10-4290(L)

10-4289(CON), 10-4647(XAP), 10-4668(XAP)

To Be Argued By:
TARA M. LA MORTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-4290(L), 10-4289(CON), 10-4647(XAP), 10-4668(XAP)

AMERICAN CIVIL LIBERTIES UNION; CENTER FOR CONSTITUTIONAL RIGHTS, INC.; PHYSICIANS FOR HUMAN RIGHTS; VETERANS FOR COMMON SENSE; VETERANS FOR PEACE,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

DEPARTMENT OF JUSTICE, and its component Office of Legal Counsel; CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellants-Cross-Appellees,

DEPARTMENT OF DEFENSE, and its components Department of Army, Department of Navy, Department of Air Force, Defense Intelligence Agency; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; DEPARTMENT OF JUSTICE components Civil Rights Division, Criminal Division, Office of Information and Privacy, Office of Intelligence, Policy and Review, Federal Bureau of Investigation,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REDACTED BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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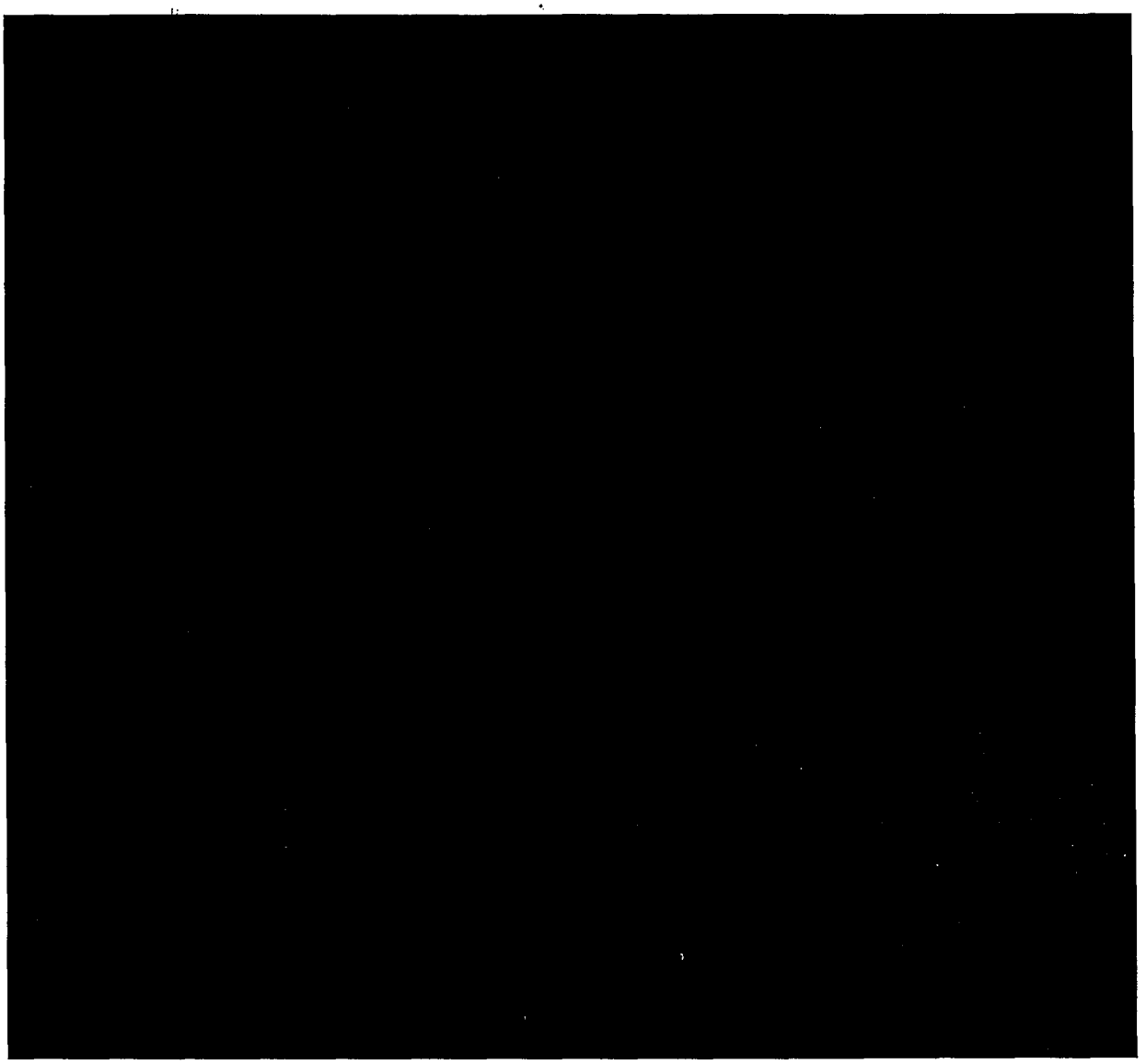
(U) Preliminary Statement

(U) Defendants-appellants-cross-appellees the Central Intelligence Agency ("CIA"), the Department of Justice ("DOJ"), and DOJ's Office of Legal Counsel ("OLC") (collectively, the "Government") appeal from a partial final judgment entered by the United States District Court for the Southern District of New York (*Hellerstein*, J.) on October 1, 2010. (Joint Appendix ("JA") 1383-87; Special Appendix ("SPA") 105-109). The judgment was entered in accordance with the district court's orders dated October 13, 2009, and December 29, 2009, directing the Government to publicly disclose certain classified information in two OLC memoranda pursuant to the Freedom of Information Act ("FOIA"). (JA 1166-1171, 1197-1200; SPA 77-82, 101-104).

[redacted] The Government's appeal concerns a single, highly classified, active intelligence method:* [redacted]

* [redacted] By Order dated February 16, 2011, this Court granted the Government leave to file a classified brief and a classified appendix ("CA") containing the classified documents in the record *ex parte*, for *in camera* review, and a redacted, unclassified version of the brief on the public record. [redacted] Because of its classification, [redacted]



The district court ordered the Government to

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this memorandum must be transmitted and stored in compliance with the standards for information classified at this level. The Government has endeavored to place as much information as possible in the public domain, consistent with its responsibility to protect national security.

[redacted]

disclose this information (hereinafter referred to as the "classified intelligence method" or the "withheld information") under FOIA because, in the district court's view, the information is best characterized as a "source of authority," and not an intelligence method. [redacted]

Disclosure of [redacted] in the OLC memoranda would publicly reveal, for the first time, [redacted]

(U) This information falls squarely within two exemptions to FOIA that independently protect such intelligence methods and activities from public disclosure. First, FOIA Exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with the National Security Act of 1947 ("NSA"), as amended, 50 U.S.C. § 401 *et seq.*, and the Central Intelligence Act of 1949 ("CIA Act"), as amended, 50 U.S.C. § 403 *et seq.*, exempts intelligence methods and CIA functions from unauthorized disclosure, even without a showing of potential harm. Second, FOIA Exemption

[redacted]

[redacted]

1, 5 U.S.C. § 552(b)(1), protects properly classified information, including the information regarding intelligence methods and activities in this case, upon a showing that public disclosure could reasonably be expected to cause harm to national security. Here, the Government has shown through detailed declarations both that the classified information at issue relates to intelligence methods and activities and that its disclosure could reasonably be expected to cause exceptionally grave harm to national security. These declarations, made by officials at the highest levels of the Executive Branch, deserve substantial deference from the Court.

(U) Indeed, even the district court recognized the potential harm that would flow from disclosure of the withheld information, and it therefore attempted to devise a "compromise" whereby the Government, in lieu of disclosure, could alter the OLC memoranda to replace the references to the classified intelligence method with a purportedly neutral substitute invented by the court. In forcing the Government to choose between this option and public disclosure of a highly classified, active intelligence method, the district court plainly exceeded its jurisdiction under FOIA. The withheld information itself is exempt from

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[redacted]

disclosure under FOIA. The district court's judgment compelling disclosure of this information accordingly should be reversed.

(U) Jurisdictional Statement

(U) Plaintiffs invoked the jurisdiction of the district court under 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(E)(iii), and 5 U.S.C. §§ 701-706, as well as 28 U.S.C. § 1331. (JA 12, No. 1). On October 1, 2010, the district court entered partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), which, among other things, compelled disclosure of information concerning the classified intelligence method contained in the OLC memoranda. (JA 1383-87; SPA 105-109). The Government filed a timely notice of appeal on October 21, 2010. (JA 1388-89); *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(U) Issues Presented for Review

1. (U) Whether FOIA Exemption 3, in conjunction with the NSA and the CIA Act, permits the Government to withhold portions of memoranda that would, if disclosed, reveal the existence and scope of a highly classified intelligence method that is still in use.

[redacted]

[redacted]

2. (U) Whether FOIA Exemption 1 permits the Government to withhold classified portions of memoranda that would, if disclosed, reveal the existence and scope of a highly classified, active intelligence method and activity, disclosure of which reasonably could be expected to result in exceptionally grave damage to the national security of the United States.

3. (U) Whether the district court exceeded its authority under FOIA by directing a purported "compromise," whereby the Government could avoid public disclosure of information concerning the classified intelligence method by altering the OLC memoranda to replace the references to the intelligence method with substituted language crafted by the district court.

(U) Statement of the Case

(U) On October 7, 2003, plaintiffs-appellees-cross appellants ("Plaintiffs") submitted a FOIA request to DOJ, CIA, and other Federal agencies, seeking the disclosure of records concerning, *inter alia*, the treatment of detainees in United States custody overseas after September 11, 2001. (JA 113 ¶ 2). On February 1, 2005, Plaintiffs submitted a second FOIA request to the OLC. (*Id.* ¶ 4). Plaintiffs filed suit on both FOIA requests (together, the "FOIA request"), seeking to compel

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release of responsive documents. (*Id.* ¶¶ 3, 5).

