan, U.S. officials say.

The March 8 strike on a suspected bomb-making facility in Miran Shah, Pakistan, killed as many as 15 people, including Hussein al-Yemeni, a rising star in the al Qaeda network led by Osama bin Laden, according to people familiar with the strike.



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Bloomberg News

CIA Director Leon Panetta at his office in Langley, Va., in September.

In an interview Wednesday, CIA Director Leon Panetta confirmed Mr. al-Yemeni's death. "We now believe that al-Yemeni, who was one of the top 20 [al Qaeda leaders], was one of those who was hit," Mr. Panetta said. "He is somebody who we believe was one of those who was involved in providing the explosives for the Khost attack."

Meanwhile, the top U.S. commander in Afghanistan, Gen. Stanley McChrystal, said there were signs high-level Taliban leaders were becoming more amenable to U.S.-backed reconciliation efforts. He said the

group's leadership appeared to have been rattled by the recent capture inside Pakistan of Mullah Abdul Ghani Barader, the Taliban's operations chief, as well as by the stepped-up military campaigns against the armed group in both Afghanistan and Pakistan.

Mr. al-Yemeni, who was in his late 20s or early 30s, was on a small council that helped plan the

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December strike on forward CIA operating base just outside the Afghan city of Khost, according to officials familiar with the operation. He was involved in training Taliban and foreign Al Qaeda recruits for strikes on troops in Afghanistan and targets outside the region.

The Khost bombing was carried out by a suspected double agent, Jordanian physician Humam Khalil Mohammed, who convinced Jordanian and U.S. intelligence officials he would lead them to the top echelon of al Qaeda, including the terror network's second-in-command, Egyptian Ayman al-Zawahiri. The bomber showed intelligence officials a picture of himself with Mr. Zawahiri to prove his value.

Killing Mr. al-Yemeni was very important to the CIA because of his status in al Qaeda and his involvement in the Khost attack, Mr. Panetta said. Mr. Panetta didn't speak directly to the circumstances of the death; the CIA doesn't discuss covert action.

"Anytime we get a high value target that is in the top leadership of al Qaeda, it seriously disrupts their operations," Mr. Panetta said. "It sent two important signals," Mr. Panetta said. "No. 1 that we are not going to hesitate to go after them wherever they try to hide, and No. 2 that we are continuing to target their leadership."

A drone strike in Pakistan apparently kills a top al Qaeda trainer who helped supervise December's suicide bombing at a Central Intelligence Agency post in Afghanistan. WSJ's Jonathan Weisman joins The New s Hub from Washington with more details.

Mr. al-Yemeni also served as a liaison with a range of affiliated militant groups, including al-Qaeda's affiliate in Yemen, the Haqqani network in the Pakistani region of North Waziristan, and the Afghan and Pakistani Taliban, another U.S. counterterrorism official said. A specialist in bombs and suicide operations, he was also a conduit in Pakistan for money, messages and recruiting, the official added.

Mr. Panetta said the pressure on al Qaeda is growing on the border region between Pakistan and Afghanistan and could be stepped up further. The Pakistanis are also "talking about the possibility of going into North Waziristan," Mr. Panetta said. That is the tribal area where Mr. al-Yemeni was killed and is the home of the Haqqani network, a terror group which coordinates with the Taliban in Afghanistan.

Mr. al-Yemeni appears to be the second Khost attack planner who had been killed since the Dec. 30 bombing of the CIA base. Pakistani Taliban chief Hakimullah Mehsud, who claimed credit for the Khost attack in a video with the bomber, is presumed dead because he hasn't resurfaced since another drone strike earlier this year, said a U.S. counterterrorism official.

Within days of his appointment as CIA director last year, Mr. Panetta decided his focus would be Pakistan's lawless tribal region. The battle against al Qaeda in Pakistan would become Panetta's war.

"The president of the United States gave us the mission of disrupting, dismantling and defeating al Qaeda and its militant allies," Mr. Panetta said. "We've virtually doubled our operations. We're putting tremendous pressure on al Qaeda as a result of that."

Presiding over the CIA's campaign against al Qaeda and its affiliates, Mr. Panetta has produced the CIA's highest annual tally of drone strikes—more than 65 since he took his post—that have taken out 400 to 500 militants. A U.S. counterterrorism official said Wednesday that in those strikes, around 20 noncombatants were killed, generally because they were right near a combatant.

He has also made the CIA's drone program, a Bush-era assassination campaign that doesn't sit well with human-rights advocates, a staple of U.S. counterterrorism operations. And he has done it with the same team that was responsible for the practices that Mr. Panetta and President Barack Obama once criticized.

The results of the campaign, which includes the capture over the last two months of 20 al Qaeda and Taliban militants, have bolstered support for Mr. Panetta in Islamabad and Washington. In the fall, when he proposed an expansion of the drone program to a fleet of 14 pilotless planes from seven, the White House was quick to approve it, according to a senior intelligence official.

Democratic Sen. Dianne Feinstein, the Senate intelligence committee chairman who worried about Mr. Panetta's lack of spy experience, now praises his "unique set of credentials."

Republican Sen. Christopher S. Bond of Missouri, who tangled with Mr. Panetta during his confirmation hearing, now says he has

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won over a lot of cynics, and he's among the very best of the intelligence appointments the current administration has made."

But the CIA's success in Pakistan comes with risks. The intensified focus on killing al Qaeda militants worries a number of CIA veterans, who say the agency is doing the military's most risky legwork while neglecting the agency's core mission, which is to collect secrets that help forecast emerging threats overseas.

"Allowing the agency to do what I think is a military job is ridiculous," said Margaret Henoch, a former senior CIA official, who added that there is no reason the Defense Intelligence Agency can't be responsible for tactical intelligence operations.

Meanwhile, others worry that the administration will become over-reliant on the drone program because it produces tangible results. "There's no question in my mind this is disrupting and hurting the enemy badly, but at the same time, you don't win this way," said Michael Hurley, a former CIA counterterrorism official.

Mr. Panetta said he understands these concerns, which is why he has asked his staff to develop a strategy to address terrorist threats not just in Afghanistan and Pakistan, but in Yemen, Somalia and other emerging terrorist hot spots. He also needs to make sure the agency doesn't lose sight of trends in other areas of the world, Mr. Panetta said. "I can't afford to be surprised," he said.

—Yochi J. Dreazen contributed to this article.

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# Exhibit E



# 'This Week' Transcript: Panetta

## Jake Tapper Interviews CIA Director Leon Panetta

June 27, 2010 —

ABC News "This Week" Jake Tapper interviews CIA Director Leon Panetta Sunday, June 27, 2010

TAPPER: Good morning and welcome to "This Week."

This morning of this week, exclusive. CIA Director Leon Panetta. His first network news interview.

Top questions on the threats facing the U.S., and whether the CIA is up to the task.

(BEGIN VIDEO CLIP)

PANETTA: And what keeps me awake at night--

(END VIDEO CLIP)

TAPPER: The latest on Al Qaida, the hunt for Osama bin Laden, Iran, North Korea, global hotspots in an increasingly dangerous world, and the threat of homegrown terrorists.

(BEGIN VIDEO CLIP)

PANETTA: We are being aggressive at going after this threat.

(END VIDEO CLIP)

TAPPER: CIA Director Leon Panetta only on "This Week."

Then, the McChrystal mess.

(BEGIN VIDEO CLIP)

PRESIDENT BARACK OBAMA: I welcome debate among my team, but I won't tolerate

(END VIDEO CLIP)

TAPPER: The change in command in Afghanistan raises new questions about the president's strategy to win the war. That and the rest of the week's politics on our roundtable with George Will, author Robin Wright of the U.S. Institute of Peace, David Sanger of the New York Times, and the Washington Post's Rajiv Chandrasekaran.

And as always, the Sunday Funnies.

(BEGIN VIDEO CLIP)

DAVID LETTERMAN, TALK SHOW HOST: It took President Obama 45 minutes to make a decision to pick a new Afghanistan commander, 45 minutes. It took him six months to pick a dog for the White House.

(END VIDEO CLIP)

TAPPER: Good morning. When the president takes a look at the world, he's confronted with threats literally all over the map. In Afghanistan, U.S. and international forces struggle to make headway against the Taliban. Iran moves ahead with a nuclear program in defiance of international condemnation. North Korea becomes even more unpredictable as it prepares for a new supreme leader. New terror threats from Pakistan, Yemen, Somalia. No one knows these threats better than the president's director of the Central Intelligence Agency, Leon Panetta. He's been in the job for 16 months, and he's here with me this morning, his first network news interview. Mr. Panetta, welcome.

PANETTA: Nice to be with you, Jake.

TAPPER: Now, this was a momentous week, with President Obama relieving General McChrystal of his command. When this was all going down, you were with General Petraeus at a joint CIA-CENTCOM conference. And I want to ask you about the war in Afghanistan, because this has been the deadliest month for NATO forces in Afghanistan, the second deadliest for U.S. troops, with 52 at least killed this month. Are we winning in Afghanistan, and is the Taliban stronger or weaker than when you started on the job?

PANETTA: I think the president said it best of all, that this is a very tough fight that we are engaged in. There are some serious problems here. We're dealing with a tribal society. We're dealing with a country that has problems with governance, problems with corruption, problems with narcotics trafficking, problems with a Taliban insurgency. And yet, the fundamental purpose, the mission that the president has laid out is that we have to go after Al Qaida. We've got to disrupt and dismantle Al Qaida and their militant allies so



they never attack this country again.

Are we making progress? We are making progress. It's harder, it's slower than I think anyone anticipated. But at the same time, we are seeing increasing violence, particularly in Kandahar and in Helmand provinces. Is the strategy the right strategy? We think so, because we're looking at about 100,000 troops being added by the end of August. If you add 50,000 from NATO, you've got 150,000. That's a pretty significant force, combined with the Afghans.

But I think the fundamental key, the key to success or failure is whether the Afghans accept responsibility, are able to deploy an effective army and police force to maintain stability. If they can do that, then I think we're going to be able to achieve the kind of progress and the kind of stability that the president is after.

TAPPER: Have you seen any evidence that they're able to do that?

PANETTA: I think so. I think that what we're seeing even in a place like Marjah, where there's been a lot of attention -- the fact is that if you look at Marjah on the ground, agriculture, commerce is, you know, moving back to some degree of normality. The violence is down from a year ago. There is some progress there.

We're seeing some progress in the fact that there's less deterioration as far as the ability of the Taliban to maintain control. So we're seeing elements of progress, but this is going to be tough. This is not going to be easy, and it is going to demand not only the United States military trying to take on, you know, a difficult Taliban insurgency, but it is going to take the Afghan army and police to be able to accept the responsibility that we pass on to them. That's going to be the key.

TAPPER: It seems as though the Taliban is stronger now than when President Obama took office. Is that fair to say?

PANETTA: I think the Taliban obviously is engaged in greater violence right now. They're doing more on IED's. They're going after our troops. There's no question about that. In some ways, they are stronger, but in some ways, they are weaker as well.

I think the fact that we are disrupting Al Qaida's operations in the tribal areas of the Pakistan, I think the fact that we are targeting Taliban leadership -- you saw what happened yesterday with one of the leaders who was dressed as a woman being taken down -- we are engaged in operations with the military that is going after Taliban leadership. I think all of that has weakened them at the same time.

So in some areas, you know, with regards to some of the directed violence, they seem to be stronger, but the fact is, we are undermining their leadership, and that I think is moving

TAPPER: How many Al Qaida do you think are in Afghanistan?

PANETTA: I think the estimate on the number of Al Qaida is actually relatively small. I think at most, we're looking at maybe 50 to 100, maybe less. It's in that vicinity. There's no question that the main location of Al Qaida is in tribal areas of Pakistan.

TAPPER: Largely lost in the trash talking in the Rolling Stone magazine were some concerns about the war. The chief of operations for General McChrystal told the magazine that the end game in Afghanistan is, quote, "not going to look like a win, smell like a win or taste like a win. This is going to end in an argument."

What does winning in Afghanistan look like?

PANETTA: Winning in Afghanistan is having a country that is stable enough to ensure that there is no safe haven for Al Qaida or for a militant Taliban that welcomes Al Qaida. That's really the measure of success for the United States. Our purpose, our whole mission there is to make sure that Al Qaida never finds another safe haven from which to attack this country. That's the fundamental goal of why the United States is there. And the measure of success for us is do you have an Afghanistan that is stable enough to make sure that never happens.

TAPPER: What's the latest thinking on where Osama bin Laden is, what kind of health he's in and how much control or contact he has with Al Qaida?

PANETTA: He is, as is obvious, in very deep hiding. He's in an area of the -- the tribal areas in Pakistan that is very difficult. The terrain is probably the most difficult in the world.

TAPPER: Can you be more specific? Is it in Waziristan or--

PANETTA: All I can tell you is that it's in the tribal areas. That's all we know, that he's located in that vicinity. The terrain is very difficult. He obviously has tremendous security around him.

But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of their Al Qaida leadership. We just took down number three in their leadership a few weeks ago. We continue to disrupt them. We continue to impact on their command-and-control. We continue to impact on their ability to plan attacks in this country. If we keep that pressure on, we think ultimately we can flush

TAPPER: When was the last time we had good intelligence on bin Laden's location?

PANETTA: It's been a while. I think it almost goes back, you know, to the early 2000s, that, you know, in terms of actually when he was moving from Afghanistan to Pakistan, that we had the last precise information about where he might be located. Since then, it's been very difficult to get any intelligence on his exact location.

TAPPER: We're in a new phase now of the war, in which the threat can come from within, the so-called homegrown terrorists or the lone wolf terrorists. I'm talking about Faisal Shahzad, the would-be Times Square bomber; Umar Farouk Abdulmutallab, the failed Christmas Day bomber; Lieutenant (sic) Nidal Hasan, the Fort Hood shooter. What do these incidents and the apparent increased occurrences of these types of attacks say about the nature of the threat we face?

PANETTA: I think what's happened is that the more we put pressure on the Al Qaida leadership in the tribal areas in Pakistan -- and I would say that as a result of our operations, that the Taliban leadership is probably at its weakest point since 9/11 and their escape from Afghanistan into Pakistan. Having said that, they clearly are continuing to plan, continuing to try to attack this country, and they are using other ways to do it.

TAPPER: Al Qaida you're talking about.

PANETTA: That's correct. They are continuing to do that, and they're using other ways to do it, which are in some ways more difficult to try to track. One is the individual who has no record of terrorism. That was true for the Detroit bomber in some ways. It was true for others.

They're using somebody who doesn't have a record in terrorism, it's tougher to track them. If they're using people who are already here, who are in hiding and suddenly decide to come out and do an attack, that's another potential threat that they're engaged in. The third is the individual who decides to self-radicalize. Hasan did that in the Fort Hood shootings. Those are the kinds of threats that we see and we're getting intelligence that shows that's the kind of stream of threats that we face, much more difficult to track. At the same time, I think we're doing a good job of moving against those threats. We've stopped some attacks, we continue to work the intelligence in all of these areas. But that area, those kinds of threats represent I think the most serious threat to the United States right now.

TAPPER: All three of those individuals were tied in some way to an American cleric who is now supposedly in Yemen, Anwar al-Awlaki. He has said to be on an assassination list by President Obama. Is that true and does being an American afford him any protection

PANETTA: Awlaki is a terrorist who has declared war on the United States. Everything he's doing now is to try to encourage others to attack this country, there's a whole stream of intelligence that goes back to Awlaki and his continuous urging of others to attack this country in some way. You can track Awlaki to the Detroit bomber. We can track him to other attacks in this country that have been urged by Awlaki or that have been influenced by Awlaki. Awlaki is a terrorist and yes, he's a U.S. citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist. We don't have an assassination list, but I can tell you this. We have a terrorist list and he's on it.

TAPPER: "The New York Times" reported this week that Pakistani officials say they can deliver the network of Sirajuddin Haqqani, an ally of Al Qaida, who runs a major part of the insurgency into Afghanistan into a power sharing arrangement. In addition, Afghan officials say the Pakistanis are pushing various other proxies with Pakistani General Kayani personally offering to broker a deal with the Taliban leadership. Do you believe Pakistan will be able to push the Haqqani network into peace negotiations?

PANETTA: You know, I read all the same stories, we get intelligence along those lines, but the bottom line is that we really have not seen any firm intelligence that there's a real interest among the Taliban, the militant allies of Al Qaida, Al Qaida itself, the Haqqanis, TTP, other militant groups. We have seen no evidence that they are truly interested in reconciliation, where they would surrender their arms, where they would denounce Al Qaida, where they would really try to become part of that society. We've seen no evidence of that and very frankly, my view is that with regards to reconciliation, unless they're convinced that the United States is going to win and that they're going to be defeated, I think it's very difficult to proceed with a reconciliation that's going to be meaningful.

TAPPER: I know you can't discuss certain classified operations or even acknowledge them, but even since you've been here today, we've heard about another drone strike in Pakistan and there's been much criticism of the predator drone program, of the CIA. The United Nations official Phil Alston earlier this month said quote, "In a situation in which there is no disclosure of who has been killed for what reason and whether innocent civilians have died, the legal principle of international accountability is by definition comprehensibly violated." Will you give us your personal assurance that everything the CIA is doing in Pakistan is compliant with U.S. and international law?

PANETTA: There is no question that we are abiding by international law and the law of war. Look, the United States of America on 9/11 was attacked by Al Qaida. They killed 3,000 innocent men and women in this country. We have a duty, we have a responsibility, to defend this country so that Al Qaida never conducts that kind of attack again. Does that make some of the Al Qaida and their supporters uncomfortable? Does it make them angry?

Yes, it probably does. But that means that we're doing our job. We have a responsibility to defend this country and that's what we're doing. And anyone who suggests that somehow we're employing other tactics here that somehow violate international law are dead wrong. What we're doing is defending this country. That's what our operations are all about.

TAPPER: I'd like to move on to Iran, just because that consumes a lot of your time as director of the CIA. Do you think these latest sanctions will dissuade the Iranians from trying to enrich uranium?

PANETTA: I think the sanctions will have some impact. You know, the fact that we had Russia and China agree to that, that there is at least strong international opinion that Iran is on the wrong track, that's important. Those sanctions will have some impact. The sanctions that were passed by the Congress this last week will have some additional impact. It could help weaken the regime. It could create some serious economic problems. Will it deter them from their ambitions with regards to nuclear capability? Probably not.

TAPPER: The 2007 national intelligence estimate said all of Iran's work on nuclear weapons ended in 2003. You don't still believe that, do you?

PANETTA: I think they continue to develop their know-how. They continue to develop their nuclear capability.

TAPPER: Including weaponization?

PANETTA: I think they continue to work on designs in that area. There is a continuing debate right now as to whether or not they ought to proceed with the bomb. But they clearly are developing their nuclear capability, and that raises concerns. It raises concerns about, you know, just exactly what are their intentions, and where they intend to go. I mean, we think they have enough low-enriched uranium right now for two weapons. They do have to enrich it, fully, in order to get there. And we would estimate that if they made that decision, it would probably take a year to get there, probably another year to develop the kind of weapon delivery system in order to make that viable.

But having said that, you know, the president and the international community has said to Iran, you've got to wake up, you've got to join the family of nations, you've got to abide by international law. That's in the best interests of Iran. It's in the best interests of the Iranian people.

TAPPER: The administration has continually said that Iran has run into technical troubles in their nuclear program. Is that because the Iranians are bad at what they do, or because the U.S. and other countries are helping them be bad at what they do, by sabotaging in some instances their program?

PANETTA: Well, I can't speak to obviously intelligence operations, and I won't. It's enough to say that clearly, they have had problems. There are problems with regards to their ability to develop enrichment, and I think we continue to urge them to engage in peaceful use of nuclear power. If they did that, they wouldn't have these concerns, they wouldn't have these problems. The international community would be working with them rather than having them work on their own.

TAPPER: How likely do you think it is that Israel strikes Iran's nuclear facilities within the next two years?

PANETTA: I think, you know, Israel obviously is very concerned, as is the entire world, about what's happening in Iran. And they in particular because they're in that region in the world, have a particular concern about their security. At the same time, I think, you know, on an intelligence basis, we continue to share intelligence as to what exactly is Iran's capacity. I think they feel more strongly that Iran has already made the decision to proceed with the bomb. But at the same time, I think they know that sanctions will have an impact, they know that if we continue to push Iran from a diplomatic point of view, that we can have some impact, and I think they're willing to give us the room to be able to try to change Iran diplomatically and culturally and politically as opposed to changing them militarily.

TAPPER: There was a big announcement over the weekend. South Korea and the U.S. agreed to delay the transfer of wartime operational control to Seoul for three years because of the belligerence of North Korea. Kim Jong-il appears to be setting the stage for succession, including what many experts believe that torpedo attack in March on a South Korean warship. They believe that this is all setting the stage for the succession of his son, Kim Jong-un. Is that how you read all this and the sinking of the warship?

PANETTA: There is a lot to be said for that. I think our intelligence shows that at the present time, there is a process of succession going on. As a matter of fact, I think the--

TAPPER: Was the warship attack part of that?

PANETTA: I think that could have been part of it, in order to establish credibility for his son. That's what went on when he took power. His son is very young. His son is very untested. His son is loyal to his father and to North Korea, but his son does not have the kind of credibility with the military, because nobody really knows what he's going to be like.

So I think, you know, part of the provocations that are going on, part of the skirmishes that are going on are in part related to trying to establish credibility for the son. And that makes it a dangerous period.

Will it result in military confrontation? I don't think so. For 40 years, we've been going through these kinds of provocations and skirmishes with a rogue regime. In the end, they always back away from the brink and I think they'll do that now.

TAPPER: The CIA recently entered into a new \$100 million contract with Blackwater, now called Xe Services for Security in Afghanistan. Blackwater guards allegedly opened fire in a city square in Baghdad in 2007, killing 17 unarmed civilians and since then, the firm has been fighting off prosecution and civil suits. Earlier this year, a federal grand jury indicted five Blackwater officials on 15 counts of conspiracy weapons and obstruction of justice charges. Here's Congresswoman Jan Schakowsky, a Democrat from Illinois, who's a member of the House Intelligence Committee.

(BEGIN VIDEO CLIP)

REP. JAN SCHAKOWSKY (D), ILLINOIS: I'm just mystified why any branch of the government would decide to hire Blackwater, such a repeat offender. We're talking about murder, a company with a horrible reputation, that really jeopardizes our mission in so many different ways.

(END VIDEO CLIP)

TAPPER: What's your response?

PANETTA: Since I've become director, I've asked us to -- asked our agency to review every contract we have had with Blackwater and whatever their new name is, Xe now. And to ensure that first and foremost, that we have no contract in which they are engaged in any CIA operations. We're doing our own operations. That's important, that we not contract that out to anybody. But at the same time, I have to tell you that in the war zone, we continue to have needs for security. You've got a lot of forward bases. We've got a lot of attacks on some of these bases. We've got to have security. Unfortunately, there are a few companies that provide that kind of security. The State Department relies on them, we rely on them to a certain extent.

So we bid out some of those contracts. They provided a bid that was underbid everyone else by about \$26 million. And a panel that we had said that they can do the job, that they have shaped up their act. So their really was not much choice but to accept that contract. But having said that, I will tell you that I continue to be very conscious about any of those contracts and we're reviewing all of the bids that we have with that company.

TAPPER: This month, Attorney General Eric Holder announced that Assistant United States Attorney John Durham is close to completing a preliminary review of whether or not there's evidence that CIA agents or contractors violated the law when they used brutal

methods, some call it torture, to interrogate terrorist detainees. Do you oppose this investigation? Are your officers -- your current officers, concerned about their legal jeopardy in the future under a future administration and what kind of guarantees can you give them?

PANETTA: Well look, CIA is an agency that has to collect intelligence, do operations. We have to take risks and it's important that we take risks and that we know that we have the support of the government and we have the support of the American people in what we're doing. With regards to this investigation, I know the reasons the attorney general decided to proceed. I didn't agree with them, but he decided to proceed. We're cooperating with him in that investigation. I've had discussions with the attorney general. He assures me that this investigation will be expedited and I think in the end, it will turn out to be OK. What I've told my people is please focus on the mission we have. Let me worry about Washington and those issues. And I think that's -- they have and I think frankly the morale at the CIA is higher than it's ever been.

TAPPER: We only have a few minutes left, but I want to ask, you're now privy to information about some of the ugliest, toughest tactics carried out by intelligence agencies with the purpose of defending our nation, stuff that probably as a member of Congress or OMB director of White House chief of staff, you suspected, but didn't actually know for a fact. How rough is it, and does any of it ever make it difficult for you to sleep at night or run to do an extra confession?

PANETTA: Well, I didn't realize that I would be making decisions, many decisions about life and death as I do now. And I don't take those decisions lightly. Those are difficult decisions. But at the same time, I have to tell you that the most rewarding part of this job -- I mean, we had a tragedy where we lost seven of our officers and it was tragic. But at the same time, it also provided a great deal of inspiration because the quality of people that work at the CIA are very dedicated and very committed to trying to help save this country and protect this country. They're not Republicans, they're not Democrats, they're just good Americans trying to do their job and that, I think, is the most rewarding part of being director of the CIA.

TAPPER: What's the flip side? Sleepless nights?

PANETTA: The flip side is you have to spend an awful lot of time worried about what the hell is going to go on our there and that keeps me up at night.

TAPPER: What -- this is my last question for you because we only have about a minute left -- what terrorist threat are we as a nation not paying enough attention to?

Or forget terrorist threat, what threat are we not paying enough attention to?



PANETTA: I think the one I worry about is, again, the proliferation of nuclear weapons and the fact that one of those weapons could fall into the hands of a terrorist. I think that's one concern. And there is a lot of the stuff out there, and you worry about just exactly where it's located and who's getting their hands on it.

The other is the whole area of cyber security. We are now in a world in which cyber warfare is very real. It could threaten our grid system. It could threaten our financial system. It could paralyze this country, and I think that's an area we have to pay a lot more attention to.

TAPPER: All right, Director Leon Panetta, thank you so much for coming here today. Really appreciate it.

TAPPER: Scenes from the McChrystal mess, one of many topics for our roundtable with George Will; from The Washington Post Rajiv Chandrasekaran; from the New York Times, David Sanger, and from the U.S. Institute of Peace, Robin Wright.

Thanks so much for joining us.

Normally, I would just go into the McChrystal thing, but Panetta does so few interviews, I do want to go around and just get your take on what you found most interesting.

George, I'll start with you.

WILL: Well, four things. First of all, he repeated the fact that we are in Afghanistan to prevent it from becoming a sovereignty vacuum into which Al Qaida could flow. He said there may be as few as 50 Al Qaida there now, which means we're there to prevent Afghanistan from becoming Yemen and Somalia, which raises the question of what we'll do about them.

Second, the president said our job, on December 1st, is to break the momentum of the Taliban. And Mr. Panetta did not really say we'd done that.

Third, the point of breaking the momentum of the Taliban was to encourage reconciliation so we can get out on -- begin to get out in July 2011. And Mr. Panetta did not suggest there was much evidence of reconciliation, which brings us to the...

TAPPER: Quite the opposite, actually.

WILL: Right, which brings us to the fourth consideration. The argument since the McChrystal debacle is the meaning of the July 2011 deadline. And it evidently has not much meaning.

TAPPER: Rajiv?

CHANDRASEKARAN: That point on reconciliation was a fundamental admission. Reconciliation is a key tenet of the Obama administration's Afghanistan strategy: apply pressure so you'll get those guys to the negotiating table; come up with a deal. We've been pushing the Karzai government for a big peace jirga. Moving forward on that front, Director Panetta sees no sign that any of those key insurgent groups are really ready to come to the table, negotiate meaningfully. That's a big red flag here.

TAPPER: David, you, like everyone else here, knows a lot of stuff about a lot of stuff. But you're, maybe, most expert on Iran. Did he say anything about Iran you thought was interesting?

SANGER: You know, Jake, I saw three things, I thought that he said that was notable. The first was that he believed that the Iranians are still working on the designs for nuclear weapons. Now, that is clearly in contravention to what was in the 2007 NIE, which was the last national intelligence estimate that was put together in the Bush administration.

He said -- he was more specific on the timeline. He said it would take them a year to enrich what they currently had in the way of nuclear fuel into bomb fuel and then another year to turn it into a weapon. So that gives you a pretty good sense where the U.S. believes, you know, is the outline of how far they could let the Iranians go.

And, finally, he said that there was a division with the Israelis on the question of whether the Iranians have determined that they should go ahead with a weapons program with the U.S. believing that there's been no decision made and the Israelis believing that, in fact, the Iranian leadership does want to move ahead with a weapon. I thought all three of those were pretty newsy.

TAPPER: Robin?

WRIGHT: Yes, I -- they took the best headlines already.

(LAUGHTER)

But it's clear that one of the things that's been most interesting in this town is the expected national intelligence estimate on Iran and it's been delayed over and over and over. And he basically gave us an outline of what is going to contain and the concern that we're going to reverse what was the controversial NIE under the Bush administration, that Iran wasn't working on weaponization and now the U.S. believes it is. And of course that then escalates the timetable, how much time do we have to try to get the Iranians to come to talk to us, to engage with the international community. And this is going to, I think, play into the questions of what do we do next since there's every indication, as he said, that the

sanctions alone are not going to be enough to convince them to either give up their enrichment program or to come back in the negotiating table.

TAPPER: Interesting. Well let's move on to the big news of the week which is obviously President Obama's dismissal of General Stanley McChrystal. George, do you think the president did the right thing?

WILL: Life is full of close calls, this is not one of them. He did the right thing and he did it with the right way, with the right words and an agreeable parsimony of words saying this is just not behavior acceptable at the senior levels of our military. And then he picked the only man around who could fill the leadership vacuum in Petraeus. But this again raises the question of you're sending Petraeus into a situation with this deadline. One of the reasons of setting the July deadline was to concentrate the mysterious mind of Hamid Karzai on what, reconciliation. But having the deadline makes the incentive for the Taliban to reconcile minimal.

TAPPER: And in fact, here's Senator Lindsey Graham talking about that this week.

(BEGIN VIDEO CLIP)

SEN. LINDSEY GRAHAM (R), SOUTH CAROLINA: I would argue that when the Taliban sends around leaflets quoting members of the administration and suggesting to people in Afghanistan after July, the Americans are going to leave you, that the enemy is seizing upon this inconsistency and uncertainty.

(END VIDEO CLIP)

TAPPER: David, can we do this on this timetable? The timetable is July 2011, U.S. troops will begin to withdraw, according the Vice President Biden, a lot of troops. According to other members of the administration, maybe not so much. But is this timeline even feasible?

SANGER: It strikes me from listening to what we have heard this past week and the underlying debate that was taking place before General McChrystal was dismissed that the general's timeline and the politicians' time lines are very different. President Obama has got a big reason to want to begin to withdraw, even if it's a small withdrawal, by next summer.

There's an election that follows here in a few months after that. But at the same time, anybody who has done counterinsurgency work in the military tells you the same thing which is counterinsurgency is taking a decade or more. That was the British experience in Malaysia. It's been the experience in many other countries.

And certainly if you look at what Director Panetta said today about how the Taliban are

not yet facing any incentive to reach reconciliation, it tells you that it would take a much longer time. And I think that's the fundamental issue. You know, the president said he doesn't mind dissent, he can't stand division. Firing General McChrystal I think only submerged the dissent. It is going to come back when this review takes place in December of the overall policy.

TAPPER: Robin?

WRIGHT: Absolutely. And I think that one of the challenges is it's not when they do the review in December, they have to look at what can they accomplish in the remaining six months and the fact is, this is Afghanistan, this is not Iraq. This is a place where you don't have a middle class. You don't have a lot of literacy even among the army and the police you're trying to recruit. The tribal structure, we relied in Iraq on the tribes to be the ones we could recruit to turn against al Qaeda. In Afghanistan, they have been decimated first by the decade-long war with the Soviet Union by the war lords and the civil war afterwards, and by the Taliban. And so you don't have the kind of network that you can turn in your favor to help lure, either defeat the Taliban or lure the Taliban in. And so the obstacles we face with just a year left in the cycle are truly daunting. And it's very hard to see how we can be very successful.

TAPPER: Rajiv, you just returned from Afghanistan. You were there a couple of weeks ago. And in fact, you were in Marjah.

CHANDRASEKARAN: Yes.

TAPPER: What did you see?

CHANDRASEKARAN: A long, hard slog there. Contrary to the initial messaging out of the Pentagon and the White House that Marjah was turning successful very quickly, what I saw was the start of what is going to be a month's long effort to try to stabilize it. And what they had hoped -- General McChrystal and Petraeus hopes for is that Marjah would be exhibit A in demonstration momentum, showing that the strategy is working. TAPPER: It's a relatively small town, 60,000 or so.

CHANDRASEKARAN: And it really should be a fairly self-contained fight. And it is, but it's not moving as quickly as they want. Now, the White House I don't think was under illusions that counter-insurgency wouldn't take a long time in Afghanistan. I think what they were hoping for was that in this narrow window, the 18 months between President Obama's decision to commit those 30,000 additional troops and next summer, that they would get enough momentum that it would compel the insurgents to sue for peace. It would get the Afghan government to get off the fence and move more quickly, to be able to field more Afghan security forces. That U.S. civilians would get out there and start to

engage in helpful reconstruction efforts.

What we're now seeing is that all of that is taking much longer than anybody anticipated. Really raising the question, what can you accomplish by the summer of 2011?

Now, you know, I think President Obama, he managed to escape any short-term political peril in naming General Petraeus to succeed General McChrystal, something with broad bipartisan support here in this town this week. But I think this comes with a potential longer-term political cost, Jake, because he's now putting out in Kabul the godfather of counter-insurgency, the guy who wrote the Army field manual on this. So that at the end of this year, when the White House has a strategy review, and next spring as they start to debate what will the pace of that drawdown be, he's going to have -- General -- having Petraeus there is a much more formidable advocate for delaying this drawdown or really attenuating it compared to what McChrystal would have been.

TAPPER: George?

WILL: And when I saw the godfather of counter-insurgency in Tampa about two months ago, it was clear to me that he read the crucial paragraph in the president's December 1st speech about the withdrawal deadline. The phrase "conditions-based withdrawal" is making the deadline all loophole and no deadline. That is to say, you can stay as long as you need. We just hope the conditions will be good then, and that hope is not a policy.

WRIGHT: One of the things that's so important is the fact that, as David pointed out, there are different -- the division that was represented in the McChrystal firing is still there. And it's going to play out over the next year, because the political timeline is what the White House is thinking about. The military is thinking about do they want to be seen to replicate the Soviet experience? After a decade, they still haven't managed to succeed. And here they are, the mightiest military in the world, fighting alongside the mightiest military alliance in the world, against a ragtag militia that has no air power, has no satellite intelligence, has no tanks, and the United States can't defeat that. What kind of image does that leave at a time when the United States leaves, it is not only superior moral power but the superior military power in the world?

TAPPER: David?

SANGER: You know, Rajiv is exactly right that putting General Petraeus in place bolsters the argument for continuing a counter-insurgency. But if you listen to what Director Panetta said today, all of the other evidence that we have that the application of more troops, at least so far, has not quieted the Taliban.

It also bolsters Vice President Biden's case, that in fact applying more troops is not

necessarily going to turn this around. And that's why I think we're headed for a much bigger collision later in the year on the strategy.

WILL: And the collision is going to be between the president and his base. The president, going into the 2010 elections, looking forward to 2012, hoped for three things. Rapid creation of jobs, the health care bill becoming more popular after it was signed. Neither has happened. And third, radical improvement in Afghanistan. The biggest number haunting the White House has to be enthusiasm deficit between Republicans eager to vote and Democrats tepid about this. And Afghanistan is going to do nothing to energize his base.

CHANDRASEKARAN: Not only not energize his base, it's won him no Republican support. The most concerning quote uttered by General McChrystal is not anything in those Rolling Stone interviews, nothing about the vice president, about Holbrooke. The most alarming thing for Washington that he said recently was in Europe, a couple of weeks ago, when he acknowledged that it's going to take far more time to convince the Afghans that international forces are there to protect them. That's a fundamental prerequisite to counter-insurgency.

TAPPER: In Kandahar. And he said that the Kandahar operation was going to be delayed because of that.

CHANDRASEKARAN: If you've got these guys who don't want us to be helping them out, helping to protect them, how do you do this?

TAPPER: Right now, President Obama is in Toronto, and I want to move on to the G-20 conference, because there's been a big debate there between President Obama and many in Europe about stimulus versus austerity. Spending more money to help the economy versus focusing on debt. Here's Treasury Secretary Tim Geithner.

(BEGIN VIDEO CLIP)

TREASURY SECRETARY TIMOTHY F. GEITHNER: There's another mistake governments, some governments have made over time, which is to, in a sense, step back too quickly. What we want to do is continue to emphasize that we're going to avoid that mistake, by making sure we recognize that, you know, it's only been a year since the world economy stopped collapsing.

(END VIDEO CLIP)

TAPPER: Rajiv, what does this debate mean for the president's agenda?

