10-4290(L)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

BRIEF FOR THE PLAINTIFFS–APPELLEES–CROSS-APPELLANTS

ALEXANDER A. ABDO
JAMEEL JAFFER
JUDY RABINOVITZ
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2517

LAWRENCE S. LUSTBERG
ALICIA L. BANNON
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102-5310

MICHAEL RATNER
GITANJALI GUTIERREZ
EMILOU MACCLEAN
SHAYANA KADIDAL
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

BETH HAROULES
ARTHUR EISENBERG
New York Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each corporate Appellee certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

Jurisdictional Statement 1

Issues Presented for Review 1

Statement of the Case 2

Statement of Facts 4

A. The FOIA Request. 4

B. The CIA's Destruction of the Videotapes and the Parties' Fifth Motions for Partial Summary Judgment. 6

C. The District Court's Rulings on the Fifth Motions for Partial Summary Judgment. 9

Summary of the Argument 11

ARGUMENT 14

I. FOIA and the Standard of Review. 14

II. The District Court Erred in Allowing the Withholding of Information Relating to Waterboarding. 18

A. The CIA may only withhold "intelligence methods" within its charter. 19

B. Waterboarding is not an "intelligence method" because, as the President has confirmed, it violates the CIA's charter. 24

III. The District Court Erred in Allowing the Withholding of a One-Page Photograph of Abu Zubaydah. 32

IV. The District Court Properly Ordered the Disclosure of the "Source of Authority." 36

CONCLUSION 41

TABLE OF AUTHORITIES

Cases

Am. Civil Liberties Union v. Dep't of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004).....4

Am. Civil Liberties Union v. Dep't of Def., 628 F.3d 612 (D.C. Cir. 2011)..... 30, 31

Am. Civil Liberties Union v. Dep't of Def., 723 F. Supp. 2d 621 (S.D.N.Y. 2010).....10

Am. Civil Liberties Union v. Dep't of Justice, No. 1:10-cv-123 (D.D.C. Feb. 14, 2011).....31

Cent. Intelligence Agency v. Sims, 471 U.S. 159 (1985)..... passim

Fed. Labor Relations Auth. v. Dep't of Veteran Affairs, 958 F.2d 503 (2d Cir. 1992) 14

Founding Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824 (D.C. Cir. 1979).....28

Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) 14, 35

Halpern v. Fed. Bureau of Investigation, 181 F.3d 279 (2d Cir. 1999)..... 14, 15, 35

In re Estate of Marcos Human Rights Litig., 910 F. Supp. 1460 (D. Haw. 1995) 26

Lesar v. Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980).....15

Lykins v. Dep't of Justice, 725 F.2d 1455 (D.C. Cir. 1984) 15

Maynard v. Cent. Intelligence Agency, 986 F.2d 547 (1st Cir. 1993).....20

Mead Data Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).....36

Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981)..... 20, 40

Morley v. Cent. Intelligence Agency, 508 F.3d 1108 (D.C. Cir. 2007) 33

Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).....33

Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005)..... 14, 15

Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).....14

Navasky v. Cent. Intelligence Agency, 499 F. Supp. 269 (S.D.N.Y. 1980)..... 17, 18, 23, 38

People for the Am. Way Found. v. Nat'l Sec. Agency, 462 F. Supp. 2d 21 (D.D.C. 2006)..... 29, 30

Phillippi v. Cent. Intelligence Agency, 546 F.2d 1009 (D.C. Cir. 1976)..... 20, 40

Terkel v. AT&T Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006).....30

United States v. Lee, 744 F.2d 1124 (5th Cir. 1984) 26

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).....15

Weissman v. Cent. Intelligence Agency, 565 F.2d 692 (D.C. Cir. 1977) ..... passim

Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009) 27, 28, 39

Wolf v. Cent. Intelligence Agency, 473 F.3d 370 (D.C. Cir. 2007) 35

Wood v. Fed. Bureau of Investigation, 432 F.3d 78 (2d Cir. 2005) 15

Statutes

18 U.S.C. § 2340A 26

18 U.S.C. § 2441 26

Central Intelligence Agency Act of 1949, Pub L. No. 81-110, 63 Stat. 208 17

50 U.S.C. § 403g..... 17, 24, 39, 40

Freedom of Information Act, 5 U.S.C. § 552 ..... passim

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 24

National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 ..... 17, 20

50 U.S.C. § 403 22

50 U.S.C. § 403-1 ..... 17, 20, 24, 39

50 U.S.C. § 403-4a 24

Other Authorities

Black's Law Dictionary (9th ed. 2009) 38

Dep't of Justice, Office of Prof'l Responsibility, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (June 29, 2009) 26

Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) 16, 17, 40

Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes*, 1 J. Int'l Crim. Just. 135 (2003) 26

Merriam-Webster (2011) 38

President Barack Obama, News Conference by the President (Apr. 29, 2009) 8, 25

President Barack Obama, Statement on Release of OLC Memos (Apr. 16, 2009) 8, 25

S. Rep. No. 94-755, Book I (1976) 23

Webster's New International Dictionary (2d ed. 1944) 38

Jurisdictional Statement

Jurisdiction over this lawsuit in the district court was based upon the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B), (6)(E)(iii), and 5 U.S.C. §§ 701–706, as well as 28 U.S.C. § 1331. Joint Appendix ("JA") 12, No. 1 (Compl.). On October 1, 2010, the district court entered partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), upon concluding that there was no just reason to delay this appeal. Special Appendix ("SPA") 105–09, JA 1383–87. Plaintiffs filed a timely notice of appeal on November 12, 2010. JA 1390–92; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

The issues presented by this appeal are:

(1) Whether waterboarding is an "intelligence method" within the meaning of the CIA's withholding authorities under FOIA even though the President has made clear that it violates the CIA's charter.

(2) Whether the CIA may withhold a photograph under FOIA Exemptions 1 and 3 despite having presented no explanation for its withholding.

(3) Whether the government may withhold the identity of a "source of authority" as an "intelligence method" under FOIA Exemptions 1 and 3.

Statement of the Case

This cross-appeal concerns the CIA's withholding under FOIA Exemptions 1 and 3 of records describing the CIA's use of waterboarding as well as "a one-page photo of Abu Zubaydah." The district court ordered the CIA to identify and process these records under FOIA after the CIA publicly revealed that it had destroyed videotapes depicting the use of "enhanced interrogation techniques" against certain prisoners held in CIA prisons overseas. Those tapes were responsive to Plaintiffs' FOIA request, and, as a partial remedy for their destruction, the district court ordered the CIA to identify all records describing their contents. The CIA identified numerous such records, but it withheld all of them. With one exception not relevant here, the district court upheld those withholdings.

The court held that information concerning "enhanced interrogation techniques," including waterboarding, could be withheld because the techniques are "intelligence methods" within the meaning of the CIA's withholding authorities under FOIA. The court also upheld the withholding of the photograph of Abu Zubaydah, notwithstanding the CIA's failure to present any justification for its withholding.

