17-157

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 17-157

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

—v.—

DEPARTMENT OF JUSTICE, including its components THE OFFICE OF LEGAL COUNSEL AND OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellants.

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

JOINT APPENDIX
VOLUME I OF IV
(Pages A-1 to A-293)

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This case was appealed to
02nd Circuit: 17-157

US District Court Civil Docket

U.S. District - New York Southern
(Foley Square)

1:15cv1954

American Civil Liberties Union et al v. Department of Justice et al

This case was retrieved from the court on Friday, March 24, 2017

Date Filed:	03/16/2015		
Assigned To:	Judge Colleen McMahon	Class Code:	CLOSED
Referred To:		Closed:	09/12/2016
Nature of suit:	FOIA (895)	Statute:	05:552
Cause:	Freedom of Information Act	Jury Demand:	None
Lead Docket:	None	Demand Amount:	$0
Other Docket:	1:12cv00794	NOS Description:	Foia
Jurisdiction:	U.S. Government Defendant		

Litigants	Attorneys
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Date	#	Proceeding Text	Source
03/16/2015	1	COMPLAINT against Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Filing Fee $ 350.00, Receipt Number 465401119747) Document filed by American Civil Liberties Union Foundation, American Civil Liberties Union. (rdz) (Entered: 03/17/2015)	
03/16/2015		SUMMONS ISSUED as to Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (rdz) (Entered: 03/17/2015)	
03/16/2015		CASE REFERRED TO Judge Colleen McMahon as possibly related to 12-cv-794. (rdz) (Entered: 03/17/2015)	
03/16/2015		Case Designated ECF. (rdz) (Entered: 03/17/2015)	
03/16/2015	2	CIVIL COVER SHEET filed. (rdz) (rdz). (Entered: 03/17/2015)	
03/16/2015	3	STATEMENT OF RELATEDNESS re: that this action be filed as related to 15-cv-794. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(rdz) (Entered: 03/17/2015)	
03/20/2015	4	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Shamsi, Hina) (Entered: 03/20/2015)	
03/20/2015	5	AFFIDAVIT OF SERVICE of Summons served on U.S. Department of Justice on 3/19/2015.	

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		Service was made by Mail. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 03/20/2015)
03/20/2015	6	AFFIDAVIT OF SERVICE of Summons served on U.S. Department of Defense on 3/19/2015. Service was made by Mail. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 03/20/2015)
03/20/2015	7	AFFIDAVIT OF SERVICE of Summons served on U.S. Department of State on 3/19/2015. Service was made by Mail. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 03/20/2015)
03/20/2015	8	AFFIDAVIT OF SERVICE of Summons served on Central Intelligence Agency on 3/19/2015. Service was made by Mail. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 03/20/2015)
03/20/2015	9	AFFIDAVIT OF SERVICE of Summons served on Eric Holder, Attorney General of the United States on 3/19/2015. Service was made by Mail. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 03/20/2015)
03/20/2015	10	AFFIDAVIT OF SERVICE of Summons served on U.S. Attorney for the Southern District of New York on 3/19/2015. Service was made by Mail. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 03/20/2015)
03/23/2015		CASE ACCEPTED AS RELATED. Create association to 1:12-cv-00794-CM. Notice of Assignment to follow. (pgu) (Entered: 03/23/2015)
03/23/2015		NOTICE OF CASE ASSIGNMENT to Judge Colleen McMahon. Judge Unassigned is no longer assigned to the case. (pgu) (Entered: 03/23/2015)
03/23/2015		Magistrate Judge James C. Francis IV is so designated. (pgu) (Entered: 03/23/2015)
03/25/2015	11	ORDER SCHEDULING AN INITIAL PRETRIAL CONFERENCE: Initial Conference set for 5/8/2015 at 11:45 AM in Courtroom 17C, 500 Pearl Street, New York, NY 10007 before Judge Colleen McMahon. (Signed by Judge Colleen McMahon on 3/25/2015) (kgo) (Entered: 03/25/2015)
04/23/2015	12	NOTICE OF APPEARANCE by Sarah Sheive Normand on behalf of Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 04/23/2015)
04/24/2015	13	ANSWER to 1 Complaint,. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 04/24/2015)
04/24/2015	14	FIRST LETTER MOTION to Adjourn Conference addressed to Judge Colleen McMahon from AUSA SARAH NORMAND dated 04/24/2015. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 04/24/2015)
04/27/2015	15	ORDER terminating 14 Letter Motion to Adjourn Conference. I'm not. I am working on your case management plan. I will give it to you before I leave the country on May 14. You can stop conferring. This time I will make the rules. (Signed by Judge Colleen McMahon on 4/27/2015) (kgo) (Entered: 04/29/2015)
04/30/2015	16	MEMORANDUM SCHEDULING ORDER: In view of the court's ever-evolving views on how to handle a case of this sort with a modicum of efficiency, I am providing the parties with the following scheduling order. The Government must move for summary judgment by September 30, 2015. The ACLU must respond to the motion by October 30, 2015. The Government must file any reply it deems necessary by November 13, 2015, and the following as further set forth herein. We all know that the issue in this case is not going to be whether documents are subject to FOIA exemptions (b)(1), (b)(3) or (b)(5) - all of them likely will be subject to at least one of those exemptions, and quite possibly to all three. I have been at this exercise long enough to know that. The issue is whether the Government has waived its right to rely on those exemptions. I have set long dates (longer than the dates I originally had in mind, which would have had the motions briefed by the end of the summer) and I will not countenance any extensions. Motions due by 9/30/2015. Responses due by 10/30/2015 Replies due by 11/13/2015. (Signed by Judge Colleen McMahon on 4/30/2015) (kgo) (Entered: 04/30/2015)
05/01/2015	17	NOTICE OF APPEARANCE by Elizabeth J Shapiro on behalf of Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Shapiro, Elizabeth) (Entered: 05/01/2015)
07/01/2015	18	MOTION Partial Modification of Scheduling Order re: 16 Scheduling Order,,,, . Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 07/01/2015)
07/01/2015	19	MEMORANDUM OF LAW in Support re: 18 MOTION Partial Modification of Scheduling Order re: 16 Scheduling Order,,,, . . Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 07/01/2015)
07/01/2015	20	DECLARATION of John E. Bies in Support re: 18 MOTION Partial Modification of Scheduling

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		Order re: 16 Scheduling Order,,,, .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 07/01/2015)
07/01/2015	21	DECLARATION of Douglas R. Hibbard in Support re: 18 MOTION Partial Modification of Scheduling Order re: 16 Scheduling Order,,,, .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 07/01/2015)
07/01/2015	22	DECLARATION of Mark H. Herrington in Support re: 18 MOTION Partial Modification of Scheduling Order re: 16 Scheduling Order,,,, .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 07/01/2015)
07/01/2015	23	DECLARATION of John F. Hackett in Support re: 18 MOTION Partial Modification of Scheduling Order re: 16 Scheduling Order,,,, .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3 (part A), # 4 Exhibit 3 (part B), # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6)(Normand, Sarah) (Entered: 07/01/2015)
07/02/2015	24	MEMORANDUM OF LAW in Opposition re: 18 MOTION Partial Modification of Scheduling Order re: 16 Scheduling Order,,,, . . Document filed by American Civil Liberties Union. (Spurlock, Matthew) (Entered: 07/02/2015)
07/09/2015	25	ORDER MODIFYING APRIL 30, 2015 SCHEDULING ORDER AND OTHERWISE ISSUING DIRECTIONS FOR THE FURTHER CONDUCT OF THIS ACTION granting 18 Motion for Partial Modification of Scheduling Order re: 16 Scheduling Order. The Government has moved for a modification of the scheduling order issued by this court on April 30, 2015. The court agrees with the Government that the preparation of preliminary Vaughn Indices is unlikely to lead to any meaningful resolution of issues with Plaintiffs. The court also has no interest in engaging in duplicate litigation. Accordingly: 1. The Government's request to be excused from filing early preliminary Vaughn Indices is granted. There is no need for the ACLU to file a response. 2. This court will not require the Government to produce in this lawsuit documents responsive to the FOIA requests made in the predecessor lawsuits that I have been handling for the past three years: New York Times v. Department of Justice, No. 11 Civ. 9336 (CM) and ACLU v. Department of Justice, No. 12 Civ. 794 (CM) (hereafter New York Times/ACLU I). (As further set forth in this Order.) (Signed by Judge Colleen McMahon on 7/9/2015) (kko) (Entered: 07/09/2015)
07/22/2015	26	MOTION for Reconsideration re; 25 Order on Motion for Miscellaneous Relief,,,, . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Jaffer, Jameel) (Entered: 07/22/2015)
07/22/2015	27	MEMORANDUM OF LAW in Support re: 26 MOTION for Reconsideration re; 25 Order on Motion for Miscellaneous Relief,,,, . . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 07/22/2015)
07/24/2015	28	FILING ERROR - WRONG EVENT TYPE SELECTED FROM MENU - RESPONSE to Motion re: 26 MOTION for Reconsideration re; 25 Order on Motion for Miscellaneous Relief . . Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) Modified on 7/27/2015 (db). (Entered: 07/24/2015)
07/27/2015		***NOTICE TO ATTORNEY TO RE-FILE DOCUMENT - EVENT TYPE ERROR. Notice to Attorney Sarah Sheive Normand to RE-FILE Document 28 Response to Motion. Use the event type Letter found under the event list Other Documents. (db) (Entered: 07/27/2015)
07/27/2015	29	LETTER addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 07/24/2015 re: Response to ACLU's Motion for Clarification and Modification of July 9, 2015 Order. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 07/27/2015)
07/27/2015	30	MEMO ENDORSEMENT on 29 LETTER addressed to Judge Colleen McMahon from AUSA Sarah S. Normand; denying 26 Motion for Reconsideration. ENDORSEMENT: I agree with the government. The stay as granted on July 9 remains in affect. The motion at Document #26 is denied. Remove from my list of open motions. (Signed by Judge Colleen McMahon on 7/27/2015) (kgo) (Entered: 07/27/2015)
08/25/2015	31	NOTICE OF APPEARANCE by Brett Max Kaufman on behalf of American Civil Liberties Union, American Civil Liberties Union Foundation. (Kaufman, Brett) (Entered: 08/25/2015)
08/28/2015	32	MOTION for Partial Summary Judgment . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Jaffer, Jameel) (Entered: 08/28/2015)
08/28/2015	33	MEMORANDUM OF LAW in Support re: 32 MOTION for Partial Summary Judgment . . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Attachments: # 1 Appendix Waiver Table)(Jaffer, Jameel) (Entered: 08/28/2015)
08/28/2015	34	DECLARATION of Matthew Spurlock in Support re: 32 MOTION for Partial Summary Judgment .. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit Request, # 2 Exhibit Dec. 1989 Parks Memo, # 3 Exhibit June 2007 Dorn Decl., # 4 Exhibit May 2009 Panetta Speech, # 5 Exhibit Feb. 2010

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		OLC Memo, # 6 Exhibit Mar. 2010 Koh Speech, # 7 Exhibit June 2010 Panetta Interview, # 8 Exhibit July 2010 OLC Memo, # 9 Exhibit Sept. 2010 Gov't Br., # 10 Exhibit Mar. 2011 Gates Speech, # 11 Exhibit Apr. 2011 Gates Statement, # 12 Exhibit May 2011 White Paper, # 13 Exhibit Oct. 2011 Panetta Statement, # 14 Exhibit Oct. 2011 Panetta Speech, # 15 Exhibit Nov. 2011 White Paper, # 16 Exhibit Feb. 2012 Johnson Speech, # 17 Exhibit Mar. 2012 Holder Speech, # 18 Exhibit Apr. 2012 Brennan Speech, # 19 Exhibit May 2012 Feinstein Letter, # 20 Exhibit June 2012 Carney Statement, # 21 Exhibit June 2012 WPR Report, # 22 Exhibit Dec. 2012 Gov't Br., # 23 Exhibit Feb. 2013 Brennan Testimony, # 24 Exhibit Feb. 2013 Rogers Interview, # 25 Exhibit Feb. 2013 McCain Interview, # 26 Exhibit Feb. 2013 Feinstein Statement, # 27 Exhibit Feb. 2013 Brennan QFR, # 28 Exhibit Mar. 2013 Gov't Br., # 29 Exhibit Mar. 2013 Feinstein Statement, # 30 Exhibit May 2013 DOD Statement, # 31 Exhibit May 2013 Holder Letter, # 32 Exhibit May 2013 Obama Speech, # 33 Exhibit May 2013 Fact Sheet, # 34 Exhibit Aug. 2013 Kerry Statement, # 35 Exhibit 2014 Rizzo Book, # 36 Exhibit Feb. 2014 Clapper Testimony, # 37 Exhibit July 2014 Yoho Statement, # 38 Exhibit July 2014 Yoho Bill, # 39 Exhibit Sept. 2014 Pentagon Statement, # 40 Exhibit Dec. 2014 WPR Report, # 41 Exhibit Jan. 2014 Burgess Bill, # 42 Exhibit Feb. 2015 Pentagon Statement, # 43 Exhibit Mar. 2015 Pentagon Statement, # 44 Exhibit Apr. 2015 Feinstein Statement, # 45 Exhibit May 2015 White House Statement, # 46 Exhibit Apr. 2015 Burr Statement, # 47 Exhibit Apr. 2015 McCain Interview, # 48 Exhibit May 2015 NSC Statement, # 49 Exhibit June 2015 Pentagon Statement, # 50 Exhibit June 2015 White House Statement)(Jaffer, Jameel) (Entered: 08/28/2015)
09/28/2015	35	LETTER MOTION for Extension of Time to File Submission due September 30, 2015, addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 09/28/2015. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 09/28/2015)
10/01/2015	36	ORDER granting 35 Letter Motion for Extension of Time to File Submission due September 30, 2015. OK. (Signed by Judge Colleen McMahon on 10/1/2015) (kko) (Entered: 10/01/2015)
10/01/2015		Set/Reset Deadlines: Motions due by 10/2/2015. (kko) (Entered: 10/01/2015)
10/02/2015	37	MOTION for Summary Judgment . Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 10/02/2015)
10/02/2015	38	DECLARATION of John E. Bies in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Normand, Sarah) (Entered: 10/02/2015)
10/02/2015	40	DECLARATION of John F. Hackett in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8)(Normand, Sarah) (Entered: 10/02/2015)
10/02/2015	41	DECLARATION of Andrew L Lewis in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 10/02/2015)
10/02/2015	42	DECLARATION of Martha M. Lutz in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit A)(Normand, Sarah) (Entered: 10/02/2015)
10/02/2015	43	DECLARATION of Douglas R. Hibbard in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Normand, Sarah) (Entered: 10/02/2015)
10/03/2015	44	DECLARATION of John Bradford Wiegmann in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit A)(Normand, Sarah) (Entered: 10/03/2015)
10/03/2015	45	DECLARATION of Jennifer Hudson in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 10/03/2015)
10/03/2015	46	MEMORANDUM OF LAW in Support re: 37 MOTION for Summary Judgment . . Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 10/03/2015)
10/03/2015	47	NOTICE of Lodging of Classified Documents re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 10/03/2015)
10/05/2015		MEMORANDUM TO THE DOCKET CLERK: Document #39 deleted as per chambers. (mde)

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		(Entered: 10/05/2015)
10/26/2015	48	LETTER MOTION to Stay addressed to Judge Colleen McMahon from Jameel Jaffer dated October 26, 2015. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Jaffer, Jameel) (Entered: 10/26/2015)
10/28/2015	49	ORDER GRANTING 30 DAY EXTENSION OF TIME. I thank the ACLU for alerting me to the Second Circuit's decision in the original case (which, I am told, is referred to by the Clerk of the Second Circuit as New York Times II). I was not notified. I do not know whether the ACLU has seen that decision; I have not. Although I doubt that New York Times II will make any difference to the briefing in this case, I will give the ACLU time to review that decision before responding. However, I am not staying the ACLU's obligation to respond; instead, I grant a 30 day extension for filing its brief. That is the length of the seal on New York Times II as ordered by the Second Circuit. The brief is now due on Monday, December 1, 2015. I would suggest that the ACLU finish drafting its brief and then make whatever additions or changes are required once it has a change to review New York Times II, because the ACLU should not count on my extending the stay. I will definitely not extend the stay until I have seen the opinion in New York Times II. It would be preferable if the Government alerted me to developments in the Court of Appeals. I should not find out about them in this manner. (Signed by Judge Colleen McMahon on 10/28/2015) By ECF to All Counsel. (rjm) (Entered: 10/28/2015)
11/24/2015	50	LETTER addressed to Judge Colleen McMahon from ACLU dated 11/24/2015 re: Request for Clarification. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Jaffer, Jameel) (Entered: 11/24/2015)
11/24/2015	51	MEMO ENDORSEMENT on re: 50 Letter filed by American Civil Liberties Union, American Civil Liberties Union Foundation. ENDORSEMENT: Tuesday December 1. (Signed by Judge Colleen McMahon on 11/24/2015) (kgo) (Entered: 11/24/2015)
12/01/2015	52	MEMORANDUM OF LAW in Opposition re: 37 MOTION for Summary Judgment . . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 12/01/2015)
12/01/2015	53	DECLARATION of Matthew Spurlock in Opposition re: 37 MOTION for Summary Judgment .. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit Report on Associated Forces, # 2 Exhibit Report on Process, # 3 Exhibit January 2014 Rizzo Book, # 4 Exhibit November 2015 Panetta Statement)(Jaffer, Jameel) (Entered: 12/01/2015)
12/09/2015	54	LETTER MOTION for Extension of Time to File Reply Memorandum of Law in Further Support of Motion for Summary Judgment addressed to Judge Colleen McMahon., LETTER MOTION for Extension of Time to File Response/Reply addressed to Judge Colleen McMahon. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 12/09/2015)
12/11/2015	55	ORDER granting 54 Letter Motion for Extension of Time to File ; granting 54 Letter Motion for Extension of Time to File Response/Reply. OK. (Replies due by 12/22/2015.) (Signed by Judge Colleen McMahon on 12/10/2015) (kgo) (Entered: 12/11/2015)
12/21/2015	56	LETTER MOTION for Leave to File Excess Pages addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 12/21/15. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 12/21/2015)
12/22/2015	57	ORDER granting 56 Letter Motion for Leave to File Excess Pages. OK. (Signed by Judge Colleen McMahon on 12/22/2015) (kgo) (Entered: 12/22/2015)
12/22/2015	58	REPLY MEMORANDUM OF LAW in Support re: 37 MOTION for Summary Judgment . . Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 12/22/2015)
12/22/2015	59	DECLARATION of AUSA Sarah S. Normand in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Normand, Sarah) (Entered: 12/22/2015)
12/23/2015	60	LETTER MOTION for Leave to File Corrected Reply Memorandum of Law and to Refile Declaration of Rear Admiral Andrew L. Lewis addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 12/23/15. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Normand, Sarah) (Entered: 12/23/2015)
12/28/2015	61	ORDER granting 60 Letter Motion for Leave to File Document. OK. (Signed by Judge Colleen McMahon on 12/28/2015) (kgo) (Entered: 12/28/2015)
12/28/2015	62	REPLY MEMORANDUM OF LAW in Support re: 37 MOTION for Summary Judgment . Corrected Reply Memorandum of law. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 12/28/2015)

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12/28/2015	63	FILING ERROR - DEFICIENT DOCKET ENTRY - DECLARATION of Rear Admiral Andrew L. Lewis in Support re: 60 LETTER MOTION for Leave to File Corrected Reply Memorandum of Law and to Refile Declaration of Rear Admiral Andrew L. Lewis addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 12/23/15., 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) Modified on 1/5/2016 (db). (Entered: 12/28/2015)
12/28/2015	64	DECLARATION of Rear Admiral Andrew L. Lewis in Support re: 37 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Normand, Sarah) (Entered: 12/28/2015)
01/05/2016		***NOTICE TO ATTORNEY TO RE-FILE DOCUMENT - PDF ERROR. Notice to Attorney Sarah Sheive Normand to RE-FILE Document 63 Declaration in Support of Motion. No/Blank PDF attached. (db) (Entered: 01/05/2016)
02/25/2016	65	SHORT FORM ORDER DIRECTING GOVERNMENT TO PRODUCE THREE DOCUMENTS FOR IN CAMERA INSPECTION: The court is today hand-delivering to the Government, and filing under seal, a memorandum order directing the Government to produce for in camera inspection three documents listed on its classified composite Vaughn Index: Department of Defense Documents 7 and 8 and Office of Legal Counsel Document 306. The Government has five business days from today's date (which, by my calculation, is March 4, 2016) to produce the three documents; as detailed in the sealed opinion, I expect all classified and National Security Act material in the documents (each of which is partially unclassified) to be clearly designated (preferably with a colored highlighter) for ease of review. The court does not believe that the memorandum order, which explains why these documents must be produced for inspection by the court, contains any classified information. However, it has been and will continue to be my practice to give the Government time to vet opinions and orders for classification issues that might escape the notice of a reader of news media in which information that the Government considers to be classified routinely appears. The Government has five business days from today's date to advise the court whether any redaction is, in its opinion, necessary; on March 4, the order will be unsealed. There may be a further request for the in camera production, but as is apparent from the unclassified memoranda of law filed by both sides, these three documents, and especially OLC 306, are the key documents in the case. After reviewing them it should be possible for me to complete the opinion disposing of the cross motions for summary judgment imminently. While I cannot assign a precise definition of that word, I hope, subject to the press of other business, to have a decision ready for vetting by the end of March. (Signed by Judge Colleen McMahon on 2/25/2016) (lmb) (Entered: 02/25/2016)
03/04/2016	66	MEMORANDUM ORDER DIRECTING PRODUCTION OF DOCUMENTS FOR IN CAMERA REVIEW: This memorandum order is issued so that the court can complete work on its decision on the parties' pending cross motions for summary judgment. For the reasons stated below, the Government is directed to produce OLC Document 306 and DoD Documents 7 and 8 for in camera review no later than March 4, 2016. The court will issue a short form order directing that the documents be produced for in camera review; that order will appear on the public docket. That will give the ACLU notice of the court's order. The court believes that this entire order should be deemed unclassified - as far as I can tell it contains not a scintilla of classified information -- but I will file the long-form order under seal and give the Government five business days - no more - to advise me whether any material needs to be redacted. If I do not hear about any proposed redactions within five business days, I will release this order for publication on ECF. (Signed by Judge Colleen McMahon on 2/25/2016) "Copies Hand Delivered by Chambers". (ama) Modified on 3/18/2016 (ama). (Entered: 03/04/2016)
03/04/2016	67	LETTER addressed to Judge Colleen McMahon from Elizabeth J. Shapiro/Sarah S. Normand dated March 4, 2016 re: Order dated February 25, 2016. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Shapiro, Elizabeth) (Entered: 03/04/2016)
03/10/2016	68	ADDITIONAL DIRECTIVE TO THE GOVERNMENT: The Government has announced that it will voluntarily produce additional portions of the documents identified as OLC 306 (the Presidential Policy Guidance) and DoD 7 and 8. The Government has 20 business days to review its Classified Vaughn Index and identify whether its concession means that any or all of the documents listed thereon are no longer exempt, in whole or in part, from FOIA production. (Signed by Judge Colleen McMahon on 3/10/2016) (cf) (Entered: 03/10/2016)
03/31/2016	69	ORDER DIRECTING ADDITIONAL PRODUCTION: As soon as possible, and certainly within the next ten days, the Government should produce for in camera inspection DoD Document #9. I apologize; I should have included this on the original list. Subject to the Government's review of the Vaughn Index in light of the partial production of OLC 306 and DoD 7 and 8, the opinion is pretty much done. I hope to have it to the Government for classification review by April 25, 2016. (Signed by Judge Colleen McMahon on 3/31/2016) (kgo) (Entered: 03/31/2016)
04/07/2016	70	LETTER addressed to Judge Colleen McMahon from Elizabeth J. Shapiro/Sarah Normand dated April 7, 2016 re: the Court's Order of March 10, 2016. Document filed by Central

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		Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit)(Shapiro, Elizabeth) (Entered: 04/07/2016)
04/13/2016	71	LETTER addressed to Judge Colleen McMahon from Jameel Jaffer dated 04/13/2016 re: President Obama's April 8, 2016 Remarks at the University of Chicago School of Law. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 04/13/2016)
04/18/2016	72	LETTER addressed to Judge Colleen McMahon from Elizabeth J. Shapiro/Sarah S. Normand dated April 18, 2016 re: Response to ACLU's Letter of April 13, 2016. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Shapiro, Elizabeth) (Entered: 04/18/2016)
04/21/2016	73	LETTER addressed to Judge Colleen McMahon from Elizabeth J. Shapiro/Sarah S. Normand dated April 21, 2016 re: Notice of Recent Decision. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit)(Shapiro, Elizabeth) (Entered: 04/21/2016)
04/22/2016	74	MEMO ENDORSEMENT on re: 73 Letter, filed by Department of Defense, Department of State, Department of Justice, Central Intelligence Agency. ENDORSEMENT: Fine. By that time I should be done with the decision on Part I and II. (Signed by Judge Colleen McMahon on 4/22/2016) (lmb) (Entered: 04/22/2016)
05/10/2016	75	ORDER DIRECTING ADDITIONAL PRODUCTION: The Government is directed to produce CIA Document #15 to the Court for in camera review, within the next 10 days. (Signed by Judge Colleen McMahon on 5/10/2016) (kgo) (Entered: 05/10/2016)
06/17/2016	76	LETTER addressed to Judge Colleen McMahon from Elizabeth J. Shapiro, Sarah S. Normand and Jameel Jaffer dated June 17, 2016 re: Parts 3 and 4 of the ACLU's FOIA Request. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State.(Shapiro, Elizabeth) (Entered: 06/17/2016)
06/20/2016	77	MEMO ENDORSEMENT on re: 76 Letter, filed by Department of Defense, Department of State, Department of Justice, Central Intelligence Agency. ENDORSEMENT: (i) is happening this week. (Signed by Judge Colleen McMahon on 6/20/2016) (kgo) (Entered: 06/21/2016)
06/21/2016	78	ORDER granting in part and denying in part 32 Motion for Partial Summary Judgment; granting 37 Motion for Summary Judgment. The court has today provided the Government with a copy of a decision disposing of the pending cross motions for summary judgment on Issues 1 and 2. Issuance of this opinion was delayed to permit in camera inspection of a number of documents, which is now concluded. The Government's motion is granted and the ACLU's is denied in significant part, but not entirely. The court is providing a copy of the decision to the Government for classification review. When that process is completed, the court will issue a further order compelling disclosure consistent with the terms of the Decision and Order. (Signed by Judge Colleen McMahon on 6/21/2016) (kgo) (Entered: 06/21/2016)
07/22/2016	79	LETTER MOTION to Compel addressed to Judge Colleen McMahon from Jameel Jaffer dated July 22, 2016. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Jaffer, Jameel) (Entered: 07/22/2016)
07/25/2016	80	SUMMARY OF SEALED ACTIVITY FOR PUBLIC RECORD granting 79 Letter Motion to Compel. The following is placed on the public record: Without having completed its classification review of the court's decision dated June 21, 2016, the Government submitted, under seal, what was, in essence, a motion for reargument, couched in the form of calling to my attention material that it thought I might have overlooked in connection with two rulings. All but one of the attachments to the Government's letter were part of the original record before the court. The newly-attached document, which was "inadvertently" not submitted the first time around, is classified. The docket sheet does not show any sealed filing by the Government last week. The Government is directed to make sure the docket sheet is updated to reflect the sealed filing. I have responded to the Government's submission by adding a few paragraphs and making a few modest changes (none of which altered the conclusions reached) to the decision, which is now the decision of July 21, rather than June 21, 2016. It will be clear from the text of the additions what the court added in response to the Government's submission. I have today received a letter from the ACLU dated July 22, 2016 (Docket # 79), asking that I order the Government to finish its classification review. It strikes the court that, the Government's disclaimers notwithstanding, this is a task that should have been accomplished by now - and nothing in the few modest additions made by the Court last week adds to that burden. I thus grant the ACLU's request and direct that the Government finish its classification review by August 5, 2016. (Signed by Judge Colleen McMahon on 7/25/2016) (kgo) (Entered: 07/25/2016)
08/05/2016	81	NOTICE of of Lodging of Classified Documents. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Shapiro, Elizabeth) (Entered: 08/05/2016)
08/05/2016	82	NOTICE of of Lodging of Classified Documents. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Shapiro, Elizabeth) (Entered: 08/05/2016)

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08/08/2016	83	MEMORANDUM DECISION AND ORDER DECIDING THE GOVERNMENT'S AND PLAINTIFFS' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT re: 37 MOTION for Summary Judgment filed by Department of Defense, Department of State, Department of Justice, Central Intelligence Agency, 32 MOTION for Partial Summary Judgment filed by American Civil Liberties Union, American Civil Liberties Union Foundation. Except insofar as is specifically stated in connection with the ruling on a particular document, the Government's motion for summary judgment is granted and the ACLU's motion for summary judgment is denied. This constitutes the decision and order of the court. The Clerk is directed to remove the motions at Docket #32 and #37 from the Court's list of open motions. Signed August 8, 2016 and filed publicly. (As further set forth in this Order.) (Signed by Judge Colleen McMahon on 8/8/2016) BY ECF AFTER REDACTION (kko) (Entered: 08/08/2016)
08/16/2016	84	DIRECTIVE TO THE PARTIES: Both parties will likely wish to appeal from some portions of the court's decision (Docket #83). All of the conditions set forth in the Government's letter of June 17, 2016 (Docket #76) have now been met. Before I leave the district for two weeks, I would like to know how the parties wish to proceed. My personal preference would be to dismiss the remaining counts, which duplicate the matters in suit in the District of Columbia, and to enter a final judgment closing this case. However, if that is not what you folks have in mind, please let me know what you are planning to do and whether I need to enter an order, since an appeal at present would be interlocutory in nature. I will be unavailable beginning Thursday afternoon. (Signed by Judge Colleen McMahon on 8/16/2016) (kgo) (Entered: 08/16/2016)
08/17/2016	85	NOTICE of ERRATA & CORRECTED EXHIBIT 54 re: 53 Declaration in Opposition to Motion,. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation. (Attachments: # 1 Errata CORRECTED EXHIBIT 54 to SPURLOCK DECLARATION) (Jaffer, Jameel) (Entered: 08/17/2016)
08/18/2016	86	LETTER addressed to Judge Colleen McMahon from Brett Max Kaufman dated 08.18.2016 re: Status Update. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Kaufman, Brett) (Entered: 08/18/2016)
08/23/2016	87	MEMO ENDORSEMENT on re: 86 Letter filed by American Civil Liberties Union, American Civil Liberties Union Foundation re: Status Update. ENDORSEMENT: Noted. (Signed by Judge Colleen McMahon on 8/23/2016) (kko) (Entered: 08/24/2016)
08/31/2016	88	MOTION for Jameel Jaffer to Withdraw as Attorney . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Jaffer, Jameel) (Entered: 08/31/2016)
09/06/2016	89	LETTER addressed to Judge Colleen McMahon from Brett Max Kaufman dated 09/06/2016 re: Remaining Claims. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Kaufman, Brett) (Entered: 09/06/2016)
09/08/2016	90	MOTION for Matthew Spurlock to Withdraw as Attorney . Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Spurlock, Matthew) (Entered: 09/08/2016)
09/09/2016	91	FILING ERROR - ELECTRONIC FILING OF NON-ECF DOCUMENT - STIPULATION OF VOLUNTARY DISMISSAL It is hereby stipulated and agreed by and between the parties and/or their respective counsel(s) that the above-captioned action is voluntarily dismissed, WITH prejudice against the defendant(s) Central Intelligence Agency, Department of Defense, Department of Justice, Department of State pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure. Document filed by American Civil Liberties Union Foundation, American Civil Liberties Union.(Shamsi, Hina) Modified on 9/12/2016 (km). (Entered: 09/09/2016)
09/09/2016	92	FILING ERROR - ELECTRONIC FILING OF NON-ECF DOCUMENT - STIPULATION OF VOLUNTARY DISMISSAL It is hereby stipulated and agreed by and between the parties and/or their respective counsel(s) that the above-captioned action is voluntarily dismissed, WITH prejudice against the defendant(s) Central Intelligence Agency, Department of Defense, Department of Justice, Department of State pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure. Document filed by American Civil Liberties Union Foundation, American Civil Liberties Union.(Shamsi, Hina) Modified on 9/12/2016 (km). (Entered: 09/09/2016)
09/12/2016		***NOTE TO ATTORNEY TO EMAIL DOCUMENTS - NON-ECF DOCUMENT ERROR. Note to Attorney Hina Shamsi to E-MAIL Document Nos. [91 & 92] Stipulation of Voluntary Dismissal with handwritten signatures of all parties to judgments@nysd.uscourts.gov. These documents are not filed via ECF. (km) (Entered: 09/12/2016)
09/12/2016	93	JOINT STIPULATION AND ORDER OF DISMISSAL OF COMPLAINT: It is hereby stipulated and agreed by and between the parties and/or their respective counsel(s) that the the remaining claims in the Complaint are dismissed with prejudice, pursuant to Rule 41(a)(1)of the Federal Rules of Civil Procedure. (Signed by Judge Colleen McMahon on 9/12/2016) (tro) (Entered: 09/13/2016)
10/20/2016	94	LETTER addressed to Judge Colleen McMahon from AUSA Sarah S. Normand and Elizabeth J. Shapiro dated 10/20/16 re: status of appellate proceedings. Document filed by Central

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		Intelligence Agency, Department of Defense, Department of Justice, Department of State. (Attachments: # 1 Exhibit 7/16/15 Order, # 2 Exhibit 8/30/16 Mandate)(Normand, Sarah) (Entered: 10/20/2016)
11/09/2016	95	JOINT LETTER addressed to Judge Colleen McMahon from Brett Max Kaufman & Elizabeth J. Shapiro dated 11/09/2016 re: Request for Entry of Judgment. Document filed by American Civil Liberties Union, American Civil Liberties Union Foundation.(Kaufman, Brett) (Entered: 11/09/2016)
11/09/2016	96	MEMO ENDORSEMENT on re: 95 Letter, filed by American Civil Liberties Union, American Civil Liberties Union Foundation. ENDORSEMENT: Send me a form of judgment and I will enter it. (Signed by Judge Colleen McMahon on 11/9/2016) (kgo) (Entered: 11/09/2016)
11/16/2016	97	JUDGMENT IN A CIVIL ACTION: Defendants' motion for summary judgment as to Prongs 1 and 2 of Plaintiffs' FOIA Request is granted in part and denied in part and Plaintiffs' motion for summary judgment is granted in part and denied in part in accordance with the Court's Memorandum Decision and Order dated August 8, 2016; the remaining claims are dismissed with prejudice. (Signed by Judge Colleen McMahon on 11/15/2016) (kgo) (Entered: 11/16/2016)
01/17/2017	98	FILING ERROR - NO ORDER/JUDGMENT SELECTED FOR APPEAL - NOTICE OF APPEAL. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Normand, Sarah) Modified on 1/18/2017 (nd). (Entered: 01/17/2017)
01/17/2017		***NOTICE TO ATTORNEY REGARDING DEFICIENT APPEAL. Notice to attorney Normand, Sarah to RE-FILE Document No. 98 Notice of Appeal,.. The filing is deficient for the following reason(s): the judgment being appealed was not selected. Re-file the appeal using the event type Corrected Notice of Appeal found under the event list Appeal Documents - attach the correct signed PDF - select the correct named filer/filers - select the correct order/judgment being appealed. (nd) (Entered: 01/18/2017)
01/18/2017	99	NOTICE OF APPEAL from 97 Judgment,. Document filed by Central Intelligence Agency, Department of Defense, Department of Justice, Department of State. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Normand, Sarah) (Entered: 01/18/2017)
01/18/2017		Appeal Fee Not Required for 99 Notice of Appeal,. Appeal filed by U.S. Government. (nd) (Entered: 01/18/2017)
01/18/2017		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 99 Notice of Appeal,. (nd) (Entered: 01/18/2017)
01/18/2017		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 99 Notice of Appeal, filed by Department of Defense, Department of State, Department of Justice, Central Intelligence Agency were transmitted to the U.S. Court of Appeals. (nd) (Entered: 01/18/2017)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

American Civil Liberties Union and the American Civil Liberties Union Foundation,

Plaintiffs,

v.

Department of Justice, including its components the Office of Legal Counsel and Office of Information Policy; Department of Defense; Department of State; and Central Intelligence Agency,

Defendants.

15 CV 1954

Civil Action No. _____

COMPLAINT

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is a lawsuit seeking the release of records pertaining to the U.S. government's "targeted-killing" program.

2. For more than a decade, the Central Intelligence Agency ("CIA") and the military's Joint Special Operations Command ("JSOC") have used lethal force to target suspected "militants," "insurgents," and "terrorists" in at least half a dozen countries, including in areas far-removed from conventional battlefields.

3. The targeted-killing program has resulted in the deaths of hundreds of foreign nationals, many of them children, engendering resentment and anger in countries where targeted killings frequently occur.

4. The government's reliance on the program in counterterrorism operations has increased dramatically in recent years, resulting in escalating public and congressional concern about the program and its legal and factual underpinnings.

5. Despite requests from legal scholars, human rights organizations, members of the media, and elected officials, the government has disclosed scant information about (1) the legal basis for the targeted-killing program; (2) the standards and evidentiary processes the government uses to evaluate (and approve or reject) the use of lethal force in particular instances; (3) before-the-fact and after-action assessments of civilian and bystander causalities; and (4) the number, identities, legal status, and suspected affiliations of those killed (intentionally or not).

6. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking injunctive and other appropriate relief, including the immediate processing and release of records sought by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively "ACLU") from Defendants Department of Justice ("DOJ"), Department of Defense ("DOD"), Department of State ("DOS"), and CIA (collectively "Defendants") through a FOIA request ("Request") made by the ACLU more than a year ago. The Request sought records concerning the targeted-killing program.

7. Plaintiffs submitted the Request to the DOJ, DOD, DOS, and CIA, as well as to specific components of the DOJ, including the Office of Legal Counsel ("OLC") and Office of Information Policy ("OIP"). Plaintiffs sought expedited processing and a waiver of fees.

8. To date, no agency has released any record in response to the Request.

Jurisdiction and Venue

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

10. Venue is premised on the place of business of the ACLU and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

11. Plaintiff American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization with more than 500,000 members dedicated to the constitutional principles of liberty and equality. The ACLU is committed to ensuring that the U.S. government acts in compliance with the Constitution and laws, including international legal obligations. The ACLU is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties and human rights. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU's work and one of its primary activities.

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

13. Defendant DOJ is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). The OLC and OIP, from which the ACLU has also requested records, are components of DOJ.

14. Defendant DOD is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

15. Defendant DOS is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

16. Defendant CIA is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

The ACLU's Request

17. On October 15, 2013, the ACLU submitted the Request for records pertaining to (1) "the legal basis in domestic, foreign, and international law upon which the government may use lethal force against individuals or groups;" (2) "the process by which the government designates individuals or groups for targeted killing;" (3) "before-the-fact assessments of civilian or bystander casualties in targeted-killing strikes and any and all records concerning 'after-action' investigations into individual targeted-killing strikes;" and (4) "the number and identities of individuals killed or injured in targeted-killing strikes."

18. The ACLU sought expedited processing, contending that the records were urgently needed to inform the public about actual or alleged Federal Government activity and that the ACLU was primarily engaged in disseminating information. *See* 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). The ACLU also sought expedited processing on the grounds that the records related to a "breaking news story of general public interest." 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv).

19. The ACLU sought a waiver of search, review, and duplication fees on the basis that disclosure of the requested records was in the public interest because it was "likely to contribute significantly to public understanding of the operations or activities of the government and [was] not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R § 286.28(d); 32 C.F.R. § 1900.13(b)(2). The ACLU also sought the waiver on the basis that the ACLU constituted a "representative of the news media" and that the records were not sought for commercial use. *See* 5 U.S.C. §

552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 28 C.F.R. § 16.11(d).

The Government's Response to the Request

20. None of the defendant agencies has released any record in response to the Request. The agencies have responded inconsistently to the ACLU's request for expedited processing and waiver of fees.

DOJ Office of Legal Counsel

21. On October 25, 2013, OLC denied the ACLU's request for expedited processing under 28 C.F.R. § 16.5(d)(1)(ii) ("An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information."), but referred the request to the Director of the Office of Public Affairs to determine whether to grant expedited processing under 28 C.F.R. 16.5(d)(1)(iv) ("A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence."). The OLC deferred its decision on the request for a fee waiver.

22. On December 6, 2013, DOJ Office of Public Affairs granted the ACLU's request for expedited processing under 28 C.F.R. § 16.5(d)(1)(iv).

23. By email dated January 8, 2014, the parties memorialized an agreed-upon modification to the scope of the ACLU's request to OLC.

24. The ACLU has received no further response or correspondence from OLC.

DOJ Office of Information Policy

25. On December 31, 2013, OIP acknowledged the request for expedited processing but advised the ACLU that "unusual circumstances" would impact the time required to process the Request.

26. By email on January 29, 2014, the parties memorialized an agreed-upon modification to the scope of the ACLU's request to OIP.

27. The ACLU has received no further response or correspondence from OIP.

Department of Defense

28. On October 29, 2013, DOD denied the ACLU's request for expedited processing and advised the ACLU that "unusual circumstances" would impact the time required to process the Request. The response did not address ACLU's request for a fee waiver.

29. By letter dated December 18, 2013, the ACLU timely filed an administrative appeal of DOD's denial of expedited processing.

30. By letter dated February 18, 2014, DOD asked the ACLU to clarify the scope of the Request and suggested certain modifications.

31. On March 10, 2014, the ACLU responded, clarifying the Request and agreeing to modify certain aspects of it.

32. On May 2, 2014, DOD denied the ACLU's appeal of the agency's denial of expedited processing.

33. The ACLU has received no further response or correspondence from DOD.

Department of State

34. On October 18, 2013, DOS's Office of Information Programs & Services denied the ACLU's request for expedited processing, stating that the ACLU had failed to demonstrate a "compelling need" for the requested records. The DOS granted the request for a fee waiver.

35. By letter dated November 6, 2013, the ACLU timely filed an administrative appeal of DOS' denial of expedited processing. By letter dated December 3, 2013, DOS informed the ACLU that it had reconsidered its earlier determination and that it would grant expedited processing.

36. By letter dated February 20, 2014, DOS asked the ACLU to clarify the scope of the Request and suggested certain modifications.

37. On March 10, 2014, the ACLU responded, clarifying the Request and agreeing to modify certain aspects of it.

38. The ACLU has received no further response or correspondence from DOS.

Central Intelligence Agency

39. On November 4, 2013, the CIA denied the ACLU's request for expedited processing.

40. On February 14, 2014, the CIA informed the ACLU that it had "completed a thorough review" of the Request and "that if any records existed, the volume or nature of those records would be currently and properly classified."

41. By letter dated March 27, 2014, the ACLU timely filed an administrative appeal of the CIA's response.

42. The ACLU has received no further response or correspondence from the CIA.

Causes of Action

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

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

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

46. The failure of Defendants OLC, OIP, DOD and CIA to grant the ACLU's request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II) and the Defendants' corresponding regulations.

47. The failure of Defendants OLC, OIP, DOD and CIA to grant the ACLU's request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 52(a)(4)(A)(iii), and the Defendants' corresponding regulations.

Requested Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Order Defendants immediately to produce all records responsive to the Request;

B. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;

C. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and

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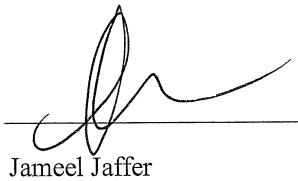
D. Grant such other relief as the Court may deem just and proper.

March 16, 2015

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and the OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

No. 15 Civ. 1954 (CM)

ECF CASE

NOTICE OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE THAT, upon the accompanying Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment and the Declaration of Matthew Spurlock, and all exhibits and attachments thereto, Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") will move this Court, before the Honorable Colleen McMahon, United States District Judge, at the United States Courthouse, 500 Pearl Street, New York, New York, for an order granting the ACLU partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for such other and further relief as the Court deems just and proper.