CHANDRASEKARAN: Well what this debate that played out over the weekend in Toronto means is that the president now faces opposition not just among Republicans on

Capitol Hill to additional stimulus activity but he's facing it from his European allies who are also concerned about growing government debt. Certainly the fallout from the Greek debt crisis reverberating around continental Europe. The Germans, the British are all very concerned about this and the president, Secretary Geithner, wanted to get out of Toronto, they really haven't gotten in terms of a commitment among the G-8 allies to do more of the second round of stimulus sending.

TAPPER: David, you know, you and I have been on these trips. The president really likes the G-20 more than he likes the G-8. He kind of thinks the G-8 is an anachronism.

SANGER: He does because the G-8 is filled, by and large, with older economies, Europe, Canada, Japan, all of whom are deeply in debt at this point, none of which feel that they can afford this kind of stimulus. And so when he brings in the G-20 for all the difficulties of managing a group that large, and the G-20 could barely come to an agreement on when to break for lunch, there -- the one advantage they bring is that there are big, growing economies there -- China, Brazil, India, and these are countries I think that the president feels over time he can manage to help stimulate the world economy in a way that he'll never get out of the old G-7.

WILL: And in the G-8, Germany lives large. And Germany and the United States have different national memories. The great economic trauma of the United States is the deflationary episode of the 1930s, the Depression. For Germany, the national memory is the inflation of the 1920s that destroyed the republic and brought on Hitler. Furthermore, the Europeans are not in that big mood to be lectured by us. They say, where did this crisis start? Oh, that's right, it was in the United States. Whose central bank kept interest rates at a bubble producing low for too long? Whose social policy encouraged an unreasonably high home ownership in the United States? And by the way, whose stimulus has by its own criterion, failed?

TAPPER: Now Robin, one of the things that the White House says is look at the growth rates. Germany, less than 1 percent. Europe, as a whole, about 1 percent. The U.S., 2.7 percent. How can they lecture us or disagree with us when our way is winning?

WRIGHT: Well, look, I think the stakes in Canada are really that two years ago, or the last two years, you have seen the international community respond, or the major economies respond as one voice. They've followed the same kind of pattern. For now, they're beginning to differ. And the danger is recovery is a lot about psychology. And if there's a sense of uncertainty, there's a danger that people don't know which way things are going to go. And the U.S. keeps arguing, look, if you don't keep stimulus, you're not likely to generate whether it's new jobs or and if you retrench too far, then that affects the sense of recovery, that you have to cut back, and that hurts the economies across the board. So there's real danger that the uncertainty generated out of Canada is going to begin to play

SANGER: And the president's also in the position in Canada of saying, don't do as I do, do as I say. I mean, just the day before he left, Congress could not come to an agreement on a very small extension of unemployment benefits, the most basic stimulus effort that the president tried to push.

TAPPER: 1.2 million Americans are going to lose their unemployment benefit extensions -- or unemployment benefits this week.

SANGER: That's right. So there's a fundamental stimulus action and the president had to go up and tell the Europeans they weren't doing enough for stimulus. TAPPER: George, why can't they pass this unemployment extension? I don't understand. The Republicans say spending cuts should pay for this, the Democrats know it's emergency spending. It seems like this is something where there could be a compromise.

WILL: Well, partly because they believe that when you subsidize something, you get more of it. And we're subsidizing unemployment, that is the long-term unemployment, those unemployed more than six months, is it at an all-time high and they do not think it's stimulative because what stimulates is the consumer and savers' sense of permanent income. And everyone knows that unemployment benefits are not permanent income.

TAPPER: Rajiv, I'm going to let you have the last word, we only have a minute left.

CHANDRASEKARAN: Both sides in this town have an incentive to let this drag out longer. The Republicans certainly playing to their base don't want to be seen as adding to the debt issues in a midterm election year. The Democrats I think are trying to sort of push the Republicans and trying to make them look like the party that's denying 1.2 million people an extension of these benefits.

And so, this is going to play out for several more weeks, and both sides are going to try to use it for their -- unfortunately, for their political gain, as we head toward the November midterms.

TAPPER: All right. Well, the roundtable will continue in the green room on abcnews.com. Hopefully they'll talk about Wall Street reform. We didn't get a chance to talk about that today. And at abcnews.com, you can also later find our fact checks of our newsmakers, courtesy of the Pulitzer Prize-winning Politifact.

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# Exhibit F

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May 31, 2010

# American Strike Is Said to Kill a Top Qaeda Leader

By ERIC SCHMITT

WASHINGTON — The operational leader for Al Qaeda in Afghanistan was killed in an American missile strike in Pakistan's tribal areas in the last two weeks, according to a statement the group issued late Monday that American officials believe is correct.

The militant leader, Mustafa Abu al-Yazid, an Egyptian, was a top financial chief for Al Qaeda as well as one of the group's founders, and was considered by American intelligence officials to be the organization's No. 3 leader, behind Osama bin Laden and his deputy, Ayman al-Zawahri, another Egyptian.

"His death will only be a severe curse by his life upon the infidels," Al Qaeda said in a statement issued to jihadist Web sites and translated by the SITE Intelligence Group, which monitors statements by jihadists.

A United States official said American intelligence analysts believed the statement from Al Qaeda was accurate. They said the death of Mr. Yazid, also known as Saeed al-Masri, was a significant setback to Al Qaeda's ability to help plan and support cross-border attacks against American and allied forces in Afghanistan from its haven in Pakistan's tribal areas.

Mr. Yazid was killed on May 22 in a drone attack in North Waziristan, a senior

Pakistani intelligence official said on Tuesday. The official said he was in the village of Boya, about 16 miles along a dirt track west from Miranshah, the main town in North Waziristan, when the missile struck.

Mr. Yazid was considered to be the overall commander for al Qaeda for Afghanistan and Pakistan, the official said.

“In terms of counterterrorism, this would be a big victory,” said the American official, who spoke on the condition of anonymity. “Al-Masri was the group’s chief operating officer, with a hand in everything from finances to operational planning. He was also the organization’s prime conduit to bin Laden and Zawahri.”

“His death would be a major blow to Al Qaeda, which in December lost both its internal and external operations chiefs,” the official said.

Mr. Yazid, 54, appeared in numerous video releases from as-Sahab, the media arm of Al Qaeda, since his first appearance on May 26, 2007, when he was formally introduced to the jihadist online community, according to SITE.

Shortly after the suicide bombing against the C.I.A. base in Khost, Afghanistan, in December, in which seven C.I.A. operatives and a Jordanian intelligence officer were killed, Mr. Yazid issued a statement praising the work of the bomber, Humam Khalil Abu Mulal al-Balawi, and said that the bombing was revenge for the killings of a number of top militant leaders in C.I.A. drone attacks.

Under President Obama, the C.I.A. has steadily increased the number of missile attacks against targets in Pakistan’s tribal areas by remotely piloted Predator and Reaper drones. As of May 28, the C.I.A. had carried out 38 strikes this year, compared with 53 for all of 2009, according to The Long War Journal, a Web site that tracks the number of strikes.

The C.I.A. has previously killed many of Mr. Yazid’s predecessors in Al Qaeda’s No. 3 slot. Mr. Yazid was reported to have been killed by an airstrike in

Pakistan before, in August 2008, only to reemerge and resume his operations.

*Ismail Khan contributed reporting from Peshawar, Pakistan*

# Exhibit G



### CIA Drone Strike Kills Al-Qaeda # 3

Posted By [Justin Fishel](#) On June 1, 2010 @ 4:23 PM In [Uncategorized](#) | [Comments Disabled](#)

Washington D.C. -- On Memorial Day, two historic World War II planes flew with a B-17 bomber while dropping flowers over the Statue of Liberty as a tribute to the seven CIA officers killed in Afghanistan's Khost province on December 30, 2009. The memorial service proved that the intelligence community, nor the public, has forgotten about the sacrifice of the men who lost their lives on one of the bloodiest days in the CIA's history.

Since that day that CIA has quietly vowed revenge, steadily increasing the number of secret drone attacks on Al Qaeda hideouts in Pakistan. According to the Long War Journal, a website that tracks these attacks, the CIA has conducted roughly 38 strikes so far this year, compared to 53 in all of 2009.

On January 4, just days after the killings, a senior U.S. intelligence official told Fox that the CIA would respond forcefully. "Relentless effort and aggressive, successful counterterrorism operations will avenge the Khost attack," this official said. "Some very bad people will eventually have a very bad day."

Late on Monday night, Al Qaeda announced its latest victim of these strikes: Saeed al-Masri, also known as Mustafa Abu Yazid, Al Qaeda's number three in command. He's described by senior U.S. officials who confirmed his death as the group's chief operating and financing officer. al-Masri (meaning the Egyptian) was a founding member of Al Qaeda 22 years ago and was "a prime conduit to bin Laden and Zawahiri," Al Qaeda's second in command, according to one U.S. official. He was "key to Al Qaeda's command and control," this official said.

Al-Masri also once threatened Al Qaeda would use Pakistan's nuclear weapons against the United States if it got the opportunity.

Shortly after the December attack in Khost al-Masri praised the killings, saying they were carried out to avenge the deaths of militants who died as a result of CIA drone strikes. It's safe to say that al-Masri hit a sore spot with the CIA.

Al-Masri now joins a list of senior Al Qaeda and Taliban leaders to die in covert missile strikes since the attack on Khost.

In early March, Ghazwan al-Yemini, a significant Al Qaeda operator and trainer known to have been involved in the planning of the Khost attack, was killed in a drone strike at a suspected bomb-making facility in Miram Shah.

In late February, a Defense Department official confirmed reports from Pakistani intelligence

that Mohammed Zafar, a wanted Taliban commander with connections to the 2006 bombing of the U.S. consulate in Karachi, was killed in a suspected CIA missile strike on North Waziristan.

According to a report issued by The Long War Journal, the list of senior operatives killed in 2010 by air strikes also includes:

- Mohammed Haqqani, a mid-level Haqqani Network military commander and brother of the group's top military commander.
- Sheikh Mansoor, an Al Qaeda Shadow Army commander who was based in North Waziristan and operated in eastern Afghanistan.
- Jamal Saeed Abdul Rahim, an Abu Nidal Organization operative who participated in killing 22 hostages during the 1986 hijacking of Pan Am flight 73.
- Mansur al Shami, an Al Qaeda ideologue and aide to Mustafa Abu Yazid.
- Haji Omar Khan, a senior Taliban leader in North Waziristan.

The CIA does not comment on drone strikes and wont confirm that is carries them out, but White House spokesman Robert Gibbs was more forthcoming Tuesday on the death of al-Masri.

"This is the biggest target to be killed or captured in five years," Gibbs said. He described it as "severe blow" to Al Qaeda.

Michael Scheuer, Chief of the CIA's Usama bin Laden unit from 1996 until 1999, disagrees with that assessment. He told Fox on Tuesday although these kills are small victories for the U.S., they aren't going to win the war. It comes down to the fact that these leadership figures are replaceable, he said. "Al Qaeda puts an enormous amount of effort into succession," Scheuer said. "Saeed had an understudy, and he'll be the one to step in." Scheuer likened al-Masri's death to the impact of losing a U.S. Marine commander. Just as the death of a Marine commander wont stop the U.S. from fighting, it's not going to stop Al Qaeda either, Scheuer said.

As for Al Qaeda's top leadership, Usama bin Laden and Ayman al-Zawahiri, Scheuer says he doesn't think the U.S. is any closer to getting them "Wherever bin Laden and Zawahiri are they are safe, they don't move around very much, they're guarded well, and they're living in a place where the community supports them."

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# Exhibit H



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The White House

Office of the Press Secretary

For Immediate Release June 01, 2010

**Press Briefing by Press Secretary Robert Gibbs, 6/1/10**

**James S. Brady Press Briefing Room**

2:21 P.M. EDT

MR. GIBBS: Mr. Feller.

Q Sir. Two topics I'd like to ask you about, Robert. On the Mideast, does President Obama condemn Israel's raid of the aid ship headed to Gaza?

MR. GIBBS: Well, Ben, let me simply restate what the international community and the United States supported early this morning at the U.N. Security Council through a presidential statement. The Security Council deeply regrets the loss of life and injuries resulting from the use of force during the Israeli military operation in international waters against the convoy sailing to Gaza. The Council in this context condemns those acts, which resulted in the loss of at least 10 civilians and many wounded, and expresses its condolences to their families. The Security Council requests the immediate release of the ships, as well as civilians held by Israel.

Q So that would seem to cover President Obama's personal feeling, while some of the allies are looking for a stronger statement from him directly.

MR. GIBBS: Again, this is supported not just by the United States but by the international community.

Q And does the President feel like he is still in a position of gathering facts about what happened or have you ascertained enough to --

MR. GIBBS: Well, the Security Council, the statement that I read, calls for an investigation that is prompt, impartial, credible and transparent, conforming to international standards of exactly what happened. And we're obviously supportive of that.

Q On oil, on the spill, was this latest attempt to try to contain the well one that BP came up with or is this an administrative directive?

MR. GIBBS: Is this the top cap?

Q Yes.

MR. GIBBS: I believe in conjunction with a number of scientists, this was one of the options that has been before us for quite some time. Obviously any action undertaken by BP to deal with the wellbore and to deal with the well itself requires the signoff of the federal on-scene coordinator.

Q What's the President's level of confidence about this effort given the lack of success of the ones before it?

MR. GIBBS: You know, I'm not in the odds prediction business in terms of this, as Carol Browner said on television this morning. Obviously this has gone on far too long. I think everybody is enormously frustrated with that, and rightfully so. We are closely monitoring the events as they start and are hopeful that this is a situation that will contain the oil coming from the well.

Obviously we're in a little different situation. This is -- this procedure -- and I don't know if you all had a chance to listen to Admiral Allen's briefing a little while ago; the transcript will be put out by the Joint Information Center and we will forward that around as well.

The solutions for -- the solution with the top kill. first in stabilizing the well with heavy drilling mud. ultimately would

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June 01, 2010 10:25 PM

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Q Just a couple more quick ones on this. The President said when the top kill procedure failed over the weekend that the leak was as enraging as it is heartbreaking. Have you seen the President enraged about this?

MR. GIBBS: Throughout this process, absolutely.

Q Do you think that that has come through to the American people?

MR. GIBBS: I think the American people are frustrated. I think the people of the Gulf are frustrated. I think the President is frustrated. I think the White House is frustrated. I don't see how anybody could look at what's happening in the Gulf and not be frustrated and heartbroken -- absolutely.

Q And is there any consideration given to the President cancelling his foreign trip?

Q We can't hear you.

Q Your mic isn't on.

MR. GIBBS: My mic's not on?

Q I don't think so.

MR. GIBBS: I said all those really important things and you guys --

Q Start from the beginning.

MR. GIBBS: Okay, so I was going to tell you tomorrow's lottery numbers, but -- (Laughter.) Can somebody figure out -- did it work now? Are you sure? This is sort of awkward. This never happens to Bill at karaoke.

Q And you complain we all ask the same question over and over again.

MR. GIBBS: Exactly right. (Laughter.) Now there's at least a good excuse. (Applause.) First time anybody has ever clapped for what I said. Go ahead, I'm sorry. Yes, exactly -- don't start from the top. Lord knows I'll -- Bill will lip-sync the transcript when it comes out, so you can -- go ahead, I'm sorry.

Q I'll just go to my last question, which was, is there any consideration being given to postponing or canceling the President's upcoming foreign trip to deal with this?

MR. GIBBS: Let me check on that. I don't know the answer to that.

Q Before returning to the Gaza flotilla incident, quick question about the oil spill. The President said that if laws were broken, then justice would be done for those responsible. Can you give a sense of when a criminal probe might emerge in the spill case?

MR. GIBBS: Well, look, obviously the Attorney General is in the Gulf today to meet with U.S. attorneys and state attorneys general. I would refer you to the Department of Justice for those answers.

Q Okay, and in light of what happened with the Gaza aid flotilla, is the President considering at least backing international calls to lift the blockade on the Gaza Strip by Israeli forces?

MR. GIBBS: No. Well, look, obviously, as we have said before, we are concerned about the humanitarian situation in Gaza and continue to work with the Israelis and international partners in order to improve those conditions. And as the U.N. Security Council statement says, obviously it's an untenable situation.

Q Should the blockade be lifted?

MR. GIBBS: Again, we're working with those to improve the humanitarian conditions. I do think it's helpful to understand that this is a blockade of -- to not allow weapons to get into the hands of Hamas.

Q And humanitarian aid.

MR. GIBBS: And we have said that -- well, I'll just leave it at that.

Q And what are the President's concerns that the Gaza incident -- the flotilla incident might -- has poisoned the atmosphere to the extent that indirect talks between Israel and the Palestinians won't go forward? Will there be delay of some sort here?

MR. GIBBS: Well, look, I would say, obviously, we're

The schedule for Mr. Abbas coming is still the same. And we think more than ever we need a comprehensive Middle East peace plan.

Q Mitchell is back in the region tomorrow, I believe --

MR. GIBBS: He is.

Q -- for the Palestine Investment Conference. Will he be shuttling between Abbas and Netanyahu for talks?

MR. GIBBS: Let me get -- I don't off the top of my head know his schedule, but I'll -- let me see if I have anything additional to --

Q But you expect indirect talks will go forward?

MR. GIBBS: Yes.

Q Okay.

MR. GIBBS: Yes, sir.

Q Does President Obama believe the Israelis' version of events?

MR. GIBBS: I'm sorry?

Q Does President Obama believe -- does he believe the Israeli government's version of events?

MR. GIBBS: Well, again, Jake, I'd refer you to the U.N. Security Council resolution calling for an investigation so that everybody knows exactly what happened.

Q Let's talk about that investigation. Is it important that it be run by the Israelis? Does the President want the international community to be involved in the investigation?

MR. GIBBS: Well, I would say that -- obviously what I said earlier, the resolution calls for a prompt and transparent investigation. Obviously we are open to ways to assure a credible investigation, including international participation.

Q And there were Americans on the flotilla. Has there been any -- do you have any information about whether any of them were hurt? There was an unconfirmed report that an American student lost an eye in the incident. Do you know anything?

MR. GIBBS: I think we're in contact with the Israelis in order to get an accounting as to whether any American citizens -- obviously American citizens were -- acting as private citizens -- were on some of these ships. We're working with the Israelis to determine if any of those individuals were injured, and as the resolution says, would call on the Israelis to release both the ships and any of those people.

Q Is the President concerned at all that after all his work to repair relations between the U.S. and the Muslim world that a situation like this destroys it overnight?

MR. GIBBS: The U.S. relationship with the Muslim --

Q The U.S. relationship with the Muslim world by standing so steadfastly with Israel?

MR. GIBBS: No, again -- again, I would point you to -- I think it was a pretty clear statement by the international community that the United States --

Q I wouldn't call it that -- I mean, it condemns acts that were taken that led to the loss of life, but it doesn't say whose acts. It could have been the flotilla's acts, or it could have been the IDF's acts. It's not clear from that statement.

MR. GIBBS: Well, I think our opinion is this is a pretty clear statement, and obviously --

Q Whose acts -- whose acts are you talking about in that statement? Is it the IDF or is it the --

MR. GIBBS: Again, we're talking about series of facts that will be determined by an appropriate investigation as I just said.

Q Okay, so there's no specificity as to whose acts it's condemning?

Q Well, it looks like you don't even know what -- you don't know what happened.

MR. GIBBS: We can play circular ball all day long, Jake. Obviously we condemn the loss of life and we regret it deeply. I think that is knowable, correct?

Q That's correct.

MR. GIBBS: Okay, good. So I would simply say -- reiterate what is in the statement. In terms of our relationship with the Muslim world, I think the President has obviously spent a lot of time on improving our relationship with countries throughout the world, and special time and care on our relationship with the Muslim world. I do not think that this will have a great impact on that.

Q Thank you. I just wonder -- I wanted to talk about oil a little bit. You mentioned Thad Allen briefed earlier today. Why did it take until day 43 for the administration to decide that you have to speak with one voice and have Thad Allen doing it, not BP briefing?

MR. GIBBS: Well, first of all, I think there were joint briefings that were held at the Joint Information Center in Robert that had a component of both BP and the Coast Guard. Today is the beginning of hurricane season. Rear Admiral Landry, who was the federal on-scene coordinator, has naturally rotated back to her position of hurricane preparedness in the Gulf. Obviously, given the prediction by NOAA that this is likely to be a more active season than we've seen in the past, those preparations are enormously important.

This has been a little bit of a difficult situation because, as I've explained here on a number of -- a number of times, there are a lot of different agencies that go into what's made up of the larger federal response. When Admiral Allen was here last week we talked about some of the commitments that he had last week in his retirement from the Coast Guard as he even -- as he remains the National Incident Commander. The briefings that he has won't be at a regular time, they won't be at a regular location. They'll be wherever he is, whenever they're conducive to his schedule, given the enormous amount of work that he has to do in ensuring our response.

Q Administration officials are also telling us today that part of the problem was that BP was not always giving accurate information in their briefing.

MR. GIBBS: Well, no, administration officials didn't tell you that today, they told you that on Sunday when Carol Browner on two news shows wanted to ensure that people adequately understood the possible risks involved to the top cap procedure which --

Q So, but --

MR. GIBBS: Let me finish this -- when we --

Q -- why did it take until day 41 at that point?

MR. GIBBS: When we cut the cap, our scientists, as part of the flow rate group, estimate you could see a 20 percent increase in the overall outflow of hydrocarbons. This was something that our scientists and others had told us about. Obviously we were uncomfortable with Saturday's briefing when somebody from BP didn't acknowledge that.

Q Right, but people have -- critics have been for weeks saying that BP's information was not adding up. You had outside experts saying that it was leaking far more than 5,000 barrels a day. They were saying that --

MR. GIBBS: Which is why we set up a flow rate group to determine adequately using the best technology possible, Ed --

Q Right, but then it took until Sunday, day 41, for Carol Browner to say, you know what, BP's information is not accurate. Why did it take so long?

MR. GIBBS: No, no, no, no, let's not -- I think you're confusing about eight issues into one. Let's understand -- no, the flow rate is an important aspect to talk about, and let's discuss it because I'm not sure we've briefed since the flow rate group talked about this.

The initial estimates that were done used overhead photography to measure the amount of oil on the surface, right? We know that through the use of subsea dispersants it's likely that not everything is going to the top, right? So -- and even with the picture that many of you guys are using on television, it's a -- it's not sufficiently of the dimension to fully measure the flow, right?

We've never been dependent upon BP for information about the flow. In fact, I think you've heard many in the administration discuss accurately that -- because fines for BP will largely be determined by the amount of pollution emitted, that they may not altogether have the same transparent public interest that we do in ensuring the public

MR. GIBBS: Well, those -- again, let's understand, Ed, I don't -- those are resources -- the tripling of resources are in the parishes in which we see the greatest -- where we're seeing the greatest amount of oil hit land, right? So obviously there continues to be a frustration with the well not being capped, even as we try to do everything in our power.

I think it is important, as many administration officials have said, our interests line up on this, the American people's interest and the company's interest line up on trying to do everything humanly possible to plug that leak.

Q Right, but I'm acknowledging the President is saying he's throwing unprecedented resources at it, and yet you still can't solve it -- does that cut into the administration's credibility? The President ran in part on this idea of competence in government, being able to solve these big problems. I understand it's unprecedented --

MR. GIBBS: But I think I'm hearing you --

Q But you're throwing unprecedented resources and you can't solve it.

MR. GIBBS: No, again, you're -- the unprecedented resources that are referred to are the resources that are on land to deal with the oil that's coming in. Ed, I think that inherent in the premise of your question is somehow we're not -- there's something that we know that we could do that we're not doing to cap the well. I can dissuade you of that.

Q So the American people basically are told nobody really knows how to fix this thing?

MR. GIBBS: Well, again, Ed, I don't know if the premise of your question is that somebody in and around this room knows how to do it and we're not doing it.

Q Okay, last thing, the President at his news conference was talking about how from day one the administration has essentially been in charge, that any big decision you've got to sign off on. But the previous week when various people here, starting with Jennifer Loven, were pressing you on why doesn't the government step in, you repeatedly said the government can't, that this is BP's, that the federal government is not in control, legally you can't really be in control. So which one is it?

MR. GIBBS: Well, no -- we've always -- no, we've always directed those resources. And as -- whether it was the top kill, whether it was the top cap, any of the exercises that needed to be signed off on by the federal on-scene coordinator in order to make happen, those were done.

Ms. Thomas.

Q The -- our initial reaction to this flotilla massacre, deliberate massacre, an international crime, was pitiful. What do you mean you regret when something should be so strongly condemned? And if any other nation in the world had done it, we would have been up in arms. What is the sacrosanct, iron-clad relationship where a country that deliberately kills people and boycotts -- and we aid and abet the boycott?

MR. GIBBS: Look, I think the initial reaction regretted the loss of life as we tried and still continue to try to gather the relevant --

Q Regret won't bring them back.

MR. GIBBS: Nothing can bring them back, Helen. We know that for sure because I think if you could, that wouldn't be up for debate. We are -- we believe that a credible and transparent investigation has to look into the facts. And as I said earlier, we're open to international participation in that investigation.

Q Why did you think of it so late?

MR. GIBBS: Why did we think of --

Q Why didn't you initially condemn it?

MR. GIBBS: Again, I think the statements that were released speak directly to that.

Chip.

Q You said earlier that the President is enraged. Is he enraged at BP specifically?

MR. GIBBS: I think he's enraged at the time that it's taken, yes. I think he's been enraged over the course of this, as I've discussed, about the fact that when you're told something is fail-safe and it clearly isn't, that that's the cause for

Q Frustration and rage are very different emotions, though. I haven't -- have we really seen rage from the President on this? I think most people would say no.

MR. GIBBS: I've seen rage from him, Chip. I have.

Q Can you describe it? Does he yell and scream? What does he do? (Laughter.)

MR. GIBBS: He said -- he has been in a whole bunch of different meetings -- clenched jaw -- even in the midst of these briefings, saying everything has to be done. I think this was an anecdote shared last week, to plug the damn hole.

Q Does the President still have confidence in BP? Is he losing confidence in BP? Is he trying to separate himself from BP?

MR. GIBBS: Based on what?

Q Well, based on, number one, Thad Allen basically taking over the daily briefings. Number two, today, that shot across the bow about prosecution; Eric Holder being sent down there. I mean, he's getting tough with BP. Is that because he is separating himself from BP and making clear it's their problem?

MR. GIBBS: Well, I would say this, Chip, we have -- it has been their problem since day one. It is also our problem, and we're doing everything that we can to both plug the leak as well as to respond at the subsea and on the surface to the pollution that's coming out. Let's understand the reason that Thad is doing this -- again, I spoke about this with Ed -- in terms of being uncomfortable with the nature of their answer as it related to the increased amount of flow --

Q Well, they kind of lied, didn't they? Why would he be just uncomfortable? That would -- there I can imagine rage. I mean, they said nothing more was going to come out but the experts say --

MR. GIBBS: Well, Chip, I think that if you look at what Carol said on Sunday, despite the fact that it is not our oil well, we believe that it's tremendously important that the American people have the best information as accurately and as quickly as possible, which is why she said clearly that, one, there was -- there could be an increase of 20 percent of hydrocarbon coming from the riser when it's sheared off. We discussed -- I mean, look, I think that's the prime example of what she said on Sunday.

She also said, I think obviously very accurately, that the long-term solution to this is the drilling of relief wells, right? And that's likely to take until mid-August.

Q Right, so I'm saying you've got this difference over the 20 percent, which the administration, you say they're uncomfortable -- it seems like that's a pretty mild response to it. And then at the press conference, the President said that they have an interest in minimizing things.

MR. GIBBS: I just said that.

Q It sounds like you're suggesting --

MR. GIBBS: I just said that.

Q But it sounds like you're suggesting BP is lying to the administration. Wouldn't you have a stronger response than than saying you're uncomfortable?

MR. GIBBS: Do I think that BP was forthcoming on what the impact would be of cutting the riser off? No, obviously.

Q Do you think they're intentionally misleading -- in other words, lying to the administration?

MR. GIBBS: I'm not in their meetings on what their scientists are telling them. I'm simply conveying to the American people precisely what our scientists are telling us is likely to be the result of cutting the top of the riser.

Q Does the President overall trust BP?

MR. GIBBS: We will continue to push BP to do whatever we feel is necessary to respond to the leak and to adequately respond to the spread of the oil and to ensure that they pay for all of it so that taxpayers don't bear any of this cost.

Savannah.

Q Recognizing you're in fact-ascertaining mode, let's take some facts not in dispute -- the ship was boarded in international waters. Do you think that violated international law in doing that? Does the administration think so?

Q Correct. Does the administration have a position on that?

MR. GIBBS: I don't know the answer to that.

Q Was it appropriate, do you think -- does the administration think for a humanitarian ship to attempt to break a blockade?

MR. GIBBS: Look, I'm not going to get into the international law implications of all this, Savannah. I think the administration --

Q I'm just asking was it appropriate for a humanitarian ship --

MR. GIBBS: -- and international community has spoken on the actions and look forward to a full accounting of the facts.

Q So rather than the U.S. having an independent reaction, you're aligning yourself entirely with the U.N. Security Council's statement. Does that mean the U.S. ratifies and accepts everything coming out of the Security Council in this regard?

MR. GIBBS: Things we vote for, yes. I mean, we supported the -- what came out of the U.N. Security Council.

Q So verbiage about there being a humanitarian crisis in Gaza --

MR. GIBBS: Yes.

Q -- and the blockade needs to be looked into?

MR. GIBBS: There's not -- we didn't -- we don't always support the first several paragraphs. We supported and voted for the entire resolution, yes.

Q Would you concede that the notion of boarding a vessel in order to stop it from breaking the blockade was poorly conceived?

MR. GIBBS: Savannah, you're asking me to be a -- I am many things; I am not an international law expert and I am not a military tactician.

Q I'm just trying to get the administration's position.

MR. GIBBS: Again, I serve some roles but neither -- I've never been in a military where I've been asked my opinion on either international law --

Q Well, obviously I'm asking for the administration's position.

MR. GIBBS: I don't have anything to add.

Q Can I follow?

MR. GIBBS: I'll come around.

Q Has the administration considered invoking the Stafford Act regarding the oil spill to speed resources to --

MR. GIBBS: Well, the Stafford Act is a set of -- is what is typically done when there is not a responsible party for a disaster, right? So if a hurricane has caused flooding in Tennessee, governors normally request a Stafford Act declaration to cover damages. As I understand it in discussing this with the lawyers, the appropriate set of responses is contained in the Oil Pollution Act.

Obviously I would say -- let me just add, there are aspects of different types of Stafford responses such as the program that SBA has began I think the 10th of May offering low-interest loans and providing loan forgiveness for people that have been hurt as an economic consequence of a disaster.

Q You spoke earlier about the balance of responsibility between the federal government being in charge and -- or perhaps earlier indications they were relying on BP to run this. Has there been any shift in your mind in the balance between who was controlling this operation between the federal government and BP since this started?

MR. GIBBS: No, again, I would refer you to what the President said last week.

Q So you're saying that there has not been any shift since the beginning?

Yes.

Q Thank you. It's pretty obvious that there was tragic over-reaction on both sides, but could you please look into two competing conflicting reports -- one report says Hamas and some terrorist groups provided the financing for this flotilla; another report claims that Israel has actually been giving a lot of humanitarian aid to the Palestinians. If you could look into both of those before --

MR. GIBBS: Let me see if there's any direction that we have on either one of those.

Yes, ma'am.

Q Did the U.S. know in advance about the Israel raid on the --

MR. GIBBS: No.

Q And part of the Indonesia trip is going to be about Muslim outreach. How will that be shaped given this latest news?

MR. GIBBS: Look, obviously Indonesia is the largest Muslim country in the world. It is important to our efforts and we work in conjunction with them on counterterrorism and a whole host of issues of mutual concern. That trip -- I'm not aware of any change in the planning for what will be done on that trip as a result of this.

Q And Robert Reich says BP should be put under a temporary receivership to ensure that the President is in charge. What do you think of that idea?

MR. GIBBS: What law would that -- I'm not entirely sure what legal mechanism one would have to do that. Do you --

Q But do you think there should be an effort --

MR. GIBBS: Well, I don't -- maybe I misunderstood -- what did he -- under what law did he ask that be done?

Q I'm not sure legally, but there's --

MR. GIBBS: Well, before I wade in -- I just told Savannah I was -- a fact she I think readily knew -- that I was not an international expert. I'm probably not a domestic law expert either, but I'm happy to look at whatever Mr. Reich has.

Yes, sir.

Q Robert, on the flow rate projections you guys put together, is it possible that if this maneuver doesn't succeed and the cutting of the riser, could that increase for some period of time the flow rate by 20 percent if it doesn't work?

MR. GIBBS: I think there is --

Q Is that a possibility that the American people should brace themselves for?

MR. GIBBS: Well, I think as Carol said clearly on Sunday, that -- well, the flow rate group estimated -- I think this is right -- 12,000 to 19,000 barrels of oil a day. We believe that that could increase, say, 20 percent with the cut of the riser. So that puts the bottom at -- I can do that math quicker than I can the other -- 15,000 for the bottom end of that. I think cutting -- and, again, we'll send out Admiral Allen's briefing -- there will be a time between the cut of that riser and the placement of a cap.

So I've seen varying estimates, but let's assume several days of increased hydrocarbon pollution in the time in which it takes to install some sort of top cap. Some of that, again, as Thad Allen said, is based on the cut that's made by the saw.

Q Right, but it's possible, considering the history of all the other efforts undertaken technologically so far, that the cut won't be as clean as they need, there will be too much push, there will be too much --

MR. GIBBS: Well, there's -- I think there's a couple -- as Thad said, there's a couple of different caps, again, based on that cut, that may seal more hydrocarbon pollution than the other. Again, this is not without risk in terms of --

Q Is it without risk in making things worse?

MR. GIBBS: No, it's not without risk at all, no. It's very -- I mean, I think as the President's statement said on Saturday that -- look there's very little that is done now based on where we are in the efforts to contain the well



Again - and I think just to be completely transparent, that you've seen Admiral Allen say today that there is also some concern about the condition of the well and the wellbore relating to the explosion that happened on the 20th of April.

Q Would you say this disagreement over the flow rate is the only incident in which BP has not been as forthcoming as the federal government would prefer, or part of a series of incidents where it has not been as honest as you would --

MR. GIBBS: I forget exactly what Tony Hayward said last week in terms of the degree to which -- whether or not there was any real pollution involved. Obviously I don't see anybody -- how anybody could come to that conclusion. We -- I clearly on Saturday did not feel comfortable with their explanation on the possible increase in flow.

Q Yesterday it was noted in the daily assessment of things that the -- one of the relief wells being drilled is 10 days ahead of schedule.

MR. GIBBS: Yes.

Q Are you satisfied with BP's efforts in that regard?

MR. GIBBS: Well, as I understand it, that well is 12,000 -- about, as of last night, about 12,000 feet down. That includes the roughly 5,000 feet of ocean. As you said, that's ahead of schedule and that is the long-term, permanent solution to the problem that we have at the well site right now. So regardless of the success of the operation currently ongoing, that's the permanent solution, which is -- again, in top kill, forcing the mud down and creating the stabilizing pressure ultimately would have led to the cementing of the well. Drilling that relief well, placing another blowout preventer obviously on that well as it's drilled and ultimately cementing it is the long-term solution for what's going on now.

Q Can you tell us the degree to which internally the conversations come from the President -- hey, can you sketch out for me what this is going to look like if we have to wait until August for this relief well to be the final, ultimate solution; what kind of ecological damage are we talking about? And is there a point at which we have calculated, no matter how much we legitimately and legally we hold BP, Transocean, Halliburton responsible, there may not be enough money to deal with all this and we may need a federal response, a taxpayer response that deals with this --

MR. GIBBS: I've not heard the latter, because the responsible party per the law will pay that back. We have, in sending legislation to improve a number of the regulatory structures around the relationship between oil and the government, one of the things that we called for was a lifting of the economic liability cap to an unlimited level that we feel comfortable -- that's where we feel comfortable at given the enormity of the disaster that we're looking at right now.

In terms of the --

Q So, wait, are we talking about both sides of Florida, parts of the Mid-Atlantic -- I mean, all these sorts of things, has that been conveyed to the President?

MR. GIBBS: I don't know the degree to which the full -- a full damage assessment has been worked up to that level based on the Loop Current and the wind direction and things like that. Obviously, Major, we can -- taking the flow rate figures that the group came out with last week, understanding, again, the floor now at 15,000 after the riser is cut, look, you can begin to quickly do the math to figure out the millions of gallons of oil that will be in the Gulf and could spread, and I think that's a -- those are sobering figures. And you can understand, as the President said today, we are dealing with the largest environmental disaster in our country's history.

Q The long-term, permanent solution -- is August the outside date by which that is expected to work, or could it be even later?

MR. GIBBS: I assume it could be both earlier and later. I think the target date was mid-August in terms of drilling to the level at which you would need to go in order to construct that relief well.