(U) The classified intelligence method at issue in this appeal is discussed in two memoranda written by the OLC and dated May 10, 2005 and May 30, 2005, respectively (collectively, the "OLC memoranda").* The Government initially withheld these and other OLC memoranda in full (JA 114-15 ¶ 12), but subsequently released unclassified versions of the memoranda with limited redactions pursuant to FOIA Exemptions 1 and 3 (JA 549 ¶ 8, 552 ¶ 11).* The parties filed cross-motions for summary judgment with regard to the Government's withholdings from the OLC memoranda and other documents. (JA 60, 65, Nos. 321, 347).

(U) The district court reviewed the unredacted OLC memoranda in a series of three *ex parte, in camera* sessions. (*See* JA 1166-71; SPA 77-82; JA 1197-

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* (U) The May 10, 2005 and May 30, 2005 OLC memoranda were called the "Second OLC memorandum" and "Fourth OLC memorandum," respectively, in the district court record, reflecting the order in which they were listed in the Unclassified Declaration of Wendy M. Hilton, dated May 13, 2009. (JA 550-51).

* (U) The information relating to the classified intelligence method is found on pages 5 and 29 of the May 10, 2005 OLC memorandum (CA 160, 184) and pages 4-5 and 7 of the May 30, 2005 OLC memorandum (CA 205-06, 208).

[redacted]

[redacted]

1200; SPA 101-04; CA 76-121, 137-241). The court also reviewed classified declarations submitted by the Government to justify its withholding of the redacted information pursuant to FOIA Exemptions 1 and 3. (*See* JA 1197-1200; SPA 101-04; JA 1317-18, 1383-87; SPA 105-09).

(U) The district court ruled that the information concerning the classified intelligence method contained in the OLC memoranda was not protected by FOIA Exemptions 1 or 3, reasoning that the information concerns a "source of authority" rather than an intelligence method. The court ordered the Government to disclose this information or, alternatively, to adopt the court's "compromise" and substitute certain words in place of the redactions. (JA 1197-99; SPA 101-04; JA 1172-86; SPA 83-97; CA 137-241).

(U) On October 1, 2010, the district court entered partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, granting Plaintiffs summary judgment with regard to the information relating to the classified intelligence method contained in the OLC memoranda.* The Government

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* (U) This judgment also embodied the court's rulings in favor of the Government on separate redactions taken to the OLC memoranda, as well as the parties' respective fifth motions for summary judgment, which concerned CIA

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[redacted] appealed the portion of the court's judgment compelling disclosure of this information. (JA 1388-89). Plaintiffs cross-appealed the court's judgment insofar as it sustained the Government's withholding of other information from the OLC memoranda and other documents. (JA 1390-92).*

(U) Statement of Facts

A. (U) Statutory Background

(U) The Freedom of Information Act requires federal agencies to disclose agency records to the public, unless the materials sought are covered by any of FOIA's nine exemptions. 5 U.S.C. § 552(a), (b). Two of the exemptions — Exemption 3 and Exemption 1 — are relevant here.

(U) Exemption 3, 5 U.S.C. § 552(b)(3), incorporates the protections of other statutes, shielding records that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The statutory directive to protect "intelligence

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documents reflecting the interrogations of detainees. (JA 1383-87; SPA 105-09).

* (U) This is the fifth appeal in this case. *See ACLU v. Dep't of Defense*, 543 F.3d 59 (2d Cir. 2008), *judgment vacated and case remanded*, 130 S. Ct. 777 (2009); *ACLU v. Dep't of Defense*, No. 08-4912 (2d Cir.); *ACLU v. CIA*, No. 06-0205 (2d Cir.); *ACLU v. Dep't of Defense*, No. 05-6286 (2d Cir.).

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[redacted]

sources and methods from unauthorized disclosure" long has been held to trigger the protections of FOIA Exemption 3. *CIA v. Sims*, 471 U.S. 159, 167 (1985) (citation omitted). That directive is found in two provisions. First, Section 102A(i)(1) of the NSA, as amended, 50 U.S.C. § 403-1(i)(1), provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Second, Section 6 of the CIA Act, as amended, 50 U.S.C. § 403g, provides that the CIA shall be exempted from "the provisions of any other law which require the publication or disclosure" of the "functions" of the Agency. 50 U.S.C. § 403g. These functions plainly include conducting intelligence activities and utilizing intelligence methods. *See, e.g.*, 50 U.S.C. § 403-4a(d).

(U) Exemption 1, 5 U.S.C. § 552(b)(1), protects 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). Executive Order 12,958, as amended, sets forth eight categories of information subject to classification, including "intelligence activities (including special

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activities) [and] intelligence sources or methods." Exec. Order 12,958 § 1.4(c).*

B. (U) The Classified Intelligence Method Discussed in the OLC Memoranda

1. (U) The CIA's Intelligence Activities

[redacted] The primary mission of the CIA is to collect and evaluate intelligence relating to national security. 50 U.S.C. § 403-4a(d); (JA 599-600 ¶

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* (U) The classification decisions here were made pursuant to Executive Order 12,958, as amended. (JA 548-49 ¶ 4); *see also* Exec. Order 12,958, 3 C.F.R. 333 (1993), reprinted as amended in 50 U.S.C. § 435 note at 91 (Supp. 2004); 68 Fed. Reg. 15,315 (Mar. 25, 2003). For purposes of Exemption 1, a classification decision should be considered under the criteria of the Executive Order pursuant to which the decision was made. *See King v. DOJ*, 830 F.2d 210, 216 (D.C. Cir. 1987). Accordingly, although Executive Order 12,958 has since been superseded by Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), all citations herein, except where indicated, are to Executive Order 12,958, as amended.

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34, 604 ¶ 40).

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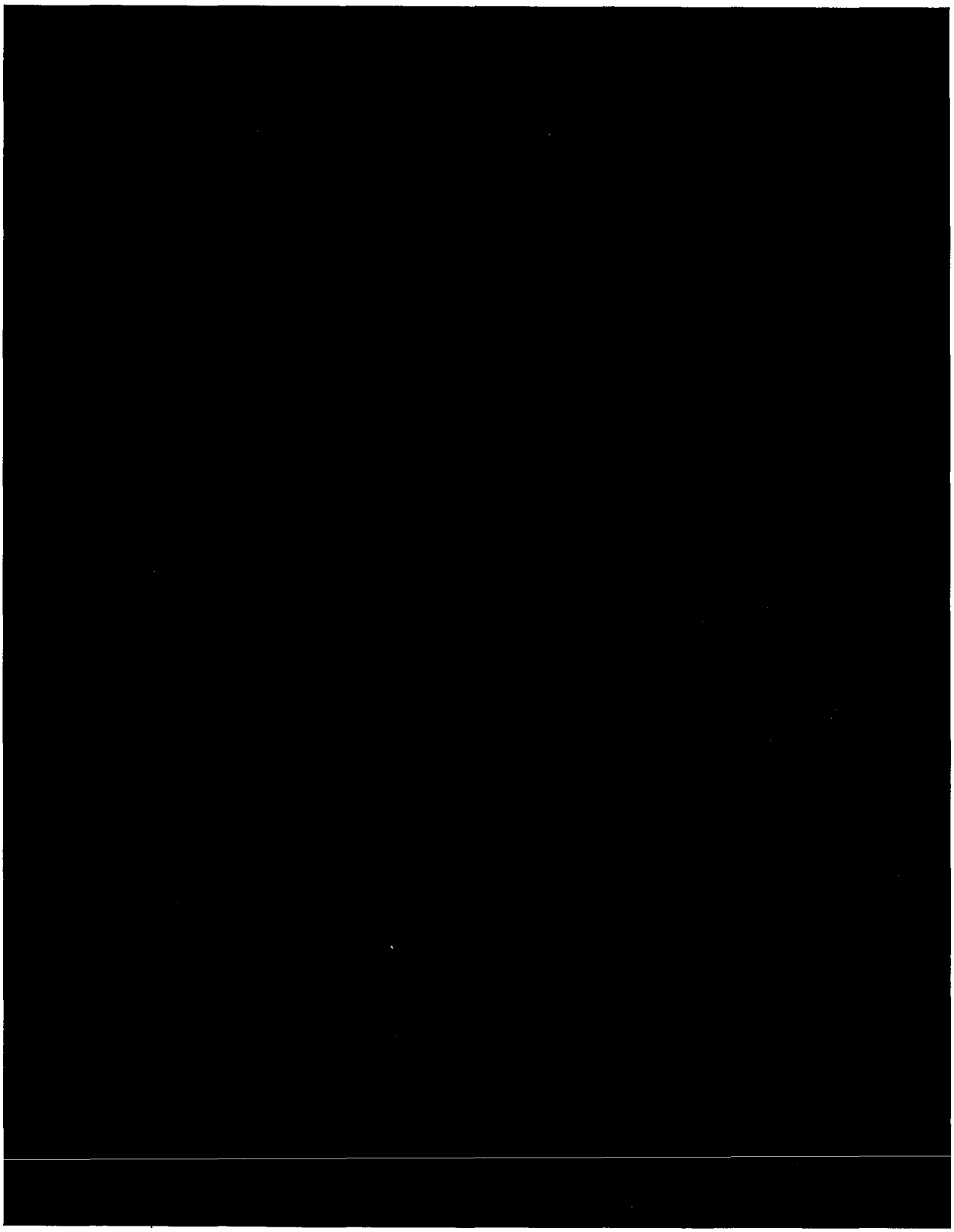