A-22

Dated: August 28, 2015

Respectfully submitted,

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Appendix

Waiver Table

I. DISCLOSURES RELATING TO THE LEGAL BASIS FOR THE TARGETED- KILLING PROGRAM

Waiver	Source of Disclosure	Exhibit	Relevant Language
Analysis of the Fourth and Fifth Amendments to the U.S. Constitution and their application to the targeted killing of U.S. citizens	July 2010 OLC Memo	Ex. 8 at 38–41	[Extended discussion]
	February 2010 OLC Memo	Ex. 5 at 6–7	[Similar to above]
	May 2011 White Paper	Ex. 12 at 20–22	[Similar to above]
	November 2011 White Paper	Ex. 15 at 5–9	[Similar to above]
	December 2012 Government Brief	Ex. 22 at 31–44	[Extended discussion]
	March 2013 Government Brief	Ex. 28 at 16–25	[Extended discussion]
Analysis of the 2001 AUMF	July 2010 OLC Memo	Ex. 8 at 21–27	[Extended discussion]
	May 2011 White Paper	Ex. 12 at 12–14	[Similar to above]
	February 2012 Johnson Speech	Ex. 16 at 7	"[T]here is nothing in the wording of the 2011 AUMF or its legislative history that restricts this statutory authority to the 'hot' battlefields of Afghanistan. . . . [T]he AUMF authorized the use of necessary and appropriate force against [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] the organizations and persons connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation."
Analysis of the definition of "associated force" under the 2001 AUMF	February 2012 Johnson Speech	Ex. 16 at 6–7	"But, the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the executive labels a 'terrorist.' Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces. Nor is the concept of an 'associated force' an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context, and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-centralized, and relies more on associates to carry out its terrorist aims. An 'associated force,' as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an 'associated force' is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001."
	May 2013 DOD Statement	Ex. 30 at 3	"A group is an associated force, if, first, it is an organized, armed group that has entered the fight alongside al Qaeda; and, second, it is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. Individuals who are part of this recognized enemy may be lawful military targets. . . . In applying these principles in this armed conflict, we conduct a careful, fact-intensive assessment to distinguish between, on the one hand, a terrorist who effectively becomes part of al Qaeda, the Taliban, or an associated force by [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] training or co-locating with the group, accepting orders from its leaders, and participating in the group's terrorist plotting, and, on the other hand, the terrorist, who without any direct connection to a member of al Qaeda, embraces extremist ideology found on the internet and self-radicalizes. Both are very dangerous, but the former is part of the congressionally-declared enemy force in a congressionally-authorized armed conflict; the latter, although dangerous, is not part of that enemy force."
Analysis of 18 U.S.C. § 1119, which prohibits the killing or attempted killing of a U.S. national outside the United States	July 2010 OLC Memo May 2011 White Paper November 2011 White Paper	Ex. 8 at 12–19 Ex. 12 at 5–17 Ex. 15 at 10–14	[Extended discussion] [Similar to above] [Similar to above]
Analysis of 18 U.S.C. § 956(a), which criminalizes conspiracy to commit murder abroad	July 2010 OLC Memo May 2011 White Paper November 2011 White Paper	Ex. 8 at 35–3 Ex. 12 at 17–18 Ex. 15 at 13 n.8	[Extended discussion] [Similar to above] [Similar to above]

Waiver	Source of Disclosure	Exhibit	Relevant Language
Analysis of the War Crimes Act, 18 U.S.C. § 2441(a), including discussion of Common Article 3 of the Geneva Convention	July 2010 OLC Memo	Ex. 8 at 37–38	[Extended discussion]
	May 2011 White Paper	Ex. 12 at 18–20	[Similar to above]
	November 2011 White Paper	Ex. 15 at 15–16	[Similar to above]
Analysis of the "public authority" doctrine	July 2010 OLC Memo	Ex. 8 at 14–37	[Extended discussion]
	May 2011 White Paper	Ex. 12 at 7–14	[Similar to above]
	November 2011 White Paper	Ex. 15 at 10–14	[Similar to above]
Analysis of the assassination ban in Executive Order 12333	February 2010 OLC Memo	Ex. 5 at 1, 4, 7	"Under the conditions and factual predicates as represented by the CIA . . . we believe that a decisionmaker . . . could reasonably conclude that the use of lethal force against Aulaqi would not violate the assassination ban in Executive Order 12333."
	March 2010 Koh Speech	Ex. 6 at 7	"[U]nder domestic law, the use of lawful weapons systems–consistent with the applicable laws of war–for precision targeting of specific high-level belligerent leaders when acting in [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'"
	November 2011 White Paper	Ex. 15 at 15	"Section 2.11 of Executive Order No. 12333 provides that '[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.' . . . A lawful killing in self-defense is not an assassination. In the Department's view, a lethal operation conducted against a U.S. citizen whose conduct poses an imminent threat of violent attack against the United States would be a legitimate act of national self-defense that would not violate the assassination ban. Similarly, the use of lethal force, consistent with the laws of war, against an individual who is a legitimate military target would be lawful and would not violate the assassination ban."
	March 2012 Holder Speech	Ex. 17 at 6	"Some have called such operations 'assassinations.' They are not, and the use of that loaded term is misplaced. Assassinations are [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
	December 1989 Parks Memo	Ex. 2 at 8	[*continued from previous page*] unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful—and therefore would not violate the Executive Order banning assassination or criminal statutes." "Assassination constitutes an act of murder that is prohibited by international law and Executive Order 12333. . . . [A] decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if the U.S. military forces were employed against the combatant forces of another nation, a guerilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States."
Analysis of the definition and requirements for the existence of non-international armed conflicts	July 2010 OLC Memo November 2011White Paper	Ex. 8 at 24–25 Ex. 14 at 2–5	[Extended discussion] "The United States is currently in a non-international armed conflict with al-Qa'ida and [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] its associated forces. . . . Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. . . . For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes. . . . None of the three branches of the U.S. Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization."
Analysis of the use of force in self-defense under international law	November 2011 White Paper	Ex. 15 at 2–3	"In addition to the authority arising from the AUMF, the President's use of force against al-Qa'ida and associated forces is lawful under the principles of U.S. and international law, including the President's constitutional responsibility to protect the nation and the inherent right to national self-defense recognized in international law (*see, e.g.*, U.N. Charter art. 51). . . . Any operation of the sort discussed here would be conducted in a foreign country against a senior operational leader of al-Qa'ida or its associated forces who pose an imminent threat of [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] violent attack against the United States. A use of force under such circumstances would be justified as an act of national self-defense."
	March 2012 Holder Speech	Ex. 17 at 5	"[W]e must . . . recognize that there are instances where our government has the clear authority—and I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force. This principle has long been established under both U.S. and international law. In response to the attacks perpetrated – and the continuing threat posed—by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	March 2010 Koh Speech	Ex. 6 at 6	"The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day."
	September 2010 Government Brief	Ex. 9 at 4–5	"In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of lethal force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (*see., e.g.*, United Nations Charter Article 51)."

Waiver	Source of Disclosure	Exhibit	Relevant Language
Analysis of international humanitarian law principles. including the requirements of: • necessity • distinction • proportionality • humanity	July 2010 OLC Memo	Ex. 8 at 28–30, 34	[Extended discussion]
	May 2011 White Paper	Ex. 12 at 13–15	[Similar to above]
	November 2011 White Paper	Ex. 15 at 8–9	[Similar to above]
	March 2010 Koh Speech	Ex. 6 at 6–7	"[T]his Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including . . . the principle of *distinction*, [and] . . . the principle of *proportionality*."
	March 2012 Holder Speech	Ex. 17 at 6–7	"[A]ny such use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force. The principle of necessity . . . [t]he principle of distinction . . . the principle of proportionality . . . the principle of humanity."
	May 2013 Holder Letter	Ex. 31 at 3	[Similar to above]
	May 2013 Fact Sheet	Ex. 33 at 2	"*First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] that organization is using or intends to use to conduct terrorist attacks. *Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force. *Third*, the following criteria must be met before lethal action may be taken: 1) Near certainty that the terrorist target is present; 2) Near certainty that non-combatants1 will not be injured or killed; 3) An assessment that capture is not feasible at the time of the operation; 4) An assessment that the relevant governmental [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and 5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons. *Finally*, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force. The United States respects national sovereignty and international law."
Analysis of the term "imminence"	November 2011 White Paper February 2010 OLC Memo	Ex. 15 at 7–8 Ex. 5 at 6–7	[Extended discussion] "[W]here [redacted] a capture operation is infeasible and [redacted] the targeted person is part of a dangerous enemy force and poses a [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*]
			continued and imminent threat to U.S. persons or interests, the use of lethal force would not violate the Fourth Amendment."
	July 2010 OLC Memo	Ex. 8 at 21, 27 n.36, 39	[Similar to above]
	May 2011 White Paper	Ex. 12 at 20–21	[Similar to above]
	March 2012 Holder Speech	Ex. 17 at 6–8	"The evaluation of whether an individual presents an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States."
	May 2013 Fact Sheet	Ex. 33 at 2	"[T]he United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	February 2013 Brennan Testimony	Ex. 23 at 43–44	"We only [use lethal strikes] as a last resort to save lives when there's no other alternative to taking an action that's going to mitigate that threat."
Analysis of the term "feasibility of capture"	July 2010 OLC Memo	Ex. 8 at 40–41	"[B]oth [the CIA and DOD] have represented that they intend to capture rather than target al-Aulaqi if feasible; yet we also understand that an operation by either agency to capture al-Aulaqi in Yemen would be infeasible at this time. . . . [W]e conclude that at least where, as here . . . a capture operation would be infeasible–and where the CIA and DoD 'continue to monitor whether changed circumstances would permit such an alternative' . . . the 'realities of combat' and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force."
	May 2011 White Paper	Ex. 12 at 2	"[A]ccording to the CIA, although there may be no occasion for surrender in light of the means by which such an operation would be carried out, [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] the CIA would prefer to capture this target, and if a potential target offers to surrender, such surrender would be accepted, if feasible. This would include any targets in Yemen, although the CIA assesses that a capture in Yemen would not be feasible at this time."
	November 2011 White Paper	Ex. 15 at 6–8	"[C]apture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. . . . Feasibility would be a highly fact-specific and potentially time-sensitive inquiry."
	March 2012 Holder Speech	Ex. 17 at 7	[Similar to above]
	May 2013 Fact Sheet	Ex. 33 at 1–2	"The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect . . . . Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] obligations to other sovereign states. . . . Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively."
Analysis of international legal principles governing respect for other countries' national sovereignty	March 2012 Holder Speech	Ex. 17 at 5	"This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States."
	March 2010 Koh Speech	Ex. 6 at 6	"Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses."
	May 2013 Fact Sheet	Ex. 33 at 2	"*Finally*, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force. The United States respects national sovereignty and international law."

II. DISCLOSURES RELATING TO THE TARGETED-KILLING PROGRAM GENERALLY

Waiver	Source of Disclosure	Exhibit	Relevant Language
The government uses drones to carry out targeted killings.	May 2013 Obama Speech	Ex. 32 at 4	"[T]he United States has taken lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones."
	April 2012 Brennan Speech	Ex. 18 at 5	"[I]n full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones."
The government uses manned aircraft to carry out targeted killings.	June 2015 Pentagon Statement	Ex. 49 at 1	"American officials confirmed that Mr. Belmokhtar was the target of the strike, carried out by multiple American F-15E fighter jets. . . . 'I can confirm that the target of last night's counterterrorism strike in Libya was Mokhtar Belmokhtar.'"

Waiver	Source of Disclosure	Exhibit	Relevant Language
The CIA and DOD have operational roles in targeted killings.	*N.Y. Times v. DOJ*, 756 F.3d 100, 122 (2d. Cir 2014)	[No exhibit]	"[T]he statements of Panetta when he was Director of CIA and later Secretary of Defense . . . have already publicly identified CIA as an agency that has an operational role in targeted drone killings."
	June 2010 Panetta Interview	Ex. 7 at 3–4	"[Osama bin Laden is] in an area of the – the tribal areas in Pakistan that is very difficult. The terrain is probably the most difficult in the world. . . . But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of their Al Qaida leadership. We just took down number three in their leadership a few weeks ago. We continue to disrupt them."
	March 2011 Gates Speech	Ex. 10 at 1	"The Air Force now has 48 Predator and Reaper combat air patrols currently flying—compared to 18 CAPs in 2007—and is training more pilots for advanced UAVs than for any other single weapons system."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	February 2014 Clapper Testimony	Ex. 36 at 2	"Q: It is—you tell me if this is correct—the administration's policy that they are exploring shifting the use of drones, unmanned aerial vehicle strikes, from the CIA to the DOD. Is that an accurate statement? Mr. CLAPPER: Yes, sir, it is."
	October 2011 Panetta Speech	Ex. 14 at 1	"Having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had at the CIA, although the Predators aren't bad."
	February 2013 Rogers Interview	Ex. 24 at 2	"[A]s the chairman of the House Intelligence Committee, even as a member, was aware and part of those discussions. And now as chairman, even before they conducted that first air strike that took Awlaki – and remember . . . [t]his guy was a bad guy. So our options were limited. This was a tool we could use to stop further terrorist attacks against Americans. I supported it then. Monthly, I have my committee go to the CIA to review them. I as chairman review every single air strike that we use in the war on terror, both from the civilian and the military side when it comes to terrorist strikes. There is plenty of oversight here."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	May 2012 Feinstein Letter	Ex. 19	"The Senate Intelligence Committee, which I chair, has devoted significant time and attention to the drone program. We receive notification with key details shortly after every strike, and we hold regular briefings and hearings on these operations. Committee staff has held 28 monthly in-depth oversight meetings to review strike records and question every aspect of the program including legality, effectiveness, precision, foreign policy implications and the care taken to minimize noncombatant casualties."
	February 2013 Feinstein Statement	Ex. 26 at 1	"The committee has devoted significant time and attention to targeted killings by drones. The committee receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations. In addition, the committee staff has held 35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	March 2013 Feinstein Statement	Ex. 29 at 2	"We've watched the intelligence aspect of the drone program: how they function. The quality of the intelligence. Watching the agency exercise patience and discretion. . . . The military [armed drone] program has not done nearly as well. . . . That causes me concern."
	April 2015 Feinstein Statement	Ex. 44	"The role of the Senate Intelligence Committee is to conduct extensive oversight of counterterrorism operations, and these efforts will continue. The committee has already been reviewing the specific January operation that led to [the deaths of Warren Weinstein and Giovanni Lo Porto], and I now intend to review that operation in greater detail. We should also again review all procedures and safeguards to make sure every measure is taken to prevent the deaths of innocent civilians."
	February 2013 McCain Interview	Ex. 25 at 8	"But what we need to do is take the whole [armed drone] program out of the hand of the Central Intelligence Agency and put it into the Department of Defense, where you have adequate oversight, you have committee oversights, you have all the things that are built in, as our oversight of the Department of Defense."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	April 2015 Burr Statement	Ex. 46	Intelligence Committee provides "extensive oversight" of drone efforts. "We always go back and look at any counterterrorism action that we take, and we will do it in great detail on this one."
	May 2015 NSC Statement	Ex. 48 at 1	National Security Council spokesman Edward Price states that President "has indicated that he will increasingly turn to our military to take the lead" in lethal strikes.
	July 2014 Yoho Bill	Ex. 38 at 1	"A bill to consolidate within the Department of Defense all executive authority regarding the use of armed unmanned aerial vehicles . . . ."
	July 2014 Yoho Statement	Ex. 37	"The CIA's main mission is intelligence collection and analysis. It should not be in the business of military strikes. This legislation will bring our armed drone fleet under the jurisdiction of the DOD, where it should be."
	January 2015 Burgess Bill	Ex. 41 at 1	"A bill to prohibit the Central Intelligence Agency from using an unmanned aerial vehicle to carry out a weapons strike or other deliberately lethal action and to transfer the authority to conduct such strikes or lethal action to the Department of Defense."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	April 2015 McCain Interview	Ex. 47 at 2	"[T]here is kind of an internal struggle going on within the administration and within the Congress as to which – whether it should be an armed services operation, this whole issue of drone strikes, or should it be done by the CIA? Obviously, as chairman of the Armed Services Committee, I have some bias, but is seems to me that as much as we could give responsibility and authority over to the Department of Defense, because that's really not the job of the intelligence agency."
The government conducts targeted killings in Pakistan, including through the use of drones.	August 2013 Kerry Statement	Ex. 34 at 1	"I believe that we're on a good track. . . . I think the [drone-strike] program will end as we have eliminated most of the threat and continue to eliminate it."
	June 2012 Carney Statement	Ex. 20 at 13	"[O]ur intelligence community has intelligence that leads them to believe that al Qaeda's number-two leader, al Libi, is dead. . . . [H]e served as al Qaeda's general manager, responsible for overseeing the group's day-to-day operations in the tribal areas of Pakistan . . . . [W]e believe that al-Libi's death is a major blow to core al Qaeda, removing the number two

[*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] leader for the second time in less than a year and further damaging the group's morale and cohesion . . . ."
	May 2009 Panetta Speech	Ex. 4 at 7	In response to a question about "remote drone strikes" in Pakistan, then–CIA Director Leon Panetta called such strikes "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership."
The CIA conducts targeted killing in Pakistan, including through the use of drones.	June 2010 Panetta Interview	Ex. 7 at 3-4	"[Osama bin Laden is] in an area of the—the tribal areas in Pakistan that is very difficult. The terrain is probably the most difficult in the world. . . . But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of the Al Qaida leadership. We just took down number three in their leadership a few weeks ago. We continue to disrupt them."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	May 2009 Panetta Speech	Ex. 4 at 7	In response to a question about "remote drone strikes" in Pakistan, then–CIA Director Leon Panetta called such strikes "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership."
The government conducts targeted killings in Yemen, including through the use of drones.	*N.Y. Times*, 756 F.3d at 118	[No exhibit]	"It is no secret that al-Awlaki was killed in Yemen."
	June 2012 WPR Report	Ex. 21 at 4	"The U.S. military has also been working closely with the Yemeni government to operationally dismantle and ultimately eliminate the terrorist threat posed by al-Qa'ida in the Arabian Peninsula (AQAP) . . . . Our joint efforts have resulted in direct action against a limited number of AQAP operatives and senior leaders in that country who posed a terrorist threat to the United States and our interests."
	December 2014 WPR Report	Ex. 40 at 5	[Similar to above]
	June 2015 White House Statement	Ex. 50	"The Intelligence Community has concluded that Nasir al-Wahishi, the leader of al-Qa'ida in the Arabian Peninsula . . . has been killed in Yemen. . . . The President has been clear that terrorists who threaten the United States will not find safe haven in any corner of the globe."

Waiver	Source of Disclosure	Exhibit	Relevant Language
The CIA conducts targeted killings in Yemen, including through the use of drones.	*N.Y. Times*, 756 F.3d at 119	[No exhibit]	"[T]he identification of the country where the drone strike occurred and CIA's role—have both already been disclosed, also as explained above."
	N.Y. Times, 756 F.3d at 122	[No exhibit]	"[T]he statements of Panetta when he was Director of CIA and later Secretary of Defense . . . have already publicly identified CIA as an agency that has an operational role in targeted drone killings."
	May 2011 White Paper	Ex. 12 at 1	"This white paper sets forth the legal basis upon which the Central Intelligence Agency ("CIA") could use lethal force in Yemen against a United States citizen who senior officials reasonably determined was a senior leader of al-Qaida or an associated force of al-Qaida."
	June 2010 Panetta Interview	Ex. 7 at 4–5	QUESTION: "All three of those individuals [Faisal Shahzad, Umar Farouk Abdulmutallab and Nidal Hasan] were tied in some way to an American cleric who is now supposedly in Yemen, Anwar al-Awalki. He has said to be on the assassination list by President Obama. Is that true and does being an American afford him any protection that any other terrorist might not enjoy? [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] PANETTA: [. . .] Awlaki is a terrorist and yes, he's a United States citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist. We don't have an assassination list, but I can tell you this. We have a terrorist list and he's on it."
The government conducts targeted killings in Somalia, including through the use of drones.	June 2012 WPR Report	Ex. 21 at 3	"In Somalia, the U.S. military has worked to counter the terrorist threat posed by al-Qa'ida and al-Qa'ida-associated elements of al-Shabaab. In a limited number of cases, the U.S. military has taken direct action in Somalia against members of al-Qa-ida . . . ."
	December 2014 WPR Report	Ex. 40 at 5	"In Somalia, a small contingent of U.S. military personnel, including some special operations forces, have worked to counter the terrorist threat posed by al-Qa'ida and associated elements of al-Shabaab. On September 1, 2014, U.S. forces conducted an airstrike in Somalia that killed the emir of the terrorist group al-Shabaab, Ahmed Abdi al-Muhammad, also known as Ahmed Godane."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	September 2014 Pentagon Statement	Ex. 39	"We have confirmed that Ahmed Godane, the co-founder of al-Shabaab, has been killed. The U.S. military undertook operations against Godane on Sept. 1, which led to his death. Removing Godane from the battlefield is a major symbolic and operational loss to al-Shabaab."
	February 2015 Pentagon Statement	Ex. 42 at 1	"[T]his past Saturday, the 31st of January . . . U.S. Special Operations forces conducted a strike south of Mogadishu, using unmanned aircraft and several Hellfire missiles. This operation was a direct strike against the al-Shabaab network, and the terrorist group's chief of external operations and planning for intelligence and security. His name was Yusuf Dheeq."
	March 2015 Pentagon Statement	Ex. 43	"On March 12 at approximately 7:30 a m. Eastern Time, working from actionable intelligence, U.S. forces using unmanned aircraft struck a vehicle carrying Adan Garar, a member of al Shabaab's intelligence and security wing, in the vicinity of Diinsoor, Somalia. The attack was a success and resulted in the death of Garar. Garar was a key operative responsible for coordinating al-Shabaab's external operations, [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] which target U.S. persons and other Western interests in order to further al-Qaida's goals and objectives. He posed a major threat to the region and the international community and was connected to the West Gate Mall attack in Nairobi, Kenya. His death has dealt another significant blow to the al Shabaab terrorist organization in Somalia."
The government conducts targeted killings in Libya, including through the use of drones.	June 2015 Pentagon Statement	Ex. 49 at 1	"'I can confirm that the target of last night's counterterrorism strike in Libya was Mokhtar Belmokhtar'. . . . Belmokhtar 'has a long history of leading terrorist activities' and 'maintains his personal allegiance to al Qaeda.'"
	April 2011 Gates Statement	Ex. 11 at 2	"At a news conference, Defense Secretary Robert M. Gates was adamant that the use of drones was not a prelude to an even deeper U.S. commitment involving more strike aircraft of U.S. ground troops. 'I think the president has been firm, for example, on boots on the ground,' he said.'"

Waiver	Source of Disclosure	Exhibit	Relevant Language
	October 2011 Panetta Statement	Ex. 13 at 1	"Standing in front of an unarmed Global Hawk surveillance drone, Panetta lauded the role played by the U.S. military's Predator fleet in the war in Libya. The use of Predators, he added slyly, 'is something I was very familiar with in my past job.'"
A September 17, 2001 Memorandum of Notification signed by President Bush authorizes the CIA to take lethal action against suspected terrorists.	January 2014 Rizzo Book	Ex. 35 at 174	"Less than a week after the 9/11 attacks, President Bush signed off on the final version [of the Memorandum of Notification]. Multiple pages in length, it was the most comprehensive, most ambitious, most aggressive, and most risky Finding or [Memorandum of Notification] I was ever involved in. One short paragraph authorized the capture and detention of Al Qaeda terrorists, another authorized taking lethal action against them. The language was simple and stark. . . . As far as I was concerned, there was nothing else we possibly could have included; we had filled the entire cover-action tool kit, including tools we had never before used."
	January 2014 Rizzo Book	Ex. 35 at 178	"[I]n late 2001, drone technology was still a work in progress; it was not yet certain that it would be lethally effective. True, I was fully [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] aware that the [Memorandum of Notification] that I helped prepare clearly sanctioned lethal actions against the Al Qaeda network. But those were only lawyer's antiseptic words on a page."
	June 2007 Dorn Declaration	Ex. 3 ¶ 66	"The CIA did locate one document signed by President Bush that pertains to the CIA's authorization to set up detention facilities outside the United States. The document … is a 14-page memorandum dated 17 September 2001 from President Bush to the Director of the CIA pertaining to the CIA's authorization to detain terrorists."
	June 2007 Dorn Declaration	Ex. 3 ¶ 67	"This 14-page document consists of a 12-page notification memorandum and an attached two-page cover memorandum. The 12-page notification memorandum is a memorandum from the President to the members of the NSC regarding a clandestine intelligence activity. The two-page cover memorandum is a transmittal memorandum from the Executive Secretary of the NSC to the Director of the CIA."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	June 2007 Dorn Declaration	Ex. 3 ¶ 68	"The 12-page memorandum pertains to the CIA's authorization to detain terrorists. The memorandum discusses the approval of the clandestine intelligence activity and related analysis and description. The memorandum also discusses other matters not relevant to Plaintiffs' general or specific FOIA requests."
The OLC provides advice establishing the legal boundaries of the targeted-killing program.	February 2013 Brennan Testimony	Ex. 23 at 44	"The Office of Legal Counsel advice establishes the legal boundaries within which we can operate."
	March 2013 Holder Testimony (quoted in *N.Y. Times*, 756 F.3d at 116)	[No exhibit]	"Attorney General Holder publicly acknowledged the close relationship between the DOJ White Paper and previous OLC advice on March 6, 2013, when he said at a hearing of the Senate Committee on the Judiciary that the DOJ White Paper's discussion of imminence of threatened action would be 'more clear if it is read in conjunction with the underlying OLC advice.'"
	February 2013 Feinstein Statement	Ex. 26 at 1	**"**Since 2010 the committee has asked for copies of all the legal opinions written by the Office of Legal Counsel (OLC) at the Department of [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] Justice on targeted killing. I have sent three letters, each joined by Vice Chairman Kit Bond or Vice Chairman Saxby Chambliss, requesting these opinions. In 2012, the committee included a legislative provision in its annual authorization bill to require the executive branch to provide OLC opinions. Unfortunately that provision was removed prior to final passage of the bill. Until last week, the committee had been provided access to only two of the nine OLC opinions that we believe to exist on targeted killings. Last week, senators on the committee were finally allowed to review two OLC opinions on the legal authority to strike U.S. citizens. We have reiterated our request for all nine OLC opinions—and any other relevant documents—in order to fully evaluate the executive branch's legal reasoning, and to broaden access to the opinions to appropriate members of the committee staff."
The government conducts before- and after-the-fact legal and factual analysis of lethal strikes.	February 2013 Brennan QFR	Ex. 27 at 1	"There should be an interagency review process when making policy decisions associated with [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] such strikes, including the criteria that governs the circumstances under which a targeted strike can be carried out. Such a process should include analysts, operators, and policymakers with roles and responsibilities bearing on intelligence, military, diplomatic, law enforcement, and homeland security, as well as lawyers from appropriate departments and agencies. . . . [T]he individuals who participate in this process consider, in a deliberate and responsible manner, the information available, including the most up-to-date intelligence. These reviews oftentimes generate requests to clarify existing information or spur requests for new information to provide the best available intelligence and analysis to inform their decision. I believe this process should continue, and should be refined and strengthened over time, while maintaining the President's ability to direct action as necessary to defend the Nation against attack."
	February 2013 Brennan QFR	Ex. 27 at 2	"The United States Government takes seriously all credible reports of civilian deaths. When civilian deaths are alleged, analysts draw on a [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] large body of information—human intelligence, signals intelligence, media reports, and surveillance footage—to help us make an informed determination about whether civilians were in fact killed or injured. In those rare instances in which civilians have been killed, after-action reviews have been conducted to identify corrective actions and to minimize the risk of innocents being killed or injured in the future. Where possible, we also work with local governments to gather facts and, if appropriate, provide condolence payments to families of those killed."
	May 2015 White House Statement	Ex. 45 at 4	"When a counterterrorism operation is carried out, it is followed by a battle damage assessment where our intelligence professionals evaluate the region or the area where the operation was carried out to determine the results of the operation and whether or not, if any, civilian casualties occurred. And in the process of carrying out that battle damage assessment, that draws on multiple sources of intel."

Waiver	Source of Disclosure	Exhibit	Relevant Language
	May 2015 White House Statement	Ex. 45 at 8	"These kinds of reviews are not unusual; . . . [O]ur national security professionals after every operation try to review what had occurred—even when it's successful, particularly when it's successful—to derive lessons learned and to look for other ways, or changes that could be put in place to strengthen our protocols both in terms of their capabilities, but also in ensuring that they're living up to the values that are so important to our country."
	May 2013 Fact Sheet	Ex. 33 at 1–2	"In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met: *First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks. *Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist [*continued on next page*]

Waiver	Source of Disclosure	Exhibit	Relevant Language
			[*continued from previous page*] does not pose such a threat, the United States will not use lethal force. *Third*, the following criteria must be met before lethal action may be taken: 1) Near certainty that the terrorist target is present; 2) Near certainty that non-combatants1 will not be injured or killed; 3) An assessment that capture is not feasible at the time of the operation; 4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and 5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

Waiver	Source of Disclosure	Exhibit	Relevant Language
Innocent bystanders have died or been injured as a result of U.S. drone or other targeted-killing strikes	May 2013 Obama Speech	Ex. 32 at 4	"There's a wide gap between U.S. assessments of [civilian] casualties and nongovernmental reports. Nevertheless, it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war. . . . Remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes."

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Plaintiffs*, v. DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and the OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY, *Defendants*.	No. 15 Civ. 1954 (CM) **ECF CASE**

DECLARATION OF MATTHEW SPURLOCK

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

I am an attorney at the American Civil Liberties Union Foundation and co-counsel for Plaintiffs in this litigation. Attached hereto are true and correct copies of the following:

Exhibit #	**Short Title**	**Full Citation**
Exhibit 1	Request	Plaintiffs' Freedom of Information Act Request (Oct. 15, 2013)
Exhibit 2	December 1989 Parks Memo	W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Lawyer, Dec. 1989, at 4
Exhibit 3	June 2007 Dorn Declaration	Eighth Decl. of Marilyn Dorn, CIA Info. Review Officer, *ACLU v. DOD*, No. 04 Civ. 4151 (S.D.N.Y. June 8, 2007), ECF No. 226

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Exhibit #	Short Title	Full Citation
Exhibit 4	May 2009 Panetta Speech	Leon Panetta, Dir., CIA, Remarks at the Pacific Council on International Policy (May 18, 2009)
Exhibit 5	February 2010 OLC Memo	David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for the Attorney Gen. Re: Lethal Operation Against Shaykh Anwar Aulaqi [REDACTED]* (Feb. 19, 2010)
Exhibit 6	March 2010 Koh Speech	Harold H. Koh, Legal Advisor, DOS, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law, (Mar. 25, 2010)
Exhibit 7	June 2010 Panetta Interview	*This Week* (ABC News television broadcast June 27, 2010)
Exhibit 8	July 2010 OLC Memo	David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for the Attorney Gen. Re: Applicability of Fed. Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar Aulaqi [REDACTED]* (July 16, 2010)
Exhibit 9	September 2010 Government Brief	Opp. to Pls.' Mot. for Preliminary Injunction & Mem. in Supp. of Defs.' Mot. to Dismiss, No. 10-cv-1469 (D.D.C. Sept. 25, 2010), ECF No. 15-1
Exhibit 10	March 2011 Gates Speech	Robert Gates, Sec'y of Def., Remarks at the U.S. Air Force Academy (Mar. 4, 2011)
Exhibit 11	April 2011 Gates Statement	Greg Jaffe, Edward Cody & William Branigin, *Libyan Rebels Welcome U.S. Drones; McCain Visits Benghazi*, Wash. Post, Apr. 22, 2011
Exhibit 12	May 2011 White Paper	DOJ, *White Paper: Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen [REDACTED]* (May 25, 2011)

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Exhibit #	Short Title	Full Citation
Exhibit 13	October 2011 Panetta Statement	Craig Whitlock, *Panetta: Loose Lips on CIA's Not-So-Secret Secret*, Wash. Post, Oct. 7, 2011
Exhibit 14	October 2011 Panetta Speech	Leon Panetta, Sec'y of Def., Remarks to Service Members in Naples, Italy (Oct. 7, 2011)
Exhibit 15	November 2011 White Paper	DOJ, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force* (Nov. 8, 2011)
Exhibit 16	February 2012 Johnson Speech	Jeh C. Johnson, Gen. Counsel, DOD, National Security Law, Lawyers, and Lawyering in the Obama Administration, Dean's Lecture at Yale Law School (Feb. 22, 2012)
Exhibit 17	March 2012 Holder Speech	Eric Holder, Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012)
Exhibit 18	April 2012 Brennan Speech	John Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012)
Exhibit 19	May 2012 Feinstein Letter	Sen. Dianne Feinstein, *Letters: Sen. Feinstein on Drone Strikes*, L.A. Times, May 17, 2012
Exhibit 20	June 2012 Carney Statement	White House, Press Briefing by Press Secretary Jay Carney (June 5, 2012)
Exhibit 21	June 2012 WPR Report	Letter from President Barack Obama to John Boehner, Speaker of the U.S. House of Representatives, 2012 War Powers Resolution 6-Month Report (June 15, 2012)
Exhibit 22	December 2012 Government Brief	Defs.' Mot. to Dismiss, No. 12-cv-1192 (D.D.C. Dec. 14, 2012), ECF No. 18

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Exhibit #	Short Title	Full Citation
Exhibit 23	February 2013 Brennan Testimony	*Nomination of John O. Brennan to be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 113th Cong. (Feb. 7, 2013)
Exhibit 24	February 2013 Rogers Interview	*Face the Nation* (CBS News television broadcast Feb. 10, 2013)
Exhibit 25	February 2013 McCain Interview	*Fox News Sunday* (Fox News television broadcast Feb. 10, 2013)
Exhibit 26	February 2013 Feinstein Statement	Press Release, Sen. Dianne Feinstein, Statement on Intelligence Committee Oversight of Targeted Killings (Feb. 13, 2013)
Exhibit 27	February 2013 Brennan QFR	*Nomination of John O. Brennan to be Director of the Central Intelligence Agency: Questions for the Record Submitted to the S. Select Comm. on Intelligence*, 113th Cong. (Feb. 14, 2013)
Exhibit 28	March 2013 Government Brief	Defs.' Reply in Supp. of Mot. to Dismiss, No. 12-cv-1192 (D.D.C. Mar. 7, 2013), ECF No. 23
Exhibit 29	March 2013 Feinstein Statement	John T. Bennett, *McCain, Feinstein Split Over Shifting Strike UAV Program to Military*, Defense News, Mar. 15, 2013
Exhibit 30	May 2013 DOD Statement	*Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force: Department of Defense Joint Statement for the Record Before the S. Comm. on Armed Services*, 113th Cong. (May 16, 2013)
Exhibit 31	May 2013 Holder Letter	Letter from Eric Holder, Attorney Gen., to Patrick Leahy, Chairman of the Senate Comm. on the Judiciary (May 22, 2013)
Exhibit 32	May 2013 Obama Speech	President Barack Obama, Remarks at the National Defense University (Mar. 23, 2015)

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Exhibit #	Short Title	Full Citation
Exhibit 33	May 2013 Fact Sheet	White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013)
Exhibit 34	August 2013 Kerry Statement	Michael R. Gordon, *Kerry, in Pakistan, Expresses Optimism on Ending Drone Strikes Soon*, N.Y. Times, Aug. 1, 2013
Exhibit 35	2014 Rizzo Book	John Rizzo, *Company Man: Thirty Years of Controversy and Crisis in the CIA* (2014)
Exhibit 36	February 2014 Clapper Testimony	Siobhan Gorman, *CIA's Drones, Barely Secret, Receive Rare Public Nod*, Wall St. J. Wash. Wire Blog (Feb. 11, 2014)
Exhibit 37	July 2014 Yoho Statement	Press Release, Rep. Ted Yoho, Yoho Wants Increased Transparency and Oversight over U.S. Drone Policy (July 11, 2014)
Exhibit 38	July 2014 Yoho Bill	Drone Reform Act, H.R. 5091, 113th Cong.
Exhibit 39	September 2014 Pentagon Statement	Press Release, DOD, Statement from Pentagon Press Secretary Rear Admiral John Kirby on Ahmed Godane (Sept. 5, 2014)
Exhibit 40	December 2014 WPR Report	Letter from President Barack Obama to John Boehner, Speaker of the U.S. House of Representatives, Six Month Consolidated War Powers Resolution Report (Dec. 11, 2014)
Exhibit 41	January 2015 Burgess Bill	To Prohibit the Central Intelligence Agency from Using an Unmanned Aerial Vehicle to Carry Out a Weapons Strike or Other Deliberately Lethal Action and to Transfer the Authority to Conduct Such Strikes or Lethal Action to the Department of Defense, H.R. 466, 114th Cong. (2015)
Exhibit 42	February 2015 Pentagon Statement	DOD, Press Briefing by Rear Adm. John Kirby (Feb. 3, 2015)

Exhibit #	Short Title	Full Citation
Exhibit 43	March 2015 Pentagon Statement	Press Release, DOD, Statement on March 12 Airstrike in Somalia (Mar. 18, 2015)
Exhibit 44	April 2015 Feinstein Statement	Press Release, Sen. Dianne Feinstein, Statement on Death of U.S., Italian Hostages (April 23, 2015)
Exhibit 45	May 2015 White House Statement	White House, Press Briefing by Press Secretary Josh Earnest (April 23, 2015)
Exhibit 46	April 2015 Burr Statement	Martin Matishak, *Key Republicans Defend Use of Drones*, The Hill, Apr. 23, 2015
Exhibit 47	April 2015 McCain Interview	*State of the Union* (CNN television broadcast Apr. 26, 2015)
Exhibit 48	May 2015 NSC Statement	Karen DeYoung, *Debate Is Renewed on Control of Lethal Drones Operations*, Wash. Post, May 5, 2015
Exhibit 49	June 2015 Pentagon Statement	Eric Schmitt, *U.S. Airstrike in Libya Targets Planner of 2013 Algeria Attack*, N.Y. Times, June 14, 2015
Exhibit 50	June 2015 White House Statement	Press Release, White House, Statement by NSC Spokesperson Ned Price on the Death of Al-Qa'ida in the Arabian Peninsula Leader Nasir al-Wahishi (June 16, 2015)

Date: August 28, 2015

Respectfully submitted,

/s/ Matthew Spurlock

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Exhibit 1

Request

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October 15, 2013

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Re: **Request Under Freedom of Information Act (Expedited Processing Requested)**

To Whom It May Concern:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU" or "Requesters")[1] submit this Freedom of Information Act ("FOIA") request for copies of all records concerning (1) the legal and factual bases for the United States' targeted-killing program; (2) the policy standards and evidentiary processes the government uses to evaluate (and approve or reject) the use of lethal force against individuals and groups under that program; and (3) the number, identities, legal status, and affiliations of those killed (intentionally or not) by the United States as part of the program.

I. Background

Since 2001, the Central Intelligence Agency ("CIA") and the military's Joint Special Operations Command have used lethal force in so-called "targeted killings" in at least half a dozen countries—not just in areas of armed conflict, like Iraq and Afghanistan, but also in areas far from any battlefield, such as Yemen and Somalia.[2] As the President acknowledged during a national address in May 2013, in the course of those operations, the

[1] The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union's members to lobby their legislators.

[2] *See, e.g.*, Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. Times, May 29, 2012, http://nyti.ms/JKJjiM.

U.S. government has killed American citizens.[3] It has also killed at least hundreds of civilian bystanders, including children, breeding resentment and anger in countries like Pakistan and Yemen, where targeted killing strikes frequently occur.[4] The government's reliance on these strikes in U.S. counterterrorism operations has increased dramatically in recent years, resulting in escalating public and congressional concern about those operations and their legal and factual underpinnings.[5]

In May 2013, in a so-called "Presidential Policy Guidance" document, the United States publicly announced guidelines that, the executive branch represented, place policy restrictions on the government's use of targeted killing strikes around the world.[6] Around the same time, administration officials represented in the media that the United States had already "begun transferring authority for drone strikes from the CIA to the Pentagon," in part to "open them up to greater congressional and public scrutiny."[7] Of late, however, administration officials have made clear that the executive branch can and has deviated from the policy restrictions it presented to the public as

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[3] *See* Barack Obama, President, Remarks by the President at the National Defense University (May 23, 2013), http://wh.gov/hrTq ("Obama NDU Speech"); *see also* Letter from Eric H. Holder, Jr., Att'y Gen., to Patrick J. Leahy, Chairman of the S. Comm. on the Judiciary (May 22, 2013), http://1.usa.gov/11bGJZi ("Holder Letter").

[4] *See* Jack Serle & Alice K. Ross, *August 2013 Update: US Covert Actions in Pakistan, Yemen and Somalia*, Bureau of Investigative Journalism, Sept. 2, 2013, http://bit.ly/18yiits; Gregory Johnsen, *How We Lost Yemen*, For. Pol'y, Aug. 6, 2013, http://atfp.co/16xgZNC; Ahmed Al-Haj & Aya Batrawy, *As US Drone Strikes Rise in Yemen, So Does Anger*, Associated Press, May 2, 2013, http://bit.ly/160rxVv; Scott Neuman, *Sen. Graham Says 4,700 Killed in U.S. Drone Strikes*, NPR News Two-Way Blog (Feb. 21, 2013 12:04 PM), http://n.pr/157whqC.

[5] *See, e.g.*, Steve Coll, *Remote Control: Our Drone Delusion*, New Yorker, May 6, 2013, http://nyr.kr/13y1H8g; David Cole, *How We Made Killing Easy*, N.Y. Rev. Books Blog (Feb. 6, 2013, 11:13 AM), http://bit.ly/11VUhcG; *see also* Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drones in Terror Fight*, N.Y. Times, Oct. 1, 2011, http://nyti.ms/qd0L4Q.

[6] Office of the Press Secretary, White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), http://wh.gov/hCwI.

[7] Mark Bowden, *The Killing Machines*, Atlantic, Aug. 14, 2013, http://bit.ly/17vOcGm.

hard limitations several months ago.[8]

* * *

The ACLU has previously filed two separate FOIA requests concerning the United States' use of targeted killing. On January 13, 2010, the ACLU filed a request with the Departments of Defense, Justice, and State, as well as the CIA, seeking "records pertaining to the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals."[9] And on October 19, 2011, the ACLU filed a FOIA request with various components of the Departments of Defense and Justice seeking "records pertaining to the legal authority and factual basis for the targeted killing of" Anwar al-Aulaqi and "two other U.S. citizens by the United States Government."[10] Both requests are the subject of ongoing litigation.[11]

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The ACLU submits this Request principally in order to reach records *not* covered by its previous FOIA requests, including documents that post-date the other requests and documents that senior government officials have mentioned in public speeches, testimony before Congress, and statements to the media.

Additionally, Requesters seek legal memoranda concerning the government's legal authority to conduct targeted killings generally, to account for the possibility that agencies may have determined any such memoranda to be *non-responsive* to the ACLU's earlier requests. (The ACLU's 2010 request focused on the use of drones in targeted killing, while its 2011 request sought documents about the targeted killings of American citizens.)[12]

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[8] *See* Eric Schmitt, *Embassies Open, But Yemen Stays on Terror Watch*, N.Y. Times, Aug. 11, 2013, http://nyti.ms/1crSPJB.

[9] Request Under Freedom of Information Act by Jonathan Manes, ACLU, Jan. 13, 2010, http://bit.ly/QBIBbR.

[10] Request Under Freedom of Information Act by Nathan Freed Wessler, ACLU, Oct. 19, 2011, http://bit.ly/15Lo7Zb.

[11] *See N.Y. Times v. U.S. Dep't of Justice*, No. 13-445 (2d Cir. oral argument held Oct. 1, 2013), *reviewing N.Y. Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309 (S.D.N.Y. 2012); *Am. Civil Liberties Union v. Dep't of Justice*, No. 10-cv-436, *remanded by Am. Civil Liberties Union v. Dep't of Justice*, 628 F.3d 612 (D.C. Cir. 2011), *reversing* 808 F. Supp. 2d 280 (D.D.C. 2011).

[12] Thus, agencies should construe the Request to encompass any and all memoranda authored by the Office of Legal Counsel ("OLC") concerning the government's legal authority under domestic and international law to engage

II. Requested Records

The ACLU seeks the release of the following records:

1. Any and all records pertaining to the **legal basis in domestic, foreign, and international law** upon which the government may use lethal force against individuals or groups, **including any record indicating which groups are considered to be "associated forces"** of Al-Qaeda under the Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) ("AUMF").

2. Any and all records pertaining to the **process by which the government designates individuals or groups for targeted killing**, including who is authorized to make such determinations and against what evidentiary standard factual evidence is evaluated to support such designations. Specifically included in this Request is the counterpart to the Presidential Policy Guidance, which Attorney General Holder described in his May 2013 letter to Congress as a document that "institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities"—standards that are "either already in place or are

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in targeted killings. In February 2013, Senator Dianne Feinstein revealed that the Senate Select Committee on Intelligence ("SSCI") was seeking access to "all nine OLC opinions" on the "legal authority to strike U.S. citizens," Feinstein Press Release, but later clarified that there were "a total of 11 OLC opinions related to targeted killing," four of which had been released to the SSCI. Ryan Reilly, *Seven Other Targeted Killing Memos Still Undisclosed*, Huffington Post, Feb. 13, 2013, http://huff.to/12gSbZC; *see also* " *Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence* at 5:18–20, 113th Cong. (Feb. 7, 2013), http://1.usa.gov/15fr1Sx ("Brennan Hearing Tr.") ("The Office of Legal Counsel advice establishes the legal boundaries within which we can operate" with respect to targeted killing.); White House, Press Gaggle by Press Secretary Jay Carney (Feb. 7, 2013), http://1.usa.gov/TQ3MLw ("[T]he President directed the Department of Justice to provide the congressional Intelligence Committee's access to classified Office of Legal Counsel advice related to the subject of the Department of Justice white paper that we've been discussing these last several days."); *Oversight of the U.S. Department of Justice Before the S. Comm. on the Judiciary* at 1:51:36–1:52:24, 113th Cong. (Mar. 6, 2013), http://1.usa.gov/14pKfSc (testimony of Eric Holder, Att'y Gen.) ("I think that white paper becomes more clear if it can be read in conjunction with the underlying OLC advice.").

to be transitioned into place."[13]

3. Any and all records pertaining to **before-the-fact assessments of civilian or bystander casualties** in targeted-killing strikes and any and all records concerning **"after-action" investigations into individual targeted-killing strikes**.