Q Let me ask you, there are credible reports that the al Qaeda number three has been killed in Pakistan. How important a blow is that? Some have described it as being as important or even more important than getting bin Laden.

MR. GIBBS: Well, in talking with -- obviously al Qaeda has commented on the loss of this individual and we welcome his demise. In speaking with John Brennan and others today, I didn't ask specifically the question of in comparison. John was quite clear in saying this is the biggest target to be either killed or captured in five years and is somebody who intricately understood and was on top of the financing of al Qaeda. So it is a -- unquestionably is a severe blow.

Q When was the President informed?

Q Robert, I wonder if you could talk about whether the President is worried that the spill is going to so consume everything until August that the rest of his agenda is hobbled to some extent. He's got a lot of things on his plate. He promised at one point that this year would all be about jobs, jobs, jobs. He's obviously spending --

MR. GIBBS: Look, the truth is we'll get -- before you -- look, I think we sort of periodically obviously get economic figures in order to gauge where we are in the recovery -- today an increase in the manufacturing index above what had been expected, and the largest spending increase in construction in 10 years aided by the Recovery Act. And we'll get a sense of where we are in the continuum of that jobs recovery with the new figures on Friday.

Q Is there an opportunity cost on all the different things that the President had in mind for this year that may be --

MR. GIBBS: I don't -- I mean, look, I was asked several weeks ago, what did this particular incident do to the likelihood of a clean energy bill or a comprehensive energy bill. Look, I think you -- it becomes clearer -- and the President said this last week in visiting a solar factory in California, that it becomes clearer that we can -- if we are going to be less dependent on foreign oil, then we're going to be more dependent on domestic oil. In order to not be -- not simply take the dependence of one and move it to a proximity closer, we have to invest heavily in a clean energy economy, largely what was done through the Recovery Act, but creating a marketplace for that to continue is tremendously important.

So I don't think it -- I think it adds to the urgency of getting something done on energy. And I would say this, Peter -- one of the things we have learned throughout our time here is you do not get to pick what events you deal with. And the President doesn't have that luxury -- including rain yesterday.

Q Can I ask on a different topic then? On Friday, after our last chance with you last week, we received this memo from Bob Bauer on the Sestak matter. In three months -- this is the response after three months of questions. I'm just wondering, if it's not a big deal, as you guys are saying, then why did we wait for three months to answer that question?

MR. GIBBS: I'd have to ask Counsel for a better answer on that. I don't know the answer.

Q Don't you have something to do with that as the chief spokesman for the White House? You were asked on a number of occasions and don't you think that that kind of created --

MR. GIBBS: If I bear some responsibility for that, I can understand that.

Ann.

Q When President Obama spoke with Prime Minister Netanyahu, did he just suggest the time has come to either change or alter the embargo --

MR. GIBBS: I can check on that. I don't know the answer to that off the top of my head.

Q And was the United States blind-sided by this incident? Certainly a lot of other countries including Turkey knew that this flotilla was headed --

MR. GIBBS: Well, I think the question that I took earlier, just to be clear, was, did we have knowledge of the military operation. And the answer to that was no. Obviously, this is not the first flotilla that has happened. So, again, my answer previously was based on previous knowledge of the military operation, which the President did not have.

Q And when do you think Prime Minister Netanyahu might come back? And what -- and how about President Abbas' visit next week?

MR. GIBBS: Well, that's on schedule I think the 9th of June, if I'm not mistaken.

Q There's no reason to cancel that?

MR. GIBBS: No, not at all. That schedule is moving forward. For the Israeli answer, obviously, he's got an open invitation. But I would direct the scheduling -- the particulars of that schedule to their government.

Q Egypt has apparently opened the -- one of the entrances to Gaza now in response to this to allow more traffic in and out. Does the United States think that's a good idea?

MR. GIBBS: Let me check with NSC. Again, I understand that we have -- we do have concerns about the humanitarian situation in Gaza.

Q Can I follow on that?

Q The aid ship the Rachel Corrie is scheduled to arrive in Gazan waters tomorrow.

MR. GIBBS: I'm sorry --

Q The aid ship the Rachel Corrie is scheduled to arrive in Gazan waters tomorrow and the Israelis are planning to intercept it. Would you consider calling on them not to do that?

MR. GIBBS: Let me get some information on the extent of that --

Q Will you get back to us on that?

MR. GIBBS: Sure, I will find that answer out.

Q Thank you, Robert. Two questions. One, there is a big delegation from India in town for a U.S.-India strategic dialogue to be held at the State Department starting tomorrow with Secretary Hillary Clinton and India's Foreign Minister Krishna. And I understand President Obama will be the guest of -- guest at the reception on Thursday at the State Department. Do you think the President will have a special message for this U.S.-India relations? And also, if U.S. is supporting India's entry in the United Nations Secretary Council?

MR. GIBBS: Well, let me get -- I don't know what the remarks are for Thursday, but I'll take a look at that.

Q And second, as far as this oil spill is concerned, I understand State Department said that there's many nations who has offered help in this connection. It's too long, and I understand President is frustrated and Americans are frustrated, but you think there is no technology who can help? So many scientists are there and are you seeking really international outside help?

MR. GIBBS: I think as Admiral Allen said today and has said in the past, we have -- several countries have offered, and we have taken their help -- some on boom, some on additional skimmers -- and so obviously throughout this process, if there are those that can aid in the disaster in the Gulf, we have accepted.

Q If I may, as far as presidential trip to Indonesia is concerned, do you think President feels that now there is a need for another clear-cut message which he had in Cairo and in Turkey for the Muslim world now in the largest Muslim country, in Indonesia?

MR. GIBBS: Well, again, let me -- I don't want to get too far ahead on the foreign trip. We'll have a chance to talk about that.

Q Thank you, Robert. Does the United States have support for additional sanctions against North Korea?

MR. GIBBS: Do we support additional sanctions?

Q Yes.

MR. GIBBS: Obviously South Korea and others have taken the concern about them, the investigation that was conducted, to the United Nations for further actions. We're obviously in close communication with the South Koreans and are supportive of their efforts to respond.

Margaret.

Q Robert, Robert, can I just ask one two-part question?

MR. GIBBS: If your name is Margaret.

Q Will you come back to me?

MR. GIBBS: I will.

Q Does the President believe that Israel is becoming a burden politically to the United States --

MR. GIBBS: I'm sorry, what was the question?

Q Does the President believe that Israel is becoming a political burden to the United States?

MR. GIBBS: Based on? Based on? No. Let me be clear here. The United States and Israel -- as I have said on countless occasions, we have a trusted relationship. They are an important ally and we are greatly supportive of their security. That's not going to change.

MR. GIBBS: That's not for me to talk about, Margaret. I'm happy to try to convey information but I don't have an answer to that.

Q Well, what does the situation do to U.S. relations with Turkey, specifically? Can you talk about that?

MR. GIBBS: Well, look, the President spoke with Prime Minister Erdogan seven to 10 days ago. They had a good conversation about things like Iran. I anticipate that in the coming days the President and Prime Minister will talk again. Obviously they're an important friend in all this and a relationship that we value greatly.

Q They have not spoken in the wake of this?

MR. GIBBS: They have not spoken, no. I know that they have not.

Q Thanks, Robert. Just a couple of quick things on the Sestak thing again. The counsel's memo on Friday said that efforts were made in June and July of 2009. Were there multiple efforts and were all those made by President Clinton?

MR. GIBBS: Whatever is in the memo is accurate.

Q Okay, but, I mean, with regards to June and July, I mean, were all those President Clinton or --

MR. GIBBS: I think the relationship on how that happened, yes, is explained in the memo.

Q Joe Sestak said he had one conversation with President Clinton.

MR. GIBBS: Let me check.

Q And just one more. As far as -- it said this is an unpaid position. Does that make a difference in the view of the White House, that it would be an unpaid position as opposed to a paid position?

MR. GIBBS: Well, again, I'm not going to get into hypotheticals. The situation was an unpaid position and didn't constitute a lot of what you're hearing.

Q Okay, and just one more -- sorry. But the Intelligence Advisory Board, which most reports said this offer was for, that would be a position a member of the House could not serve on. Is that --

MR. GIBBS: That's how I understand the way the PIAB is written.

Q But the memo, it said that this would be a position to serve in the House and serve on a presidential advisory board.

MR. GIBBS: Correct.

Q Well, how could he sit on the board?

Q Yes, how would that work?

MR. GIBBS: He couldn't.

Q So why was your offer --

Q So that wasn't the offer, then?

MR. GIBBS: I'd refer you to --

Q What position, what board, was it then? Do you know?

MR. GIBBS: I'd refer you to the memo.

Q But the memo didn't specify.

MR. GIBBS: Right. Thank you. (Laughter.)

Q Carol Browner said that BP had a financial interest in keeping the numbers on the flow rates low so that they

Q On the part of BP.

MR. GIBBS: Again, let me, before I -- again, there were estimates that they made, there were estimates that NOAA made, again based on surface photography, that we had always felt was important to get a better understanding of, when we got a better look at what was happening 5,000 feet below the surface of the ocean. So we stood up the flow rate group in order to get a better accounting and we'll continue to look at as we make cuts --

Q But she made this connection between them saving some money and --

MR. GIBBS: Because, again, as she said and I've said, the penalty that will be given to BP is based off not only on the environmental record, but based -- or can change based on the environmental record, but is also impacted by the amount of ultimate pollution entered into, in this case, the Gulf.

So as we've said, they have -- while they may have a financial incentive to have a lower number, the estimates that we made were based on a group -- a team of scientists that had been peer-reviewed by other scientists in order to come up with as accurate a gauge as we can. Understanding -- and this is not to minimize, but we are -- again, we're talking about something that's happening 5,000 below. It is not something that you can see and touch except using a remotely operated vehicle.

Q And the other thing is BP's stock price took a big hit today and there's been some speculation that if this thing turns out to be as big as folks think, this could really hurt the company, perhaps, some folks have speculated, that it might have to be broken up. Would it concern the administration that the price would become so onerous to BP that they would either go bankrupt or be broken up?

MR. GIBBS: I have not heard that expressed because I believe you've got a company with the type of market capitalization that can -- and will -- fully pay for the damage caused on the disaster that they're responsible for.

Yes, sir.

Q Some Senate Democrats have said that they were told by the White House that the President would be making recess appointments. Will there be any appointments this week? And are you just talking about a handful or --

MR. GIBBS: Let me -- I have not gotten any guidance on that, George, thus far, but let me take a look into that.

Q Robert, Robert --

I'll go with Lester and then I'll go --

Q Thank you very much. A two-part question relating to yesterday, Memorial Day. As a graduate of Harvard and Harvard Law School, the President has never protested --

MR. GIBBS: He didn't graduate from Harvard, Lester. He graduated from Harvard Law School, but he graduated from Columbia undergrad.

Q I'm sorry, I correct that. Thank you very much. The President has never protested the memorials to Harvard's war dead in World War I and II, which include the names of Harvard alumni designated as "enemy" because they were soldiers of the Kaiser and of the Fuhrer. Has he -- he's never protested that, has he? (Laughter.)

MR. GIBBS: You know, Lester, I honestly don't have -- I don't have any knowledge.

Q Does the President believe it is right for Harvard to have memorials mentioning these three German enemies, but no memorial at all to 71 Harvard alumni who died in the Confederate Army? (Laughter.)

MR. GIBBS: Wow.

Q Thank you, Robert.

MR. GIBBS: Thanks, guys. (Laughter.)

END  
3:12 P.M. EDT

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# Exhibit I

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al.,	:	
	:	<b><u>ORDER RESOLVING FOURTH</u></b>
Plaintiffs,	:	<b><u>AND FIFTH SUMMARY</u></b>
	:	<b><u>JUDGMENT MOTIONS</u></b>
-against-	:	
	:	04 Civ. 4151 (AKH)
DEPARTMENT OF DEFENSE, et al.,	:	
	:	
Defendants.	:	
-----	x	
ALVIN K. HELLERSTEIN, U.S.D.J.:		

The parties in the above-captioned case appeared before me on September 30, 2009 for oral argument on their fourth and fifth motions for partial summary judgment. On the same date, the Government also attended an *in camera* session to present its arguments regarding the specific documents at issue.

I ordered the Government to review the transcript of the *in camera* session and to propose for the Court’s review redactions to that transcript to allow as complete as possible a public record of that *in camera* session. I subsequently issued an order memorializing my decision to defer to the Government’s withholding of information contained in the documents at issue in both motions, with the exception of certain instances in which I ordered the Government to provide further support to justify the withholding of information.

During subsequent *in camera* sessions held on October 27 and October 29, 2009, I reviewed the additional justification provided by the Government in the form of classified declarations, filed with the Court Security Officer, from James L. Jones, Assistant to the President for National Security and National Security Advisor and Wendy M. Hilton, Associate Information Review Officer at the CIA. Both of these declarations were submitted in further support of CIA’s withholding from the Second and Fourth OLC Memoranda of what the CIA

refers to as an intelligence method but what I consider to be more appropriately characterized as a source of authority. Transcript of Proceedings, dated Sept. 30, 2008, at 5-6 (the “Withheld Information”).

During the October 27 and October 29 *in camera* sessions, I also reviewed documents 54, 56, 59a,<sup>1</sup> and 60 of the sample set of documents at issue in the fifth motion for partial summary judgment and the Government’s proposed redactions to the transcript of the *in camera* proceedings of September 30, 2009. During those sessions, Government counsel communicated to the Court that, in light of his pending criminal investigation, Special Prosecutor John H. Durham invoked FOIA Exemption 7(A) to withhold information that the CIA proposed for release in Documents 54, 56, 59a, and 60. Mr. Durham filed a declaration, dated November 24, 2009, to support his invocation of Exemption 7(A) for documents 54, 56, 59a and 60. By letter dated December 4, 2009, Plaintiffs stated that they did not challenge Mr. Durham’s invocation of Exemption 7(A) with respect to documents 54, 56, 59a and 60 but did not waive their right to challenge any future invocation by Mr. Durham of Exemption 7(A) with respect to so-called paragraph four documents, which relate to the destruction of the CIA videotapes.

Consistent with my rulings at the October 29, 2009 *in camera* session, I hereby order the following:

1. With respect to the Withheld Information in the Second and Fourth OLC

Memoranda, the Court does not defer to the Government’s determination that this information

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<sup>1</sup> Document 59 is handwritten notes of a CIA employee discussing the CIA interrogation videotapes with a CIA attorney. *See* Entry 59 of *Vaughn* Index attached to the unclassified Declaration of Leon E. Panetta, Director of the CIA, dated June 8, 2009. Following the Court’s review of Document 59 on September 30, 2009, the CIA located the final version of Document 59, a typed report containing the same information as the handwritten, earlier version. Accordingly, at the *in camera* sessions on October 27 and 29, the Court reviewed the CIA’s line-by-line justifications and proposed releases of this final, typed version of the document, which the CIA and the Court referred to as Document 59a.



should be withheld under Exemptions 1 and 3, and finds that the Withheld Information should be released for the reasons set forth. The Withheld Information should be released as follows: on page 5 (redaction on line 10 of first paragraph) and page 29 (redaction on line 8 of first full paragraph) of the Second OLC Memoranda and on page 4 (first full paragraph), page 5 (first sentence of the bottom paragraph) and page 7 (redaction made to lines 4-5 of second paragraph under the heading “2.”) of the Fourth OLC Memoranda. In order to address the Government’s national security concerns, however, the Court orders that specific words be inserted in brackets to replace the actual text of the documents in certain limited instances, with the inserted words used to preserve the meaning of the text. The Court’s complete ruling on the Withheld Information is reflected in the transcripts of the *in camera* session that occurred on October 29, 2009, including the sealed exhibits to the transcript that consist of the two relevant OLC memoranda that were annotated during the session to reflect the Court’s ruling. If the Government does not wish to insert in brackets the text set forth by the Court, the Government in the alternative must release the corresponding actual text in those specific parts of the documents.

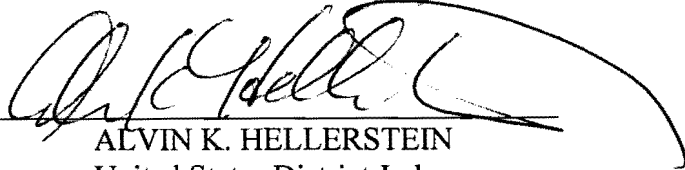
2. With respect to documents 54, 56, 59a, and 60, to the extent the CIA has identified releasable information within these four documents, the Court defers to Special Prosecutor Durham’s invocation of FOIA Exemption 7(A) to withhold the release of any information contained within the four documents while his investigation is pending. As to Ms. Durham’s invocation of Exemption 7(A), and any other such 7(A) invocations, the Court further orders that Mr. Durham must renew his assertion, as appropriate, of Exemption 7(A) every six months and that, in any event, Mr. Durham should promptly advise the Court of any events that subsequently render his assertion of Exemption 7(A) inapplicable to the documents in question.

3. With respect to the Government's proposed redactions to the transcript of the *in camera* session that occurred on September 30, 2009, the Court defers to the Government's redactions except orders the release of additional information relating to the Withheld Information, that is the subject of the Court's ruling in paragraph 1 above, as follows: page 7, lines 1, 4-7, 18-21; page 10, lines 6-12; page 11, lines 7-9, 15-16; page 12, lines 7-10, 19-20; page 18, line 9; page 20, lines 21-25; page 21, lines 1-5, 16-21; page 22, line 1; and, page 26, lines 24-25.

4. The Government is granted a stay for 30 days to permit it time to determine whether it will appeal the Court's disclosure rulings set forth in numbered paragraphs 1 and 3 above.

SO ORDERED.

Dated: December 29, 2009  
New York, New York

  
ALVIN K. HELLERSTEIN  
United States District Judge

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES  
UNION, et al.,

Plaintiffs,

v.                                      04 CV 4151 (AKH)

DEPARTMENT OF DEFENSE, et al.,

Defendants.

-----x  
New York, N.Y.  
October 29, 2009  
3:15 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,  
District Judge

APPEARANCES

PREET BHARARA  
United States Attorney for the  
Southern District of New York  
HEATHER K. MCSHAIN  
SEAN H. LANE  
Assistant United States Attorneys

BRIAN KNIGHT  
Central Intelligence Agency

ALSO PRESENT: David Simunovich, Law Clerk

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1                    (In chambers; law clerk not present)

2                    THE COURT: This is the last part of a two-part  
3 proceeding. It began on October 27, it went for approximately  
4 two hours. We went together off the record to discuss the  
5 various redactions that were being reconsidered by the  
6 government and the CIA. In all those proceedings, the  
7 government attorneys, Mr. Lane, Ms. McShain, and Mr. Knight,  
8 showed me line by line the various redactions. I made certain  
9 suggestions with some deferred to the government with others,  
10 and I think I may have ruled against the government in a few  
11 instances also.

12                    The government wanted to consider my rulings, taking  
13 instructions from superiors in Washington, and thus we recessed  
14 until now. And now we are convened in a session where I intend  
15 to record the views I expressed.

16                    The government will take the transcript, review it,  
17 and then make a decision as to what may be public and what will  
18 be filed under seal.

19                    Have I stated that correctly?

20                    MR. LANE: That's correct, your Honor.

21                    THE COURT: Let's proceed item by item. You'll do the  
22 identification and give it to me to look. If you want to look  
23 over my shoulder, it might be the easiest way to proceed.

24                    MR. LANE: We think the first issue before we get to  
25 documents is your Honor had asked us to specifically identify

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1     the second declarant. There is a second declaration in this  
2     case. And we wanted to put that on the record that that  
3     declaration is from James L. Jones, Assistant to the President  
4     for National Security and National Security Advisor.

5                    THE COURT: I read two declarations, both were  
6     classified and both will be filed under seal in their  
7     entireties.

8                    MR. LANE: Correct, your Honor. They both have been  
9     filed under seal.

10                   THE COURT: In their entireties.

11                   MR. LANE: Correct, your Honor.

12                   THE COURT: And identify them, please.

13                   MR. LANE: Certainly, your Honor. One of the  
14     declarations is the one that we referenced from General James  
15     L. Jones; and the other is from Wendy Hilton, who is a CIA  
16     employee.

17                   THE COURT: Both support the argument for maintenance  
18     of the redactions.

19                   MR. LANE: Correct, your Honor. They both address  
20     what the government has been calling "the intelligence method"  
21     withheld from the two OLC memos, and the Court has been  
22     referring to as "the source of the CIA's authority."

23                   That's probably an appropriate segue to get into that  
24     issue.

25                   THE COURT: I'll say a word which will illustrate it

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1        in the redactions themselves. I think the government calls  
2        these "methods of interrogation" because part of the method is  
3        to seek authority from a higher source. And I've called these  
4        "source of authority" because I think they're less a matter of  
5        methodology and more an aspect of authorization.

6                      I'm not comfortable with calling these "methods." The  
7        statute authorizes classification with regard to methods of  
8        interrogation. It does not say anything about sources of  
9        authority for interrogation, and that's one of the tensions  
10       between the position expressed by the government and the  
11       rulings of the Court.

12                     MR. LANE: Thank you, your Honor. What we can do at  
13       this point is go through the Court's specific references line  
14       by line in the two OLC memoranda. Where these source of  
15       authority is referenced.

16                     MS. McSHAIN: I am going to start with what we've been  
17       calling the second OLC memo, which is dated May 10, 2005. And  
18       it is a total of 46 pages in length.

19                     THE COURT: Are they numbered, Ms. McShain?

20                     MS. McSHAIN: Your Honor, unfortunately in the copy  
21       that you've seen, the photocopy, only some of them. The fax  
22       numbers don't match up. The Bates stamps start 0000013.

23                     THE COURT: Let's call it 13.

24                     MS. McSHAIN: Okay. And that's the only Bates stamp,  
25       and it is on the first page.

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1 THE COURT: Is it possible to put a number on the  
2 bottom right of the page?

3 MR. LANE: Certainly we can do that, your Honor.  
4 Absolutely.

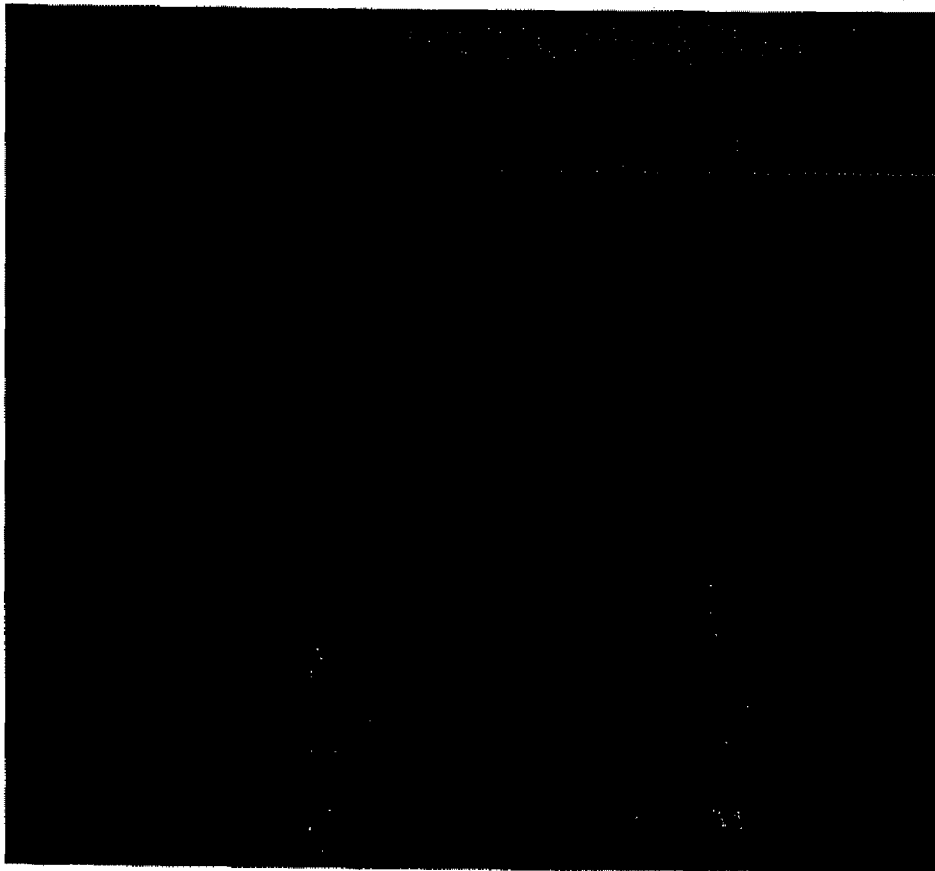
5 MS. McSHAIN: I am going to through and number it one  
6 through 46. I am going to insert handwritten page numbers one  
7 through 46 in the second OLC memo.

8 Do you want me to do it now, your Honor?

9 THE COURT: Yes. You might as well.

10 MS. McSHAIN: Your Honor's first ruling in the second  
11 OLC memo appears on page five.

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[REDACTED]

For example, in one of the two affidavits presented to me, there is an argument that various other governments [REDACTED]

[REDACTED]

I'm in no position to evaluate that assertion. But I told the government lawyers that I would defer to them as long as there is an adequate reference to show that the CIA is functioning [REDACTED]

[REDACTED]

The government lawyers received instructions that that phrase also would be covered by their need to redact. I reject that. I rule against the government on that particular point.

[REDACTED]

I would think, cause the descriptions to be misleading.

Actually, there could not be anything other in that context than [REDACTED] Because at some point, the source of authority has to be identified, and it could not

[REDACTED]

I further think that there can be no real compromise

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1     of security by noting that [REDACTED]  
2     that is involved in all of this.

3            So, I then put to the government whether they would  
4     like the document, if my ruling is adhered to, to be presented  
5     publicly in unredacted form on this page, or would the  
6     redaction to be kept, and the phrase [REDACTED]  
7     substituted. I leave it to them to choose which of those two.

8            MR. LANE: Your Honor, the government would take the  
9     position that it wants the information redacted, and is not  
10    willing to insert the phrase [REDACTED] But it  
11    is certainly conscious of the Court's ruling.

12           THE COURT: All right. Very well.

13           MS. McSHAIN: The next ruling your Honor made with  
14    respect to the second OLC memo appears on page 29.

15           THE COURT: It is the same point regarding the top  
16    most redaction. I think that was the only one in issue, right?

17           MS. McSHAIN: That is. It is in the first full  
18    paragraph that appears on page 29.

19           THE COURT: Right. It is the same point.

20           MS. McSHAIN: Okay. Your Honor, the next ruling you  
21    made is with respect to what we have deemed the fourth OLC memo  
22    which is dated May 30, 2005, and is 40 pages in length. And  
23    this memo already has page numbers visible on it.

24           Your first ruling was made on page four to the first  
25    full paragraph that appears under I.

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THE COURT: That's exactly the same point.

MS. McSHAIN: Do you want to specify what you had suggested as far as insertions and deletions?

THE COURT: I think it would be necessary for me to read out what is here. The top paragraph under I is redacted.

It reads as follows: [REDACTED]

I ruled that the phrase [REDACTED] could be substituted to the end of the first line and the continuation in the second line, so the phrase would read as follows:

[REDACTED]

Next, on the sixth line continuing to the ninth line, there is the source citation for that which we just read. And it read as follows:

[REDACTED]

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[REDACTED]

I'll stop at this point although the redaction continues.

That is the same [REDACTED] that we discussed a few minutes ago, and [REDACTED]

The government argues, in addition to the arguments I mentioned before, that [REDACTED]

[REDACTED]

The ability of the United States to collaborate with other governments and the sensitivity regarding that has been noted by the D.C. Circuit in the Glomar opinions. I think specifically the latter of the Glomar opinions, which I cited in my lengthy opinion in this case previously. So I'm aware of the sensitivity in this regard. And I can understand the claim of redaction by the government. And as I told the government lawyers, I would defer to their interests with the notion that

[REDACTED]

Again, I leave it to the government to decide whether they insist on the full redaction or abide by my ruling or abide by the compromise I suggested.

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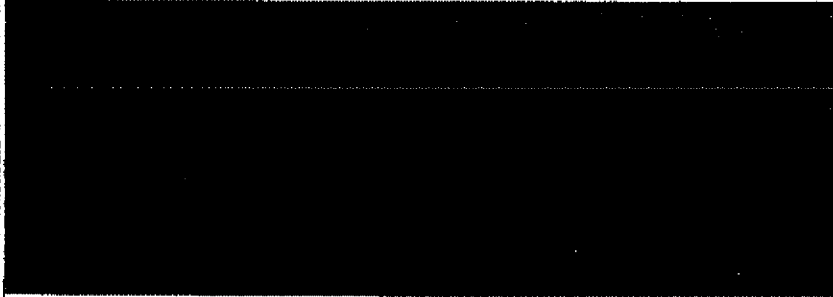
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MR. LANE: The government again would --

THE COURT: I understand your position.

MR. LANE: -- stand by its position, correct.

THE COURT: You are going to inquire on this, but you're not withdrawing any part of your position.



I defer to the government on this particular point, and I note that if this is in the



as the government lawyers have argued. But I maintain that substitution of the phrase in the space I mentioned does not compromise that interest, and supports the interest of proper disclosure.

Finally, there is a reference to another memorandum, see also counter-terrorism, detention and interrogation activities, September 2001 to October 2003, and identification number and a date, May 7, 2004, and that is the IG report.

And does the government wish to keep that redacted or is it now agreeing that that part can be disclosed? That's the IG report that I think is public.

MR. LANE: Your Honor, if I can, I confess that I'm

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1      not sure that anyone in the government has focused specifically  
2      on just that cite by itself. So at this point what --  
3      obviously your Honor has the cite released, and then the  
4      subsequent parenthetical redacted. What I would say at this  
5      point is the government stands by its position, but we will  
6      bring that specific issue back. So we will let the Court know  
7      immediately.

8                      THE COURT:    Follow that up.

9                      MR. LANE:    Thank you, your Honor.

10                     THE COURT:    The parenthetical phrase says [REDACTED]

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15                     I think that should travel with the decision whether  
16      or not to redact. I rule you should disclose that and the  
17      parenthesis after that, and you'll decide whether you want to  
18      appeal that particular point or abide by it.

19                     MR. LANE:    If I can, for a second. I think it may be,  
20      since this is a public document, the IG report, we'll go back  
21      and discuss that with the client, because it is in a slightly  
22      different posture than the parenthetical references, [REDACTED]

23  
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THE COURT: [REDACTED]

MR. LANE:    Correct. So the parenthetical refers to

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1     the document that's up here that's been redacted from that  
2     second line. So I confess I am not quite sure what to make of  
3     that IG report cite by itself.

4            THE COURT: I think you should look at the IG report  
5     and see if there are references in the public document that  
6     reference [REDACTED]

7            MR. LANE: I can represent there are no references,  
8     public references [REDACTED] in the IG report.

9            THE COURT: Well, you can redact the phrase

10    [REDACTED]  
11    [REDACTED]

12            MR. LANE: Thank you, your Honor.

13            MS. McSHAIN: Your Honor's next ruling appeared on  
14     page five, under I, the first four lines, and then also the  
15     last partial paragraph.

16            THE COURT: I deferred to you on those first four  
17     lines.

18            MS. McSHAIN: Yes, your Honor. The second redaction  
19     on page five to which your Honor made a ruling appears in the  
20     last partial paragraph on page five.

21            THE COURT: But I gave you that point.

22            MS. McSHAIN: Yes.

23            THE COURT: So we don't have to discuss what I gave  
24     you.

25            MS. McSHAIN: Just to memorialize, your Honor deferred

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1            to the government.

2                    THE COURT: Unless you are bringing up the point, the  
3            redactions were excluded by me.

4                    MR. LANE: What we might do is we'll just address the  
5            ones where the Court ordered disclosure. What we might suggest  
6            is we give to the court reporter at some point a copy of these  
7            documents as were marked up during the in camera sessions.

8                    THE COURT: What we need to do is make this a sealed  
9            exhibit.

10                   MR. LANE: Exactly. That's what I mean. So in that  
11            way we don't have to go back over what the Court has already  
12            addressed.

13                   THE COURT: Right.

14                   MR. LANE: We will do that, your Honor. Make it a  
15            sealed exhibit.

16                   MS. McSHAIN: Your Honor's last ruling in the fourth  
17            OLC memo appears on page seven. It is the second full  
18            paragraph under the number two. And it begins on the fourth  
19            line of that paragraph.

20                   THE COURT: As I did before, I ruled that the phrase

21             So I defer

23            to the redaction, ruling that a phrase of equivalence and  
24            neutrality should be put inside, which I believe is my  
25            authority under the CISA, Confidential Information Securities

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1     Act. Where the Court is given the ability to summarize and  
2     create equivalences. That's a procedure that's done where  
3     classified information has to be introduced at trial, and there  
4     is a process by which the Court reviews that with the  
5     intelligence officials and tries to create neutral summaries  
6     that can be admitted, providing the content and the substance  
7     that has to be disclosed without compromising classified  
8     information.

9                      MS. McSHAIN: Your Honor, I believe that applies to  
10     criminal cases.

11                     THE COURT: It does. And civil cases, possibly. But  
12     I adopt it for FOIA.

13                     MR. LANE: Thank you, your Honor.

14                     MS. McSHAIN: That's the last ruling your Honor made.

15                     THE COURT: Thank you.

16                     MS. McSHAIN: We also have the transcript that you  
17     made rulings on.

18                     MR. LANE: I think, your Honor, we can summarize those  
19     rulings to say that wherever the Court addressed something  
20     other than [REDACTED] the government,  
21     where you ordered additional releases, the government will  
22     release that information.

23                     THE COURT: That's fine.

24                     MR. LANE: As to the [REDACTED]  
25     references, the government would raise the same objection and



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1            understands that the Court has ordered that release. And that  
2            to the extent that the government doesn't appeal that, that  
3            would be released.

4                              THE COURT: Released with the substitution.

5                              MR. LANE: Correct. As your Honor had marked it up at  
6            the session, and as reflected in what we'll make this sealed  
7            exhibit to this proceeding.

8                              THE COURT: Right.

9                              MS. McSHAIN: We can memorialize that as well for the  
10           order.

11                             MR. LANE: Again, we're happy to, although if we have  
12           a sealed exhibit, that may actually be -- if your Honor wants a  
13           public order, we are happy to put this together and provide  
14           your Honor with a draft of the references so your Honor can  
15           make something public, so the ACLU is fully aware of what your  
16           Honor's rulings were.

17                             THE COURT: I'd like that.

18                             MR. LANE: We will do that, your Honor.

19                             THE COURT: This transcript is now completed.

20                             MR. LANE: We had one or two other minor things that  
21           won't take very long, and I think one minor thing. As you  
22           remember, your Honor, in the last session, you had looked at  
23           document 59-A which was a typed version of document 59. And we  
24           had said that the CIA had certain information that it was ready  
25           to release, but that the -- for reasons we explained in camera

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1            outside the presence of the CIA counsel, that the Durham team  
2            had asserted 7A --

3                      THE COURT:    I think I can get my law clerk.

4                      MR. LANE:    Yes, you can, your Honor.

5                      (Law clerk present)

6                      THE COURT:    Okay.

7                      MR. LANE:    Your Honor, back on the record, the last  
8            item for today is that there were some documents out of the  
9            sample of 65 that we had discussed at the last in camera  
10           session. The first one was 59-A, which is a typed version of  
11           document 59.

12                     THE COURT:    59 was a log of what the investigator did.

13                     MR. LANE:    [REDACTED]

14                     [REDACTED]                     And

15           the CIA had some information. As the institution is ready to  
16           release, the prosecutor, the Durham team came in and said they  
17           would like that information, the document to be withheld  
18           because of concerns about their ongoing investigation. And the  
19           Court had deferred to the prosecutors with the same sort of  
20           temporal limitations that your Honor had earlier expressed to  
21           the Durham team.

22                     THE COURT:    I think I asked you to look into that?

23                     MR. LANE:    No, your Honor made the ruling. What I had  
24           promised to do was to look into two other documents that the  
25           Durham team had not had the chance to look at. Those were

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1            documents 54 and 56. And the Durham team, we communicated with  
2            them earlier today, and they have looked at those and they have  
3            the same position for 54 and 56 because of concerns about their  
4            ongoing investigation.

5                            THE COURT:    I would like to put a temporal duration  
6            for the rulings, after which they should be made public.

7                            MR. LANE:    Your Honor, if I can, I believe that there  
8            was a temporal duration discussed in your in camera discussion  
9            with Mr. Durham.

10                           THE COURT:    Do you remember what it was?

11                           MR. LANE:    I confess I wasn't privy to that. Because  
12            it was a 6(e) issue.

13                           MS. McSHAIN: I have a redacted version of that  
14            transcript, your Honor. I don't know if it was redacted or if  
15            it is part of the public version of the transcript. I can look  
16            quickly to see if it is in, because they redacted anything that  
17            was 6(e).

18                           MR. LANE:    Your Honor, at the last session you applied  
19            that ruling to 59 and to document 60, and then today we ask you  
20            to apply that same ruling to 54 and 56. And again, I don't  
21            recall, because we've been very cautious about 6(e) problems,  
22            if we are aware of the temporal limitation. I know it was  
23            communicated to your Honor in that transcript.