On appeal, Plaintiffs pursue only their challenges to the withholding of information relating to waterboarding and to the withholding of the photograph of

Abu Zubaydah. Information about waterboarding may not be suppressed by the CIA as an "intelligence method" because, as the President has publicly confirmed, waterboarding is illegal and therefore falls outside the CIA's charter. The CIA has also improperly withheld the photograph of Abu Zubaydah because it has yet to offer an adequate basis for its withholding. The district court upheld the photograph's withholding apparently based upon the CIA counsel's contention at a closed hearing that disclosure of the photograph would reveal more information about the subject of the photograph than simply his name. But that rationale is plainly inadequate. The CIA is not entitled to withhold records simply because the records would reveal information that has not already been revealed, and here the CIA has not demonstrated, or even claimed, that information that would be disclosed by the photograph is independently withholdable as an "intelligence source or method."

For these reasons and those discussed below, the Court should reverse the judgment of the district court with respect to these withholdings. Additionally, the Court should affirm the portion of the district court's order at issue in the government's appeal. That appeal concerns the district court's correct conclusion that a "source of authority" redacted from two memoranda released by the government is not an "intelligence method."

Statement of Facts

A. The FOIA Request.

On October 7, 2003, Plaintiffs served the Central Intelligence Agency ("CIA") and other federal agencies with a FOIA request seeking the disclosure of records concerning the treatment, death, and extraordinary rendition of individuals apprehended after September 11, 2001 and held in U.S. custody abroad. JA 113; JA 12, No. 1 (Compl. ¶ 2). On June 2, 2004, having received no meaningful response to the request, Plaintiffs commenced this action. *Id.*

Several months later, the Honorable Alvin K. Hellerstein, U.S. District Judge for the Southern District of New York, ordered the CIA and the other agencies involved to produce or identify all records responsive to Plaintiffs' request. *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004).

Since that time, the government has disclosed thousands of documents in response to Plaintiffs' FOIA request. Among the most significant of the disclosures is a memorandum from the Office of Legal Counsel ("OLC") to the CIA, dated August 1, 2002 and entitled *Interrogation of al Qaeda Operative*. JA 508–25; *see also* JA 550–51. That memorandum analyzed whether ten "enhanced interrogation techniques"—which the CIA sought to use in the interrogation of a detainee named Abu Zubaydah—would violate the federal prohibition against

torture, 18 U.S.C. § 2340A. JA 508–09. The ten techniques considered were: "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard." *Id.*

The memorandum described "the waterboard" as follows:

> In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated.

JA 510–11. Other memoranda and reports released in response to this litigation provide additional detail about the CIA's use of waterboarding. *See, e.g.*, JA 434–36, 462–66 (OLC memorandum, dated May 10, 2005); JA 482, 496, 498 & n.28 (OLC memorandum, dated May 30, 2005); JA 533–34, 541–42 (OLC memorandum, dated May 10, 2005); *see generally* JA 875–94 (CIA Inspector General's *Special Review*).

B. The CIA's Destruction of the Videotapes and the Parties' Fifth Motions for Partial Summary Judgment.

On December 6, 2007, in anticipation of forthcoming news stories on the topic, the CIA disclosed that it had videotaped the interrogations of Abu Zubaydah and others in 2002, and that it had destroyed those videotapes in 2005. JA 370–71; JA 1371. Because the videotapes were responsive to Plaintiffs' FOIA request and subject to the Court's processing orders, Plaintiffs promptly moved the district court to hold the CIA in contempt for the tapes' destruction, a motion that is now awaiting resolution.[1] *Id.* As partial recompense for the tapes' destruction, the district court ordered the CIA to produce records describing the contents of the videotapes to allow their reconstruction. *Id.*; JA 63, No. 339 (Order Regulating Government's Proposed Work Plan ¶ 3, Apr. 20, 2009).

In response to that order, the CIA identified approximately 580 records describing the contents of the destroyed videotapes, and it created an index of a 65-record sample of those records. JA 1371; JA 583.[2] The sample records consist of contemporaneous accounts of interrogations, interrogation logbooks, a photograph

[1] The district court held Plaintiffs' contempt motion in abeyance pending the completion of a criminal investigation into the CIA's destruction of the tapes. That investigation recently concluded, and Plaintiffs have accordingly renewed their contempt motion.

[2] The CIA's declarations filed in support of its invocation of Exemptions 1 and 3 to withhold the sixty-five sample records are at JA 582–605 and JA 1084–89. The indices listing the records are appended to the first of those declarations and appear on the district court's docket as *Vaughn* Index, June 8, 2009, ECF Nos. 352-2, 352-3, *available at* http://www.aclu.org/files/pdfs/safefree/acluvdod_panettadeclaration_index1.pdf, *and* http://www.aclu.org/files/pdfs/safefree/acluvdod_panettadeclaration_index2.pdf.

of Abu Zubaydah, and other documents. JA 1371. Specifically, the records comprise:

- 53 cables between the CIA's headquarters and an interrogation facility, *Vaughn* Index Nos. 1–53;
- 3 emails postdating the tapes' destruction, *id.* Nos. 54–56;
- 2 lengthy logbooks detailing "observations of interrogation sessions," *id.* Nos. 57–58;
- 1 set of handwritten notes from a meeting between a CIA employee and a CIA attorney, *id.* No. 59;
- 2 memoranda for the record containing descriptions of the contents of the videotapes, *id.* Nos. 60–61;
- 1 lengthy set of handwritten notes taken during a review of the videotapes, *id.* No. 62;
- 2 records "summariz[ing] details of waterboard exposures from the destroyed videotapes," *id.* Nos. 63–64; and
- "a one-page photo of Abu Zubaydah" from October 11, 2002, *id.* No. 65.

The CIA withheld these records in full pursuant to FOIA Exemptions 1 and 3. JA 583.[3] In their fifth motion for partial summary judgment, Plaintiffs challenged the CIA's withholding of information regarding the CIA's use of the "enhanced interrogation techniques," as well as the withholding of the photograph of Abu Zubaydah. JA 67, Nos. 360, 366. The CIA defended its withholdings under Exemptions 1 and 3 in two public declarations and one classified declaration

[3] Portions of the records were also withheld under other exemptions, but those withholdings are not at issue here.

from its director, Leon E. Panetta, JA 582–605; JA 1084–89; Classified Appendix 53–65, which argued that the "enhanced interrogation techniques" were "intelligence methods" within the meaning of the CIA's withholding authorities under FOIA, JA 582–605; JA 1084–89. Mr. Panetta's public declarations provided no explanation for the CIA's withholding of the photograph of Abu Zubaydah. *See generally id.* The index listing the photograph described it as "a one-page photo of Abu Zubaydah," but it, too, failed to explain the basis for the CIA's withholding. *Vaughn* Index No. 65.