4. Any and all records pertaining to the **number and identities** of individuals killed or injured in targeted-killing strikes, *including but not limited to* records regarding the **legal status** of those killed or injured, with these separated out by **individuals intentionally targeted** and **collateral casualties or injuries**.

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With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, we request that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 32 C.F.R. § 1900.34(c); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); 22 C.F.R. § 171.12(b). There is a "compelling need" for these records, as defined in the statute and regulations, because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 32 C.F.R. § 1900.34(c)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 22 C.F.R. § 171.12(b)(2). In addition, the records sought relate to a "breaking news story of general public interest." 32 C.F.R. § 1900.34(c)(2) (providing for expedited processing when "the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity"); *see also* 32 C.F.R. § 286.4(d)(3)(ii)(A); 22 C.F.R. § 171.12(b)(2)(i).

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[13] Holder Letter at 4; *see also* Karen DeYoung, *A CIA Veteran Transforms U.S. Counterterrorism Policy*, Wash. Post, Oct. 24, 2012, http://wapo.st/RkL6zx ("The 'playbook,' as [former chief White House counterterrorism advisor and now CIA Director John] Brennan calls it, will lay out the administration's evolving procedures for the targeted killings that have come to define its fight against al-Qaeda and its affiliates. It will cover the selection and approval of targets from the 'disposition matrix,' the designation of who should pull the trigger when a killing is warranted, and the legal authorities the administration thinks sanction its actions in Pakistan, Yemen, Somalia and beyond.").

A. The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and relevant regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 1900.34(c)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 22 C.F.R. § 171.12(b)(2); *see Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit, public-interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information" (citation omitted)); *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (finding Leadership Conference—whose mission is "to serve as the site of record for relevant and up-to-the-minute civil rights news and information" and to "disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws"—to be "primarily engaged in the dissemination of information").

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Dissemination of information about actual or alleged government activity is a critical and substantial component of the ACLU's mission and work. The ACLU disseminates this information to educate the public and promote the protection of civil liberties. The ACLU's regular means of disseminating and editorializing information obtained through FOIA requests include: a paper newsletter distributed to approximately 450,000 people; a bi-weekly electronic newsletter distributed to approximately 300,000 subscribers; published reports, books, pamphlets, and fact sheets; a widely read blog; heavily visited websites, including an accountability microsite, http://www.aclu.org/accountability; and a video series.

The ACLU also regularly issues press releases to call attention to documents released through FOIA and other breaking news.[14] ACLU

[14] *See, e.g.*, Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), *available at* http://www.aclu.org/node/36742; Press Release, American Civil Liberties Union, FOIA Documents Show FBI Using "Mosque Outreach" for Intelligence Gathering (Mar. 27, 2012), *available at* http://www.aclu.org/national-security/foia-documents-show-fbi-using-mosque-outreach-intelligence-gathering; Press Release, American Civil Liberties Union, FOIA Documents Show FBI Illegally Collecting Intelligence Under Guise of "Community Outreach" (Dec. 1, 2011), *available at* http://www.aclu.org/national-security/foia-documents-show-fbi-illegally-collecting-intelligence-under-guise-community; Press Release, American

attorneys are frequently interviewed for news stories about documents released through ACLU FOIA requests.[15]

The ACLU website specifically includes features on information about actual or alleged government activity obtained through FOIA.[16] For example, the ACLU maintains an online "Torture Database," a compilation of over 100,000 FOIA documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.[17] The ACLU also maintains a "Torture FOIA" webpage containing commentary about the ACLU's FOIA requests, press releases, and analysis of the FOIA documents.[18] (That webpage also

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Civil Liberties Union, FOIA Documents from FBI Show Unconstitutional Racial Profiling (Oct. 20, 2011), *available at* http://www.aclu.org/national-security/foia-documents-fbi-show-unconstitutional-racial-profiling; Press Release, American Civil Liberties Union, Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees is Widespread National Problem (Oct. 19, 2011), *available at* http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse; Press Release, American Civil Liberties Union, New Evidence of Abuse at Bagram Underscores Need for Full Disclosure About Prison, Says ACLU (June 24, 2009), *available at* http://www.aclu.org/national-security/new-evidence-abuse-bagram-underscores-need-full-disclosure-about-prison-says-aclu.

[15] *See, e.g.*, Carrie Johnson, *Delay in Releasing CIA Report Is Sought; Justice Dept. Wants More Time to Review IG's Findings on Detainee Treatment*, WASH. POST, June 20, 2009 (quoting ACLU staff attorney Amrit Singh); Peter Finn & Julie Tate, *CIA Mistaken on 'High-Value' Detainee, Document Shows*, WASH. POST, June 16, 2009 (quoting ACLU staff attorney Ben Wizner); Scott Shane, *Lawsuits Force Disclosures by C.I.A.*, N.Y. TIMES, June 10, 2009 (quoting ACLU National Security Project director Jameel Jaffer); Joby Warrick, *Like FBI, CIA Has Used Secret 'Letters,'* WASH. POST, Jan. 25, 2008 (quoting ACLU staff attorney Melissa Goodman).

[16] *See, e.g.*, http://www.aclu.org/national-security/predator-drone-foia; http://www.aclu.org/national-security/anwar-al-awlaki-foia-request; http://www.aclu.org/torturefoia; http://www.aclu.org/olcmemos; http://www.aclu.org/mappingthefbi; http://www.aclu.org/national-security/bagram-foia; http://www.aclu.org/safefree/torture/csrtfoia.html; http://www.aclu.org/natsec/foia/search.html; http://www.aclu.org/safefree/nsaspying/30022res20060207.html; http://www.aclu.org/patriotfoia; http://www.aclu.org/spyfiles; http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html; and http://www.aclu.org/exclusion.

[17] http://www.torturedatabase.org/.

[18] http://www.aclu.org/torturefoia/.

notes that the ACLU, in collaboration with Columbia University Press, has published a book about the documents obtained through FOIA. See JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND (Columbia Univ. Press 2007)). Similarly, the ACLU's webpage about the OLC torture memos it obtained through FOIA contains commentary and analysis of the memos; an original, comprehensive chart summarizing the memos; links to web features created by ProPublica (an independent, non-profit, investigative-journalism organization) based on the ACLU's information gathering, research, and analysis; and ACLU videos about the memos.[19] In addition to websites, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through FOIA.

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The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use, and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.[20]

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

These records are urgently needed to inform the public about actual or alleged government activity; moreover, the records sought relate to a breaking news story of general public interest. Specifically, the requested records relate to the government's legal foundation for secretly targeting and killing individuals both within and outside the context of an armed conflict. *See* 32 C.F.R. § 1900.34(c)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii)(A); 22 C.F.R. § 171.12(b)(2).

As discussed in Part I, the government's legal position vis-à-vis its targeted-killing program has been the subject of widespread public controversy and media attention. Throughout 2013, the legal memoranda justifying the government's targeted-killing program have been the subject of sustained attention. The records sought through this Request would contribute to the public's understanding of the government's positions and policy because, as Senator Feinstein explained when discussing congressional

[19] http://www.aclu.org/safefree/general/olc_memos.html.

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

oversight of the program, "it is really necessary to understand what the official legal interpretation is" when weighing the legality of controversial government action.[21] That is also true when it comes to the public's oversight role because "making sure that the American people are brought into these debates . . . is what you need to preserve a republic."[22] For the same reason, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

Given the foregoing, expedited processing should be granted for this request.

IV. Application for Waiver or Limitation of Fees

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A. Release of records is in the public interest.

The ACLU requests a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records is in the public interest because it is likely to contribute significantly to the public understanding of the United States government's operations or activities and is not primarily in the Requester's commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 1900.13(b)(2); 28 C.F.R. § 16.11(k); 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17.

Numerous news accounts reflect the considerable public interest in the records the ACLU seeks. See *supra* Part I. The ACLU makes this Request to further the public's understanding of the government's legal position on its targeted-killing program. Moreover, disclosure is not in the ACLU's commercial interest. Any information obtained by the ACLU as a result of this FOIA Request will be made available to the public at no cost. *See* 32 C.F.R. § 1900.13(b)(2); 28 C.F.R. § 16.11(k); 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17. Therefore, a fee waiver would fulfill Congress' legislative intent in amending FOIA to provide for fee waivers such as the one sought herein. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act").

The legal memoranda and other records sought through this Request, containing legal viewpoints and justifications as well as explanations of evidentiary and legal standards being employed within the Executive Branch

[21] Brennan Hearing Tr. at 28:5–6.

[22] *Id.* at 55:5–7 (statement of Sen. Wyden).

as part of its targeted-killing program, are of crucial significance to the public's understanding of the legality of the use of lethal force and the circumstances under which the government believes it can kill people. As a result, the public has a compelling interest in the production of the records sought through this Request.

B. The ACLU qualifies as a representative of the news media.

A waiver of search and review fees is warranted because the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); *see also* 32 C.F.R. § 1900.02(h)(3); 28 C.F.R. § 16.11(k); 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17. Accordingly, fees associated with the processing of this request should be "limited to reasonable standard charges for document duplication." 28 C.F.R. § 16.11(k); *see* 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media"); 32 C.F.R. § 1900.02(h)(3); 32 C.F.R. § 286.28(d); 22 C.F.R. § 171.17.

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

The ACLU is a "representative of the news media" for the same reasons that it is "primarily engaged in the dissemination of information." *See Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for FOIA purposes).[23] The ACLU disseminates information through many

[23] On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services

channels, including its websites, blogs, press releases, books, reports, newsletters, news briefings, fact sheets, educational brochures, pamphlets, television series, and public speaking engagements. See supra part II(A). As Senator Leahy said during a debate about FOIA's fee-waiving provisions: "[A]ny person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986). Indeed, the ACLU recently was held to be a "representative of the news media." *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11CV1534 (MRK), 2012 WL 3683399, at *3 (D. Conn. May 14, 2012); *accord Am. Civil Liberties Union of Wash. v. U.S. Dep't of Justice*, No. C09–0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011), *reconsidered in part on other grounds*, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

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

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

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granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the U.S. Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Finally, three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

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

Brett Max Kaufman
American Civil Liberties Union
125 Broad Street—18th Floor
New York, NY 10004
Tel: 212.549.2603
Fax: 212.549.2654
bkaufman@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

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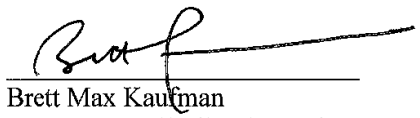
Respectfully,



Brett Max Kaufman
American Civil Liberties Union Foundation

Exhibit 2

December 1989 Parks Memo

A-86

Memorandum of Law: Executive Order 12333 and Assassination

In 1977 President Gerald R. Ford promulgated Executive Order 11905, which provided, in part, that "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Each successive administration has repromulgated this prohibition. The Reagan Administration Executive Order 12333 containing the prohibition on assassination has been continued without change by President Bush. None of these executive orders defined the term "assassination." In the process of rewriting U.S. Army Field Manual 27-10, The Law of War, the following memorandum was prepared to explain the term in the context of military operations across the conflict spectrum.

DAJA-IA (27-1a)

MEMORANDUM OF LAW

SUBJECT: Executive Order 12333 and Assassination

1. Summary. Executive Order 12333 prohibits assassination as a matter of national policy, but does not expound on its meaning or application. This memorandum explores the term and analyzes application of the ban to military operations at three levels: (a) conventional military operations; (b) counterinsurgency operations; and (c) peacetime counterterrorist operations. It concludes that the clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in EO 12333 or by international law.

2. Memorandum Purpose. The purpose of this memorandum is to explore "assassination" in the context of national and international law to provide guidance in the revision of U.S. Army Field Manual 27-10, *The Law of War*, consistent with Executive Order 12333. This memorandum is not intended to be, and does not constitute, a statement of policy.

3. a. *Assassination in General*. Executive Order 12333 is the Reagan Administration's successor to an Executive Order renouncing assassination first promulgated in the Ford Administration. Paragraph 2.11 of Executive Order 12333 states that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." The Bush Administration has continued Executive Order 12333 in force without change. Neither Executive Order 12333 nor its predecessors defines the term "assassination."

Appendix A contains a number of definitions from recognized sources that were considered in development of this memorandum. In general, assassination involves murder of a targeted individual for political purposes.

While assassination generally is regarded as an act of murder for political reasons, its victims are not necessarily limited to persons of public office or prominence. The murder of a private person, if carried out for political purposes, may constitute an act of assassination. For example, the 1978 "poisoned-tip umbrella" killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents on the streets of London falls into the category of an act of murder carried out for political purposes, and constitutes an assassination. In contrast, the murder of Leon Klinghoffer, a private citizen, by the terrorist Abu el Abbas during the 1985 hijacking of the Italian cruise ship *Achille Lauro*, though an act of murder for political purposes, would not constitute an assassination. The distinction lies not merely in the purpose of the act and/or its intended victim, but also under certain circumstances in its covert nature. [1] Finally, the killing of Martin Luther King and Presidents Abraham Lincoln, James A. Garfield, William McKinley and John F. Kennedy generally are regarded as assassination because each involved the murder of a public figure or national leader for political purposes accomplished through a surprise attack.

b. Assassination in Peacetime. In peacetime, the citizens of a nation — whether private individuals or public figures — are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation. Article 2(4) of the Charter of the United Nations provides that all Member States

> shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purpose of the United Nations.

Peacetime assassination, then, would seem to encompass the murder of a private individual or public figure for political purposes, and in some cases (as cited above) also require that the act constitute a covert activity, particularly when the individual is a private citizen. Assassination is unlawful killing, and would be prohibited by international law even if there were no executive order proscribing it.

c. Assassination in Wartime. Assassination in wartime takes on a different meaning. As Clausewitz noted, war is a "continuation of political activity by other means." *On War* (Howard and Paret, eds. [1976]), p. 87. In wartime the role of the military includes the legalized killing (as opposed to murder) of the enemy, whether

[1] *Covert operations* are defined as "operations which are planned and executed so as to conceal the identity of or permit plausible denial by the sponsor. They differ from clandestine operations in that emphasis is placed on concealment of identity of [the] sponsor rather than on concealment of the operation." In contrast, low visibility operations are defined as "Sensitive operations wherein the political/military restrictions inherent in covert and clandestine operations are either not necessary or not feasible; actions are taken as required to limit exposure of those involved and/or their activities. Execution of these operations is undertaken with the knowledge that the action and/or sponsorship of the operation may preclude plausible denial by the initiating power." JCS Pub. 1, *Dictionary of Military and Associated Terms* (1 June 1987).

lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in the hostilities. See Grotius, *The Law of War and Peace* (1646), Bk. III, Sec. XVIII(2); Oppenheim, *International Law* II (H. Lauterpacht, ed., 1952), pp. 332, 346; and Berriedale, 2 *Wheaton's International Law* (1944), p. 171.

The term *assassination* when applied to wartime military activities against enemy combatants or military objectives does not preclude acts of violence involving the element of surprise. Combatants are liable to attack at any time or place, regardless of their activity when attacked. Spaight, *War Rights on Land* (1911), pp. 86, 88; U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), para. 31. Nor is a distinction made between combat and combat service support personnel with regard to the right to be attacked as combatants; combatants are subject to attack if they are participating in hostilities through fire, maneuver, and assault; providing logistic, communications, administrative, or other support; or functioning as staff planners. An individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such. Nor does the prohibition on assassination limit means that otherwise would be lawful; no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or boobytrap, a single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one *vis-a-vis* another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination.

Likewise, the death of noncombatants ancillary to the lawful attack of a military objective is neither assassination nor otherwise unlawful. Civilians and other noncombatants who are within or in close proximity to a military objective assume a certain risk through their presence in or in proximity to such targets; this is not something about which an attacking military force normally would have knowledge or over which it would have control.

The scope of assassination in the U.S. military was first outlined in U.S. Army General Orders No. 100 (1863). Paragraph 148 states

> *Assassination*. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. . . .

This provision, consistent with the earlier writings of Hugo Grotius *(Cf.* Bk. III, Sec. XXXVIII(4)), has been continued in U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), which provides (paragraph 31):

> (Article 23b, Annex to Hague Convention IV, 1907) is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'

The foregoing has endeavored to define *assassination* in the sense of what the term normally encompasses, as well as those lawful acts carried out by military forces in time of war that do not constitute assassination. The following is a discussion of assassination in the context of specific levels of conflict.

3. Conventional War. As noted in the quote from paragraph 31 of U.S. Army Field Manual 27-10, assassination in the context of a conventional war consists of "outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.' "

This prohibition complements the proscription on denial of quarter contained in article 23d, Annex to Hague Convention IV (1907). (The prohibition on denial of quarter makes it illegal to refuse to accept an enemy's surrender under any circumstances, or to put to death those who surrender or who are *hors de combat*.) However, neither proscription precludes the attack of enemy combatants with the intent to kill rather than capture so long as those who endeavor to surrender are availed that opportunity where circumstances permit. This is not always possible. The death of an enemy combatant who endeavors to surrender while caught in the center of the kill zone of an infantry ambush normally would not be a violation of either proscription, for example. Neither would the killing of an enemy soldier who, in the midst of an assault by his unit, has a change of heart and throws down his weapon, raises his hands, and dies in a hail of bullets put out by the defending unit repelling the enemy attack. The test is one of reasonableness.

As previously noted, enemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of their attack. Such attacks do not constitute assassination unless carried out in a "treacherous" manner, as prohibited by article 23(b) of the Annex to the Hague Regulations (Hague Convention IV) of 1907. While the term "treacherous" has not been defined, as previously noted in this memorandum it is not regarded as prohibiting operations that depend upon the element of surprise, such as a commando raid or other form of attack behind enemy lines.

Thus, none of the following constitutes assassination, although the term has been applied loosely (and incorrectly) to the first two:

> 18 November 1941: Commando raid by No. 11 Scottish Commando at Bedda Littoria, Libya, to kill German Field Marshal Erwin Rommel.
>
> 18 April 1943: USAAF P-38 fighter aircraft intercept and down Japanese aircraft carrying Admiral Osoruku Yamamoto over Bougainville, killing Admiral Yamamoto.
>
> 30 October 1951: U.S. Navy airstrike kills 500 senior Chinese and North Korean military officers and security forces attending a military planning conference at Kapsan, North Korea.

Traditionally, soldiers have an obligation to wear uniforms to distinguish themselves from the civilian population. Law of war sources prior to World War II suggested that the prohibition on killing or wounding "treacherously" referred to soldiers disguising themselves as civilians in order to approach an enemy force and carry out a surprise attack. That concept was thrown into disarray during World War II by the reliance on partisans by all parties to that conflict. While frequently characterized as an assassination, the 27 May 1942 ambush of SS General Reinhard Heydrich by British SOE-trained Czechoslovakian partisans is representative of the practice of each party to the conflict employing organized resistance units to carry out attacks against military units and personnel of an occupying power. [2]

Reliance upon organized partisan forces changed state practice and, accordingly, the law of war. Coordinated British and U.S. revisions of their respective post-World War II law of war manuals reflected this change. For example, the following underlined sentence was added to paragraph 31 of FM 27-10:

> (Article 23b, Annex to the Hague Convention IV, 1907) is construed as prohibiting assassination. . . . *It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*

The annotations to FM 27-10 state that the underlined sentence was inserted "so as not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons." The deliberate decision by many nations to employ surrogate guerrilla forces in lieu of or in conjunction with conventional military units to fight a succession of guerrilla wars since 1945 has served to raise further doubts regarding the traditional rule.

While state practice suggests that the employment of partisans is lawful, that is, would not constitute assassination, a question remains regarding the donning of civilian clothing by conventional forces personnel for the purpose of killing enemy combatants. However, in the one known case of such practice during World War II, a British officer who successfully entered a German headquarters dressed in civilian attire and killed the commanding general was decorated rather than punished for his efforts. [3]

Another unresolved issue concerns which civilians may be regarded as combatants, and therefore subject to lawful attack. While there is general agreement among law of war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant. Appendix B places members of the civilian population into four distinct categories. Those who do not participate in the hostilities always are immune from intentional attack. The remaining three categories have been defined by one group of experts as follows:

> War effort: all national activities which by their nature and purpose would contribute to the military defeat of the adversary.
>
> Military effort: all activities by civilians which objectively are useful in defense or attack in the military sense, without being the direct cause of damage inflicted, on the military level.
>
> Military operations: movements of attack or defense.

There is a lack of agreement on this matter, and no existing law of war treaty provides clarification or assistance. Historically, however, the decision as to the level at which civilians may be regarded as combatants or "quasi-combatants" and thereby subject to attack generally has been a policy rather than a legal matter. The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of limited segments of the civilian population with each nation's conduct of military operations and vital support activities.

Three points can be made in this respect. (a) Civilians who work within a military objective are at risk from attack during the times in which they are present within that objective, whether their injury or death is incidental to the attack of that military objective or results from their direct attack. Neither would be assassination. (b) The substitution of a civilian in a position or billet that normally would be occupied by a member of the military will not make that position immune from attack. (c) Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation's war effort than that person's service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation's national security or war aims. Thus, more than 90% of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves. Attack of these individuals would not constitute assassination. [4]

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[2] A degree of confusion exists, as Heydrich was characterized by the British law of war manual as the "civilian" governor in Czechoslovakia. While Heydrich's predecessor, Konstantin von Neurath, was a civilian, Heydrich's position as a uniformed officer in the SS, a military organization, clearly made him a combatant.

[3] Had he been captured by the Germans, he would have been subject to trial and execution as a spy.

[4] While a civilian head of state who serves as commander-in-chief of the armed forces may be a lawful target (and his or her attack therefore would not constitute an act of assassination), as a matter of comity such attacks generally have been limited. As previously stated, the death of an individual incidental to the attack of a military objective would not constitute assassination.

4. Counterinsurgency. Guerrilla warfare is particularly difficult to address because a guerrilla organization generally is divided into political and guerrilla (military) cadre, each garbed in civilian attire in order to conceal their presence or movement from the enemy. Appendix C illustrates a division of the "civilian" population in an insurgent environment.

Just as members of conventional military units have an obligation to wear uniforms in order to distinguish themselves from the civilian population, civilians have an obligation to refrain from actions that might place the civilian population at risk. A civilian who undertakes military activities assumes a risk of attack, and efforts by military forces to capture or kill that individual would not constitute assassination.

The wearing of civilian attire does not make a guerrilla immune from lawful attack, and does not make a lawful attack on a guerrilla an act of assassination. As with the attack of civilians who have combatant responsibilities in conventional war, the difficulty lies in determining where the line should be drawn between guerrillas/combatants and the civilian population in order to provide maximum protection from intentional attack to innocent civilians. The law provides no precise answer to this problem, and one of the most heated debates arising during and after the U.S. war in Vietnam surrounded this issue. [5] As with conventional war, however, ultimately the issue was settled along policy rather than legal lines. If a member of a guerrilla organization falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be assassination.

5. Peacetime operations. The use of force in peacetime is limited by the previously-cited article 2(4) of the Charter of the United Nations. However, article 51 of the Charter of the United Nations recognizes the inherent right of self defense of nations. Historically the United States has resorted to the use of military force in peacetime where another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities. For example:

— 1804-1805: Marine First Lieutenant Presley O'Bannon led an expedition into Libya to capture or kill [6] the Barbary pirates.

— 1916: General "Blackjack" Pershing led a year-long campaign into Mexico to capture or kill the Mexican bandit Pancho Villa following Villa's attack on Columbus, New Mexico.

— 1928-1932: U.S. Marines conducted a campaign to capture or kill the Nicaraguan bandit leader Augusto Cesar Sandino.

— 1967: U.S. Army personnel assisted the Bolivian Army in its campaign to capture or kill Ernesto "Che" Guevara.

— 1985: U.S. Naval forces were used to force an Egypt Air airliner to land at Sigonella, Sicily, in an attempt to prevent the escape of the *Achille Lauro* hijackers.

— 1986: U.S. naval and air forces attacked terrorist-related targets in Libya in response to the Libyan government's continued employment of terrorism as a foreign policy means.

Hence there is historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security.

The Charter of the United Nations recognizes the inherent right of self defense and does not preclude unilateral action against an immediate threat.

In general terms, the United States recognizes three forms of self defense:

a. Against an actual use of force, or hostile act.

b. Preemptive self defense against an imminent use of force. [7]

c. Self defense against a continuing threat. [8]

A national decision to employ military force in self defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self defense. The terrorist organizations envisaged as appropriate to necessitate or warrant an armed

[5] Extended civil litigation between Sam Adams and General William C. Westmoreland failed to resolve this issue, illustrating its complexity.

[6] In the employment of military forces, the phrase "capture or kill" carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture (e.g.) a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual(s) in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ (e.g.) an airstrike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.

[7] *See, e.g.*, U.S. Navy Regulations (1973), article 0915, which states in part that force may be used "to counter either the use of force or an immediate threat of the use of force," or JCS SM 846-88 (28 October 1988), Peacetime Rules of Engagement for U.S. Forces, pp. I-4 and I-5, which define hostile intent.

[8] The last has been exercised on several occasions within the past decade. It formed the basis for the U.S. Navy air strike against Syrian military objectives in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day. It also was the basis for the air strikes against terrorist-related targets in Libya on the evening of 15 April 1986. This right of self defense would be appropriate to the attack of terrorist leaders where their actions pose a continuing threat to U.S. citizens or the national security of the United States. As with an attack on a guerrilla infrastructure, the level to which attacks could be carried out against individuals within a terrorist infrastructure would be a policy rather than a legal decision.

response by U.S. military forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force. [9]

6. Summary. Assassination constitutes an act of murder that is prohibited by international law and Executive Order 12333. The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy. Its intent was not to limit lawful self defense options against legitimate threats to the national security of the United States or individual U.S. citizens. Acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.

W. HAYS PARKS
Chief, International Law Branch
International Affairs Division

Appendix A

General Definitions

While none is entirely satisfactory, the following definitions of *assassinate* or *assassination* were considered in the formulation of this memorandum.

The Oxford English Dictionary (1933) defines *assassination* as "the taking of the life of anyone by treacherous violence, especially by a hired emissary, or one who has taken upon him to execute the deed," and *assassin* as "one who undertakes to put another to death by treacherous violence. The term retains so much of its original application as to be used chiefly of the murder of a public personage, who is generally hired or devoted to the deed, and aims purely at the death of his victim."

Webster's Third New International Dictionary of the English Language (1976) defines *assassination* as "1. To murder (a usually prominent person) violently. . . . 3. to injure, wound, or destroy, usually unexpectedly and treacherously." Under the term *kill*, that dictionary defines *assassination* as "implies the killing of a person in governmental or political power."

Webster's Ninth New Collegiate Dictionary (1984) utilizes the same definition for *assassination* as the larger volume, quoted above, but defines the term under *kill* as applying to "deliberate killing openly or secretly, often for political purposes."

The Random House Dictionary of the English Language (2nd edition, 1987), defines *assassinate* as "to kill suddenly or secretly, especially a politically prominent person; murder premeditatedly and treacherously."

The Oxford Companion to Law (1980) defines *assassination* as "the murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people from political motives, e.g. the assassination of President Kennedy."

Black's Law Dictionary (5th edition, 1979) defines *assassination* as "murder committed, usually, though not necessarily, for hire, without direct provocation or cause of resentment given to the murderer by the person upon whom the crime is committed; though an assassination of a public figure might be done by one acting alone for personal, social or political reasons. . . ."

Black's Law Dictionary (4th edition, 1951) explains the distinction between *murder* and *homicide* by defining the latter as ". . .the act of a human being in taking away the life of another human being. . . . Homicide is not necessarily a crime. It is a necessary ingredient of the crime of murder, but there are cases in which homicide may be committed without criminal intent and without criminal consequences, as, where it is done. . .in *self-defense*. . . . [emphasis supplied]."

A recent law review article defines *assassination* as "the intentional killing of an internationally protected person." Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 Virginia Journal of International Law (Spring 1987), p. 655; though limiting it to a class of individuals such as diplomats and other statesmen, who are protected by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (28 U.S.T. 1975, T.I.A.S No. 8532, 1035 U.N.T.S. 167 [1973]).

Historical analyses of assassination contain similar definitions. For example, one source defines *assassination* as

> . . .the sudden, surprising, treacherous killing of a public figure, who has responsibilities to the public, by someone who kills in the belief that he is acting in his own private or the public interest. McConnell, *The History of Assassination* (1969), p. 12.

Another analysis defines *assassination* as

> . . .those killings or murders, usually directed against individuals in public life, motivated by political rather than personal relationships. Havens, Leiden, and Schmitt, *Assassination and Terrorism: Their Modern Dimensions* (1975), p. 4.

On the other hand, other scholars have declined to define the term. See, for example, Bell, *Assassins!* (1979), p. 22; and Ford, *Political Murder* (1985), pp. 1, 46, 196, 301-307.

[9] In a conventional armed conflict, such individuals would be regarded as unprivileged belligerents, subject to attack, but not entitled to prisoner of war protection or exemption from prosecution for their crimes. Employment of military force against terrorists does not bestow prisoner of war protection upon members of the terrorist organization.

Exhibit 3

June 2007 Dorn Declaration

A-93

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, and VETERANS FOR PEACE,

Plaintiffs,

v. 04 Civ. 4151 (AKH)

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 JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; and CENTRAL INTELLIGENCE AGENCY,

Defendants.

EIGHTH DECLARATION OF MARILYN A. DORN
INFORMATION REVIEW OFFICER
CENTRAL INTELLIGENCE AGENCY

Introduction

I, MARILYN A. DORN, hereby declare and state:

1. I am the Information Review Officer (IRO) for the National Clandestine Service (NCS)[1] of the Central Intelligence

[1] The NCS is the successor to the Directorate of Operations (DO).

Agency (CIA). After serving one and a half years as Associate NCS/IRO, I was appointed to my current position on 1 August 2003.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities; conducting special activities, including covert action; conducting liaison with foreign intelligence and security services; serving as the repository of foreign counterintelligence information; supporting clandestine technical collection; and coordinating CIA support to the Department of Defense and other U.S. Government agencies.

3. The Associate Deputy Director of the CIA has appointed me Records Validation Officer (RVO) for the purpose of this and certain other litigation. As RVO, I am authorized to have access to all CIA records on any subject relevant to this litigation, and am authorized to sign declarations on behalf of the CIA regarding searches of CIA records systems and the contents of records, including those located in, or containing information under the cognizance of, CIA directorates other than the NCS.

4. As a senior CIA official and under a written delegation of authority pursuant to section 1.3(c) of Executive Order

12958, as amended,[2] I hold original classification authority at the TOP SECRET level. I am authorized, therefore, to conduct classification reviews and to make original classification and declassification decisions. When acting as RVO, which I am doing in this litigation, my original classification and declassification authority extends to all CIA information.

5. Through the exercise of my official duties, I am familiar with this civil action. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

6. The purpose of this declaration is to describe, to the greatest extent possible on the public record, the Plaintiffs' Freedom of Information Act (FOIA) request, the procedural history of this case, the President's 6 September 2006 speech acknowledging the existence of a CIA detention and interrogation program, the effect of the President's speech on this case, the CIA's records search for documents responsive to Plaintiffs' FOIA request, the documents located, and the FOIA exemptions upon which the CIA relies to withhold the documents.

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[2] Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as amended by Exec. Order No. 13292. See Exec. Order No. 12,958, 3 C.F.R. 333 (1995), *reprinted as amended* in 50 U.S.C.A. § 435 note at 180 (West. Supp. 2006).

Plaintiffs' FOIA Request

7. Plaintiffs' 25 May 2004 letter (hereinafter "general FOIA request") requested records since 11 September 2001 relating to "the treatment of Detainees in United States custody, the deaths of Detainees in United States custody; and, the rendition of Detainees and other individuals to foreign powers known to employ torture or illegal interrogation techniques." Plaintiffs' 16 August 2004 letter specified 70 items that they considered included within their general FOIA request. This declaration addresses three of Plaintiffs' specific requests. Item No. 1 requested a "Late 2001 Memorandum from DOJ to CIA interpreting the Convention Against Torture." Item No. 29 requested a "DOJ memorandum, specifying interrogation methods that the CIA may use against top al-Qaeda members." Item No. 61 requested a "Directive signed by President Bush that grants CIA, the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against Detainees."

Procedural History

8. Relying on the *Glomar* doctrine and FOIA Exemptions b(1) and b(3), the CIA refused to confirm or deny the existence of documents responsive to Items No. 1, 29, and 61. The CIA

determined that confirming or denying the existence of the documents would have revealed whether it had an interest in engaging in a clandestine intelligence activity. On 29 September, 2 November, and 19 December 2005, the Court upheld the CIA's *Glomar* response with respect to Items No. 29 and 61, but denied its *Glomar* response with respect to Item No. 1. On 14 February 2006, the CIA offered an administrative response to Plaintiffs with respect to Item No. 1. The CIA responded that it had not located any documents responsive to Item No. 1, but had located one similar document that was responsive to the general FOIA request. The CIA withheld this document in its entirety on the bases of FOIA Exemptions b(1), b(3), and b(5).

9. On 9 January 2006, Plaintiffs appealed the district court's judgment upholding the CIA's *Glomar* response with respect to Items No. 29 and 61. The parties completed their briefing on the *Glomar* issue by 22 May 2006 and the appeal was argued to the U.S. Court of Appeals for the Second Circuit on 12 June 2006. The Court of Appeals requested and received supplemental letter briefs from the CIA and Plaintiffs on 16 June and 21 June 2006, respectively. On 6 September 2006, while the appeal was pending, President Bush delivered a speech acknowledging the existence of a CIA terrorist detention and interrogation program, which is described in paragraphs 12-13. That same date, the CIA filed a notice advising the appeals

court that the President's speech may affect the CIA's position with respect to Plaintiffs' appeal.

10. On 12 September 2006, the Court of Appeals ordered the CIA to show cause why, in light of the President's 6 September 2006 speech, the portion of the judgment of the district court relating to the *Glomar* issue should not be vacated and the case remanded for further proceedings. On 18 and 20 September 2006, respectively, the CIA and Plaintiffs consented to a remand to the district court. On 22 September 2006, the Court of Appeals vacated the portion of the judgment of the district court relating to the *Glomar* issue and remanded the case for further proceedings. On 2 November 2006, the Court of Appeals issued its mandate.[3]

11. On 10 November 2006, the CIA withdrew its *Glomar* response and acknowledged that it had located two documents responsive to Items No. 29 and 61. The CIA withheld these documents in their entirety on the bases of FOIA Exemptions b(1), b(3), and b(5).

[3] By order dated 1 November 2006, the appeals court recalled its 25 September 2006 mandate and amended its 22 September 2006 order to clarify that the court was vacating only that portion of the district court's order that was the subject of this appeal--the *Glomar* issue--and was not vacating the entire district court order, which also dealt with other agencies and documents.

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The President's 6 September 2006 Speech

12. On 6 September 2006, President Bush delivered a speech that officially acknowledged the existence of a CIA terrorist detention and interrogation program. The President acknowledged that a small number of suspected terrorist leaders and operatives captured during the war on terrorism have been held and questioned outside the United States in a program operated by the CIA. He further acknowledged that the CIA employed an alternative set of interrogation procedures that the Department of Justice (DOJ) had reviewed and determined to be lawful. He announced that fourteen suspected terrorists in CIA custody had been transferred to the United States Naval Base Guantanamo Bay, Cuba. He stated that, due to the transfers, no detainees remained in the CIA program. He also stated that as more suspected high-ranking terrorists are captured, the need to obtain intelligence from such individuals will remain critical, and having a CIA program for questioning terrorists will continue to be crucial to getting lifesaving information.

13. The President emphasized that he was making limited disclosures only and specifically declined to provide any information relating to the details of the CIA terrorist detention and interrogation program, including the locations where the detainees were held, the details of their confinement,

and the specific interrogation methods proposed, authorized, or employed with them. The President stated:

> Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country. I can say that questioning the detainees in this program has given us information that has saved innocent lives by helping us stop new attacks here in the United States and across the world . . . .
>
> . . . . And so the CIA used an alternative set of procedures . . . . I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning and to keep information from us that we need to prevent new attacks on our country . . . .
>
> This program has been and remains one of the most vital tools in our war against the terrorists. It is invaluable to America and to our allies.
>
> Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this program has saved innocent lives.

Declassification

14. In his speech, the President stated that he officially acknowledged the existence of a CIA terrorist detention and interrogation program for two reasons. First, he stated that the CIA had largely completed its questioning of the fourteen suspected terrorists and that it was time to bring them into the open to start the process for bringing them to trial. Second,

he stated that the *Hamdan* decision had put into question the future of the CIA program.

15. Section 3.1(b) of Executive Order 12958 provides that, in some exceptional cases, the need to protect classified information may be outweighed by the public interest in disclosure of the information. In light of the President's determination to bring the CIA detainees to trial, the Director of the CIA, in accordance with section 3.1(b), determined that the public interest in disclosure of the existence of the CIA terrorist detention and interrogation program and the limited information disclosed in the President's speech outweighed the need to protect certain limited classified information relating to the existence of the program. Neither the President nor the Director of the CIA disclosed any information relating to the details of the CIA terrorist detention and interrogation program, including the locations where the detainees were held, the details of their confinement, or the specific interrogation methods proposed, authorized, or employed with them.

CIA Records Search

16. The CIA processed Plaintiffs' requests for records responsive to Items No. 1, 29, and 61 in accordance with the FOIA, 5 U.S.C. § 552, as amended. After conducting a diligent search of relevant systems of records that was reasonably

calculated to discover any responsive records, the CIA located one document responsive to Item No. 29 and one document responsive to Item No. 61. The CIA did not locate a document responsive to Item No. 1, but did locate one similar document that is responsive to the general FOIA request in Plaintiffs' 25 May 2004 letter. The CIA has included this document in this *Vaughn* declaration, and for purposes of this declaration will refer to this document as "responsive" to Item No. 1.

17. The document responsive to Item No. 1 is withheld in its entirety on the basis of FOIA Exemption b(5). The documents responsive to Items No. 29 and 61 are withheld in their entirety on the bases of FOIA Exemptions b(1), b(3), and b(5). All of the documents are withheld in their entirety because there is no meaningful, non-exempt information that can be reasonably segregated from the exempt information.

FOIA Exemption b(1)

18. FOIA Exemption b(1) provides that the FOIA does not apply to matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
>
> (B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b)(1).

19. The authority to classify information is derived from a succession of Executive orders, the most recent of which is Executive Order 12958. I have reviewed the two documents responsive to Items No. 29 and 61 under the criteria established by Executive Order 12958 and have determined that the information withheld on the basis of FOIA Exemption b(1) is in fact properly classified pursuant to the Order.

20. Section 6.1(h) of the Executive Order defines "classified national security information" or "classified information" as "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form." Section 6.1(y) of the Order defines "national security" as the "national defense or foreign relations of the United States."

21. Section 1.1(a) of the Executive Order provides that information may be originally classified under the terms of this order only if all of the following conditions are met:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Exec. Order 12958, § 1.1(a).

22. *Original classification authority* - Section 1.3(a) of the Executive Order provides that the authority to classify information originally may be exercised only by the President and, in the performance of executive duties, the Vice President; agency heads and officials designated by the President in the *Federal Register*; and United States Government officials delegated this authority pursuant to section 1.3(c) of the Order. Section 1.3(c)(2) provides that TOP SECRET original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to section 1.3(a)(2) of the Executive Order.

23. In accordance with section 1.3(a)(2), the President designated the Director of the CIA as an official who may classify information originally as TOP SECRET.[4] Under the authority of section 1.3(c)(3), the Director of the CIA has

[4] Order of President, Designation under Executive Order 12958, 70 Fed. Reg. 21,609 (Apr. 21, 2005), *reprinted in* U.S.C.A. § 435 note at 192 (West Supp. 2006). This order succeeded the prior Order of President, Officials Designated to Classify National Security Information, 60 Fed. Reg. 53,845 (Oct. 13, 1995), *reprinted in* U.S.C.A. § 435 note at 486 (West 2006), in which the President similarly designated the Director of the CIA as an official who may classify information originally as TOP SECRET.

delegated original TOP SECRET classification authority to me. Section 1.3(b) of the Executive Order provides that original TOP SECRET classification authority includes the authority to classify information originally as SECRET and CONFIDENTIAL. With respect to the information for which FOIA Exemption b(1) is asserted in this case, I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they contain information that is currently and properly classified TOP SECRET by an original classification authority.

24. *U.S. Government information* - Information may be originally classified only if the information is owned by, produced by or for, or is under the control of the United States Government. With respect to the information for which FOIA Exemption b(1) is asserted in this case, I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they are owned by the U.S. Government, produced by the U.S. Government, and under the control of the U.S. Government.

25. *Categories of classified information* - Information may be classified only if it concerns one of the categories of information set forth in section 1.4 of the Executive Order. With respect to the information for which FOIA Exemption b(1) is asserted in this case, I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they contain

information that concerns one or more of the following classification categories in the Executive Order:

> (a) Information concerning intelligence activities (including special activities), or intelligence sources or methods [§ 1.4(c)]; and
>
> (b) Information concerning foreign relations or foreign activities of the United States, including confidential sources [§ 1.4(d)].

26. *Damage to the national security* - Section 1.2(a) of the Executive Order provides that information shall be classified at one of three levels if the unauthorized disclosure of the information reasonably could be expected to cause damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage. Information shall be classified TOP SECRET if its unauthorized disclosure reasonably could be expected to result in *extremely grave damage* to the national security; SECRET if its unauthorized disclosure reasonably could be expected to result in *serious damage* to the national security; and CONFIDENTIAL if its unauthorized disclosure reasonably could be expected to result in *damage* to the national security.

27. With respect to the information for which FOIA Exemption b(1) is asserted in this case, I have reviewed the documents responsive to Items No. 29 and 61 and have determined that their unauthorized disclosure reasonably could be expected

to result in extremely grave damage to the national security, including damage to the United States' defense against transnational terrorism, and thus they are classified TOP SECRET. The damage to national security, including damage to the United States' defense against transnational terrorism, that reasonably could be expected to result from the unauthorized disclosure of this classified information is described in the relevant paragraphs below in the sections identifying the documents responsive to Items No. 29 and 61. See ¶¶ 57-60 and 70-74.

28. *Proper purpose* - I have reviewed the documents responsive to Items No. 29 and 61 and have determined that no information has been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

29. *Marking* - I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they are properly marked in accordance with section 1.6 of the Executive Order. Each document bears on its face one of the three classification levels defined in section 1.2 of the order; the identity, by name or personal identifier and position, of the original

classification authority; the agency and office of origin, if not otherwise evident; declassification instructions; and a concise reason for classification that, at a minimum, cites the applicable classification categories of section 1.4.

30. *Proper classification* - I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they have been classified in accordance with the substantive and procedural requirements of Executive Order 12958 and that, therefore, they are currently and properly classified.

31. *Special access program* - Section 6.1(kk) of the Executive Order defines a "special access program" as "a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level." Section 4.3 of the Order specifies the U.S. Government officials who may create a special access program. This section further provides that for special access programs pertaining to intelligence activities (including special activities, but not including military operations, strategic, and tactical programs), or intelligence sources or methods, this function shall be exercised by the Director of the CIA. This section specifies that special access programs shall be established only when the program is required by statute or upon a specific finding that the vulnerability of, or threat to, specific

information is exceptional; and the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure.

32. Officials of the National Security Council (NSC) determined that in light of the extraordinary circumstances affecting the vital interests of the United States and the sensitivity of the activities contemplated in the document, it is essential to limit access to the information in the document responsive to Item No. 61. NSC officials established a special access program[5] governing access to information relating to activities described in the document, including the CIA terrorist detention and interrogation program. As the executive agent for implementing the terrorist detention and interrogation program, the CIA is responsible for limiting access to such information in accordance with the NSC's direction.

33. The documents responsive to Items No. 29 and 61 contain classified information, including information relating to the CIA terrorist detention and interrogation program, that falls within the strict access provisions of this special access program.

[5] The name of the special access program is itself classified SECRET.

FOIA Exemption b(3)

34. FOIA Exemption b(3) provides that the FOIA does not apply to matters that are:

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

5 U.S.C. § 552(b)(3). I have reviewed the documents responsive to Items No. 29 and 61 and have determined that there are two relevant withholding statutes.

35. *National Security Act of 1947* - Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-1(i)(1) (West Supp. 2006), provides that the Director of National Intelligence (DNI) shall protect intelligence sources and methods from unauthorized disclosure. I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they contain information, including information relating to the CIA's terrorist detention and interrogation program, that if disclosed would reveal intelligence sources and methods, including clandestine intelligence activities and interrogation methods. For this reason, the DNI authorized the Director of the CIA to take all necessary and appropriate measures in this

case to ensure that intelligence sources and methods are protected from disclosure. The CIA, therefore, relies on the National Security Act of 1947 to withhold any information that would reveal intelligence sources and methods.

36. In contrast to Executive Order 12958, the National Security Act's statutory requirement to protect intelligence sources and methods does not require the CIA to identify or describe the damage to national security that reasonably could be expected to result from their unauthorized disclosure. In any event, the information relating to intelligence sources and methods in the documents responsive to Items No. 29 and 61 that is covered by the National Security Act is the same as the information relating to intelligence sources and methods that is covered by the Executive Order for classified information. Therefore, the damage to national security, including damage to the United States' defense against transnational terrorism, that reasonably could be expected to result from the unauthorized disclosure of such information relating to intelligence sources and methods is co-extensive with the damage that reasonably could be expected to result from the unauthorized disclosure of classified information, which is described in the relevant paragraphs below in the sections identifying the documents responsive to Items No. 29 and 61. See ¶¶ 57-60 and 70-74.