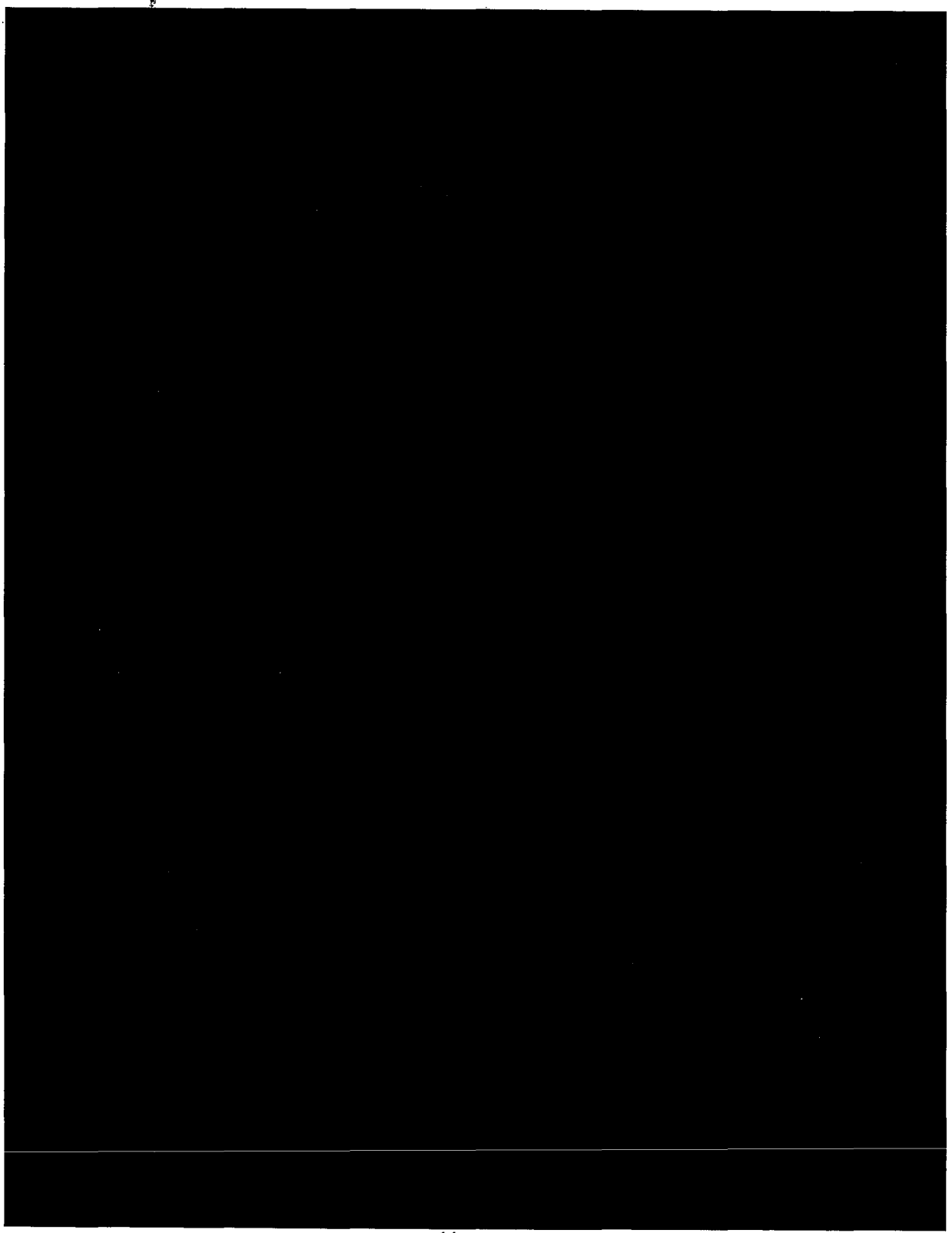

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2. (U) The Classified Intelligence Method

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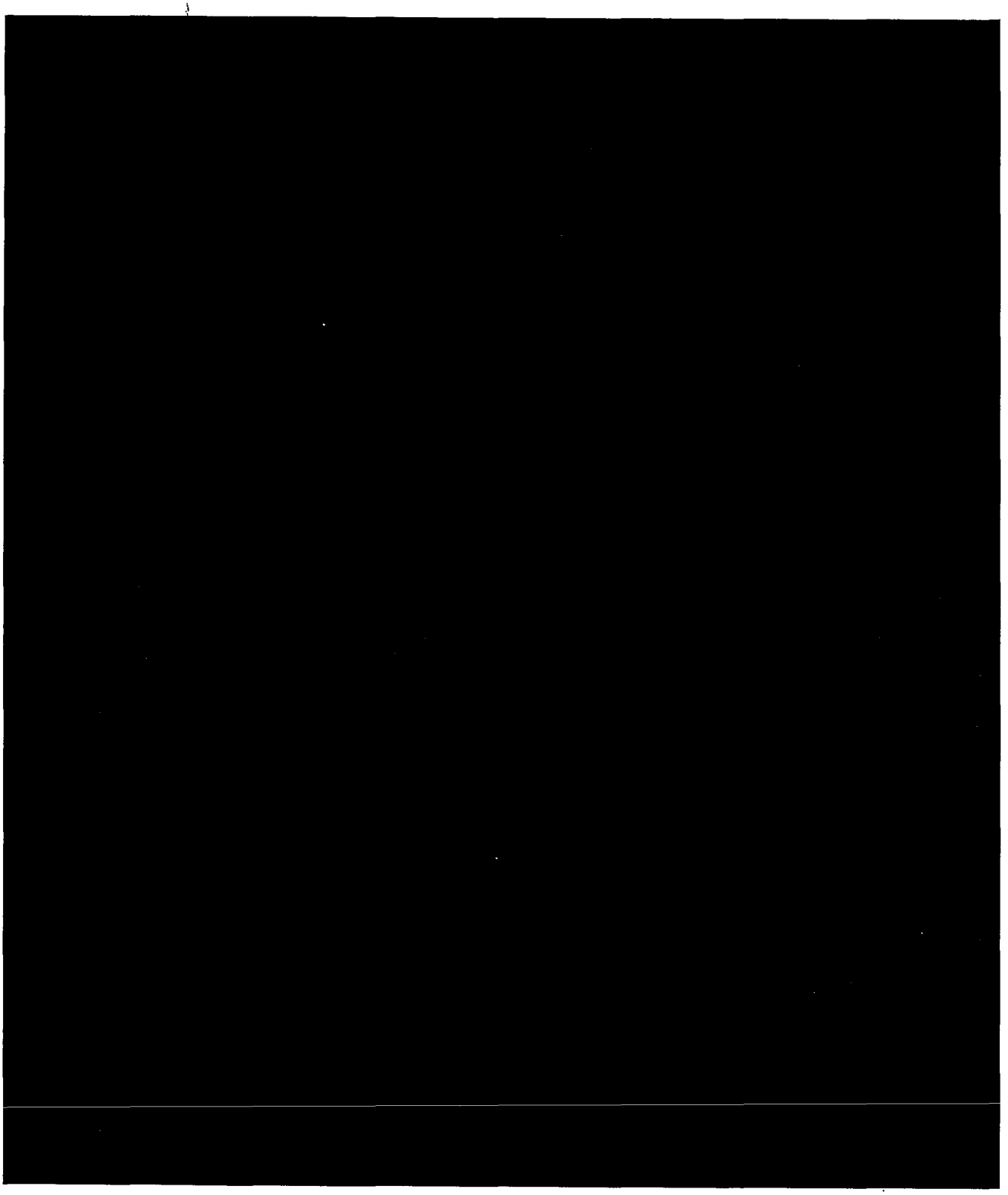

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C. (U) **The Government's Withholdings and the District Court's Orders**

(U) The Government withheld information concerning the classified

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[redacted] intelligence method from the May 10, 2005 and May 30, 2005 OLC memoranda pursuant to FOIA Exemptions 1 and 3.

[redacted] The May 10, 2005 OLC memorandum contains two references to the classified intelligence method. Page 5 of this memorandum includes the following sentence:

> [redacted] If the plan calls for the use of any of the interrogation techniques discussed herein, it is submitted to CIA Headquarters, which must review the plan and approve the use of any of these interrogation techniques before they may be applied. *See* George J. Tenet, Director of Central Intelligence, *Guidelines on Interrogations Conducted Pursuant to the* [redacted] at 3 (Jan. 28, 2003) ("Interrogation Guidelines").*

(*See* CA 160). Page 29 of the May 10 memorandum also contains a reference to the classified intelligence method. (*See* CA 184).

[redacted] The May 30, 2005 OLC memorandum contains three references to the classified intelligence method. [redacted]

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* (U) The underlined portions of the quotations from the OLC memoranda set forth in this section reflect the information redacted pursuant to FOIA Exemptions 1 and 3. The remaining portions of the quoted passages have been released to Plaintiffs.

[redacted]

[redacted] In addition, page 5 of the May 30 memorandum [redacted] the CIA uses enhanced interrogation techniques only if the CIA's Counterterrorist Center ("CTC") determines an individual to be a "High Value Detainee, ..." (CA 206). [redacted]

[redacted]

(U) The district court examined the Government's withholdings from the OLC memoranda in several *ex parte, in camera* sessions. (*See* CA 76-121, 137-241; JA 1166-71; SPA 77-82).

(U) The court first examined this information during an *ex parte, in camera* session on September 30, 2009. (CA 76, 77). At that time, the court issued a preliminary ruling that all but one of the references to the classified intelligence method in the OLC memoranda must be disclosed. (*See* CA 86-87, 92-99; JA 1171; SPA 82). The court opined that publicly disclosing that information would not reveal an intelligence method, but only a source of the CIA's authority. (CA 84-86).* The court nevertheless permitted the Government to submit additional declarations supporting its withholding decision. (CA 86; JA 1171; SPA 82). The

* (U) The district court sustained the Government's redaction of information relating to the classified intelligence method on page 5 of the May 30, 2005 OLC memorandum, but did not explain why it treated that redaction differently. (CA 97).

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Government submitted multiple declarations from high-level Executive Branch officials supporting its invocation of FOIA Exemptions 1 and 3 with respect to information concerning the classified intelligence method.*

(U) In a subsequent *in camera* session, the district court adhered to its preliminary ruling and explained that it viewed the withheld information as a "source of authority" rather than an intelligence method:

> (U) I think the government calls these "methods of interrogation" because part of the method is to seek authority from a higher source. And I've called these "source of authority" because I think they're less a matter of methodology and more an aspect of authorization.
>
> I'm not comfortable with calling these "methods." The statute authorizes classification with regards to methods of interrogation. It does not say anything about sources of authority for interrogation, and that's one of the tensions between the position expressed by the

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* (U) *See* Unclassified Declaration of Wendy M. Hilton, CIA Associate Information Review Officer, dated May 13, 2009 (JA 546-81); Classified Declaration of Wendy M. Hilton, dated September 29, 2009 (CA 66-75); Classified Declaration of Wendy M. Hilton, dated October 14, 2009 (CA 122-29); Classified Declaration of James L. Jones, then-National Security Advisor and Assistant to the President for National Security, dated October 26, 2009 (CA 130-36); Classified Declaration of Wendy M. Hilton, dated March 1, 2010 (CA 242-66) (incorporating, *inter alia,* Classified Declaration of Leon Panetta, Director of the CIA, dated June 8, 2009 (CA 53-65), and Unclassified Declaration of Leon Panetta, dated June 8, 2009 (JA 582-605)); and Unclassified Declaration of Wendy M. Hilton, dated May 7, 2010 (JA 1363-68).