24                           THE COURT:    I don't recall having put a temporal  
25            limitation.

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1                    MR. LANE: I think what happened, your Honor, the  
2 description the Durham team gave me was that Mr. Durham made a  
3 representation about how long he thought it was going to take  
4 for certain things to happen in terms of his investigation.  
5 And that your Honor had said, okay, well, we'll reach that  
6 point and we'll see where we are.

7                    MS. McSHAIN: It's redacted. Do you want this on the  
8 record? It is this paragraph. It gives the time but then  
9 "will" and then it's redacted.

10                    (Discussion off the record)

11                    THE COURT: I was discussing with the people here how  
12 to create a temporal duration to the order for secrecy based on  
13 Mr. Durham's representations of what his needs are for the  
14 grand jury investigation.

15                    My recollection is that I did not make such an order,  
16 and my belief is that I should have such an order. So I'm  
17 going to ask Mr. Durham to give me a representation every six  
18 months of his continuing need for secrecy with regard to  
19 documents that but for his representations would be covered by  
20 my orders for disclosure, along with a representation that when  
21 his need ends, he will promptly let me know so that the  
22 documents can be made public.

23                    MR. LANE: Thank you, your Honor. We can also  
24 communicate that to him. We are happy to do that. Chambers  
25 has enough things to do.

# Exhibit J

10/3/10 Wash. Post (Bus. Sec.) (Pg. Unavail. Online)  
2010 WLNR 19596415

Washington Post  
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October 3, 2010

CIA Using Military Drones in Pakistan (Washn)

Greg Miller

WASHINGTON - The CIA is using an arsenal of armed drones and other equipment provided by the U.S. military to secretly escalate its operations in Pakistan by striking targets beyond the reach of American forces based in Afghanistan, U.S. officials said.

The merging of covert CIA operations and military firepower is part of a high-stakes attempt by the Obama administration to deal decisive blows to Taliban insurgents who have regained control of swaths of territory in Afghanistan but stage most of their operations from sanctuaries across that country's eastern border.

The move represents a significant evolution of an already controversial targeted killing program run by the CIA. The agency's drone program began as a sporadic effort to kill members of the al-Qaida terrorist network, but in the past month it has been delivering what amounts to a cross-border bombing campaign in coordination with conventional military operations a few miles away.

The campaign continued Saturday amid reports that two new CIA drone strikes had killed 16 militants in northwest Pakistan, following 22 such attacks last month.

The strategy shift carries significant risks, particularly if it is perceived as an end run around the Pakistan government's long-standing objections to American military operations within its domain.

Indeed, the surge in drone strikes over the past four weeks has to a large extent targeted elements of a network led by Jalaluddin Haqqani, a militant regarded as a close ally of Pakistan's powerful Inter-Services Intelligence directorate.

Officials said last week that some of the recent strikes have also been aimed at disrupting al-Qaida terror plots targeting Europe. A U.S. official said the State Department was weighing whether to issue an alert that would caution Americans to be "vigilant" when traveling in Europe - guidance that could come as soon as Sunday.

The U.S. military quietly has been providing Predator and Reaper drones, as well as other weaponry, to the CIA in an effort to give the agency more capacity to carry out lethal strikes in Pakistan, American officials said.

"Increasing the operational tempo against terrorists in Pakistan has been in the works since last year," a U.S. official said. "The CIA sought more resources to go after terrorists in Pakistan, which the White House strongly supported."

The official added that Defense Secretary Robert Gates and CIA Director Leon Panetta "worked closely together to expand the effort. The foundation for the latest intensification of strikes was laid then, and the results speak for themselves."

Although President Barack Obama's announcement in December of the results of a U.S. strategy review in the region focused on deployment of 30,000 additional troops to Afghanistan, officials said the months-long evaluation centered largely on the need to eliminate insurgent sanctuaries in Pakistan. In late November, Obama wrote a

personal letter to Pakistani President Asif Ali Zardari offering an expanded partnership and bluntly warning that continued ambiguity in Pakistan's relationship with the militants would no longer be tolerated. If the Pakistani military did not take more forceful action, Obama warned, the United States would be forced to act.

That message was reinforced last spring after intelligence indicated that the failed Times Square bomber had been trained in Pakistan. Panetta and national security adviser James Jones traveled to Pakistan to make clear that the United States was dissatisfied with Pakistan's efforts.

The White House said Saturday it had no comment on the drone campaign.

The intensification of the drone campaign is unprecedented in scale. According to records kept by the New America Foundation, the 22 strikes the CIA is known to have carried out in September nearly doubled the previous monthly record, which was set in January after seven agency personnel were killed in a suicide attack in Afghanistan.

All but three of the September strikes have been aimed at insurgent nodes in North Waziristan, part of Pakistan's largely ungoverned tribal territories that is a stronghold of the Haqqani group.

The attacks have reportedly killed dozens of insurgents and an unknown number of civilians in a region that sits almost directly across from a cluster of U.S. military and secret CIA forward operating bases that have been used by the agency to build a network of informants that stretches into Pakistan.

"Our intelligence has gotten a lot better," the U.S. official said. "And you want to have the capabilities to match the quality of the intelligence coming."

Both the agency and the military have at times struggled with a shortage in the number of available drones, an asset that has transformed warfare over the past decade and that is in ever-increasing demand.

The military's willingness to loan at least part of its fleet to the CIA, which was first reported by the Wall Street Journal on Saturday, reflects rising frustration within the U.S. military command with Pakistan's inability or unwillingness to use its own forces to contain Haqqani's and other insurgent groups.

Officials said Gen. David Petraeus, the top U.S. military leader in Afghanistan, has advocated a more aggressive posture with Pakistan and been particularly supportive of the CIA drone effort, which was first authorized by President George W. Bush.

The strikes are seen as a critical to crippling Taliban elements at a time when U.S. forces are facing looming deadlines to show progress in Afghanistan and to begin making plans for at least a small withdrawal of troops beginning in July.

Obama has promised Congress and the American public an assessment in December of whether the overall strategy is working. In a National Security Council meeting last month, Petraeus told the president he expected to show progress in five areas, including in the number of kills and captures of senior insurgents. In addition to the targeted drone attacks in Pakistan, Special Operations forces have escalated attacks against selected Taliban commanders in southern and eastern Afghanistan.

"Frustration with Pakistan is reaching the boiling point," said Bruce Riedel, a former CIA analyst who led the Obama administration's initial overhaul of its Afghanistan-Pakistan strategy. "The consequence is there is a green light to whack away."

Although the drone strike count has soared, its impact on the war effort remains unclear. Only scant information has surfaced so far on the targets that have been struck, let alone whether the damage will be sufficient to slow the insurgent campaign.

Beyond the drone strikes, the U.S. military has also become more aggressive in recent weeks along the border, carrying out helicopter raids that on at least three occasions crossed over into Pakistani air space in pursuit of targets accused of firing on American troops.

"It's moving from using [drones] as a counterterrorism platform to an almost counterinsurgency platform," said Riedel, a counterterrorism expert at the Brookings Institution. "Instead of using it to take out top operatives planning attacks in the United States, you're now using it almost tactically to soften up the sanctuary safe haven [to aid] our military."

"The risk that we run here is that at some point we're going to overload the circuit in Pakistan and they're going to say, 'too much,'" Riedel said, adding that the new use of CIA drones to strike targets on behalf of the American military alters the scale of an operation that depends on permission and cooperation from Pakistan.

There are recent indications that Pakistan is losing patience with the more aggressive American posture. Last week's U.S. helicopter forays enraged Islamabad, prompting the nation to close, at least temporarily, a key U.S. military supply route into Afghanistan.

It was unclear whether the drones loaned to the CIA by the military are being flown by CIA personnel, but officials said the aircraft now operate under the agency's authorities as part of a program under broad agency control.

CIA drone flights are restricted to so-called "flight boxes," or boundaries set by the Pakistanis. The aircraft have been flown from bases inside Pakistan as well as Afghanistan.

Panetta was in Pakistan last week meeting with senior government officials. The trip had been planned for some time, officials said, and it was not clear whether it had been scheduled in anticipation that the accelerated pace of strikes would lead to new tensions.

The CIA operations come at a time when the U.S. military has opened a major phase of operations in an around Kandahar as part of an effort to reverse Taliban momentum on its home turf, and provide security for citizens loyal to the beleaguered government in Kabul.

bc-drones

---- INDEX REFERENCES ---

COMPANY: WHITEHOUSE; AMERICA FOUNDATION; INFORMATICA APLICATA SA; DEFENSE SOLUTIONS HOLDING INC; BROOKINGS INSTITUTION THE; IMMOBILIARE AZIONARIA SPA; STATE DEPARTMENT

NEWS SUBJECT: (Counter-Terrorism (1CO40); International Terrorism (1IN37); Top World News (1WO62); Military Conflicts (1MI68); Emerging Market Countries (1EM65); World Conflicts (1WO07); Global Politics (1GL73); Government (1GO80))

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REGION: (Pakistan (1PA05); North America (1NO39); Western Asia (1WE54); USA (1US73); Americas (1AM92); Asia (1AS61); Afghanistan (1AF45); Southern Asia (1SO52); Indian Subcontinent (1IN32))

Language: EN

OTHER INDEXING: (AMERICA FOUNDATION; BROOKINGS INSTITUTION; CIA; DEFENSE; NATIONAL SECURITY COUNCIL; STATE DEPARTMENT; WHITE HOUSE) (Asif Ali Zardari; Barack Obama; Bruce



Riedel; David Petraeus; George W. Bush; Haqqani; Jalaluddin Haqqani; James Jones; Leon Panetta; Obama;  
Panetta; Petraeus; Predator; Qaida; Riedel; Robert Gates)

Word Count: 1420  
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# Exhibit K

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September 27, 2010

# C.I.A. Steps Up Drone Attacks on Taliban in Pakistan

By **MARK MAZZETTI** and **ERIC SCHMITT**

WASHINGTON — The C.I.A. has drastically increased its bombing campaign in the mountains of Pakistan in recent weeks, American officials said. The strikes are part of an effort by military and intelligence operatives to try to cripple the Taliban in a stronghold being used to plan attacks against American troops in Afghanistan.

As part of its covert war in the region, the C.I.A. has launched 20 attacks with armed drone aircraft thus far in September, the most ever during a single month, and more than twice the number in a typical month. This expanded air campaign comes as top officials are racing to stem the rise of American casualties before the Obama administration's comprehensive review of its Afghanistan strategy set for December. American and European officials are also evaluating reports of possible terrorist plots in the West from militants based in Pakistan.

The strikes also reflect mounting frustration both in Afghanistan and the United States that Pakistan's government has not been aggressive enough in dislodging militants from their bases in the country's western mountains. In particular, the officials said, the Americans believe the Pakistanis are unlikely to launch military operations inside North Waziristan, a haven for Taliban and

Qaeda operatives that has long been used as a base for attacks against troops in Afghanistan. Some Pakistani troops have also been diverted from counterinsurgency missions to help provide relief to victims of the country's massive flooding.

Beyond the C.I.A. drone strikes, the war in the region is escalating in other ways. In recent days, American military helicopters have launched three airstrikes into Pakistan that military officials estimate killed more than 50 people suspected of being members of the militant group known as the Haqqani network, which is responsible for a spate of deadly attacks against American troops.

Such air raids by the military remain rare, and officials in Kabul said Monday that the helicopters entered Pakistani airspace on only one of the three raids, and acted in self-defense after militants fired rockets at an allied base just across the border in Afghanistan. At the same time, the strikes point to a new willingness by military officials to expand the boundaries of the campaign against the Taliban and Haqqani network — and to an acute concern in military and intelligence circles about the limited time to attack Taliban strongholds while American “surge” forces are in Afghanistan.

Pakistani officials have angrily criticized the helicopter attacks, saying that NATO's mandate in Afghanistan does not extend across the border in Pakistan.

As evidence of the growing frustration of American officials, Gen. [David H. Petraeus](#), the top American commander in Afghanistan, has recently issued veiled warnings to top Pakistani commanders that the United States could launch unilateral ground operations in the tribal areas should Pakistan refuse to dismantle the militant networks in North Waziristan, according to American officials.

“Petraeus wants to turn up the heat on the safe havens,” said one senior administration official, explaining the sharp increase in drone strikes. “He has

pointed out to the Pakistanis that they could do more.”

Special Operations commanders have also been updating plans for cross-border raids, which would require approval from **President Obama**. For now, officials said, it remains unlikely that the United States would make good on such threats to send American troops over the border, given the potential blowback inside Pakistan, an ally.

But that could change, they said, if Pakistan-based militants were successful in carrying out a terrorist attack on American soil. American and European intelligence officials in recent days have spoken publicly about growing evidence that militants may be planning a large-scale attack in Europe, and have bolstered security at a number of European airports and railway stations.

“We are all seeing increased activity by a more diverse set of groups and a more diverse set of threats,” said Homeland Security Secretary **Janet Napolitano** before a Senate panel last week.

The senior administration official said the strikes were intended not only to attack Taliban and Haqqani fighters, but also to disrupt any plots directed from or supported by extremists in Pakistan’s tribal areas that were aimed at targets in Europe. “The goal is to suppress or disrupt that activity,” the official said.

The 20 C.I.A. drone attacks in September represent the most intense bombardment by the spy agency since January, when the C.I.A. carried out 11 strikes after a suicide bomber **killed seven agency operatives** at a remote base in eastern Afghanistan.

According to one Pakistani intelligence official, the recent drone attacks have not killed any senior Taliban or Qaeda leaders. Many senior operatives have already fled North Waziristan, he said, to escape the C.I.A. drone campaign.

Over all the spy agency has carried out 74 drone attacks this year, according to the Web site **The Long War Journal**, which tracks the strikes. A vast majority

of the attacks — which usually involve several drones firing multiple missiles or bombs — have taken place in North Waziristan.

The Obama administration has enthusiastically embraced the C.I.A.'s drone program, an ambitious and historically unusual war campaign by American spies. According to The Long War Journal, the spy agency in 2009 and 2010 has launched nearly four times as many attacks as it did during the final year of the Bush administration.

One American official said that the recent strikes had been aimed at several groups, including the Haqqani network, [Al Qaeda](#) and the Pakistani Taliban. The United States, he said, hopes to “keep the pressure on as long as we can.”

But the C.I.A.'s campaign has also raised concerns that the drone strikes are fueling anger in the Muslim world. The man who attempted to detonate a truck filled with explosives in Times Square told a judge that the C.I.A. drone campaign was one of the factors that led him to attack the United States.

In a meeting with reporters on Monday, General Petraeus indicated that it was new intelligence gathering technology that helped NATO forces locate the militants killed by the helicopter raids against militants in Pakistan.

In particular, he said, the military has expanded its fleet of reconnaissance blimps that can hover over hide-outs thought to belong to the Taliban in eastern and southern Afghanistan.

The intelligence technology, General Petraeus said, has also enabled the expanded campaign of raids by Special Operations commandos against Taliban operatives in those areas.

*Rod Nordland and Alissa J. Rubin contributed reporting from Kabul, Afghanistan, and Ismail Khan from Peshawar, Pakistan.*

# Exhibit L



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## U.S. citizen Anwar Awlaki added to CIA target list

*The Obama administration has authorized the CIA to capture or kill the New Mexico-born Muslim cleric believed to be in Yemen. He is thought to have taken on an operational role in terrorist plots.*

April 06, 2010 | By David S. Cloud

Reporting from Washington — After concluding that he has taken on an operational role in attempted terrorist attacks, the Obama administration has authorized the capture or killing of a U.S.-born Muslim cleric who is believed to be in Yemen, U.S. officials said.

Anwar Awlaki, 38, who was born in New Mexico, recently was added to the CIA target list after a special government review of his activities, prompted by his status as a U.S. citizen, one of the officials said.

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August 4, 2010

Awlaki was in e-mail contact with Nidal Malik Hasan, an Army major accused of killing 13 people at Ft. Hood, Texas. He is known to have had links with Umar Farouk Abdulmutallab, a Nigerian suspected of attempting to bomb an airliner on Christmas Day.

Awlaki is believed to be the first U.S. citizen the CIA has been given authorization to kill or capture since 2001. The U.S. military keeps a separate list of individuals it is permitted to capture or kill. Awlaki's name was already on that list.

U.S. officials say that Awlaki has helped transform Yemen's Al Qaeda offshoot into the terrorist network's most active affiliate outside Pakistan and Afghanistan.

Awlaki was known for delivering fiery sermons at U.S. mosques before moving to Yemen in 2004. But until his ties to the suspected Ft. Hood attacker became clear, he was not considered an operational planner.

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# Exhibit M

# The Washington Post

## Muslim cleric Aulaqi is 1st U.S. citizen on list of those CIA is allowed to kill

By Greg Miller  
Washington Post Staff  
Writer  
Wednesday, April 7, 2010;  
A08

Advertisement



A Muslim cleric tied to the attempted bombing of a Detroit-bound airliner has become the first U.S. citizen added to a list of suspected terrorists the CIA is authorized to kill, a U.S. official said Tuesday.

Anwar al-Aulaqi, who resides in Yemen, was previously placed on a target list maintained by the U.S. military's Joint Special Operations Command and has survived at least one strike carried out by Yemeni forces with U.S. assistance against a gathering of suspected al-Qaeda operatives.

Because he is a U.S. citizen, adding Aulaqi to the CIA list required special approval from the White House, officials said. The move means that Aulaqi would be considered a legitimate target not only for a military strike carried out by U.S. and Yemeni forces, but also for lethal CIA operations.

"He's in everybody's sights," said the U.S. official, who spoke on the condition of anonymity because of the topic's sensitivity.

CIA spokesman Paul Gimigliano said: "This agency conducts its counterterrorism operations in strict accord with the law."

The decision to add Aulaqi to the CIA target list reflects the view among agency analysts that a man previously regarded mainly as a militant preacher has taken on an expanded role in al-Qaeda's Yemen-based offshoot.

"He's recently become an operational figure for al-Qaeda in the Arabian Peninsula," said a second U.S. official. "He's working actively to kill Americans, so it's both lawful and sensible to try to stop him." The official stressed that there are "careful procedures our government follows in these kinds of cases, but U.S. citizenship hardly gives you blanket protection overseas to plot the murder of your fellow citizens."

Aulaqi corresponded by e-mail with Maj. Nidal M. Hasan, the Army psychiatrist accused of killing 12 soldiers and one civilian at Fort Hood, Tex., last year. Aulaqi is not believed to have helped plan the attack, although he praised Hasan in an online posting for carrying it out.

Concern grew about the cleric's role after he was linked to the Nigerian accused of attempting to bomb a U.S. airliner on Christmas Day by detonating an explosive device he had smuggled in his underwear. Aulaqi acknowledged teaching and corresponding with the Nigerian but denied ordering the attack.

The CIA is known to have carried out at least one Predator strike in Yemen. A U.S. citizen, Kamal Derwish, was among six alleged al-Qaeda operatives killed in that 2002 operation but was not the target.

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# Exhibit N

## **U.S. citizen in CIA's cross hairs**

The agency builds a case for putting Anwar al Awlaki, linked to the Ft. Hood shootings and Christmas bomb attempt, on its hit list. The complications involved are a window into a secretive process.

Los Angeles Times  
January 31, 2010|By Greg Miller

Reporting from Washington — The CIA sequence for a Predator strike ends with a missile but begins with a memo. Usually no more than two or three pages long, it bears the name of a suspected terrorist, the latest intelligence on his activities, and a case for why he should be added to a list of people the agency is trying to kill.

The list typically contains about two dozen names, a number that expands each time a new memo is signed by CIA executives on the seventh floor at agency headquarters, and contracts as targets thousands of miles away, in places including Pakistan and Yemen, seem to spontaneously explode.

No U.S. citizen has ever been on the CIA's target list, which mainly names Al Qaeda leaders, including Osama bin Laden, according to current and former U.S. officials. But that is expected to change as CIA analysts compile a case against a Muslim cleric who was born in New Mexico but now resides in Yemen.

Anwar al Awlaki poses a dilemma for U.S. counter-terrorism officials. He is a U.S. citizen and until recently was mainly known as a preacher espousing radical Islamic views. But Awlaki's ties to November's shootings at Ft. Hood and the failed Christmas Day airline plot have helped convince CIA analysts that his role has changed.

"Over the past several years, Awlaki has gone from propagandist to recruiter to operational player," said a U.S. counter-terrorism official.

Awlaki's status as a U.S. citizen requires special consideration, according to former officials familiar with the criteria for the CIA's targeted killing program. But while Awlaki has not yet been placed on the CIA list, the officials said it is all but certain that he will be added because of the threat he poses.

"If an American is stupid enough to make cause with terrorists abroad, to frequent their camps and take part in their plans, he or she can't expect their citizenship to work as a magic shield," said another U.S. official. "If you join the enemy, you join your fate to his."

The complications surrounding Awlaki's case provide a rare window into the highly secretive process by which the CIA selects targets.

CIA spokesman Paul Gimigliano declined to comment, saying that it is "remarkably foolish in a war of this kind to discuss publicly procedures used to identify the enemy, an enemy who wears no uniform and relies heavily on stealth and deception."

Other current and former U.S. officials agreed to discuss the outlines of the CIA's target selection procedures on the condition of anonymity because of their sensitive nature. Some wanted to defend a program that critics have accused of causing unnecessary civilian casualties.

Decisions to add names to the CIA target list are "all reviewed carefully, not just by policy people but by attorneys," said the second U.S. official. "Principles like necessity, proportionality, and the minimization of collateral damage -- to persons and property -- always apply."

The U.S. military, which has expanded its presence in Yemen, keeps a separate list of individuals to capture or kill. Awlaki is already on the military's list, which is maintained by the U.S. Joint Special Operations Command. Awlaki apparently survived a Dec. 24 airstrike conducted jointly by U.S. and Yemeni forces.

The CIA has also deployed more operatives and analysts to Yemen. CIA Deputy Director Stephen Kappes was in the country last month, just weeks before a Nigerian accused of training with Al Qaeda in Yemen boarded a jetliner bound for Detroit on Christmas Day.

From beginning to end, the CIA's process for carrying out Predator strikes is remarkably self-contained. Almost every key step takes place within the Langley, Va., campus, from proposing targets to piloting the remotely controlled planes.

The memos proposing new targets are drafted by analysts in the CIA's Counter-Terrorism Center. Former officials said analysts typically submit several new names each month to high-level officials, including the CIA general counsel and sometimes Director Leon E. Panetta.

Former officials involved in the program said it was handled with sober awareness of the stakes. All memos are circulated on paper, so those granting approval would "have to write their names in ink," said one former official. "It was a jarring thing, to sign off on people getting killed."

The program is governed by extensive procedures and rules, but targeting decisions come down to a single criterion: whether the individual in question is "deemed to be a continuing threat to U.S. persons or interests."

Given that standard, the list mainly comprises Al Qaeda leaders and those seen as playing a direct role in devising or executing attacks. Espousing violence or providing financial support to Al Qaeda would not meet the threshold, officials said. But providing training to would-be terrorists or helping them get to Al Qaeda camps probably would.

The list is scrutinized every six months, officials said, and in some cases names are removed if the intelligence on them has grown stale.

"If someone hadn't popped on the screen for over a year, or there was no intelligence linking him to known terrorists or plans, we'd take him off," the former official said.

The National Security Council oversees the program, which is based on a legal finding signed after the Sept. 11 attacks by then-President George W. Bush. But the CIA is given extensive latitude to execute the program, and generally does not need White House approval when adding names to the target list.

The only exception, officials said, would be when the name is a U.S. citizen's.

The CIA has at times considered adding Americans' names to the target list. None were ever approved, the officials said, not because their citizenship protected them but because they didn't meet the "continuing threat" threshold.

Adam Gadahn, a California native now believed to be hiding in Pakistan, has been indicted on charges of treason and providing support to Al Qaeda. But Gadahn, former officials said, has mainly served in a propaganda role.

Officials said that whether Awlaki is added to the list hinges more on intelligence agencies' understanding of his role than any concern about his status as a U.S. citizen.

"If you are a legitimate military target abroad -- a part of an enemy force -- the fact that you're a U.S. citizen doesn't change that," said Michael Edney, who served as deputy legal advisor to the National Security Council from 2007 until 2009.

Awlaki, 38, was known for delivering fiery sermons at mosques in San Diego and suburban Virginia before moving to Yemen in 2004. Because of his radical online postings, he has been portrayed as a catalyst or motivator in nearly a dozen terrorism cases in the U.S. and abroad.

But it was his involvement in the two recent cases that triggered new alarms. U.S. officials uncovered as many as 18 e-mails between Awlaki and Nidal Malik Hasan, a U.S. Army major accused of killing 13 people at Ft. Hood, Texas. Awlaki also has been tied to Umar Farouk Abdulmutallab, the Nigerian accused of attempting to detonate a bomb on a Detroit-bound flight.

"Awlaki's interested in operations outside of Yemen, and he's trying to recruit more extremists, including Westerners," said the U.S. counter-terrorism official. "His knowledge of Western culture and language makes him valuable to [the offshoot] Al Qaeda on the Arabian Peninsula.

"Taking him off the street," the official said of Awlaki, "would deal a blow to the group."

The CIA has carried out dozens of Predator strikes in Pakistan over the last year. The program is not foolproof, as drone strikes often kill multiple people even when the intended target escapes. The CIA has also made grievous mistakes in counter-terrorism operations, including capturing individuals misidentified as terrorism suspects. But the program remains valuable to U.S. officials.

President Obama alluded to the campaign in his State of the Union speech last week, saying that during his first year in office, "hundreds of Al Qaeda's fighters and affiliates, including many senior leaders, have been captured or killed -- far more than in 2008."

Many of those strikes were aimed at gatherings of militant groups or training complexes, current and former officials said. In such cases, the CIA is free to fire even if it does not have intelligence indicating the presence of anyone on its target list.

The CIA has carried out Predator attacks in Yemen since at least 2002, when a drone strike killed six suspected Al Qaeda operatives traveling in a vehicle across desert terrain.

The agency knew that one of the operatives was an American, Kamal Derwish, who was among those killed. Derwish was never on the CIA's target list, officials said, and the strike was aimed at a senior Al Qaeda operative, Qaed Sinan Harithi, accused of orchestrating the 2000 attack on the U.S. destroyer Cole.



# Exhibit O

12/4/02 Chi. Trib. 19  
2002 WLNR 12684412

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December 4, 2002

Section: News

Bush order: CIA can kill Americans in Al Qaeda  
John J. Lumpkin, Associated Press.

U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA under President Bush's rules for the war on terrorism, U.S. officials say.

That authority is granted under a secret finding, which Bush signed after the Sept. 11 suicide hijackings, that directs the CIA to covertly attack operatives of the terrorist organization anywhere. The authority makes no exception for Americans, so permission to strike them is understood rather than specifically described, officials said.

These officials, speaking anonymously, said the authority would be used only when other options are unavailable. Military-type strikes will take place only when law enforcement and internal security efforts by allied foreign countries fail, the officials said.

Capturing and questioning Al Qaeda operatives is preferable, even more so if an operative is a U.S. citizen, the officials said. A decision to strike an American will be made at the highest levels, perhaps by the president.

U.S. officials said few Americans are working with Al Qaeda, but they have no specific estimates.

The CIA already has killed one American under this authority, although U.S. officials maintain that he was not the target.

On Nov. 3, a missile from a CIA-operated Predator drone aircraft destroyed a carload of suspected Al Qaeda operatives in Yemen. The target of the attack, a Yemeni named Ali Qaed Sinan al-Harhi, was the top Al Qaeda operative in that country. Efforts by Yemeni authorities to detain him had previously failed.

But the CIA didn't know a U.S. citizen, Yemeni-American Kamal Derwish, was in the car. He died, along with al-Harhi and four other Yemenis.

The Bush administration said the killing of an American in this fashion was legal.

"I can assure you that no constitutional questions are raised here. There are authorities that the president can give to officials," National Security Adviser Condoleezza Rice said after the attack. "He's well within the balance of accepted practice and the letter of his constitutional authority."

U.S. authorities have alleged that Derwish was the leader of an Al Qaeda cell near Buffalo, N.Y. Most of the alleged members of the cell were arrested and charged with supporting terrorists, but Derwish was not accused of any crime in U.S. courts.

Family members in Buffalo said they have yet to be contacted by the U.S. government about Derwish's death, which they learned about through the media.

Mohamed Albanna, vice president of the American Muslim Council's Buffalo chapter, said Derwish "has not been tried and has not been found guilty, so, in that sense, he's still an innocent American who was killed. That's what the law states."

But the Bush administration defined Derwish as an enemy combatant, officials said. Under this legal definition, experts say, his constitutional rights are nullified and he can be killed.

Other Americans have been similarly classified since Sept. 11, including Jose Padilla, a former Chicago gang member accused of plotting to use a radioactive "dirty bomb" in the U.S., and Yaser Esam Hamdi, who was found fighting with the Taliban in Afghanistan. Both are in military custody.

A third American, John Walker Lindh, was sentenced to 20 years in prison after pleading guilty to aiding the Taliban and carrying explosives.

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---- INDEX REFERENCES ---

NEWS SUBJECT: (International Terrorism (1IN37); Sept 11th Aftermath (1SE05))

REGION: (Middle East (1MI23); Yemen (1YE36); Arab States (1AR46))

Language: EN

OTHER INDEXING: (AMERICAN; AMERICAN KAMAL DERWISH; AMERICAN MUSLIM COUNCIL; CIA; DERWISH; NATIONAL SECURITY ADVISER CONDOLEEZZA RICE; TALIBAN) (Bush; Capturing; Family; Harthi; John Walker Lindh; Jose Padilla; Mohamed Albanna; Yaser Esam Hamdi)

KEYWORDS: UNITED STATES; TERRORISM; LAW

EDITION: North Sports Final

Word Count: 666  
12/4/02 CHICAGOTR 19  
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# Exhibit P

10/10/10 N.Y. Times 7  
2010 WLNR 20226655

New York Times (NY)  
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October 10, 2010

Section: WK

Lethal Force Under Law

The Obama administration has sharply expanded the shadow war against terrorists, using both the military and the C.I.A. to track down and kill hundreds of them, in a dozen countries, on and off the battlefield.

The drone program has been effective, killing more than 400 Al Qaeda militants this year alone, according to American officials, but fewer than 10 noncombatants. But assassinations are a grave act and subject to abuse -- and imitation by other countries. The government needs to do a better job of showing the world that it is acting in strict compliance with international law.

The United States has the right under international law to try to prevent attacks being planned by terrorists connected to Al Qaeda, up to and including killing the plotters. But it is not within the power of a commander in chief to simply declare anyone anywhere a combatant and kill them, without the slightest advance independent oversight. The authorization for military force approved by Congress a week after 9/11 empowers the president to go after only those groups or countries that committed or aided the 9/11 attacks. The Bush administration's distortion of that mandate led to abuses that harmed the United States around the world.

The issue of who can be targeted applies directly to the case of Anwar al-Awlaki, an American citizen hiding in Yemen, who officials have admitted is on an assassination list. Did he inspire through words the Army psychiatrist who shot up Fort Hood, Tex., last November, and the Nigerian man who tried to blow up an airliner on Christmas? Or did he actively participate in those plots, and others? The difference is crucial. If the United States starts killing every Islamic radical who has called for jihad, there will be no end to the violence.

American officials insist that Mr. Awlaki is involved with actual terror plots. But human rights lawyers working on his behalf say that is not the case, and have filed suit to get him off the target list. The administration wants the case thrown out on state-secrets grounds.

The Obama administration needs to go out of its way to demonstrate that it is keeping its promise to do things differently than the Bush administration did. It must explain how targets are chosen, demonstrate that attacks are limited and are a last resort, and allow independent authorities to oversee the process.

**PUBLIC GUIDELINES** The administration keeps secret its standards for putting people on terrorist or assassination lists. In March, Harold Koh, legal adviser to the State Department, said the government adheres to international law, attacking only military targets and keeping civilian casualties to an absolute minimum. "Our procedures and practices for identifying lawful targets are extremely robust," he said in a speech, without describing them.

Privately, government officials say no C.I.A. drone strike takes place without the approval of the United States ambassador to the target country, the chief of the C.I.A. station, a deputy at the agency, and the agency's director. So far, President Obama's system of command seems to have prevented any serious abuses, but the approval process is entirely within the administration. After the abuses under President Bush, the world is not going to accept a simple "trust us" from the White House.

There have been too many innocent people rounded up for detention and subjected to torture, too many cases of mistaken identity or trumped-up connections to terror. Unmanned drones eliminate the element of risk to American forces and make it seductively easy to attack.

The government needs to make public its guidelines for determining who is a terrorist and who can be targeted for death. It should clearly describe how it follows international law in these cases and list the internal procedures and checks it uses before a killing is approved. That can be done without formally acknowledging the strikes are taking place in specific countries.

**LIMIT TARGETS** The administration should state that it is following international law by acting strictly in self-defense, targeting only people who are actively planning or participating in terror, or who are leaders of Al Qaeda or the Taliban -- not those who raise funds for terror groups, or who exhort others to acts of terror.

Special measures are taken before an American citizen is added to the terrorist list, officials say, requiring the approval of lawyers from the National Security Council and the Justice Department. But again, those measures have not been made public. Doing so would help ensure that people like Mr. Awlaki are being targeted for terrorist actions, not their beliefs or associations.

**A LAST RESORT** Assassination should in every case be a last resort. Before a decision is made to kill, particularly in areas away from recognized battlefields, the government needs to consider every other possibility for capturing the target short of lethal force. Terrorists operating on American soil should be captured using police methods, and not subject to assassination.

If practical, the United States should get permission from a foreign government before carrying out an attack on its soil. The government is reluctant to discuss any of these issues publicly, in part to preserve the official fiction that the United States is not waging a formal war in Pakistan and elsewhere, but it would not harm that effort to show the world how seriously it takes international law by making clear its limits.

**INDEPENDENT OVERSIGHT** Dealing out death requires additional oversight outside the administration. Particularly in the case of American citizens, like Mr. Awlaki, the government needs to employ some due process before depriving someone of life. It would be logistically impossible to conduct a full-blown trial in absentia of every assassination target, as the lawyers for Mr. Awlaki prefer. But judicial review could still be employed.

The government could establish a court like the Foreign Intelligence Surveillance Court, which authorizes wiretaps on foreign agents inside the United States. Before it adds people to its target list and begins tracking them, the government could take its evidence to this court behind closed doors -- along with proof of its compliance with international law -- and get the equivalent of a judicial warrant in a timely and efficient way.

Congressional leaders are secretly briefed on each C.I.A. attack, and say they are satisfied with the information they get and with the process. Nonetheless, that process is informal and could be changed at any time by this president or his successors. Formal oversight is a better way of demonstrating confidence in American methods.

Self-defense under international law not only shows the nation's resolve and power, but sends a powerful message to other countries that the United States couples drastic action with careful judgment.

---- INDEX REFERENCES ---

Word Count: 1121  
10/10/10 NYT 7  
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# Exhibit Q

## Smart Reads



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### THE WALL STREET JOURNAL

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ASIA NEWS | OCTOBER 23, 2010

## Wider Role for CIA Sought

*Efforts to Intensify Targeting of Taliban on Pakistani Soil Have Been Rebuffed by Islamabad*

By JULIAN E. BARNES and ADAM ENTOUS



Agence France-Presse

Pakistani soldiers carry coffins of their colleagues during a funeral.

WASHINGTON—The U.S. is pushing to expand a secret CIA effort to help Pakistan target militants in their havens near the Afghan border, according to senior officials, as the White House seeks new ways to prod Islamabad into more aggressive action against groups allied with al Qaeda,

The push comes as relations between Washington and Islamabad have soured over U.S. impatience with the slow pace of Pakistani strikes against militants who routinely attack U.S.-led troops in Afghanistan. President Barack Obama has said he will begin to withdraw troops from Afghanistan in July, increasing the urgency to show progress in the nine-year war against the Taliban.

The U.S. asked Pakistan in recent weeks to allow additional Central Intelligence Agency



officers and special operations military trainers to enter the country as part of Washington's efforts to intensify pressure on militants.

The requests have so far been rebuffed by Islamabad, which remains extremely wary of allowing a larger U.S. ground presence in Pakistan, illustrating the precarious nature of relations between Washington and its wartime ally.

The number of CIA personnel in Pakistan has grown substantially in recent years. The exact number is highly classified. The push for more forces reflects, in part, the increased need for intelligence to support the CIA drone program that has killed hundreds of militants with missile strikes. The additional officers could help Pakistani forces reach targets drones can't.

There are currently about 900 U.S. military personnel in Pakistan, 600 of which are providing flood relief and 150 of which are assigned to the training mission.

A senior Pakistani official said relations with the CIA remain strong but Islamabad continues to oppose a large increase in the number of American personnel on the ground.