37. *Central Intelligence Agency Act of 1949* - Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C.A. § 403g (West Supp. 2006), provides that in the interests of the security of the foreign intelligence activities of the United States and in order to further implement section 403-1(i) of Title 50, which provides that the DNI shall be responsible for the protection of intelligence sources and methods from unauthorized disclosure, the CIA shall be exempted from the provisions of any law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA. In accordance with section 403-4a(d) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-4a(d) (West. Supp. 2006), foremost among the functions of the CIA is the collection of intelligence through human sources and by other appropriate means.

38. I have reviewed the documents responsive to Items No. 29 and 61 and have determined that they contain information, including information relating to the CIA's terrorist detention and interrogation program, that if disclosed would reveal the functions of the CIA, including the conduct of clandestine intelligence activities to collect intelligence from human sources using interrogation methods. In the interests of the security of the foreign intelligence activities of the United

States and in order to further implement the DNI's responsibility to protect intelligence sources and methods from unauthorized disclosure, the CIA relies on the Central Intelligence Agency Act of 1949 to withhold any information that would reveal the functions of the CIA, including the collection of foreign intelligence through intelligence sources and methods--such as the conduct of clandestine intelligence activities to collect intelligence from human sources using interrogation methods.

39. Again, in contrast to Executive Order 12958, the CIA Act's statutory requirement to further protect intelligence sources and methods by protecting CIA functions does not require the CIA to identify or describe the damage to national security that reasonably could be expected to result from their unauthorized disclosure. In any event, the information relating to CIA functions and intelligence sources and methods contained in the documents responsive to Items No. 29 and 61 that is covered by the CIA Act's statutory requirement is the same as the information relating to intelligence sources and methods that is covered by the Executive Order for classified information. Therefore, the damage to national security, including damage to the United States' defense against transnational terrorism, that reasonably could be expected to result from the unauthorized disclosure of CIA functions and

intelligence sources and methods is co-extensive with the damage that reasonably could be expected to result from the unauthorized disclosure of classified information, which is described in the relevant paragraphs below in the sections identifying the documents responsive to Items No. 29 and 61. See ¶¶ 57-60 and 70-74.

FOIA Exemption b(5)

40. FOIA Exemption b(5) provides that the FOIA does not apply to matters that are inter-agency or intra-agency memorandums or letters which would not be available by law to a private party other than an agency in litigation with the agency. I have reviewed the three documents at issue and have determined that they are inter-agency memoranda that contain information that is protected from disclosure by four privileges.

41. *Attorney-client* - The attorney-client privilege protects confidential communications between a client and his attorney relating to a matter for which the client has sought legal advice. I have reviewed the document responsive to Item No. 29 and have determined that it contains confidential communications between attorneys at the Office of Legal Counsel (OLC) of DOJ and its client, the CIA, relating to a matter for which the CIA sought DOJ's legal advice. This document was

prepared by OLC in its role of assisting the Attorney General in the discharge of his responsibilities as legal advisor to the President and the heads of the Executive Branch departments and agencies. In preparing this document, OLC performed a purely advisory role, providing legal advice and assistance. Although I understand that on rare occasions OLC has drafted memoranda with the expectation that they will be made public, generally OLC memoranda are prepared with the expectation that they will be held in confidence. This document was prepared by OLC for the CIA with the joint expectation of the CIA and OLC that it would be held in confidence, and it has been held in confidence.

42. I have reviewed the document responsive to Item No. 61 and have determined that a portion of it contains confidential communications among attorneys at CIA, DOJ, and the NSC staff, and their client, the President, relating to a matter for which the NSC sought their legal advice. The NSC is the President's principal forum for considering national security and foreign policy matters with his senior national security advisors and cabinet officials. A portion of this document was prepared by NSC attorneys, with input from DOJ attorneys and CIA attorneys, as part of the NSC's role of advising the President on legal matters affecting the national security and foreign policy. A portion of this document was prepared by NSC officials with the

expectation of the President, NSC, DOJ, and CIA that it would be held in confidence, and it has been held in confidence.

43. The document responsive to Item No. 29 and a portion of the document responsive to Item No. 61 reveal information provided by government clients to government attorneys, as well as opinions given by those attorneys to their clients based upon and reflecting that information, as well as communications among attorneys that reflect client-supplied information.

44. *Attorney work-product* - The attorney work-product privilege protects information, legal analysis, and opinions prepared by attorneys in contemplation of criminal, civil, and administrative proceedings.

45. I have reviewed the documents responsive to Items No. 1 and 29 and have determined that they contain information, legal analysis, and opinions prepared by OLC attorneys at the request of the CIA in contemplation of criminal, civil, and administrative proceedings.[6] These two documents were prepared by OLC for the CIA with the joint expectation of the CIA and OLC that they would be held in confidence, and they have been held in confidence.

46. *Deliberative process* - The deliberative process privilege protects inter-agency or intra-agency predecisional

[6] In its administrative response letters dated 14 February and 10 November 2006, the CIA claimed the attorney work-product privilege for the document responsive to Item No. 1, but did not claim the attorney work-product privilege for the document responsive to Item No. 29.

deliberations, including preliminary evaluations, opinions, and recommendations of government officials. The documents responsive to Items No. 1 and 29 and a portion of the document responsive to Item No. 61 contain inter-agency predecisional deliberations, including preliminary evaluations, opinions, and recommendations of NSC, DOJ, and CIA officials. Disclosure of the deliberations would discourage open, frank discussions on matters of policy between subordinates and superiors, result in premature disclosure of proposed policies before they are finally adopted, and create public confusion by disclosing considerations that were not in fact ultimately the grounds for a governmental action.

47. With respect to the withheld information protected by the attorney-client, attorney work-product, and deliberative process privileges, compelled disclosure of these advisory and predecisional documents would cause serious harm to the deliberative processes of the President, NSC, DOJ, CIA, and the Executive Branch as a whole and disrupt the attorney-client relationship between the President and Director of the CIA and their attorneys at the NSC, DOJ, and CIA. Attorneys in the NSC, DOJ, and CIA are often asked to provide advice and analysis with respect to very difficult and unsettled areas of law. Frequently, such issues arise in connection with highly complex and sensitive intelligence activities. It is essential to the

constitutional mission of the Executive Branch that legal advice from NSC, DOJ, and CIA, and the development of that advice, not be inhibited by concerns about public disclosure. Protecting the confidentiality of these documents is essential in order to ensure that even controversial legal issues may be explored candidly, effectively, and in writing, to ensure that Executive Branch officials will continue to request legal advice on such matters. Especially in light of the Nation's ongoing fight against global terrorism, and the public interest in the effective performance of these activities, the need of the President and Director of the CIA for candid, thoroughly considered legal advice in considering potential executive actions is compelling.

48. *Presidential communications* - The presidential communications privilege protects confidential communications between the President and his advisors. I have reviewed the document responsive to Item No. 61 and have determined that it was created by NSC officials at the direction of the President, is signed by the President, and contains confidential communications among the President, members of the NSC, and the Director of the CIA. This document was prepared with the expectation of the President, NSC, and CIA that it would be held in confidence, and it has been held in confidence.

Item No. 1

49. Item No. 1 requested a "Late 2001 Memorandum from DOJ to CIA interpreting the Convention Against Torture." Although the CIA did not locate such a memorandum, the CIA did locate a similar document that is responsive to the general FOIA request in Plaintiffs' 25 May 2004 letter. The CIA has included this document in this *Vaughn* declaration, and for purposes of this declaration will refer to this document as "responsive" to Item No. 1. The document responsive to the general FOIA request that is similar to Item No. 1 is a 31-page undated, unsigned, draft legal memorandum from OLC to the Office of General Counsel of the CIA that interprets the Convention Against Torture. This document is withheld in its entirety on the basis of FOIA Exemption b(5).

50. This undated, unsigned, draft legal memorandum contains a preliminary analysis of legal matters relating to the Convention Against Torture and certain other laws and contains a preliminary version of DOJ's confidential legal analysis and opinion to the CIA regarding the Convention Against Torture.

51. *Exemption b(5): Attorney work-product* - This draft document contains preliminary legal analysis and opinions prepared by OLC attorneys at the request of the CIA in contemplation of criminal, civil, and administrative proceedings. This legal analysis and opinion is protected from

disclosure by the attorney work-product privilege described in paragraphs 44-45, and thus the document responsive to Item No. 1 is withheld in its entirety under Exemption (b)(5).

52. *Deliberative process* - This draft document contains inter-agency predecisional deliberations between DOJ and the CIA, and reflects intra-agency predecisional deliberations within the CIA, including preliminary evaluations, opinions, and conclusions of government officials that are protected from disclosure by the deliberative process privilege described in paragraphs 46-47, and thus the document responsive to Item No. 1 is withheld in its entirety under Exemption (b)(5). The deliberations and preliminary conclusions in this draft are not adopted or explicitly referenced in a decision memorandum.

53. Portions of the document responsive to Item No. 1 contain information that is substantially similar to information contained in two OLC legal memoranda that have been officially released to the public by DOJ.[7] Disclosure of the draft memorandum responsive to Item No. 1 would permit one to compare the draft OLC legal memorandum with the two released OLC legal memoranda and identify the similarities and differences between the draft and final legal documents. Such a comparison would

[7] See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Att'y Gen., OLC, DOJ, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*, Aug. 1, 2002, *superseded by* Memorandum for James B. Comey, Dep. Att'y Gen., DOJ, from Daniel Levin, Acting Asst. Att'y Gen., OLC, DOJ, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, Dec. 30, 2004.

damage the very interests sought to be protected by the attorney work-product and deliberate process privileges. Compelled disclosure of such draft analyses, opinions, and conclusions in this confidential, predecisional, deliberative document would discourage open, frank discussions and would cause serious harm to the deliberative processes of DOJ and the CIA, and disrupt the relationship between the Attorney General and the Director of the CIA for the reasons stated in paragraphs 44-47.

54. This document is withheld in its entirety on the basis of FOIA Exemption b(5) because there is no meaningful unprivileged information that can be reasonably segregated from the information protected by the attorney work-product and deliberative process privileges.

Item No. 29

55. Item No. 29 requested a "DOJ memorandum, specifying interrogation methods that the CIA may use against top al-Qaeda members." DOJ does not "specify" the activities in which clients may engage, but rather provides legal advice to clients. The CIA, therefore, interprets Plaintiffs' FOIA request in Item No. 29 as a request for a DOJ memorandum advising the CIA regarding interrogation methods it may use against al Qaeda members. Pursuant to that interpretation, the document responsive to Item No. 29 is an 18-page legal memorandum dated

1 August 2002 from OLC to the Office of General Counsel of the CIA. This document is withheld in its entirety on the basis of FOIA Exemption b(5). Substantial portions of this document also contain information relating to intelligence sources and methods that is classified TOP SECRET and is withheld on the bases of FOIA Exemptions b(1) and b(3).

56. This legal memorandum contains DOJ's confidential legal advice to the CIA regarding potential interrogation methods. It includes confidential communications from the client (CIA) to the attorney (DOJ) regarding potential interrogation methods and the context in which their use was contemplated. It then contains DOJ's confidential legal analysis and opinion to the CIA regarding the potential interrogation methods.

57. *Exemption b(1)* - Substantial portions of this document contain information relating to intelligence activities, intelligence sources, and intelligence methods that is currently and properly classified at the TOP SECRET level pursuant to section 1.4(c) of Executive Order 12958, as amended, as described in paragraph 18-33, as its disclosure reasonably could be expected to cause exceptionally grave damage to the national security, and thus is withheld under Exemption (b)(1). In accordance with the NSC's direction to the CIA to establish a special access program for information relating to the CIA

terrorist detention and interrogation program, the CIA is charged with strictly controlling access to the information contained in the document responsive to Item No. 29.

58. Disclosure of information regarding potential interrogation methods and the context in which their use was contemplated reasonably could be expected to cause exceptionally grave damage to the national security by revealing to the public--including avowed enemies of the United States during an ongoing war against global terrorism--alternative interrogation methods by which the CIA seeks to collect critical foreign intelligence to disrupt terrorist attacks against the United States and its citizens and interests worldwide.

59. In his 6 September 2006 speech, the President announced that, with the transfer of fourteen suspected terrorists to Guantanamo Bay, no detainees remained in CIA custody. Importantly, he also stated that as more suspected high-ranking terrorists are captured, the need to obtain intelligence from such individuals will remain critical, and having a CIA program for questioning terrorists will continue to be crucial to getting lifesaving information. In reserving the option of detaining terrorists in CIA custody in the future, the President also declined to identify the alternative interrogation methods proposed, authorized, or employed with

detainees, or the context in which such methods may be used. The President stated:

> Many specifics of this program, including where the detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country . . . . And so the CIA used an alternative set of procedures . . . . I cannot describe the specific methods used -- I think you understand why -- if I did, it would help the terrorists learn how to resist questioning and to keep information from us that we need to prevent new attacks on our country.

60. The CIA knows from intelligence collection that al Qaeda trains operatives in interrogation resistance. If al Qaeda learns the CIA interrogation methods proposed, authorized, or employed with detainees, then al Qaeda training in interrogation resistance techniques could become more effective. This could allow a captured al Qaeda operative to resist cooperation, thus jeopardizing the national security by limiting intelligence collection on terrorist activities and potentially preventing the United States from averting another terrorist attack.

61. *Exemption b(3)* - Substantial portions of this document contain information relating to intelligence sources and methods that is protected from disclosure by the statutory requirements established by section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-1(i)(1) (West Supp.

2006), and section 6 of the CIA Act of 1949, as amended, 50 U.S.C.A. § 403g (West Supp. 2006), described in paragraphs 34-39, and thus is withheld under Exemption (b)(3). The information relating to intelligence sources and methods protected by the National Security Act and the CIA Act is the same as that protected by Executive Order 12958, and is described in paragraphs 57-60.

62. *Exemption b(5): Attorney-client.* This document contains confidential communications between OLC attorneys and their clients concerning information provided by the CIA in the course of requesting legal advice from DOJ. These communications are protected from disclosure by the attorney-client privilege described in paragraphs 41-43, and thus the document responsive to Item No. 29 is withheld in its entirety under Exemption (b)(5).

63. *Attorney work-product* - This document contains information, legal analysis, and opinions prepared by OLC attorneys at the request of the CIA in contemplation of criminal, civil, and administrative proceedings. This information, legal analysis, and opinion is protected from disclosure by the attorney work-product privilege described in paragraphs 44-45, and thus the document responsive to Item No. 29 is withheld in its entirety under Exemption (b)(5).

64. *Deliberative process* - This document contains inter-agency predecisional deliberations between DOJ and the CIA, and reflects intra-agency deliberations within the CIA, including preliminary evaluations and opinions of government officials that are protected from disclosure by the deliberative process privilege described in paragraphs 46-47, and thus the document responsive to Item No. 29 is withheld in its entirety under Exemption (b)(5). The deliberations are not adopted or explicitly referenced in a decision memorandum.

65. This document is withheld in its entirety because there is no meaningful unclassified and unprivileged information that can be reasonably segregated from the classified information relating to intelligence sources and methods and information protected by the attorney-client, attorney work-product, and deliberative process privileges.

Item No. 61

66. Item No. 61 requested a "Directive signed by President Bush that grants CIA, the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against Detainees." The CIA did not locate a document signed by President Bush outlining interrogation methods that may be used against detainees. The CIA did locate one document signed by President Bush that

pertains to the CIA's authorization to set up detention facilities outside the United States. The document responsive to Item No. 61 is a 14-page memorandum dated 17 September 2001 from President Bush to the Director of the CIA pertaining to the CIA's authorization to detain terrorists. This document is withheld in its entirety on the basis of FOIA Exemption b(5). Substantial portions of this document contain information relating to intelligence sources and methods and foreign relations and foreign activities of the United States that is classified TOP SECRET and is withheld on the bases of FOIA Exemptions b(1) and b(3).

67. This 14-page document consists of a 12-page notification memorandum and an attached two-page cover memorandum. The 12-page notification memorandum is a memorandum from the President to the members of the NSC regarding a clandestine intelligence activity. The two-page cover memorandum is a transmittal memorandum from the Executive Secretary of the NSC to the Director of the CIA.

68. The 12-page memorandum pertains to the CIA's authorization to detain terrorists. The memorandum discusses the approval of the clandestine intelligence activity and related analysis and description. The memorandum also discusses other matters not relevant to Plaintiffs' general or specific FOIA requests.

69. The two-page cover memorandum is a transmittal memorandum from the Executive Secretary of the NSC to the Director of the CIA. It forwards to the Director of the CIA the attached notification memorandum, along with other information relating to implementation of the activity.

70. *Exemption b(1)* - Substantial portions of the notification memorandum and portions of the cover memorandum contain information relating to intelligence activities, intelligence sources, and intelligence methods, and foreign relations and foreign activities of the United States that is currently and properly classified at the TOP SECRET level pursuant to sections 1.4(c) and (d) of Executive Order 12958, as amended, as described in paragraphs 18-33, as its disclosure reasonably could be expected to cause exceptionally grave damage to the national security, and thus is withheld under Exemption (b)(1). In accordance with the NSC's direction to the CIA to establish a special access program for information relating to the CIA terrorist detention and interrogation program, the CIA is charged with strictly controlling access to the information contained in the document responsive to Item No. 61.

71. The document responsive to Item No. 61 is a presidential communication regarding CIA's authorization to engage in a clandestine intelligence activity. For the reasons stated in his speech and reiterated in paragraph 14, the

President decided to officially acknowledge the existence of an intelligence activity: the CIA terrorist detention and interrogation program. He also disclosed certain limited facts concerning the program: a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a program operated by the CIA; the CIA employed an alternative set of interrogation procedures; and fourteen suspected terrorists in CIA custody had been transferred to the United States Naval Base Guantanamo Bay, Cuba.

72. In the same speech, the President emphasized that he was making limited disclosures only and specifically declined to provide any information relating to the details of the CIA terrorist detention and interrogation program. The document responsive to Item No. 61 contains just the sort of specific details of the program that the President declined to disclose.

73. The document responsive to Item No. 61 contains specific information relating to the intelligence sources and methods by which the CIA was to implement the clandestine intelligence activity. Disclosure of such information reasonably could be expected to result in extremely grave damage to the national security, including the United States' defense against transnational terrorism, by revealing to our adversaries

the counterterrorism playbook that the CIA intended to employ with them.

74. In addition to damaging the national security through the disclosure of intelligence sources and methods, disclosure of the information in the document responsive to Item No. 1 reasonably could be expected to impair the foreign relations and foreign activities of the United States by undermining the cooperative relationships that the United States has developed with its critical partners in the global war on terrorism.

75. *Exemption b(3)* - Substantial portions of the notification memorandum and portions of the cover memorandum contain information relating to intelligence sources and methods that is protected from disclosure by the statutory requirements established by section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-1(i)(1) (West Supp. 2006), and section 6 of the CIA Act of 1949, as amended, 50 U.S.C.A. § 403g (West Supp. 2006), described in paragraphs 34-39, and thus is withheld under Exemption (b)(3). The information relating to intelligence sources and methods protected by the National Security Act and CIA Act is the same as that protected by Executive Order 12958, and is described in paragraphs 70-74.

76. *Exemption b(5): Attorney-client.* Portions of the notification memorandum contain confidential communications

between NSC, DOJ, and CIA attorneys and the President and the NSC concerning information provided by the clients in the course of requesting legal advice from government attorneys. These communications are protected from disclosure by the attorney-client privilege described in paragraphs 41-43, and thus are withheld under Exemption (b)(5).

77. *Deliberative process* - Portions of the notification memorandum contain inter-agency predecisional deliberations, including preliminary evaluations, opinions, and recommendations, of NSC, DOJ, and CIA officials that are protected from disclosure by the deliberative process privilege described in paragraphs 46-47, and thus are withheld under Exemption (b)(5). The deliberations and recommendations are not adopted or explicitly referenced in the notification memorandum.

78. *Presidential communications* - This document, consisting of the notification memorandum and the cover memorandum, is a confidential communication from the President that is protected from disclosure by the presidential communications privilege described in paragraph 48, and thus is withheld in its entirety under Exemption b(5). It contains confidential communications between the President and his advisors.

79. This document is withheld in its entirety because there is no meaningful unclassified and unprivileged information

that can be reasonably segregated from the classified information relating to intelligence sources and methods and information protected by the attorney-client, deliberative process, and presidential communications privileges.

Segregability

80. The three documents are withheld in their entirety because there is no meaningful non-exempt information that can be reasonably segregated from the exempt information. The unclassified and unprivileged information is so inextricably intertwined with the classified and privileged information that release of the non-exempt information would produce only incomplete, fragmented, unintelligible sentences and phrases composed of isolated, meaningless words. The unclassified and unprivileged information does not contain any meaningful information responsive to Plaintiffs' general FOIA request for information concerning the treatment, death, or rendition of detainees, or Plaintiffs' specific FOIA requests for information concerning DOJ's interpretation of the Convention Against Torture, DOJ's legal advice regarding interrogation methods that the CIA may use against top al Qaeda members, or a presidential directive that grants the CIA the authority to set up detention facilities outside the United States.

Conclusion

81. The document responsive to Plaintiffs' general FOIA request that is similar to the document sought by Item No. 1 is withheld in its entirety on the basis of FOIA Exemption b(5) because it contains information exempt from disclosure by the attorney work-product and deliberative process privileges.

82. The document responsive to Item No. 29 is withheld in its entirety on the basis of FOIA Exemption b(5) because it contains information that is exempt from disclosure by the attorney-client, attorney work-product, and deliberative process privileges. Substantial portions of this document also are withheld on the basis of FOIA Exemptions b(1) and b(3) because they contain classified information relating to intelligence sources and methods that is exempt from disclosure.

83. The document responsive to Item No. 61 is withheld in its entirety on the basis of FOIA Exemption b(5) because it contains information that is exempt from disclosure by the presidential communications privilege. Portions of the 12-page notification memorandum are withheld on the basis of FOIA Exemption b(5) because they contain information that is exempt from disclosure by the attorney-client and deliberative process privileges. Finally, substantial portions of the 12-page notification memorandum and the two-page cover memorandum are withheld on the bases of FOIA Exemptions b(1) and b(3) because

they contain information relating to classified intelligence sources and methods and foreign relations and foreign activities of the United States that is exempt from disclosure.

* * * *

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

Executed this 5th day of January, 2007.

Marilyn A. Dorn
Information Review Officer
National Clandestine Service
Central Intelligence Agency

Exhibit 4

May 2009 Panetta Speech

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Director's Remarks at the Pacific Council on International Policy

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

May 18, 2009

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

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

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

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

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

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

In the world, as we know — and I said this a few months ago — there are people who work for our Intelligence Community whose identities are not known, who right at this moment it's probably dark in the places I'm thinking of, are doing things that are incredibly personally dangerous. They're doing those things so that we can learn about the plans and intentions of some who might try to harm us. And if anyone thinks this is a safe world, think again. It is not a safe world.

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

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

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

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

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

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

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

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

And I forgot one thing that he did before he assumed this role. That is, he co-chaired a commission formed by Governor Schwarzenegger to advise California on the round of BRAC closures — the Base Realignment and — Base Realignment and — Closure Commission. I didn't want to mention that word because I wouldn't accept it. The largest issue in California — the largest potential closure was the Los Angeles Air Force Base, which Mel Levine will remember; he first told me about it. He said, Jane, it doesn't look like an Air Force base.

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

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

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

(Applause.)

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

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

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

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

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

I went through a BRAC closure. As many of you know, I represented Fort Ord. Monterey, California and Fort Ord installation was one of the largest closures that took place. It's nothing pleasant to have to go through. And so I had the opportunity, having gone through it, to try to exercise hopefully some leadership in the effort to try to maintain those military facilities that are important not only to California but more importantly to the country. And that's certainly true in this area.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Of course, no discussion of the dangers of nuclear proliferation is complete without mention of North Korea. Our intelligence agencies are all working together to try to assess that country's nuclear weapons program and its long-range missile capabilities. The country's interest in selling technology and expertise to anyone willing to pay the price is a very serious concern. Like Iran, North Korea is a tough

target to penetrate for intelligence purposes, but we're making good progress. The fact is, we had good notice about the fact that they were going to deploy the Taepodong missile and knew pretty well within an hour when that was going to happen.

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

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

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

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

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

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

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

In addition, they have to have better language training. I'm a believer that, frankly, without language training it's very difficult to get the kind of intelligence that you need. You have to understand people. You have to understand their culture. And the key to doing that is language training. I hope we can reach a point, frankly, where every officer in the CIA is required to undergo language training of some kind. It is an essential key to being able to do their job.

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

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

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

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

Thank you very much.

(Applause.)

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

First question, please, sir?

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

You mentioned that you believe the strategy in Pakistan is working — the President's strategy in Pakistan in the tribal regions, which is the drone — the remote drone strikes. You've seen the figures recently from David Kilcullen and others that the strikes have killed 14 midlevel operatives and 700 civilians in collateral damage. And his assessment as a counterinsurgency expert is it's creating more anti-Americanism than it is disrupting al-Qaeda networks.

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

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

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

DR. GREEN: Next question? Kimberly?

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

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

MR. PANETTA: You know, I'm — as I said, I'm a creature of the Congress, and my view is that if Congress makes that decision to move forward on that kind of study then, as Director of the CIA, I'll do everything poss ble to cooperate with that effort. As you may know, the Intelligence Committee on the Senate side, under the chairmanship of Dianne Feinstein, is now conducting that kind of review. And they are going back over that material, and we have provided access to that material. We are working with their staff and working with her and her co-chair to make sure that whatever questions they have, whatever information they would l ke to have, we will provide it to them, and obviously then they'll draw their own conclusions.

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

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

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

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

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

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

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

DR. GREEN: Mark Nathanson.

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

So the question I have is how are you going to improve relations with local law enforcement? And also, how can the local business community help the CIA?

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

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

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

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

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

other areas such as nonmilitary means to fight terrorism.

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

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

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

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

On the broader picture, clearly what happens is people in al-Qaeda or other terrorist groups feed on the frustration of people who feel they have no opportunity to be able to succeed. And so we have got to build a broader message with the United States of America, a broader message that reaches out to them and says we understand those problems. And we've got to show that we're willing to work to deal with those kinds of problems.

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

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

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

Thank you.

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

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

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

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

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

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

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

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

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

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

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

Secondly, we have got to make the tribal leaders understand that — look, the reason the Tal ban is successful in those areas is because the Taliban comes in when there's a lot of disruption and they basically say, we can provide order. And that's what hurts us the most is that in the search for order, in the search for security, the Taliban represents that.

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

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

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

Q: (Off mike.)

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

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

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

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

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

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

We have to be ahead of that. And I do have to kind of pay tr bute to the NSA, which spends an awful lot of its time basically focusing on these issues in this area and has developed some absolutely fantastic technology to try to confront some of these potential threats for the future. It's changing and being developed all the time; every day changes are taking place. We have got to make sure that we stay ahead of it. If we fall behind, any one of these areas could be extremely dangerous to us.

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

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

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

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

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

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

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

to improve that relationship.

The Intelligence Community does have a responsibility to oversee our operations. And what I intend to so is to make sure that they are fully informed of what we're doing. I do not want to just do a Gang of Four briefing — in other words, just inform the leaders of the party. My view is — and I said this at my confirmation hearings — I think it's very important to inform all the members of the Intelligence Committee about what's going on when we have to provide notification.

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

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

DR. GREEN: Thank you so much.

(Applause.)

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

(END)

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Exhibit 5

February 2010 OLC Memo

A-153

A-154

TOP SECRET// NF (b)(1) (b)(3)

Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General Washington, D.C. 20530

February 19, 2010

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Lethal Operation Against Shaykh Anwar Aulaqi (b)(1) (b)(3)

(b)(5) has asked for your views on the legality of the Central Intelligence Agency's ("CIA") proposed use of lethal force in Yemen against Shaykh Anwar Aulaqi, a U.S. citizen who the CIA assesses is a senior leader of Al-Qa'ida in the Arabian Peninsula. (b)(5)

Under the conditions and factual predicates as represented by the CIA and in the materials provided to us from the Intelligence Community, we believe that a decisionmaker, on the basis of such information, could reasonably conclude that the use of lethal force against Aulaqi would not violate the assassination ban in Executive Order 12333 or any applicable constitutional limitations due to Aulaqi's United States citizenship. This memorandum confirms oral advice setting forth this conclusion. (b)(1) (b)(3)

I.

(b)(1) (b)(3) (b)(5)

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(b)(1) (b)(3) (b)(5)

consistent with the assassination ban in Executive Order 12333[2] killings in self-defense are not assassinations

(b)(1) (b)(3) (b)(5)

[2] Section 2.11 of Executive Order 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 46 Fed. Reg. 59941 (Dec. 4, 1981).

(b)(1) (b)(3) (b)(5)

The question that remains is whether Aulaqi's status as a U.S. citizen imposes any constitutional limitations that would preclude the proposed lethal action

(b)(1) (b)(3) (b)(5)

being a U.S. person does not give a member of al Qa'ida a constitutional immunity from attack.

(b)(1) (b)(3) (b)(5)

This conclusion finds support in Supreme Court case law addressing whether a U.S. citizen who acts as an enemy combatant may be subject to the use of certain types of military force. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-24 (2004) (plurality opinion); *cf. also Ex parte Quirin*, 317 U.S. 1, 37-38 (1942) ("[c]itizens who associate themselves with the military arm of the enemy government,

and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war). (b)(1) (b)(3)

Because Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely applies in some respects, even while he is abroad (in this case, in Yemen). *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 167-68 (2d Cir. 2008). In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to outline the due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action,' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). (b)(1) (b)(3)

(b)(1) (b)(3) (b)(5)

(b)(1) (b)(3) (b)(5) the plurality in *Hamdi* stated that "[t]he parties agree that initial captures on the battlefield need not receive the process we discuss here; that process is due only when the determination is made to *continue* to hold those who have been seized," and the plurality thus found it "unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts." 542 U.S. at 534 (plurality opinion). on the battlefield, the Government's interests and burdens preclude offering a process to judge whether a detainee is truly an enemy combatant. In the case of a member, associate, or affiliate of al-Qa'ida operating abroad in circumstances where capture is infeasible, and it is known that the individual continued and imminent threat (b)(1) (b)(3) (b)(5) given the weight of the government's interest in using an authorized means of force to respond to an imminent threat posed by the activities of a person operating as a member, associate, or affiliate of an enemy force. (b)(1) (b)(3)

(b)(1) (b)(3) (b)(5) to the extent Fourth Amendment principles are relevant in the context of operations against a U.S. person who is a member of al-Qa'ida and whose activities pose a continued and imminent threat, the proposed lethal operation would not violate the Fourth Amendment, *Verdugo-Urquidez*, 494 U.S. at 273-74

("Application of the Fourth Amendment to these circumstances [i.e., foreign policy operations] could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.") (b)(1) (b)(3) (b)(5)

This conclusion draws further support from the fact that, even in domestic law enforcement operations, the Supreme Court has noted that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). (b)(1) (b)(3) (b)(5)

(b)(1) (b)(3) (b)(5) where a capture operation is infeasible and the targeted person is part of a dangerous enemy force and poses a continued and imminent threat to U.S. persons or interests, the use of lethal force would not violate the Fourth Amendment.

(b)(1) (b)(3) (b)(5)

For these reasons, and on these understandings, we do not believe the Constitution prohibits the proposed lethal action, does not violate the assassination ban in Executive Order 12333. (b)(1) (b)(3) (b)(5)

Please let us know if we can be of further assistance. (U)

David J. Barron
Acting Assistant Attorney General

Exhibit 6

March 2010 Koh Speech

A-162

The Obama Administration and International Law

Speech
Harold Hongju Koh
Legal Adviser, U.S. Department of State
Annual Meeting of the American Society of International Law
Washington, DC
March 25, 2010

Thank you, Dean Areen, for that very generous introduction, and very special thanks to my good friends President Lucy Reed and Executive Director Betsy Andersen for the extraordinary work you do with the American Society of International Law. It has been such a great joy in my new position to be able to collaborate with the Society on so many issues.

It is such a pleasure to be back here at the ASIL. I am embarrassed to confess that I have been a member of ASIL for more than 30 years, since my first year of law school, and coming to the annual meeting has always been a highlight of my year. As a young lawyer just out of law school I would come to the American Society meeting and stand in the hotel lobby gaping at all the famous international lawyers walking by: for international lawyers, that is as close as we get to watching the Hollywood stars stroll the red carpet at the Oscars! And last year at this time, when this meeting was held, I was still in the middle of my confirmation process. So under the arcane rules of that process, I was allowed to come here to be seen, but not heard. So it is a pleasure finally to be able to address all of you and to give you my perspective on the Obama Administration's approach to international law.

Let me start by bringing you special greetings from someone you already know.

As you saw, my client, Secretary Clinton very much wanted to be here in person, but as you see in the headlines, this week she has been called away to Mexico, to meeting visiting Pakistani dignitaries, to testify on Capitol Hill, and many other duties. As you can tell, she is very proud of the strong historical relationship between the American Society and the State Department, and she is determined to keep it strong. As the Secretary mentioned, I and another long time member of the Society, your former President Anne Marie Slaughter of the Policy Planning Staff join her every morning at her 8:45 am senior staff meeting, so the spirit of the American Society is very much in the room (and the smell of the Society as well, as I am usually there at that hour clutching my ASIL coffee mug!)

Since this is my first chance to address you as Legal Adviser, I thought I would speak to three issues. First, the nature of my job as Legal Adviser. Second, to discuss the strategic vision of international law that we in the Obama Administration are attempting to implement. Third and finally, to discuss particular issues that we have grappled with in our first year in a number of high-profile areas: the International Criminal Court, the Human Rights Council, and what I call The Law of 9/11: detentions, use of force, and prosecutions.

I. The Role of the Legal Adviser

First, my job. I have now been the Legal Adviser of the State Department for about nine months. This is a position I first heard of about 40 years ago, and it has struck me throughout my career as the most fascinating legal job in the U.S. Government. Now that I've actually been in the job for awhile, I have become even more convinced that that is true, for four reasons.

First, I have absolutely extraordinary colleagues at the Legal Adviser's Office, which we call "L," which is surely the greatest international law firm in the world. Its numbers include many current lawyers and alumni who are sitting here in the audience, and it is a training ground for America's international lawyers [To prove that point, could I have a show of hands of how many of you in the audience have worked in L sometime during your careers?] Our 175 lawyers are spread over 24 offices, including four extraordinary career deputies and a Counselor of International Law, nearly all of whom are members of this Society and many of whom you will find speaking on the various panels throughout this Annual Meeting program.

Second, I have extraordinary clients and you just saw one, Secretary Hillary Clinton, who is a remarkably able lawyer. Of course, another client of mine, the President, is also an outstanding lawyer, as are both Deputy Secretaries, the Department's Counselor, the Deputy Chief of Staff, and a host of Under Secretaries and Assistant Secretaries.

Third, each day we tackle extraordinarily fascinating legal questions. When I was a professor, I would spend a lot of time trying to think up exam questions. For those of you who are professors, this job literally presents you with a new exam question every single day. For example, I had never really thought about the question: "can you attach a panda?" Or the question, can Mu'ammar al-Qadhafi erect a tent in Englewood, New Jersey, notwithstanding a contrary local ordinance? To be honest, I had never really thought about those questions. But rest assured, in the future, many Yale law students will.

Fourth and finally, my position allows me to play extraordinary and varied roles. Some government lawyers have the privilege for example, of giving regular advice to a particularly prominent client or pleading particular cases before a particular court. But the Legal Adviser must shift back and forth constantly between four rich and varied roles: which I call counselor, conscience, defender of U.S. interests, and spokesperson for international law.

As **Counselor,** I mean obviously, that the Legal Adviser must play all the traditional functions of an agency general counsel, but with a twist. Like every in-house counsel's office, we do buildings and acquisitions, but those buildings may well be in Afghanistan or Beijing. We review government contracts, but they may require contracting activities in Iraq or Pakistan. We review employment decisions, but with respect to employees with diplomatic and consular immunities or special visa

problems.

But in addition to being counselors, we also serve as a **conscience** for the U.S. Government with regard to international law. The Legal Adviser, along with many others in policy as well as legal positions, offers opinions on both the wisdom and morality of proposed international actions. For it is the unique role of the Legal Adviser's Office to coordinate and render authoritative legal advice for the State Department on international legal issues, or as Dick Bilder once put it, to "speak law to power." In this role, the Legal Adviser must serve not only as a source of black letter advice to his clients, but more fundamentally, as a source of good judgment. That means that one of the most important roles of the Legal Adviser is to advise the Secretary when a policy option being proposed is "lawful but awful." As Herman Pfleger, one former Legal Adviser, put it: "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no." And because my job is simply to provide the President and the Secretary of State with the very best legal advice that I can give them, I have felt little conflict with my past roles as a law professor, dean and human rights lawyer, because as my old professor, former legal adviser Abram Chayes, once put it: "There's nothing wrong with a lawyer holding the United States to its own best standards and principles."

A third role the Legal Adviser plays is **defender** of the United States interests in the many international fora in which the U.S. appears-- the International Court of Justice, where I had the honor recently of appearing for the United States in the *Kosovo* case; the UN Compensation Commission; the Iran-US Claims Tribunal; NAFTA tribunals (where I was privileged to argue recently before a Chapter XI tribunal in the *Grand River* case) – and we also appear regularly in US domestic litigation, usually as of counsel to the Department of Justice in a case such as the Supreme Court's current case of *Samantar v. Yousuf*, on which this Society held a panel this morning.

A fourth and final role for the Legal Adviser, and the reason I'm here tonight, is to act as a **spokesperson** for the US Government about why international law matters. Many people don't understand why obeying our international commitments is both right and smart, and that is a message that this Administration, and I as Legal Adviser, are committed to spreading.

II. The Strategic Vision

That brings me to my second topic: what strategic vision of international law are we trying to implement? How does obeying international law advance U.S foreign policy interests and strengthen America's position of global leadership? Or to put it another way, with respect to international law, is this Administration really committed to what our President has famously called "change we can believe in"? Some, including a number of the panelists who have addressed this conference, have argued that there is really more continuity than change from the last administration to this one.

To them I would answer that, of course, in foreign policy, from administration to administration, there will always be more continuity than change; you simply cannot turn the ship of state 360 degrees from administration to administration every four to eight years, nor should you. But, I would argue—and these are the core of my remarks today-- to say that is to understate the most important difference between this administration and the last: and that is with respect to its **approach and attitude toward international law**. The difference in that approach to international law I would argue is captured in **an Emerging "Obama-Clinton Doctrine,"** which is based on four commitments: to: 1. *Principled Engagement;* 2. Diplomacy as a Critical Element of *Smart Power;* 3. *Strategic Multilateralism; and* 4. the notion that *Living Our Values* Makes us Stronger and Safer, by Following *Rules of Domestic and International Law; and Following Universal Standards, Not Double Standards.*

As articulated by the President and Secretary Clinton, I believe the Obama/Clinton doctrine reflects these four core commitments. First, a **Commitment to Principled Engagement**: A powerful belief in the interdependence of the global community is a major theme for our President, whose father came from a Kenyan family and who as a child spent several years in Indonesia.

Second, a commitment to what Secretary Clinton calls "**smart power"—**a blend of principle and pragmatism" that makes "intelligent use of all means at our disposal," including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy.

Third, a commitment to what some have called **Strategic Multilateralism**: the notion acknowledged by President Obama at Cairo, that the challenges of the twenty-first century "can't be met by any one leader or any one nation" and must therefore be addressed by open dialogue and partnership by the United States with peoples and nations across traditional regional divides, "based on mutual interest and mutual respect" as well as acknowledgment of "the rights and responsibilities of [all] nations."

And fourth and finally, a commitment to **living our values by respecting the rule of law**, As I said, both the President and Secretary Clinton are outstanding lawyers, and they understand that by imposing constraints on government action, law legitimates and gives credibility to governmental action. As the President emphasized forcefully in his National Archives speech and elsewhere, the American political system was founded on a vision of common humanity, universal rights and rule of law. Fidelity to [these] values" makes us stronger and safer. This also means **following universal standards, not double standards**. In his Nobel lecture at Oslo, President Obama affirmed that "[a]dhering to standards, international standards, strengthens those who do, and isolates those who don't." And in her December speech on a 21st Century human rights agenda, and again two weeks ago in introducing our annual human rights reports, Secretary Clinton reiterated that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves."

Now in implementing this ambitious vision—this Obama-Clinton doctrine based on principled international engagement, smart power, strategic multilateralism, and the view that global leadership flows to those who live their values and obey the law and global standards—I am reminded of two stories.

The first, told by a former teammate is about the late Mickey Mantle of the American baseball team, the New York Yankees, who, having been told that he would not play the next day, went out and got terrifically drunk (as he was wont to do). The next day, he arrived at the ballpark, somewhat impaired, but in the late innings was unexpectedly called upon to pinch-hit. After staggering out to the field, he swung wildly at the first two pitches and missed by a mile. But on the third pitch, he hit a tremendous home run. And when he returned to the dugout, he squinted out at the wildly cheering crowd and confided to his teammates, "[t]hose people don't know how hard that really was."[1]

In much the same way, I learned that the making of U.S. foreign policy is infinitely harder than it looks from the ivory tower. Why? Because, as lawyers, we are accustomed to the relatively orderly world of law and litigation, which is based on a knowable and identifiable structure and sequence of events. The workload comes with courtroom deadlines, page limits and scheduled arguments. But if conducting litigation is like climbing a ladder, making foreign policy is much more like driving the roundabout near the Coliseum in Rome.

In this maze of bureaucratic politics, you are only one lawyer, and there is only so much that any one person can do. Collective government decision-making creates enormous coordination problems. We in the Legal Adviser's Office are not the only lawyers in government: On any given issue, my office needs to reach consensus decisions with all of the other interested State Department bureaus, but our Department as a whole then needs to coordinate its positions not just with other government law offices, which include: our lawyer clients (POTUS/SecState/DepSecState); White House Lawyers (WHCounsel/NSC Legal Counsel/USTR General Counsel); DOD Lawyers (OGC, Jt Staff, CoComs, Services, JAGs); DOJ Lawyers (OLC, OSG, Litigating Divisions-Civ., Crim, OIL, NSD); IC Lawyers (DNI, CIA); DHS Lawyers, not to mention lawyers in the Senate and House.

To make matters even more complex, we participate in a complicated web of legal processes within processes: the policy process, the clearance process, the interagency process, the legislative process; and once a U.S. position is developed, an *inter*governmental lawyering process. So unlike academics, who are accustomed to being individualists, in government you are necessarily part of a team. One obvious corollary to this is that as one government lawyer, your views and the views of your client are not the only views that matter. As Walter Dellinger observed when he worked at OLC:

"[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority… When lawyers who are now [in my office] begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions."[2]

Now to say that is not to say that one administration cannot or should not reverse a previous administration's legal positions. But what it does mean, as I noted at my confirmation hearings, is that government lawyers should begin with a presumption of *stare decisis*--that an existing interpretation of the Executive Branch should stand-- unless after careful review, a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinces us that a change to the prior interpretation is warranted.

So that is what I mean when I say it's harder than it looks. And as those listening who have served in government know, it is a lot harder to get from a good idea to the implementation of that idea than those outside the government can imagine.

That brings me to my second, shorter story: about two Irishmen walking down the road near Galway. One of them asks the other, "So how do you get to Dublin?" And the other answers, "I wouldn't start from here."

In the same way, given the choice, no one would have started with what we inherited: the worst recession since the Depression, with conflicts in Iraq, Afghanistan, against al-Qaeda. Add to this mix a difficult and divided political environment, which makes it very difficult to get 60 Senate votes for cloture, much less the 67 you would need for treaty ratification, and such thorny carryover issues as resuming international engagement, closing Guantanamo, not to mention tackling an array of new challenges brought to us by the 21st century: climate change, attendant shifts in the polar environment; cyber crime, aggression and terrorism, food security, and global health just to name a few. Just to round things out, throw in a 7.0 earthquake in Haiti, another earthquake in Chile, four feet of snow in Washington, and you might well say to yourselves, to coin a phrase, "I wouldn't start from here."

But that having been said, how have we played the hand we have been dealt? What legal challenges do we face? There are really five fields of law that have occupied most of my time: what I call the law of international justice and dispute resolution, the law of 9/11, the law of international agreements, the law of the State Department, and the law of globalization. Tonight I want to focus on the first two of these areas: the law of international justice and dispute resolution and the law of 9/11. For they best illustrate how we have tried to implement the four themes I have outlined: principled engagement, multilateralism, smart power, and living our values.

III. Current Legal Challenges

A. International Justice and Dispute Resolution

By international justice and dispute resolution, I refer to the U.S.'s renewed relationship to international tribunals and other international bodies. Let me address two of them: the International Criminal Court and the U.N. Human Rights Council. As President Obama recognized, "a new era of engagement has begun and renewed respect for international law and institutions is critical if we are to resume American leadership in a new global century."

1. The International Criminal Court

With respect to the U.S. relationship to the ICC, let me report on my recent participation in the Resumed 8th Session of ICC Assembly of States Parties in New York, from which I have just returned. Last November, Ambassador-at-Large for War Crimes Stephen Rapp and I led an interagency delegation that resumed engagement with the Court by attending a meeting of the ICC Assembly of States Parties (ASP). This was the first time that the United States had attended such a meeting, and this week's New York meeting continued that November session. As you know, the United States is not party to the Rome Statute, but we have attended these meetings as an observer. Our goal in November was to listen and learn, and by listening to gain a better understanding of the issues being considered by the ASP and of the workings of the International Criminal Court.