[redacted]

[redacted] government and the rulings of the Court.

(JA 1175).

[redacted] As a "compromise," however, the district court offered to allow the Government to insert the phrase [redacted] (CA 142-43; *see also* JA 1198-99; SPA 102-03). With respect to the redaction on page 4 of the May 30, 2005 OLC memorandum, which [redacted] the court acknowledged the sensitivity of the information involved, but nonetheless ordered the Government to either disclose the information or adopt the court's compromise:

> [redacted] The government argues, in addition to the arguments I mentioned before, that [redacted] . . . 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.

[redacted]

[redacted]

(CA 145).

(U) The district court also ordered that references to the classified intelligence method contained in the transcript of the September 30, 2009 *ex parte, in camera* proceeding be disclosed, or otherwise released in accordance with the court's compromise proposal. (JA 1185-86, 1200; SPA 96-97).

(U) On October 1, 2010, the district court entered partial final judgment based on all of its prior rulings concerning the Government's redactions to the OLC memoranda, as well as its rulings on other documents that are the subject of Plaintiffs' cross-appeal. (JA 1383-87; SPA 105-09).

(U) Summary of Argument

[redacted] This Court should reverse the district court's judgment compelling disclosure of the information regarding the classified intelligence method contained in the OLC memoranda. [redacted]

[redacted]

[redacted] The record further establishes that publicly disclosing information concerning the classified intelligence method could reasonably be expected to cause exceptionally grave damage to national security; that this information was properly classified; and that the information thus is exempt from disclosure under Exemption 1. The Government's declarants — including the present CIA Director, his predecessor, and the then-National Security Advisor and Assistant to the President for National Security — explain in detail [redacted]

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(U) The district court exceeded its authority under FOIA by attempting to "compromise" by crafting purportedly neutral language to substitute for the withheld information. FOIA permits a court to order disclosure of non-exempt documents and information; it does not permit the court to compel the Government to create modified documents that the court believes would not be exempt. The court's apparent reliance on the Classified Information Procedures Act was misplaced, as that statute applies only in criminal cases, has materially different purposes (permitting the use of altered classified information in order to preserve the defendant's right to a fair trial), and cannot expand the court's power

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under FOIA. Because the information relating to the classified intelligence method is exempt from disclosure, it was properly withheld without regard to whether other information or language would be exempt. *See infra* Point IV.

(U) ARGUMENT

I. (U) FOIA and the Standard of Review

(U) FOIA "expresses a public policy in favor of disclosure so that the public might see what activities federal agencies are engaged in." *A. Michael's Piano v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). Congress recognized, however, that public disclosure is not always in the public interest, and accordingly exempted nine categories of information from disclosure. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Those FOIA exemptions "are intended to have meaningful reach and application." *Id.*

(U) An agency carries its burden of proving the applicability of a FOIA exemption by declaration. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009). Agency declarations are entitled to a presumption of good faith, *see id.* at 69, and "'[s]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific

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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,'" *id.* at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

(U) An agency's assertion of a FOIA exemption to withhold documents is reviewed *de novo*. *Wilner*, 592 F.3d at 69. In the national security context, however, the agency's justification for its withholding decision is entitled to "substantial weight." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007); *see also Sims*, 471 U.S. at 179 ("The decisions of the Director [of the CIA, in exercising his authority pursuant to the National Security Act], who must of course be familiar with 'the whole picture' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake."). "'Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wilner*, 592 F.3d at 73 (quoting *Larson*, 565 F.3d at 862); *id.* at 75; *ACLU v. Dep't of Defense*, 628 F.3d 612, 619, 624 (D.C. Cir. 2011).

[redacted]

[redacted]

II. (U) The Government Properly Withheld Information Concerning the Classified Intelligence Method Under FOIA Exemption 3

A. (U) Exemption 3 and the Protection in the NSA and CIA Act for Intelligence Methods and CIA Functions

(U) FOIA Exemption 3, 5 U.S.C. § 552(b)(3), shields from public disclosure records specifically protected by another non-FOIA statute. In adjudicating an Exemption 3 claim, the Court must determine (1) whether the other statute qualifies as an Exemption 3 statute, and (2) whether the withheld information satisfies the criteria of that statute. *See Sims*, 471 U.S. at 167; *Fitzgibbon v. CIA*, 911 F.2d 755, 761-62 (D.C. Cir. 1990). Both criteria are satisfied here.

(U) First, as the district court noted, plaintiffs have not disputed that Section 102A(i)(1) of the NSA and Section 6 of the CIA Act are both exempting statutes within the meaning of Exemption 3. (JA 1375). Indeed, the directives in those statutes to protect "intelligence sources and methods" and CIA "functions" from unauthorized disclosure unquestionably trigger the protection of Exemption 3. *See Sims*, 471 U.S. at 167-68 (discussing prior version of NSA); *Larson*, 565 F.3d at 865 (discussing current version of NSA); *Baker v. CIA*, 580 F.2d 664, 667

[redacted]

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(D.C. Cir. 1978) (discussing Section 6 of CIA Act).

(U) Second, the information at issue is protected by the NSA and CIA Act. The question relevant here is simply whether the Government has shown that the withheld information "logically" or "plausibly," *Wilner*, 592 F.3d at 73, falls within the criteria of the NSA and the CIA Act, *i.e.*, that "release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods" or CIA functions. *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). As explained below, it plainly does.

B. (U) The Withheld Information Relates to Intelligence Methods and CIA Functions

[redacted] The Government's declarations establish that disclosure of the withheld information would reveal the Government's specific implementation of a highly sensitive intelligence method employed by the CIA.

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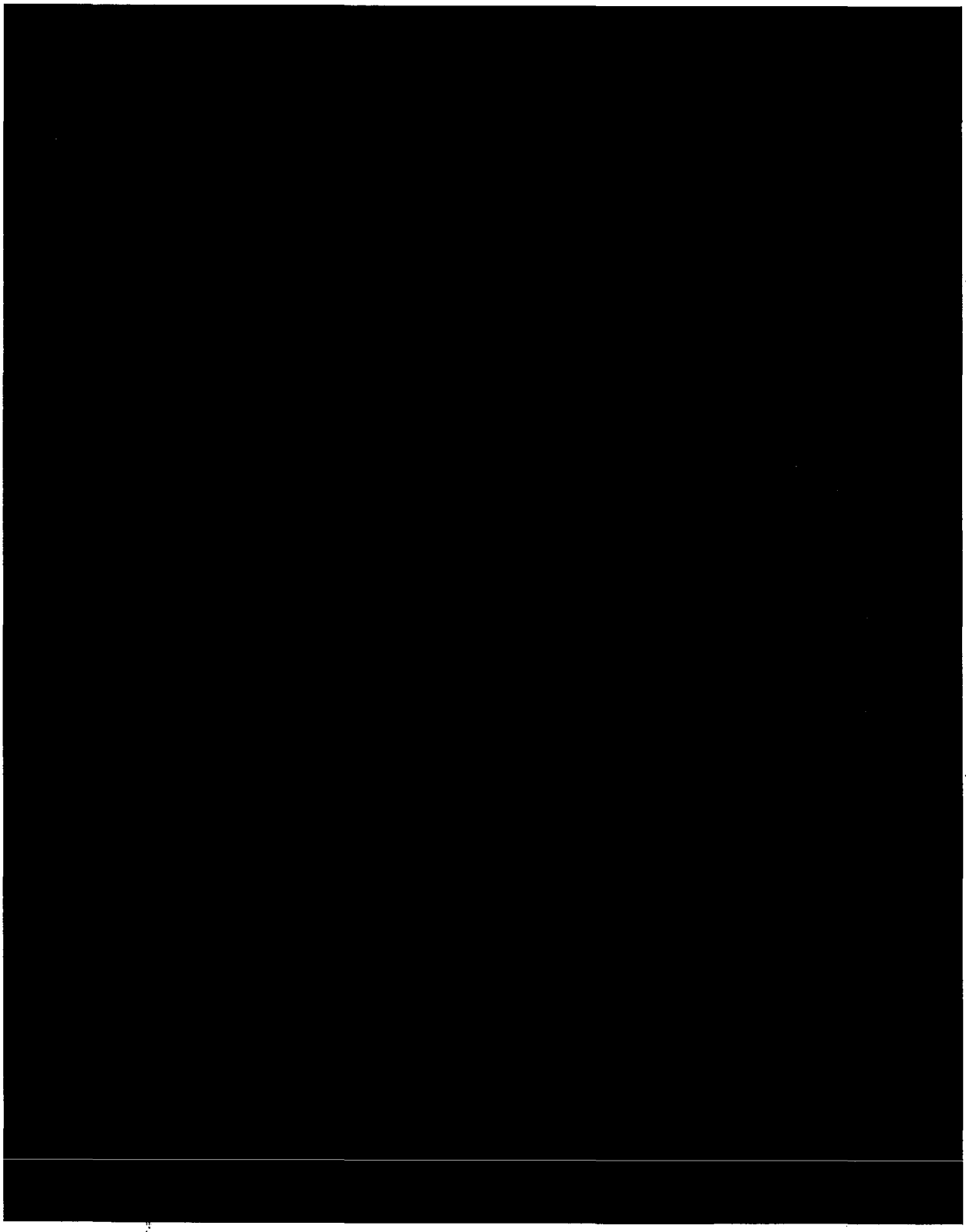

[redacted] The district court therefore was entirely wrong in concluding that disclosing [redacted] would not reveal an intelligence method. [redacted]