The Obama administration has been ramping up pressure on Islamabad in recent weeks to attack militants after months of publicly praising Pakistani efforts. The CIA has intensified drone strikes in Pakistan, and the military in Afghanistan has carried out cross-border helicopter raids, underlining U.S. doubts Islamabad can be relied upon to be more aggressive. Officials have even said they were going to stop asking for Pakistani help with the U.S.'s most difficult adversary in the region, the North Waziristan-based Haqqani network, because it was unproductive.

The various moves reflect a growing belief that the Pakistani safe havens are a bigger threat to Afghan stability than previously thought.

When senior Pakistani officials visited Washington this week, Obama administration officials signaled they are willing to push for a long-term military aid package. But they also have made clear to Pakistani officials they expect tangible results, and they threatened that current cash payments to Pakistan could be reduced if things don't improve in tribal areas such as North Waziristan.

The current efforts to expand CIA presence are meant to expand intelligence collection and facilitate more aggressive Pakistani-led actions on the ground. Some U.S. officials, however, remain hopeful that Islamabad will allow a greater covert presence that could include CIA paramilitary forces.

Given Pakistan's objections to U.S. ground troops, using more CIA paramilitary forces could be a "viable option," said a government official. "That gives them a little bit of cover," the official added, referring to the Pakistanis.

U.S. officials said a stronger U.S.-Pakistan intelligence partnership would not be a substitute for closer working relationship with the military's special operation forces.

Much of the on-ground intelligence in Pakistan is gathered by the country's Inter-Services Intelligence agency. Some U.S. officials believe Pakistan wants the U.S. to remain dependent on the ISI for that intelligence.

While the Obama administration has been focused on North Waziristan, officials said there also is a need for Pakistani operations in the southern city of Quetta and the surrounding province of Baluchistan. The U.S. hopes that if it can develop precise information on militant leaders, it could entice the Pakistan government to arrest some top members of the Quetta Shura, the ruling council of the Afghan Taliban movement.

Some officials are hopeful that Islamabad will reverse course and grant the additional CIA and military visas in the coming days. The Pakistani government has in the past used its control over visas to express displeasure with U.S. policy and limit the number of Americans who can work in the country.

Tensions remain between the Pakistan military and the U.S. military in Afghanistan, especially after a series of cross border raids by NATO in recent weeks.

In September, the CIA stepped up the pace of drone strikes in Pakistan, in part to counter suspected terrorism plots in western Europe as well as cross-border attacks by the Haqqani network. The stepped-up activity by the CIA has received little criticism from Pakistan, and tacit support from the government.

CIA Director Leon Panetta, who visited Islamabad late last month, said ISI has been "very cooperative," playing down tensions over U.S. allegations that elements of the intelligence agency were helping the Haqqanis and other militant groups fighting the U.S. "We're getting good cooperation," Mr. Panetta said.

Pakistani officials believe the CIA is better able to keep details of its operations largely out of the public eye, although the agency's drone program has received widespread attention and is enormously unpopular with the Pakistani public.

U.S. military forces on the ground remain a red line for Islamabad. A senior Pakistani official said if the Pakistan public became aware of U.S. military forces conducting combat operations on Pakistani territory, it would wipe out popular support for fighting the militants in the tribal areas. Whether covert CIA forces would cross that line however, remains an open question.

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# Exhibit R

# The Washington Post

## CORRECTION TO THIS ARTICLE

The article referred incorrectly to the presence of U.S. citizens on a CIA list of people the agency seeks to kill or capture. After The Post's report was published, a source said that a statement the source made about the CIA list was misunderstood. Additional reporting produced no independent confirmation of the original report, and a CIA spokesman said that The Post's account of the list was incorrect. The military's Joint Special Operations Command maintains a target list that includes several Americans. In recent weeks, U.S. officials have said that the government is prepared to kill U.S. citizens who are believed to be involved in terrorist activities that threaten Americans.

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## U.S. military teams, intelligence deeply involved in aiding Yemen on strikes

By Dana Priest  
Washington Post Staff Writer  
Wednesday, January 27, 2010; A01

U.S. military teams and intelligence agencies are deeply involved in secret joint operations with Yemeni troops who in the past six weeks have killed scores of people, among them six of 15 top leaders of a regional al-Qaeda affiliate, according to senior administration officials.

The operations, approved by [President Obama](#) and begun six weeks ago, involve several dozen troops from the U.S. military's clandestine Joint Special Operations Command (JSOC), whose main mission is tracking and killing suspected terrorists. The American advisers do not take part in raids in Yemen, but help plan missions, develop tactics and provide weapons and munitions. Highly sensitive intelligence is being shared with the Yemeni forces, including electronic and video surveillance, as well as three-dimensional terrain maps and detailed analysis of the al-Qaeda network.

As part of the operations, Obama approved a Dec. 24 strike against a

compound where a U.S. citizen, Anwar al-Aulaqi, was thought to be meeting with other regional al-Qaeda leaders. Although he was not the focus of the strike and was not killed, he has since been added to a shortlist of U.S. citizens specifically targeted for killing or capture by the JSOC, military officials said. The officials, like others interviewed for this article, spoke on the condition of anonymity because of the sensitivity of the operations.

The broad outlines of the U.S. involvement in Yemen have come to light in the past month, but the extent and nature of the operations have not been previously reported. The far-reaching U.S. role could prove politically challenging for Yemen's president, Ali Abdullah Saleh, who must balance his desire for American support against the possibility of a backlash by tribal, political and religious groups whose members resent what they see as U.S. interference in Yemen.

The collaboration with Yemen provides the starkest illustration to date of the Obama administration's efforts to ramp up counterterrorism operations, including in areas outside the Iraq and Afghanistan war zones.

"We are very pleased with the direction this is going," a senior administration official said of the cooperation with Yemen.

Obama has ordered a dramatic increase in the pace of CIA drone-launched missile strikes into Pakistan in an effort to kill al-Qaeda and Taliban members in the ungoverned tribal areas along the Afghan border. There have been more such strikes in the first year of Obama's administration than in the last three years under President [George W. Bush](#), according to a military officer who tracks the attacks.

Obama also has sent U.S. military forces briefly into Somalia as part of an operation to kill Saleh Ali Nabhan, a Kenyan sought in the 2002 bombing of an Israeli-owned resort in Kenya.

Republican lawmakers and former vice president [Richard B. Cheney](#) have sought to characterize the new president as soft on terrorism after he banned the harsh interrogation methods permitted under Bush and announced his intention to close the U.S. military prison at Guantanamo Bay, Cuba.

Obama has rejected those two elements of Bush's counterterrorism program, but he has embraced the notion that the most effective way to kill or capture members of al-Qaeda and its affiliates is to work closely with foreign partners, including those that have feeble democracies,

shoddy human rights records and weak accountability over the vast sums of money Washington is giving them to win their continued participation in these efforts.

In the case of Yemen, a steady stream of high-ranking officials has visited Saleh, including the rarely seen JSOC commander, Vice Adm. William H. McRaven; White House counterterrorism adviser [John O. Brennan](#); and [Gen. David H. Petraeus](#), head of U.S. Central Command.

A Yemeni official briefed on security matters said Tuesday that the two countries maintained a "steadfast cooperation in combating AQAP, but there are clear limits to the U.S. involvement on the ground. Information sharing has been a key in carrying out recent successful counterterrorism operations." AQAP is the abbreviation for al-Qaeda in the Arabian Peninsula, the affiliate operating in Yemen.

In a newly built joint operations center, the American advisers are acting as intermediaries between the Yemeni forces and hundreds of U.S. military and intelligence officers working in Washington, Virginia and Tampa and at Fort Meade, Md., to collect, analyze and route intelligence.

The combined efforts have resulted in more than two dozen ground raids and airstrikes. Military and intelligence officials suspect there are several hundred members of AQAP, a group that has historical links to the main al-Qaeda organization but that is thought to operate independently.

The chairman of the Joint Chiefs of Staff, [Adm. Mike Mullen](#), told a Navy War College class in early January that the United States had "no plans" to send ground troops to Yemen and that he had been concerned about the growing al-Qaeda presence there "for a long time now."

"We have worked hard to try to improve our relationships and training, education and war-fighting support," Mullen said. "And, yet, we still have a long way to go."

Saleh has faced pressure not only from the United States but also his country's main financial backers, Saudi Arabia and the United Arab Emirates, to gain better control over its lawless northern border. In August, Saleh asked U.S. officials to begin a more in-depth conversation over how the two countries might work together, according to administration officials. The current operation evolved from those talks.

"President Saleh was serious about going after al-Qaeda and wasn't going to resist our encouragement," the senior official said.

The Obama administration's deepening of bilateral intelligence relations builds on ties forged during George J. Tenet's tenure as CIA director.

Shortly after the Sept. 11, 2001, attacks, Tenet coaxed Saleh into a partnership that would give the CIA and U.S. military units the means to attack terrorist training camps and al-Qaeda targets. Saleh agreed, in part, because he believed that his country, the ancestral home of Osama bin Laden, was next on the U.S. invasion list, according to an adviser to the Yemeni president.

Tenet provided Saleh's forces with helicopters, eavesdropping equipment and 100 Army Special Forces members to train an antiterrorism unit. He also won Saleh's approval to fly Predator drones armed with Hellfire missiles over the country. In November 2002, a CIA missile strike killed six al-Qaeda operatives driving through the desert. The target was Abu Ali al-Harithi, organizer of the 2000 attack on the USS Cole. Killed with him was a U.S. citizen, Kamal Derwish, who the CIA knew was in the car.

Word that the CIA had purposefully killed Derwish drew attention to the unconventional nature of the new conflict and to the secret legal deliberations over whether killing a U.S. citizen was legal and ethical.

After the Sept. 11 attacks, Bush gave the CIA, and later the military, authority to kill U.S. citizens abroad if strong evidence existed that an American was involved in organizing or carrying out terrorist actions against the United States or U.S. interests, military and intelligence officials said. The evidence has to meet a certain, defined threshold. The person, for instance, has to pose "a continuing and imminent threat to U.S. persons and interests," said one former intelligence official.

The Obama administration has adopted the same stance. If a U.S. citizen joins al-Qaeda, "it doesn't really change anything from the standpoint of whether we can target them," a senior administration official said. "They are then part of the enemy."

Both the CIA and the JSOC maintain lists of individuals, called "High Value Targets" and "High Value Individuals," whom they seek to kill or capture. The JSOC list includes three Americans, including Aulqi, whose name was added late last year. As of several months ago, the CIA list included three U.S. citizens, and an intelligence official said that Aulqi's name has now been added.

Intelligence officials say the New Mexico-born imam also has been linked to the Army psychiatrist who is accused of killing 12 soldiers and a civilian at Fort Hood, Tex., although his communications with Maj. Nidal M. Hasan were largely academic in nature. Authorities say that Aulaqi is the most important native, English-speaking al-Qaeda figure and that he was in contact with the Nigerian accused of attempting to bomb a U.S. airliner on Christmas Day.

Yemeni Foreign Minister Abubaker al-Qirbi said in Washington last week that his government's present goal is to persuade Aulaqi to surrender so he can face local criminal charges stemming from his contacts with the Fort Hood suspect. Aulaqi is being tracked by the country's security forces, the minister added, and is now thought to be in the southern province of Shabwa.

*Staff writer R. Jeffrey Smith and staff researcher Julie Tate contributed to this report.*

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# Exhibit S

3/21/10 Wash. Post (Bus. Sec.) (Pg. Unavail. Online)  
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Washington Post  
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March 21, 2010

### Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes

Peter Finn and Joby Warrick

The plan was a standard one in the CIA's war against extremists in Pakistan: The agency was using a Predator drone to monitor a residential compound; a Taliban leader was expected to arrive shortly; a CIA missile would kill him.

On the morning of Aug. 5, CIA Director Leon Panetta was informed that Baitullah Mehsud was about to reach his father-in-law's home. Mehsud would be in the open, minimizing the risk that civilians would be injured or killed. Panetta authorized the strike, according to a senior intelligence official who described the sequence of events.

Some hours later, officials at CIA headquarters in Langley identified Mehsud on a feed from the Predator's camera. He was seen resting on the roof of the house, hooked up to a drip to palliate a kidney problem. He was not alone.

Panetta was pulled out of a White House meeting and told that Mehsud's wife was also on the rooftop, giving her husband a massage. Mehsud, implicated in suicide bombings and the assassination of former Pakistani Prime Minister Benazir Bhutto, was a major target. Panetta told his officers to take the shot. Mehsud and his wife were killed.

Panetta, an earthy former congressman with exquisitely honed Washington smarts, was President Barack Obama's surprise choice to head the CIA. During his 13 months in the job, Panetta has led a relentless assault on al-Qaida and Taliban operatives in Pakistan, delivering on Obama's promise to target them more aggressively than his predecessor.

Apart from a brief stint as a military intelligence officer in the 1960s, little in Panetta's resume appeared to merit his nomination to become the 19th director of the CIA, but his willingness to use force has won over skeptics inside the agency and on Capitol Hill. Said one former senior intelligence official: "I've never sensed him shirking from it."

The stepped-up drone strikes, Panetta's opposition to the release of information about CIA interrogation practices, and his resistance to greater oversight of the agency by the Office of the Director of National Intelligence have prompted criticism that he is a thrall of the agency's old guard. In the meantime, the strikes have begun to draw greater scrutiny, with watchdog groups demanding to know more about how they are carried out and the legal reasoning behind the killings.

In an interview Wednesday at CIA headquarters, Panetta refused to directly address the matter of Predator strikes, in keeping with the agency's long-standing practice of shielding its actions in Pakistan from public view. But he said that U.S. counterterrorism policies in the country are legal and highly effective, and that he is acutely aware of the gravity of some of the decisions thrust upon him.

"Any time you make decisions on life and death, I don't take that lightly. That's a serious decision," he said. "And yet, I also feel very comfortable with making those decisions because I know I'm dealing with people who threaten the safety of this country and are prepared to attack us at any moment."

Mehsud's followers and their al-Qaida allies vowed to avenge his death, and within months they put into motion a

plan that culminated in a Dec. 30 suicide bombing that killed seven CIA officers and contractors at a base in eastern Afghanistan.

On the Monday after the bombing, the regular 8:30 a.m. meeting of senior staff members at CIA began with a minute of silence. Then the director spoke.

"We're in a war," Panetta said, according to one participant. "We cannot afford to be hesitant. ... The fact is we're doing the right thing. My approach is going to be to work that much harder ... that we beat these sons of bitches."

At the end of the George W. Bush administration, the CIA could keep seven Predators in the air round-the-clock, but the number will double by the end of this year, according to the senior intelligence official. Like other current and former officials interviewed for this report, this source spoke on the condition of anonymity because the agency does not acknowledge its actions in Pakistan.

Since 2009, as many as 666 terrorism suspects, including at least 20 senior figures, have been killed by missiles fired from unmanned aircraft flying over Pakistan, according to figures compiled by the New America Foundation as of mid-March. From 2004 to 2008, the number was 230. According to the foundation, 177 civilians may also have been killed in the airstrikes since 2009. Intelligence officials say the number of noncombatants killed is much lower and noted that on Aug. 5 only Mehsud and his wife were killed, despite reports that other family members and bodyguards also were killed.

Panetta personally authorizes every strike, sometimes reversing his decision or reauthorizing a target if the situation on the ground changes, according to current and former senior intelligence officials. "He asks a lot of questions about the target, the intelligence picture, potential collateral damage, women and children in the vicinity," said the senior intelligence official.

Killing by drone has drawn increased scrutiny from human rights activists, who say such strikes raise legal questions when used outside the traditional battlefield. Some critics worry that the antiseptic quality of drone attacks, in which targets are identified on a video screen and killed with the press of a button, is anesthetizing policymakers and the public to the costs of war. The ACLU sued the government this month to compel the disclosure of the legal basis for its use of unmanned aircraft overseas.

"The government's use of drones to conduct targeted killings raises complicated questions — not only legal questions, but policy and moral questions as well," said Jameel Jaffer, director of the ACLU's National Security Project. "These kinds of questions ought to be discussed and debated publicly, not resolved secretly behind closed doors."

After weathering a number of storms on Capitol Hill, including a face-off with House Speaker Nancy Pelosi after the California Democrat accused the CIA of lying, Panetta has studiously cultivated his old colleagues, holding informal get-togethers with the Senate and House intelligence committees.

"It's Krispy Kremes and coffee," said Sen. Dianne Feinstein, D-Calif., chairman of the Senate intelligence committee. "People are relaxed, the conversation is free-flow, and I think that is very useful. "

Last summer Panetta shut down a still-embryonic Bush-era plan to create an assassination team that would target terrorism suspects, angry that Congress had never been informed of the plan. "He found it offensive," said the former senior intelligence official, recalling that it was one of the few times he had seen Panetta visibly angry.

Panetta has impressed the ranking Republican on the Senate intelligence committee. "I'm from the show-me state. He's done a pretty good job of showing me," said Sen. Christopher Bond of Missouri, an early doubter of Panetta's ability to lead the CIA. "I think the CIA knows ... at least their director is supporting them even though other elements of the administration (are) causing them pain and grief."

Expectations were low when Panetta arrived at CIA headquarters in February 2009. One recently retired officer recalled that some of his colleagues were initially angered by the appointment of a liberal politician who lacked extensive experience in the intelligence world and had publicly equated waterboarding with torture.

But almost from the first week, Panetta positioned himself as a strong advocate for the CIA, even when it put him at odds with the White House and the Office of the Director of National Intelligence (ODNI). Panetta lobbied fiercely against the release of Justice Department memos that spelled out how the Bush administration had authorized the use of waterboarding and other coercive interrogation measures. He famously unleashed an epithet-laden tirade at a White House meeting over Attorney General Eric Holder's decision to investigate CIA officers who participated in the interrogations.

Panetta has refused to yield to the ODNI over the CIA's independence and preeminence in overseas intelligence-gathering. The long-simmering conflict came to a head last spring when Director of National Intelligence Dennis Blair asserted that his agency should directly oversee the CIA's covert operations, while also deciding who would serve as the chief U.S. intelligence officer in overseas locations. Traditionally, the top CIA officer in each country automatically assumed that title.

Vice President Joe Biden, Panetta's longtime friend, was summoned to referee the dispute, which was resolved mostly in the CIA's favor: The CIA station chief would continue to be the top intelligence officer, and the CIA would be required only to consult with the ODNI about its covert missions.

Since becoming director, Panetta has visited more than 20 CIA stations worldwide, where he holds all-hands meetings and works the room with his easy charm, according to insiders. "Morale is good, especially downrange" in forward areas, Crumpton said.

Critics worry that Panetta has become a captive of the agency he leads.

"To survive in the CIA, he had to become more Catholic than the pope," said Anthony Romero, executive director of the ACLU. "He opposed important public disclosure of past use of torture and abuse and has worked to limit the scope of criminal investigations into any crimes committed by CIA officials."

Staff researcher Julie Tate contributed to this report.

bc-panetta

---- INDEX REFERENCES ---

INTELLIGENCE DENNIS BLAIR; NATIONAL SECURITY PROJECT; ODNI; PAKISTANI PRIME; PREDATOR; SENATE; SENATE AND HOUSE; WHITE HOUSE) (Anthony Romero; Baitullah Mehsud; Barack Obama; Benazir Bhutto; Bush; Christopher Bond; Crumpton; Dianne Feinstein; Drone Strikes; Eric Holder; George W. Bush; Jameel Jaffer; Joe Biden; Julie Tate; Leon Panetta; Mehsud; Morale; Obama; Panetta; Qaida; Wins Friends)

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# Exhibit T

# THE NEW YORKER

THE POLITICAL SCENE

## THE PREDATOR WAR

*What are the risks of the C.I.A.'s covert drone program?*

by Jane Mayer

OCTOBER 26, 2009



The “push-button” approach to fighting Al Qaeda represents a radically new use of state-sanctioned lethal force.

**O**n August 5th, officials at the Central Intelligence Agency, in Langley, Virginia, watched a live video feed relaying closeup footage of one of the most wanted terrorists in Pakistan. Baitullah Mehsud, the leader of the Taliban in Pakistan, could be seen reclining on the rooftop of his father-in-law’s house, in Zanghara, a hamlet in South Waziristan. It was a hot summer night, and he was joined outside by his wife and his uncle, a medic; at one point, the remarkably crisp images showed that Mehsud, who suffered from diabetes and a kidney ailment, was receiving an intravenous drip.

The video was being captured by the infrared camera of a Predator drone, a remotely controlled, unmanned plane that had been hovering, undetected, two miles or so above the house. Pakistan’s Interior Minister, A. Rehman Malik, told me recently that Mehsud was resting on his back. Malik, using his hands to make a picture frame, explained that the Predator’s targeters could see Mehsud’s entire body, not just the top of his head. “It was a perfect picture,” Malik, who watched the videotape later, said. “We used to see James Bond movies where he talked into his shoe or his watch. We thought it was a fairy tale. But this was fact!” The image remained just as stable when the C.I.A. remotely launched two Hellfire missiles from the Predator. Authorities watched the fiery blast in real time. After the dust cloud dissipated, all that remained of Mehsud was a detached torso. Eleven others died: his wife, his father-in-law, his mother-in-law, a

Pakistan's government considered Mehsud its top enemy, holding him responsible for the vast majority of recent terrorist attacks inside the country, including the assassination of former Prime Minister Benazir Bhutto, in December, 2007, and the bombing, last September, of the Marriott Hotel in Islamabad, which killed more than fifty people. Mehsud was also thought to have helped his Afghan confederates attack American and coalition troops across the border. Roger Cressey, a former counterterrorism official on the National Security Council, who is now a partner at Good Harbor, a consulting firm, told me, "Mehsud was someone both we and Pakistan were happy to see go up in smoke." Indeed, there was no controversy when, a few days after the missile strike, CNN reported that President Barack Obama had authorized it.

However, at about the same time, there was widespread anger after the *Wall Street Journal* revealed that during the Bush Administration the C.I.A. had considered setting up hit squads to capture or kill Al Qaeda operatives around the world. The furor grew when the *Times* reported that the C.I.A. had turned to a private contractor to help with this highly sensitive operation: the controversial firm Blackwater, now known as Xe Services. Members of the Senate and House intelligence committees demanded investigations of the program, which, they said, had been hidden from them. And many legal experts argued that, had the program become fully operational, it would have violated a 1976 executive order, signed by President Gerald R. Ford, banning American intelligence forces from engaging in assassination.

Hina Shamsi, a human-rights lawyer at the New York University School of Law, was struck by the inconsistency of the public's responses. "We got so upset about a targeted-killing program that didn't happen," she told me. "But the drone program *exists*." She said of the Predator program, "These are targeted international killings by the state." The program, as it happens, also uses private contractors for a variety of tasks, including flying the drones. Employees of Xe Services maintain and load the Hellfire missiles on the aircraft. Vicki Divoll, a former C.I.A. lawyer, who now teaches at the U.S. Naval Academy, in Annapolis, observed, "People are a lot more comfortable with a Predator strike that kills many people than with a throat-slitting that kills one." But, she added, "mechanized killing is still killing."

The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based. It was initiated by the Bush Administration and, according to Juan Zarate, a counterterrorism adviser in the Bush White House, Obama has left in place virtually all the key personnel. The program is classified as covert, and the intelligence agency declines to provide any information to the public about where it operates, how it selects targets, who is in charge, or how many people have been killed.

Nevertheless, reports of fatal air strikes in Pakistan emerge every few days. Such stories are often secondhand and difficult to confirm, as the Pakistani government and the military have tried to wall off the tribal areas from journalists. But, even if a precise account is elusive, the outlines are clear: the C.I.A. has joined the Pakistani intelligence service in an aggressive campaign to eradicate local and foreign militants, who have taken refuge in some of the most inaccessible parts of the country.

The first two C.I.A. air strikes of the Obama Administration took place on the morning of January 23rd—the President's third day in office. Within hours, it was clear that the morning's bombings, in Pakistan, had killed an estimated twenty people. In one strike, four Arabs, all likely affiliated with Al Qaeda, died. But in the second strike a drone targeted the wrong house, hitting the residence of a pro-government tribal leader six miles outside the town of Wana, in South Waziristan. The blast killed the tribal leader's entire family, including three children, one of them five years old. In keeping with U.S. policy, there was no official acknowledgment of either strike.

Since then, the C.I.A. bombardments have continued at a rapid pace. According to a just completed study by the New America Foundation, the number of drone strikes has risen dramatically since Obama became President. During his first nine and a half months in office, he has authorized as many C.I.A. aerial attacks in Pakistan as George W. Bush did in his final three years in office. The study's authors, Peter Bergen and Katherine Tiedemann, report that the Obama Administration has sanctioned at least forty-one C.I.A. missile strikes in Pakistan since taking office—a rate of approximately one bombing a week. So far this year, various estimates suggest, the C.I.A. attacks have killed between three hundred and twenty-six and five hundred and thirty-eight people. Critics say that many of the victims have been innocent bystanders, including children.

In the last week of September alone, there were reportedly four such attacks—three of them in one twenty-four-

hour period. At any given moment, a former White House counterterrorism official says, the C.I.A. has multiple drones flying over Pakistan, scouting for targets. According to the official, “there are so many drones” in the air that arguments have erupted over which remote operators can claim which targets, provoking “command-and-control issues.”

General Atomics Aeronautical Systems, the defense contractor that manufactures the Predator and its more heavily armed sibling, the Reaper, can barely keep up with the government’s demand. The Air Force’s fleet has grown from some fifty drones in 2001 to nearly two hundred; the C.I.A. will not divulge how many drones it operates. The government plans to commission hundreds more, including new generations of tiny “nano” drones, which can fly after their prey like a killer bee through an open window.

With public disenchantment mounting over the U.S. troop deployment in Afghanistan, and the Obama Administration divided over whether to escalate the American military presence there, many in Washington support an even greater reliance on Predator strikes. In this view, the U.S., rather than trying to stabilize Afghanistan by waging a counter-insurgency operation against Taliban forces, should focus purely on counterterrorism, and use the latest technology to surgically eliminate Al Qaeda leaders and their allies. In September, the conservative pundit George Will published an influential column in the *Washington Post*, “Time to Get Out of Afghanistan,” arguing that “America should do only what can be done from offshore, using intelligence, drones, cruise missiles, air strikes and small, potent Special Forces units, concentrating on the porous 1,500-mile border with Pakistan, a nation that actually matters.” Vice-President Joseph Biden reportedly holds a similar view.

It’s easy to understand the appeal of a “push-button” approach to fighting Al Qaeda, but the embrace of the Predator program has occurred with remarkably little public discussion, given that it represents a radically new and geographically unbounded use of state-sanctioned lethal force. And, because of the C.I.A. program’s secrecy, there is no visible system of accountability in place, despite the fact that the agency has killed many civilians inside a politically fragile, nuclear-armed country with which the U.S. is not at war. Should something go wrong in the C.I.A.’s program—last month, the Air Force lost control of a drone and had to shoot it down over Afghanistan—it’s unclear what the consequences would be.

The Predators in the C.I.A. program are “flown” by civilians, both intelligence officers and private contractors. According to a former counterterrorism official, the contractors are “seasoned professionals—often retired military and intelligence officials.” (The intelligence agency outsources a significant portion of its work.) Within the C.I.A., control of the unmanned vehicles is split among several teams. One set of pilots and operators works abroad, near hidden airfields in Afghanistan and Pakistan, handling takeoffs and landings. Once the drones are aloft, the former counterterrorism official said, the controls are electronically “slewed over” to a set of “reachback operators,” in Langley. Using joysticks that resemble video-game controls, the reachback operators—who don’t need conventional flight training—sit next to intelligence officers and watch, on large flat-screen monitors, a live video feed from the drone’s camera. From their suburban redoubt, they can turn the plane, zoom in on the landscape below, and decide whether to lock onto a target. A stream of additional “signal” intelligence, sent to Langley by the National Security Agency,\* provides electronic means of corroborating that a target has been correctly identified. The White House has delegated trigger authority to C.I.A. officials, including the head of the Counter-Terrorist Center, whose identity remains veiled from the public because the agency has placed him under cover.

People who have seen an air strike live on a monitor described it as both awe-inspiring and horrifying. “You could see these little figures scurrying, and the explosion going off, and when the smoke cleared there was just rubble and charred stuff,” a former C.I.A. officer who was based in Afghanistan after September 11th says of one attack. (He watched the carnage on a small monitor in the field.) Human beings running for cover are such a common sight that they have inspired a slang term: “squirters.”

Peter W. Singer, the author of “Wired for War,” a recent book about the robotics revolution in modern combat, argues that the drone technology is worryingly “seductive,” because it creates the perception that war can be “costless.” Cut off from the realities of the bombings in Pakistan, Americans have been insulated from the human toll, as well as from the political and the moral consequences. Nearly all the victims have remained faceless, and the damage caused by the bombings has remained unseen. In contrast to Gaza, where the targeted killing of Hamas fighters by the Israeli military has been extensively documented—making clear that the collateral damage, and the loss of civilian life, can be severe—Pakistan’s tribal areas have become largely forbidden territory for media organizations. As a result, no videos of a drone attack in progress have been released, and only a few photographs of the immediate aftermath of a



Predator strike have been published.

The seeming unreality of the Predator enterprise is also felt by the pilots. Some of them reportedly wear flight suits when they operate a drone's remote controls. When their shifts end, of course, these cubicle warriors can drive home to have dinner with their families. Critics have suggested that unmanned systems, by sparing these combatants from danger and sacrifice, are creating what Sir Brian Burridge, a former British Air Chief Marshal in Iraq, has called "a virtueless war," requiring neither courage nor heroism. According to Singer, some Predator pilots suffer from combat stress that equals, or exceeds, that of pilots in the battlefield. This suggests that virtual killing, for all its sterile trappings, is a discomfiting form of warfare. Meanwhile, some social critics, such as Mary Dudziak, a professor at the University of Southern California's Gould School of Law, argue that the Predator strategy has a larger political cost. As she puts it, "Drones are a technological step that further isolates the American people from military action, undermining political checks on . . . endless war."

**T**he advent of the Predator targeted-killing program "is really a sea change," says Gary Solis, who teaches at Georgetown University's Law Center and recently retired from running the law program at the U.S. Military Academy. "Not only would we have expressed abhorrence of such a policy a few years ago; we did." In July, 2001, two months before Al Qaeda's attacks on New York and Washington profoundly altered America's mind-set, the U.S. denounced Israel's use of targeted killing against Palestinian terrorists. The American Ambassador to Israel, Martin Indyk, said at the time, "The United States government is very clearly on record as against targeted assassinations. . . . They are extrajudicial killings, and we do not support that."

Before September 11th, the C.I.A., which had been chastened by past assassination scandals, refused to deploy the Predator for anything other than surveillance. Daniel Benjamin, the State Department's counterterrorism director, and Steven Simon, a former counterterrorism adviser, report in their 2002 book "The Age of Sacred Terror" that the week before Al Qaeda attacked the U.S. George Tenet, then the agency's director, argued that it would be "a terrible mistake" for "the Director of Central Intelligence to fire a weapon like this."

Yet once America had suffered terrorist attacks on its own soil the agency's posture changed, and it petitioned the White House for new authority. Within days, President Bush had signed a secret Memorandum of Notification, giving the C.I.A. the right to kill members of Al Qaeda and their confederates virtually anywhere in the world. Congress endorsed this policy, passing a bill called the Authorization for Use of Military Force. Bush's legal advisers modelled their rationale on Israel's position against terrorism, arguing that the U.S. government had the right to use lethal force against suspected terrorists in "anticipatory" self-defense. By classifying terrorism as an act of war, rather than as a crime, the Bush Administration reasoned that it was no longer bound by legal constraints requiring the government to give suspected terrorists due process.

In November, 2002, top Bush Administration officials publicly announced a successful Predator strike against an Al Qaeda target, Qaed Salim Sinan al-Harethi, a suspect in the 2000 bombing of the U.S.S. Cole. Harethi was killed after a Hellfire missile vaporized the car in which he and five other passengers were riding, on a desert road in Yemen. Paul Wolfowitz, then the Deputy Defense Secretary, praised the new tactic, telling CNN, "One hopes each time that you get a success like that, not only to have gotten rid of somebody dangerous but to have imposed changes in their tactics, operations, and procedures."

At first, some intelligence experts were uneasy about drone attacks. In 2002, Jeffrey Smith, a former C.I.A. general counsel, told Seymour M. Hersh, for an article in this magazine, "If they're dead, they're not talking to you, and you create more martyrs." And, in an interview with the *Washington Post*, Smith said that ongoing drone attacks could "suggest that it's acceptable behavior to assassinate people. . . . Assassination as a norm of international conduct exposes American leaders and Americans overseas."

Seven years later, there is no longer any doubt that targeted killing has become official U.S. policy. "The things we were complaining about from Israel a few years ago we now embrace," Solis says. Now, he notes, nobody in the government calls it assassination.

The Predator program is described by many in the intelligence world as America's single most effective weapon against Al Qaeda. In May, Leon Panetta, the C.I.A.'s director, referred to the Predator program as "the only game in town" in an unguarded moment after a public lecture. Counterterrorism officials credit drones with having killed more than a dozen senior Al Qaeda leaders and their allies in the past year, eliminating more than half of the C.I.A.'s twenty most wanted "high value" targets. In addition to Baitullah Mehsud, the list includes Nazimuddin Zalalov, a former

lieutenant of Osama bin Laden, Ilyas Kashmiri, Al Qaeda's chief of paramilitary operations in Pakistan, Saad bin Laden, Osama's eldest son; Abu Sulayman al-Jazairi, an Algerian Al Qaeda planner who is believed to have helped train operatives for attacks in Europe and the United States; and Osama al-Kini and Sheikh Ahmed Salim Swedan, Al Qaeda operatives who are thought to have played central roles in the 1998 bombings of American embassies in East Africa.

Juan Zarate, the Bush counterterrorism adviser, believes that "Al Qaeda is on its heels" partly because "so many bigwigs" have been killed by drones. Though he acknowledges that Osama bin Laden and Ayman al-Zawahiri, the group's top leaders, remain at large, he estimates that no more than fifty members of Al Qaeda's senior leadership still exist, along with two to three hundred senior members outside the terror organization's "inner core."

Zarate and other supporters of the Predator program argue that it has had positive ripple effects. Surviving militants are forced to operate far more cautiously, which diverts their energy from planning new attacks. And there is evidence that the drone strikes, which depend on local informants for targeting information, have caused debilitating suspicion and discord within the ranks. Four Europeans who were captured last December after trying to join Al Qaeda in Pakistan described a life of constant fear and distrust among the militants, whose obsession with drone strikes had led them to communicate only with elaborate secrecy and to leave their squalid hideouts only at night. As the *Times* has reported, militants have been so unnerved by the drone program that they have released a video showing the execution of accused informants. Pakistanis have also been gripped by rumors that paid C.I.A. informants have been planting tiny silicon-chip homing devices for the drones in the tribal areas.

The drone program, for all its tactical successes, has stirred deep ethical concerns. Michael Walzer, a political philosopher and the author of the book "Just and Unjust Wars," says that he is unsettled by the notion of an intelligence agency wielding such lethal power in secret. "Under what code does the C.I.A. operate?" he asks. "I don't know. The military operates under a legal code, and it has judicial mechanisms." He said of the C.I.A.'s drone program, "There should be a limited, finite group of people who are targets, and that list should be publicly defensible and available. Instead, it's not being publicly defended. People are being killed, and we generally require some public justification when we go about killing people."

Since 2004, Philip Alston, an Australian human-rights lawyer who has served as the United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, has repeatedly tried, but failed, to get a response to basic questions about the C.I.A.'s program—first from the Bush Administration, and now from Obama's. When he asked, in formal correspondence, for the C.I.A.'s legal justifications for targeted killings, he says, "they blew me off." (A C.I.A. spokesperson told me that the agency "uses lawful, highly accurate, and effective tools and tactics to take the fight to Al Qaeda and its violent allies. That careful, precise approach has brought major success against a very dangerous and deadly enemy.") Alston then presented a critical report on the drone program to the U.N. Human Rights Council, but, he says, the U.S. representatives ignored his concerns.

Alston describes the C.I.A. program as operating in "an accountability void," adding, "It's a lot like the torture issue. You start by saying we'll just go after the handful of 9/11 masterminds. But, once you've put the regimen for waterboarding and other techniques in place, you use it much more indiscriminately. It becomes standard operating procedure. It becomes all too easy. Planners start saying, 'Let's use drones in a broader context.' Once you use targeting less stringently, it can become indiscriminate."

**U**nder international law, in order for the U.S. government to legally target civilian terror suspects abroad it has to define a terrorist group as one engaging in armed conflict, and the use of force must be a "military necessity." There must be no reasonable alternative to killing, such as capture, and to warrant death the target must be "directly participating in hostilities." The use of force has to be considered "proportionate" to the threat. Finally, the foreign nation in which such targeted killing takes place has to give its permission.