Significantly, although during the last decade the U.S. was largely absent from the ICC, our historic commitment to the cause of international justice has remained strong. As you all know, we have not been silent in the face of war crimes and crimes against humanity. As one of the vigorous supporters of the work of the ad hoc tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra Leone, and Lebanon, the United States has worked for decades, and we will continue to work, with other States to ensure accountability on behalf of victims of such crimes. But as some of those ad hoc war crimes tribunals enter their final years, the eyes of the world are increasingly turned toward the ICC. At the end of May, the United States will attend the ASP's Review Conference in Kampala, Uganda. There are two key items on the agenda: stock-taking and aggression.

In the current situation where the Court has open investigations and prosecutions in relation to four situations, but has not yet concluded any trials, the stock-taking exercise is designed to address ways to strengthen the Court, and includes issues such as state cooperation; complementarity; effect on victims; peace and justice; and universality of membership. Even as a non-State party, the United States believes that it can be a valuable partner and ally in the cause of advancing international justice. The Obama Administration has been actively looking at ways that the U.S. can, consistent with U.S. law, assist the ICC in fulfilling its historic

charge of providing justice to those who have endured crimes of epic savagery and scope. And as Ambassador Rapp announced in New York, we would like to meet with the Prosecutor at the ICC to examine whether there are specific ways that the United States might be able to support the particular prosecutions that already underway in the Democratic Republic of Congo, Sudan, Central African Republic, and Uganda.

But as for the second agenda item, the definition of the crime of aggression, the United States has a number of serious concerns and questions. The crime of aggression, which is a *jus ad bellum* crime based on acts committed by the state, fundamentally differs from the other three crimes under the Court's jurisdiction—genocide, war crimes, and crimes against humanity—which are *jus in bello* crimes directed against particular individuals. In particular, we are concerned that adopting a definition of aggression at this point in the court's history could divert the ICC from its core mission, and potentially politicize and weaken this young institution. Among the States Parties we found strongly held, yet divergent, views on many fundamental and unresolved questions.

First, there are questions raised by the terms of the definition itself, including the degree to which it may depart from customary international law of both the "crime of aggression" and the state "act of aggression." This encompasses questions like what does it mean when the current draft definition requires that an act of aggression must be a "manifest" –as opposed to an "egregious" violation of the U.N. Charter?

A second question of who decides. The United States believes that investigation or prosecution of the crime of aggression should not take place absent a determination by the U.N. Security Council that aggression has occurred. The U.N. Charter confers on the Security Council the responsibility for determining when aggression has taken place. We are concerned by the confusion that might arise if more than one institution were legally empowered to make such a determination in the same case, especially since these bodies, under the current proposal, would be applying different definitions of aggression.

Third, there are questions about how such a crime would potentially affect the Court at this point in its development. For example, how would the still-maturing Court be affected if its prosecutor were mandated to investigate and prosecute this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political--both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged? To what extent would the availability of such a charge place burdens on the prosecutor in every case, both those in which he chooses to charge aggression and those in which he does not? If you think of the Court as a wobbly bicycle that is finally starting to move forward, is this frankly more weight than the bicycle can bear?

Fourth, would adopting the crime of aggression at this time advance or hinder the key goals of the stock-taking exercise: promoting complementarity, cooperation, and universality? With respect to complementarity, how would this principle apply to a crime of aggression? Do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will moving to adopt this highly politicized crime at a time when there is genuine disagreement on such issues enhance the prospects for universal adherence to the Rome Statute?

All of these questions go to our ultimate concern: has a genuine consensus yet emerged to finalize a definition of the crime of aggression? What outcome in Kampala will truly strengthen the Court at this critical moment in its history? What we heard at the Resumed Session in New York is that no clear consensus has yet emerged on many of these questions. Because this is such a momentous decision for this institution, which would bring about such an organic change in the Court's work, that we believe that we should leave no stone unturned in search of genuine consensus. And we look forward to discussing these important issues with as many States Parties and Non States Parties as possible between now and what we hope will be a successful Review Conference in Kampala.

2. Human Rights Council

In addition to reengaging with the ICC, the United States has also reengaged the U.N. Human Rights Council in Geneva. Along with my long time friend and colleague, Assistant Secretary of State for Democracy, Human Rights and Labor Michael Posner, who has my old job, and Assistant Secretary of State for International Organizations Esther Brimmer, I had the privilege of leading the first U.S. delegation to return to the Human Rights Council this past September.

You know the history: In March 2006, the U.N. General Assembly voted overwhelmingly to replace the flawed Human Rights Commission with this new body: the Human Rights Council. The last Administration participated actively in the negotiations in New York to reform the Commission, but ultimately voted against adoption of the UNGA resolution that created the HRC, and decided not to run for a seat.

The UNGA resolution that created the HRC made a number of important changes from the commission process: it created the Universal Periodic Review process, a mandatory process of self-examination and peer review that requires each U.N. member state to defend its own record before the HRC every four years. The Obama Administration would like our report to serve as a model for the world. Accordingly, we are preparing our first UPR report, which will be presented this November, with outreach sessions in an unprecedented interagency listening tour being conducted in about ten locations around the United States to hear about human rights concerns from civil society, community leaders, and tribal governments. Second, the HRC and its various subsidiary bodies and mechanisms meet far more frequently throughout the year than did the Commission, a pace that exhausts delegations. Third, the election criteria were revised. So while HRC membership still includes a number of authoritarian regimes that do not respect human rights, the election requirement of a majority of UNGA votes in often competitive elections has led to certain countries being defeated for membership and others declining to run for a seat. The rule that only one-third of membership (16 members) can convene a special session, has led to a disproportionate number of special sessions dedicated to criticism of Israel, which already is the only country with a permanent agenda item dedicated to examination of its human rights practices: an unbalanced focus that we have clearly and consistently criticized.

When the Obama Administration took office, we faced two choices with respect to the Human Rights Council: we could continue to stay away, and watch the flaws continue and possibly get worse, or we could engage and fight for better outcomes on human rights issues, even if they would not be easy to achieve. With the HRC, as with the ICC and other fora, we have chosen principled engagement and strategic multilateralism. While the institution is far from perfect, it is important and deserves the long-term commitment of the United States, and the United States must deploy its stature and moral authority to improve the U.N. human rights system where possible. This is a long-term effort, but one that we are committed to seeing through to success consistent with the basic goals of the Obama-Clinton doctrine: principled engagement and universality of human rights law. Our inaugural session as an HRC member in September saw some important successes, most notably the adoption by consensus of a freedom of expression resolution, which we co-sponsored with Egypt, that brought warring regional groups together and preserved the resolution as a vehicle to express firm support for freedom of speech and expression. This resolution was a way of implementing some of the themes in President Obama's historic speech in Cairo, bridging geographic and cultural divides and dealing with global issues of discrimination and intolerance. We also joined country resolutions highlighting human rights situations in Burma, Somalia, Cambodia, and Honduras, and were able to take positions joined by other countries on several resolutions on which the United States previously would have been isolated, including ones on toxic waste and the financial crisis. The challenges in developing a body that fairly and even-handedly addresses human rights issues are significant, but we will continue to work toward that end.

At the March HRC session, which ends tomorrow, we have continued to pursue principled engagement by taking on a variety of initiatives at the HRC that seek to weaken protections on freedom of expression, in particular, the push of some Council Members to ban speech that "defames" religions, such as the Danish cartoons. At this session, we made supported a country resolution on Guinea and made significant progress in opposing the Organization of the Islamic Conference's highly problematic "defamation of religions" resolution, even while continuing to deal with underlying concerns about religious intolerance.

B. The Law of 9/11

Let me focus the balance of my remarks on that aspect of my job that I call "The Law of 9/11." In this area, as in the other areas of our work, we believe, in the President's words, that "living our values doesn't make us weaker, it makes us safer and it makes us stronger."

We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a "conflict that America did not seek, one in which we are joined by forty-three other countries…in an effort to defend ourselves and all nations from further attacks." In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).

Everyone here at this meeting is committed to international law. But as President Obama reminded us, "the world must remember that it was not simply international institutions -- not just treaties and declarations -- that brought stability to a post-World War II world. …[T]he instruments of war do have a role to play in preserving the peace."

With this background, let me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? ***Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.*** As the President reaffirmed in his Nobel Prize Lecture, "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct … [E]ven as we confront a vicious adversary that abides by no rules … the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength." We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts – in particular, detention operations, targeting, and prosecution of terrorist suspects – in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.

Let me say a word about each: detention, targeting, and prosecution.

1. Detention

With respect to detention, as you know, the last Administration's detention practices were widely criticized around the world, and as a private citizen, I was among the vocal critics of those practices. This Administration and I personally have spent much of the last year seeking to revise those practices to ensure their full compliance with domestic and international law, first, by unequivocally guaranteeing *humane treatment* for all individuals in U.S. custody as a result of armed conflict and second, by *ensuring that all detained individuals are being held pursuant to lawful authorities*.

a. Treatment

To ensure humane treatment, on his second full day in office, the President unequivocally banned the use of torture as an instrument of U.S. policy, a commitment that he has repeatedly reaffirmed in the months since. He directed that executive officials could no longer rely upon the Justice Department OLC opinions that had permitted practices that I consider to be torture and cruel treatment -- many of which he later disclosed publicly -- and he instructed that henceforth, all interrogations of detainees must be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. An interagency review of U.S. interrogation practices later advised – and the President agreed – that no techniques beyond those in the Army Field Manual (and traditional noncoercive FBI techniques) are necessary to conduct effective interrogations. That Interrogation and Transfer Task Force also issued a set of recommendations to help ensure that the United States will not transfer individuals to face torture. The President also revoked Executive Order 13440, which had interpreted particular provisions of Common Article 3, and restored the meaning of those provisions to the way they have traditionally been understood in international law. The President ordered CIA "black sites" closed and directed the Secretary of Defense to conduct an immediate review – with two follow-up visits by a blue ribbon task force of former government officials – to ensure that the conditions of detention at Guantanamo fully comply with Common Article 3 of the Geneva Conventions. Last December, I visited Guantanamo, a place I had visited several times over the last two decades, and I believe that the conditions I observed are humane and meet Geneva Conventions standards.

As you all know, also on his second full day in office, the President ordered Guantanamo closed, and his commitment to doing so has not wavered, even as closing Guantanamo has proven to be an arduous and painstaking process. Since the beginning of the Administration, through the work of my colleague Ambassador Dan Fried, we have transferred approximately 57 detainees to 22 different countries, of whom 33 were resettled in countries that are not the detainees' countries of origin. Our efforts continue on a daily basis. Just this week, five more detainees were transferred out of Guantanamo for resettlement. We are very grateful to those countries who have contributed to our efforts to close Guantanamo by resettling detainees; that list continues to grow as more and more countries see the positive changes we are making and wish to offer their support.

During the past year, we completed an exhaustive, rigorous, and collaborative interagency review of the status of the roughly 240 individuals detained at Guantanamo Bay when President Obama took office. The President's Executive Order placed responsibility for review of each Guantanamo detainee with six entities –the Departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff – to collect and consolidate from across the government all information concerning the detainees and to ensure that diplomatic, military, intelligence, homeland security, and law enforcement viewpoints would all be fully considered in the review process. This interagency task force, on which several State Department attorneys participated, painstakingly considered each and every Guantanamo detainee's case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and our policy not to transfer individuals to countries where they would likely face torture or persecution. The six entities ultimately reached unanimous agreement on the proper disposition of all detainees subject to review. As the President has made clear, this is not a one-time review; there will be "a thorough process of periodic review, so that *any* prolonged detention is carefully evaluated and justified." Similarly, the Department of Defense has created new review procedures for individuals held at the detention facility in Parwan at Bagram airfield, Afghanistan, with increased representation for detainees, greater opportunities to present evidence, and more transparent proceedings. Outside organizations have begun to monitor these proceedings, and even some of the toughest critics have acknowledged the positive changes that have been made.

b. Legal Authority to Detain

Some have asked what legal basis we have for continuing to detain those held on Guantanamo and at Bagram. But as a matter of both international and domestic law, the legal framework is well-established. As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of "all necessary measures" by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan. As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld.*

The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases, but the Administration is not asserting an unlimited detention authority. For example, with regard to individuals detained at Guantanamo, we explained in a March 13, 2009 habeas filing before the DC federal court --and repeatedly in habeas cases since -- that we are resting our detention authority on a domestic statute – the 2001 Authorization for Use of Military Force (AUMF) – as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source.

In explaining this approach, let me note two important differences from the legal approach of the last Administration. First, as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.

Second, unlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF *as informed by the laws of war.* Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is "necessary and appropriate" under the AUMF requires some "translation," or analogizing principles from the laws of war governing traditional *international* conflicts.

Some commentators have criticized our decision to detain certain individuals based on their membership in a non-state armed group. But as those of you who follow the Guantanamo habeas litigation know, we have defended this position based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war. Moreover, while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that individuals who are part of an organized armed group like al-Qaeda can be subject to law of war detention for the duration of the current conflict. In sum, we have based our authority to detain not on conclusory labels, like "enemy combatant," but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

A final point: the Obama Administration has made clear both its goal not only of closing Guantanamo, but also of moving to shift detention responsibilities to the local governments in Iraq and Afghanistan. Last July, I visited the detention facilities in Afghanistan at Bagram, as well as Afghan detention facilities near Kabul, and I discussed the conditions at those facilities with both Afghan and U.S. military officials and representatives of the International Committee of the Red Cross. I was impressed by the efforts that the Department of Defense is making both to improve our ongoing operations and to prepare the Afghans for the day when we turn over responsibility for detention operations. This Fall, DOD created a joint task force led by a three-star admiral, Robert Harward, to bring new energy and focus to these efforts, and you can see evidence of his work in the rigorous implementation of our new detainee review procedures at Bagram, the increased transparency of these proceedings, and closer coordination with our Afghan partners in our detention operations.

In sum, with respect to both treatment and detainability, we believe that our detention practices comport with both domestic and international law.

B. Use of Force

In the same way, in all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say *is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.*

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and

- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict-- such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate *domestic law,* in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute "assassination."

In sum, let me repeat: as in the area of detention operations, this Administration is committed to ensuring that the targeting practices that I have described are lawful.

C. Prosecutions:

The same goes, third and finally, for our policy of prosecutions. As the President made clear in his May 2009 National Archives speech, we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low.

Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism committed in the context of an armed conflict can constitute both war crimes and violations of our Federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last Administration found, those who have violated American criminal laws can be successfully tried in federal courts, for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and provision of material support to al-Qaeda. We have also effectively used the criminal justice system to pursue those who have sought to commit terrorist acts overseas. On March 18, 2010, for example, David Headley pleaded guilty to a dozen terrorism charges in U.S. federal court in Chicago, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper.

As the President noted in his National Archives speech, lawfully constituted military commissions are also appropriate venues for trying persons for violations of the laws of war. In 2009, with significant input from this Administration, the Military Commissions Act was amended, with important changes to address the defects in the previous Military Commissions Act of 2006, including the addition of a provision that renders inadmissible any statements taken as a result of cruel, inhuman or degrading treatment. The 2009 legislative reforms also require the government to disclose more potentially exculpatory information, restrict hearsay evidence, and generally require that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements).

IV. CONCLUSION

In closing, in the last year, this Administration has pursued principled engagement with the ICC and the Human Rights Council, and has reaffirmed its commitment to international law with respect to all three aspects of the armed conflicts in which we find ourselves: detention, targeting and prosecution. While these are not all we want to achieve, neither are they small accomplishments. As the President said in his Nobel Lecture, "I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor ideals by upholding them not when it's easy, but when it is hard." As President Obama went on to say, even in this day and age war is sometimes justified, but "this truth", he said, "must coexist with another – that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory … But war itself is never glorious, and we must never trumpet it as such. So part of our challenge is reconciling these two seemingly irreconcilable truths – that war is sometimes necessary, and war at some level is an expression of human folly."

Although it is not always easy, I see my job as an international lawyer in this Administration as reconciling these truths around a thoroughgoing commitment to the rule of law. That is the commitment I made to the President and the Secretary when I took this job with an oath to uphold the Constitution and laws of the United States. That is a commitment that I make to myself every day that I am a government lawyer. And that is a commitment that I make to each of you, as a lawyer deeply committed—as we all are—to the goals and aspirations of this American Society of International Law.

Thank you.

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[1] Jim Bouton, Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues 30 (1970).

[2] Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107 (1995).

Exhibit 7

June 2010 Panetta Interview

A-172

'This Week' Transcript: Panetta

Jake Tapper Interviews CIA Director Leon Panetta

June 27, 2010 —

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

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

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

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

(BEGIN VIDEO CLIP)

PANETTA: And what keeps me awake at night--

(END VIDEO CLIP)

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

(BEGIN VIDEO CLIP)

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

(END VIDEO CLIP)

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

Then, the McChrystal mess.

(BEGIN VIDEO CLIP)

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

(END VIDEO CLIP)

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

And as always, the Sunday Funnies.

(BEGIN VIDEO CLIP)

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

(END VIDEO CLIP)

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

PANETTA: Nice to be with you, Jake.

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

PANETTA: I think the president said it best of all, that this is a very tough fight that we are engaged in. There are some serious problems here. We're dealing with a tribal society. We're dealing with a country that has problems with governance, problems with corruption, problems with narcotics trafficking, problems with a Taliban insurgency. And yet, the fundamental purpose, the mission that the president has laid out is that we have to go after Al Qaida. We've got to disrupt and dismantle Al Qaida and their militant allies so they never attack this country again.

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

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

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

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

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

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

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

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

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

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

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

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

What does winning in Afghanistan look like?

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

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

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

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

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

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

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

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

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

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

TAPPER: Al Qaida you're talking about.

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

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

TAPPER: All three of those individuals were tied in some way to an American cleric who is now supposedly in Yemen, Anwar al-Awlaki. He has said to be on an assassination list by President Obama. Is that true and does being an American afford him any protection that any other terrorist might not enjoy?

PANETTA: Awlaki is a terrorist who has declared war on the United States. Everything he's doing now is to try to encourage others to attack this country, there's a whole stream of intelligence that goes back to Awlaki and his continuous urging of others to attack this country in some way. You can track

Awlaki to the Detroit bomber. We can track him to other attacks in this country that have been urged by Awlaki or that have been influenced by Awlaki. Awlaki is a terrorist and yes, he's a U.S. citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist. We don't have an assassination list, but I can tell you this. We have a terrorist list and he's on it.

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

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

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

PANETTA: There is no question that we are abiding by international law and the law of war. Look, the United States of America on 9/11 was attacked by Al Qaida. They killed 3,000 innocent men and women in this country. We have a duty, we have a responsibility, to defend this country so that Al Qaida never conducts that kind of attack again. Does that make some of the Al Qaida and their supporters uncomfortable? Does it make them angry? Yes, it probably does. But that means that we're doing our job. We have a responsibility to defend this country and that's what we're doing. And anyone who suggests that somehow we're employing other tactics here that somehow violate international law are dead wrong. What we're doing is defending this country. That's what our operations are all about.

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

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

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

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

TAPPER: Including weaponization?

PANETTA: I think they continue to work on designs in that area. There is a continuing debate right now as to whether or nor they ought to proceed with the bomb. But they clearly are developing their nuclear capability, and that raises concerns. It raises concerns about, you know, just exactly what are their intentions, and where they intend to go. I mean, we think they have enough low-enriched uranium right now for two weapons. They do have to enrich it, fully, in order to get there. And we would estimate that if they made that decision, it would probably take a year to get there, probably another year to develop the kind of weapon delivery system in order to make that viable.

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

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

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

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

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

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

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

TAPPER: Was the warship attack part of that?

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

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

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

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

(BEGIN VIDEO CLIP)

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

(END VIDEO CLIP)

TAPPER: What's your response?

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

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

TAPPER: This month, Attorney General Eric Holder announced that Assistant United States Attorney John Durham is close to completing a preliminary review of whether or not there's evidence that CIA agents or contractors violated the law when they used brutal methods, some call it torture, to interrogate terrorist detainees. Do you oppose this investigation? Are your officers -- your current officers, concerned about their legal jeopardy in the future under a future administration and what kind of guarantees can you give them?

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

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

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

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

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

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

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

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

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

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

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

Thanks so much for joining us.

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

George, I'll start with you.

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

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

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

TAPPER: Quite the opposite, actually.

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

TAPPER: Rajiv?

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

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

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

He said -- he was more specific on the timeline. He said it would take them a year to enrich what they currently had in the way of nuclear fuel into bomb fuel and then another year to turn it into a weapon.

So that gives you a pretty good sense where the U.S. believes, you know, is the outline of how far they could let the Iranians go.

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

TAPPER: Robin?

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

(LAUGHTER)

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

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

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

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

(BEGIN VIDEO CLIP)

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

(END VIDEO CLIP)

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

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

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

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

TAPPER: Robin?

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

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

CHANDRASEKARAN: Yes.

TAPPER: What did you see?

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

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

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

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

TAPPER: George?

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

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

TAPPER: David?

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

It also bolsters Vice President Biden's case, that in fact applying more troops is not necessarily going to turn this around. And that's why I think we're headed for a much bigger collision later in the year on the strategy.

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

CHANDRASEKARAN: Not only not energize his base, it's won him no Republican support. The most concerning quote uttered by General McChrystal is not anything in those Rolling Stone

interviews, nothing about the vice president, about Holbrooke. The most alarming thing for Washington that he said recently was in Europe, a couple of weeks ago, when he acknowledged that it's going to take far more time to convince the Afghans that international forces are there to protect them. That's a fundamental prerequisite to counter-insurgency.

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

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

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

(BEGIN VIDEO CLIP)

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

(END VIDEO CLIP)

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

CHANDRASEKARAN: Well what this debate that played out over the weekend in Toronto means is that the president now faces opposition not just among Republicans on Capitol Hill to additional stimulus activity but he's facing it from his European allies who are also concerned about growing government debt. Certainly the fallout from the Greek debt crisis reverberating around continental Europe. The Germans, the British are all very concerned about this and the president, Secretary Geithner, wanted to get out of Toronto, they really haven't gotten in terms of a commitment among the G-8 allies to do more of the second round of stimulus sending.

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

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

WILL: And in the G-8, Germany lives large. And Germany and the United States have different national memories. The great economic trauma of the United States is the deflationary episode of the 1930s, the Depression. For Germany, the national memory is the inflation of the 1920s that destroyed the republic and brought on Hitler. Furthermore, the Europeans are not in that big mood to be lectured by us. They say, where did this crisis start? Oh, that's right, it was in the United States. Whose central

bank kept interest rates at a bubble producing low for too long? Whose social policy encouraged an unreasonably high home ownership in the United States? And by the way, whose stimulus has by its own criterion, failed?

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

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

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

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

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

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

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

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

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

TAPPER: All right. Well, the roundtable will continue in the green room on abcnews.com. Hopefully they'll talk about Wall Street reform. We didn't get a chance to talk about that today. And at

abcnews.com, you can also later find our fact checks of our newsmakers, courtesy of the Pulitzer Prize-winning Politifact.

Exhibit 8

July 2010 OLC Memo

A-190

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General — *Washington, D.C. 20530*

July 16, 2010

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi

II.

We begin our legal analysis with a consideration of section 1119 of title 18, entitled "Foreign murder of United States nationals." Subsection 1119(b) provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[6] In light of the nature of the contemplated operations described above, and the fact that their target would be a "national of the United States" who is outside the United States, we must examine whether section 1119(b) would prohibit those operations. We first explain, in this part, the scope of section 1119 and why it must be construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances. We next explain in part III-A why that public authority justification would apply to the contemplated DoD operation. Finally, we explain in part III-B why that justification would apply to the contemplated CIA operation. As to each agency, we focus on the particular circumstances in which it would carry out the operation.

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have construed section 1119(b) to incorporate the substantive elements of those cross-referenced provisions of title 18. *See, e.g.*, *United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Ca. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." *Id.* § 1111(a). Section 1112 similarly provides criminal sanctions for "manslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112. Section 1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[7]

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[6] *See also* 18 U.S.C. § 1119(a) (providing that "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)).

[7] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[8] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[9]

"[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.*

[8] A 1908 joint congressional committee report on the Act explained that "[u]nder existing law [i.e., prior to the 1909 Act], there [had been] no statutory definition of the crimes of murder or manslaughter." Report by the Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong. 1st Sess., at 12 (Jan. 6, 1908) ("Joint Committee Report"). We note, however, that the 1878 edition of the Revised Statutes did contain a definition for manslaughter (but not murder): "Every person who, within any of the places or upon any of the waters [within the exclusive jurisdiction of the United States] unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Revised Statutes § 5341 (1878 ed.) (quoted in *United States v. Alexander*, 471 F.2d 923, 944-45 n.54 (D.C. Cir. 1972)). With respect to murder, the 1908 report noted that the legislation "enlarges the common-law definition, and is similar in terms to the statutes defining murder in a large majority of the States." Joint Committee Report at 24; *see also Revision of the Penal Laws: Hearings on S. 2982 Before the Senate as a Whole*, 60th Cong., 1st Sess. 1184, 1185 (1908) (statement of Senator Heyburn) (same). With respect to manslaughter, the report stated that "[w]hat is said with respect to [the murder provision] is true as to this section, manslaughter being defined and classified in language similar to that to be found in the statutes of a large majority of the States." Joint Committee Report at 24.

[9] *See, e.g.*, Cal. Penal Code § 187(a) (West 2009) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Fla. Stat. § 782.04(1)(a) (West 2009) (including "unlawful killing of a human being" as an element of murder); Idaho Code Ann. § 18-4001 (West 2009) ("Murder is the unlawful killing of a human being"); Nev. Rev. Stat. Ann. § 200.010 (West 2008) (including "unlawful killing of a human being" as an element of murder); R. I. Gen. Laws § 11-23-1 (West 2008) ("The unlawful killing of a human being with malice aforethought is murder."); Tenn. Code Ann. § 39-13-201 (West 2009) ("Criminal homicide is the unlawful killing of another person"). Such statutes, in turn, reflect the view often expressed in the common law of murder that the crime requires an "unlawful" killing. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of Laws of England* 47 (London, W. Clarke & Sons 1809) ("Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."); 4 William Blackstone, *Commentaries on the Laws of England* 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied.") (internal quotation marks omitted).

As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[10] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized, *id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable.").[11] Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings.").

B.

Here, we focus on the potential application of one such recognized justification—the justification of "public authority"—to the contemplated DoD and CIA operations. Before examining whether, on these facts, the public authority justification would apply to those operations, we first explain why section 1119(b) incorporates that particular justification.

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly

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[10] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g.*, *Territory v. Gonzales*, 89 P. 250, 252 (N.M. Terr. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001). Similarly, the Uniform Code of Military Justice makes it unlawful for members of the armed forces to, "without justification or excuse, unlawfully kill[] a human being" under certain specified circumstances. 10 U.S.C. § 918. Notwithstanding that the statute already expressly requires lack of justification or excuse, it is the longstanding view of the armed forces that "[k]illing a human being is *unlawful*" for purposes of this provision "when done without justification or excuse." Manual for Courts-Martial United States (2008 ed.), at IV-63, art. 118, comment (c)(1) (emphasis added).

[11]

refer to a public authority justification.[12] Prosecutions where such a "public authority" justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. VISA Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[13] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And this Office has invoked analogous rationales in several instances in which it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[14]

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[12] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. We do not address such a circumstance in this opinion.

[13] The question of a "public authority" justification is much more frequently litigated in cases where a private party charged with a crime interposes the defense that he relied upon authority that a public official allegedly conferred upon him to engage in the challenged conduct. *See generally* United States Attorneys' Manual tit. 9, Criminal Resource Manual § 2055 (describing and discussing three different such defenses of "governmental authority"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(2); Model Penal Code § 3.03(3)(b); *see also United States v. Fulcher*, 250 F.3d 244, 253 (4th Cir. 2001); *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir. 1986); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984); Fed. R. Crim. P. 12.3 (requiring defendant to notify government if he intends to invoke such a public authority defense). We do not address such cases in this memorandum, in which our discussion of the "public authority" justification is limited to the question of whether a particular criminal law applies to specific conduct undertaken by *government agencies* pursuant to their authorities.

[14] *See, e.g.*, Memorandum for

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or, the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature has otherwise authorized the Executive to undertake pursuant to another statute.[15] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[16]

Here, we consider a federal murder statute, but there is no general bar to applying the public authority justification to such a criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[17] Other states, although not adopting that precise

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see also Visa Fraud Investigation, 8 Op. O.L.C. at 287-88 (concluding that civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

[15] *See, e.g.*, *Nardone v. United States*, 302 U.S. 379, 384 (1937) (government wiretapping was proscribed by federal statute);

[16] In accord with our prior precedents, each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect—such as whether it imposes a less qualified limitation than section 1119 imposes. *See generally, e.g.*, *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

[17] *See, e.g.*, Neb. Rev. Stat. § 28-1408(2)(b); Pa. C.S.A. § 504(b)(2); Tex. Penal Code tit. 2, § 9.21(c).

formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[18] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[19] There is, however, no federal statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification.

Against this background, we believe the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. We conclude that the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as we explain above, establish the substantive scope of section 1119(b)).[20] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here.

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675 The United States did not have

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[18] *See, e.g.*, Ariz. Rev. Stat. § 13-410.C; Maine Rev. Stat. Ann. tit. 17, § 102.2.

[19] *See, e.g.*, Ala. Stat. § 13A-3-22; N.Y. Penal Law § 35.05(1); LaFave, *Substantive Criminal Law* § 10.2(b), at 135 n.15; *see also* Robinson, *Criminal Law Defenses* § 149(a), at 215 (proposing that the defense should be available only if the actor engages in the authorized conduct "when and to the extent necessary to protect or further the interest protected or furthered by the grant of authority" and where it "is reasonable in relation to the gravity of the harms or evils threatened and the importance of the interests to be furthered by such exercise of authority"); *id.* § 149(c), at 218-20.

[20] In concluding that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification, we do not mean to suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 16.

an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.*

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[21] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law.

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[22]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994).

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the conduct of an authorized military operation by U.S. armed forces or the sort of CIA counterterrorism operation contemplated here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States,

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[21] The Thurmond proposal also contained procedural limitations on prosecution virtually identical to those that Congress ultimately enacted and codified at 18 U.S.C. § 1119(c). *See* S. 861, 102d Cong. § 2.

[22] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 13 (1993); 137 Cong. Rec. 8677 (1991) (letter for Senator Ernest F. Hollings, from Janet G. Mullins, Assistant Secretary, Legislative Affairs, U.S. State Department (Dec. 26, 1989), submitted for the record during floor debate on the Thurmond bill) (S4752 ("The United States has generally taken the position that the exercise of extraterritorial criminal jurisdiction based solely on the nationality of the victim interferes unduly with the application of local law by local authorities.").

reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[23] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory provisions that from all indications were intended to incorporate recognized justifications and excuses.

It is true that here the target of the contemplated operations would be a U.S. citizen. But we do not believe al-Aulaqi's citizenship provides a basis for concluding that section 1119 would fail to incorporate the established public authority justification for a killing in this case. As we have explained, section 1119 incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful" killings, 18 U.S.C. §§ 1111, 1112, a category that was intended to include, from all of the evidence of legislative intent we can find, only those killings that may not be permissible in light of traditional justifications for such action. At the time the predecessor versions of sections 1111 and 1112 were enacted, it was understood that killings undertaken in accord with the public authority justification were not "unlawful" because they were justified. There is no indication that, because section 1119(b) proscribes the unlawful killing abroad of U.S. nationals by U.S. nationals, it silently incorporated all justifications for killings *except* that public authority justification.

III.

Given that section 1119 incorporates the public authority justification, we must next analyze whether the contemplated DoD and CIA operations would be encompassed by that justification. In particular, we must analyze whether that justification would apply even though the target of the contemplated operations is a United States citizen. We conclude that it would—a conclusion that depends in part on our determination that each operation would accord with any potential constitutional protections of the United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, we do not address other cases or circumstances, involving different facts. Instead, we emphasize the sufficiency of the facts that have been represented to us here, without determining whether such facts would be necessary to the conclusion we reach.[24]

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[23] Courts have interpreted other federal homicide statutes to apply extraterritorially despite the absence of an express provision for extraterritorial application. *See, e.g.*, 18 U.S.C. § 1114 (criminalizing unlawful killings of federal officers and employees); *United States v. Al Kassar*, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) (construing 18 U.S.C. § 1114 to apply extraterritorially).

[24] In light of our conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the operations here would be covered by that justification, we need not and thus do not address whether other grounds might exist for concluding that the operations would be lawful.

A.

We begin with the contemplated DoD operation. We need not attempt here to identify the minimum conditions that might establish a public authority justification for that operation. In light of the combination of circumstances that we understand would be present, and which we describe below, we conclude that the justification would be available because the operation would constitute the "lawful conduct of war"—a well-established variant of the public authority justification.[25]

As one authority has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely imprisoned").[26] Moreover, without invoking the public authority justification by terms, our Office has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly

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[25] *See, e.g.*, 2 Paul H. Robinson, *Criminal Law Defenses* § 148(a), at 208 (1984) (conduct that would violate a criminal statute is justified and thus not unlawful "[w]here the exercise of military authority relies upon the law governing the armed forces or upon the conduct of war"); 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136 ("another aspect of the public duty defense is where the conduct was required or authorized by 'the law governing the armed services or the lawful conduct of war'") (internal citation omitted); Perkins & Boyce, *Criminal Law* at 1093 (noting that a "typical instance[] in which even the extreme act of taking human life is done by public authority" involves "the killing of an enemy as an act of war and within the rules of war"); *Frye*, 10 Cal. Rptr. 2d at 221 n.2 (identifying "homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war," as one example of a justifiable killing that would not be "unlawful" under the California statute describing murder as an "unlawful" killing); *State v. Gut*, 13 Minn. 341, 357 (1868) ("that it is legal to kill an alien enemy in the heat and exercise of war, is undeniable"); *see also* Model Penal Code § 3.03(2)(b) (proposing that criminal statutes expressly recognize a public authority justification for a killing that "occurs in the lawful conduct of war," notwithstanding the Code recommendation that the use of deadly force generally should be justified only if expressly prescribed by law); *see also id.* at 25 n.7 (collecting representative statutes reflecting this view enacted prior to Code's promulgation); 2 Robinson, *Criminal Law Defenses* § 148(b), at 210-11 nn.8-9 (collecting post-Model Code state statutes expressly recognizing such a defense).

[26] *Cf. Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 19, 46 I.L.M. 375, 382 (Israel Supreme Court sitting as the High Court of Justice, 2006) ("When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting 'by law', and they have a good justification defense [to criminal culpability]. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions."); *Calley v. Callaway*, 519 F.2d 184, 193 (5th Cir. 1975) ("an order to kill unresisting Vietnamese would be an illegal order, and . . . if [the defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense").

unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

In applying this variant of the public authority justification to the contemplated DoD operation, we note as an initial matter that DoD would undertake the operation pursuant to Executive war powers that Congress has expressly authorized. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). By authorizing the use of force against "organizations" that planned, authorized, and committed the September 11th attacks, Congress clearly authorized the President's use of "necessary and appropriate" force against al-Qaida forces, because al-Qaida carried out the September 11th attacks. *See* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, §2(a) (2001) (providing that the President may "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.").[27] And, as we have explained, *supra* at 9, a decision-maker could reasonably conclude that this leader of AQAP forces is part of al-Qaida forces. Alternatively, and as we have further explained, *supra* at 10 n.5, the AUMF applies with respect to forces "associated with" al-Qaida that are engaged in hostilities against the U.S. or its coalition partners, and a decision-maker could reasonably conclude that the AQAP forces of which al-Aulaqi is a leader are "associated with" al Qaida forces for purposes of the AUMF. On either view, DoD would carry out its contemplated operation against a leader of an organization that is within the scope of the AUMF, and therefore DoD would in that respect be operating in accord with a grant of statutory authority.

Based upon the facts represented to us, moreover, the target of the contemplated operation has engaged in conduct as part of that organization that brings him within the scope of the AUMF. High-level government officials have concluded, on the basis of al-Aulaqi's activities in Yemen, that al-Aulaqi is a leader of AQAP whose activities in Yemen pose a "continued and imminent threat" of violence to United States persons and interests. Indeed, the facts represented to us indicate that al-Aulaqi has been involved, through his operational and leadership roles within AQAP, in an abortive attack within the United States and continues to plot attacks intended to kill Americans from his base of operations in Yemen. The contemplated DoD operation, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.[28]

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[27] We emphasize this point not in order to suggest that statutes such as the AUMF have superseded or implicitly repealed or amended section 1119, but instead as one factor that helps to make particularly clear why the operation contemplated here would be covered by the public authority justification that section 1119 (and section 1111) itself incorporates.

[28] *See Hamlily*, 616 F. Supp. at 75 (construing AUMF to reach individuals who "function[] or participate[] within or under the command structure of [al-Qaida]"); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009); *see also al-Marri v. Pucciarelli*, 534 F.3d 213, 325 (4th Cir. 2008) (en banc) (Wilkinson, J., dissenting in part) (explaining that the ongoing hostilities against al-Qaida permit the Executive to use necessary and appropriate force

Al-Aulaqi is a United States citizen, however, and so we must also consider whether his citizenship precludes the AUMF from serving as the source of lawful authority for the contemplated DoD operation. There is no precedent directly addressing the question in circumstances such as those present here; but the Supreme Court has recognized that, because military detention of enemy forces is "by 'universal agreement and practice,' [an] 'important incident[] of war,'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)), the AUMF authorized the President to detain a member of Taliban forces who was captured abroad in an armed conflict against the United States on a traditional battlefield. *See id.* at 517-19 (plurality opinion).[29] In addition, the Court held in

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under the AUMF against an "enemy combatant," a term Judge Wilkinson would have defined as a person who is (1) "a member of" (2) "an organization or nation against whom Congress has declared war or authorized the use of military force," and (3) who "knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization"), *vacated and remanded sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); Government March 13th *Guantánamo Bay Detainee* Brief at 1 (arguing that AUMF authorizes detention of individuals who were "part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces").

Several of the Guantánamo habeas petitioners, as well as some commentators, have argued that in a non-international conflict of this sort, the laws of war and/or the AUMF do not permit the United States to treat persons who are part of al-Qaida as analogous to members of an enemy's armed forces in a traditional international armed conflict, but that the United States instead must treat all such persons as civilians, which (they contend) would permit targeting those persons only when they are directly participating in hostilities. *Cf. also al-Marri*, 534 F.3d at 237-47 (Motz, J. concurring in the judgment, and writing for four of nine judges) (arguing that the AUMF and the Constitution, as informed by the laws of war, do not permit military detention of an alien residing in the United States whom the government alleged was "closely associated with" al-Qaida, and that such individual must instead be treated as a civilian, because that person is not affiliated with the military arm of an enemy nation); Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 58, at 19 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) ("*Report of the Special Rapporteur*") (reasoning that because "[u]nder the [international humanitarian law] applicable to non-international armed conflict, there is no such thing as a 'combatant'"—i.e., a non-state actor entitled to the combatant's privilege—it follows that "States are permitted to attack only civilians who 'directly participate in hostilities'"). Primarily for the reasons that Judge Walton comprehensively examined in the *Gherebi* case, *see* 609 F. Supp. 2d at 62-69, we do not think this is the proper understanding of the laws of war in a non-international armed conflict, or of Congress's authorization under the AUMF. *Cf. also* International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28, 34 (2009) (even if an individual is otherwise a "citizen" for purposes of the laws of war, a member of a non-state armed group can be subject to targeting by virtue of having assumed a "continuous combat function" on behalf of that group); Alston, *supra*, ¶ 65, at 30-31 (acknowledging that under the ICRC view, if armed group members take on a continuous command function, they can be targeted anywhere and at any time); *infra* at 37-38 (explaining that al-Aulaqi is continually and "actively" participating in hostilities and thus not protected by Common Article 3 of the Geneva Conventions).

[29] *See also Al Odah v. Obama*, No. 09-5331, 2010 WL 2679752, at *1, and other D.C. Circuit cases cited therein (D.C. Cir. 2010) (AUMF gives United States the authority to detain a person who is "part of" al-Qaida or Taliban forces); *Hamlily*, 616 F. Supp. 2d at 74 (Bates, J.); *Gherebi*, 609 F. Supp. 2d at 67 (Walton, J.); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (Lamberth, C. J.); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009) (Kollar-Kotelly, J.); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (Robertson, J.); *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009) (Hogan, J.); *Hatim v.* Obama, 677 F. Supp. 2d 1, 7, (D.D.C. 2009) (Urbina, J.); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (Kessler, J.), *rev'd on other grounds*, No. 09-5333 (D.C. Cir. July 13, 2010).

Hamdi that this authorization applied even though the Taliban member in question was a U.S. citizen. *Id.* at 519-24; *see also Quirin*, 317 U.S. at 37-38 ("[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war). Furthermore, lower federal courts have relied upon *Hamdi* to conclude that the AUMF authorizes DoD to detain individuals who are part of al-Qaida even if they are apprehended and transferred to U.S. custody while not on a traditional battlefield. *See, e.g.*, *Bensayah v. Obama*, No. 08-5537, 2010 WL 2640626, at *1, *5, *8 (D.C. Cir. June 28, 2010) (concluding that the Department of Defense could detain an individual turned over to the U.S. in Bosnia if it demonstrates he was part of al-Qaida); *Al-Adahi v. Obama*, No. 09-5333 (D.C. Cir. July 13, 2010) (DoD has authority under AUMF to detain individual apprehended by Pakistani authorities in Pakistan and then transferred to U.S.); *Anam v. Obama*, 2010 WL 5896S (D.D.C. 2010) (same); *Razak Ali v. Obama*, 2009 WL 4030864 (D.D.C. 2009) (same); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (same).

In light of these precedents, we believe the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy organization within the scope of the force authorization. The use of lethal force against such enemy forces, like military detention, is an "'important incident of war,'" *Hamdi*, 542 U.S. at 518 (plurality opinion) (quotation omitted). *See, e.g.*, General Orders No. 100: Instructions for the Government of Armies of the Untied States in the Field ¶ 15 (Apr. 24, 1863) (the "Lieber Code") ("[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies"); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)* § 4789 (1987); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 94 (2004) ("*Conduct of Hostilities*") ("When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack."). And thus, just as the AUMF authorizes the military detention of a U.S. citizen captured abroad who is part of an armed force within the scope of the AUMF, it also authorizes the use of "necessary and appropriate" lethal force against a U.S. citizen who has joined such an armed force. Moreover, as we explain further in Part VI, DoD would conduct the operation in a manner that would not violate any possible constitutional protections that al-Aulaqi enjoys by reason of his citizenship. Accordingly, we do not believe al-Aulaqi's citizenship provides a basis for concluding that he is immune from a use of force abroad that the AUMF otherwise authorizes.

In determining whether the contemplated DoD operation would constitute the "lawful conduct of war," LaFave, *Substantive Criminal Law* § 10.2(c), at 136, we next consider whether that operation would comply with the international law rules to which it would be subject—a question that also bears on whether the operation would be authorized by the AUMF. *See* Response for Petition for Rehearing and Rehearing En Banc, *Al Bihani v. Obama*, No. 09-5051 at 7 (D.C. Cir.) (May 13, 2010) (AUMF "should be construed, if possible, as consistent with international law") (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains")); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (customary international law is "law that (we must assume) Congress ordinarily

seeks to follow"). Based on the combination of facts presented to us, we conclude that DoD would carry out its operation as part of the non-international armed conflict between the United States and al-Qaida, and thus that on those facts the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.

In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida. 548 U.S. 557, 628-31 (2006). In so holding, the Court rejected the argument that non-international armed conflicts are limited to civil wars and other internal conflicts between a state and an internal non-state armed group that are confined to the territory of the state itself; it held instead that a conflict between a transnational non-state actor and a nation, occurring outside that nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations." *Id.* at 630.

Here, unlike in *Hamdan*, the contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida.[30] To be sure, *Hamdan* did not directly address the geographic scope of the non-international armed conflict between the United States and al-Qaida that the Court recognized, other than to implicitly hold that it extended to Afghanistan, where Hamdan was apprehended. *See* 548 U.S. at 566; *see also id.* at 641-42 (Kennedy, J., concurring in part) (referring to Common Article 3 as "applicable to our Nation's armed conflict with al Qaeda in Afghanistan"). The Court did, however, specifically reject the argument that non-international armed conflicts are necessarily limited to internal conflicts. The Common Article 3 term "conflict not of an international character," the Court explained, bears its "literal meaning"—namely, that it is a conflict that "does not involve a clash between nations." *Id.* at 630 (majority opinion). The Court referenced the statement in the 1949 ICRC Commentary on the Additional Protocols to the Geneva Conventions that a non-international armed conflict "'is distinct from an international armed conflict *because of the legal status of the entities opposing each other*,'" *id.* at 631 (emphasis added). The Court explained that this interpretation—that the nature of the conflict depends at least in part on the status of the parties, rather than simply on the locations in which they fight—in turn accords with the view expressed in the commentaries to the Geneva Conventions that "the scope of application" of Common Article 3, which establishes basic protections that govern conflicts not of an international character, "must be as wide as possible.'" *Id.*[31]

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[30] Our analysis is limited to the circumstances presented here, regarding the contemplated use of lethal force in Yemen. We do not address issues that a use of force in other locations might present. *See also supra* note 1.