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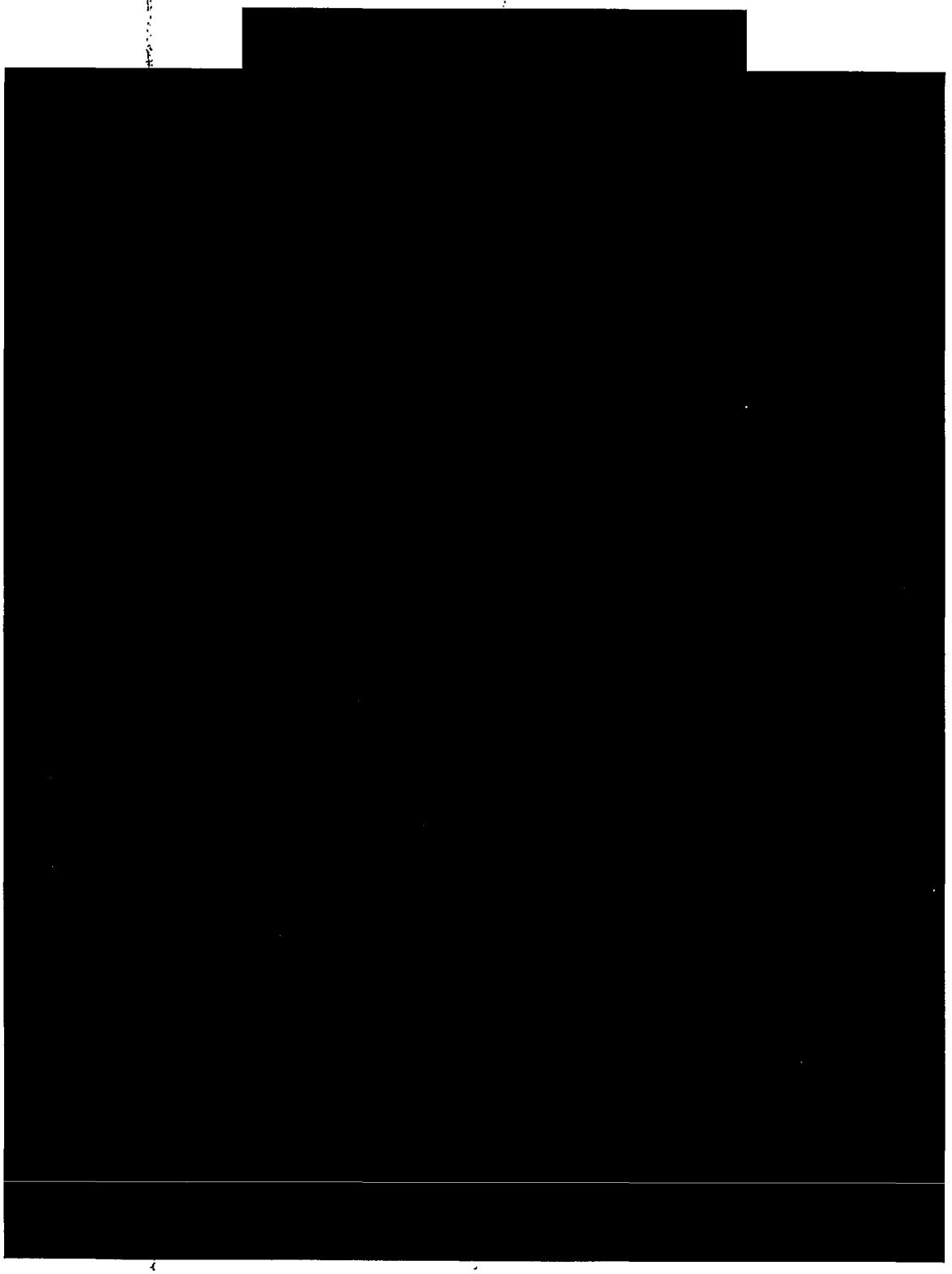

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Disclosing contained on page 4 of the May 30, 2005 OLC memorandum would reveal additional information about U.S. intelligence methods and CIA functions. [redacted]

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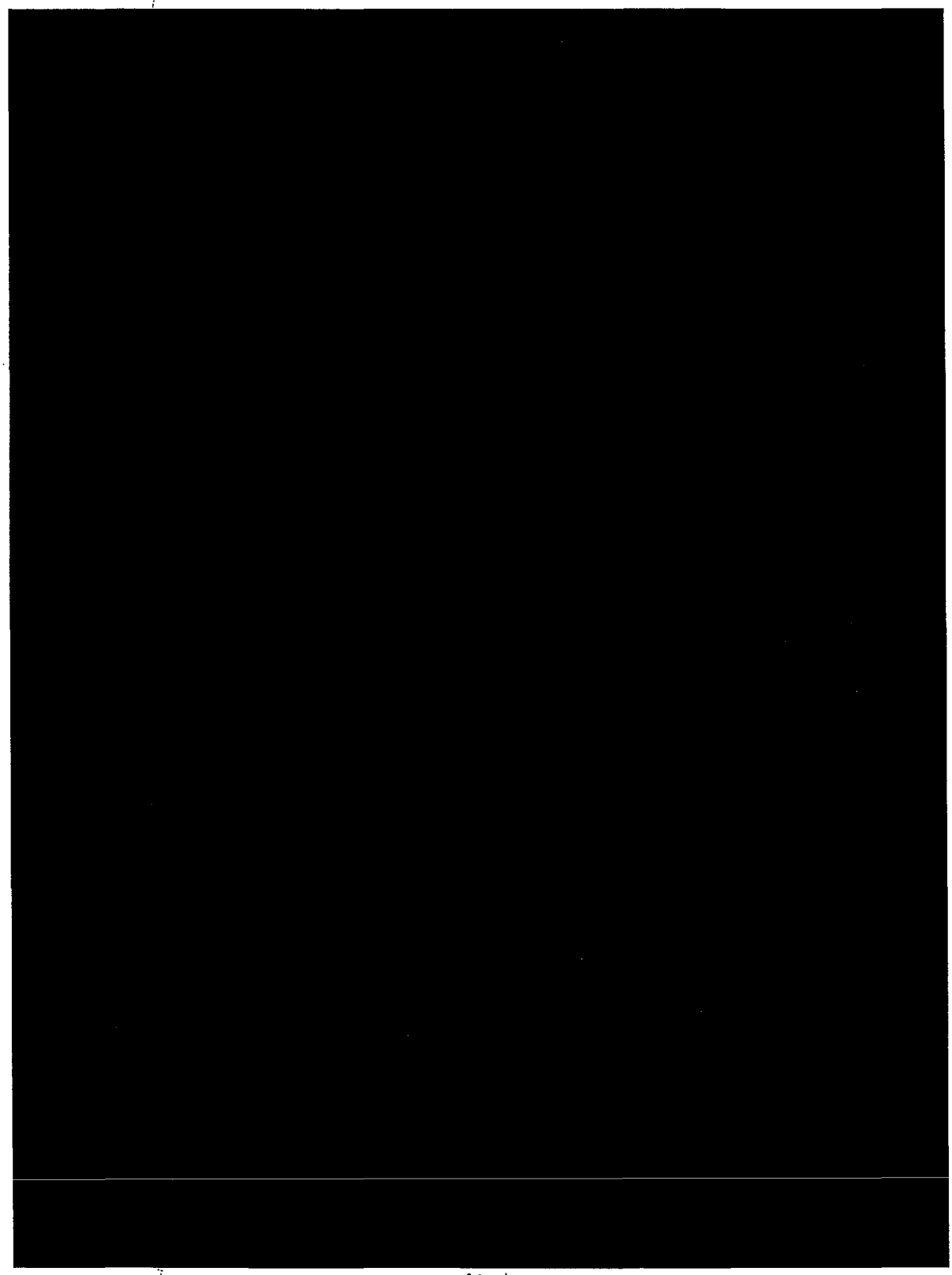

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(U) The Government's declarations in this case therefore establish on their face that the withheld information concerns intelligence methods and CIA functions protected from disclosure under the NSA and CIA Act. That conclusion is reinforced by the substantial deference that courts must give to those declarations.

(U) The Supreme Court has made clear that the CIA's judgment in determining what would constitute an unauthorized disclosure of intelligence sources or methods is "very broad." *Sims*, 471 U.S. at 168-69. The Court in *Sims* explained that Congress vested the CIA with "sweeping power" in the NSA to

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shield its activities from public disclosure, and emphasized that the statute's "plain meaning" cannot "be squared with any limiting definition that goes beyond the requirement that the [withheld] information fall within the Agency's mandate to collect foreign intelligence." *Id.* at 169. Congress did not limit the scope of "intelligence sources and methods" under the NSA in any way. *Id.* Indeed, the CIA "would be virtually impotent" without "broad power to protect the secrecy and integrity of the intelligence process." *Id.* at 170. The Supreme Court thus instructed the judiciary to defer to the CIA's judgments with respect to disclosures that may affect intelligence sources and methods:

> [I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence gathering process.

Id. at 180; *see also Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (describing Exemption 3 in conjunction with the NSA as "a near-blanket FOIA exemption").

(U) Moreover, "[a] specific showing of potential harm to national security is irrelevant to the language of" the NSA because "Congress has already decided" that disclosure of information protected by the statute "is potentially harmful."

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Linder v. NSA, 94 F.3d 693, 696 (D.C. Cir. 1996) (alterations omitted). The Court thus must decide only "whether the withheld material relates to intelligence sources and methods," *Larson*, 565 F.3d at 865, or the CIA's functions of conducting intelligence activities and utilizing intelligence methods.