In response, Plaintiffs argued, among other things, that the "enhanced interrogation techniques" were not "intelligence methods" within the meaning of the CIA's withholding authorities because they had been repudiated—and, in the case of waterboarding, declared to be unlawful—by the President. *See, e.g.*, President Barack Obama, Statement on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/; President Barack Obama, News Conference by the President (Apr. 29, 2009), http://www.whitehouse.gov/the-press-office/news-conference-president-4292009 ("I believe that waterboarding was torture."; "What I've said—and I will repeat—is that waterboarding violates our ideals and our values. I do believe that it is torture. I don't think that's just my opinion; that's the opinion of many who've examined the topic. And that's why I

put an end to these practices."). Plaintiffs also argued that withholding of the photograph of Abu Zubaydah was improper because the CIA had failed to provide any rationale whatsoever for doing so under Exemptions 1 and 3.

C. The District Court's Rulings on the Fifth Motions for Partial Summary Judgment.

On September 30, 2009, the district court conducted an *in camera* and *ex parte* review of a portion of the sixty-five sample records, as well as a public hearing on the parties' motions. SPA 31–76, JA 1120–65; SPA 1–30, JA 1090–119.[4] With one exception not relevant here, the court deferred to the CIA's withholding decisions under FOIA Exemption 3. SPA 77–82, JA 1166–71; SPA 1–30, JA 1090–119. In a written order dated October 13, 2009 memorializing its tentative oral rulings, the court held that the lawfulness of an intelligence activity is not relevant to whether the activity may qualify as an "intelligence method" within the meaning of the CIA's withholding authorities. JA 1170–71.

Although the court's October 13, 2009 opinion did not mention the photograph of Abu Zubaydah, the district court upheld the CIA's withholding of the photograph during the proceedings on September 30. During the public session, it stated that "the image of a person in a photograph is another aspect of information that is important in intelligence gathering, and I defer in that respect

[4] The district court later released a declassified transcript of the closed proceedings. SPA 31–76, JA 1120–65.

[to the CIA's withholding] as well." SPA 26, JA 1115. During the *in camera* and *ex parte* session, the court appeared to rely on another rationale as well:

> THE COURT: So, on the theory that a person's picture gives out a lot more information, in addition to knowing the name, you want to keep [the photograph] secret.
>
> MR. LANE: Right. And because this is actually a CIA photo of a person in custody.
>
> THE COURT: I defer to that position.

SPA 75–76, JA 1164–65.

Plaintiffs moved for reconsideration of the district court's order allowing the CIA to withhold information relating to the "enhanced interrogation techniques." On July 15, 2010, the court denied that motion, affirming its earlier determination that the CIA's withholdings were justified under Exemption 3 and alternatively holding that withholding was proper under Exemption 1. JA 1369–82; *Am. Civil Liberties Union v. Dep't of Def.*, 723 F. Supp. 2d 621 (S.D.N.Y. 2010).

On October 1, 2010, the district court entered partial final judgment pursuant to Federal Rule of Civil Procedure 54(b), denying Plaintiffs' fifth motion for partial summary judgment and granting the CIA's fifth motion for partial summary judgment. SPA 105–09, JA 1383–87. That same order also resolved the parties' fourth motions for partial summary judgment, which concerned the partial withholding of OLC memos relating to the "enhanced interrogation techniques." The CIA appealed from that portion of the judgment insofar as it ordered the

disclosure of a "source of authority" in the OLC memoranda. JA 1388–89. Plaintiffs cross-appealed from the judgment. JA 1390–92. On appeal, Plaintiffs pursue only their claims that the CIA continues improperly to withhold (1) information about waterboarding and (2) the photograph of Abu Zubaydah.

Summary of the Argument

This appeal turns principally on a simple yet critically important question: whether waterboarding is an "intelligence method" within the meaning of the CIA's withholding authorities under FOIA. In holding that waterboarding *is* such an intelligence method, the district court erred. The very statutes that the CIA invokes to support its assertion that waterboarding is a protectable intelligence method expressly prohibit the CIA from engaging in conduct that is unlawful. The CIA does not contend that its use of waterboarding was lawful—nor could it, because the President himself has repeatedly declared to the contrary. Nor does the CIA contend that disclosure of records relating to waterboarding would compromise ongoing intelligence programs that are lawful. The question here, then, is whether the CIA's authority to withhold information about intelligence methods extends to information concerning activities that have been prohibited by Congress and declared unlawful by the President, where the CIA's only argument for withholding is that the concededly unlawful technique—waterboarding—is itself an intelligence method within the meaning of the relevant statutes.

The district court's holding that waterboarding is an intelligence method is inconsistent with the language of the CIA's withholding statutes and with Congress's intent in enacting those statutes. Indeed, to accept the CIA's argument and the district court's holding would vest the CIA with virtually unreviewable authority to conceal evidence of illegal activity, no matter how clearly that activity contravenes the CIA's charter. It would, for example, allow the CIA to declare that outright murder in the course of an interrogation is an "intelligence method" and to forever conceal any such killings on that basis alone. This cannot be the law. This Court should reverse the judgment of the district court and remand for the district court to determine upon *in camera* review whether segregable portions of the records discussing waterboarding may be released.

The Court should also reverse the judgment of the district court upholding the CIA's withholding of the "one-page photo of Abu Zubaydah." Neither the CIA's declarations in support of its withholdings, nor the CIA's index describing the image and enumerating the exemptions relied upon to withhold it, provide any justification for the withholding of the photograph. In fact, the only justification ever offered by the government came from the government's counsel during an *in camera* and *ex parte* hearing with the district court. Even were an explanation from an agency's counsel an adequate substitute for the agency's own explanation of its withholding—which it is not—the justification offered, which was accepted

by the district court, is conclusory and inadequate. Disclosure of the photograph of Abu Zubaydah would not reveal any "intelligence sources or methods" not already revealed by the government's official acknowledgment of his identity.

Finally, the Court should affirm the district court's judgment ordering disclosure of a "source of authority" discussed in two OLC memoranda released by the government. As the district court held, the "source of authority" is not an "intelligence method" within the plain meaning of the CIA's withholding authorities and may not be withheld as such. The CIA's argument on appeal to the contrary rests primarily on the unprecedented argument that the CIA, and not the judiciary, has the authority to define the term "intelligence method." The CIA is wrong. Although agencies are often owed some measure of deference under FOIA in their predictive judgments (generally of harm), it is ultimately the responsibility of the courts, not the executive branch, to interpret the law. Whether the CIA's "source of authority" is an "intelligence method" is a legal question to be determined by the judiciary.

For these reasons, the Court should reverse the district court's judgment allowing the CIA to withhold information relating to waterboarding and the photograph of Abu Zubaydah, and affirm it with respect to the CIA's "source of authority."

ARGUMENT

I. FOIA and the Standard of Review.

Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) ("FOIA was enacted in order to 'promote honest and open government and to assure the existence of an informed citizenry . . . .'" (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999))).