[31] We think it is noteworthy that the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes, and that nearly a decade after its enactment, none of the three branches of the United States Government has identified a strict geographical limit on the permissible scope of the authority the AUMF confers on the President with respect to this armed conflict. *See, e.g.*, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 15, 2010) (reporting, "consistent with . . . the War Powers Resolution," that the armed forces, with the assistance of numerous international partners,

Invoking the principle that for purposes of international law an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and armed groups," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-1AR72, ¶ 70 (ICTY App. Chamber Oct. 2, 1995) ("*Tadic* Jurisdictional Decision"), some commentators have suggested that the conflict between the United States and al-Qaida cannot extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. *See, e.g.*, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 857-59 (2009); *see also* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 54, at 18 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) (acknowledging that a non-international armed conflict can be transnational and "often does" exist "across State borders," but explaining that the duration and intensity of attacks in a particular nation is also among the "cumulative factors that must be considered for the objective existence of an armed conflict"). There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this issue, we must look to principles and statements from analogous contexts, recognizing that they were articulated without consideration of the particular factual circumstances of the sort of conflict at issue here.

In looking for such guidance, we have not come across any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict. *See* John R. Stevenson, Legal Adviser, Department of State, *United States Military Action in Cambodia: Questions of International Law* (address before the Hammarskjold Forum of the Association of the Bar of the City of New York, May 28, 1970), *in* 3 *The Vietnam War and International Law: The Widening Context* 23, 28-30 (Richard A. Falk, ed. 1972) (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state). Nor do we see any obvious reason why that more categorical, nation-specific rule should govern in analogous circumstances in this sort of non-international armed conflict.[32]

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continue to conduct operations "against al-Qa'ida terrorists," and that the United States has "deployed combat-equipped forces to a number of locations in the U.S. Central . . . Command area[] of operation in support of those [overseas counter-terrorist] operations"); Letter for the Speaker of the House of Representatives and the President Pro Tempore of the Senate, from President Barack Obama (Dec. 16, 2009) (similar); *DoD May 18 Memorandum for OLC*, at 2 (explaining that U.S. armed forces have conducted AQAP targets in Yemen since December 2009, and that DoD has reported such strikes to the appropriate congressional oversight committees).

[32] In the speech cited above, Legal Adviser Stevenson was referring to cases in which the government of the nation in question is unable to prevent violations of its neutrality by belligerent troops.

Rather, we think the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case. Such an inquiry may be particularly appropriate in a conflict of the sort here, given that the parties to it include transnational non-state organizations that are dispersed and that thus may have no single site serving as their base of operations.[33]

We also find some support for this view in an argument the United States made to the International Criminal Tribunal for Yugoslavia (ICTY) in 1995. To be sure, the United States was there confronting a question, and a conflict, quite distinct from those we address here. Nonetheless, in that case the United States argued that in determining *which* body of humanitarian law applies in a particular conflict, "the conflict must be considered as a whole," and that "it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of [the relevant] rules." Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, Case No. IT-94-1AR72 (ICTY App. Chamber) at 27-28 (July 1995) ("U.S. *Tadic* Submission"). Likewise, the court in *Tadic*—although not addressing a conflict that was transnational in the way the U.S. conflict with al-Qaida is—also concluded that although "the definition of 'armed conflict' varies depending on whether the hostilities are international or internal . . . the scope of both internal and international armed conflicts *extends beyond the exact time and place of hostilities*." *Tadic* Jurisdictional Decision ¶ 67 (emphasis added); *see also* International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 18 (2003) (asserting that in order to assess whether an armed conflict exists it is necessary to determine "whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense"). Although the basic approach that the United States proposed in *Tadic*, and that the ICTY may be understood to have endorsed, was advanced without the current conflict between the U.S. and al-Qaida in view, that approach reflected a concern with ensuring that the laws of war, and the limitations on the use of force they establish, should be given an appropriate application.[34] And that same consideration, reflected in *Hamdan* itself, *see supra* at 24, suggests

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[33] The fact that the operation occurs in a new location might alter the way in which the military must apply the relevant principles of the laws of war—for example, requiring greater care in some locations in order to abide by the principles of distinction and proportionality that protect civilians from the use of military force. But that possible distinction should not affect the question of whether the laws of war govern the conflict in that new location in the first instance

[34] *See also* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temp. L. Rev. 787, 799 (2008) ("If . . . the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose."); *cf. also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 40-41 (2003) (arguing that if Common Article 3 applies to wholly internal conflicts, then it "applies a fortiori to armed conflicts with international or transnational dimensions," such as to the United States's armed conflict with al-Qaida).

a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict absent a specified level and intensity of hostilities in the particular location where it occurs.

For present purposes, in applying the more context-specific approach to determining whether an operation would take place within the scope of a particular armed conflict, it is sufficient that the facts as they have been represented to us here, in combination, support the judgment that DoD's operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. Specifically, DoD proposes to target a leader of AQAP, an organized enemy force[35] that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy. *See supra at* 9-10 & n.5. Moreover, DoD would conduct the operation in Yemen, where, according to the facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. *See supra at* 7-9. Taken together, these facts support the conclusion that the DoD operation would be part of the non-international armed conflict the Court recognized in *Hamdan*.[36]

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[35] *Cf. Prosecutor v. Haradnizaj*, No IT-04-84-T 60 (ICTY Trial Chamber I, 2008) ("an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means—a condition that can be evaluated with respect to non-state groups by assessing "several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled," including, among other things, the existence of a command structure, and disciplinary rules and mechanisms within the group, the ability of the group to gain access to weapons, other military equipment, recruits and military training, and its ability to plan, coordinate, and carry out military operations).

[36] We note that the Department of Defense, which has a policy of compliance with the law of war "during all armed conflicts, however such conflicts are characterized, *and in all other military operations*," Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) (emphasis added), has periodically used force—albeit in contexts different from a conflict such as this—in situations removed from "active battlefields," in response to imminent threats. *See, e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 116-17 (2004) (describing 1998 cruise missile attack on al-Qaida encampments in Afghanistan following al-Qaida bombings of U.S. embassies in East Africa); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Lawyer, at 7 (Dep't of Army Pamphlet 27-50-204) (Dec. 1989) ("*Assassination*") at 7 n.8 (noting examples of uses of military force in "[s]elf defense against a continuing threat," including "the U.S. Navy air strike against Syrian military objections in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day," and "air strikes against terrorist-related targets in Libya on the evening of 15 April 1986"); *see also id.* at 7 ("A national decision to employ military force in self defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self defense. The terrorist organizations envisaged as appropriate to necessitate or warrant an armed response by U.S. forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force."); Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons ¶ 42, 1996 I.C.J. 226, 245 ("Nuclear Weapons Advisory Opinion") (fundamental law-of-war norms are applicable even where military force might be employed outside the context of an armed conflict, such as when using powerful weapons in an act of national self-defense); *cf. also 9/11 Commission Report* at 116-17 (noting the Clinton Administration position—with respect to a presidential memorandum authorizing CIA assistance to an operation that could result in the killing of Usama Bin Ladin "if the CIA and the tribals judged that capture was not feasible"—that "under the law of armed

There remains the question whether DoD would conduct its operation in accord with the rules governing targeting in a non-international armed conflict—namely, international humanitarian law, commonly known as the laws of war. *See* Dinstein, *Conduct of Hostilities* at 17 (international humanitarian law "takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism").[37] The 1949 Geneva Conventions to which the United States is a party do not themselves directly impose extensive restrictions on the conduct of a non-international armed conflict—with the principal exception of Common Article 3, *see Hamdan*, 548 U.S. at 630-31. But the norms specifically described in those treaties "are not exclusive, and the laws and customs of war also impose limitations on the conduct of participants in non-international armed conflict." U.S. *Tadic* Submission at 33 n.53; *see also, e.g.*, Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble ("Hague Convention (IV)"), 36 Stat. 2277, 2280 (in cases "not included" under the treaty, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience").

In particular, the "fundamental rules" and "intransgressible principles of international customary law," Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons ¶ 79, 1996 I.C.J. 226, 257 ("Nuclear Weapons Advisory Opinion"), which apply to all armed conflicts, include the "four fundamental principles that are inherent to all targeting decisions"—namely, military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction. United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006); *see also generally id.* at 88-92; Dinstein, *Conduct of Hostilities* at 16-20, 115-16, 119-23. Such fundamental rules also include those listed in the annex to the Fourth Hague Convention, *see* Nuclear Weapons Advisory Opinion ¶ 80, at 258, article 23 of which makes it "especially forbidden" to, inter alia, kill or wound treacherously, refuse surrender, declare a denial of quarter, or cause unnecessary suffering, 36 Stat. at 2301-02.

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conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination"). As we explain below, DoD likewise would conduct the operation contemplated here in accord with the laws of war and would direct its lethal force against an individual whose activities have been determined to pose a "continued and imminent threat" to U.S. persons and interests.

[37] *Cf.* Nuclear Weapons Advisory Opinion ¶ 25, 1996 I.C.J. at 240 (explaining that the "test" of what constitutes an "arbitrary" taking of life under international human rights law, such as under article 6(1) of the International Covenant of Civil and Political Rights (ICCPR), must be determined by "the law applicable in armed conflict which is designed to regulate the conduct of hostilities," and "can only be decided by reference to the law applicable in armed conflict and not deduced from terms of the Covenant itself"); Written Statement of the Government of the United States of America before the International Court of Justice, *Re: Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* at 44 (June 20, 1995) (ICCPR prohibition on arbitrary deprivation of life "was clearly understood by its drafters to exclude the lawful taking of human life," including killings "lawfully committed by the military in time of war"); Dinstein, *Conduct of Hostilities* at 23 (right to life under human rights law "does not protect persons from the ordinary consequences of hostilities"); *cf. also infra* Part VI (explaining that the particular contemplated operations here would satisfy due process and Fourth Amendment standards because, *inter alia*, capturing al-Aulaqi is currently infeasible).

DoD represents that it would conduct its operation against al-Aulaqi in compliance with these fundamental law-of-war norms. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). In particular, the targeted nature of the operation would help to ensure that it would comply with the principle of distinction, and DoD has represented to us that it would make every effort to minimize civilian casualties and that the officer who launches the ordnance would be required to abort a strike if he or she concludes that civilian casualties will be disproportionate or that such a strike will in any other respect violate the laws of war. *See DoD May 18 Memorandum for OLC*, at 1 ("Any official in the chain of command has the authority and duty to abort" a strike "if he or she concludes that civilian casualties will be disproportionate or that such a strike will otherwise violate the laws of war.").

Moreover, although DoD would specifically target al-Aulaqi, and would do so without advance warning, such characteristics of the contemplated operation would not violate the laws of war and, in particular, would not cause the operation to violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary. . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[38] Those prohibitions do not categorically preclude the use of stealth or surprise, nor forbid military attacks on identified, individual soldiers or officers, *see* U.S. Army Field Manual 27-10, ¶ 31 (1956) (article 23(b) of the Annex to the Hague Convention IV does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where"), and we are not aware of any other law-of-war grounds precluding the use of such tactics. *See* Dinstein, *Conduct of Hostilities* at 94-95, 199; Abraham D. Sofaer, *Terrorism, The Law, and the National Defense*, 126 Mil. L. Rev. 89, 120-21 (1989).[39] Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart

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[38] Although the United States is not a party to the First Protocol, the State Department has announced that "we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Remarks of Michael J, Matheson, Deputy Legal Adviser, Department of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. of Int'l L. & Pol'y 415, 425 (1987). (U)

[39] There is precedent for the United States targeting attacks against particular commanders. *See, e.g.*, Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 Mil. L. Rev. 123, 136-37 (1991) (describing American warplanes' shoot-down during World War II of plane carrying Japanese Admiral Isoroku Yamamoto); *see also* Parks, *Assassination*, Army Lawyer at 5.

bombs—as long as they are employed in conformity with applicable laws of war." Koh, *The Obama Administration and International Law*. DOD also informs us that if al-Aulaqi offers to surrender, DoD would accept such an offer.[40]

In light of all these circumstances, we believe DoD's contemplated operation against al-Aulaqi would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. In consequence, the operation should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification. Accordingly, the contemplated attack, if conducted by DoD in the manner described, would not result in an "unlawful" killing and thus would not violate section 1119(b).

B.

We next consider whether the CIA's contemplated operation against al-Aulaqi in Yemen would be covered by the public authority justification. We conclude that it would be; and thus that operation, too, would not result in an "unlawful" killing prohibited by section 1119. As with our analysis of the contemplated DoD operation, we rely on the sufficiency of the particular factual circumstances of the CIA operation as they have been represented to us, without determining that the presence of those specific circumstances would be necessary to the conclusion we reach.

[40] *See* Geneva Conventions Common Article 3(1) (prohibiting "violence to life and person, in particular murder of all kinds," with respect to persons "taking no active part in the hostilities" in a non-international armed conflict, "including members of armed forces who have laid down their arms"); *see also* Hague Convention IV, Annex, art. 23(c), 37 Stat. at 2301-02 ("it is especially forbidden . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion"); *id.* art. 23(d) (forbidding a declaration that no quarter will be given); 2 William Winthrop, *Military Law and Precedents* 788 (1920) ("The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death simply by virtue of his capture.").

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We explain in Part VI why the Constitution would impose no bar to the CIA's contemplated operation under these circumstances, based on the facts as they have been represented to us. There thus remains the question whether that operation would violate any statutory restrictions, which in turn requires us to consider whether 18 U.S.C. § 1119 would apply to the contemplated CIA operation.[42] Based on the combination of circumstances that we understand would be present, we conclude that the public authority justification that section 1119 incorporates—and that would prevent the contemplated DoD operation from violating section 1119(b)—would also encompass the contemplated CIA operation.[43]

[42] We address potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—in Parts IV and V of this opinion.

[43] We note, in addition, that the "lawful conduct of war" variant of the public authority justification, although often described with specific reference to operations conducted by the armed forces, is not necessarily limited to operations by such forces; some descriptions of that variant of the justification, for example, do not imply such a limitation. *See, e.g.*, *Frye*, 10 Cal. Rptr. 2d at 221 n.2 ("homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war"); Perkins & Boyce, *Criminal Law* at 1093 ("the killing of an enemy as an act of war and within the rules of war").

Specifically, we understand that the CIA, like DoD, would carry out the attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

the CIA—

—would conduct the operation in a manner that accords with the rules of international humanitarian law governing this armed conflict, and in circumstances

See supra at 10-11.[44]

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[44] If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g.*, *Shoot Down Opinion* at 165 n. 33 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)).

Nor would the fact that CIA personnel would be involved in the operation itself cause the operation to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See Report of the Special Rapporteur* ¶ 71, at 22; *see also* Dinstein, *Conduct of Hostilities*, at 31. Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989);

Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g.*, *id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). We note

Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As we have explained, *supra* at 17-19, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to DoD.

Thus, we conclude that just as Congress did not intend section 1119 to bar the particular attack that DoD contemplates, neither did it intend to prohibit a virtually identical attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, that the CIA would carry out in accord with

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in this regard that DoD's current Manual for Military Commissions does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr. 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

[45] As one example, the Senate Report pointed to the Department of Justice's conclusion that the Neutrality Act, 18 U.S.C. § 960, prohibits conduct by private parties but is not applicable to the CIA and other government agencies. *Id.* The Senate Report assumed that the Department's conclusion about the Neutrality Act was premised on the assertion that in the case of government agencies, there is an "absence of the mens rea necessary to the offense." *Id.* In fact, however, this Office's conclusion about that Act was not based on questions of mens rea, but instead on a careful analysis demonstrating that Congress did not intend the Act, despite its words of general applicability, to apply to the activities of government officials acting within the course and scope of their duties as officers of the United States. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

See also infra at 38-41 (explaining that the CIA operation under the circumstances described to us would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force).

Accordingly, we conclude that, just as the combination of circumstances present here supports the judgment that the public authority justification would apply to the contemplated operation by the armed forces, the combination of circumstances also supports the judgment that the CIA's operation, too, would be encompassed by that justification. The CIA's contemplated operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119.

IV.

For similar reasons, we conclude that the contemplated DoD and CIA operations would not violate another federal criminal statute dealing with "murder" abroad, 18 U.S.C. § 956(a). That law makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy.

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[46] *Cf. also VISA Fraud Investigation*, 8 Op. O.L.C. at 287 (applying similar analysis in evaluating the effect of criminal prohibitions on certain otherwise authorized law enforcement operations, and explaining that courts have recognized it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion"); *id.* at 288 (concluding that issuance of an otherwise unlawful visa that was necessary for undercover operation to proceed, and done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate federal statute).

Like section 1119(b), section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons we explained earlier in this opinion, *see supra* at 12-14, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. As we have further explained both the CIA and DoD operations, on the facts as they have been represented to us, would be covered by that justification. Nor do we believe that Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflects an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that our analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit.

The legislative history of section 956(a) further confirms our conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). As far as

we have been able to determine, the legislative history contains nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle.

Accordingly, we do not believe section 956(a) would prohibit the contemplated operations.

V.

We next consider the potential application of the War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907; (iii) that is a "grave breach" of Common Article 3 of the Geneva Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[47]

In defining what conduct constitutes a "grave breach" of Common Article 3 for purposes of the War Crimes Act, subsection 2441(d) includes "murder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). This language derives from Common Article 3(1) itself, which prohibits certain acts (including murder) against "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 3(1), 6 U.S.T. 3316, 3318-20. Although Common Article 3 is most commonly applied with respect to persons within a belligerent party's control, such as detainees, the language of the article is not so limited—it protects all "[p]ersons taking no active part in the hostilities" in an armed conflict not of an international character.

Whatever might be the outer bounds of this category of covered persons, we do not think it could encompass al-Aulaqi. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. *See supra* at 23. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged

[47] The operations in question here would not involve conduct covered by the Land Mine Protocol. And the articles of the Geneva Conventions to which the United States is currently a party *other than* Common Article 3, as well as the relevant provisions of the Annex to the Fourth Hague Convention, apply by their terms only to armed conflicts between two or more of the parties to the Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 2, 6 U.S.T. 3316, 3406.

from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked"). Al-Aulaqi, an active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances posited to us would not violate Common Article 3 and therefore would not violate the War Crimes Act.

VI.

We conclude with a discussion of potential constitutional limitations on the contemplated operations due to al-Aulaqi's status as a U.S. citizen, elaborating upon the reasoning in our earlier memorandum discussing that issue. Although we have explained above why we believe that neither the DoD or CIA operation would violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that al-Aulaqi is a United States citizen could raise distinct questions under the Constitution. As we explained in our earlier memorandum, Barron Memorandum at 5-7, we do not believe that al-Aulaqi's U.S. citizenship imposes constitutional limitations that would preclude the contemplated lethal action under the facts represented to us by DoD, the CIA and the Intelligence Community.

Because al-Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects him in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008).

In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

We believe similar reasoning supports the constitutionality of the contemplated operations here. As explained above, on the facts represented to us, a decision-maker could reasonably decide that the threat posed by al-Aulaqi's activities to United States persons is "continued" and "imminent"

In addition to the nature of the threat posed by al-Aulaqi's activities, both agencies here have represented that they intend to capture rather than target al-Aulaqi if feasible; yet we also understand that an operation by either agency to capture al-Aulaqi in Yemen would be infeasible at this time.

Cf., e.g., Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02 ¶ 40, 46 I.L.M. 375, 394 (Israel Supreme Court sitting as the High Court of Justice, 2006) (although arrest, investigation and trial "might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place," such alternatives "are not means which can always be used," either because they are impossible or because they involve a great risk to the lives of soldiers).

Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531. we conclude that at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, "the highest officers in the Intelligence Community have reviewed the factual basis" for the lethal operation, and a capture operation would be infeasible—and where the CIA and DoD "continue to monitor whether changed circumstances would permit such an alternative," *see also DoD May 18 Memorandum for OLC* at 2—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that Court "accord[s] the greatest respect and consideration to the judgments of military

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authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion).

Similarly, assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the operations at issue here would result in a "seizure" within the meaning of that Amendment,

The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). Even in domestic law enforcement operations, the Court has noted that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Id.* at 11-12.

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in a situation like such as that at issue here. In the present circumstances, as we understand the facts, the U.S. citizen in question has gone overseas and become part of the forces of an enemy with which the United States is engaged in an armed conflict; that person is engaged in continual planning and direction of attacks upon U.S. persons from one of the enemy's overseas bases of operations; the U.S. government does not know precisely when such attacks will occur; and a capture operation would be infeasible. . at least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests the use of lethal force would not violate the Fourth Amendment. and thus that the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts that have been represented to us.

Please let us know if we can be of further assistance.

David J. Barron
Acting Assistant Attorney General

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk

CERTIFIED: April 21, 2014 by Catherine O'Hagan Wolfe
DEPUTY CLERK

Exhibit 9

September 2010 Government Brief

A-222

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, on his own behalf and as next friend acting on behalf of ANWAR AL-AULAQI Plaintiff, v. BARACK H. OBAMA, President of the United States; ROBERT M. GATES, Secretary of Defense; and LEON E. PANETTA, Director of the Central Intelligence Agency, Defendants.	)	Civ. A. No. 10-cv-1469 (JDB)

OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Barack H. Obama, President of the United States, Leon E. Panetta, Director of the Central Intelligence, and Robert M. Gates, Secretary of Defense, hereby move to dismiss Plaintiff's complaint, pursuant to Federal Rule of Civil Procedure 12(b)(1), on the grounds that Plaintiff lacks standing and that his claims require the Court to decide non-justiciable political questions. Alternatively, the Court should exercise its equitable discretion not to grant the relief sought. In addition, Plaintiff has no cause of action under the Alien Tort Statute.

To the extent that the foregoing are not sufficient grounds to dismiss this lawsuit, plaintiff's action should be dismissed on the ground that information properly protected by the military and state secrets privilege would be necessary to litigate this action.

Date: September 24, 2010

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INTRODUCTION

Anwar al-Aulaqi is a dual U.S.-Yemeni citizen and a leader of al-Qaeda in the Arabian Peninsula (AQAP), a Yemen-based terrorist group that has claimed responsibility for numerous armed terrorist attacks against American, Saudi Arabian, Korean and Yemeni targets since January 2009. *See* Public Declaration of James R. Clapper, Director of National Intelligence (DNI), Exhibit 1, ¶ 13. As set forth by the DNI, Anwar al-Aulaqi has recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped focus AQAP's attention on attacking U.S. interests. *Id.* ¶ 14. In addition, since late 2009, Anwar al-Aulaqi has taken on an increasingly operational role in AQAP, including preparing Umar Farouk Abdulmutallab in his attempt to detonate an explosive device aboard a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day 2009. *Id.* The United States has further determined that AQAP is an organized armed group that is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda that has directed armed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court recognized in *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006).

Plaintiff Nasser al-Aulaqi is a citizen of Yemen and Anwar al-Aulaqi's father. Plaintiff does not seek to challenge the Government's determination that his son is an operational leader of AQAP and does not seek to categorically stop the United States from using lethal force against his son under all circumstances. Rather, plaintiff seeks to enjoin the President of the United States, the Secretary of Defense, and the Director of the Central Intelligence Agency, from "intentionally killing U.S. citizen Anwar Al-Aulaqi" outside an armed conflict "unless he is found to present a concrete, specific, and imminent threat to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threat[.]"

See Proposed Preliminary Injunction at 2.

The injunction plaintiff seeks would be unprecedented, improper, and extraordinarily dangerous, regardless of the truth of his allegations (which the United States does not and cannot confirm or deny). That requested injunction would necessarily and improperly inject the courts into decisions of the President and his advisors about how to protect the American people from the threat of armed attacks, including imminent threats, posed by a foreign organization against which the political branches have authorized the use of necessary and appropriate force. Plaintiff's motion should be denied and this case dismissed at the outset for several reasons.

First, plaintiff's attempt to invoke the Court's Article III jurisdiction in order to seek an injunction on behalf of his son is unprecedented and unfounded. The very basis of this lawsuit—the alleged threat of lethal force—does not foreclose Anwar al-Aulaqi's access to the courts: Defendants state that if Anwar al-Aulaqi were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances. Anwar al-Aulaqi would have the choice at that point, as he does now, to seek legal assistance and access to U.S. courts. This forecloses any grounds for his father to seek standing as a "next friend" in this case. That Anwar al-Aulaqi may choose not to come forward and seek judicial relief does not mean he lacks access to the courts or that his father should be able to presume his son wishes to invoke the federal courts and therefore to file suit on his son's behalf.

Plaintiff also lacks Article III standing in this action because the relief he seeks is based on unfounded speculation that the Executive Branch is acting or planning to act in a manner inconsistent with the terms of the requested injunction. Because such allegations are entirely

speculative and hypothetical, plaintiff cannot demonstrate that he faces the sort of real and immediate threat of future injury that is required in order to seek the relief he is requesting. Moreover, the declaratory and injunctive relief plaintiff seeks is extremely abstract and therefore advisory—in effect, simply a command that the United States comply with generalized standards, without regard to any particular set of real or hypothetical facts, and without any realistic means of enforcement as applied to the real-time, heavily fact-dependent decisions made by military and other officials on the basis of complex and sensitive intelligence, tactical analysis and diplomatic considerations.

Third, even if the plaintiff were to have standing, the particular relief he seeks—declaratory and injunctive relief that lethal force not be used unless a threat was imminent and no reasonable alternative existed—would require the resolution of clearly non-justiciable political questions. In particular, plaintiff's requested relief would put at issue the lawfulness of the future use of force overseas that Executive officials might undertake at the direction of the President against a foreign organization as to which the political branches have authorized the use of all necessary and appropriate force. Specific decisions regarding the use of force frequently must be made in the midst of crisis situations that can arise at any time, and that involve the delicate balancing of short- and long-term security, foreign policy, and intelligence equities. The Judiciary is simply not equipped to manage the President and his national security advisors in their discharge of these most critical and sensitive executive functions and prescribe *ex ante* whether, where, or in what circumstances such decisions would be lawful. Whatever the limits of the political question doctrine, this case is at its core.

For example, even assuming for the sake of argument that plaintiff has appropriately described the legal contours of the President's authority to use force in a context of the sort described in the Complaint, the questions he would have the court evaluate—such as whether a threat to life or physical safety may be "concrete," "imminent," or "specific," or whether there are "reasonable alternatives" to force—can only be assessed based upon military and foreign policy considerations, intelligence and other sources of sensitive information, and real-time judgments that the Judiciary is not well-suited to evaluate. Application of these and other considerations in this setting requires complex and predictive judgments that are the proper purview of the President and Executive branch officials who not only have access to the sensitive intelligence information on which such judgments are necessarily based, but also are best placed to make such judgments. Enforcing an injunction requiring military and intelligence judgments to conform to such general criteria, as plaintiff would have this court command, would necessarily limit and inhibit the President and his advisors from acting to protect the American people in a manner consistent with the Constitution and all other relevant laws, including the laws of war. Such judicial interference in fact-intensive decisions concerning how to protect national security could have unforeseen and potentially catastrophic consequences.

More broadly, the Complaint seeks judicial oversight of the President's power to use force overseas to protect the Nation from the threat of attacks by an organization against which the political branches have authorized the use of all necessary and appropriate force, in compliance with applicable domestic and international legal requirements, including the laws of war. *See* Authorization for Use of Military Force (AUMF), Pub. L. No. 107 40, 115 Stat. 224 (2001) (Joint Resolution of Congress signed by the President). In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of

force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (*see, e.g.*, United Nations Charter Article 51). Plaintiff asks the Court to issue *ex ante* commands to the President and his military and intelligence advisors about how to exercise this authority—judicial commands that could unduly complicate and confuse these officials' daily implementation of lawful commands issued by the President. Adjudication of plaintiff's challenge to the possible use of lethal force here would thus necessarily require the Court to oversee decisions textually committed to the political Branches, and thus plaintiff's request for relief is barred.

Beyond these jurisdictional barriers, exercise of this Court's equitable discretion to grant plaintiff's request for unprecedented relief against the President and his military and intelligence advisors would be inappropriate here. Plaintiff's Complaint attaches documents describing some of the information underlying the Government's designation of his son as a terrorist under sanctions regimes based on his role as an operational leader of AQAP who has directed attacks against United States persons. The Complaint notably does not deny those allegations. Yet, through this lawsuit, a U.S. citizen engaged in active operational planning to harm U.S. citizens, would come before a U.S. court, through a "next friend," seeking to enjoin the United States Government from acting to protect national security. Plaintiff seeks relief even though, as Defendants state herein, Anwar al-Aulaqi can choose to present himself to the proper authorities, and thereby moot the threat his father claims he faces. In these circumstances, injunctive relief that would require this Court to exercise an unprecedented degree of supervision over alleged ongoing military and intelligence operations is plainly unwarranted.

These considerations are more than sufficient to dispose of plaintiff's request for an unprecedented preliminary injunction here, and the Court should deny plaintiff's request for

relief on that basis. Where there are so many fundamental jurisdictional and justiciability bars to proceeding, the Court need not reach the question of privileged information in this case. But the military and states secrets privilege, invoked only after substantial deliberation and consistent with the Department of Justice's new Guidelines, *see* Exhibit 2, would also bar disclosure of the evidence necessary to determine plaintiff's standing and to decide whether plaintiff is entitled to any relief and whether the defendants were in compliance with the relief plaintiff seeks.

For the foregoing reasons, set forth further below, the Court should deny plaintiff's motion for a preliminary injunction and should dismiss the Complaint.

BACKGROUND

Anwar al-Aulaqi is a dual U.S.-Yemeni citizen who is believed to be currently in Yemen. *See* Plaintiff's Complaint ¶¶ 17, 26. As noted above, the United States Intelligence Community has publicly disclosed some information concerning Anwar al-Aulaqi, *see* Public DNI Clapper Decl. ¶¶ 13-15, including that:

* Anwar al-Aulaqi is a leader of AQAP, a Yemen-based terrorist group that has claimed responsibility for numerous terrorist acts against Saudi, Korean, Yemeni, and U.S. targets since January 2009. *Id*. ¶ 13.

* Anwar al-Aulaqi has pledged an oath of loyalty to AQAP emir, Nasir al-Wahishi, and is playing a key role in setting the strategic direction for AQAP. *Id.* ¶ 14.

* Anwar al-Aulaqi has also recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped focus AQAP's attention on planning attacks on U.S. interests. *Id.* ¶ 14.

* Since late 2009, Anwar al-Aulaqi has taken on an increasingly operational role in the group, including preparing Umar Farouk Abdulmutallab, who received instructions from Anwar Al–Aulaqi to detonate an explosive device aboard a U.S. airplane over U.S. airspace and thereafter attempted to do so aboard a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day 2009, for his operation. *Id.* ¶ 15.

Based in part on this information, on July 16, 2010, the U.S. Department of the Treasury

issued an order designating Anwar al-Aulaqi a "Specially Designated Global Terrorist" (SDGT) for, *inter alia*, "acting for or on behalf of al-Qaeda in the Arabian Peninsula (AQAP) . . . and for providing financial, material or technological support for, or other services to or in support of, acts of terrorism[.]" Designation of ANWAR AL–AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233, 43234 (July 23, 2010).[1] On July 20, 2010, four days after the Treasury Department designated Anwar al-Aulaqi a Global Terrorist, the United Nations' Al-Qaeda and Taliban Sanctions Committee added him to its Consolidated List of individuals and entities associated with al-Qaeda, Osama bin Laden or the Taliban.[2] This listing was based on Anwar al-Aulaqi's:

> "participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of", "recruiting for", and "otherwise supporting acts or activities of " Al-Qaeda (QE.4.01) and Al-Qaeda in the Arabian Peninsula (QE.A.129.10).

See Press Release, United Nations, QI.A.283.10 ANWAR NASSER ABDULLA AL-AULAQI (July 20, 2010).[3] The United Nations based its listing of Anwar al-Aulaqi on findings that are

[1] This designation was issued pursuant to the President's authority under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-06. After the terrorist attacks of September 11, 2001, the President issued Executive Order No. 13224 ("E.O. 13224"), 66 Fed. Reg. 49,079 (2001), effective September 24, 2001, declaring a national emergency with respect to the "grave acts of terrorism . . . and the continuing and immediate threat of further attacks on United States nationals or the United States." *See* E.O. 13224, Preamble. The Secretary of State previously designated AQAP as a Foreign Terrorist Organization on January 19, 2010, pursuant to her powers under the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189. (*See* http://www.state.gov/r/pa/prs/ps/2010/01/135364.htm).

[2] On October 15, 1999, the United Nations Security Council established the Al-Qaeda and Taliban Sanctions Committee ("the Committee"). *See* U.N. Res. 1267 (Oct. 15, 1999) (available at http://daccess-ods.un.org/TMP/7965262.53223419.html). The Committee previously added al-Qaeda to the Consolidated List on October 6, 2001, and AQAP on January 19, 2010.

[3] Available at http://www.un.org/sc/committees/1267/NSQIA28310E.shtml.

substantially identical to those made by the U.S. Department of the Treasury. *See id*. In connection with the U.N. action, Ambassador Daniel Benjamin, the Department of State's Coordinator for Counterterrorism explained:

> Today's designation of Anwar al-Aulaqi is in direct response to the operational role he plays in AQAP, and most importantly because of the integral part he played in planning AQAP's attempted destruction of Northwest Airlines flight 253 over the United States. Anwar al-Aulaqi and AQAP actively engage in terrorist plotting with the intent to harm U.S. citizens. The UN's listing of al-Aulaqi highlights the threat al-Aulaqi poses to the international community.

See Press Release, U.S. Department of State, Listing of Al-Qaeda in the Arabian Peninsula (AQAP) (July 20, 2010) (available at http://www.state.gov/r/pa/prs/ps/2010/07/144929.htm).[4] The Director of the National Counterterrorism Center echoed these sentiments recently, testifying before Congress that "[d]ual US-Yemeni citizen and Islamic extremist ideologue Anwar al-Aulaqi played a significant role in the attempted [Christmas 2009] airliner attack . . . Aulaqi's familiarity with the West and role in AQAP remain key concerns for us." *See* September 22, 2010 Statement by Michael Leiter to the Senate Homeland Security and Governmental Affairs Committee, Exhibit 3 at pg. 5.

Furthermore, as noted above, the Executive Branch has determined that AQAP is an organized armed group that is either part of al-Qaeda or, alternatively, is an organized associated force, or cobelligerent, of al-Qaeda that has directed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda that the Supreme Court has recognized (*see Hamdan*, 548 U.S. at 628-31). Accordingly, although it would not be appropriate to make a comprehensive statement as to the circumstances in which he might

[4] The OFAC and UN designations pertain solely to action taken to block assets and impose economic sanctions, and the information relied upon for the designations is set forth solely as publicly available background information.

lawfully do so, it is sufficient to note that, consistent with the AUMF, and other applicable law, including the inherent right to self-defense, the President is authorized to use necessary and appropriate force against AQAP operational leaders, in compliance with applicable domestic and international legal requirements, including the laws of war.

ARGUMENT

PLAINTIFF IS NOT ENTITLED TO A PRELIMINARY INJUNCTION AND THIS ACTION SHOULD BE DISMISSED.

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 128 S.Ct. 2207, 2219 (2008) (citation and quotation omitted); *see also Sociedad Anonima Vina Santa Rita v. U.S. Dep't of Treasury*, 193 F. Supp. 2d 6, 13 (D.D.C. 2001). Accordingly, the "power to issue a preliminary injunction . . . should be 'sparingly exercised,'" *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969), and such an injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

To prevail in a request for a preliminary injunction, a plaintiff bears the burden of demonstrating that: (1) there is a substantial likelihood of success on the merits; (2) failure to grant the injunction would result in irreparable injury; (3) the requested injunction would not substantially injure other interested parties; and (4) the public interest would be furthered by the injunction. *Katz v. Georgetown Univ.*, 246 F.3d 685, 687-88 (D.C. Cir. 2001) (citation omitted); *Nat'l Head Start Ass'n v. HHS*, 297 F. Supp. 2d 242, 246-47 (D.D.C. 2004) (Bates, J.). Plaintiffs must satisfy all four factors, and the Court must also find that the four factors together justify the drastic intervention of a preliminary injunction. *See CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). Moreover, if a plaintiff has little likelihood of

succeeding on the merits of his claim, the Court need not address the other factors. *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253-54 (D.C. Cir. 2006). As set forth below, plaintiff fails to establish a likelihood of success on the merits, and cannot show that the balance of interests of the public interest favor the entry of extraordinary injunctive relief.

I. Plaintiff Lacks Standing in This Case.

The power of the federal courts extends only to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2. A litigant's standing to sue is "an essential and unchanging part of the case-or-controversy requirement." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As the "irreducible constitutional minimum" of standing to sue, a plaintiff must allege (1) a concrete and imminent "injury in fact" that is (2) "fairly traceable" to the challenged conduct and (3) likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 560-61.

Prudential limitations on a finding of standing include "the general prohibition on a litigant's raising another person's legal rights [and] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches." *Allen v. Wright*, 468 U.S. 737, 751 (1984). "There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated — the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 80 (1978). This limitation ensures that a court does not "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions [.]" *Warth*, 422 U.S. at 500.

The Court's inquiry into plaintiff's standing must be "especially rigorous when reaching the merits of the dispute would force [a court] to decide whether an action taken by [another] branch[ ] of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997).

A. Plaintiff Lacks "Next Friend" Standing.

Nasser al-Aulaqi seeks to proceed as "next friend" to assert three claims on his son's behalf: a Fourth Amendment claim to be free from unreasonable seizures; a Fifth Amendment claim not to be deprived of life without due process; and an additional Fifth Amendment claim asserting a right to notice. *See* Compl. ¶¶ 27-29. The Supreme Court has emphasized that next friend standing—which allows a third person to file a claim on someone else's behalf—is "by no means granted automatically to whomever seeks to pursue an action on behalf of another." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). Rather, consistent with the constitutional limits established by Article III, a litigant who asserts next friend standing bears the burden of "clearly . . . establish[ing] the propriety of his status and thereby justify[ing] the jurisdiction of the court." *Id.* at 164. To meet this burden, a purported next friend must satisfy "two firmly rooted prerequisites" to have standing:

> First, a "next friend" must provide an adequate explanation-such as inaccessibility, mental incompetence, or other disability-why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest.

Id. at 163-64.

The next friend does not become a party to the case, "but simply pursues the cause on behalf of the [incompetent or unavailable party], who remains the real party in interest." *Id.* at

163. "For that reason, the 'next friend' application has been uncommonly granted[.]" *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 523 (1982). "If there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Whitmore*, 495 U.S. at 164.

1. Next Friend Standing Has Not Been Recognized Outside of the Habeas Context to a Mentally Competent Adult.

The only circumstance in which the Supreme Court has accepted next friend standing is with writs of habeas corpus filed "on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek [habeas] relief themselves." *Whitmore,* 495 U.S. at 162. Moreover, in *Whitmore*, the Court noted that next friends are authorized to appear in the habeas corpus context pursuant to federal statute, *see* 28 U.S.C. § 2242 (2010 ed.), and expressly declined to decide whether "a 'next friend' may ever invoke the jurisdiction of a federal court absent congressional authorization[.]" *Whitmore*, 495 U.S. at 164. Given the absence of any applicable statutory authorization here, next friend standing should be rejected on this ground alone. In addition, while courts have historically permitted next friends to prosecute actions on behalf of minors and adult mental incompetents, *see id*. at 163, n.4, and the Federal Rules of Civil Procedure provide that a "[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend," Fed. R. Civ. Proc. 17(c)(2), Nasser al-Aulaqi seeks to bring a next friend suit on behalf of someone who fits none of these categories. Particularly given the nature of plaintiff's suit, this Court should not expand the concept of next friend standing beyond what any other federal court appears to have accepted or the Federal Rules of Civil Procedure expressly authorize.

2. Plaintiff Has Not Established That Anwar al-Aulaqi Lacks Access to the Courts or Is Interested in Bringing This Action.

Assuming, *arguendo*, this Court concludes next friend standing could conceivably be involved in a case of this sort, plaintiff cannot establish any basis for proceeding as a "next friend" here. Plaintiff's assertion that he should be entitled to sue as his son's "next friend" appears to be predicated on his allegation that his son, Anwar al-Aulaqi, "cannot access legal assistance or a court without risking his life." *See* Declaration of Nasser al-Aulaqi ¶ 10. But this assertion is not supported by any evidence. More to the point, as noted above, Defendants state that if Anwar al-Aulaqi were to surrender or otherwise present himself to the proper authorities in a peaceful and appropriate manner, legal principles with which the United States has traditionally and uniformly complied would prohibit using lethal force or other violence against him in such circumstances. *See* Geneva Convention Common Article 3(1) (prohibiting violence to life and person with respect to persons "who have laid down their arms" in an armed conflict not of an international character); *see also Hamdan*, 548 U.S. at 630-32 (holding that Common Article 3 applies to the U.S. armed conflict with al-Qaeda); *cf. also* Hague Convention IV, Annex, art. 23(c), 37 Stat. at 2301-02 ("[I]t is especially forbidden . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at his discretion."); *cf.Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (in a domestic law enforcement context, "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so"). Anwar al-Aulaqi would have the choice at that point, as he does now, to seek legal assistance and access to U.S. courts. That Anwar al-Aulaqi may not choose to avail

himself of this opportunity[5] does not mean that the courts are inaccessible to him—a prerequisite for his father's next friend standing.

Nor has plaintiff pointed to any other reason to believe that his son has lacked the ability to communicate his desire to access the courts.[6] According to the Complaint, news sources began reporting in January 2010 that plaintiff's son was allegedly on a list of approved targets. *Id.* at 7. Yet his son has not taken any steps in the past eight or nine months to seek judicial process. Plaintiff's unsupported assertion that Anwar al-Aulaqi has been incommunicado for over eight months and unable to communicate his wish to access the court system does not sustain plaintiff's burden—especially not in the face of public information (noted above) indicating that Anwar al-Aulaqi has been able to communicate his views during 2010 and has failed to indicate any desire to file a lawsuit such as this one.

In addition, while courts have held that parents typically satisfy the second requirement of the *Whitmore* test for next friend standing, *see, e.g., Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998), even where the next friend has a substantial relationship with the absent party,

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[5] On May 23, 2010, the media arm of AQAP posted a 45-minute video of what is described as an interview with Anwar al-Aulaqi. *See* Public DNI Clapper Declaration ¶ 16, (transcript available at http://www.memritv.org/clip_transcript/en/2480.htm, video available at http://www.memritv.org/clip/en/2480.htm). In that video, which the U.S. Intelligence Community assesses is Anwar al-Aulaqi, *see id*., al-Aulaqi stated that he did not intend to turn himself in to America, *id.* ("I have no intention of turning myself in to [the Americans]. If they want me, let them search for me.")

[6] Even if Anwar al-Aulaqi's access to the courts were somewhat constrained by circumstances not of his own making (which, as we explain, is not the case), that would not suffice to establish next friend standing. *See, e.g.*, *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1160-61 (9th Cir. 2002) (rejecting next friend petitioners' contention that they had satisfied the first *Whitmore* prong because Guantanamo Bay detainees were "totally incommunicado," noting that the detainees had visitors and limited opportunities to write friends and family).

courts still examine whether they are acting in accord with that party's wishes.[7] There are good reasons to doubt that this suit reflects Anwar al-Aulaqi's wishes. Plaintiff concedes he has had no contact with his son "since at least January 2010," *see* Compl. at 2, 9, and he does not aver that his son ever communicated to him a desire to file suit against the United States in federal court. His son's public pronouncements indicate that he has no desire to avail himself of protections afforded by the Constitution and courts of a nation that he deems an enemy deserving of violent attacks. *See* Public Clapper Decl. ¶ 16.[8] Plaintiff should not be permitted to act as a "next friend" where he has offered this Court no basis on which to conclude that Anwar al-Aulaqi "want[s] legal representation as a general matter or more specifically by Counsel in the instant matter." *Does v. Bush*, No. Civ.A.05 313 CKK, 2006 WL 3096685, *5 (D.D.C. Oct. 31, 2006); *see also id*. at * 6 (next friend's "'good faith basis' that every detainee desires to avail himself of his right to seek habeas relief through the American legal system is merely her clearly subjective belief.").

[7] *See Idris v. Obama*, 667 F. Supp. 2d 25, 29 (D.D.C. 2009) (brother of a Guantanamo Bay detainee could not be said to be acting in the detainee's "best interests" as defined by *Whitmore*, because he had not met with the detainee since his confinement began); *Hauser v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000) (expressing serious "reservations" about whether a prisoner's "biological mother, who gave [him] up for adoption," was truly dedicated to his best interests rather than being "motivated solely by [her] desires to block imposition of the death penalty."); *Davis v. Austin*, 492 F. Supp. 273, 276 (N.D. Ga. 1980) (denying next friend standing to the cousin of a prisoner who "not visited [the prisoner] in over a year and ha[d] had only two contacts with him during that period.").