(U) The Government's declarations easily satisfy the standard of demonstrating a "logical" or "plausible" basis for the CIA's judgment that the withheld information pertains to intelligence methods and CIA functions. *Wilner*, 592 F.3d at 75. By characterizing this information as merely a "source of authority," and not an intelligence method, the district court improperly narrowed the scope of intelligence methods and CIA functions protected by the NSA and CIA Act (and therefore Exemption 3). This is precisely what the Supreme Court has admonished courts not to do. The Court in *Sims* reversed the court of appeals' determination that only certain intelligence sources were entitled to protection under the NSA and Exemption 3, concluding that the lower court's "narrowing" of the CIA's authority to protect intelligence sources and methods "not only contravene[d] the express intention of Congress, but also overlook[ed] the practical necessities of modern intelligence gathering — the very reason Congress

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entrusted the Agency with sweeping power to protect its 'intelligence sources and methods.'" 471 U.S. at 169. The district court here likewise erred in imposing its own definition of intelligence methods rather than deferring to the CIA's informed judgment. This Court accordingly should reverse the judgment of the district court.

III. (U) The Government Properly Withheld Information Concerning the Classified Intelligence Method Under Exemption 1

A. (U) Exemption 1 and the Classification of Intelligence Methods and Activities Under Executive Order 12,958

(U) Exemption 1 of FOIA, 5 U.S.C. § 552(b)(1), provides an independent basis to withhold the classified intelligence method from public disclosure. Exemption 1 protects matters that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy," and "are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). As relevant here, Executive Order 12,958, as amended, authorized the classification of information concerning "intelligence activities (including special activities), [and] intelligence sources or methods," so long as an original classification authority "determines that the

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unauthorized disclosure of the [information] . . . reasonably could be expected to result in damage to the national security" and "is able to identify or describe the damage." Exec. Order 12,958 §§ 1.4(c), 1.1(4), 68 Fed. Reg. 15,315-34, at 15,315, 15,317.*

(U) As in the Exemption 3 context, in reviewing the Executive Branch's classification determination under FOIA Exemption 1, "substantial weight" must be accorded agency affidavits concerning the classified status of the records at issue. *Doherty v. DOJ,* 775 F.2d 49, 52 (2d Cir. 1985). This Court recently observed in *Wilner* that:

> we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review. We affirm our deferential posture in FOIA cases regarding the uniquely executive purview of national security. Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies, regarding questions such as whether disclosure of

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* (U) There is no dispute that the remaining criteria for proper classification are satisfied: Information Review Officer Hilton was delegated original classification authority within the meaning of Executive Order 12,958 (*see* JA 549 ¶ 6, 555-56 ¶ 19); she personally reviewed the classified information at issue (JA 555-56 ¶ 19); and she determined that such information is "owned by the U.S. Government" (JA 556 ¶ 20). *See* Exec. Order 12,958, 68 Fed. Reg. at 15,315.

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terrorist-related surveillance records would pose a threat to national security.

592 F.3d at 76 (internal citations and quotation marks omitted). Accordingly, "[t]he [Government's] arguments need only be both 'plausible' and 'logical' to justify the invocation of' Exemption 1. *ACLU*, 628 F.3d at 624; *see Wilner*, 592 F.3d at 75.

B. (U) The Government Has Demonstrated That the Withheld Information Was Properly Classified

(U) The Government's declarations plainly establish that the information concerning the classified intelligence method withheld from the OLC memoranda falls squarely within the category of "intelligence activities (including special activities), [and] intelligence sources or methods" that is properly classified pursuant to Executive Order 12,958 § 1.4(c), 68 Fed. Reg. at 15,317. For all of the reasons discussed above with respect to Exemption 3, the information at issue concerns intelligence methods. *See supra* Point II.B.

[redacted] The information also pertains to intelligence activities. Exec. Order 12,958 § 1.4(c), 68 Fed. Reg. at 15,317. [redacted]

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[redacted] The Government's declarations also demonstrate that disclosure could reasonably be expected to cause exceptionally grave damage to the national security of the United States. [redacted]

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1. (U) **Damage to Activities and Relationships With Foreign Intelligence Partners**

(U) Revealing the withheld information likely would damage the United

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States' "ongoing activities and relationships with foreign intelligence liaison partners, which are of the utmost importance to the CIA's overseas intelligence operations." (JA 1367 ¶ 9(a)).

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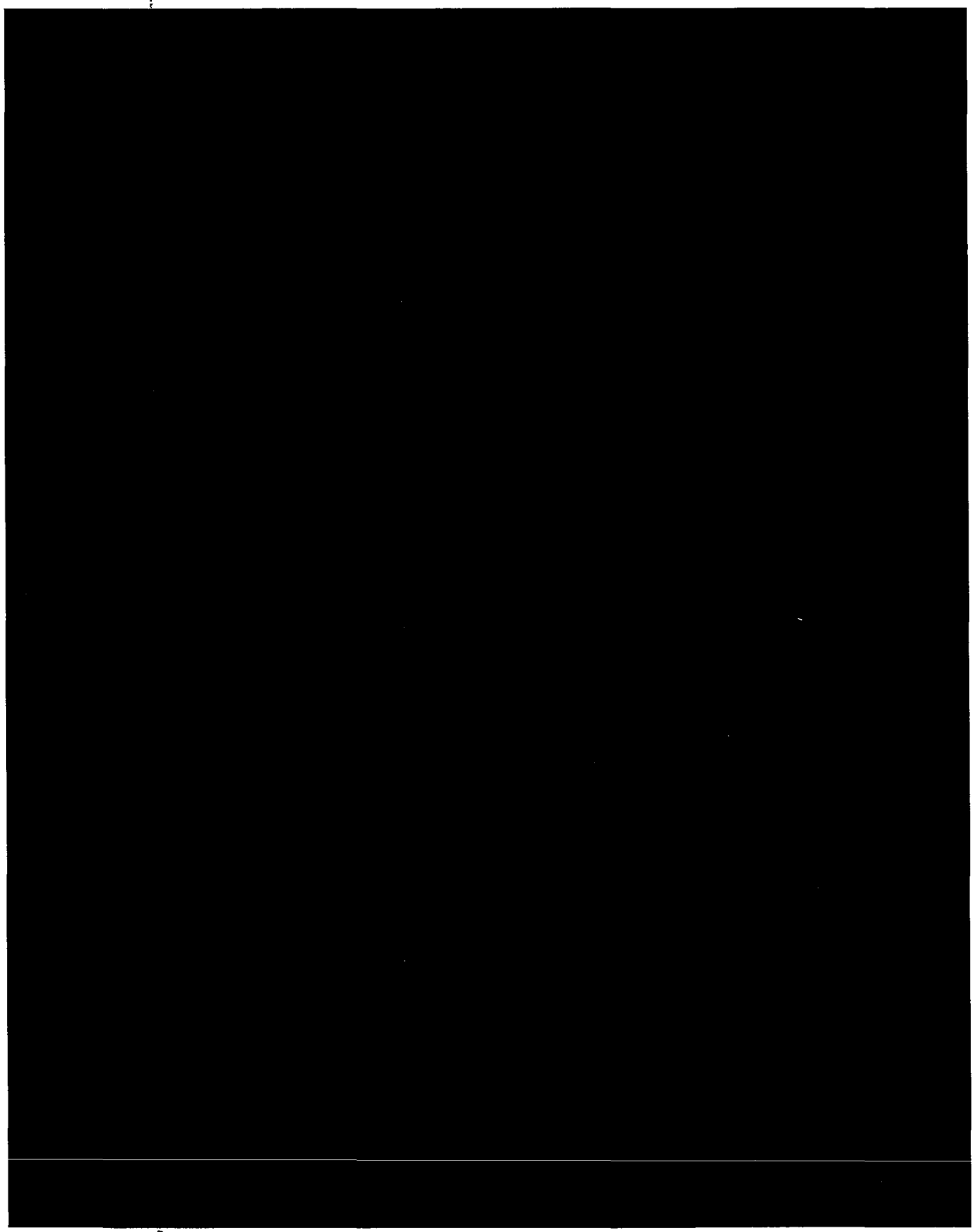