Toward that end, FOIA requires federal agencies to disclose their records to the public when sought, 5 U.S.C. § 552(a)(3)(A), (a)(6), subject to nine enumerated exemptions, *id.* § 552(b). "In keeping with [FOIA's] policy of full disclosure, the exemptions are 'narrowly construed with doubts resolved in favor of disclosure.'" *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 287 (2d Cir. 1999) (quoting *Fed. Labor Relations Auth. v. Dep't of Veteran Affairs*, 958 F.2d 503, 508 (2d Cir. 1992)); *accord Nat'l Council of La Raza*, 411 F.3d at 355–56. For this reason, any reasonably segregable portion of a withheld record must be released. 5 U.S.C. § 552(b).

The government "bears the burden of demonstrating that any claimed exemption applies." *Nat'l Council of La Raza*, 411 F.3d at 356. Under FOIA, a court must undertake de novo review of an agency's decision to withhold documents, 5 U.S.C. § 552(a)(4)(B), and this Court reviews de novo a district court's grant of summary judgment, *Wood v. Fed. Bureau of Investigation*, 432 F.3d 78, 82 (2d Cir. 2005).

In order to satisfy its burden of demonstrating that an exemption to disclosure applies, the government must submit what are now referred to as a *Vaughn* declaration and *Vaughn* index setting forth the bases for its claimed exemptions under FOIA. *See Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973); *Halpern*, 181 F.3d at 290–93. In light of the tendency of federal agencies to "claim the broadest possible grounds for exemption for the greatest amount of information," agencies are required to produce "a relatively detailed analysis" of the withheld material "in manageable segments" without resort to "conclusory and generalized allegations of exemptions." *Vaughn*, 484 F.2d at 826–27; *see Halpern*, 181 F.3d at 290–93. The *Vaughn* declaration must describe with "reasonable specificity" the nature of the documents and the justification for non-disclosure. *See Halpern*, 181 F.3d at 293–94; *Lesar v. Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980); *Lykins v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)

(requiring "that as much information as possible be made public" in *Vaughn* indices to "enable[] the adversary system to operate").

Two exemptions are relevant here: Exemption 1 and Exemption 3. 5 U.S.C. § 552(b)(1), (b)(3).

Exemption 1 allows the withholding of records 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." *Id.* § 552(b)(1). Here, the CIA relies upon Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995),[5] which provides a comprehensive system for classifying documents that may be kept secret by the government. The Executive Order provides that information may be classified if it falls within an authorized withholding category. *Id.* § 1.1(a)(3). In this case, the CIA relies upon the category that permits the classification of "intelligence sources or methods." *Id.* § 1.4(c). Additionally, information may be classified only if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, . . . and the original classification authority is able to identify or describe the damage." *Id.* § 1.1(a)(4). Notably, the Executive Order prohibits the

[5] Executive Order No. 12,958 was amended by Executive Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). All citations to Executive Order No. 12,958 are to the order as amended.

government from classifying information "in order to . . . conceal violations of the law." *Id.* § 1.7(a)(1).

Exemption 3 allows the withholding of information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). In *Central Intelligence Agency v. Sims*, the Supreme Court established that the consideration of withholdings under Exemption 3 is a two-step process. 471 U.S. 159, 168–69 (1985). First, a court must determine whether the statute relied upon by the government is in fact a withholding statute under Exemption 3. *Id.* Second, a court must assess whether the information withheld actually falls within the withholding statute. *Id.* Here, the CIA relies upon the amended versions of the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, sometimes referred to as the CIA's "charter," *Navasky v. Cent. Intelligence Agency*, 499 F. Supp. 269, 273 (S.D.N.Y. 1980), and the Central Intelligence Agency Act of 1949 ("CIA Act"), Pub L. No. 81-110, 63 Stat. 208, as withholding statutes. The CIA relies specifically upon Section 102A(i)(1) of the National Security Act, 50 U.S.C. § 403-1(i)(1), and Section 6 of the CIA Act, 50 U.S.C. § 403g. Both provisions authorize the Director of National Intelligence to protect "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1); 50 U.S.C. § 403g.

II. The District Court Erred in Allowing the Withholding of Information Relating to Waterboarding.

The heart of this dispute is the CIA's withholding under Exemptions 1 and 3 of information—captured in cables, emails, memoranda, logbooks, and notes—relating to its use of waterboarding, an interrogation technique that the United States has previously prosecuted as a war crime and that the President has declared to be unlawful. The district court held that, under both exemptions, waterboarding is a protectable "intelligence method." This was error. The term "intelligence method" is broad but does not encompass every activity in which the CIA might engage. Rather, precedent interpreting that term—including the Supreme Court's decision in *Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985), the D.C. Circuit's decision in *Weissman v. Central Intelligence Agency*, 565 F.2d 692 (D.C. Cir. 1977), and the Southern District of New York's decision in *Navasky v. Central Intelligence Agency*, 499 F. Supp. 269 (S.D.N.Y. 1980)—has underscored that the term's reach is limited, and specifically that it reaches only those methods that are within the CIA's charter. Thus, "intelligence method" does not encompass activities that Congress has prohibited and that the President has declared to be unlawful.

A. The CIA may only withhold "intelligence methods" within its charter.

The plain language of the National Security Act and the CIA Act make clear that the term "intelligence methods" specifically excludes activities outside the CIA's charter. The district court disagreed, holding that the CIA may withhold information relating to any and every interrogation technique, even if the executive itself considers the technique to fall outside the CIA's charter. In doing so, the court misconstrued Plaintiffs' argument concerning the scope of the CIA's withholding statutes as an argument, instead, about the meaning of Exemption 3. *See, e.g.*, JA 1379 ("Plaintiffs similarly seek to insert 'limiting language' into Exemption 3 . . . ."); *see also* JA 1377–79. As a result, the district court failed to recognize that the CIA's withholding statutes themselves place limits on their scope and that other courts have recognized these limits. Moreover, the district court afforded virtually unreviewable discretion to the CIA to determine the meaning of the statutory phrase "intelligence method." This Court should reverse the judgment of the district court and make clear that (1) it is the province of the courts and not the CIA to define the statutory phrase "intelligence method," and (2) the plain meaning of "intelligence method" within the CIA's withholding statutes excludes conduct that falls outside of the CIA's charter.

Three cases, including the Supreme Court's decision in *Sims*, establish that the term "intelligence methods" does not encompass conduct that falls outside of the CIA's charter.[6]

In *Sims*, FOIA requesters sought the names of individuals and institutions consulted by the CIA as part of a clandestine research and development project. 471 U.S. at 161–63. The CIA withheld those names as "intelligence sources." *Id.*[7] The requesters argued and the lower courts held that an extra-textual limitation applied to the CIA's withholding statute, namely that the CIA could not withhold the names of "intelligence sources" unless it also demonstrated that it needed to maintain the confidentiality of those sources. *Id.* at 164–65. Unsurprisingly, the Court rejected that extra-textual interpretation, holding that the withholding statute at issue "contains no such limiting language." *Id.* at 169. Rather, the Court held, the "'plain meaning' of [the statute] may not be squared with any limiting

[6] Although *Sims* addresses the scope of "intelligence sources and methods" under Exemption 3, the definition of that phrase is the same under Exemption 1. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981) (holding Exemption 3 provides overlapping protection with Exemption 1 where disclosure of classified information would reveal intelligence sources and methods); *Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (noting that the "inquiries into the applicability of the two exemptions [1 and 3] may tend to merge" for "intelligence sources and methods"); *Maynard v. Cent. Intelligence Agency*, 986 F.2d 547, 555 (1st Cir. 1993) (finding review is essentially the same "[w]hen . . . Exemptions 1 and 3 are claimed on the basis of potential disclosure of intelligence sources or methods").