[8] *See* http://www.memritv.org/clip/en/2480.htm (Interview by AQAP with Anwar al-Aulaqi released May 23, 2010 in which al-Aulaqi states: "My message to the Muslims in general, and to those in the Arabian Peninsula in particular, is that we should participate in this Jihad against America."); *see also id*. (discussing failed 2009 Christmas Day airline bombing, al-Aulaqi states: "[N]o one should even ask us about targeting a bunch of Americans who would have been killed in an airplane. Our unsettled account with America includes, at the very least, one million women and children. I'm not even talking about the men. Our unsettled account with America, in women and children alone, has exceeded one million. Those who would have been killed in the plane are a drop in the ocean.").

B. Plaintiff Otherwise Lacks Article III Standing.

Even if the Court found that plaintiff could proceed as a next friend, he would still otherwise lack Article III standing. To have Article III standing, a plaintiff must seek relief that provides redress for an alleged injury that is "concrete and particularized," and "actual or imminent," not "conjectural," "hypothetical" or "abstract." *Lujan*, 504 U.S. at 560; *Whitmore*, 495 U.S. at 155; *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983). Here, the injury plaintiff purports to allege on behalf of his son (and himself) is *not* that his son is being targeted for lethal force by the United States. Rather, the precise injury is that his son is allegedly being targeted "without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." *Compl*. ¶ 23; *see also id*. ¶¶ 27-29; Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction ("Pls. Mem.") at 6, 31.

Plaintiff cites nothing to support his assumption that the United States would not take account of such considerations as the nature and imminence of an individual's threat, and the feasibility of means short of lethal force to address such threats. Plaintiff claims that because Anwar al-Aulaqi has allegedly been on a so-called "kill list" for months, the United States must have authorized the use of lethal force against him without regard to whether there was or remains any "imminent" threat of harm to national security, or whether such threats could be addressed through alternative means. *See* Pls. Mem. at 6. The mere allegation, however, that time has passed since the government allegedly first considered the use of force against an individual does not support the inference that the government is indifferent to whether there would be an imminent threat if and when the decision whether to use force against that person was specifically contemplated, or to whether a reasonable alternative to force existed. Plaintiff's

conjecture that the government might in the future act in a certain manner that is alleged to be unlawful, however, is not enough to obtain equitable relief. *See, e.g., Lyons*, 461 U.S. at 105-06 (mere allegation that police would apply force where it was not necessary "falls far short of the allegations that would be necessary to establish a case or controversy between these parties.").

The declaratory and injunctive relief plaintiff seeks is thus extremely abstract—in effect, simply a command that the United States comply with generalized constitutional standards, untethered to any particular fact situation, and without any basis for assuming that the United States would otherwise disregard applicable legal constraints. Plaintiff's requested injunction—even assuming *arguendo* it would reflect legal standards that may be applicable in this context—would nowhere indicate how to assess whether a threat may be "imminent" or "concrete," nor whether alternatives to lethal force might be "reasonably" available. The Court is ill-equipped to evaluate whether such standards are satisfied in any particular circumstance, and may not merely impose them even if it were to agree with plaintiff that they state the law. A judicial decree may not be entered to provide guidance, but only where necessary in order to change the behavior of the defendant, for it would otherwise constitute a mere advisory opinion.

In analogous circumstances, the Supreme Court in *Gilligan v. Morgan*, 413 U.S. 1 (1973), rejected declaratory and injunctive relief to restrain future operations of the Ohio National Guard after the 1970 shootings at Kent State University. Plaintiffs sought to enjoin the Governor of Ohio from prematurely ordering the National Guard troops to duty in civil disorders and to restrain National Guard leaders from violating the students' constitutional rights in the future. The Court found that the requested injunction would be "advisory" because it was not clear that the National Guard or the Governor were then violating applicable legal standards or were likely to do so in the future. *See* 413 U.S. at 10; *see also id*. at 13 (Blackmun, J.,

concurring) (noting that "respondents' complaint contains nothing suggesting that they are likely to suffer specific injury in the future as a result of the practices they challenge").

Gilligan demonstrates that an injunction requiring continuing judicial supervision of the military to ensure that it complies with particular legal norms in these circumstances constitutes an advisory opinion, where, as here, there is no evidence that the alleged constitutional violations are occurring or will occur, and therefore, that entry of an injunction would result in any relief to the plaintiff. Plaintiff's request for declaratory relief likewise must be dismissed for the same reason. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (to constitute "a proper judicial resolution of a 'case or controversy' rather than an advisory opinion," declaratory relief must "affect[] the behavior of the defendant towards the plaintiff").[9] If the court were to enter such relief, urgent and time-sensitive efforts to protect the nation from threats posed by enemy terrorist organizations would proceed under the shadow of imprecise injunctive commands, which could have unforeseen and potentially disastrous consequences—including the loss of life of U.S. forces or U.S. citizens targeted for future terror attacks.[10]

Moreover, and as explained further below, in the circumstances presented here it would be virtually impossible, and inappropriate, for the court to attempt to *enforce* the general standards of the injunction plaintiff seeks, as applied to real-time, heavily fact-dependent decisions made overseas by military and other officials on the basis of complex and sensitive

[9] Similarly, the D.C. Circuit has held that "a declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985).

[10] Indeed, there is question whether the relief plaintiff seeks would meet the specificity requirements of Fed. R. Civ. P. 65(d)(1)(C) to "describe in reasonable detail . . . the act or acts restrained."

intelligence, tactical analysis and diplomatic considerations. This problem further highlights the advisory nature of the relief sought, and thus the absence of a concrete case or controversy.

II. Plaintiff's Claims Require the Court to Decide Non-Justiciable Political Questions.

Even if plaintiff had standing, his claims and the declaratory and injunctive relief he seeks raise fundamentally non-justiciable political questions. Plaintiff seeks judicial oversight of the Government's decisions with respect to a foreign organization against which the political branches have authorized the use of all necessary and appropriate force. The particular relief plaintiff seeks would constitute an *ex ante* command to military and intelligence officials that could interfere with lawful commands issued by the President, who is constitutionally designated as Commander-in-Chief of the armed forces and constitutionally responsible for national security. Moreover, enforcement of such an injunction would insert the Judiciary into an area of decision-making where the courts are particularly ill-equipped to venture, *i.e.*, in assessing whether a particular threat to national security is imminent and whether reasonable alternatives for the defense of the Nation exist to the use of lethal military force. Courts have neither the authority nor expertise to assume these tasks.

"The political question doctrine is a natural outgrowth of fidelity to the concept of separation of powers." *Doe v. State of Israel,* 400 F. Supp. 2d 86, 111 (D.D.C. 2005) (Bates, J.); *accord Baker v. Carr*, 369 U.S. 186, 217 (1962). The doctrine is "based upon respect for the pronouncements of coordinate branches of government that are better equipped and properly intended to consider issues of a distinctly political nature," *Doe,* 400 F. Supp. 2d at 111, and "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the

confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Baker*, the Supreme Court "enumerated six situations that constitute political questions, over which there is no jurisdiction to proceed." *Doe*, 400 F. Supp. 2d at 111.

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

"Foreign policy and military affairs figure prominently among the areas in which the political question doctrine has been implicated." *Aktepe v. USA*, 105 F.3d 1400, 1402-04 (11th Cir. 1997); *see also El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (*en banc*); *Bancoult v. McNamara*, 445 F.3d 427, 433 (D.C. Cir. 2006). Because such cases raise issues that "frequently turn on standards that defy judicial application" or "involve the exercise of a discretion demonstrably committed to the executive or legislature," *Baker*, 369 U.S. at 211, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981). *See El-Shifa*, 607 F.3d at 841; *see also Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1263-64 (D.C. Cir. 2006). "[T]he political branches of government are accorded a particularly high degree of deference in the area of military affairs." *Aktepe*, 105 F.3d at 1403 (citing *Owens v. Brown*, 455 F. Supp. 291, 299 (D.D.C. 1978)); *Bancoult*, 445 F.3d

at 429-31.[11]

Of course, "[not] every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, and claims based on constitutionally protected interests may sometimes require the court to address the limits on the Executive's exercise of national security powers. *See Abu-Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64-65 (D.D.C. 2004) (Bates, J.); *see also Bancoult*, 445 F.3d at 435, 437. But the mere presence of a constitutional due process claim does not automatically render a case justiciable. Instead, courts must conduct "a discriminating analysis of the particular question posed" in the "specific case." *El-Shifa*, 607 F.3d at 841 (*quoting Baker*, 369 U.S. at 211). Here, that analysis leads inescapably to the conclusion that plaintiff's claims raise non-justiciable political questions.

Plaintiff's Complaint challenges the authority of the President of the United States, as "Commander-in-Chief of the U.S. armed forces" and "Chair of the National Security Council"—as well as the authority of the Secretary of Defense "over the U.S. armed forces worldwide," and the authority of the Director of the Central Intelligence Agency "over CIA operations worldwide"—to utilize lethal force against plaintiff's son, Anwar al-Aulaqi, whom plaintiff avers is hiding in a foreign country (Yemen). *See* Compl. ¶¶ 3, 10-12. Plaintiff's Complaint nowhere challenges the Government's determinations that Anwar al-Aulaqi is a part of AQAP, a terrorist organization responsible for numerous attacks and against which Congress has authorized the use of force, and that he has taken on an operational leadership role in that

[11] In *Aktepe*, the court held that tort claims challenging the alleged negligent use of military force in a drill that killed members of the Turkish navy were not justiciable because deciding the claims would require the court to make an initial policy decision reserved to the military as to the necessity to conduct drills that simulate battle conditions. *See* 105 F.3d at 1402-04. In *Bancoult*, the court held that a challenge to the relocation of residents to enable the establishment of a U.S. military base on the island of Diego Garcia was non-justiciable in the face of allegations that this action resulted in extreme mistreatment and hardship to the residents, including threats of death. *See* 445 F.3d at 437 (courts may not bind the Executive's hands on such military matters "whether directly—by restricting what may be done—or indirectly-by restricting how the executive may do it").

organization. *See* Exh. T to Declaration of Ben Wizner. Rather, plaintiff challenges the alleged lethal targeting of Anwar al-Aulaqi on the grounds that "[t]he United States is not at war with Yemen or within it," *see* Compl. ¶ 3, that therefore any use of lethal force against a person in Yemen would allegedly be "outside of armed conflict," *see id.* ¶¶ 4, 13, 16, 27-30, and that, in these circumstances, the Government cannot target al-Aulaqi (or any U.S. citizen) "without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." *See id.* ¶ 23; *see also id.* ¶¶ 27-29.

The extraordinary declaratory and injunctive relief plaintiff seeks here would constitute *ex ante* commands by the Judicial Branch to the President and officials responsible for military and intelligence operations against a foreign organization as to which political branches have authorized the use of all necessary and appropriate force. Enforcement of such orders would necessarily require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force overseas against that organization. Courts are not equipped to superintend such questions.

Apparently conceding that U.S. courts cannot supervise the rules of engagement overseas with respect to a statutorily covered enemy force in the context of an armed conflict, plaintiff rests his challenge to the alleged use of lethal force against his son on the theory that he is physically located in a place where such force could not be used as part of an armed conflict. But even assuming, as plaintiff does, that his claims would depend upon whether the actions in question would take place in an armed conflict, the very determination of whether and in what circumstances the United States' armed conflict with al-Qaeda might extend beyond the borders of Iraq and Afghanistan is itself a non-justiciable political question. Moreover, as plaintiff recognizes, *see* Compl. ¶ 25, any determination of this issue by this Court would necessarily

implicate sensitive foreign policy issues affecting relations with Yemen.

Indeed, resolution of most of the questions plaintiff puts at issue here would require the Court to assess a wide range of highly sensitive military, intelligence, and diplomatic information in order to determine what actions the President and U.S. forces may take against an operational leader of AQAP and to assess after the fact whether Executive actions have satisfied the Court's injunctive standard. But the law is clear that in these circumstances the Judiciary does not have the capacity or expertise to evaluate the array of sensitive and complex information upon which the President and his national security advisors and military personnel regularly rely in making their real-time decisions respecting the use of force abroad, or to second-guess the predictive judgments those officials must make concerning what actions may be in the Nation's best interests.

For these reasons, set forth further below, adjudication of plaintiff's Complaint requires the resolution of non-justiciable political questions.

A. The Relief Sought in this Case Would Require the Court to Adjudicate Non-Justiciable Political Questions.

There is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider*, 412 F.3d at 194. Article I, Section 8 of the Constitution, enumerating powers of the national legislature, is "richly laden with delegation of foreign policy and national security powers." *See Schneider*, 412 F.3d at 194 (*citing* U.S. CONST., Art. I, § 8).[12] Article II also gives the President authority in these areas, and designates that "the President shall be Commander in Chief of the Army and

[12] U.S. CONST., Art. I, § 8 includes the power to provide for the Common Defence, *id.,* cl. 1; the power to "define and punish Piracies and Felonies committed on the High Seas and Offenses against the Law of Nations," *id.,* cl. 10; the power to "declare War" and make "Rules concerning Captures on Land and Water," *id.*, cl. 11; the power to "raise and support Armies..." and maintain a Navy, *id.,* cl. 13; and the power to "[t]o provide for calling forth the Militia to... repel Invasions," *id.*, cl. 15.

Navy of the United States." U.S. CONST., Art. II, § 2. As the Supreme Court has noted, the President may act to protect the Nation from imminent attack and "determine what degree of force [a] crisis demands." *The Prize Cases*, 67 U.S. (2 Black) 635, 668, 670 (1863). In contrast, in defining the powers of the judicial branch, Article III "provides no authority for policymaking in the realm of foreign relations or provision of national security." *Schneider*, 412 F.3d at 195; *see also Bancoult*, 445 F.3d at 433-34.

Here, the political branches have exercised their respective constitutional authorities to protect national security. Congress authorized the President to use necessary and appropriate military force against al-Qaeda, the Taliban and associated forces, AUMF, 115 Stat. 224, and the Executive Branch has determined that AQAP is an organization within the scope of this authorization, and that Anwar al-Aulaqi is a senior operational leader of AQAP. In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (*see, e.g.*, United Nations Charter Article 51).

It is inappropriate for a court in such circumstances to adjudicate *ex ante* the permissible scope of particular tactical decisions that the Executive may take against a foreign organization against which the political branches have authorized the use of all necessary and appropriate force. Yet that is precisely what plaintiff asks this Court to do.

1. To begin with, the very entry of the extraordinary relief plaintiff seeks would establish a judicial command concerning military and intelligence matters abroad in possible tension with commands of the President who is textually designated as Commander- in-Chief of the armed forces, thus giving rise to multifarious pronouncements to officials in the field with respect to the real-time use of force against AQAP. It is not difficult to imagine the resultant confusion and unmanageability that might result if such officials must hazard to guess (on fear of

contempt sanctions) whether compliance with the instructions of the Commander- in-Chief would be in accord with the general and unspecified terms of the injunction plaintiff seeks. We are unaware of any precedent for the *ex ante* imposition of such judicial commands to military and intelligence officials in such a context. *See also Hamdi*, 542 U.S. at 534 (distinguishing between the process that is (or is not) due a U.S. citizen "on the battlefield" from the process that would be due "when the determination is made to *continue* to hold those who have been seized," which "meddles little, if at all, in the strategy or conduct of war").

2. Moreover, the Court could not properly enforce any subsequent alleged non-compliance with the requested injunction without deciding whether the President and U.S. forces acted or planned to act when a threat was "imminent" and whether there was no reasonable alternative to lethal force. For example, if the court were to issue the requested declaratory or injunctive relief, and a person targeted was later killed by U.S. forces under circumstances the Government believed complied with the Court's order, the Court would be in the difficult position of determining just how concrete and imminent a threat the target at issue posed—a determination that would not only call into question whether the action was justified, *see El-Shifa*, 607 F.3d at 844-45, but could also pit the Judiciary against the Executive in assessing and acting upon sensitive intelligence and diplomatic considerations in matters of national security and foreign policy. A judicial pronouncement might therefore interfere with the ability to present "a single-voiced statement of the Government's views," *Baker*, 369 U.S. at 211, particularly as it relates to activities inside a foreign nation. For these reasons, the questions that would have to be decided to enforce the relief plaintiff seeks "turn on standards that defy judicial application." *El-Shifa*, 607 F.3d at 841.

In order to enforce its injunction, the Court would presumably have to assess whether the United States could use force against a U.S. citizen who may pose an imminent threat to the

United States, what response that threat may warrant, including whether there were "reasonable" alternatives to lethal force, and what the criteria should be for making these determinations—all judgments that are reserved to the President and his military and intelligence advisors. In particular, whether a threat is "imminent," and whether reasonable alternatives exist to the use of lethal force, may depend upon on a variety of factors, including the existence of highly sensitive U.S. intelligence information concerning that threat, the capabilities of the terrorist operative to carry out a threatened attack, what response would be sufficient to address that threat, possible diplomatic considerations that may bear on such responses, the vulnerability of potential targets the terrorists may strike, the availability of military and non-military options, and the risks to military and nonmilitary personnel in attempting application of non-lethal force. These are the types of "delicate, complex" judgments that "involve large elements of prophecy" and thus "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Chicago & Southern Air Lines v. Waterman S.S. Corp*., 333 U.S. 103, 111 (1948) (*citing Coleman v. Miller*, 307 U.S. 433, 454 (1939); *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319-21 (1936)).

As the D.C. Circuit stated in *El-Shifa* —a case that involved the President's decision to launch a military strike against a facility in Sudan that the United States believed was associated with Osama bin Laden—"[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target." 607 F.3d at 844. Addressing the *Baker* standards, the Court in *El-Shifa* observed that "whether the terrorist activity of foreign organizations constitute threats to the United States" are "political judgments" vested in the political branches. *Id*. at 843 (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22-24 (D.C. Cir. 1999)); *see also Ange v. Bush*, 752 F. Supp. at 514 (courts are ill-

equipped to determine whether hostilities are "imminent" to justify the deployment of forces).

The relief requested by plaintiff puts precisely such a non-justiciable question at issue. Determining whether the Executive complied with the requested injunction in this case would require the court to make at least four complex determinations outside of its expertise and for which no judicially manageable standards exist: (1) whether the activities of the person in question pose a "concrete" threat; (2) whether that threat is "specific"; (3) whether that threat is "imminent"; and (4) whether means other than lethal force could "reasonably" be employed given the panoply of diplomatic and military (operational) constraints.[13] Each of these terms of plaintiff's proposed relief would be difficult for a court to enforce in the context of military operations, particularly in real time, halfway around the world.

The relief plaintiff seeks here, then, is analogous to that sought in *Gilligan v. Morgan*, *supra*. In that case, the Supreme Court held that a constitutional due process claim brought by university students seeking declaratory and injunctive to restrain future operations of the Ohio National Guard after the 1970 shootings at Kent State University presented non-justiciable questions. *See* 413 U.S. at 11. The Court rejected the plaintiffs' "broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard." *Id.* at 5. The Court went on to explain that the injunction plaintiffs sought would require the district court to establish standards for the training, weapons, and orders of the National Guard, and would require the district court to exercise "continuing judicial surveillance over the Guard" to assure compliance with those standards. *Id.* at 6. Because the Constitution vests Congress with the power to provide for the Militia—and because Congress had given the President the authority to prescribe regulations governing the organization and discipline of the National

[13] As discussed *infra*, plaintiff's Complaint raises a fifth issue that is beyond the Court's power to determine: whether the action in question would be undertaken as part of an "armed conflict."

Guard—the Court held that such an injunction would impermissibly interfere with the other Branches' functions.

> [I]t is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Id. at 10.

Gilligan requires rejection of the type of relief plaintiff seeks here: broad and abstract declaratory and injunctive relief that would require judicial supervision of fact-intensive determinations of how to use force abroad against a foreign terrorist organization. Moreover, each of the complex and delicate national security determinations implicated by plaintiff's request for relief would require careful assessment of highly sensitive and classified information pertaining to foreign intelligence, military actions, and foreign relations. As the Supreme Court has observed, in matters of foreign affairs and national security the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." *Curtiss-Wright*, 299 U.S. at 319-21.

> [The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Id.; *see also Chicago & Southern Air Lines*, 333 U.S. at 111 ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world"). "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & Southern Air Lines*, 333 U.S. at 111. "Judges deficient in military knowledge, lacking vital information upon

which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action" cannot reasonably review the lawfulness of a an alleged military or intelligence operation. *Dacosta*, 471 F.2d at 1155; *see also Schneider v. Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005) ("Unlike the executive, the judiciary has no covert agents, no intelligence sources, and no policy advisors. The courts are therefore ill-suited to displace the political branches in such decision-making."). That resolution of plaintiff's claims would put at issue the Executive's confidential military, intelligence, and diplomatic information, including information concerning the threat posed by a foreign organization against which the political branches have authorized the use of all necessary and appropriate force, whether that threat is imminent or concrete, whether there are reasonable alternatives to lethal force, and how such actions may affect relations with a foreign state, is further evidence that plaintiff raises non-reviewable political questions.[14]

[14] For similar reasons, plaintiff's Fourth Claim for Relief, *see* Complaint 30, and his accompanying request for an order disclosing the alleged "criteria that are used in determining whether the government will carry out the targeted killing of a U.S. citizen," *see id.* at 11, should be dismissed. Plaintiff argues that the Government must disclose such criteria because "basic notions of fairness would be violated if penalties were visited on individuals who had no reasonable notice that their conduct would result in such penalties." PI Brief at 32. However, again without confirming or denying any allegation, plaintiff cannot credibly claim that a person who becomes a senior operational leader of a force associated with al-Qaeda and facilitates attacks against the United States lacks notice that he could expose himself to military-type rules of engagement. Nor is it true that, "in the absence of clearly stated rules, there is little to restrain the government from acting arbitrarily." *Id.* at 33. There are many aspects of military and national security operations in which the government does not publicly disclose the criteria that guide its actions, but that hardly means that in all such operations the government acts "arbitrarily." The President has a constitutional duty to take care that the law is faithfully executed, and he and the other defendants here take that obligation very seriously, endeavoring at all points to comply with all applicable domestic and international laws. The laws themselves are not secret. And apart from those laws, the alleged operations here would be guided by fact-intensive military and intelligence determinations involving command and policy judgments in the context of highly context-specific diplomatic and logistical considerations. Any effort to reduce those judgments to a set of "criteria" to be publicly announced in response to a judicial injunction and subsequently enforced would, for the reasons previously discussed, exceed the bounds of judicial authority. Even in the context of domestic law enforcement, the government does not disclose operational plans, standards or techniques for enforcement. *See, e.g.*, 5 U.S.C. 552(b)(7)(E) (exempting from mandatory disclosure information that "would disclose techniques

3. Nor does the presence of constitutional claims (nominally) on behalf of a U.S. citizen establish any means by which the case could be made justiciable. *See Gilligan*, 413 U.S. at 6 (holding citizens' due process claim non-justiciable). Plaintiff errs in comparing this case to cases in which individuals (including U.S. citizens) challenge their ongoing detention *after* being seized by the U.S. military on the battlefield. *See* Pls. Mem. at 21 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)). In those cases, the plaintiffs invoked the writ of habeas corpus, a constitutionally guaranteed recourse for persons held in detention within the scope of the writ. The Court in *El-Shifa* observed that "the political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial role in this area." *Id*. at 848-49 (citing *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 2247 (2008) ("The [Suspension] Clause protects the rights of the detained by affirming *the duty and authority of the Judiciary* to call the jailer to account.") (original emphasis) and *Hamdi*, 542 U.S. at 535 (discussing the courts' "time-honored and constitutionally mandated roles of reviewing and resolving claims" of citizens challenging their military detention)). Habeas review is materially different from the relief sought here, particularly because a habeas petition does not ask a court to impose an *ex ante* injunction regulating the future real-time decision-making of executive officials contending with a congressionally identified enemy force—the habeas writ does not, for example, regulate the circumstances in which such officials may make future decisions to apprehend enemy forces.

This Court's decision in *Abu-Ali* is not to the contrary. There the plaintiff filed a petition for a writ of habeas corpus, and the Court rejected application of the political question doctrine

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and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law"). *A fortiori* there is no basis for a court to compel the President, the Secretary of Defense or the Director of the CIA to disclose plans or criteria for military or intelligence operations abroad.

to a claim that the "United States has unjustly deprived an American citizen of liberty through acts it has already taken" by facilitating the detention of a U.S. citizen by a foreign country overseas. *See* 350 F. Supp. 2d at 65. But the Court noted that the type of claim at issue there was "precisely what courts are accustomed to assessing," *see id*., and made the related observation that, unlike in this case, the United States did not contend in *Abu-Ali* that its alleged actions would be undertaken pursuant to the President's war powers. *See id.* at 62 n.33. Not only is this not a case in which the writ of habeas corpus is invoked, but plaintiff asks the Court to superintend sensitive national security decision-making against an organization as to which the political branches have authorized the use of all necessary and appropriate force, and to do so *before* the Executive makes fact-intensive, real-time decisions.

Likewise, the circumstances in which courts have reviewed the merits of claims of U.S. citizens brought under the Due Process Clause in a military setting overseas are markedly different than those presented here. The court of appeals in *El-Shifa*, for example, identified a line of cases in which courts have reviewed whether seizures or destruction of foreign persons' property was a taking for which the government owed just compensation. *El-Shifa*, 607 F.3d at 849. Such takings claims, however, seek compensation after the fact for a seizure of property that has already occurred. This case is fundamentally different in at least two respects. First, the takings cases cited in *El-Shifa* did not challenge the legality of the use of force, nor did they seek to limit *ex ante* the circumstances in which force against an enemy overseas may be used in the future. Instead, the cases cited in *El-Shifa* were based on the Just Compensation Clause, which does not prohibit takings of property and merely requires that they be compensated *after the fact*.[15] Second, the determination of whether compensation is owed for a past taking of property

[15] *Cf. Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("A key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages for their injuries. Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational

does not require—as enforcement of the injunction here would—a judicial assessment of complex considerations that are beyond the courts' capacity to evaluate, such as whether the Executive Branch's real-time analysis of whether a potential target of lethal force overseas poses an "imminent" or "concrete" threat to U.S. persons, and whether alternative means of addressing such a threat were feasible, were reasonable judgments. *See Gilligan*, 414 U.S. at 10.[16]

B. Whether and in What Circumstances the Use of Force In a Particular Geographic Location Would be Part of the Armed Conflict Between the United States and Al-Qaeda and Associated Forces Is Also a Non-Justiciable Political Question.

What is more, plaintiff's own legal theories appear to depend, by their terms, on the assertion that any use of force against his son beyond the borders of Iraq and Afghanistan would necessarily occur "outside of armed conflict." *See* Compl. ¶¶ 27-30; *see also* Pls. Mem. at 2. But even if one were to assume—as plaintiff does—that the scope of the armed conflict is critical to his claims, that question, too, is non-justiciable. As noted, the Executive Branch has

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decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions."); *Comer v. Murphy Oil USA*, 585 F.3d 855, 874 (5th Cir. 2009) ("Claims for damages are also considerably less likely to present nonjusticiable political questions, compared with claims for injunctive relief."); *Norwood v. Raytheon Co.*, 455 F. Supp. 2d 597 (W.D. Tex. 2006) ("Unlike the request for injunctive relief in the *Gilligan* case, Plaintiffs' request for damages from defense contractors would in no way require judicial oversight of military decisions."); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 15-16 (D.D.C. 2005) ("An action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in 'overseeing the conduct of foreign policy or the use and disposition of military power.'") (*quoting Luftig v. McNamara*, 373 F.2d 664, 666 (D.C. Cir. 1967)), *vacated on other grounds*, *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009).

[16] Likewise, plaintiff's effort to limit *ex ante* the alleged real-time decision-making of military and intelligence officials renders this case distinguishable from *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988), which involved a suit seeking declaratory and injunctive relief against the funding of the Contras. The relief requested in *Committee of United States Citizens Living in Nicaragua* required a one-time-only judicial determination whether the provision of funds to the Contras caused a violation of their Fifth Amendment rights. Unlike the instant case, it would not have required ongoing judicial supervision of Executive Branch determinations whether a potential military or intelligence target poses an "imminent" or "concrete" threat to the United States, and whether alternative means of addressing such a threat were feasible.

determined that AQAP is a part of al-Qaeda—or at a minimum is an organized, associated force or co-belligerent of al-Qaeda in the non-international armed conflict between the United States and al-Qaeda. Plaintiff contends that "armed conflict" does not extend outside of Iraq and Afghanistan. But if (as the Complaint appears to argue) the Court must concur in that judgment in order for plaintiff to prevail, then plaintiff's claims are non-justiciable, because whether and in what circumstances the U.S. armed conflict with al-Qaeda and associated forces may extend—now or at some later point—is itself a question that involves predicate foreign policy and national security determinations beyond the purview of the Court.

The scant authority on which plaintiff relies—a law review article, congressional testimony by the author of that article, a U.N. report, and a decision by an international criminal tribunal, *see* Pls. Mem. at 9-10—underscores the non-justiciable nature of the question. For example, in *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), the tribunal observed that the existence of a non-international armed conflict turns on "the intensity of the conflict and the organization of the parties to the conflict." ¶ 562; *see also* Report of the Special Rapporteur, Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add. 6 ¶ 52 (criteria for deciding whether an armed conflict exists includes whether a group has a "[m]inimal level of organization . . . such that armed forces are able to identify" it, and whether it is "[e]ngage[d] . . . in collective, armed, anti-government action," and whether there is "a minimal threshold of intensity and duration"). Even assuming that these criteria were to govern the question, the fact the United States' armed conflict with al-Qaeda exists in one particular location does not mean that it cannot exist outside this geographic area—subject, of course, to applicable international law principles, including sovereignty and neutrality.

Once Congress and the President have mutually decided that a particular foreign

organization may be subject to the use of necessary and appropriate force, it is inappropriate, particularly under the circumstances framed by plaintiff's complaint, for a court to adjudicate *ex ante* the particular scope of the conflict, geographic or otherwise. For example, in *DaCosta v. Laird*, the court of appeals held that the legality of the President's unilateral decision to mine the harbors of North Vietnam and to bomb targets in that country—and more specifically, whether that action constituted an escalation of the war beyond that authorized by Congress—presented a nonjusticiable political question. *DaCosta III*, 471 F.2d 1146 (2d Cir. 1973). The court recognized that courts "cannot reasonably or appropriately determine whether a specific military operation constitutes an 'escalation' of the war or is merely a new tactical approach within a continuing strategic plan." *Id.* at 1155. Similarly, in *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), the court held that an effort to enjoin military activities in Cambodia presented a nonjusticiable political question. The *Holtzman* plaintiffs argued that the bombing of Cambodia was a "basic change" in the scope of the war—rather than a mere tactical decision—that a court could review to assess whether it was authorized. The court of appeals disagreed, again emphasizing that it was in no position to gather and interpret diplomatic and military intelligence, and that "the sharing of Presidential and Congressional responsibility particularly at this juncture is a bluntly political and not a judicial question." *Id.* at 1311; *see also Ange v. Bush*, 752 F. Supp. 509, 513 (D.D.C. 1990) (Lamberth, J.), (holding that the President's order deploying a member of the National Guard to the Persian Gulf was not reviewable because the Constitution grants operational powers in foreign affairs only to the two political branches).

Such cases demonstrate that the Judiciary lacks judicially manageable standards, as well as access to the requisite information, to make such determinations concerning the specific scope of an armed conflict. Accordingly, a judicial decision as to whether or not an "armed conflict" exists where an enemy organization has a significant, organized presence and from which it has

planned and launched attacks against the United States, would intrude on the judgment of the political branches, in consultation with each other and foreign states—an assessment that could fluctuate depending on future events.[17]

* * *

The nonjusticiability of the plaintiff's claims in this Court "does not leave the executive power unbounded." *Schneider*, 412 F.3d at 200. "The political branches effectively exercise such checks and balances on each other in the area of political questions[,]" and "[i]f the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Id.* Accordingly, "the allocation of political questions to the political branches is not inconsistent with our constitutional tradition of limited government and balance of powers." *Id.*

III. The Court Should Exercise Its Equitable Discretion Not to Grant the Relief Sought.

Even if the Court concludes that plaintiff has standing, and that his claims are otherwise justiciable, the Court should decline to enter the declaratory and injunctive relief plaintiff seeks. "The decision to grant or deny [] injunctive relief is an act of equitable discretion by the district court[.]" *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) ("The exercise of equitable discretion . . . must include the ability to deny as well as grant injunctive relief [.]"). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 312; *see also Yakus v. United States*,

[17] In analogous circumstances, this Court held that attempting to characterize the nature of the ongoing Israeli-Palestinian conflict in order to resolve various statutory claims brought by Palestinian residents of the West Bank against the State of Israel would require the resolution of "predicate policy determinations" reserved to the political branches, including whether that conflict in the West Bank is either "genocide" or "self-defense." *Doe v. State of Israel,* 400 F. Supp. 2d at 112.

321 U.S. 414, 440 (1944) (where an injunction will adversely affect a public interest even temporarily, the court may in the public interest withhold relief until a final determination of the rights of the parties).[18] The Court should exercise its equitable discretion to reject the declaratory and injunctive relief sought here based on many of the same concerns identified above.

Plaintiff does not dispute the Government's public determination that his son plays an operational role in AQAP planning terrorist attacks against the United States. The imposition of declaratory and injunctive relief that would restrict the manner in which the President and other Government officials may act to protect the national security of the United States would be plainly improper where Anwar al-Aulaqi would remain free to plot terrorist attacks against the United States. As discussed above, Anwar al-Aulaqi may peacefully present himself to U.S. officials, which would eliminate any hypothetical possibility that he would be subjected to lethal force that has prompted plaintiff to file this lawsuit. The Court should not allow a "next friend" plaintiff to use the judicial process to seek such relief.

In addition, as set forth above—and again without confirming or denying any allegation—plaintiff simply speculates that, if lethal force has been authorized against his son, such an authorization necessarily has been made "without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." *See* Pls. Mem. at 6; *see also id*. at 31. Plaintiff cites nothing to support this proposition, but infers that this must be true based on an assumption that Anwar al-Aulaqi has been on a so-called "kill list" for months and, as a result, that there could be no "imminent" threat of harm to national security at stake and any lethal targeting could not be a last resort. *See id.* at 6. Plaintiff, who

[18] Again, where prudential considerations would preclude an injunction, they also preclude declaratory judgment. *See Samuels v. Mackell*, 401 U.S. 66, 69-74 (1971).

concedes he has not even spoken to his son for eight months, cannot possibly know the facts and circumstances that may be at issue and seeks extraordinary injunctive relief based on sheer unsupported conjecture. Thus, even if plaintiff could demonstrate his standing to seek declaratory and injunctive relief, equitable considerations should still foreclose its entry. *See Lyons,* 461 U.S. at 103 ("[c]ase or controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief'") (*quoting O'Shea*, 414 U.S. 488, 499 (1974)).

Article III courts should generally refrain from directing the President to take any official presidential act or not to take any such act. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion) (*quoting Mississippi v. Johnson*, 71 U.S. (4 Wall) 475, 501 (1866)); *see also Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923); *Clinton v. Jones*, 520 U.S. 681, 718-19 (1997) (Breyer, J., concurring) (acknowledging "the apparently unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts") (*quoting Franklin*, 505 U.S. at 802-03)); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (noting that the Supreme Court has issued a "stern admonition" that injunctive relief against the President personally is an "extraordinary measure"); *Newdow v. Bush*, 391 F. Supp. 2d 95, 105 (D.D.C. 2005) (Bates, J.); *Swan*, 100 F.3d at 977 n.1; *see also Franklin*, 505 U.S. at 827-28 (Scalia, J., concurring) ("Permitting declaratory or injunctive relief against the President . . . would produce needless head-on confrontations between district judges and the Chief Executive.") (*quoting Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (internal footnote omitted).[19] Thus, the Court should exercise its equitable discretion not to issue any injunction against the President in this case, particularly as to the exercise of his

[19] Plaintiff also attempts to invoke the Court's jurisdiction pursuant to Section 702 of the APA, 5 U.S.C. § 702, *see* Complaint ¶ 7, but the President is not an agency within the meaning of the APA whose actions are subject to APA review. *Franklin*, 505 U.S. at 796.

authority as Commander-in-Chief.

Moreover, because the imposition of any injunctive relief on the Secretary of Defense and CIA Director would also necessarily enjoin the authority of the President, no such relief should be entered against these officials as well. The Secretary of Defense is "the principal assistant to the President in all matters relating to the Department of Defense" and his authority is expressly "[s]ubject to the direction of the President." 10 U.S.C. § 113(b); *see also* Public Declaration of Robert M. Gates, Secretary of Defense, Exhibit 4, ¶ 1. The CIA Director performs such intelligence functions and duties "as the President . . . may direct." 50 U.S.C. § 403-4a(d)(4). Thus, any action taken by these subordinate officials in the context of this case necessarily implicates the President's own authority and discretion in directing the use of force.

Indeed, in *Mississippi v. Johnson* itself, the Supreme Court denied a request to enjoin not only President Andrew Johnson from executing and carrying out the post-Civil War Reconstruction Acts, but the military commander assigned to the State of Mississippi as well. *See* 71 U.S. (4 Wall) at 475 (describing bill to enjoin). The Supreme Court noted that one of the Reconstruction Acts imposed duties "on the several commanding generals," and observed that "these duties must necessarily be performed under the supervision of the President as commander-in-chief." *Id*. at 499. Discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court in *Johnson* went on to observe that the duty imposed by the Reconstruction Act "on the President is in no just sense ministerial. It is purely executive and political." *Johnson*, 71 U.S. (4 Wall) at 499. *Marbury* itself explains that "the President is invested with certain important political powers" under the Constitution for which he is accountable only politically, and in that context, he is authorized to appoint officers "who act by his authority and in conformity with his orders." 5 U.S. (1 Cranch) at 165-66. "In such cases, their acts are his acts," and courts have "no power to control that discretion." *Id.* at 166.

The allegations of this case do not concern a mere ministerial act by the President or his subordinate officials, but instead fundamentally challenge the scope of the authority of the President, acting through two of his principal Executive officers for national defense and intelligence, to protect the national security from a terrorist threat overseas posed by an organization against which the political branches have authorized the use of necessary and appropriate force. In these circumstances, any injunction against principal military and intelligence officers and assistants to the President would as a practical matter impose an immediate and direct injunction on the President himself. The court should not exercise its equitable discretion to bring about such an unprecedented result. *See Sanchez-Espinoza*, 770 F.2d at 208 (holding, in a case where plaintiffs sought, *inter alia*, declaratory and injunctive relief with respect to U.S. support for the Nicaraguan Contras, that "the support for military operations that we are asked to terminate has, if the allegations in the complaint are accepted as true, received the attention and approval of the President . . . the Secretary of Defense, and the Director of the CIA, and involves the conduct of our diplomatic relations with [a] foreign state," and "whether or not this is . . . a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief").

For the foregoing reasons, the balance of interests at stake and the public interest, weighs heavily against the entry of injunctive relief sought by plaintiff.

IV. Plaintiff Has No Cause of Action under the Alien Tort Statute.

Plaintiff lacks a common law cause of action based on the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The "torts" cognizable under the ATS include "three primary offenses,"

namely, "violation of safe conducts, infringements of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Beyond those, courts in certain circumstances may create a federal common law cause of action for an additional offense that would incorporate an international law standard. At a minimum, any such cause of action would have to be based on an offense that is no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted" in 1789. *Id.* at 732. In addition, the Supreme Court has stated that the courts must exercise "great caution in adapting the law of nations to private rights," *id.* at 728, and enumerated reasons why the courts must engage in "vigilant doorkeeping" in recognizing a "narrow class of international norms today," *id.* at 729.

This Court should not recognize the novel ATS cause of action plaintiff seeks to assert for the alleged "arbitrary killing" of his son, Pls. Mem. at 24, for two separate reasons. First, plaintiff asks this court to use its restricted power to create federal common law to fashion a cause of action for injunctive and declaratory relief against the President, the Secretary of Defense, and the Director of the CIA with respect to military and intelligence operations abroad. This would be an extraordinary exercise of lawmaking power by the Judiciary that is nowhere suggested in the text or origins of the ATS, and that would be manifestly contrary to the Supreme Court's instruction that a court must exercise "great caution" in recognizing new causes of action under the ATS. *Sosa*, 542 U.S. at 727-28.

Indeed, fashioning a common law cause of action under the ATS for the purely injunctive and declaratory relief that plaintiff seeks here would be especially improper. Because "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity," *Sanchez-Espinoza*, 770 F.2d at 207 (Scalia, J.); *see El-Shifa*, 607 F.3d at 857-58 (Kavanaugh, J., concurring), plaintiff must rely on the APA for a waiver of sovereign immunity. But the APA's waiver does not apply to the

President, *Franklin*, 505 U.S. at 800-01 (President is not an "agency" under the APA); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991), and does not displace a court's authority and responsibility to "deny relief on . . . any other appropriate legal or equitable ground." 5 U.S.C. § 702. Courts have held that "it would be an abuse of [the court's] discretion to provide discretionary relief" under the APA where a case involves "military operations that [the court is] asked to terminate," and where "the allegations in the complaint" are that those military operations "received the attention and approval of the President . . . the Secretary of Defense, and the Director of the CIA, and involve[] the conduct of our diplomatic relations with [a] foreign state[.]" *Sanchez-Espinoza*, 770 F.2d at 208. It would thus be improper for a court to use its limited authority to fashion federal common law under the ATS to create a cause of action limited to precisely the type of discretionary relief that courts should not award under the APA.

Moreover, the APA also specifies that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Federal Tort Claims Act ("FTCA") comprehensively addresses "civil actions on claims against the United States" for "personal injury or death" or other torts "caused by . . . wrongful act or omission of any employee of the Government" but provides only "for money damages," 28 U.S.C. § 1346(b)(1), which by implication precludes any injunctive relief, *Moon v. Takisaki*, 501 F.2d 389, 390 (9th Cir. 1974). The jurisdictional grant in the ATS should not be combined with the APA waiver of immunity to create an injunctive or declaratory tort remedy (which is the only relief plaintiff requests) where the FTCA provides only for damages.

Second, plaintiff's ATS claim should be dismissed because he asserts a cause of action for a tort that it is not even universally recognized under domestic law, let alone under international law. Plaintiff predicates his claim on the theory that, if his son were "arbitrarily

killed," then he (as the father) would suffer as a bystander from an alleged intentional infliction of emotional distress. Plaintiff has not alleged and cannot show that established international law protects bystanders from intentional infliction of emotional distress, and that such a norm has the same definite content and acceptance among civilized nations as the historical paradigms familiar when § 1350 was enacted in 1789. *Sosa*, 542 U.S. at 731.

The tort of emotional distress, as a general matter, is not universally recognized even in this Nation. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 545 n.3 (1994). And it is even less commonly accepted where, as here, plaintiff's alleged emotional distress does not arise from an actual physical injury already inflicted on his son, but from the alleged threat of a future injury to his son. In addition, when a claimant asserts bystander emotional distress based on conduct directed at someone else – such as when "a husband is murdered in the presence of his wife" – the tort is normally limited "to plaintiffs who were present at the time." Restatement (Second) of Torts § 46, cmt. l. The only tort that plaintiff himself could assert – something akin to bystander intentional infliction of emotional distress in the absence of any physical injury or presence in the zone of danger – thus does not meet the accepted requirements of many jurisdictions in this Nation. Nor does it separately meet *Sosa*'s requirement to have a "content and acceptance among civilized nations" that is similar to the "historical paradigm" of offenses against the laws of nations recognized in 1789. 542 U.S. at 731. Accordingly, this Court should decline to recognize a new cause of action under the ATS of the sort that plaintiff seeks.

V. The Protection of Information Subject to the Military and States Secrets Privilege and Statutory Protection Forecloses Litigation of Plaintiff's Claims.

A. The State Secrets Privilege Need Not Be Reached In This Case.

The foregoing threshold legal obstacles supply multiple grounds on which the Court should deny the motion for a preliminary injunction and dismiss the case. The Court therefore need not reach a final reason why this case must be dismissed: information protected by the military and state secrets privilege and related statutory protections is necessary to litigate plaintiff's claims. Consistent with the judicial admonition that the state secrets privilege be "invoked no more often or extensively than necessary," *Mohamed v. Jeppesen Dataplan, Inc.*, --- F.3d ---, 2010 WL 3489913 at *10 (9th Cir. Sept. 8, 2010) (en banc), the Court should not reach the privilege issue if the case can be resolved on the preceding grounds—particularly given the extraordinary posture of this case. However, were the Court inclined to allow the case to proceed after considering the government's other arguments, the Court should find that plaintiff cannot establish a likelihood of success on the merits, and should dismiss the case, because specific categories of information properly protected against disclosure by the privilege would be necessary to litigate each of plaintiff's claims and the case therefore cannot proceed without significant harm to the national security of the United States. [20]

The government does not invoke the protections of the state secrets privilege lightly. Pursuant to a policy announced by the Attorney General on September 23, 2009, the U.S.

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[20] At a status conference on September 3, 2010, the Court directed that the Government present all of its arguments in opposition to the motion for a preliminary injunction in a single brief by this date. The Court declined the Government's suggestion that the briefing be sequenced to address the foregoing threshold legal issues first and reserve consideration of the state secrets privilege for a later stage.