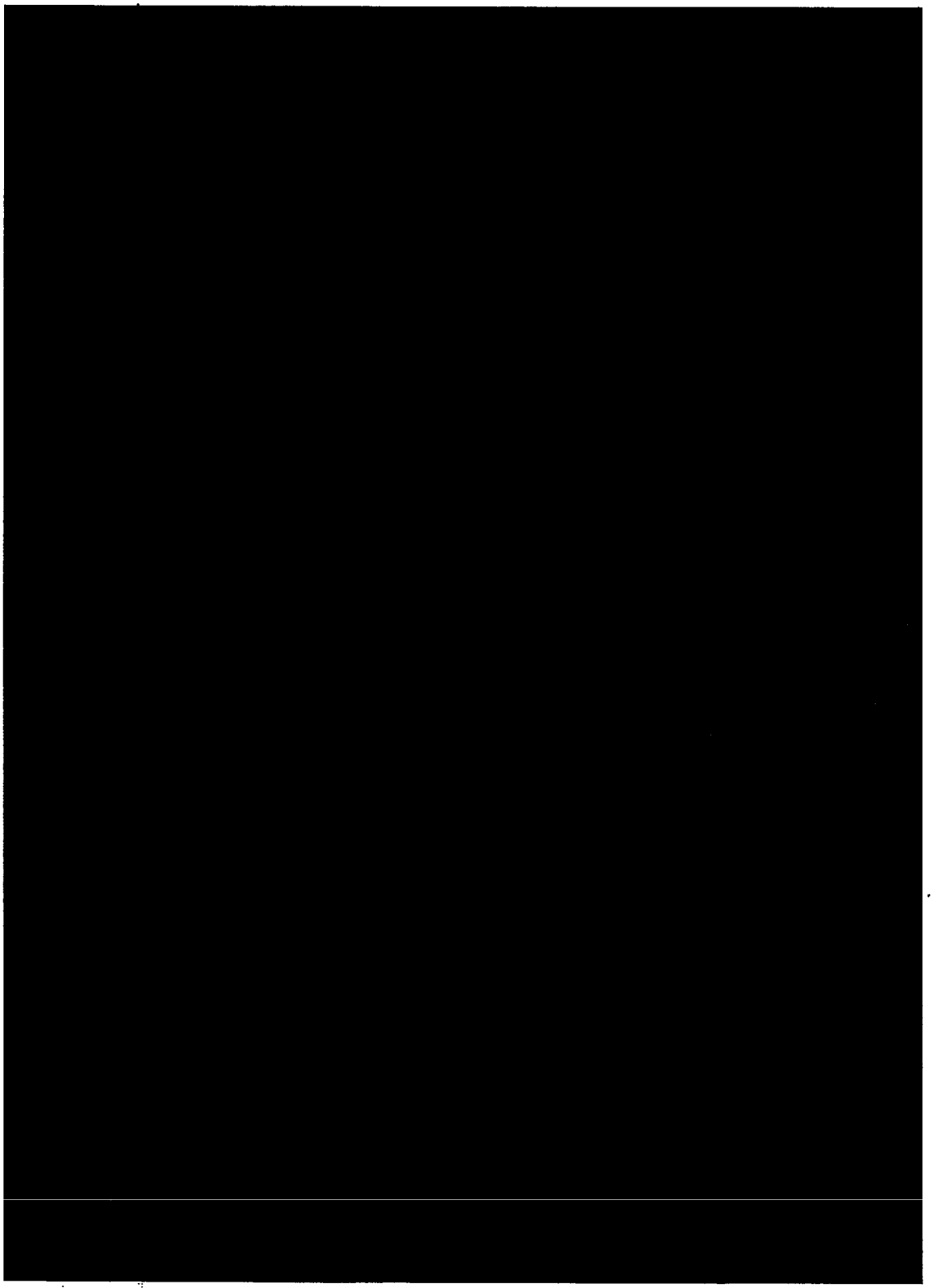

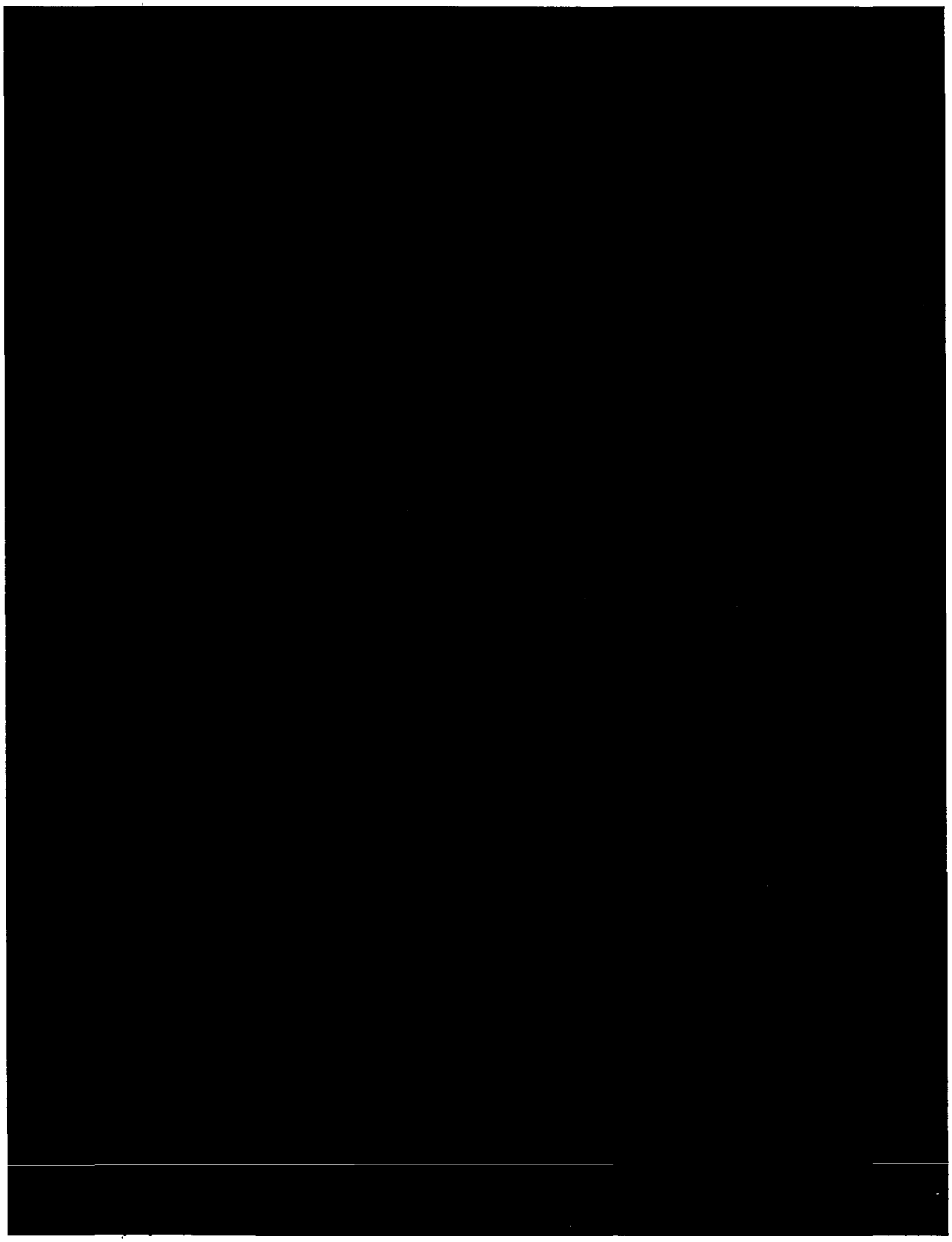

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2. (U) Revealing Information to Hostile Organizations and Increasing Risk to Intelligence Agents and Sources

(U) Disclosure of information relating to the classified intelligence method would "alert[] our adversaries to the existence of that intelligence method, which would give them the opportunity to alter their conduct to adapt to this new

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information and make future intelligence operations more dangerous and less effective." (JA 1367 ¶ 9(b)). This would also "increase the risks for all individuals involved in those operations." (JA 1368 ¶ 9(c)).

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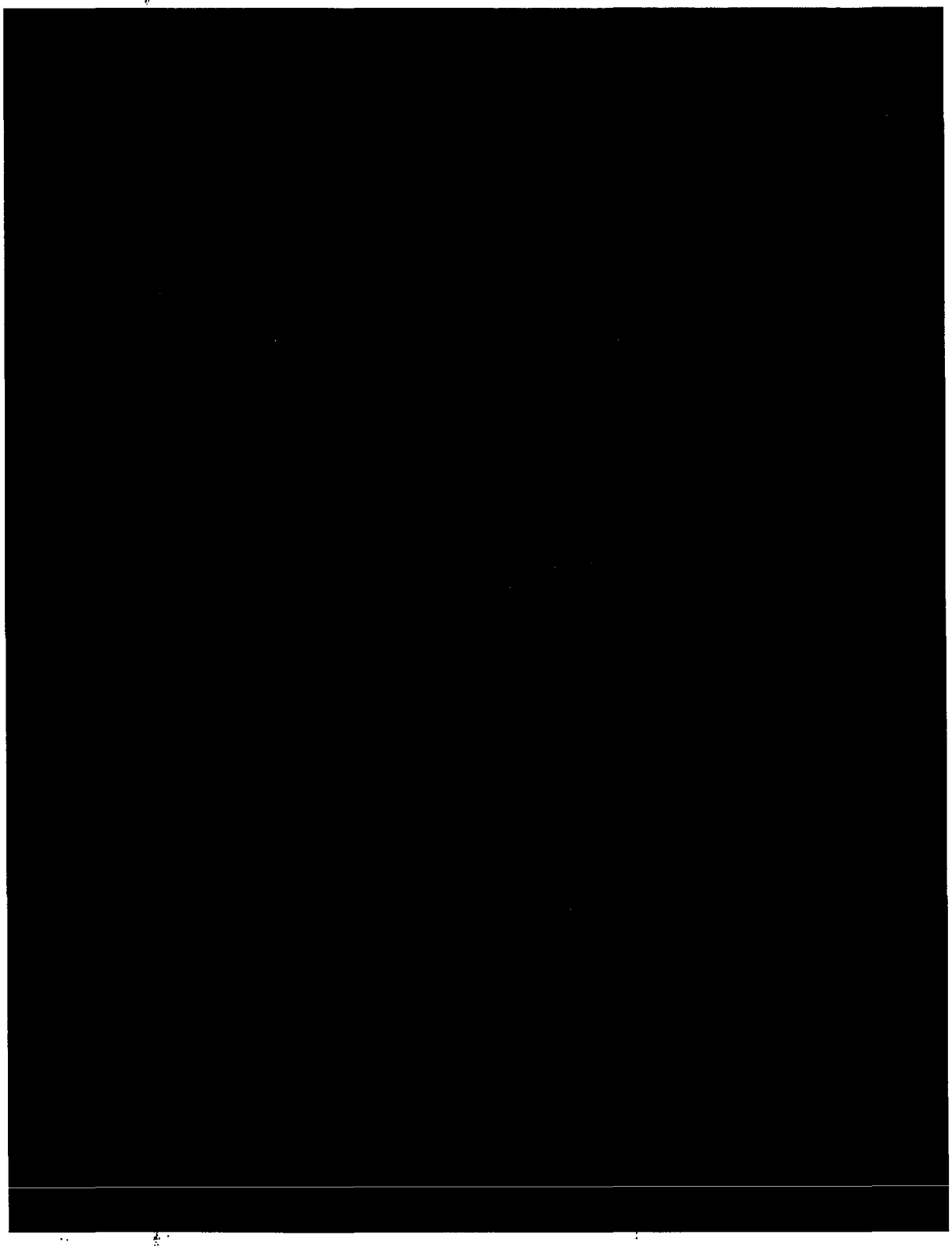