[7] In *Sims*, the CIA premised withholding upon 50 U.S.C. § 403(d)(3), an essentially equivalent predecessor to the withholding statute at issue here. *Compare* National Security Act of 1947, Pub. L. No. 80-253, § 102(d)(3), 61 Stat. 495, *available at* http://intelligence.senate.gov/nsact1947.pdf, *with* 50 U.S.C. § 403-1(i)(1).

definition that goes beyond the requirement that the information *fall within the Agency's mandate* to conduct foreign intelligence." *Id.* (emphasis added).

In other words, the Supreme Court held that the CIA's authority is broad but not unlimited. If the intelligence activity at issue is "within the Agency's mandate," it is an "intelligence source or method" within the meaning of the CIA's charter and may be withheld. Conversely, intelligence activities outside the CIA's charter are not "intelligence sources or methods" within the meaning of the withholding statutes, and they may not be withheld as such.

Although the Supreme Court has yet to hear a case in which the CIA sought to withhold information outside its charter, at least two lower courts have. Both rejected the CIA's claim of exemption upon determining that the conduct at issue fell outside the CIA's charter.

In *Weissman*, the D.C. Circuit considered Gary Weissman's FOIA request to the CIA for files about himself. 565 F.2d at 693. The CIA initially disclosed documents to Weissman revealing that he had been under periodic investigation by the CIA for approximately five years, but it withheld approximately fifty documents under Exemptions 1, 3, and 7, claiming, in part, that the National Security Act's protection of "intelligence sources and methods" extended to the CIA's *domestic* investigation of Weissman. *Id.* at 695–96. The D.C. Circuit rejected this reliance on the "intelligence sources and methods" provision because

the CIA's charter prohibited the CIA from engaging in domestic law-enforcement functions. *Id.* The court held, in essence, that the protection of "intelligence sources and methods" did not "grant [the CIA] power to conduct security investigations of unwitting American citizens," *id.* at 696, and that the withheld documents could not, therefore, be withheld as "intelligence sources and methods."

The D.C. Circuit based this interpretation of "intelligence sources and methods" on the text of the National Security Act. *See, e.g.*, *id.* at 695 ("The National Security Act of 1947, which created the CIA and empowered it to correlate and evaluate intelligence relating to the national security, specifically provided that the 'Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions.' 50 U.S.C. § 403(d)(3). This directive was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency."). The court also cited the Act's legislative history, *see, e.g.*, *id.* ("Congress was well aware such activities create a potential for abuse, and chose to limit the Agency's activities to intelligence gathering abroad. It was unwilling to make it a policeman at home, or to create a conflict between the CIA and the FBI."), and the findings of the Church Committee Report, *see, e.g.*, *id.* at 696 ("'Given the prohibition against internal security functions, it is unlikely that the ['intelligence sources and methods'] provision was meant to include investigations

of private American nationals who had no contact with the CIA, on the grounds that eventually their activities might threaten the Agency.'" (quoting S. Rep. No. 94-755, Book I, at 139 (1976))).

A district court within the Southern District of New York engaged in a similar analysis in *Navasky*, 499 F. Supp. at 274–75. Victor Navasky, a journalist, had sought documents relating to the CIA's "clandestine book publishing activities" as described in the Church Committee Report. *Id.* at 271. The CIA claimed that documents responsive to the request were exempt from disclosure as "intelligence sources and methods." *Id.* at 274. The court rejected that position, holding that neither the text nor the legislative history of the National Security Act "indicates that covert propaganda activities of the kind involved here were contemplated by Congress." *Id.* Secret "book publishing activities," in other words, fell outside of the CIA's charter and, thus, could not be withheld as "intelligence sources and methods." *Id.* at 275 ("The 'intelligence sources and methods' language of section 403(d)(3), therefore, cannot be applied to protect authors, publishers and books involved in clandestine propaganda activities from disclosure.").

The lessons of *Sims*, *Weissman*, and *Navasky* are twofold. First, courts and not the CIA determine the statutory meaning of the phrase "intelligence sources

and methods." And second, while that phrase is broad in meaning, it does not encompass activities that fall outside the CIA's charter.

B. Waterboarding is not an "intelligence method" because, as the President has confirmed, it violates the CIA's charter.

Waterboarding is not an "intelligence method" within the meaning of the CIA's withholding statutes because it falls outside the CIA's charter. Although the National Security Act requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1), the very same Act unequivocally obligates the Director to "ensure compliance with the Constitution and laws of the United States by the Central Intelligence Agency," 50 U.S.C. § 403-1(f)(4); *see also id.* § 403-4a(d)(1) (instructing the Director of the CIA to "collect intelligence through human sources and by other *appropriate* means" (emphasis added)).[8]

This provision of the National Security Act was enacted in 2004. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 102A(f)(4), 118 Stat. 3638, 3649. As with the provision in *Weissman*, it defines the outer boundaries of the CIA's broad authority to use "intelligence sources and

[8] The CIA Act does not independently authorize the protection of "intelligence methods" or broaden that term's reach. It simply recognizes the National Security Act's protection and provides for the additional protection of CIA information not at issue in this appeal. *See* 50 U.S.C. § 403g ("in order further to implement [the National Security Act's protection of] sources and methods . . . the Agency shall be exempted from the provisions of sections 1 and 2 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U.S.C. 654), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency").

methods." The provision in *Weissman* prohibited the CIA from engaging in domestic law-enforcement functions, 565 F.2d at 695–96; the more recently enacted provision prohibits the CIA from violating the law. Because both types of conduct fall outside of the CIA's charter, neither may qualify as an "intelligence method."

Application of this principle to this litigation is straightforward. On April 29, 2009, the President of the United States unequivocally recognized, in a declaration binding on the CIA, that waterboarding is torture and therefore illegal. *See, e.g.*, President Barack Obama, Statement on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/; President Barack Obama, News Conference by the President (Apr. 29, 2009), http://www.whitehouse.gov/the-press-office/news-conference-president-4292009 ("I believe that waterboarding was torture."; "What I've said—and I will repeat—is that waterboarding violates our ideals and our values. I do believe that it is torture. I don't think that's just my opinion; that's the opinion of many who've examined the topic. And that's why I put an end to these practices.").