Many lawyers who have looked at America's drone program in Pakistan believe that it meets these basic legal tests. But they are nevertheless troubled, as the U.S. government keeps broadening the definition of acceptable high-value targets. Last March, the Obama Administration made an unannounced decision to win support for the drone program inside Pakistan by giving President Asif Ali Zardari more control over whom to target. "A lot of the targets are nominated by the Pakistanis—it's part of the bargain of getting Pakistani cooperation," says Bruce Riedel, a former C.I.A. officer who has served as an adviser to the Obama Administration on Afghanistan and Pakistan. According to the New America Foundation's study, only six of the forty-one C.I.A. drone strikes conducted by the Obama Administration in Pakistan have targeted Al Qaeda members. Eighteen were directed at Taliban targets in Pakistan, and

fifteen were aimed specifically at Baitullah Mehsud. Palat Masood, a retired Pakistani lieutenant general and an authority on security issues, says that the U.S.'s tactical shift, along with the elimination of Mehsud, has quieted some of the Pakistani criticism of the American air strikes, although the bombings are still seen as undercutting the country's sovereignty. But, given that many of the targeted Pakistani Taliban figures were obscure in U.S. counterterrorism circles, some critics have wondered whether they were legitimate targets for a Predator strike. "These strikes are killing a lot of low-level militants, which raises the question of whether they are going beyond the authorization to kill leaders," Peter Bergen told me. Roger Cressey, the former National Security Council official, who remains a strong supporter of the drone program, says, "The debate is that we've been doing this so long we're now bombing low-level guys who don't deserve a Hellfire missile up their ass." (In his view, "Not every target has to be a rock star.")

The Obama Administration has also widened the scope of authorized drone attacks in Afghanistan. An August report by the Senate Foreign Relations Committee disclosed that the Joint Integrated Prioritized Target List—the Pentagon's roster of approved terrorist targets, containing three hundred and sixty-seven names—was recently expanded to include some fifty Afghan drug lords who are suspected of giving money to help finance the Taliban. These new targets are a step removed from Al Qaeda. According to the Senate report, "There is no evidence that any significant amount of the drug proceeds goes to Al Qaeda." The inclusion of Afghan narcotics traffickers on the U.S. target list could prove awkward, some observers say, given that President Hamid Karzai's running mate, Marshal Mohammad Qasim Fahim, and the President's brother, Ahmed Wali Karzai, are strongly suspected of involvement in narcotics. Andrew Bacevich, a professor of history and international relations at Boston University, who has written extensively on military matters, said, "Are they going to target Karzai's brother?" He went on, "We should be very careful about who we define as the enemy we have to kill. Leaders of Al Qaeda, of course. But you can't kill people on Tuesday and negotiate with them on Wednesday."

Defining who is and who is not too tangential for the U.S. to kill can be difficult. John Radsan, a former lawyer in the C.I.A.'s office of general counsel, who is now a professor at William Mitchell College of Law, in St. Paul, Minnesota, says, "You can't target someone just because he visited an Al Qaeda Web site. But you also don't want to wait until they're about to detonate a bomb. It's a sliding scale." Equally fraught is the question of how many civilian deaths can be justified. "If it's Osama bin Laden in a house with a four-year-old, most people will say go ahead," Radsan says. "But if it's three or four children? Some say that's too many. And if he's in a school? Many say don't do it." Such judgment calls are being made daily by the C.I.A., which, Radsan points out, "doesn't have much experience with killing. Traditionally, the agency that does that is the Department of Defense."

Though the C.I.A.'s methodology remains unknown, the Pentagon has created elaborate formulas to help the military make such lethal calculations. A top military expert, who declined to be named, spoke of the military's system, saying, "There's a whole taxonomy of targets." Some people are approved for killing on sight. For others, additional permission is needed. A target's location enters the equation, too. If a school, hospital, or mosque is within the likely blast radius of a missile, that, too, is weighed by a computer algorithm before a lethal strike is authorized. According to the recent Senate Foreign Relations Committee report, the U.S. military places no name on its targeting list until there are "two verifiable human sources" and "substantial additional evidence" that the person is an enemy.

In Israel, which conducts unmanned air strikes in the Palestinian territories, the process of identifying targets, in theory at least, is even more exacting. Military lawyers have to be convinced that the target can't reasonably be captured, and that he poses a threat to national security. Military specialists in Arab culture also have to be convinced that the hit will do more good than harm. "You have to be incredibly cautious," Amos Guiora, a law professor at the University of Utah, says. From 1994 to 1997, he advised Israeli commanders on targeted killings in the Gaza Strip. "Not everyone is at the level appropriate for targeted killing," he says. "You want a leader, the hub with many spokes." Guiora, who follows the Predator program closely, fears that national-security officials here lack a clear policy and a firm definition of success. "Once you start targeted killing, you better make damn sure there's a policy guiding it," he says. "It can't be just catch-as-catch-can."

Daniel Byman, the director of Georgetown University's Center for Peace and Security Studies, argues that, when possible, "it's almost always better to arrest terrorists than to kill them. You get intelligence then. Dead men tell no tales." The C.I.A.'s killing of Saad bin Laden, Osama's son, provides a case in point. By the time that Saad bin Laden had reached Pakistan's tribal areas, late last year, there was little chance that any law-enforcement authority could capture him alive. But, according to Hillary Mann Leverett, an adviser to the National Security Council between 2001 and 2003, the Bush Administration would have had several opportunities to interrogate Saad bin Laden earlier, if it had

been willing to make a deal with Iran, where, according to U.S. intelligence, he lived occasionally after September 11th. “The Iranians offered to work out an international framework for transferring terror suspects, but the Bush Administration refused,” she said. In December, 2008, Saad bin Laden left Iran for Pakistan; within months, according to NPR, a Predator missile had ended his life. “We absolutely did not get the most we could,” Leverett said. “Saad bin Laden would have been very, very valuable in terms of what he knew. He probably would have been a gold mine.”

Byman is working on a book about Israel’s experiences with counterterrorism, including targeted killing. Though the strikes there have weakened the Palestinian leadership, he said, “if you use these tools wrong, you can lose the moral high ground, which is going to hurt you. Inevitably, some of the intelligence is going to be wrong, so you’re always rolling the dice. That’s the reality of real-time intelligence.”

Indeed, the history of targeted killing is marked by errors. In 1973, for example, Israeli intelligence agents murdered a Moroccan waiter by mistake. They thought that he was a terrorist who had been involved in slaughtering Israeli athletes at the Munich Olympics, a year earlier. And in 1986 the Reagan Administration attempted to retaliate against the Libyan leader Muammar Qaddafi for his suspected role in the deadly bombing of a disco frequented by American servicemen in Germany. The U.S. launched an air strike on Qaddafi’s household. The bombs missed him, but they did kill his fifteen-month-old daughter.

The C.I.A.’s early attempts at targeting Osama bin Laden were also problematic. After Al Qaeda blew up the U.S. Embassies in Tanzania and Kenya, in August, 1998, President Bill Clinton retaliated, by launching seventy-five Tomahawk cruise missiles at a site in Afghanistan where bin Laden was expected to attend a summit meeting. According to reports, the bombardment killed some twenty Pakistani militants but missed bin Laden, who had left the scene hours earlier.

The development of the Predator, in the early nineteen-nineties, was supposed to help eliminate such mistakes. The drones can hover above a target for up to forty hours before refuelling, and the precise video footage makes it much easier to identify targets. But the strikes are only as accurate as the intelligence that goes into them. Tips from informants on the ground are subject to error, as is the interpretation of video images. Not long before September 11, 2001, for instance, several U.S. counterterrorism officials became certain that a drone had captured footage of bin Laden in a locale he was known to frequent in Afghanistan. The video showed a tall man in robes, surrounded by armed bodyguards in a diamond formation. At that point, drones were unarmed, and were used only for surveillance. “The optics were not great, but it was him,” Henry Crumpton, then the C.I.A.’s top covert-operations officer for the region, told *Time*. But two other former C.I.A. officers, who also saw the footage, have doubts. “It’s like an urban legend,” one of them told me. “They just jumped to conclusions. You couldn’t see his face. It could have been Joe Schmo. Believe me, no tall man with a beard is safe anywhere in Southwest Asia.” In February, 2002, along the mountainous eastern border of Afghanistan, a Predator reportedly followed and killed three suspicious Afghans, including a tall man in robes who was thought to be bin Laden. The victims turned out to be innocent villagers, gathering scrap metal.

In Afghanistan and Pakistan, the local informants, who also serve as confirming witnesses for the air strikes, are notoriously unreliable. A former C.I.A. officer who was based in Afghanistan after September 11th told me that an Afghan source had once sworn to him that one of Al Qaeda’s top leaders was being treated in a nearby clinic. The former officer said that he could barely hold off an air strike after he passed on the tip to his superiors. “They scrambled together an élite team,” he recalled. “We caught hell from headquarters. They said ‘Why aren’t you moving on it?’ when we insisted on checking it out first.” It turned out to be an intentionally false lead. “Sometimes you’re dealing with tribal chiefs,” the former officer said. “Often, they say an enemy of theirs is Al Qaeda because they just want to get rid of somebody. Or they made crap up because they wanted to prove they were valuable, so that they could make money. You couldn’t take their word.”

The consequences of bad ground intelligence can be tragic. In September, a NATO air strike in Afghanistan killed between seventy and a hundred and twenty-five people, many of them civilians, who were taking fuel from two stranded oil trucks; they had been mistaken for Taliban insurgents. (The incident is being investigated by NATO.) According to a reporter for the *Guardian*, the bomb strike, by an F-15E fighter plane, left such a tangle of body parts that village elders resorted to handing out pieces of unidentifiable corpses to the grieving families, so that they could have something to bury. One Afghan villager told the newspaper, “I took a piece of flesh with me home and I called it my son.”

Predator drones, with their superior surveillance abilities, have a better track record for accuracy than fighter jets, according to intelligence officials. Also, the drone's smaller Hellfire missiles are said to cause far less collateral damage. Still, the recent campaign to kill Baitullah Mehsud offers a sobering case study of the hazards of robotic warfare. It appears to have taken sixteen missile strikes, and fourteen months, before the C.I.A. succeeded in killing him. During this hunt, between two hundred and seven and three hundred and twenty-one additional people were killed, depending on which news accounts you rely upon. It's all but impossible to get a complete picture of whom the C.I.A. killed during this campaign, which took place largely in Waziristan. Not only has the Pakistani government closed off the region to the outside press; it has also shut out international humanitarian organizations like the International Committee for the Red Cross and Doctors Without Borders. "We can't get within a hundred kilometres of Waziristan," Brice de la Vingne, the operational coordinator for Doctors Without Borders in Pakistan, told me. "We tried to set up an emergency room, but the authorities wouldn't give us authorization."

A few Pakistani and international news stories, most of which rely on secondhand sources rather than on eyewitness accounts, offer the basic details. On June 14, 2008, a C.I.A. drone strike on Mehsud's home town, Makeen, killed an unidentified person. On January 2, 2009, four more unidentified people were killed. On February 14th, more than thirty people were killed, twenty-five of whom were apparently members of Al Qaeda and the Taliban, though none were identified as major leaders. On April 1st, a drone attack on Mehsud's deputy, Hakimullah Mehsud, killed ten to twelve of his followers instead. On April 29th, missiles fired from drones killed between six and ten more people, one of whom was believed to be an Al Qaeda leader. On May 9th, five to ten more unidentified people were killed; on May 12th, as many as eight people died. On June 14th, three to eight more people were killed by drone attacks. On June 23rd, the C.I.A. reportedly killed between two and six unidentified militants outside Makeen, and then killed dozens more people—possibly as many as eighty-six—during funeral prayers for the earlier casualties. An account in the Pakistani publication *The News* described ten of the dead as children. Four were identified as elderly tribal leaders. One eyewitness, who lost his right leg during the bombing, told Agence France-Presse that the mourners suspected what was coming: "After the prayers ended, people were asking each other to leave the area, as drones were hovering." The drones, which make a buzzing noise, are nicknamed *machay* ("wasps") by the Pashtun natives, and can sometimes be seen and heard, depending on weather conditions. Before the mourners could clear out, the eyewitness said, two drones started firing into the crowd. "It created havoc," he said. "There was smoke and dust everywhere. Injured people were crying and asking for help." Then a third missile hit. "I fell to the ground," he said.

The local population was clearly angered by the Pakistani government for allowing the U.S. to target a funeral. (Intelligence had suggested that Mehsud would be among the mourners.) An editorial in *The News* denounced the strike as sinking to the level of the terrorists. The Urdu newspaper *Jang* declared that Obama was "shutting his ears to the screams of thousands of women whom your drones have turned into dust." U.S. officials were undeterred, continuing drone strikes in the region until Mehsud was killed.

After such attacks, the Taliban, attempting to stir up anti-American sentiment in the region, routinely claims, falsely, that the victims are all innocent civilians. In several Pakistani cities, large protests have been held to decry the drone program. And, in the past year, perpetrators of terrorist bombings in Pakistan have begun presenting their acts as "revenge for the drone attacks." In recent weeks, a rash of bloody assaults on Pakistani government strongholds has raised the spectre that formerly unaligned militant groups have joined together against the Zardari Administration.

David Kilcullen, a counter-insurgency warfare expert who has advised General David Petraeus in Iraq, has said that the propaganda costs of drone attacks have been disastrously high. Militants have used the drone strikes to denounce the Zardari government—a shaky and unpopular regime—as little more than an American puppet. A study that Kilcullen co-wrote for the Center for New American Security, a think tank, argues, "Every one of these dead non-combatants represents an alienated family, a new revenge feud, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased." His co-writer, Andrew Exum, a former Army Ranger who has advised General Stanley McChrystal in Afghanistan, told me, "Neither Kilcullen nor I is a fundamentalist—we're not saying drones are not part of the strategy. But we are saying that right now they are part of the problem. If we use tactics that are killing people's brothers and sons, not to mention their sisters and wives, we can work at cross-purposes with insuring that the tribal population doesn't side with the militants. Using the Predator is a tactic, not a strategy."

Exum says that he's worried by the remote-control nature of Predator warfare. "As a military person, I put myself

in the shoes of someone in FATA”—Pakistan’s Federally Administered Tribal Areas—“and there’s something about pilotless drones that doesn’t strike me as an honorable way of warfare,” he said. “As a classics major, I have a classical sense of what it means to be a warrior.” An Iraq combat veteran who helped design much of the military’s doctrine for using unmanned drones also has qualms. He said, “There’s something important about putting your own sons and daughters at risk when you choose to wage war as a nation. We risk losing that flesh-and-blood investment if we go too far down this road.”

Bruce Riedel, who has been deeply involved in these debates during the past few years, sees the choices facing Obama as exceedingly hard. “Is the drone program helping or hurting?” he asked. “It’s a tough question. These are not cost-free operations.” He likened the drone attacks to “going after a beehive, one bee at a time.” The problem is that, inevitably, “the hive will always produce more bees.” But, he said, “the only pressure currently being put on Pakistan and Afghanistan is the drones.” He added, “It’s really all we’ve got to disrupt Al Qaeda. The reason the Administration continues to use it is obvious: it doesn’t really have anything else.” ♦

\*Correction, December 1, 2009: The original sentence said, incorrectly, “National Security Administration.”

ILLUSTRATION: GUY BILLOUT

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April 6, 2010

# U.S. Approves Targeted Killing of American Cleric

By **SCOTT SHANE**

WASHINGTON — The Obama administration has taken the extraordinary step of authorizing the targeted killing of an American citizen, the radical Muslim cleric [Anwar al-Awlaki](#), who is believed to have shifted from encouraging attacks on the United States to directly participating in them, intelligence and counterterrorism officials said Tuesday.

Mr. Awlaki, who was born in New Mexico and spent years in the United States as an imam, is in hiding in [Yemen](#). He has been the focus of intense scrutiny since he was linked to Maj. [Nidal Malik Hasan](#), the Army psychiatrist accused of killing 13 people at [Fort Hood](#), Tex., in November, and then to [Umar Farouk Abdulmutallab](#), the Nigerian man charged with trying to blow up a Detroit-bound airliner on Dec. 25.

American counterterrorism officials say Mr. Awlaki is an operative of Al Qaeda in the Arabian Peninsula, the affiliate of the terror network in Yemen and Saudi Arabia. They say they believe that he has become a recruiter for the terrorist network, feeding prospects into plots aimed at the United States and at Americans abroad, the officials said.

It is extremely rare, if not unprecedented, for an American to be approved for targeted killing, officials said. A former senior legal official in the administration of [George W. Bush](#) said he did not know of any American who was approved for targeted killing under the former president.

But the director of national intelligence, [Dennis C. Blair](#), told a House hearing in February that such a step was possible. “We take direct actions against terrorists in the intelligence community,” he said. “If we think that direct action will involve killing an American, we get specific permission to do that.” He did not name Mr. Awlaki as a target.

The step taken against Mr. Awlaki, which occurred earlier this year, is a vivid illustration of his rise to prominence in the constellation of terrorist leaders. But his popularity as a cleric, whose lectures on Islamic scripture have a large following among English-speaking Muslims, means any action against him could rebound against the United States in the larger ideological campaign against [Al Qaeda](#).

The possibility that Mr. Awlaki might be added to the target list was reported by The Los Angeles



Times in January, and Reuters reported on Tuesday that he was approved for capture or killing.

“The danger Awlaki poses to this country is no longer confined to words,” said an American official, who like other current and former officials interviewed for this article spoke of the classified counterterrorism measures on the condition of anonymity. “He’s gotten involved in plots.”

The official added: “The United States works, exactly as the American people expect, to overcome threats to their security, and this individual — through his own actions — has become one. Awlaki knows what he’s done, and he knows he won’t be met with handshakes and flowers. None of this should surprise anyone.”

As a general principle, international law permits the use of lethal force against individuals and groups that pose an imminent threat to a country, and officials said that was the standard used in adding names to the list of targets. In addition, Congress approved the use of military force against Al Qaeda after the Sept. 11, 2001, terrorist attacks. People on the target list are considered to be military enemies of the United States and therefore not subject to the ban on political assassination first approved by President [Gerald R. Ford](#).

Both the [C.I.A.](#) and the military maintain lists of terrorists linked to Al Qaeda and its affiliates who are approved for capture or killing, former officials said. But because Mr. Awlaki is an American, his inclusion on those lists had to be approved by the [National Security Council](#), the officials said.

At a panel discussion in Washington on Tuesday, [Representative Jane Harman](#), Democrat of California and chairwoman of a House subcommittee on homeland security, called Mr. Awlaki “probably the person, the terrorist, who would be terrorist No. 1 in terms of threat against us.”

# Exhibit V



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## The Obama Administration and International Law

**Harold Hongju Koh**

Legal Adviser, U.S. Department of State

**Annual Meeting of the American Society of International Law**

**Washington, DC**

**March 25, 2010**

Thank you, Dean Areen, for that very generous introduction, and very special thanks to my good friends President Lucy Reed and Executive Director Betsy Andersen for the extraordinary work you do with the American Society of International Law. It has been such a great joy in my new position to be able to collaborate with the Society on so many issues.

It is such a pleasure to be back here at the ASIL. I am embarrassed to confess that I have been a member of ASIL for more than 30 years, since my first year of law school, and coming to the annual meeting has always been a highlight of my year. As a young lawyer just out of law school I would come to the American Society meeting and stand in the hotel lobby gaping at all the famous international lawyers walking by: for international lawyers, that is as close as we get to watching the Hollywood stars stroll the red carpet at the Oscars! And last year at this time, when this meeting was held, I was still in the middle of my confirmation process. So under the arcane rules of that process, I was allowed to come here to be seen, but not heard. So it is a pleasure finally to be able to address all of you and to give you my perspective on the Obama Administration's approach to international law.

Let me start by bringing you special greetings from someone you already know.

As you saw, my client, Secretary Clinton very much wanted to be here in person, but as you see in the headlines, this week she has been called away to Mexico, to meeting visiting Pakistani dignitaries, to testify on Capitol Hill, and many other duties. As you can tell, she is very proud of the strong historical relationship between the American Society and the State Department, and she is determined to keep it strong. As the Secretary mentioned, I and another long time member of the Society, your former President Anne Marie Slaughter of the Policy Planning Staff join her every morning at her 8:45 am senior staff meeting, so the spirit of the American Society is very much in the room (and the smell of the Society as well, as I am usually there at that hour clutching my ASIL coffee mug!)

Since this is my first chance to address you as Legal Adviser, I thought I would speak to three issues. First, the nature of my job as Legal Adviser. Second, to discuss the strategic vision of international law that we in the Obama Administration are attempting to implement. Third and finally, to discuss particular issues that we have grappled with in our first year in a number of high-profile areas: the International Criminal Court, the Human Rights Council, and what I call The Law of 9/11: detentions, use of force, and prosecutions.

### I. The Role of the Legal Adviser

First, my job. I have now been the Legal Adviser of the State Department for about nine months. This is a position I first heard of about 40 years ago, and it has struck me throughout my career as the most fascinating legal job in the U.S. Government. Now that I've actually been in the job for awhile, I have become even more convinced that that is true, for four reasons.

First, I have absolutely extraordinary colleagues at the Legal Adviser's Office, which we call "L," which is surely the greatest international law firm in the world. Its numbers include many current lawyers and alumni who are sitting here in the audience, and it is a training ground for America's international lawyers [To prove that point, could I have a show of hands of how many of you in the audience have worked in L sometime during your careers?] Our 175 lawyers are spread over 24 offices, including four extraordinary career deputies and a Counselor of International Law, nearly all of whom are members of this

Second, I have extraordinary clients and you just saw one, Secretary Hillary Clinton, who is a remarkably able lawyer. Of course, another client of mine, the President, is also an outstanding lawyer, as are both Deputy Secretaries, the Department's Counselor, the Deputy Chief of Staff, and a host of Under Secretaries and Assistant Secretaries.

Third, each day we tackle extraordinarily fascinating legal questions. When I was a professor, I would spend a lot of time trying to think up exam questions. For those of you who are professors, this job literally presents you with a new exam question every single day. For example, I had never really thought about the question: "can you attach a panda?" Or the question, can Mu'ammr al-Qadhafi erect a tent in Englewood, New Jersey, notwithstanding a contrary local ordinance? To be honest, I had never really thought about those questions. But rest assured, in the future, many Yale law students will.

Fourth and finally, my position allows me to play extraordinary and varied roles. Some government lawyers have the privilege for example, of giving regular advice to a particularly prominent client or pleading particular cases before a particular court. But the Legal Adviser must shift back and forth constantly between four rich and varied roles: which I call counselor, conscience, defender of U.S. interests, and spokesperson for international law.

As **Counselor**, I mean obviously, that the Legal Adviser must play all the traditional functions of an agency general counsel, but with a twist. Like every in-house counsel's office, we do buildings and acquisitions, but those buildings may well be in Afghanistan or Beijing. We review government contracts, but they may require contracting activities in Iraq or Pakistan. We review employment decisions, but with respect to employees with diplomatic and consular immunities or special visa problems.

But in addition to being counselors, we also serve as a **conscience** for the U.S. Government with regard to international law. The Legal Adviser, along with many others in policy as well as legal positions, offers opinions on both the wisdom and morality of proposed international actions. For it is the unique role of the Legal Adviser's Office to coordinate and render authoritative legal advice for the State Department on international legal issues, or as Dick Bilder once put it, to "speak law to power." In this role, the Legal Adviser must serve not only as a source of black letter advice to his clients, but more fundamentally, as a source of good judgment. That means that one of the most important roles of the Legal Adviser is to advise the Secretary when a policy option being proposed is "lawful but awful." As Herman Pfleger, one former Legal Adviser, put it: "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no." And because my job is simply to provide the President and the Secretary of State with the very best legal advice that I can give them, I have felt little conflict with my past roles as a law professor, dean and human rights lawyer, because as my old professor, former legal adviser Abram Chayes, once put it: "There's nothing wrong with a lawyer holding the United States to its own best standards and principles."

A third role the Legal Adviser plays is **defender** of the United States interests in the many international fora in which the U.S. appears-- the International Court of Justice, where I had the honor recently of appearing for the United States in the Kosovo case; the UN Compensation Commission; the Iran-US Claims Tribunal; NAFTA tribunals (where I was privileged to argue recently before a Chapter XI tribunal in the *Grand River* case) -- and we also appear regularly in US domestic litigation, usually as of counsel to the Department of Justice in a case such as the Supreme Court's current case of *Samantar v. Yousuf*, on which this Society held a panel this morning.

A fourth and final role for the Legal Adviser, and the reason I'm here tonight, is to act as a **spokesperson** for the US Government about why international law matters. Many people don't understand why obeying our international commitments is both right and smart, and that is a message that this Administration, and I as Legal Adviser, are committed to spreading.

## II. The Strategic Vision

That brings me to my second topic: what strategic vision of international law are we trying to implement? How does obeying international law advance U.S. foreign policy interests and strengthen America's position of global leadership? Or to put it another way, with respect to international law, is this Administration really committed to what our President has famously called "change we can believe in"? Some, including a number of the panelists who have addressed this conference, have argued that there is really more continuity than change from the last administration to this one.

To them I would answer that, of course, in foreign policy, from administration to administration, there will always be more continuity than change; you simply cannot turn the ship of state 360 degrees from administration to administration every four to eight years, nor should you. But, I would argue—and these are the core of my remarks today-- to say that is to understate the most important difference between this administration and the last: and that is with respect to its **approach and attitude toward international law**. The difference in that approach to international law I would argue is captured in **an Emerging "Obama-Clinton Doctrine,"** which is based on four commitments: to: 1. *Principled Engagement*; 2. *Diplomacy as a Critical Element of Smart Power*; 3. *Strategic Multilateralism*; and 4. the notion that *Living Our Values Makes us Stronger and Safer, by Following Rules of Domestic and International Law, and Following Universal Standards, Not Double Standards*.

community is a major theme for our President, whose father came from a Kenyan family and who as a child spent several years in Indonesia.

Second, a commitment to what Secretary Clinton calls "**smart power**"—a blend of principle and pragmatism" that makes "intelligent use of all means at our disposal," including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy.

Third, a commitment to what some have called **Strategic Multilateralism**: the notion acknowledged by President Obama at Cairo, that the challenges of the twenty-first century "can't be met by any one leader or any one nation" and must therefore be addressed by open dialogue and partnership by the United States with peoples and nations across traditional regional divides, "based on mutual interest and mutual respect" as well as acknowledgment of "the rights and responsibilities of [all] nations."

And fourth and finally, a commitment to **living our values by respecting the rule of law**. As I said, both the President and Secretary Clinton are outstanding lawyers, and they understand that by imposing constraints on government action, law legitimates and gives credibility to governmental action. As the President emphasized forcefully in his National Archives speech and elsewhere, the American political system was founded on a vision of common humanity, universal rights and rule of law. Fidelity to [these] values" makes us stronger and safer. This also means **following universal standards, not double standards**. In his Nobel lecture at Oslo, President Obama affirmed that "[a]dhering to standards, international standards, strengthens those who do, and isolates those who don't." And in her December speech on a 21<sup>st</sup> Century human rights agenda, and again two weeks ago in introducing our annual human rights reports, Secretary Clinton reiterated that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves."

Now in implementing this ambitious vision—this Obama-Clinton doctrine based on principled international engagement, smart power, strategic multilateralism, and the view that global leadership flows to those who live their values and obey the law and global standards—I am reminded of two stories.

The first, told by a former teammate is about the late Mickey Mantle of the American baseball team, the New York Yankees, who, having been told that he would not play the next day, went out and got terrifically drunk (as he was wont to do). The next day, he arrived at the ballpark, somewhat impaired, but in the late innings was unexpectedly called upon to pinch-hit. After staggering out to the field, he swung wildly at the first two pitches and missed by a mile. But on the third pitch, he hit a tremendous home run. And when he returned to the dugout, he squinted out at the wildly cheering crowd and confided to his teammates, "[t]hose people don't know how hard that really was."<sup>[1]</sup>

In much the same way, I learned that the making of U.S. foreign policy is infinitely harder than it looks from the ivory tower. Why? Because, as lawyers, we are accustomed to the relatively orderly world of law and litigation, which is based on a knowable and identifiable structure and sequence of events. The workload comes with courtroom deadlines, page limits and scheduled arguments. But if conducting litigation is like climbing a ladder, making foreign policy is much more like driving the roundabout near the Coliseum in Rome.

In this maze of bureaucratic politics, you are only one lawyer, and there is only so much that any one person can do. Collective government decision-making creates enormous coordination problems. We in the Legal Adviser's Office are not the only lawyers in government: On any given issue, my office needs to reach consensus decisions with all of the other interested State Department bureaus, but our Department as a whole then needs to coordinate its positions not just with other government law offices, which include: our lawyer clients (POTUS/SecState/DepSecState); White House Lawyers (WHCounsel/NSC Legal Counsel/USTR General Counsel); DOD Lawyers (OGC, Jt Staff, CoComs, Services, JAGs); DOJ Lawyers (OLC, OSG, Litigating Divisions-Civ., Crim, OIL, NSD); IC Lawyers (DNI, CIA); DHS Lawyers, not to mention lawyers in the Senate and House.

To make matters even more complex, we participate in a complicated web of legal processes within processes: the policy process, the clearance process, the interagency process, the legislative process; and once a U.S. position is developed, an *intergovernmental* lawyering process. So unlike academics, who are accustomed to being individualists, in government you are necessarily part of a team. One obvious corollary to this is that as one government lawyer, your views and the views of your client are not the only views that matter. As Walter Dellinger observed when he worked at OLC:

"[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority... When lawyers who are now [in my office] begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions."<sup>[2]</sup>

of stare decisis—that an existing interpretation of the Executive Branch should stand—unless after careful review, a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinces us that a change to the prior interpretation is warranted.

So that is what I mean when I say it's harder than it looks. And as those listening who have served in government know, it is a lot harder to get from a good idea to the implementation of that idea than those outside the government can imagine.

That brings me to my second, shorter story: about two Irishmen walking down the road near Galway. One of them asks the other, "So how do you get to Dublin?" And the other answers, "I wouldn't start from here."

In the same way, given the choice, no one would have started with what we inherited: the worst recession since the Depression, with conflicts in Iraq, Afghanistan, against al-Qaeda. Add to this mix a difficult and divided political environment, which makes it very difficult to get 60 Senate votes for cloture, much less the 67 you would need for treaty ratification, and such thorny carryover issues as resuming international engagement, closing Guantanamo, not to mention tackling an array of new challenges brought to us by the 21<sup>st</sup> century: climate change, attendant shifts in the polar environment; cyber crime, aggression and terrorism, food security, and global health just to name a few. Just to round things out, throw in a 7.0 earthquake in Haiti, another earthquake in Chile, four feet of snow in Washington, and you might well say to yourselves, to coin a phrase, "I wouldn't start from here."

But that having been said, how have we played the hand we have been dealt? What legal challenges do we face? There are really five fields of law that have occupied most of my time: what I call the law of international justice and dispute resolution, the law of 9/11, the law of international agreements, the law of the State Department, and the law of globalization. Tonight I want to focus on the first two of these areas: the law of international justice and dispute resolution and the law of 9/11. For they best illustrate how we have tried to implement the four themes I have outlined: principled engagement, multilateralism, smart power, and living our values.

### **III. Current Legal Challenges**

#### **A. International Justice and Dispute Resolution**

By international justice and dispute resolution, I refer to the U.S.'s renewed relationship to international tribunals and other international bodies. Let me address two of them: the International Criminal Court and the U.N. Human Rights Council. As President Obama recognized, "a new era of engagement has begun and renewed respect for international law and institutions is critical if we are to resume American leadership in a new global century."

##### **1. The International Criminal Court**

With respect to the U.S. relationship to the ICC, let me report on my recent participation in the Resumed 8th Session of ICC Assembly of States Parties in New York, from which I have just returned. Last November, Ambassador-at-Large for War Crimes Stephen Rapp and I led an interagency delegation that resumed engagement with the Court by attending a meeting of the ICC Assembly of States Parties (ASP). This was the first time that the United States had attended such a meeting, and this week's New York meeting continued that November session. As you know, the United States is not party to the Rome Statute, but we have attended these meetings as an observer. Our goal in November was to listen and learn, and by listening to gain a better understanding of the issues being considered by the ASP and of the workings of the International Criminal Court.

Significantly, although during the last decade the U.S. was largely absent from the ICC, our historic commitment to the cause of international justice has remained strong. As you all know, we have not been silent in the face of war crimes and crimes against humanity. As one of the vigorous supporters of the work of the ad hoc tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra Leone, and Lebanon, the United States has worked for decades, and we will continue to work, with other States to ensure accountability on behalf of victims of such crimes. But as some of those ad hoc war crimes tribunals enter their final years, the eyes of the world are increasingly turned toward the ICC. At the end of May, the United States will attend the ASP's Review Conference in Kampala, Uganda. There are two key items on the agenda: stock-taking and aggression.

In the current situation where the Court has open investigations and prosecutions in relation to four situations, but has not yet concluded any trials, the stock-taking exercise is designed to address ways to strengthen the Court, and includes issues such as state cooperation; complementarity; effect on victims; peace and justice; and universality of membership. Even as a non-State party, the United States believes that it can be a valuable partner and ally in the cause of advancing international justice. The Obama Administration has been actively looking at ways that the U.S. can, consistent with U.S. law, assist the ICC in fulfilling its historic charge of providing justice to those who have endured crimes of epic savagery and scope. And as Ambassador Rapp announced in New York, we would like to meet with the Prosecutor at the ICC to examine whether there

But as for the second agenda item, the definition of the crime of aggression, the United States has a number of serious concerns and questions. The crime of aggression, which is a *jus ad bellum* crime based on acts committed by the state, fundamentally differs from the other three crimes under the Court's jurisdiction—genocide, war crimes, and crimes against humanity—which are *jus in bello* crimes directed against particular individuals. In particular, we are concerned that adopting a definition of aggression at this point in the court's history could divert the ICC from its core mission, and potentially politicize and weaken this young institution. Among the States Parties we found strongly held, yet divergent, views on many fundamental and unresolved questions.

First, there are questions raised by the terms of the definition itself, including the degree to which it may depart from customary international law of both the "crime of aggression" and the state "act of aggression." This encompasses questions like what does it mean when the current draft definition requires that an act of aggression must be a "manifest" – as opposed to an "egregious" violation of the U.N. Charter?

A second question of who decides. The United States believes that investigation or prosecution of the crime of aggression should not take place absent a determination by the U.N. Security Council that aggression has occurred. The U.N. Charter confers on the Security Council the responsibility for determining when aggression has taken place. We are concerned by the confusion that might arise if more than one institution were legally empowered to make such a determination in the same case, especially since these bodies, under the current proposal, would be applying different definitions of aggression.

Third, there are questions about how such a crime would potentially affect the Court at this point in its development. For example, how would the still-maturing Court be affected if its prosecutor were mandated to investigate and prosecute this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political--both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged? To what extent would the availability of such a charge place burdens on the prosecutor in every case, both those in which he chooses to charge aggression and those in which he does not? If you think of the Court as a wobbly bicycle that is finally starting to move forward, is this frankly more weight than the bicycle can bear?

Fourth, would adopting the crime of aggression at this time advance or hinder the key goals of the stock-taking exercise: promoting complementarity, cooperation, and universality? With respect to complementarity, how would this principle apply to a crime of aggression? Do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will moving to adopt this highly politicized crime at a time when there is genuine disagreement on such issues enhance the prospects for universal adherence to the Rome Statute?

All of these questions go to our ultimate concern: has a genuine consensus yet emerged to finalize a definition of the crime of aggression? What outcome in Kampala will truly strengthen the Court at this critical moment in its history? What we heard at the Resumed Session in New York is that no clear consensus has yet emerged on many of these questions. Because this is such a momentous decision for this institution, which would bring about such an organic change in the Court's work, that we believe that we should leave no stone unturned in search of genuine consensus. And we look forward to discussing these important issues with as many States Parties and Non States Parties as possible between now and what we hope will be a successful Review Conference in Kampala.

## 2. Human Rights Council

In addition to reengaging with the ICC, the United States has also reengaged the U.N. Human Rights Council in Geneva. Along with my long time friend and colleague, Assistant Secretary of State for Democracy, Human Rights and Labor Michael Posner, who has my old job, and Assistant Secretary of State for International Organizations Esther Brimmer, I had the privilege of leading the first U.S. delegation to return to the Human Rights Council this past September.

You know the history: In March 2006, the U.N. General Assembly voted overwhelmingly to replace the flawed Human Rights Commission with this new body: the Human Rights Council. The last Administration participated actively in the negotiations in New York to reform the Commission, but ultimately voted against adoption of the UNGA resolution that created the HRC, and decided not to run for a seat.

The UNGA resolution that created the HRC made a number of important changes from the commission process: it created the Universal Periodic Review process, a mandatory process of self-examination and peer review that requires each U.N. member state to defend its own record before the HRC every four years. The Obama Administration would like our report to serve as a model for the world. Accordingly, we are preparing our first UPR report, which will be presented this November, with outreach sessions in an unprecedented interagency listening tour being conducted in about ten locations around the United States to hear about human rights concerns from civil society, community leaders, and tribal governments. Second,

includes a number of authoritarian regimes that do not respect human rights, the election requirement of a majority of UNCA votes in often competitive elections has led to certain countries being defeated for membership and others declining to run for a seat. The rule that only one-third of membership (16 members) can convene a special session, has led to a disproportionate number of special sessions dedicated to criticism of Israel, which already is the only country with a permanent agenda item dedicated to examination of its human rights practices: an unbalanced focus that we have clearly and consistently criticized.