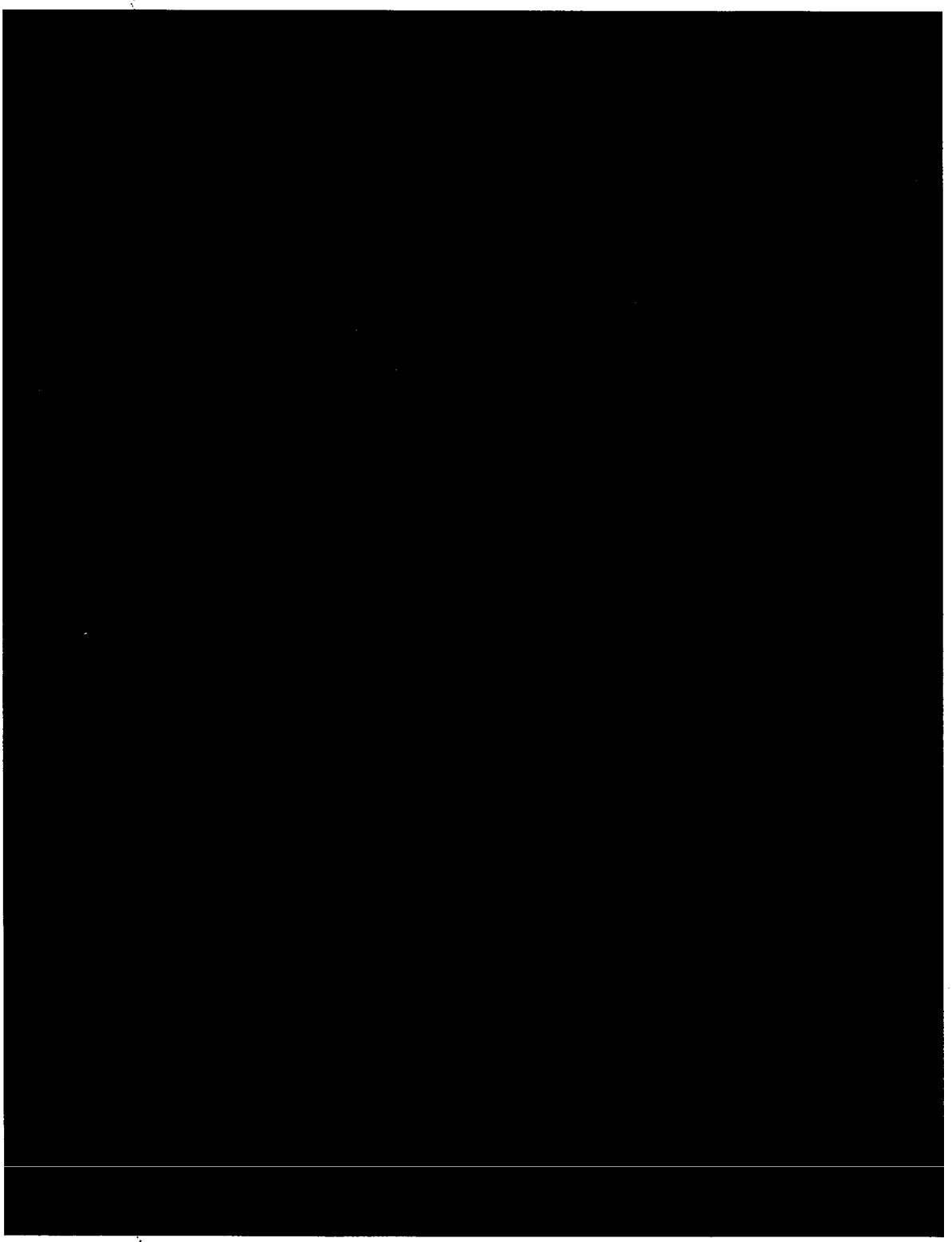

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(U) In sum, the Government's declarations make clear that disclosing information concerning the classified intelligence method would "damag[e] on-going activities and relationships with foreign intelligence liaison partners," (JA 1367 ¶ 9(a)), "make future intelligence operations more dangerous and less effective" (*id.* ¶ 9(b)), and "increas[e] the risks for all individuals involved in those operations, including CIA officers and assets" (JA 1368 ¶ 9(c)). In light of these anticipated harms, the intelligence method is properly classified as TOP SECRET because its disclosure "reasonably could be expected to result in extremely grave damage to the national security." (JA 568 ¶ 40; *see* JA 557-58 ¶¶ 22-23 (citing Executive Order 12,958)).

(U) The Government's justifications for the classification of this information are "logical" and "plausible," and thus entitled to substantial

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deference from this Court. *Wilner*, 592 F.3d at 73, 75; *ACLU*, 628 F.3d at 619, 624; *cf. also Wilson v. CIA*, 586 F.3d 171, 196 (2d Cir. 2009) (deferring to harms predicted by CIA because agency provided "rational and plausible reasons for continued classification"). Courts consistently have deferred to the Executive Branch's assessment that disclosure of classified information would cause precisely these kinds of harms. *See, e.g.*, *ACLU*, 628 F.3d at 625, 626 (deferring to Executive Branch's assessment that revelation of information would harm national security by undermining agency's ability to secure cooperation of foreign governments, and by advising hostile foreign governments and other organizations of the United States' intelligence operations, making future operations more difficult and more dangerous); *Larson*, 565 F.3d at 863-64 (deferring to Executive Branch's assessment that intelligence sources could well refuse to supply information if CIA is unable to maintain confidentiality of relationship); *Wolf*, 473 F.3d at 376 (exposure of information concerning CIA's secret relationship with foreign national could be expected to adversely affect United States' relations with that country); *see also Sims*, 471 U.S. at 175 ("The Government has a compelling interest in protecting both the secrecy of information important to our national

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security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." (citation and internal quotation marks omitted)); *Phillippi*, 655 F.2d at 1332 ("[T]he FOIA does not require the CIA to lighten the task of our adversaries around the world by providing them with documentary assistance from which to piece together the truth."). In short, the Government properly invoked Exemption 1, and the district court's judgment can be reversed on that independent ground.

IV. (U) The District Court's "Compromise Proposal" Exceeded Its Authority Under FOIA

(U) Finally, the district court's effort to craft a "compromise proposal," whereby the Government could avoid public disclosure of information regarding the classified intelligence method only by substituting a purportedly neutral phrase invented by the district court (CA 149-50; *see* CA 142-46, 151), exceeded the court's authority under FOIA.

(U) FOIA does not permit courts to compel an agency to produce anything other than responsive, non-exempt records. *See* 5 U.S.C. § 552(a)(4)(B) (district court "has jurisdiction to enjoin the agency from withholding agency records and

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to order the production of any agency records improperly withheld from" complainant). Once an agency establishes that information falls within a FOIA exemption, it cannot be compelled to produce that information, even in an altered or modified form. *See, e.g., Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) ("The Act does not obligate agencies to create or retain documents."); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975) (FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create"); *Carson v. U.S. Office of Special Counsel*, 534 F. Supp. 2d 99, 103 (D.D.C. 2008) ("[P]laintiff's request that this Court order the defendant to create records or to render opinions . . . is not cognizable under the FOIA.").

(U) Here, the district court acknowledged the potential harms that could be expected to flow from public disclosure of information concerning the classified intelligence method. (CA 145; *see also* CA 86, 142, 148-49). The district court recognized that revealing this information could chill our relationship with foreign allies and be used by hostile groups to the United States' detriment. (CA 142, 145, 146). The court stated that it deferred to the Executive Branch's assessments in

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this regard. (CA 142, 145, 146).

(U) Once the district court determined that the Government's judgments of harm were reasonable and entitled to deference, its inquiry should have ended. The district court had no authority under FOIA to attempt to devise substitute text for exempt information that, in its judgment, would avoid the harms that could be expected to flow from disclosure of such information. *Cf. Wilner*, 592 F.3d at 76 ("Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies." (internal quotation marks and citation omitted)).

(U) The district court's apparent reliance on the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, §§ 1-16, as a basis to expand the scope of available relief under FOIA (*see* CA 149-50) was erroneous.* CIPA applies exclusively in criminal cases. *See* 18 U.S.C. App. 3, §§ 2-3, 5.

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* (U) The district court specifically referred to the "CISA, Confidential Information Securities Act." (JA 1184-85; SPA 95-96). It appears that the court intended to refer to CIPA, as "CISA" does not exist, and the court described the statute as providing a procedure for handling the introduction of classified evidence in criminal trials. (*Id.*).

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(U) By adopting CIPA-like procedures in the FOIA context (CA 149-50), the district court also failed to appreciate the materially distinct purposes animating those statutes. CIPA "was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest." *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) (internal quotation marks omitted).* CIPA's procedures allow a court to authorize the Government to disclose information in an unclassified and modified form to ensure that a defendant receives a fair trial, while protecting sensitive classified information from disclosure. 18 U.S.C. App. 3, § 6(c). Significantly, the Government retains ultimate control as to whether classified information will be disclosed, in any form, during the criminal proceedings, *id.* § 6(e), and the Government always retains the option to discontinue the prosecution if it deems it

* (U) Congress also intended to "minimize the problem of so-called graymail — a threat by the defendant to disclose classified information in the course of trial — by requiring a ruling on the admissibility of the classified information before trial." *Id.* (quoting S. Rep. No. 823, 96th Cong., 2d Sess. 2, reprinted in 1980 U.S.S.C.A.N. 4294, 4295). As courts have noted, this concern cuts against allowing disclosure in the civil litigation context. *See Sterling v. Tenet*, 416 F.3d 338, 343, 347-48 (4th Cir. 2005).

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necessary.

(U) This contrasts sharply with FOIA. A FOIA requester's need for documents responsive to his or her request is irrelevant to the propriety of disclosure. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). The only issue for a court adjudicating an agency's withholding of records is whether the records fall within any of the nine exemptions delineated by the statute. 5 U.S.C. § 552(b). And unlike in criminal cases, the Government does not have the option of discontinuing a FOIA case in order to avoid disclosure of classified national security information, nor can the Government restrict the right of the person receiving the information to publish that material. Under FOIA, release to one requester requires release to *all* requesters. *Nat'l Archives & Records Adm. v. Favish*, 541 U.S. 157, 174 (2004) ("It must be remembered that once there is disclosure, the information belongs to the general public.").

(U) There is therefore no basis for a district court to "compromise" under FOIA. Where, as here, information is protected by a FOIA exemption, it may be withheld, without regard to whether other language or information would be exempt.

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(U) Conclusion

(U) For the foregoing reasons, the district court's judgment dated October 1, 2010, compelling disclosure of information concerning the classified intelligence method contained in the OLC memoranda, should be reversed.

Dated: New York, New York
March 4, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 11,528 words in this brief.

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