The President's binding declaration, combined with the CIA charter's prohibition on conduct that violates U.S. law, confirms that waterboarding falls outside the CIA's charter and therefore cannot be an "intelligence method" within

the meaning of the CIA's withholding statutes. For this reason, the district court erred in affirming the CIA's withholding of information about waterboarding as an "intelligence method."[9]

It is important to emphasize the narrowness of this argument. Plaintiffs do not contend that the illegality of governmental conduct is a free-standing trump card to an otherwise valid withholding of information under FOIA. In some circumstances, information relating to illegal activities may be withholdable on other grounds. For example, the questions asked and the responses given during the CIA's waterboarding need not be disclosed because the CIA may have an independent and legitimate interest in protecting them under Exemptions 1 and 3. Nor must interrogation techniques within the CIA's charter be disclosed simply

[9] Even putting aside the President's declaration, it is clear that waterboarding is unlawful and falls outside of the CIA's charter. *See, e.g.*, 18 U.S.C. § 2340A (criminalizing torture); 18 U.S.C. § 2441 (criminalizing grave breaches of Common Article 3 of the Geneva Conventions); *United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984) (rejecting the appeal of a Texas sheriff who was criminally convicted for the use of "water torture" to question prisoners); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (discussing the "water cure"—"where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation"—as a "human rights violation" and a "form[] of torture"); Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes*, 1 J. Int'l Crim. Just. 135 (2003) (discussing the court-martial of U.S. soldiers for use of the "water-cure" during the American occupation of the Philippines after the 1898 Spanish–American war); Dep't of Justice, Office of Prof'l Responsibility, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 234 n.192 (June 29, 2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf (discussing the conviction of Japanese soldiers for the use of "water torture" on American and Allied prisoners during World War II). But the Court need not reach this analysis, as the President's declaration is binding on the CIA.

because they are discussed in the same records discussing waterboarding. Indeed, even a discussion of waterboarding may be withheld if it is otherwise properly withholdable. What the government may *not* do, however, is withhold information about waterboarding, an illegal interrogation technique, on the basis that the illegal conduct is *itself* an "intelligence method."

The district court reached its conclusion to the contrary by making two errors. First, the court insisted that Plaintiffs "seek to insert 'limiting language' into Exemption 3." JA 1379. That is incorrect. Plaintiffs rely, as the court did in *Weissman*, on limiting language *already* in the CIA's charter—language that defines the outer boundary of the CIA's otherwise broad authority to gather intelligence.

Second, the district court read too broadly a decision of this Court relating to the Terrorist Surveillance Program ("TSP"). *See* JA 1379. In *Wilner v. National Security Agency*, 592 F.3d 60 (2d Cir. 2009), this Court considered a FOIA request by attorneys seeking "records showing whether the government ha[d] intercepted plaintiffs' communications relating to the representation of their detainee clients." *Id.* at 64. The National Security Agency ("NSA") refused to confirm or deny the existence of such records, arguing that to do so would compromise the secrecy and efficacy of its "signals intelligence," or surveillance, functions. *Id.* at 74–75. Furthermore, the NSA noted that surveillance, or "signals intelligence," is one of

its "primary functions." *Id.* at 74. Thus, to reveal information about the TSP would compromise one of the NSA's core surveillance activities, not limited to the TSP. This Court upheld the NSA's withholding decision and held that the legality of the TSP was not relevant—as the requesters conceded—to the question of whether details about the NSA's surveillance functions were withholdable. *Id.* at 77.

The requesters in *Wilner* did not, of course, make the argument that Plaintiffs advance here, that the statutory meaning of "intelligence methods" precludes the government from labeling as one such method a technique that the President has declared to be unlawful and, therefore, outside the CIA's charter. But even had the requesters in *Wilner* done so, *Wilner* is simply not pertinent here. The crucial factual distinction is that the NSA's withholdings in *Wilner* focused on its "signals intelligence" functions, information independently withholdable under FOIA even if the NSA were to concede that the TSP—one of many programs using "signals intelligence"—was illegal. Had the Court ordered release of the requested information, it would have potentially compromised ongoing and lawful surveillance activities and not just the TSP. Therefore, the alleged illegality of the TSP did not undermine the NSA's withholding of details about its general surveillance functions, the legality of which had not been challenged. *See also Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 829 n.49

(D.C. Cir. 1979) ("Although NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation, it may properly withhold records gathered illegally if divulgence would reveal *currently viable* information channels, albeit ones that were abused in the past." (emphasis added)).

Another case that considered a similar request for information about the TSP confirms this understanding of *Wilner*. In *People for the American Way Foundation v. National Security Agency*, 462 F. Supp. 2d 21 (D.D.C. 2006), the plaintiffs sought documents related to the TSP and claimed that the documents could not be withheld under FOIA because the TSP was illegal. *Id.* at 30. The court concluded, however, that it "need not grapple with" the alleged illegality of the TSP because the actual activities that the agency sought to suppress—information related to its "signals intelligence"—were in fact legitimate methods that the agency had an interest in protecting. *Id.* at 31; *see id.* (noting that the TSP was only "one of the NSA's *many* SIGINT programs involving the collection of electronic communications" (emphasis added)).

The distinction drawn by *People for the American Way* bears emphasis. When the underlying intelligence method is legitimate, the mere fact that it has been used in an unlawful manner does not necessitate disclosure. But the CIA may

not withhold evidence of illegal conduct by claiming that the illegal conduct *itself* is the "intelligence source or method" deserving of protection.

The CIA has argued that, despite the plain language in its withholding statutes excluding unlawful activity, it alone decides whether an intelligence activity falls within its charter and is therefore withholdable. But this interpretation would vest unreviewable authority within the CIA to conceal evidence of its own misconduct, no matter how egregious. *See generally Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006) (expressing concern that the NSA's interpretation of its withholding statute, "if . . . taken to its logical conclusion, . . . would allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions"); *People for the Am. Way Found.*, 462 F. Supp. 2d at 31 (agreeing with the court in *Terkel* that the NSA's withholding authority is "not without limits").[10]

The D.C. Circuit's recent decision in *American Civil Liberties Union v. Dep't of Defense*, 628 F.3d 612, 622 (D.C. Cir. 2011), did not address Plaintiffs'

[10] The district court drew support for its ruling from the fact that *Sims* upheld the CIA's withholdings despite the fact that portions of the underlying CIA program at issue had been repudiated by an executive order. JA 1379. But this misses the point. Those allegedly unlawful portions of the program were in fact revealed and "became the subject of executive and congressional investigations." *Sims*, 471 U.S. at 162. As with the TSP cases, however, the information still withheld by the CIA—its "intelligence sources" related to the program—were properly withheld because an independent ground for withholding existed even though other portions of the program fell outside the CIA's charter.

arguments here. Although the court upheld the CIA's withholding of information relating to the CIA's use of "enhanced interrogation techniques," the court's legal reasoning (in the four sentences it devotes to the issue) is consistent with Plaintiffs' position. The court stated that "there is no legal support for the conclusion that illegal activities cannot produce classified documents." *Id.* Plaintiffs agree. For example, the alleged illegality of the TSP was properly determined to be no barrier to the withholding of the NSA's "signals intelligence" functions, which remained properly classified. In any event, the D.C. Circuit did not address its prior decision in *Weissman* or the crux of Plaintiffs' claim here: that the meaning of "intelligence method" within the CIA's charter is broad but limited by Congress's requirement that the CIA comply with the law. Although illegal activity may be withholdable on other grounds, the illegal activity itself cannot be an "intelligence method."[11]

For these reasons, the Court should reverse the judgment of the district court and remand with instructions for the district court to determine whether information relating to waterboarding may be segregated from properly classified information. If it can, it must be disclosed.