When the Obama Administration took office, we faced two choices with respect to the Human Rights Council: we could continue to stay away, and watch the flaws continue and possibly get worse, or we could engage and fight for better outcomes on human rights issues, even if they would not be easy to achieve. With the HRC, as with the ICC and other fora, we have chosen principled engagement and strategic multilateralism. While the institution is far from perfect, it is important and deserves the long-term commitment of the United States, and the United States must deploy its stature and moral authority to improve the U.N. human rights system where possible. This is a long-term effort, but one that we are committed to seeing through to success consistent with the basic goals of the Obama-Clinton doctrine: principled engagement and universality of human rights law. Our inaugural session as an HRC member in September saw some important successes, most notably the adoption by consensus of a freedom of expression resolution, which we co-sponsored with Egypt, that brought warring regional groups together and preserved the resolution as a vehicle to express firm support for freedom of speech and expression. This resolution was a way of implementing some of the themes in President Obama's historic speech in Cairo, bridging geographic and cultural divides and dealing with global issues of discrimination and intolerance. We also joined country resolutions highlighting human rights situations in Burma, Somalia, Cambodia, and Honduras, and were able to take positions joined by other countries on several resolutions on which the United States previously would have been isolated, including ones on toxic waste and the financial crisis. The challenges in developing a body that fairly and even-handedly addresses human rights issues are significant, but we will continue to work toward that end.

At the March HRC session, which ends tomorrow, we have continued to pursue principled engagement by taking on a variety of initiatives at the HRC that seek to weaken protections on freedom of expression, in particular, the push of some Council Members to ban speech that "defames" religions, such as the Danish cartoons. At this session, we made supported a country resolution on Guinea and made significant progress in opposing the Organization of the Islamic Conference's highly problematic "defamation of religions" resolution, even while continuing to deal with underlying concerns about religious intolerance.

## B. The Law of 9/11

Let me focus the balance of my remarks on that aspect of my job that I call "The Law of 9/11." In this area, as in the other areas of our work, we believe, in the President's words, that "living our values doesn't make us weaker, it makes us safer and it makes us stronger."

We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a "conflict that America did not seek, one in which we are joined by forty-three other countries...in an effort to defend ourselves and all nations from further attacks." In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).

Everyone here at this meeting is committed to international law. But as President Obama reminded us, "the world must remember that it was not simply international institutions -- not just treaties and declarations -- that brought stability to a post-World War II world. ...[T]he instruments of war do have a role to play in preserving the peace."

With this background, let me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? **Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.** As the President reaffirmed in his Nobel Prize Lecture, "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct ... [E]ven as we confront a vicious adversary that abides by no rules ... the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength." We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts -- in particular, detention operations, targeting, and prosecution of terrorist suspects -- in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.

Let me say a word about each: detention, targeting, and prosecution.

### 1. Detention

With respect to detention, as you know, the last Administration's detention practices were widely criticized around the world, and as a private citizen, I was among the vocal critics of those practices. This Administration and I personally have spent much of the last year seeking to revise those practices to ensure their full compliance with domestic and international law



**a. Treatment**

To ensure humane treatment, on his second full day in office, the President unequivocally banned the use of torture as an instrument of U.S. policy, a commitment that he has repeatedly reaffirmed in the months since. He directed that executive officials could no longer rely upon the Justice Department OLC opinions that had permitted practices that I consider to be torture and cruel treatment -- many of which he later disclosed publicly -- and he instructed that henceforth, all interrogations of detainees must be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. An interagency review of U.S. interrogation practices later advised -- and the President agreed -- that no techniques beyond those in the Army Field Manual (and traditional noncoercive FBI techniques) are necessary to conduct effective interrogations. That Interrogation and Transfer Task Force also issued a set of recommendations to help ensure that the United States will not transfer individuals to face torture. The President also revoked Executive Order 13440, which had interpreted particular provisions of Common Article 3, and restored the meaning of those provisions to the way they have traditionally been understood in international law. The President ordered CIA "black sites" closed and directed the Secretary of Defense to conduct an immediate review -- with two follow-up visits by a blue ribbon task force of former government officials -- to ensure that the conditions of detention at Guantanamo fully comply with Common Article 3 of the Geneva Conventions. Last December, I visited Guantanamo, a place I had visited several times over the last two decades, and I believe that the conditions I observed are humane and meet Geneva Conventions standards.

As you all know, also on his second full day in office, the President ordered Guantanamo closed, and his commitment to doing so has not wavered, even as closing Guantanamo has proven to be an arduous and painstaking process. Since the beginning of the Administration, through the work of my colleague Ambassador Dan Fried, we have transferred approximately 57 detainees to 22 different countries, of whom 33 were resettled in countries that are not the detainees' countries of origin. Our efforts continue on a daily basis. Just this week, five more detainees were transferred out of Guantanamo for resettlement. We are very grateful to those countries who have contributed to our efforts to close Guantanamo by resettling detainees; that list continues to grow as more and more countries see the positive changes we are making and wish to offer their support.

During the past year, we completed an exhaustive, rigorous, and collaborative interagency review of the status of the roughly 240 individuals detained at Guantanamo Bay when President Obama took office. The President's Executive Order placed responsibility for review of each Guantanamo detainee with six entities --the Departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff -- to collect and consolidate from across the government all information concerning the detainees and to ensure that diplomatic, military, intelligence, homeland security, and law enforcement viewpoints would all be fully considered in the review process. This interagency task force, on which several State Department attorneys participated, painstakingly considered each and every Guantanamo detainee's case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and our policy not to transfer individuals to countries where they would likely face torture or persecution. The six entities ultimately reached unanimous agreement on the proper disposition of all detainees subject to review. As the President has made clear, this is not a one-time review; there will be "a thorough process of periodic review, so that *any* prolonged detention is carefully evaluated and justified." Similarly, the Department of Defense has created new review procedures for individuals held at the detention facility in Parwan at Bagram airfield, Afghanistan, with increased representation for detainees, greater opportunities to present evidence, and more transparent proceedings. Outside organizations have begun to monitor these proceedings, and even some of the toughest critics have acknowledged the positive changes that have been made.

**b. Legal Authority to Detain**

Some have asked what legal basis we have for continuing to detain those held on Guantanamo and at Bagram. But as a matter of both international and domestic law, the legal framework is well-established. As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of "all necessary measures" by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan. As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld*.

The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases, but the Administration is not asserting an unlimited detention authority. For example, with regard to individuals detained at Guantanamo, we explained in a March 13, 2009 habeas filing before the DC federal court --and repeatedly in habeas cases since -- that we

In explaining this approach, let me note two important differences from the legal approach of the last Administration. First, as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.

Second, unlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF *as informed by the laws of war*. Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is "necessary and appropriate" under the AUMF requires some "translation," or analogizing principles from the laws of war governing traditional *international* conflicts.

Some commentators have criticized our decision to detain certain individuals based on their membership in a non-state armed group. But as those of you who follow the Guantanamo habeas litigation know, we have defended this position based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war. Moreover, while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that individuals who are part of an organized armed group like al-Qaeda can be subject to law of war detention for the duration of the current conflict. In sum, we have based our authority to detain not on conclusory labels, like "enemy combatant," but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

A final point: the Obama Administration has made clear both its goal not only of closing Guantanamo, but also of moving to shift detention responsibilities to the local governments in Iraq and Afghanistan. Last July, I visited the detention facilities in Afghanistan at Bagram, as well as Afghan detention facilities near Kabul, and I discussed the conditions at those facilities with both Afghan and U.S. military officials and representatives of the International Committee of the Red Cross. I was impressed by the efforts that the Department of Defense is making both to improve our ongoing operations and to prepare the Afghans for the day when we turn over responsibility for detention operations. This Fall, DOD created a joint task force led by a three-star admiral, Robert Harward, to bring new energy and focus to these efforts, and you can see evidence of his work in the rigorous implementation of our new detainee review procedures at Bagram, the increased transparency of these proceedings, and closer coordination with our Afghan partners in our detention operations.

In sum, with respect to both treatment and detainability, we believe that our detention practices comport with both domestic and international law.

## **B. Use of Force**

In the same way, in all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say *is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.*

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the

this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict-- such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

In sum, let me repeat: as in the area of detention operations, this Administration is committed to ensuring that the targeting practices that I have described are lawful.

### C. Prosecutions:

The same goes, third and finally, for our policy of prosecutions. As the President made clear in his May 2009 National Archives speech, we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low.

Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism committed in the context of an armed conflict can constitute both war crimes and violations of our Federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last Administration found, those who have violated American criminal laws can be successfully tried in federal courts, for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and provision of material support to al-Qaeda. We have also effectively used the criminal justice system

As the President noted in his National Archives speech, lawfully constituted military commissions are also appropriate venues for trying persons for violations of the laws of war. In 2009, with significant input from this Administration, the Military Commissions Act was amended, with important changes to address the defects in the previous Military Commissions Act of 2006, including the addition of a provision that renders inadmissible any statements taken as a result of cruel, inhuman or degrading treatment. The 2009 legislative reforms also require the government to disclose more potentially exculpatory information, restrict hearsay evidence, and generally require that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements).

#### IV. CONCLUSION

In closing, in the last year, this Administration has pursued principled engagement with the ICC and the Human Rights Council, and has reaffirmed its commitment to international law with respect to all three aspects of the armed conflicts in which we find ourselves: detention, targeting and prosecution. While these are not all we want to achieve, neither are they small accomplishments. As the President said in his Nobel Lecture, "I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor ideals by upholding them not when it's easy, but when it is hard." As President Obama went on to say, even in this day and age war is sometimes justified, but "this truth", he said, "must coexist with another – that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory ... But war itself is never glorious, and we must never trumpet it as such. So part of our challenge is reconciling these two seemingly irreconcilable truths – that war is sometimes necessary, and war at some level is an expression of human folly."

Although it is not always easy, I see my job as an international lawyer in this Administration as reconciling these truths around a thoroughgoing commitment to the rule of law. That is the commitment I made to the President and the Secretary when I took this job with an oath to uphold the Constitution and laws of the United States. That is a commitment that I make to myself every day that I am a government lawyer. And that is a commitment that I make to each of you, as a lawyer deeply committed—as we all are—to the goals and aspirations of this American Society of International Law.

Thank you.

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<sup>[1]</sup> Jim Bouton, *Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues* 30 (1970).

<sup>[2]</sup> Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107 (1995).

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

No. 1:10-cv-436-RMC

**NOTICE OF ADDITIONAL AUTHORITY**

Plaintiffs respectfully bring to the Court's attention an article by Tara McKelvey in the February 21, 2011, edition of Newsweek Magazine, titled *Inside the Killing Machine: President Obama is ordering a record number of Predator strikes. An exclusive interview with a man who approved 'lethal operations'*, which is relevant to the CIA's motion for summary judgment and to plaintiffs' cross-motion for partial summary judgment (filings nos. 15, 20-23, 25). A copy of the article is attached hereto.

The article recounts an interview with John A. Rizzo, who was the Chief Legal Officer at the CIA from 2001 to 2002 and then against from 2004 until his retirement in 2009. *See* Steptoe & Johnson LLP, Biographical note of John Rizzo, Senior Counsel, <http://www.steptoe.com/professionals-869.html>. In the course of the interview, Mr. Rizzo makes the following points, among others:

- He "was the one who signed off" on CIA targeted killing operations.
- "The Predator [drone] is the weapon of choice" for CIA targeted killings.
- CIA Predator drones that engage in targeted killings are remotely operated from offices in Northern Virginia.

- Before an individual is targeted by the CIA, lawyers working at the CIA's Counterterrorist Center "write a cable asserting that the individual poses a grave threat to the United States."
- Cables that are "ready for prime time" conclude with the following words: "Therefore we request approval for targeting for lethal operation." These words are followed by a space for the signature of the CIA General Counsel (or the Acting General Counsel, in Mr. Rizzo's case), along with the word "concurd."
- He reviewed about one such cable per month.
- At any given time roughly 30 individuals were being targeted.
- In carrying out strikes, the CIA tried to minimize collateral damage, especially to women and children.

These disclosures further undermine the CIA's "*Glomar* response" – that is, its refusal to confirm or deny the very existence of any records responsive to plaintiffs' Freedom of Information Act request. Plaintiffs have argued that the extensive public disclosures by current and former officials about the CIA's targeted drone killings eliminate the possibility that any harm to national security would result from disclosing the mere fact that the CIA has documents responsive to their FOIA request. *See* filings nos. 20-21 at 20-24; no. 25 at 12-14. While Mr. Rizzo is retired and therefore does not speak officially, the extensive detail that he provides, as the very official who authorized CIA targeted killings for a significant period of time covered by plaintiffs' FOIA request, demonstrates that no conceivable harm to national security could result from the CIA's

mere confirmation that it has responsive records.<sup>1</sup> There is no longer any mystery about whether the CIA has responsive records. *Cf. Watts v. Indiana*, 338 U.S. 49, 54 (1949) (“[T]here comes a point where this Court should not be ignorant as judges of what we know as men [and women].”) (plurality opinion). The Court should therefore reject the CIA’s invocation of Exemption (b)(1). *See Wash. Post v. U.S. Dep’t of Def.*, 766 F. Supp. 1, 10-12 (D.D.C. 1991) (“By providing evidence that the information being withheld is already within the public domain, a FOIA plaintiff brings into question the government’s determination that release of such information might reasonably be expected to damage the national security.”). The Court should also regard the CIA’s reliance on Exemption (b)(3) with all due skepticism. *See* filings nos. 20-21 at 8-15; no. 25 at 1-3.

Respectfully submitted,

/s/ Arthur B. Spitzer

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*Attorneys for Plaintiffs*

March 29, 2011

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<sup>1</sup> The government does not appear to have treated Mr. Rizzo’s candid remarks as a threat to national security. Plaintiffs are aware of no evidence that the federal government has initiated a criminal or civil investigation against Rizzo for disclosing classified secrets.

2/21/11 Newsweek 34  
2011 WLNR 2990757

Newsweek U.S. Edition  
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February 21, 2011

Volume 157; Issue 08

Section: Nation

#### Inside the Killing Machine

President Obama is ordering a record number of Predator strikes. An exclusive interview with a man who approved 'lethal operations.'

Tara Mckelvey

President Obama is ordering a record number of Predator strikes. An exclusive interview with a man who approved 'lethal operations.'

It was an ordinary-looking room located in an office building in northern Virginia. The place was filled with computer monitors, keyboards, and maps. Someone sat at a desk with his hand on a joystick. John A. Rizzo, who was serving as the CIA's acting general counsel, hovered nearby, along with other people from the agency. Together they watched images on a screen that showed a man and his family traveling down a road thousands of miles away. The vehicle slowed down, and the man climbed out.

A moment later, an explosion filled the screen, and the man was dead. "It was very businesslike," says Rizzo. An aerial drone had killed the man, a high-level terrorism suspect, after he had gotten out of the vehicle, while members of his family were spared. "The agency was very punctilious about this," Rizzo says. "They tried to minimize collateral damage, especially women and children."

The broad outlines of the CIA's operations to kill suspected terrorists have been known to the public for some time—including how the United States kills Qaeda and Taliban militants by drone aircraft in Pakistan. But the formal process of determining who should be hunted down and "blown to bits," as Rizzo puts it, has not been previously reported. A look at the bureaucracy behind the operations reveals that it is multilayered and methodical, run by a corps of civil servants who carry out their duties in a professional manner. Still, the fact that Rizzo was involved in "murder," as he sometimes puts it, and that operations are planned in advance in a legalistic fashion, raises questions.

More than a year after leaving the government, Rizzo, a bearded, elegant 63-year-old who wears cuff links and



pale yellow ties, discussed his role in the CIA's "lethal operations" with me over Côtés du Rhone and steak in a Washington restaurant. At times, Rizzo sounded cavalier. "It's basically a hit list," he said. Then he pointed a finger at my forehead and pretended to pull a trigger. "The Predator is the weapon of choice, but it could also be someone putting a bullet in your head."

The number of such killings, carried out mostly by Predators in Pakistan, has increased dramatically during the Obama administration, and these covert actions have become an integral part of U.S. counterterrorism strategy.

How CIA staffers determine whether to target someone for lethal operations is a relatively straightforward, and yet largely unknown, story. The president does not review the individual names of people; Rizzo explains that he was the one who signed off. People in Washington talk about a "target list," as former undersecretary of state Richard Armitage described the process at a recent event in Washington. In truth, there is probably no official CIA roster of those who are slated to die. "I never saw a list," says a State Department official who has been involved in discussions about lethal operations, speaking without attribution because of the nature of the subject. Officials at the CIA select targets for "neutralization," he explains. "There were individuals we were searching for, and we thought, it's better now to neutralize that threat," he says.

The military and the CIA often pursue the same targets—Osama bin Laden, for example—but handle different regions of the world. Sometimes they team up—or even exchange jobs. When former CIA officer Henry A. Crumpton was in Afghanistan after 9/11, he and Gen. Stanley McChrystal—the former head of Joint Special Operations Command, a secretive military unit—worked closely together, and so did their subordinates. "Some of the people I knew and who worked for me went to work for him—and vice versa," recalls Crumpton. Some counterterrorism experts say that President Obama and his advisers favor a more aggressive approach because it seems more practical—that administration officials prefer to eliminate terrorism suspects rather than detain them. "Since the U.S. political and legal situation has made aggressive interrogation a questionable activity anyway, there is less reason to seek to capture rather than kill," wrote American University's Kenneth Anderson, author of an essay on the subject that was read widely by Obama White House officials. "And if one intends to kill, the incentive is to do so from a standoff position because it removes potentially messy questions of surrender."

In defense of a hard-nosed approach, administration officials say the aerial-drone strikes are wiping out Qaeda militants and reducing the chances of another terrorist attack. They have also been careful to reassure the public that the killings are legal. When NEWSWEEK asked the administration for comment, a U.S. official who declined to be identified addressing such a sensitive subject said: "These CT [counterterrorism] operations are conducted in strict accordance with American law and are governed by legal guidance provided by the Department of Justice."

Explains Bruce Riedel, a former CIA officer, "We're not in kindergarten on this anymore: we've been doing this since 2001, and there's a well-established protocol."

A Los Angeles Times article once described John Rizzo as "the most influential career lawyer in CIA history," and he arguably knows more than anyone else in the government about the legal aspects of the CIA's targeted

killings. But he stumbled into the world of espionage almost by accident. He graduated from George Washington University Law School and was living in D.C. in the 1970s when the Church committee released its report on the CIA's attempts to assassinate foreign leaders. Rizzo sensed an opportunity: "With all that going on, they'd need lawyers." He got a CIA job soon afterward.

Decades later, as the CIA's interrogations and lethal operations were ramped up after 9/11, Rizzo found himself at the center of controversy. He was, as he puts it, "up to my eyeballs" in President Bush's program of enhanced interrogations in the so-called black sites, or secret prisons, located in Afghanistan and in other countries. Justice Department lawyer John C. Yoo wrote the infamous "torture memo" of August 2002 because Rizzo had asked for clarification about techniques that could be used on detainees. Rizzo had once hoped to become the CIA's general counsel, but members of the Senate intelligence committee balked because of the role he played in authorizing the interrogations. Rizzo retired in 2009.

Today, Rizzo can sometimes sound boastful. "How many law professors have signed off on a death warrant?" he asks. He is quick to emphasize that the groundwork was prepared in a judicious manner, and felt it important that he observe the killing of some of the high-level terrorism suspects via live footage shown in CIA offices. "I was concerned that it be done in the cleanest possible way," he explains.

Clean, but always morally complex. Rizzo would sometimes find himself sitting in his office on the seventh floor of the CIA building with a cable about a terrorism suspect in front of him, and he would wonder how his Irish-Italian parents would feel about his newly assigned duties.

After President Bush authorized the CIA to hunt down Qaeda fighters in the wake of 9/11, "the attorneys were always involved, but they were very good—very aggressive and helpful, in fact," says Crumpton. "They would help us understand international law and cross-border issues, and they would interpret specific language of the presidential directive."

Under another Bush order, signed several years later, a variety of people who worked in terrorist camps could be targeted, and not just named terrorism suspects; at that point, the pool of potential candidates reviewed by CIA lawyers became much larger. Despite the secrecy surrounding these orders, their scope has become clear. "The authority given in these presidential findings is surely the most sweeping and most lethal since the founding of the CIA," William C. Banks, director of Syracuse University's Institute for National Security and Counterterrorism, told a House committee.

The hub of activity for the targeted killings is the CIA's Counterterrorist Center, where lawyers—there are roughly 10 of them, says Rizzo—write a cable asserting that an individual poses a grave threat to the United States. The CIA cables are legalistic and carefully argued, often running up to five pages. Michael Scheuer, who used to be in charge of the CIA's Osama bin Laden unit, describes "a dossier," or a "two-page document," along with "an appendix with supporting information, if anybody wanted to read all of it." The dossier, he says, "would go to the lawyers, and they would decide. They were very picky." Sometimes, Scheuer says, the hurdles may have been too high. "Very often this caused a missed opportunity. The whole idea that people got shot because someone has a hunch—I only wish that was true. If it were, there would be a lot more bad guys dead."

Sometimes, as Rizzo recalls, the evidence against an individual would be thin, and high-level lawyers would tell their subordinates, “You guys did not make a case.” “Sometimes the justification would be that the person was thought to be at a meeting,” Rizzo explains. “It was too squishy.” The memo would get kicked back downstairs.

The cables that were “ready for prime time,” as Rizzo puts it, concluded with the following words: “Therefore we request approval for targeting for lethal operation.” There was a space provided for the signature of the general counsel, along with the word “concurring.” Rizzo says he saw about one cable each month, and at any given time there were roughly 30 individuals who were targeted. Many of them ended up dead, but not all: “No. 1 and No. 2 on the hit parade are still out there,” Rizzo says, referring to “you-know-who and [Ayman al-] Zawahiri,” a top Qaeda leader.

As administration critics have pointed out, government officials have to go through a more extensive process in order to obtain permission to wiretap someone in this country than to make someone the target of a lethal operation overseas.

Rizzo seems bitter that he and other CIA officials have been criticized for authorizing harsh interrogations under Bush, and yet there has been little outcry over the faster pace of lethal operations under Obama. (From 2004 to 2008, Bush authorized 42 drone strikes, according to the New America Foundation. The number has more than quadrupled under President Obama—to 180 at last count.)

The detainees, by and large, survived, Rizzo observes; today, high-level terrorism suspects often do not.

And for all the bureaucratic review, it’s not always precise in the real world. In December people took to the streets of Islamabad to protest the strikes and to show support for a Waziristan resident, Karim Khan, whose son and brother were killed in a strike in 2009 and has filed a lawsuit against the U.S., charging a CIA official for their deaths.

Administration officials insist that the targeted killings rest on a solid legal foundation, but many scholars disagree. Georgetown University’s Gary Solis, the author of *The Law of Armed Conflict*, says people at the CIA who pilot unmanned aerial vehicles are civilians directly engaged in hostilities, an act that makes them “unlawful combatants” and possibly subject to prosecution.

These days, Rizzo is working on a memoir. He does not talk about the morality of what he did—he is not that kind of guy—but lately has been trying to come to terms with the implications of the deadly task he performed, and which others are now performing in that office building in Virginia.

--- INDEX REFERENCES ---

COMPANY: SYRACUSE UNIVERSITY; AMERICA FOUNDATION; GEORGETOWN UNIVERSITY (THE); INFORMATICA APLICATA SA; AMERICAN UNIVERSITY; DE RADIOCOMUNICACIONES MOVILES SA; IMMOBILIARE AZIONARIA SPA; JUSTICE DEPARTMENT; STATE DEPARTMENT

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Language: EN

OTHER INDEXING: (AMERICA FOUNDATION; AMERICAN UNIVERSITY; CHURCH COMMITTEE; CIA; CÔTES; COUNTERTERRORIST CENTER; DEPARTMENT OF JUSTICE; GEORGETOWN UNIVERSITY; HOUSE COMMITTEE; JOINT SPECIAL OPERATIONS COMMAND; JUSTICE DEPARTMENT; LAW OF ARMED; LAW SCHOOL; NEWSWEEK; OBAMA WHITE HOUSE; PREDATOR; SENATE INTELLIGENCE COMMITTEE; STATE DEPARTMENT; SYRACUSE UNIVERSITY; WAZIRISTAN) (Bruce Riedel; Bush; Clean; Crumpton; Henry A. Crumpton; Inside; John A. Rizzo; John C. Yoo; John Rizzo; Karim Khan; Kenneth Anderson; Michael Scheuer; Obama; Osama; Qaeda; Richard Armitage; Rizzo; Scheuer; Stanley McChrystal; Taliban; William C. Banks; Zawahiri)

EDITION: U.S. Edition

Word Count: 1946

2/21/11 NEWSWEEK 34

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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<b>UNION, <i>et al.</i>,</b>	)	
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<b>Plaintiffs,</b>	)	
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<b>v.</b>	)	<b>Civil Action No. 10-0436 (RMC)</b>
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<b>DEPARTMENT OF JUSTICE, <i>et al.</i>,</b>	)	
	)	
<b>Defendants.</b>	)	
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**MEMORANDUM OPINION**

Alarmed at the reported use of unmanned drones to kill selected human targets in Pakistan, Afghanistan, and elsewhere, the American Civil Liberties Union and the American Civil Liberties Union Foundation submitted identical broad requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to the Central Intelligence Agency, the Department of Defense, the Department of State, the Department of Justice, and DOJ’s Office of Legal Counsel for records documenting the alleged practice. When the CIA refused to admit or deny that it had any relevant records, and therefore denied the FOIA request, Plaintiffs sued and cited public comments by Leon E. Panetta, former CIA Director, to support their argument that CIA use of drones has been officially acknowledged and that a program of drone strikes is not an intelligence activity, source or method protectable from disclosure under FOIA Exemptions 1 and 3. Plaintiffs read the FOIA exemption for intelligence gathering too narrowly and Mr. Panetta’s comments too broadly. Whether or not the CIA has any relevant records, that fact is exempt from disclosure under FOIA. Summary judgment will be granted to the CIA.

## I. FACTS

Plaintiffs ACLU and ACLU Foundation followed the customary path before bringing this dispute to court. The background facts are uncontested and are taken from the declaration of Mary Ellen Cole, Information Review Officer for the CIA. *See* CIA’s Mot. for Summ. J. [Dkt. # 15] (“CIA Mem.”), Ex. 1 (Declaration of Mary Ellen Cole (“Cole Decl.”)). In a letter to the CIA’s Information and Privacy Coordinator on January 13, 2010 (incorrectly dated as January 13, 2009), Plaintiffs submitted a FOIA request seeking “records pertaining to the use of unmanned aerial vehicles (‘UAVs’)—commonly referred to as ‘drones’ and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals.” Cole Decl., Ex. A (Jan. 13, 2010 FOIA Request) (“FOIA Request”) at 2. In particular, Plaintiffs were seeking “information about the legal basis in domestic, foreign, and international law for the use of drones to conduct targeted killings.” *Id.*

By letter dated March 9, 2010, the CIA issued a final response to Plaintiffs’ request, stating that “the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request.” *Id.*, Ex. B (Mar. 9, 2010 CIA Response). The CIA explained that the “fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended.” *Id.* The CIA cited FOIA Exemptions 1 and 3 as the basis for its response. *Id.* Plaintiffs appealed this denial on April 22, 2010. Before the appeal was decided, Plaintiffs filed an amended complaint on June 1, 2010, adding the CIA as defendant.<sup>1</sup> The CIA

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<sup>1</sup> Plaintiffs’ January 13, 2010 FOIA request was simultaneously submitted to the U.S. Department of Defense, Department of Justice, DOJ’s Office of Legal Counsel, Department of State, and CIA. Plaintiffs’ original complaint brought suit against the Departments of Defense, Justice, and

thereafter closed the administrative appeal file.

Plaintiffs seek information on “drone strikes;” a term used by Plaintiffs (and the Court for the sake of consistency) to mean the “targeted killing” of a human with a drone. Paraphrasing the ten categories of information listed in the FOIA request, Plaintiffs seek records pertaining to:

1. The “legal basis in domestic, foreign and international law upon which unmanned aerial vehicles” can be used to execute targeted killings, including who may be targeted with this weapon system, where and why;
2. . . . .
3. The “selection of human targets for drone strikes and any limits on who may be targeted by a drone strike;”
4. “[C]ivilian casualties in drone strikes,” including measures to limit civilian casualties;
5. The “assessment or evaluation of individual drone strikes after the fact,” including how the number and identities of victims are determined;
6. “[G]eographical or territorial limits on the use of UAVs to kill targeted individuals;”
7. The “number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike;”
8. The “number, identity, status, and affiliation of individuals killed in drone strikes;”
9. “[W]ho may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings,” including records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel, and;
10. The “training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone.”

Cole Decl., Ex. A (Jan. 13, 2010 FOIA Request) at 5–8 (emphasis omitted). In briefing, Plaintiffs

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State; the amended complaint added the CIA as co-defendant. *See* Am. Compl. [Dkt. # 11]. In this Opinion, the Court addresses only Plaintiffs’ FOIA request for CIA records.

abandoned their request of the CIA for information on category 2 and subcategory 1(B) as listed in the FOIA request, both of which concern records on the understanding, cooperation or involvement of foreign governments in drone strikes. *See* Pls.’ Opp’n & Cross-Mot. for Summ. J. [Dkts. ## 20, 21] (“Pls.’ Opp’n”) at 3.

## II. LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law.” FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Moreover, summary judgment is properly granted against a party who “after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party’s favor and accept the nonmoving party’s evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party; however, must establish more than “the mere existence of a scintilla of evidence” in support of its position. *Id.* at 252.

Federal district courts have original jurisdiction over civil actions arising under federal statutes. *See* 28 U.S.C. § 1331. As Plaintiffs bring suit under FOIA, this Court has original jurisdiction. FOIA cases are typically and appropriately decided on motions for summary judgment. *See, e.g., Rushford v. Civiletti*, 485 F. Supp. 477, 481 n.13 (D.D.C. 1980); *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007).

Jurisdiction in a FOIA case is dependent upon a showing that an agency has



(1) improperly (2) withheld (3) agency records. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *United We Stand America, Inc. v. IRS*, 359 F.3d 595, 598 (D.C. Cir. 2004). The agency bears the burden to demonstrate – not the requester to disprove – that it has not improperly withheld agency records. *Tax Analysts*, 492 U.S. at 142 n.3. This is consistent with the purpose of FOIA which was “enacted to facilitate public access to Government documents,” *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), in order “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). “Consistently with this purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *Ray*, 502 U.S. at 173.

An agency may meet its burden solely on the basis of information provided in agency declarations that describe “the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). “[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the government’s burden.” *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.” *Id.* at 862 (internal quotation marks omitted). Further, the “court owes substantial weight to detailed agency explanations in the national security context.” *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). A “defendant in a FOIA action is entitled to summary judgment if the defendant proves that it has fully discharged its obligations under the

Act.” *Reliant Energy*, 520 F. Supp. 2d at 200.

The exemptions under FOIA “cover not only the content of protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption.” *Larson*, 565 F.3d at 861. Thus, an agency may refuse to confirm or deny the existence of responsive records – an answer commonly known as a Glomar response – when “to answer the FOIA inquiry would cause harm cognizable under an FOIA exception.” *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *see also Larson*, 565 F.3d at 861. A Glomar response takes its name from the Hughes Glomar Explorer, an oceanic research vessel at issue in the case that first authorized the government to refuse to confirm or deny the existence of records responsive to a FOIA request. *See generally Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

### III. ANALYSIS

Neither side disputes the customary principles that govern FOIA requests to the CIA. In this matter, the CIA has invoked FOIA Exemptions 1 and 3 to justify its Glomar response. The CIA “invoked the Glomar response in this case because confirming or denying the existence or nonexistence of CIA records responsive to Plaintiffs’ FOIA request would reveal classified information that is protected from disclosure by statute. . . . [S]uch a response would implicate information concerning clandestine intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities.” Cole Decl. ¶ 12; *see also* ¶ 15 (“[T]he CIA asserted a Glomar response to Plaintiffs’ request because the existence or nonexistence of CIA records responsive to this request is a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security. What is classified is not just individual records themselves on a document-by-document basis, but also the mere fact of whether

or not the CIA possesses responsive records that pertain to drone strikes.”).

### A. Exemption 3

FOIA Exemption 3 authorizes the withholding of agency records on subject-matters specifically exempted from disclosure by a non-FOIA statute, provided that such statute “(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). To properly invoke Exemption 3, the CIA “need only show that the statute claimed is one of exemption as contemplated by Exemption 3 and that the withheld material falls within the statute.” *Larson*, 565 F.3d at 865.

The CIA first points to the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.* (“CIA Act”), which exempts the CIA from “any . . . law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.” 50 U.S.C. § 403g. Secondly, the CIA proffers the National Security Act of 1947, as amended, 50 U.S.C. § 401 *et seq.* (the “NSA”), which mandates that the “Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 403-1(i)(1). It is well-established that both statutory provisions cited by the CIA qualify as withholding statutes for purposes of Exemption 3. *See, e.g., ACLU v. U.S. Dep’t of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011); *Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980); *Majed Subh v. CIA*, 760 F. Supp. 2d 66, 70 (D.D.C. 2011).

#### **1. Whether Drone Strikes Relate to “Functions” of CIA Personnel Under the CIA Act?**

The CIA claims it properly relies upon § 403g of the CIA Act to protect information

relating to the “functions” of its personnel; that is, “information relating to its core functions – which plainly include clandestine intelligence activities, intelligence sources and methods and foreign liaison relationships.” Cole Decl. ¶41. Plaintiffs counter that the CIA presents an overbroad reading of CIA “functions” under the statute. To be sure, the D.C. Circuit has recognized that § 403g is not without limits: it does not sanction the CIA to “refuse to provide any information at all about anything it does” under the guise that such information pertains to personnel “functions.” *Phillippi*, 546 F.2d at 1015 n.14. The provision is designed primarily to shield the CIA from having to divulge “information about its internal structure.” *Id.* Accordingly, § 403g of the CIA Act offers a limited sanctuary from the CIA’s FOIA obligations because “[o]nly the specific information on the CIA’s personnel and internal structure that is listed in the statute will obtain protection from disclosure.” *Baker v. CIA*, 580 F.2d 664, 670 (D.C. Cir. 1978).

The CIA’s Information Review Officer responds that the CIA is “charged with carrying out a number of important functions on behalf of the United States, which include, among other activities, collecting and analyzing foreign intelligence and counterintelligence.” Cole Decl. ¶ 13. “A defining characteristic of the CIA’s intelligence activities is that they are typically carried out through clandestine means, and therefore they must remain secret in order to be effective.” *Id.* “In the context of FOIA, this means that the CIA must carefully evaluate whether its response to a particular FOIA request could jeopardize the clandestine nature of its intelligence activities or otherwise reveal previously undisclosed information about its sources, capabilities, authorities, interests, strengths, weaknesses, resources, etc.” *Id.*

“Hypothetically, if the CIA were to respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least

had an intelligence interest in drone strikes – perhaps by providing supporting intelligence, as an example.” *Id.* ¶ 19. “In either case, such a response would reveal a specific clandestine intelligence activity or interest of the CIA, and it would provide confirmation that the CIA had the capability and resources to be involved in these specific activities.” *Id.* On the other hand, by revealing it had no responsive records, that fact “would indicate that the CIA had no involvement or interest in drone strikes.” *Id.* ¶ 21. “Such a response would reveal sensitive information about the CIA’s capabilities, interests, and resources that is protected from disclosure.” *Id.*

The fact of the existence or nonexistence of responsive information falls within the ambit of § 403g because whether the CIA cooperates with, is interested in, or actually directs drone strikes pertains to (possible) functions of CIA personnel. *See Riquelme v. CIA*, 453 F. Supp. 2d 103, 111 (D.D.C. 2006) (accepting CIA’s argument that FOIA request seeking information relating to CIA agents’ “activities, assistance, participation, involvement, and contacts” speaks to the “functions” of CIA agents, protected from disclosure under § 403g). Plaintiffs’ FOIA request – sent to multiple agencies – is clearly designed, at least in part, to determine which agencies, and its personnel, are involved in drone strikes and in what capacities. *See* FOIA Request at 4 (“Reports also suggest that in addition to Air Force and Special Forces personnel, non-military personnel including CIA agents are making targeting decisions, piloting drones, and firing missiles . . . [i]t appears, therefore, that lethal force is being exercised by individuals who are not in the military chain of command.”); *id.* at 5 (“It is unclear who may be targeted by a drone strike, how targets are selected . . . and who is making operational decisions about particular strikes.”); *id.* at 6 (seeking records regarding “whether drones can be used by the CIA . . . in order to execute targeted killings”); *id.* at 7 (requesting records “pertaining to the assessment or evaluation of individual drone strikes after the

fact,” including how the performance of those operating and involved in drone strikes is assessed); *id.* at 8 (seeking records “pertaining to the involvement of CIA personnel” in drone strikes and the piloting and operation of drones).

The CIA affidavit, which is entitled to “substantial weight,” *see Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999), asserts that disclosing the existence or nonexistence of responsive records could reveal the functions of CIA personnel, including their involvement or noninvolvement in drone strikes and any related intelligence interest in drone strikes. *See Cole Decl.* ¶¶ 19–21, 41. It could reveal functions of CIA personnel if, for instance, the CIA possessed records responsive to the target selection categories of the request, but not the post-strike analysis and evaluation categories, or if the CIA possessed records relevant to these categories but not to information on the training, supervision, oversight or discipline of drone operators. And if the CIA possessed no records responsive to these categories, it could reveal that CIA personnel were not performing any of these potential functions related to drone strikes.

The CIA declaration offers “reasonable specificity of detail rather than merely conclusory statements” and has not been “called into question by contradictory evidence in the record or by evidence of agency bad faith.” *Halperin*, 629 F.2d at 148. “If the agency’s statements meet this standard, the court is not to conduct a detailed inquiry to decide whether it agrees with the agency’s opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency.” *Id.* In the end, the CIA is justifiably concerned that revealing the existence or nonexistence of records sought on the various topics sought by Plaintiffs could alone reveal information on the CIA’s internal structure and its capabilities and potential interests and involvement in/operation of the drone program. Although the matter is not entirely free from doubt,

the Court is satisfied that the CIA has properly invoked § 403g of the CIA Act to withhold this fact under Exemption 3.

## **2. Whether Drone Strikes Relate to “Intelligence Sources or Methods” Under NSA?**

Whatever the ambit of § 403g of the CIA Act, the CIA correctly contends that its Glomar response is justified because the information sought by Plaintiffs relates to “intelligence sources and methods,” protected from disclosure under the NSA. 50 U.S.C. § 403-1(i)(1).<sup>2</sup> Again, Plaintiffs challenge the information withheld as not properly falling within the coverage offered by the cited statute, here § 403-1(i)(1). Plaintiffs believe that CIA’s Glomar response must be rejected because a program that targets certain persons for death or incapacitation cannot be deemed a means of collecting intelligence, so that neither a source nor a method of intelligence gathering is implicated by the fact of whether CIA has responsive records. Instead, Plaintiffs argue that they simply seek basic information about the “scope, limits, oversight, and legal basis of this killing program.” Pls.’ Opp’n at 18. Plaintiffs attempt to cabin the realm of protectable “intelligence sources and methods” to a concept of “foreign intelligence” analogous to “securing all possible data pertaining to foreign governments or the national defense and security of the United States.” *CIA v. Sims*, 471 U.S. 159, 170 (1985) (internal quotation marks omitted).

*Sims* explained that through the statutory predecessor to § 403-1(i)(1) of the NSA, Congress vested the Director of Central Intelligence<sup>3</sup> with “very broad authority to protect all sources

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<sup>2</sup> Although § 403-1(i)(1) of the NSA provides that the “Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure,” the CIA may rely upon this statutory provision to withhold records under FOIA. *See, e.g., Larson*, 565 F.3d at 865.

<sup>3</sup> Per § 403-1(i)(1), the “Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.” The statutory precursors to § 403-1(i)(1), *i.e.*, 50

of intelligence information from disclosure” and “broad power to protect the secrecy and integrity of the intelligence process.” 471 U.S. at 168–70. In focusing more on the definition of intelligence “sources” than “methods,” the Supreme Court rejected the D.C. Circuit’s definition of “intelligence sources” which was limited to sources requiring confidentiality as a condition of providing information. *Id.* at 168. The Supreme Court explained:

The plain meaning of the statutory language, as well as the legislative history of the National Security Act, however, indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure. The Court of Appeals’ narrowing of this authority not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering – the very reason Congress entrusted this Agency with sweeping power to protect its “intelligence sources and methods.”

. . . . Section 102(d)(3) [of the NSA] specifically authorizes the Director of Central Intelligence to protect “intelligence sources and methods” from disclosure. Plainly the broad sweep of this statutory language comports with the nature of the Agency’s unique responsibilities. To keep informed of other nations’ activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency’s efforts.

*Id.* at 169–70.

Accordingly, the Supreme Court held the “‘plain meaning’ of § 102(d)(3) [codified at § 403-1(i)(1)] may not be squared with any limiting definition that goes beyond the requirement

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U.S.C. § 403-3(c)(7) and 50 U.S.C. § 403(d)(3), had previously entrusted the identical responsibility to the Director of Central Intelligence. Pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, the newly-created Director of National Intelligence assumed the duties previously delegated to the Director of Central Intelligence, a position which then ceased to exist. *See, e.g., Wolf v. CIA*, 473 F.3d 370, 377 n.6 (D.C. Cir. 2007); *Majed Subh*, 760 F. Supp. 2d at 70 n.4. The CIA is now headed by the Director of the Central Intelligence Agency, who reports to the Director of National Intelligence.



that the information fall within the Agency’s mandate to conduct foreign intelligence.” *Sims*, 471 U.S. at 169. “Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence.” *Id.* at 169–70. Against a congressional backdrop “highlighting the requirements of effective intelligence operations,” *id.* at 172, the Court noted that Congress authorized the CIA to protect intelligence sources and methods to ensure “the most effective accomplishment of the intelligence mission related to the national security.” *Id.* (internal quotation omitted).

At first blush, there is force to Plaintiffs’ argument that a “targeted-killing program is not an intelligence program” in the most strict and traditional sense, the argument bolstered by the principle that FOIA exemptions are to be narrowly construed. *See Public Citizen, Inc. v. Rubber Mfrs. Ass’n*, 533 F.3d 810, 813 (D.C. Cir. 2008). Nonetheless, Plaintiffs seek too narrow a reading of the authority conferred by the NSA to protect “intelligence sources and methods.” The “Supreme Court has recognized the broad sweep of ‘intelligence sources’ warranting protection in the interest of national security.” *Wolf v. CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 760–63 (D.C. Cir. 1990). Moreover, the *Sims* Court warned that limiting definitions of the NSA’s reach had “ignored[d] the realities of intelligence work, which often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information.” *Fitzgibbon*, 911 F.2d at 760 (quoting *Sims*, 471 U.S. at 176). “Relying on this broad statutory authority, and mindful of ‘the practical necessities of modern intelligence gathering,’ [*Sims*, 471 U.S. at 169], the Supreme Court held that the proper reading of the statute is that ‘an intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory

obligations.” *Fitzgibbon*, 911 F.2d at 761 (quoting *Sims*, 471 U.S. at 177).

The Court has no reason to second-guess the CIA as to which programs that may or may not be of interest implicate the gathering of intelligence, *see Wolf*, 473 F.3d at 377 (“The Supreme Court gives even greater deference to CIA assertions of harm to intelligence sources and methods under the National Security Act.”). The CIA need only “demonstrate[] that the information withheld logically falls within the claimed exemption.” *ACLU*, 628 F.3d at 619; *see also Fitzgibbon*, 911 F.2d at 762 (explaining that in determining whether the material withheld “relates to intelligence sources and methods . . . we accord substantial weight and due consideration to the CIA’s affidavits”).

Ms. Cole declares that, “[i]ntelligence sources and methods are the basic practices and procedures used by the CIA to accomplish its mission. They can include human assets, foreign liaison relationships, sophisticated technological devices, collection activities, cover mechanisms, and other sensitive intelligence tools.” Cole Decl. ¶ 33. Knowing whether the CIA lacks or maintains records responsive to Plaintiffs’ FOIA request “would reveal a specific clandestine intelligence activity or interest of the CIA, and it would provide confirmation that the CIA had the capability and resources to be involved in these specific activities.” *Id.* ¶ 19. Responding to Plaintiffs’ request, the CIA argues, would reveal whether the CIA maintains an intelligence interest in, cooperates with, or directly operates a program of drone strikes. *See id.* ¶¶ 32–35, 40.

The CIA further explains that it “must do more than prevent explicit references to an intelligence source or method; it must also prevent indirect references to such a source or method.” *Id.* ¶ 35. By reviewing officially disclosed information about CIA capabilities, hostile groups “have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and

methods from disparate details to defeat the CIA's collection efforts." *Id.* "Thus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data." *Id.*

"Because 'the purpose of national security exemptions to the FOIA is to protect intelligence sources before they are compromised and harmed, not after,' *Halperin*, 629 F.2d at 149, 'the Director of Central Intelligence may protect all intelligence sources, regardless of their provenance.'" *Wolf*, 473 F.3d at 377 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990)). Taking into account the deference owed the CIA's declaration in the FOIA context, the Court finds the CIA's justification for its concerns about unauthorized disclosure of intelligence sources or methods to be both "logical" and "plausible." *ACLU*, 628 F.3d at 619 (quoting *Larson*, 565 F.3d at 862).

Lastly, Plaintiffs' argument that a program of drone strikes cannot form the basis of, or involve, intelligence sources or methods also ignores the scope of the CIA's specific authority to engage in activities beyond "traditional" intelligence gathering (however defined), such as intelligence activities and operations, covert operations, and foreign relations activities. Executive Order 12333, as amended, includes within the CIA's mandate the requirement that it, *inter alia*, "[c]ollect . . . , analyze, produce, and disseminate foreign intelligence and counterintelligence;" "[c]onduct counterintelligence activities;" "[c]onduct covert action activities approved by the President;" "[c]onduct foreign intelligence liaison relationships;" and "[p]erform such other functions and duties related to intelligence as the Director [of the Central Intelligence Agency] may direct." *See United States Intelligence Activities*, Executive Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981), *as amended by* Further Amendments to Executive Order 12333, Executive Order No.

13470, 73 Fed. Reg. 45325, § 1.7(a) (July 30, 2008); *see also* 50 U.S.C. § 403-4a(d) (authorizing the Director of the Central Intelligence Agency to, *inter alia*, “collect intelligence through human sources and by other appropriate means” and “perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct”); *id.* § 403-4a(f) (directing the Director of the CIA to “coordinate the relationships between elements of the intelligence community and the intelligence or security services of foreign governments or international organizations on all matters involving intelligence related to the national security or involving intelligence acquired through clandestine means”).

The Supreme Court noted that the authority granted under the NSA “may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency’s mandate to conduct foreign intelligence.” *ACLU*, 628 F.3d at 622 (quoting *Sims*, 471 U.S. at 169); *see also Sims*, 471 U.S. at 169–70 (“Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence.”). It would surprise no one that the CIA may be authorized to engage in more than gathering facts around the world; the NSA’s grant of protection to “intelligence sources and methods” cannot be so limited. *See, e.g., Riquelme*, 453 F. Supp. 2d at 108–11 (finding agency’s Glomar response proper under Exemption 1 and 3 relating to “clandestine activities” including whether CIA engaged in activities related to the ascension of a general to power in a particular nation or participated in training of officers in the School of the Americas).

Confirming the existence or nonexistence of pertinent agency records on drone strikes could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and/or

methods. See *Halperin*, 629 F.2d at 147.<sup>4</sup> The CIA has properly classified this fact under § 403-1(i)(1) of the NSA, as protected by FOIA Exemption 3.

**B. Has the Agency Acknowledged the Existence of Records?**

Plaintiffs next contend that former CIA Director Leon J. Panetta has officially admitted that some or all of the requested records exist so that they are no longer FOIA exempt. When “information has been ‘officially acknowledged,’ its disclosure may be compelled even over an agency’s otherwise valid exemption claim.” *Fitzgibbon*, 911 F.2d at 765. To be officially acknowledged: “(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure.” *ACLU*, 628 F.3d at 620–21. Moreover, as the D.C. Circuit “further explained in *Wolf*, ‘[p]rior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure. This insistence on exactitude recognizes the Government’s vital interest in information relating to national security and foreign affairs.” *Id.* at 621 (quoting *Wolf*, 473 F.3d at 378). Ultimately, the “fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not

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<sup>4</sup> Plaintiffs further argue that the fact that some documents may need to be redacted does not justify a blanket Glomar response, Pls.’ Opp’n at 18–19, which may be correct in most cases. The CIA responds that if it had to admit the existence of responsive records, and thereby be obligated to provide a Vaughn index – indicating the number and nature of withheld records – such disclosure alone would reveal the depth and breadth of the CIA’s possible involvement in the drone program. Cole Decl. ¶ 20. “If, for instance, the CIA possessed 10,000 responsive records, that might indicate a significant CIA involvement or interest in drone strikes whereas 10 responsive records might indicate minimal involvement or interest.” *Id.* “Similarly, disclosing the dates of the responsive records would provide a timeline of the CIA’s activities that could provide a roadmap to when and where the CIA is operating or not operating.” *Id.*

cause harm cognizable under a FOIA exemption.” *Wolf*, 473 F.3d at 378. Plaintiffs bear the burden of demonstrating that the information they seek has been officially acknowledged. *See id.*

This question is somewhat muddled by the CIA’s stated reason for its *Glomar* response, which is essentially that to respond to the FOIA request would reveal whether or not the CIA was involved or interested in drone strike operations, in any capacity. *See Cole Decl.* ¶¶ 19, 22. Plaintiffs seize on this rationale and contend that it is no longer operative because of the following statements by then-Director Panetta which arguably acknowledged CIA involvement in drone strikes.

For instance, on May 18, 2009, Director Panetta spoke before the Pacific Council on International Policy, and during a question and answer session, the following exchange with Director Panetta occurred:

Q. [Audience Member] You mentioned that you believe the strategy in Pakistan is working – the President’s strategy in Pakistan in the tribal regions, which is the drone – the remote drone strikes. You’ve seen the figures recently from David Kilcullen and others that the strikes have killed 14 midlevel operatives and 700 civilians in collateral damage. And his assessment as a counterinsurgency expert is it’s creating more anti-Americanism than it is disrupting al-Qaeda networks. . . .

A. [Panetta] . . . On the first issue, obviously because these are covert and secret operations I can’t go into particulars. I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage. I know that some of the – sometimes the criticisms kind of sweep into other areas from either plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage. And sometimes I’ve found in discussing this that all of this is kind of mixed together. But I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it’s the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership. . . .

Pls.’ Opp’n, Ex. B (Leon Panetta Remarks at the Pacific Council on International Policy (May 18, 2009)) at 9–10.

Contrary to Plaintiffs’ argument, these comments by Director Panetta did not officially disclose the CIA’s involvement in the drone strike program. Responding to the questioner’s perception of the drone strikes as the “President’s strategy in Pakistan,” Director Panetta spoke generally of his knowledge of “covert and secret operations” in Pakistan and his assessment that those operations had been precise with minimal collateral damage. Even if Director Panetta were speaking squarely on the issue of drone strikes, he never acknowledged the CIA’s involvement in such program. That Director Panetta acknowledged that such a program exists and he had some knowledge of it, or that he was able to assess its success, is simply not tantamount to a specific acknowledgment of the CIA’s involvement in such program, nor does it waive the CIA’s ability to properly invoke *Glomar*. See, e.g., *Wilner v. NSA*, 592 F.3d 60, 70 (2d Cir. 2009) (“[A]n agency may invoke the *Glomar* doctrine in response to a FOIA request regarding a publicly revealed matter.”)<sup>5</sup>;

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<sup>5</sup> In *Wilner*, the Second Circuit reviewed a FOIA request for records obtained under the Terrorist Surveillance Program (“TSP”), a clandestine program initiated after September 11, 2001, in which the National Security Agency intercepted international communications of people with known links to terrorist organizations without warrants or oversight by the Foreign Intelligence Surveillance Court. 592 F.3d at 65–66. Plaintiffs’ FOIA requests sought information from the Government on whether it had intercepted any of their communications, to which the Government provided a *Glomar* response. *Id.* at 64. Plaintiffs argued the *Glomar* response was improper because the Government had officially disclosed the existence of the TSP. The Circuit noted that the existence of the TSP had been officially acknowledged by President George W. Bush and former CIA Director Michael Hayden, but that the “specific methods used, targets of surveillance, and information obtained through the program have not been disclosed.” *Id.* at 69–70.

The Second Circuit explained, “Here, although the public is aware that the TSP exists, the government has found it necessary to keep undisclosed the details of the program’s operations and scope—the subject of plaintiffs’ FOIA request in this case. The fact that the public is aware of the program’s existence does not mean that the public is entitled to have information regarding the operation of the program, its targets, the information it has yielded, or other highly sensitive national

*Students Against Genocide v. Dep't of State*, 50 F. Supp. 2d 20, 25 (D.D.C. 1995) (“[T]here is certainly no ‘cat out of the bag’ philosophy underlying FOIA so that any public discussion of protected information dissipates the protection which would otherwise shield the information sought.”); *Phillippi v. CIA*, 655 F.2d 1325, 1331 (D.C. Cir. 1981) (“There may be much left to hide, and if there is not, that itself may be worth hiding.”).

Plaintiffs also quote selected statements from an interview Director Panetta gave to the *Washington Post*, which was printed on March 17, 2010. The Court quotes a few paragraphs:

Relentless attacks against al-Qaida in the Pakistan tribal region appear to have driven Osama bin Laden and other top leaders deeper into hiding, leaving the organization rudderless and less capable of planning sophisticated operations, CIA Director Leon Panetta said Wednesday.

....

Panetta credited an increasingly aggressive campaign against al-Qaida and its Taliban allies, including more frequent strikes and better coordination with Pakistan, in a near-acknowledgment of the CIA’s war against extremists in Pakistan. He called it “the most aggressive operation that CIA has been involved in in our history.”

“Those operations are seriously disrupting al-Qaida,” Panetta said. “It’s pretty clear from all the intelligence we are getting that they are having a very difficult time putting together any kind of command and control, that they are scrambling. And that we really do have them on the run.”

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security information that the government has continued to classify. Indeed, the fact that the TSP’s existence has been made public reinforces the government’s continuing stance that it is necessary to keep confidential the details of the program’s operations and scope.” *Id.* at 70. The Circuit upheld the Glomar response and held that “an agency may issue a Glomar response to FOIA requests seeking information obtained under a ‘publicly acknowledged’ intelligence program such as the Terrorist Surveillance Program at least when the existence of such information has not already been publicly disclosed.” *Id.* at 77. Similarly, even if Director Panetta had confirmed that the drone program exists, the statements offered by Plaintiffs did not specifically acknowledge that the CIA is involved directly or indicate whether the CIA has responsive records.



The comments came as a senior U.S. intelligence official revealed new details of a March 8 killing of a top al-Qaida commander in the militant stronghold of Miram Shah in North Waziristan, in Pakistan's autonomous tribal region. The al-Qaida official died in what local news reports described as a missile strike by an unmanned aerial vehicle. The CIA formally declines to acknowledge U.S. participation in such attacks inside Pakistan territory.

Pls.' Opp'n, Ex C (Mar. 17, 2010 Article "Al-Qaida Crippled as Leaders Stay in Hiding, CIA Chief Says) at 1.

The *Post* story focused on relentless attacks targeting al-Qaida in Pakistan, and appeared to speak to the joint efforts of the military and non-military agencies of the U.S. Government (and perhaps even its allies) in the efforts against terrorism there. Director Panetta merely admitted that the CIA's operations in Pakistan, left undefined, were the most aggressive ever undertaken by the CIA. While the story cited "more frequent strikes" as one example of the aggressive campaign waged in Pakistan, the reference is just as easily read to describe part of a larger campaign in Pakistan, in which the CIA played an undefined role. Furthermore, the article specified that the CIA formally declined to acknowledge U.S. participation in the use of unmanned aerial vehicles in Pakistan; it would be contradictory under the circumstances to read Director Panetta's reference to the CIA operations as a specific reference to drone strikes.

Plaintiffs argue that Director Panetta had gone "so far as to acknowledge the targets of particular strikes." Pls.' Opp'n at 12. In a *Wall Street Journal* article on the March 8, 2010 drone strike killing of Hussein al-Yemeni, Director Panetta commented, "We now believe that al-Yemeni, who was one of the top 20 [al Qaeda leaders], was one of those who was hit." Director Panetta was also quoted as saying, "He is somebody who we believe was one of those who was involved in providing explosives for the Khost attack." *Id.*, Ex D (Mar. 18, 2010 Article "Drone Kills Suspect

in CIA Suicide Bombing”) at 1. The article continued:

Killing Mr. al-Yemeni was very important to the CIA because of his status in al Qaeda and his involvement in the Khost attack, Mr. Panetta said. Mr Panetta didn’t speak directly to the circumstances of the death; the CIA doesn’t discuss covert action.

“Anytime we get a high value target that is in the top leadership of al Qaeda, it seriously disrupts their operations,” Mr. Panetta said. “No. 1 that we are not going to hesitate to go after them wherever they try to hide, and No. 2 that we are continuing to target their leadership.”

*Id.* at 2.

Similarly, in speaking with ABC News, Mr. Panetta echoed the comment, stating in response to a question about the possible whereabouts of Osama bin Laden:

But having said that, the more we continue to disrupt Al Qaida’s operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We’ve taken down more than half of their Taliban leadership, of their Al Qaida leadership. We just took down number three in their leadership a few weeks ago.

*Id.*, Ex. E (June 27, 2010 Transcript of *This Week* “Jake Tapper Interviews CIA Director Leon Panetta”) at 4.

Plaintiffs argue that these comments, together with other news stories, bar the CIA from relying on a generalized Glomar response here; that the “fact underlying the CIA’s *Glomar* response is identical to the fact officially acknowledged: that the CIA is involved in drone strikes.” Pls.’ Opp’n at 15. Interesting as it is, Plaintiffs’ argument misperceives the applicable legal standard. Whereas Director Panetta spoke generally, Plaintiffs fail to cite any official disclosure containing the *exact* information sought by Plaintiffs. Director Panetta’s comments lacked a specific reference to any particular CIA action except that the CIA was involved in undefined, aggressive operations

in Pakistan. In all the statements cited by Plaintiffs, Director Panetta's references to "we" or "our" could have just as easily referred to the joint efforts of all U.S. military and civilian resources dedicated in Afghanistan and Pakistan. The gist of the stories was that the U.S. had al-Qaida on the run and was disrupting its networks. Further, two of the statements cited by Plaintiffs stated specifically that the CIA did not officially speak to covert actions.

Ultimately, Plaintiffs attempt to impose an exactitude lacking in Director Panetta's generalized statements. "We have noted, however, that 'while the logic of FOIA postulates that an exemption can serve no purpose once information ... becomes public, we must be confident that the information sought is truly public and that the requester receive no more than what is publicly available before we find a waiver.'" *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (quoting *Cottone v. Reno*, 193 F.3d 550, 555 (D.C. Cir. 1999)).

Here, Plaintiffs seek exactly what is *not* publicly available – an official CIA acknowledgment of the fact that it is or is not involved in the drone strike program. *See Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993) ("FOIA plaintiffs cannot simply show that similar information has been released, but must establish that a specific fact already has been placed in the public domain."). Even were the public to believe this to be a foregone conclusion, the statements cited by Plaintiffs demonstrate that the CIA has carefully and specifically refused to acknowledge any role or interest in such program. To the contrary of demonstrating public disclosure, the tenor, deliberate ambiguity, and explicit disclaimers of involvement in targeted attacks in the statements cited by Plaintiffs further illustrate this point. *See Wolf*, 473 F.3d at 378 ("The insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'") (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 203

(D.C. Cir. 1993)).

Even less can it be said that Director Panetta officially confirmed the existence of CIA records on drone strikes – which the CIA argues is the relevant inquiry here. See Def.’s Opp’n at 14. “In the Glomar context, then, if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information.” *Wolf*, 473 F.3d at 379; see also *Wilner*, 592 F.3d at 70 (“An agency only loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed.”). Certainly none of the comments by former Director Panetta on which Plaintiffs rely constituted an explicit admission “that a specific record exists.” *Wilner*, 592 F.3d at 70.

Plaintiffs submitted ten detailed requests for records, covering the gamut from the “legal basis” for drone strikes; the selection of human targets; civilian casualties; post-strike assessments; limits to the use of drones; the agency of government or branch of the military involved; the supervision, oversight, discipline, or training of drone operators and those involved in targeting decisions, and more. There is nothing in the various statements submitted by Plaintiffs which speaks to any records on these points; only by inference from former Director Panetta’s statements might one conclude that the CIA might have some kind(s) of documentation somewhere. Thus, even if former Director Panetta could be understood colloquially to have suggested some sort of CIA involvement in drone strikes, he neither referenced specific records nor referenced records that go to the exact requests posed by Plaintiffs.

Lastly, despite speculation or overt factual assertions of the CIA’s involvement in

drone strikes rampant in the various articles cited in Plaintiffs' briefs, the statements of journalists, "experts," or even unofficial or unidentified sources (even were they CIA personnel) are not "official" disclosures by the CIA. *See Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999); *ACLU*, 628 F.3d at 621 (explaining that a leaked report, not released pursuant to a government declassification process, could not be considered officially acknowledged). Ultimately, "[i]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *ACLU*, 628 F.3d at 621–22 (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)).

Plaintiffs fail to demonstrate that the CIA has officially acknowledged either the CIA's involvement in a drone strike program or the existence or nonexistence of pertinent agency records. Plaintiffs' arguments to the contrary, the CIA has not waived its ability to issue a broad Glomar response.

### **C. FOIA Exemption 1**

FOIA Exemption 1 also authorizes the CIA's Glomar response. Exemption 3 and 1 are independent exemptions; the "[p]roper invocation of, and affidavit support for, either Exemption, standing alone, may justify the CIA's Glomar response." *Wolf*, 473 F.3d at 375; *see also Gardels*, 689 F.2d at 1106. Although the Court need not consider the CIA's invocation of Exemption 1 to affirm its Glomar response, already found proper under Exemption 3, *see Larson*, 565 F.3d at 862–63, the Court nonetheless considers the CIA's reliance on Exemption 1 and finds it proper.

Exemption 1 of FOIA protects matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or

foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1); *see also Larson*, 565 F.3d at 861. Executive Order 13526 governs the classification of national security information. *See Classified National Security Information*, Executive Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (“E.O. 13526”). Information can be properly classified under Executive Order 13526 if four requirements are met: (1) an original classification authority classifies the information; (2) the United States Government owns, produces, or controls the information; (3) the information falls within one or more of eight protected categories listed in section 1.4 of the Executive Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damage. *Id.* § 1.1(a). Executive Order 13526 expressly authorizes an agency to “refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.” *Id.* § 3.6(a).

Mary Ellen Cole, the Information Review Officer for the CIA’s National Clandestine Service, holds original classification authority and has determined that “the existence or nonexistence of [responsive] records is a currently and properly classified fact” under the control of the U.S. Government. Cole Decl. ¶¶ 3, 5, 30. Ms. Cole explains that this fact is protected from disclosure by § 1.4(c) and (d) of the Executive Order, which permits the classification of information concerning “intelligence activities (including covert action), intelligence sources or methods, or cryptology,” and “foreign relations or foreign activities of the United States, including confidential sources,” respectively. Cole Decl. ¶ 30 (quoting E.O. 13526 § 1.4(c), (d)). Ms. Cole explains with sufficient detail that the unauthorized disclosure of the existence or nonexistence of records

reasonably could be expected to result in specific and identifiable damage to the national security.

Through Ms. Cole's Affidavit, the CIA has sufficiently demonstrated that disclosure of records sought by Plaintiffs would cause damage to national security by providing insight into the CIA's intelligence activities, sources and methods, which are properly classifiable under § 1.4(c) of Executive Order 13526. The Court has already determined that the records sought pertain to "intelligence sources and methods" under the NSA; such analysis applies here as well. *See infra* Part III(A)(2); *Military Audit Project*, 656 F.2d at 736 n.39. Information on drone strikes is even easier to fit within the purview of intelligence activities. As the CIA states cogently, "Clandestine intelligence techniques, capabilities, or devices are valuable only so long as they remain unknown and unsuspected. Once an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use by the CIA is seriously jeopardized." Cole Decl. ¶ 34. The fact of whether or not the CIA has responsive records would reveal whether the CIA has an interest in, or can employ, drone technology. *Id.* ¶ 17. "That fact could be extremely valuable to the targets of CIA intelligence efforts, who could carry out their activities with the knowledge that the CIA would be unable to monitor their activities using that particular technology." *Id.*

Independently, the CIA also demonstrates that the fact of whether or not the CIA maintains responsive records also implicates "foreign relations or foreign activities of the United States, including confidential sources." E.O. 13526 § 1.4(d). Because the CIA's operations are conducted almost exclusively outside the United States, they inherently involve foreign activities. *See* Cole Decl. ¶ 36. "Although it is generally known that the CIA conducts clandestine intelligence operations, identifying an interest in a particular matter or publicly disclosing a particular intelligence activity could cause the affected or interested foreign government to respond in ways that would

damage U.S. national interests.” *Id.* ¶ 37. The CIA argues that to acknowledge officially whether it has responsive records could be construed by foreign governments as an affirmation that the CIA has operated undetected in their borders, or has taken intelligence operations against its citizens or residents, which could adversely affect U.S. relations with such nations. *See id.*; *cf. Afshar v. Dep’t of State*, 702 F.2d 1125, 1130–31 (D.C. Cir. 1983) (“Also, even if a fact – such as the existence of such a liaison – is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security. Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgment may force a government to retaliate.”).

The information sought by Plaintiffs directly “implicat[es] national security, a uniquely executive purview.” *Ctr. for Nat’l Sec. Studies v. DOJ*, 331 F.3d 918, 926–27 (D.C. Cir. 2003); *see also Larson*, 565 F.3d at 865 (“Today we reaffirm our deferential posture in FOIA cases regarding the ‘uniquely executive purview’ of national security.”). Since the United States is at war in Afghanistan against a guerrilla enemy disassociated from any nation or state, it surprises no one that U.S. information concerning its enemies comes predominately from the intelligence community and is classified and closely guarded to protect sources, covert actions and operations, U.S. agents, related intelligence activities and methods, and any workings with foreign governments and foreign agencies. While Plaintiffs may hold a general knowledge of the existence and use of drones, that knowledge does not mean that the underlying intelligence efforts that reveal and guide weapons to targets are somehow unprotected under FOIA and open to any requester.

In reviewing the CIA’s basis for anticipating harm from a non-Glomar response, the



“test is not whether the court personally agrees in full with the CIA’s evaluation of the danger – rather, the issue is whether on the whole record the Agency’s judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role.” *Gardels*, 689 F.2d at 1105. The fact that the public may already speak freely of the existence of drones, or speculate openly that such a program may be directed in part or in whole by the CIA, does not emasculate the CIA’s warnings of harm were it forced to acknowledge officially the existence or nonexistence of requested records. Plaintiffs counter that because information on the program is “already in the public domain in whole or in part,” *i.e.*, “it is no secret that the CIA uses drones to target and kill individuals,” that “no additional harm could reasonably be expected to flow from the CIA’s confirmation that it possesses records responsive to Plaintiffs’ FOIA request.” *See* Pls.’ Opp’n at 20, 22–23. However, the D.C. Circuit has foreclosed this argument: “that the information withheld by the CIA is ‘so widely disseminated’ that it could not cause harm to national security is foreclosed by our requirement . . . that information be ‘officially acknowledged.’” *ACLU*, 628 F.3d at 625. “The ‘officially acknowledged’ test recognizes that even if information exists in some form in the public domain that does not mean that official disclosure will not cause harm cognizable under a FOIA exemption.” *Id.*<sup>6</sup> As explained above, the CIA has never officially acknowledged its involvement in the drone program publicly.

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<sup>6</sup> Plaintiffs’ additional authority, consisting of statements by John A. Rizzo, acting general counsel at the CIA until his retirement in 2009, does not do more: unauthorized disclosure of classified facts does not officially disclose those facts. *See Afshar*, 702 F.2d at 1133–34 (noting that books by former CIA agents, even where the books had been pre-screened and approved by the CIA, did not constitute official and documented disclosures for purposes of waiving an exemption); *Wilson v. CIA*, 586 F.3d 171, 189 (2d Cir. 2009) (“A former employee’s public disclosure of classified information cannot be deemed an ‘official’ act of the [Central Intelligence] Agency.”).

More to the point, leaving hostile groups guessing as to the CIA's possible interest or involvement in, or control over, drone strikes could itself be of eminent benefit. *See Military Audit Project*, 656 F.2d at 743-45 (noting that, despite widespread speculation, the lack of an authoritative acknowledgment of a covert project's actual purpose could itself prove beneficial by leaving foreign agencies with "lingering doubts whether some other purpose motivated the project"); *Frugone*, 169 F.3d at 775 (acknowledging CIA's asserted benefit of Glomar response that by denying it had records on a subject it "would lessen the burden facing a foreign intelligence agency attempting to track the CIA's covert activities abroad"). The CIA has met its burden of showing that the release of any acknowledgment of responsive records could damage national security; FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar*, 702 F.2d at 1130.<sup>7</sup>

Courts "have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927. The Court finds that the CIA has adequately justified its Glomar response under FOIA Exemption 1. Accordingly, the CIA is independently entitled to summary judgment under Exemption 1.

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<sup>7</sup> The CIA also offers to supplement its unclassified declaration with a classified declaration containing additional information were the Court to find its affidavit insufficient. The D.C. Circuit has cautioned courts against performing *in camera* review of redacted information when an agency meets its burden by affidavit. *ACLU*, 628 F.3d at 626. "*In camera* inspection is particularly a last resort in national security situations like this case—a court should not resort to it routinely on the theory that 'it can't hurt.'" *Id.* (quoting *Larson*, 565 F.3d at 870). The Court finds that it would be neither necessary nor appropriate to take the CIA up on its offer where, as here, it has provided specific information that the information withheld properly falls within the exemptions cited, that this information is not contradicted in the record, and there is no evidence of agency bad faith. *See id.*



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
AMERICAN CIVIL LIBERTIES,	)	
UNION, <i>et al.</i> ,	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
v.	)	<b>Civil Action No. 10-0436 (RMC)</b>
	)	
DEPARTMENT OF JUSTICE, <i>et al.</i> ,	)	
	)	
<b>Defendants.</b>	)	
_____	)	

**ORDER**

For the reasons stated in the Memorandum Opinion filed separately and contemporaneously herewith, it is hereby

**ORDERED** that defendant Central Intelligence Agency’s motion for summary judgment [Dkt. # 15] is **GRANTED**; and it is

**FURTHER ORDERED** that Plaintiffs’ motion for partial summary judgment against the Central Intelligence Agency [Dkt. # 21] is **DENIED**; and it is

**FURTHER ORDERED** that the Central Intelligence Agency is hereby **DISMISSED** as a defendant in this matter.

**SO ORDERED.**

Date: September 9, 2011

\_\_\_\_\_  
/s/  
ROSEMARY M. COLLYER  
United States District Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

No. 1:10-cv-436-RMC

STIPULATION REGARDING VOLUNTARY DISMISSAL  
OF CLAIMS AGAINST CERTAIN PARTIES

The Parties in the above-captioned Freedom of Information Act case have conferred and reached a stipulated agreement that all claims against Defendants Department of Justice (“DOJ”), Department of Defense (“DOD”), and Department of State (“DOS”) shall be voluntarily dismissed from this action with prejudice. The Parties advise the Court of this agreement as follows:

1. On March 16, 2010, Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, “Plaintiffs”) filed a complaint for injunctive relief pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), naming as Defendants the Department of Justice, Department of Defense, and Department of State;
2. On June 1, 2010, Plaintiffs filed an amended complaint adding Defendant Central Intelligence Agency (“CIA”);
3. Defendant CIA moved for summary judgment on October 1, 2010; Plaintiffs cross-moved for partial summary judgment on November 1, 2010; and the Court granted the CIA’s motion and denied Plaintiffs’ motion on September 9, 2011;

4. Pursuant to Federal Rule of Civil Procedure 54(b), the Court's order of September 9, 2011 is not yet a final appealable order because claims remain unadjudicated as to the Defendants other than CIA;
5. Defendants DOJ, DOD, and DOS have now completed production of records and *Vaughn* indices in accordance with schedules set by the Court;
6. A status report is due to the Court on October 26, 2011;
7. Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Plaintiffs and Defendants hereby stipulate that all claims against Defendants DOJ, DOD, and DOS are voluntarily dismissed from this action with prejudice;
8. Summary judgment having previously been granted in favor of the remaining defendant, this action may now be closed on the Court's docket.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CIVIL LIBERTIES UNION and  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, DEPARTMENT  
OF DEFENSE, DEPARTMENT OF STATE, and  
CENTRAL INTELLIGENCE AGENCY,

Defendants.

No. 1:10-cv-436-RMC

**NOTICE OF APPEAL**

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order of this court entered on the 9th day of September, 2011, granting defendant Central Intelligence Agency's motion for summary judgment and denying plaintiffs' motion for partial summary judgment. That order became final and appealable on the 26th day of October, 2011, when plaintiffs' claims against the other defendants were voluntarily dismissed.

/s/Arthur B. Spitzer

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November 9, 2011