[11] In an unpublished decision, a district court for the District of Columbia recently followed the D.C. Circuit's decision in affirming the withholding of information relating to "enhanced interrogation techniques." *Am. Civil Liberties Union v. Dep't of Justice*, No. 1:10-cv-123 (D.D.C. Feb. 14, 2011).

III. The District Court Erred in Allowing the Withholding of a One-Page Photograph of Abu Zubaydah.

The district court also erred in affirming the CIA's withholding of a "one-page photo of Abu Zubaydah." That photograph was processed by the CIA in response to the district court's order of April 20, 2009, JA 1371, and withheld under Exemptions 1 and 3. The district court upheld that withholding even though the CIA itself offered no explanation for its withholding; even though the only explanation ever offered for its withholding came from the government's counsel, not the CIA, during an *in camera* and *ex parte* hearing; and even though that explanation was deficient. The Court should therefore reverse the district court's judgment and remand for the district court to order the CIA to disclose the photograph.

The CIA filed three public documents in support of its withholding of the documents at issue here, none of which explains the withholding of the photograph. The first is the CIA's declaration of June 8, 2009, which mentions the photograph a single time, JA 584, but does not describe the photo or defend its classification. *See* JA 582–605. The second is an index attached to the CIA's declaration. It describes the image as "a one-page photo of Abu Zubaydah," dated October 11, 2002, sent from the "Field" to the "Record," and withheld under Exemptions 1 and 3, *Vaughn* Index No. 65, *available at* http://www.aclu.org/files/pdfs/safefree/acluvdod_panettadeclaration_index2.pdf,

and it includes two boilerplate descriptions of Exemptions 1 and 3, but it does not explain the photograph's withholding under either exemption. *Id.* The third document is the CIA's supplemental declaration of September 21, 2009. JA 1084–89. It does not mention the photograph. *Id.*

The CIA's failure to provide any justification for its withholding of the photograph is dispositive. Agencies must defend their withholdings and may not rely on post-hoc rationalizations offered by counsel. *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1119–20 (D.C. Cir. 2007) (a government counsel's "*post hoc* explanation cannot make up for [the agency's] silence" (citing *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's post hoc rationalizations for agency action. . . . It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Even were post-hoc explanations offered by counsel acceptable, the explanations offered in this case would not suffice to justify the CIA's withholding of the photograph. The government's first explanation of its withholding of the photograph came during the *in camera* and *ex parte* session held on September 30, 2009. This is the entire exchange with the district court:

> THE COURT: 65 is a photograph.
>
> MR. LANE: Correct. That was the next one I wanted to bring to the Court's attention. As the Court is aware, for photographs from the Department of Defense that the Court has considered, those photographs were not photographs taken by the Department of Defense, but rather by third-party individuals—
>
> THE COURT: Let me cut this short. You've given out various names, but as I recall, nobody's picture has been given out.
>
> MR. LANE: Not by the U.S. government, no, that's correct, your Honor.
>
> THE COURT: So, on the theory that a person's picture gives out a lot more information, in addition to knowing the name, you want to keep that secret.
>
> MR. LANE: Right. And because this is actually a CIA photo of a person in custody.
>
> THE COURT: I defer to that position. Have we done everything?

SPA 75–76, JA 1164–65. During the subsequent public hearing, the district court explained its decision as follows: "I think that the image of a person in a photograph is another aspect of information that is important in intelligence gathering, and I defer in that respect as well." SPA 26, JA 1115. The district court did not memorialize its oral rulings related to the photograph in any of its opinions. *See* JA 1166–71; JA 1197–200; JA 1369–82.

Although the precise holding of the district court is not entirely clear, it appears that it upheld the CIA's withholding on two grounds: (1) that "a person's picture gives out a lot more information, in addition to knowing the name," and (2)

that the photograph of Abu Zubaydah "is actually a CIA photo of a person in custody."

The first observation is undoubtedly true—an image does contain more, or at least different, information than a person's name—but neither the district court nor the government explained how that additional information qualifies as an "intelligence source or method" (or some other classifiable fact) under Exemptions 1 and 3. Indeed, neither explained, even in broad or vague terms, what that information might be. This is precisely the sort of conclusory explanation of a withholding that this Court has rejected under FOIA. *See, e.g.*, *Halpern*, 181 F.3d at 293 ("Such a conclusory statement completely fails to provide the kind of fact-specific justification that either (a) would permit appellant to contest the affidavit in adversarial fashion, or (b) would permit a reviewing court to engage in effective *de novo* review of the FBI's redactions."); *accord Grand Cent. P'ship, Inc.*, 166 F.3d at 478. Moreover, if the photograph simply depicts Abu Zubaydah—a fact officially acknowledged by the CIA—then, absent more, the CIA may not classify it. *See Wolf v. Cent. Intelligence Agency*, 473 F.3d 370, 378 (D.C. Cir. 2007).

The second observation, which was made by the government and seemingly adopted by the court, is that the photograph "is actually a CIA photo of a person in custody." That simply does not matter. The CIA appears to believe that it may classify the photograph merely because the CIA took it. But as the district court

recognized earlier in the same closed hearing, it is generally the content of a record that determines whether the government may withhold it, not its form. SPA 65, JA 1154 ("The fact it is a cable or even a contemporaneous cable in my mind is neutral. The content[] is what I'm looking at . . . ."); *see also Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("The focus of the FOIA is information, not documents . . . ."). Moreover, the CIA has already officially acknowledged that it took the photograph; it may now withhold it only if disclosing it would reveal classified information. Neither the CIA nor the district court has identified any such risk.

In sum, the CIA has acknowledged the photograph's content ("a one-page photo of Abu Zubaydah") and that it took the photograph. On these facts alone, the photograph is not withholdable. The Court should reverse the district court's judgment and remand for the district court to order the CIA to disclose the photograph.

IV. The District Court Properly Ordered the Disclosure of the "Source of Authority."

The government appeals from the district court's order requiring it to disclose a "source of authority" discussed in two OLC memoranda and in *in camera*, *ex parte* hearings in this case. Although much of the government's argument is redacted, CIA Br. 23–58, the central issue appears to be whether the redacted text at issue is properly characterized as a "source of authority" (as the

district court held) or as an "intelligence method" under Exemptions 1 and 3 (as the government argues). Factually, this issue appears to be straightforward as even one of the OLC memoranda at issue treats the redacted information as a source of "authorities." JA 450 ("The Director, DCI Counterterrorist Center shall ensure that all personnel directly engaged in the interrogation of persons detained pursuant to the *authorities set forth in* [redacted text ordered disclosed by the district court]." (emphasis added)).[12] But the government's primary contention is a legal one: that the CIA alone decides whether something is or is not an "intelligence method" within the meaning of its withholding authorities. CIA Br. 37–38 ("The district court here likewise erred in imposing its own definition of intelligence methods rather than deferring to the CIA's informed judgment."). This, of course, is incorrect: courts and not agencies are charged with interpreting withholding statutes. *See, e.g.*, *Sims*, 471 U.S. at 168–70.

The government's claim that the CIA may define its own withholding authorities stems from a fundamental misunderstanding of the Supreme Court's decision in *Sims*. As discussed above, in *Sims*, the Supreme Court rejected a

[12] The first redaction at issue, on page 5 of the May 10, 2005 OLC memorandum, JA 426; CIA Br. 18, makes clear that the redacted "source of authority" appears in the title of a separate memorandum from former CIA Director George Tenet: "*Guidelines on Interrogations Conducted Pursuant to the* [redacted text ordered disclosed by the district court]." *Id.* Tenet's memorandum was released in the context of this case, JA 1017–20, and likewise treats the information at issue here as a source of "authorities": "These Guidelines address the conduct of interrogations of persons who are detained pursuant to the authorities set forth in [redacted]." JA 1017.

specific extra-textual limitation imposed by the lower courts on the definition of "intelligence sources and methods." 471 U.S. at 168–70. Nowhere did the Court suggest, however, that the phrase therefore encompasses anything and everything the CIA chooses to include within it. Rather, the Court emphasized the plain statutory meaning of the phrase, which the Court—not the CIA—interpreted as protecting "all sources [and methods] of intelligence information . . . within the Agency's mandate." *Id.* at 169. *Weissman* and *Navasky* were based on the same understanding. Each interpreted the phrase "intelligence sources and methods" as excluding certain conduct: *Weissman* concluded that domestic law-enforcement functions were not "intelligence sources and methods," 565 F.2d at 695–96, and *Navasky* concluded that clandestine book-publishing was not an "intelligence method" and that the authors and publishers of those books were not "intelligence sources," 499 F. Supp. at 274–75.

Plainly, sources of authority are not "intelligence methods." A method is "[a]n orderly procedure or process." Webster's New International Dictionary 1548 (2d ed. 1944).[13] As the district court noted, the redacted information is "less a matter of methodology and more an aspect of authorization." SPA 86, JA 1175. The CIA claims that the Court nonetheless owes it deference in its withholding

[13] *See also* Merriam-Webster (2011) ("method": "a procedure or process for attaining an object"); Black's Law Dictionary (9th ed. 2009) ("method": "A mode of organizing, operating, or performing something, esp. to achieve a goal").

decision. CIA Br. 36. Though true as a general matter, that deference is to the CIA's determinations of *harm* under Exemption 1, *see, e.g.*, *Wilner*, 592 F.3d at 76 ("[W]e have consistently deferred to executive affidavits predicting harm to the national security . . . ." (internal quotation marks omitted) (alteration in original)), or to the CIA's determination to withhold a conceded "intelligence source and method" under Exemption 3, which requires no demonstration of harm, *see, e.g.*, *Sims*, 471 U.S. at 180 ("The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. And it 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.").[14] That deference does not extend, however, to the legal question of whether withheld information is an "intelligence source and method" in the first place. Courts owe no deference to the CIA on that legal question, and the government cites no authority supporting that claim.

[14] In the context of Exemption 3, this "deference" is nothing more than a recognition that neither the National Security Act nor the CIA Act hinges withholding on a determination of harm. *See* 50 U.S.C. §§ 403-1(i)(1), 403g. Once a court determines that the withheld information is in fact an "intelligence source or method" within the meaning of the CIA's withholding statutes, withholding is proper.

Although the government primarily attempts to withhold the "source of authority" as an "intelligence method," at times throughout its brief it refers to the "source of authority" as a withholdable "function," CIA Br. 29, or "intelligence activity," CIA Br. 40. Those terms do in fact appear in the CIA's withholding authorities, 50 U.S.C. § 403g; Exec. Order No. 12,958, § 1.4(c). But courts have rejected expansive constructions of such terms lest they effectively exempt the CIA altogether from FOIA. In *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976), for example, the court confronted the argument that "[section] 403g's reference to withholding information about 'functions . . . of personnel employed by the Agency' . . . allows the agency to refuse to provide any information at all about anything it does." *Id.* at 1015 n.14. Recognizing that "[t]his argument . . . would accord the Agency a complete exemption from the FOIA," *id.*, the court rejected it. *See id.* ("We do not think that [section] 403g is so broad."). The court held that the term "functions" protects only "intelligence sources and methods" and "information about [the CIA's] internal structure." *Id.*; *see also Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981) (same). In any event, a "source of authority" is neither a "function" nor an "intelligence activity." To be sure, intelligence sources, methods, and activities might flow from a source of authority; but withholding of the source of authority itself is only proper if disclosing it would reveal those intelligence sources,

methods, or activities. The CIA does not appear to have argued, either before the district court or here, that disclosing the "source of authority" would somehow reveal other potentially withholdable information.

For these reasons, the Court should affirm the district court's judgment ordering disclosure of the CIA's "source of authority." Plaintiffs agree with the government that the district court erred in attempting to craft a "compromise" to full disclosure. Though laudable, that effort is not authorized by FOIA. Therefore, if affirmed, the district court's holding that the CIA's "source of authority" is not withholdable as an "intelligence method" compels disclosure.

CONCLUSION

For the foregoing reasons, the Court should (1) reverse the judgment of the district court and hold that waterboarding is not an "intelligence method" within the meaning of the CIA's withholding authorities, (2) reverse the judgment of the district court and hold that the CIA has not justified the withholding of the "one-page photo of Abu Zubaydah," and (3) affirm the judgment of the district court and hold that the CIA's "source of authority" is not an "intelligence method." The Court should thus remand to the district court for that court to order disclosure of information relating to waterboarding that is segregable from properly classified information, to order disclosure of the photograph of Abu Zubaydah, and to order disclosure of the "source of authority."

June 3, 2011

Respectfully submitted,

/s/ Alexander A. Abdo

Alexander A. Abdo
Jameel Jaffer
Judy Rabinovitz
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2517
Fax: (212) 549-2654
aabdo@aclu.org

Lawrence S. Lustberg
Alicia L. Bannon
GIBBONS, P.C.
One Gateway Center
Newark, NJ 07102-5310

Michael Ratner
Gitanjali Gutierrez
Emilou MacClean
Shayana Kadidal
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Beth Haroules
Arthur Eisenberg
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because it contains 10,039 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Alexander A. Abdo
Alexander A. Abdo
Counsel for Appellees–Cross-Appellants

June 3, 2011