Department of Justice will defend an assertion of the state secrets privilege in litigation, and seek dismissal of a claim on that basis, only when "necessary to protect against the risk of significant harm to national security." *See* Exhibit 2 (State Secrets Policy). Moreover, "[t]he Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security." *Id.* at 2. The Attorney General also established detailed procedures— followed in this case—for review of a proposed assertion of the state secrets privilege in a particular case. Those procedures require submissions by the relevant government departments or agencies specifying "(i) the nature of the information that must be protected from unauthorized disclosure; (ii) the significant harm to national security that disclosure can reasonably be expected to cause; [and] (iii) the reason why unauthorized disclosure is reasonably likely to cause such harm." *Id.* In addition, the Department will only defend an assertion of the privilege in court with the personal approval of the Attorney General following review and recommendations from senior Department officials. *Id.* at 3.

The state secrets privilege should be invoked only rarely, but its assertion in this case is proper and entirely consistent with the Attorney General's Policy. Without admitting or denying plaintiff's allegations (and indeed regardless of whether any particular allegations are true), the Complaint puts directly at issue the existence and operational details of alleged military and intelligence activities directed at combating the terrorist threat to the United States. Notably, plaintiff demands the disclosure of any "secret" criteria governing the use of lethal force against operational leaders of enemy forces overseas. *See* Compl. ¶ 30 (Fourth Claim for Relief).

Plaintiff also repeatedly concedes that resolution of his other claims on the merits would require discovery into the "totality" of the factual circumstances concerning whether or not and, if so, how the United States may plan to use lethal force, including whether, when and how the Government evaluates if a threat to national security is imminent, whether such force would be a last resort, and what the government is or is not actually doing to counter the ongoing and dangerous threat posed by al Qa'ida and its associated forces. It should therefore be apparent that to litigate any aspect of this case, starting with the threshold question of whether plaintiff has in fact suffered any cognizable injury that could be remedied by the requested relief, would require the disclosure of highly sensitive national security information concerning alleged military and intelligence actions overseas. For this reason, the Secretary of Defense, the Director of National Intelligence, and the Director of the CIA have all invoked both the military and state secrets privilege, and related statutory protections, to prevent disclosures of information that reasonably could be expected to harm national security. Absent the privileged information, the case cannot proceed.

"The Supreme Court has long recognized that in exceptional circumstances courts must act in the interest of the country's national security to prevent disclosure of state secrets, even to the point of dismissing a case entirely." *Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *6; *see also id*. at *23 (Hawkins, J., dissenting) ("Within the *Reynolds* framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs' allegations or a valid defense that would otherwise be available to the defendant."). But precisely because this result is extraordinary, courts have an important role to play in conducting an independent review of whether the information is privileged. To that end, the government has submitted (*ex parte*, *in camera*) robust classified declarations for the Court's

review from the Secretary of Defense, the DNI, and the CIA Director setting forth the specific categories of information that must be protected to prevent significant harm to national security and the reasons why such harm would result from disclosure of the privileged information. When each of plaintiff's claims is considered in light of the privileged information, it should be apparent that this case cannot be litigated without creating an unacceptable risk of disclosing privileged information.

B. The State Secrets Privilege Bars the Use of Privileged Information in Litigation.

The military and state secrets privilege protects information from disclosure in litigation where there is a reasonable danger that disclosure would "expose military matters which, in the interests of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953); Halkin v. *Helms*, 598 F.2d 1, 8-9 (D.C. Cir. 1978) ("*Halkin I*"); *see also In re Sealed Case* (*Horn*), 494 F.3d 139, 142 (D.C. Cir. 2007). The ability of the Executive to protect state secrets from disclosure in litigation has been recognized from the earliest days of the Republic. *Totten v. United States*, 92 U.S. 105 (1875) (citing the proceedings against Aaron Burr, *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807)); *see Reynolds*, 345 U.S. at 7-9; *see also Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *6. The privilege "performs a function of constitutional significance" by allowing the Executive "to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities." *El-Masri v. United States*, 479 F.3d 296, 303 (4th Cir.) (citing and discussing *United States v. Nixon*, 418 U.S. 683, 710 (1974)), *cert. denied*, 128 S. Ct. 373 (2007). The privilege protects a broad range of information, including disclosures that could reasonably be expected to lead to the "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and

disruption of diplomatic relations with foreign governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). The privilege also protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information. *Id.* at 57 n.31; *Halkin v. Helms*, 690 F.2d 977, 993 & n.57 (D.C. Cir. 1982) ("*Halkin II*").

"[T]he state secrets doctrine does not represent a surrender of judicial control over access to the courts." *El-Masri*, 479 F.3d at 312; *Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *12. "To ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation." *Ellsberg*, 709 F.2d at 58. At the same time,"[c]ourts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets," *Halkin I*, 598 F.2d at 9,[21] in determining whether "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," *id.* (*quoting Reynolds*, 345 U.S. at 10); *see also In re Sealed Case (Horn)*, 494 F.3d at 144 (a "reasonable danger of divulging too much" is sufficient).

The privilege can be invoked at any stage in the process, including the pleading stage. *See Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *10-11; *Ellsberg*, 709 F.2d at 54 & n.6. Once the court determines that the privilege has been properly invoked, it "is absolute and cannot be compromised by any showing of need on the part of the party seeking the information." *Halkin I*,

[21] *See also Halkin I*, 598 F.2d at 9 ("'[C]ourts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.'") (*quoting United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.").

598 F.2d at 7. "[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11; *see also Ellsberg*, 709 F.2d at 57.

C. The Secretary of Defense, the Director of National Intelligence, and the Director of the Central Intelligence Agency Have Properly Invoked the State Secrets Privilege in this Case.

To invoke the state secrets privilege, the government must satisfy three procedural requirements: (1) there must be a "formal claim of privilege"; (2) the claim must be "lodged by the head of the department which has control over the matter"; and (3) the claim must be made "after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8; *see Edmonds v. U.S. Dep't of Justice*, 323 F. Supp.2d 65; *see also Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *10. These requirements have been satisfied here. The Secretary of Defense, the DNI, and the CIA Director have each made formal claims of privilege protecting various categories of information implicated by the allegations in this case. *See* Public Declarations of Robert M. Gates, Secretary of Defense; James R. Clapper, Director of National Intelligence; and Leon E. Panetta, Director of the Central Intelligence Agency asserting formal claim of military and state secrets privilege.[22]

Summarized in necessarily general and unclassified terms (and again without confirming or denying any allegation in the Complaint), the privilege assertions encompass not only whether or not the United States plans the use of lethal force against particular terrorist adversaries

[22] The Secretary of Defense is the head of a department (namely, the Department of Defense) having control over the matter. *See* 10 U.S.C. 113(a). Likewise, the DNI is head of the United States Intelligence Community, *see* 50 U.S.C. § 403(b)(1), with authority to protect intelligence sources and methods, *see id*. § 403-1(i)(1). The DCIA is the head of the CIA pursuant to the National Security Act of 1947, 50 U.S.C. § 403-4a.

overseas but, if so, pursuant to what information and procedures. This would include, for example, (i) intelligence information that would reveal the Government's knowledge as to the imminence of any threat posed by AQAP or Anwar al-Aulaqi, and the sources and methods by which such intelligence was obtained, *see* Gates Public Decl. ¶ 6; Clapper Public Decl. ¶¶ 18-19; (ii) information concerning possible operations in Yemen and any criteria or procedures that may be utilized in connection with such operations; *see* Public Gates Decl. ¶ 7; (iii) information concerning security, military, or intelligence relations between the United States and Yemen. *See* Gates Public Decl. ¶ 8; (iv) and any other information that would tend to confirm or deny any allegations in the Complaint pertaining to the CIA, including information that would tend to expose intelligence sources and methods, *see* Public Panetta Decl. ¶ 3.[23]

The disclosure of such information reasonably could be expected to harm the national security of the United States. *See* Gates Public Decl. ¶¶ 6-8; Clapper Public Decl. ¶¶ 20; Public Panetta Decl. ¶ 3. For obvious reasons, revealing to a terrorist organization what the United States may know of their plans, and thereby risking disclosure of any sources and methods at

[23] Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 10-458, 118 Stat. 3638 (Dec. 17, 2004) (codified at 50 U.S.C. § 403-1(i)(1)), requires the DNI to protect intelligence sources and methods from unauthorized disclosure. *See CIA v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the [Director of National 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 . . . intelligence-gathering process."). The information protected by this statutory privilege is at least co-extensive with the assertion of the state secrets privilege by the DNI. *See* Clapper Public Decl. ¶¶ 8, 19. Section 102A(i)(1) of the National Security Act of 1947, as amended, and section 6 of the CIA Act of 1949, as amended also require the CIA Director to protect intelligence sources and methods. *See* Public Panetta Decl. ¶ 3. These statutory protections underscore that the protection of intelligence sources and methods is not only supported by the judgment of the Executive branch, but pursuant to congressional authority as well. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

issue, would provide a treasure trove of vital information enabling that organization to alter their plans and conceal their plotting. *See* Gates Public Decl. ¶ 6; Clapper Public Decl. ¶ 20. Similarly, disclosure of whether or not lethal force has been authorized to combat a terrorist organization overseas, and, if so, the specific targets of such action and any criteria and procedures used to determine whether or not to take action, would again enable that organization to determine whether or not, when, how, or under what circumstances, the United States may utilize lethal force overseas—critical information needed to evade hostile action. *See* Gates Public Decl. ¶ 7. Similarly, and as again should be apparent, the disclosure of classified information concerning military or intelligence relations with a foreign state would pose the risk of serious harm to those relations as well as foreign relations generally and, as a result, to U.S. national security. *See* Gates Public Decl. ¶ 8. The particular harms at issue in this case are addressed further in the classified declarations provided for the Court's *in camera*, *ex parte* review.

D. The Exclusion of the Information Protected by the States Secrets and Statutory Privileges Requires Dismissal of this Action.

After information protected by the military and state secrets privilege has been excluded from a case, a court must then determine what impact that exclusion has on the adjudication of plaintiff's claims. *In re Sealed Case (Horn)*, 494 F.3d at 144. In some cases, it may be possible for the court to exclude the privileged information but proceed to decide the merits of the plaintiff's claim on the basis of other available evidence. Indeed, under the "narrow tailoring" provision of the Attorney General's Policy, the Department considers whether such an approach short of dismissal of the case is possible. *See* Ex. 1 at 1. On the other hand, courts have recognized that "[i]n some instances, . . . application of the privilege may require dismissal of

the action." *Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *13. In particular, if the plaintiff is "manifestly unable to make out a prima facie case without the [privileged] information," then "dismissal of the relevant portion of the suit would be proper." *Horn*, 494 F.3d at 145. Similarly, where the "defendant will be deprived of a valid defense based on the privileged materials," then the court "may properly dismiss the complaint." *Id.* at 149. Finally, "even if the claims and defenses might theoretically be established without relying on privileged evidence, it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Jeppesen*, --- F.3d ---, 2010 WL 3489913 at * 13.

This case is a paradigmatic example of one in which no part of the case can be litigated on the merits without immediately and irreparably risking disclosure of highly sensitive and classified national security information. The purpose of this lawsuit is to adjudicate the existence and lawfulness of alleged targeting decisions and to compel the disclosure of any "secret criteria" used to make those alleged determinations. Plaintiff's complaint alleges (i) that the United States has carried out "targeted killings" outside of Iraq and Afghanistan, Compl. ¶ 13, (ii) and has specifically targeted Anwar al-Aulaqi, Compl. ¶¶ 19-21, and, in particular, (iii) that Anwar al-Aulaqi is allegedly subject to the use of lethal force "without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." Compl. ¶ 23. At every turn, litigation of plaintiff's claims would risk or require the disclosure of highly sensitive and properly protected information to respond to allegations regarding purported secret operations and decision criteria. Even if some aspect of

the underlying facts at issue had previously been officially disclosed, the Government's privilege assertions demonstrate that properly protected state secrets would remain intertwined in every step of the case, starting with an adjudication of the threshold issue of plaintiff's standing (*i.e.*, whether or not there is an alleged "target list" which includes plaintiff's son, and whether he is being subjected to the threat of lethal force absent an imminent threat or a reasonable alternative to force), and the inherent risk of disclosures that would harm national security should be apparent from the outset. As the Ninth Circuit in *Jeppesen* most recently observed, where "the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable," dismissal is required. *Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *19.

As a starting point, even if the complaint sufficiently alleged an injury that could give rise to Article III standing (which the Government disputes), plaintiff would still have to prove the factual basis for his alleged injury were the case to proceed.[24] Assuming he may proceed as a next friend, plaintiff would have to prove, at a minimum, whether or not his son has in fact been targeted for lethal force in the circumstances alleged. Plaintiff concedes that the existence of the injury alleged—targeting for lethal force without compliance with the asserted imminence and last resort limitations—is a fact question, and yet fails to cite any competent evidence that

[24] To establish Article III standing, a plaintiff must demonstrate an "injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling." *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). Because the plaintiff is the party asserting federal jurisdiction, he bears the burden of establishing Article III standing, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006), and must not merely allege these three elements, but must at the appropriate point prove them as well, *Lujan*, 504 U.S. at 560-61. Plaintiff cannot rest on general allegations in his Complaint, but must set forth specific facts that establish his standing to obtain the relief sought. *See Lewis v. Casey*, 518 U.S. 343, 358 (1996) (citing *Lujan*, 504 U.S. at 561).

remotely confirms these facts. Rather, as discussed above, plaintiff attempts to infer that there could be no imminent threat, and that the U.S. has authorized the use of lethal force even where it is not necessary to interdict any imminent threat, from the mere existence of an alleged "standing order" to kill. But even if that unsupported speculation is a sufficient allegation as a matter of pleading, the determination of whether or not the Government has in fact targeted Anwar al-Aulaqi for lethal force, and, if so, whether it has done so without regard to "imminence" and "reasonable alternative" limitations, and, if those criteria do apply, whether or not Anwar al-Aulaqi "is found to present" a concrete, specific, and imminent threat and there are no reasonable alternatives to lethal force, *see* Proposed Preliminary Injunction at 2, are *all* fact questions for which the privileged information would be necessary to determine. Indeed, it would be extraordinary for the Government to be required to confirm or deny such matters in a lawsuit brought by the father of an operational terrorist who remains free to plan attacks against the United States.[25]

The privilege assertions similarly protect information essential to litigate the merits of each of plaintiff's claims. The first claim is that the alleged use of lethal force by the Government violates the Fourth Amendment by authorizing the "seizure" of plaintiff's son "in circumstances [that] do not present [a] concrete, specific, and imminent threat[] to life or physical safety, and where there are means other than lethal force that could reasonably be

[25] *See Halkin II*, 690 F.2d at 991-94, 997 (where evidence concerning whether or not plaintiffs were in fact targeted by government surveillance program was protected by the state secrets privilege, plaintiffs were "incapable of demonstrating that they have standing to challenge that practice" and their claims must be dismissed); *see also Ellsberg*, 709 F.2d at 52-53, 59, 65 (same); *ACLU* v. *NSA*, 493 F.3d 644, 653-56 (6th Cir. 2007) (same); *Al-Haramain*, 507 F.3d at 1205 (same).

employed to neutralize any such threat." Compl.¶ 27.[26] On its face, the complaint concedes that there *are* circumstances where the use of lethal force as a "seizure" *would* be entirely consistent with the Fourth Amendment. Likewise, plaintiff concedes that his son's targeting would be constitutional if "at the time lethal force is employed, the citizen poses an imminent threat of death or serious physical injury and there are no non-lethal means that could reasonably be used to neutralize the threat." Pls. Mem. at 11. Plaintiff agrees that "[w]hether a seizure is justified requires consideration of the 'totality of the circumstances.'" Pl. Mem. at 11; *see also* Pls. Mem. at 15 ("To be sure, the Fourth Amendment's reasonableness inquiry is context-specific."). Resolution of plaintiff's claim therefore would require the Court to answer a range of questions, even apart from the question of whether the plaintiff's son been targeted: What kind of threat, if any, does plaintiff's son pose? If there is a threat, how imminent is it, and how continuing is it? How many innocent people are threatened by the danger plaintiff's son might pose? In the totality of the circumstances does the United States have the capability and access to capture plaintiff's son safely? In trying to capture him, how many innocent people or military personnel would likely be killed or injured in the process? It is self-evident that all the above questions (and more) directly implicate information protected by the military and state secrets privilege, at a minimum because those facts would require the examination of any available and pertinent classified intelligence that might exist on the subject, as well as the sources or methods for gathering that intelligence, and any related information concerning foreign relations and diplomatic communications.

[26] Plaintiff's Fifth Amendment claim would require the same fact-specific analysis of the very evidence made unavailable under the state secrets privilege and related statutory protections. *See* Pls. Mem. at 16 (Fifth Amendment claims virtually identical to Fourth Amendment claim).

Likewise, plaintiff's third claim, alleging that the alleged targeting of his son "violates treaty and international law," Compl. ¶ 29, raises identical fact issues. Plaintiff again concedes that the alleged use of lethal force could be lawful under international law in certain circumstances. Pls. Mem. at 27 ("[U]nder the body of international law . . . a state may intentionally deprive an individual of life" if it "meets certain stringent criteria."). Even assuming plaintiff has correctly stated the international law requirements for the use of force in self defense, the criteria plaintiff believes the Court would have to apply—"proportionality," "necessity," and "precaution," Pls. Mem. at 27— are just as fact-specific as the inquiry he concedes is required in the Fourth and Fifth Amendment contexts. *See* Pls. Mem. at 27-29.

Notably, plaintiff contends that the lawfulness of the alleged targeting of his son under international law would depend on whether the government could show either that Yemen has consented to the use of lethal force in its nation or that Yemen is unwilling or unable to stop any threat posed by plaintiff's son. *Id.* at 30. Any evidence that might exist as to either proposition, however, would plainly implicate sensitive diplomatic relations between the United States and Yemen and would thus also be covered by the state secrets privilege. *See* Public Gates Decl. ¶ 8; *see also Ellsberg*, 709 F.2d at 57 (state secrets privilege prevents harms including "disruption of diplomatic relations with foreign governments").

Finally, plaintiff also raises a claim under the Fifth Amendment that expressly seeks disclosure of alleged secret criteria governing the targeting of U.S. citizens engaged in terrorist activities with lethal force. Such a disclosure would reveal not only whether such targeting has occurred or been considered in any given case but would disclose to the plaintiff and any potential target the criteria utilized by the Government to make this determination. It strains credulity to argue that the Due Process Clause requires the Government to disclose to Anwar al-

Aulaqi, an operational leader of AQAP, whatever criteria it may be applying to respond to his activities. Plaintiff does not and cannot point to a single precedent of any court holding that the Due Process Clause requires advance notice of the criteria used to inform the Executive's decision-making process for determining what, if any, targets might be struck in this context. In any event, disclosure of any such criteria would arm al-Aulaqi and all other AQAP leaders with vital information for ascertaining whether, when, and how they may be subject to lethal force.

Plaintiff's contention that the Government has already conceded the operative facts, *see* Compl. ¶¶ 15, 20; Pls. Mem. at 3-4, is meritless. The public statements made by U.S. Government officials cited by plaintiff do not establish plaintiff's standing or the information needed to decide the merits of plaintiff's claims. For example, then-DNI Blair specifically did *not* confirm that Anwar al-Aulaqi is subject to lethal targeting. *See* Exh. G to Declaration of Ben Wizner. Similarly, Deputy National Security Advisor John Brennan did not specifically discuss Anwar al-Aulaqi or the use of lethal force at all, but indicated that an American Citizen overseas trying to carry out terrorist attacks could face the "full brunt" of a U.S. response in "many forms." *See* Exh. I to Wizner Declaration. Likewise, CIA Director Leon Panetta's statement that Anwar al-Aulaqi is "someone we're looking for" and "focusing on" does not remotely confirm plaintiff's standing. *See* Exh. J to Wizner Declaration. Plaintiff's citation to a statement by the White House Press Secretary that Anwar al-Aulaqi has "cast his lot" with al Qa'ida, *see* Exh. K to Wizner Declaration, also fails to demonstrate any standing here. The Treasury Department's Designation of Anwar al-Aulaqi as a Specially Designated Global Terrorist, and related statement by Treasury Undersecretary Stuart Levey, also relied upon by plaintiff, *see* Exhibit T to Wizner Declaration, says nothing at all about alleged lethal targeting.

Beyond this, many of the newspaper reports on which plaintiff relies contain a mix of unnamed, anonymous sources,[27] or have no source at all for its discussion of the facts alleged in plaintiff's complaint.[28] "[W]idespread media and public speculation" does not amount to an official public acknowledgment by the government of the allegations made in the complaint, and it is often the case (as it is here) that only an "official acknowledgment" of a particular allegation "would cause damage to the national security." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) (FOIA context). Moreover, the media reports conflict with each other and vary from allegations in the complaint: some make no mention of any operations in Yemen;[29] some make no mention of Anwar Al-Aulaqi as an alleged target[30] or expressly *decline* to say whether

[27] *See, e.g.,* Wizner Decl. Exh. A ("senior government officials," "current and former officials," "a senior law enforcement official"); Exh. B ("administrations officials"); Exh. C ("Bush administration officials," "the administration"); Exh. E ("current and former U.S. officials," "a U.S. counter-terrorism official"); Exh. F ("senior administration officials," "military officials," "military and intelligence officials," "an intelligence official"); Exh. H ("intelligence and counterterrorism officials," "an American official,"); Exh. J ("senior intelligence official"); Exh. L ("a U.S. official"); Exh. M ("officials"); Exh. N ("senior intelligence official"); Exh. P ("counterterrorism officials," "[f]ormer C.I.A. officials"); Exh. Q ("some US media reported alleged statements by unnamed US government sources"); Exh. R ("American officials"); Exh. S ("intelligence officials," "[i]ntelligence sources"); Exh. Y ("U.S. officials").

[28] *Id.* Exhs. U, V, AA.

[29] *Id.* Exhs. N, O, P; *see* Exh. G (former DNI acknowledged targeting U.S. citizens "abroad" without mentioning Yemen), Exh. AB ("U.S. military officials have refused to comment on whether American surveillance drones are operating in Yemen").

[30] *Id.* Exhs. A, B, C, O, P, Q, R, W, X, Z, AB.

he is a target;[31] others make only vague statements,[32] or refuse to acknowledge any details about the alleged activities.[33] And, of course, these media reports are devoid of any substantive discussion of the imminence of a threat in making an alleged targeting decision; whether Anwar al-Aulaqi poses any imminent threat; whether lethal force would be a last resort; or any operational details for implementing alleged lethal force or carrying out the alleged targeting of al-Aulaqi. *Northrop Corp.* v. *McDonnell Douglas*, 751 F.2d 395, 402 n.9 (D.C. Cir. 1984) (emphasis added) ("it is irrelevant" if the government previously disclosed *this* information which "cover[s] matters *related to* those over which [the government] claims the state secrets privilege," because "though related, the nature of the precise information contained in the revealed documents is different from that contained in the privileged documents and justifies different treatment") (emphasis added); *see also Jeppesen*, --- F.3d ---, 2010 WL 3489913 at *19 (partial disclosure of some aspects of the alleged activity does not preclude other details from remaining state secrets if their disclosure would risk grave harm to national security); *Al-*

[31] *Id.* Exh. G (former DNI Blair "did not specifically refer to the targeting of Aulaqi"), Exh. H (former DNI "did not name Ar. Awlaki as a target"), Exh. I (John O. Brennan, deputy White House national security advisor "said he would not talk about lists of targeted American terrorists"), Exh. K at 9-10 (Press Secretary Robert Gibbs expressly declines to acknowledge whether al-Aulaqi is a target).

[32] *Id.* Exh. J (Al-Aulaqi is "someone that we're looking for" and is "one of the individuals that we're focusing on"), Exh. M (al-Aulaqi "is in the sights" of Yemeni officials with the U.S. "helping them," and "Americans who are trying to attack our country * * * we will definitely pursue [and] are targets"), Exh. R (America will rely on the "scalpel" rather than "the hammer"); Exh. V (U.S. is "actively trying to find" al-Aulaqi and "will continue to take action directly at terrorists like Awlaki").

[33] *Id.* Exh. I ("would not comment on the details of lethal operations or the procedure for targeting Americans"); Exh. K at 12-13 ("There's a process in place that I'm not at liberty to discuss" and "I'm just not at liberty to discuss intelligence matters."), Exh. L (there are "careful procedures" in place), Exh. N (refused to directly address the matter of drone strikes); Exh. P ("the United States refuses to officially acknowledge the attacks").

Haramain, 507 F.3d at 1203 (undisclosed details of officially acknowledged wiretapping program protected by state secrets privilege).

To turn unconfirmed statements, speculation, and hearsay into admissible evidence, the underlying allegations at issue here would have to be probed at length in discovery and the actual facts ascertained under the rules of evidence, including by obtaining and cross-examining sworn testimony.

> Adversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable. Although district courts are well equipped to wall off isolated secrets from disclosure, the challenge is exponentially greater in exceptional cases like this one, where the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication.

Jeppesen, --- F.3d ---, 2010 WL 3489913 at *18. It is this intrusive and exacting process that would plainly risk or require the disclosure of specific privileged information, including intelligence sources and methods.

For the foregoing reasons, should the Court decline to dismiss this case on the numerous jurisdictional grounds outlined above, it should nonetheless find that the information needed to litigate this case, from standing forward, is properly protected by the Government's privilege assertion and that this requires dismissal as well.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied and the plaintiff's complaint should be dismissed.

A-286

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Exhibit 10

March 2011 Gates Speech

A-288

Remarks by Secretary Gates at the United States Air Force Academy

Presenter: Secretary of Defense Robert M. Gates
March 04, 2011

SEC. GATES: Thank you, Josh, for that introduction.

It's a pleasure to be back in Colorado Springs, for my third and final visit to the Air Force Academy as Secretary of Defense. I had the honor of addressing cadets last spring, meaning you may have a distinct feeling of déjà vu right about now.

I would take your willingness to return for this encore performance as a compliment, but I also know from experience that your presence is not exactly optional. So I'll just thank you for trying to stay awake and promise to keep my remarks reasonably brief.

Which brings to mind a story about George Bernard Shaw, who once told a speaker he had 15 minutes to speak. The speaker replied, "15 minutes? How can I tell them all I know in 15 minutes?" Shaw said, "I advise you to speak very slowly."

As Secretary of Defense, I have many opportunities to interact with our military's top leaders. I have relatively fewer chances to interact with our military's youngest leaders. So it's great to see all the Firsties in this hall, who have only 82 days to go until commissioning. And I know the Four Degrees aren't in the audience right now, but, over closed-circuit TV, I do want to congratulate them in advance on achieving recognition next week.

Whether it's visiting the service academies or meeting with junior enlisted at forward operating bases in Afghanistan, it is always an extraordinary pleasure to interact with our future military leaders. That's because you will be having an impact on your service and our nation's security long after I and all of today's generals are long retired from government service. As future Air Force leaders, you will be the ones tackling the challenges of the 21st century head on. And those challenges will be significant. So today, I want to talk to you about what I believe the Air Force of the 21st century must look like -- the challenges to be embraced, the pitfalls to be avoided -- and what that will mean for you as leaders.

We are far removed from the world as it was 44 years ago, when in January 1967, I was commissioned a second Lieutenant in the Air Force. In my first assignment, I spent a year targeting the Soviet Union with ICBMs [Intercontinental Ballistic Missiles] at Whiteman Air Force Base, before heading to Washington to begin my career at CIA [Central Intelligence Agency] as an analyst on the Soviet desk. The decades-long Cold War had long receded by the time I became Secretary of Defense, but when I arrived at the Pentagon I found that all of the military services -- including the Air Force -- still to a great extent viewed the world through the prism of the 20th century. They were largely oriented towards winning big battles in big wars against nation-states comparably armed and equipped, even as our military was struggling to defeat insurgencies in Afghanistan and Iraq.

More than five years after 9/11, all the services were only then beginning to undertake the changes required to prevail in the more diverse and uncertain security environment of this century. One of my priorities as Secretary of Defense has been to accelerate that process of institutional change, in order to ensure that our military was both responding to the urgent needs of our troops in Iraq and Afghanistan, and simultaneously investing in and preparing for a range of future threats -- from global terrorism to ethnic conflicts; from rogue nations to rising powers with increasingly sophisticated capabilities. I freely acknowledge that this focus has, at various times, brushed up against the traditional preferences and bureaucratic sacred cows of all the services -- including the Air Force.

Almost three years ago I challenged the Air Force, and indeed our entire military, to do more, much more, to get needed unmanned intelligence, surveillance, and reconnaissance assets into theater, a process I compared to "pulling teeth." Over the course of my tenure, I've also questioned whether the Air Force has the right mix of platforms for the future. Some, inside the Pentagon and out, thought I had it in for the Air Force.

But far from being a skeptic of air power, I believe that air supremacy -- in all its components -- will be indispensable to maintaining American military strength, deterrence, and global reach for decades to come. Here, to some degree, the Air Force is a victim of its own success. There hasn't been a U.S. Air Force airplane lost in air combat in nearly 40 years, or an American soldier attacked by enemy aircraft since Korea. American ownership of the skies has been so effortless it is taken for granted. Air supremacy in this century, however, will almost certainly mean different things, and require different systems, personnel policies, and thinking than was the case for most of the Cold War.

In order to make that transition, the Air Force has had to shed the nostalgia that can too often consume the institutional culture of any large, successful organization. This is a problem for all the services. Each has had a traditional orientation -- rooted originally in World War II and the Cold War, and then reinforced in the 1991 Persian Gulf campaign -- that has been, to varying degrees, neglected in the Iraq and Afghanistan campaigns. Blue-water carrier ops in the case of the Navy, mechanized combined arms warfare for the Army, and amphibious assault for the Marine Corps.

For the Air Force, its traditional orientation has been air-to-air combat and strategic bombing, and members of those communities have so dominated the service leadership and organizational culture that other critical missions and new capabilities have been subordinated and neglected. I recall in the early 1990s, when I was Director of CIA, I pushed to get UAVs [Unmanned Aerial Vehicles] into development because they represented a less risky and far more versatile means of gathering data in the field, and other nations like Israel were using effectively. In 1992, however, the Air Force would not co-fund with CIA an aircraft without a pilot.

Now, in case there was any doubt, I strongly believe the United States military will always need manned flight. But I also believe we must recognize the enormous strategic and cultural implications of the vast expansion in remotely piloted vehicles, both for reconnaissance and strike, in this past decade -- a development entirely unexpected just ten years ago. As Secretary Donley has pointed out, in 2000 the leadership of the Air Force projected an unmanned aerial system fleet of less than 80 by 2020 -- and today that projection has grown more than six-fold.

The concerns about a diminished role for manned flight date back to before the founding of the independent U.S. Air Force in 1947, a time when new developments in rockets were seen as making airplanes obsolete. Consider what General Hap Arnold told the Air Force Science Advisory Group, in 1944. He said that, in the future: "I see a manless Air Force. I see no excuse for men in fighter planes to shoot down bombers…The next Air Force is going to be built around scientists."

Almost twenty years later, when President Kennedy gave the commencement address here at the Air Force Academy, he felt compelled to reassure the graduating class that he firmly disagreed with those that: "claim that the future of the Air Force is mortgaged to an obsolete weapons system, the manned aircraft, or that Air Force officers of the future will be nothing more than 'silent silo sitters.'"

Of course, none of those predictions came true. And those making similar projections today would be just as misguided. Even given the potential game-changing capabilities of UAVs, we do not want to engage in the kind of techno-optimism about remote-control warfare that has muddled strategic thinking in the past. The Air Force -- and all the services -- are seeking to find the right balance between preserving what is unique and valuable in their traditions, while making the adjustments needed to win the wars of today and prepare for likely future threats.

The campaign underway in Afghanistan, though primarily a ground engagement, has become a major demonstration of the global reach, effectiveness, and necessity of U.S. air power. The pace of air operations in support of soldiers and Marines has surged over the past year, and that has played an important role in rolling back the Taliban from their strongholds. In 2010, the Air Force completed more than 33,000 close air support sorties in Afghanistan, an increase of more than 20 percent compared to the year before. Meanwhile, combined ISR sorties in Iraq and Afghanistan have almost doubled since 2008 and tripled since 2007.

The Air Force now has 48 Predator and Reaper combat air patrols currently flying --compared to 18 CAPs in 2007 -- and is training more pilots for advanced UAVs than for any other single weapons system. Nonetheless, the demand from commanders for ISR [Intelligence, Surveillance and Reconnaissance] continues to outpace supply, and we must press on to ensure that everything that can be done is being done to give our troops down range what they need to survive and succeed on the battlefield.

Equally important to the projection of our power in combat theaters has been the work of mobility forces. Last year, in order to accomplish the major drawdown in Iraq and the simultaneous surge in Afghanistan, nearly 300,000 short tons of cargo were airlifted in both theaters. And the Air Force airdropped more than 60 million pounds of supplies for Operation Enduring Freedom, almost double the total from 2009. Our airmen, as you know, are also playing the critical role of life-savers -- completing 9,700 personnel recovery sorties in 2010 alone. All told, the expertise and courage of Air Force search and rescue teams are making the goal of the "golden hour" medevac a reality in Afghanistan. Without all of the efforts and exertions of tens of thousands airmen, many of them on the ground -- including engineers, security forces, medical personnel, explosive ordnance disposal experts -- the entire U.S. war effort would grind to a halt.

The versatility on display by the Air Force in combat theaters these past few years befits the greatest traditions of the force. Yet I'm concerned that the view still lingers in some corners that once I depart as Secretary, and once U.S. forces drawdown in Iraq and in Afghanistan in accordance with the President's and NATO's strategy, things can get back to what some consider to be real Air Force normal.

This must not happen. Stability and security missions, counterterrorism, train, assist and equip, persistent battlefield ISR, close air support, search and rescue, and the ever-critical transport missions are with us to stay -- even without a repeat of Iraq and Afghanistan. Air Force leaders now and in the future must have a comprehensive and integrated view of the service's future needs and capabilities -- including the service's important role in cyber and space -- a view that encompasses with equal emphasis all of its varied missions.

That includes the requirement for more sophisticated, high end capabilities. I've said before that it would be irresponsible to assume that a future adversary -- given enough time, money, and technological acumen -- will not one day be able to directly threaten U.S. command of the skies.

So even as I've touted the need to incorporate the lessons of the current conflicts, I have also committed the Department of Defense, and this country, to the most advanced and expensive tactical fighter program in history -- the $300 billion F-35 Joint Strike Fighter. The department is programmed to buy 2,400 of these aircraft, and the first Air Force training aircraft will arrive at Eglin Air Force Base in just over two months. Having a robust, large quantity of fifth generation tactical air fighters is something I view as a core requirement, and in this era of increasing budget constraints, my goal has been to ensure that core capabilities for all the services are protected. This has meant increasing development funding for the F-35, scaling back or cutting other programs that are not as essential, and intervening directly to get the program back on track, on budget, and on schedule.

At the same time that F-35 received high priority, the Department made the decision not to buy more than the 187 F-22s planned for our arsenal. As I have said before, the F-22 is far and away the best air-to-air fighter ever produced, and it will ensure U.S. command of the skies for the next generation. But in assessing how many F-22s the Air Force needed, the Department had to make choices and set priorities among competing demands and risks. Three years before I took this job, the previous Secretary of Defense imposed a funding cap on the F-22 and approved a program of 183 aircraft. Subsequent analysis conducted by the Department concluded that 187 was the number needed for high-end air to air missions that only the F-22 could perform, the number ultimately chosen. Within a fixed Air Force and overall Department of Defense budget, buying more F-22s would have meant doing less of something else -- in this case, other air power capabilities where the military was underinvested relative to the threat.

Given that the military will face a broadening spectrum of conflict, and that our nation finds itself in an era of fiscal duress, the military's resources need to be invested in those capabilities that are of use across the widest possible range of scenarios. One of the ways that spectrum will broaden is with the emergence of high end, asymmetric threats. Indeed, looking at capabilities that China and others are developing -- long-range precision weapons, including anti-ship cruise and ballistic missiles, quieter submarines, advanced air defense missiles -- and what the Iranians and North Koreans are up to, they appear designed to neutralize the advantages the U.S. military has enjoyed since the end of the Cold War -- unfettered freedom of movement and the ability to project power to any region across the globe by surging aircraft, ships, troops and supplies.

The Air Force will play a lead role in maintaining U.S. military supremacy in the face of this anti-access, area-denial strategy. In fact, as you may know, the Air Force and Navy have been working together on an Air Sea battle concept that has the potential to do for America's military deterrent power at the beginning of the 21st century what Air Land Battle did near the end of the 20th. The leadership of the Air Force and the Navy, who are collaborating closely on this new doctrine, recognize the enormous potential in developing new joint war fighting capabilities -- think of naval forces in airfield defense, or stealth bombers augmented by Navy submarines -- and the clear benefits from this more efficient use of taxpayer dollars.

These high end conflict scenarios are also driving the development of new air power capabilities. Although program cuts and cancellations tend to make the headlines, the Air Force is actually investing in significant new modernization programs. The budget the president submitted to the Congress last month included funds for a joint portfolio of long-range strike systems, including a new, optionally-manned, nuclear-capable, penetrating Air Force bomber, which remains a core element of this nation's power projection capability. The budget also funds F-22 modernization that leverages radar and electronic protection technologies from the F-35 program to ensure the F-22's continued dominance. Meanwhile, the multi-billion dollar effort to modernize the radars of the F-15s will keep this key fighter available and viable into the future. Finally, a new follow-on to the AMRAAM [Advanced Medium-Range Air-to-Air Missile], the medium range air-to-air missile, will have greater range, lethality and protection against electronic jamming.

A key aspect of the service's portfolio of capabilities will remain its nuclear deterrent. Thanks to the leadership of Secretary Donley and General Schwartz, the Air Force has come a long way in restoring institutional excellence to this mission, where there is no room for error. America's nuclear deterrent -- including the missile and bomber legs maintained by the Air Force -- will remain a critical guarantor of our security, even as the nation works toward the long term goal of a world without nuclear weapons.

All told, I've described a wide range of capabilities -- from low-end asymmetric to high end asymmetric and conventional -- that the Air Force will need in the 21st century. Over the last four years, I have pushed the Air Force, and indeed all of the services, to institutionalize capabilities needed for asymmetric threats and unconventional warfare. However, as my discussion of air supremacy today should confirm, this is not because these are the only kinds of missions I believe the military must be prepared for.

But my message to the services is being distorted by some and misunderstood by others. At the Navy League last year, I suggested that the Navy should think anew about the role of aircraft carriers and the size of amphibious modernization programs. The speech was characterized by some as my doubting the value of carriers and amphibious assault capabilities altogether. At West Point last week I questioned the wisdom of sending large land armies into major conflicts in Asia, Africa, and the Middle East, and suggested the Army should think about the number and role of its heavy armored formations for the future. That has been interpreted as my questioning the need for the Army at all, or at least one its present size, the value of heavy armor generally, and the even the wisdom of our involvement in Afghanistan. I suspect that my remarks today will be construed as an attack on bombers and TACAIR [tactical air].

But my actions and my budgets over the last four years belie these mistaken interpretations. You have just heard me elaborate what we are doing to modernize the tactical air and bomber fleet. For the Navy, I have approved continuing the carrier program but also more attack submarines, a new ballistic missile submarine, and more guided missile destroyers. For the Army, we will invest billions modernizing armored vehicles, tactical communications, and other ground combat systems. And the Marine Corps' existing amphibious assault capabilities will be upgraded and new systems funded for the ship-to-shore mission. During my tenure as Secretary of Defense, I have approved the largest increases in the size of the Army and Marine Corps in decades. In 2007, I stopped the drawdown in personnel for both the Air Force and Navy. And I supported and have presided over the surges in both Iraq and Afghanistan.

All that said, I have also been trying to get across to all of the military services that they will have many and varied missions in the 21st century. As a result, they must think harder about the entire range of these missions and how to achieve the right balance of capabilities in an era of tight budgets. As I said a few moments ago, military leaders must have a comprehensive and integrated view of their service's future needs and capabilities, a view that encompasses with equal emphasis all of the services' varied missions. And service leaders must think about how to use the assets they have with the greatest possible flexibility, and how much capability they need.

This country requires all the capabilities we have in the services -- yes, I mean carriers, TACAIR, tanks, and amphibious assault -- but the way we use them in the 21st century will almost certainly not be the way they were used in the 20th century. Above all, the services must not return to the last century's mindset after Iraq and Afghanistan, but prepare and plan for a very different world than we all left in 2001.

Finally, all the services also need to think aggressively about how to truly take advantage of being part of the joint force -- whether for search and rescue, ISR, fire support, forced entry from the sea, long-range strike, or anything else. From the opening weeks of the Afghan campaign nearly a decade ago, to the complex operations required in both combat theaters, we have seen what is possible when America's military services are employing and integrating every tool at their disposal. As I mentioned earlier, the Air Force and the Navy are off to a promising start in trying to leverage each other's capabilities to overcome future anti-access and area-denial threats. But we must always guard against the old bureaucratic politics and parochial tendencies -- especially after the Iraq and Afghanistan campaigns wind down and budgets become tight. It's easier to be joint and talk joint when there's money to go around and a war to be won. It's much harder to do when tough choices have to be made within and between the military services -- between what is ideal from a particular service perspective, and what will get the job done taking into account broader priorities and considerations.

This complex world, and the wide variety of capabilities and missions I've described, should give you a sense of the tremendous and varied challenges you will face throughout your career. But there are also tremendous opportunities ahead. And in order to take advantage of these opportunities -- whether afforded by new technology or new strategic realities -- as officers you will need to show great flexibility, agility, resourcefulness, and imagination. Because your Air Force will face different kinds of conflict than it has prepared for during the last six decades, it will need leaders who think creatively and decisively in the manner of Air Force legends like Billy Mitchell, Hap Arnold, Bernard Schriever, and John Boyd. You will need to challenge conventional wisdom and call things as you see them to subordinates and superiors alike.

A related quality you will need as leaders is accountability. Great leaders embrace accountability in all that they do, and are willing to accept criticism from within or outside their organization. Holding leaders to a high standard of performance and ethics is a credit to the Air Force. But to meet that high standard going forward, you must have the discipline to cultivate integrity and moral courage from here at the Academy, and then from your earliest days as a commissioned officer. Those qualities do not suddenly emerge fully developed overnight or as a revelation after you have assumed important responsibilities. They have their roots in the small decisions you will make here and early in your career and must be strengthened all along the way. And you must always ensure that your moral courage serves the greater good: that it serves what is best for the nation and our highest values -- not a particular program or ego or service parochialism.

I would close by noting that you all entered military service in a time of war, knowing you would be at war. For my part, know that I feel personally responsible for each and every one of you, as if you were my own sons and daughters, and will for as long as I am Secretary of Defense. My only prayer is that you serve with honor and return home safely. And I personally thank you from the bottom of my heart for your service. And from one airman to another, I bid you farewell and ask God's blessing on each of you.

Q: Sir, Cadet First Class Tom Chandler. Sir, in order for the president's national security strategy to succeed, should politicians subscribe to the view that America is exceptional among its peers in the international community?

SEC. GATES: Well, I must tell you that I am very much an American exceptionalist. I believe that this country, unlike almost any other country in the world, is a force for good, and that we have accomplished that over the decades.

We've certainly made our mistakes. There are times when we have not lived up to our own values. But one of the things that makes this country great, in my view, is that we are the most self-critical and quickly self-correcting country in the world. When we get off the path, we get back on faster than anybody.

And I believe that as you look at the tens of millions, literally the hundreds of millions of people that have gained their freedom over the past -- just over the past 20 years, beginning with the collapse of the Soviet Union, and the number of people whose freedom has been protected or restored to them by military action by the United States, whether it's World War I or World War II or subsequent conflicts, Iraq, Afghanistan -- I think you put all these things together, it is a unique historical record.

And I believe that our willingness to be a force for good is unique in the world. We obviously look out for our interests. I am considered sort of the quintessential realist. But I think that if you scratch most of us, you will find that we are both idealists and romantics in terms of what this country stands for. So from my standpoint, the achievement of our objectives requires us to have a vision of ourselves as a unique country and carrying out unique roles in the world, whether it's in our national security or other arenas as well.

Q: Thank you, sir.

Q: Sir, Cadet First Class Trent Belter from CS-40.

Sir, you mentioned that the Air Force should be prepared in the future to use a broader set of capabilities. In some cases these capabilities may overlap with those of the other services.

What does that overlap mean for the joint force of the future?

SEC. GATES: Well, one of the things that's quite clear from Iraq and Afghanistan is that we have come to a place where we operate very effectively jointly. But we do not procure jointly. We -- the services still want to do their own thing.

And one of the things that we're working on right now: each of the services has its own programs for UAVs. But there are some cases where a common capability would serve everybody. One thing that's common to all of these UAVs, in many respects, are the kinds of ground stations that they have. The air -- the Army and the Marine Corps are working very closely together on a program called Shadow and -- where they are basically doing this jointly.

But one of the -- one of the reasons that we've made some of the program changes that we have in the past couple of years has been -- because of service -- was investing in a capability for itself that actually was a capability to serve another service. And so why not work together in creating that capability? Search and rescue is an example.

So I think that we have a lot of opportunities in front of us in terms of joint procurement. The Joint Strike Fighter is good example of this, where we're taking essentially the same airframe, particularly for the Air Force and the -- and the Navy and working off of that. And I think that leverage is a good thing.

Clearly there are some capabilities that will be service unique, and those will continue. I'm sure those will be well-protected, and we don't have to worry about them being vulnerable. But I do think, particularly in the current budgetary environment, that we're going to have to be more effective in looking for ways to do acquisition and procurement in more areas more jointly.

STAFF: We have time for one final question.

Q: Sir, what programs do you see being cut in the military due to our recent budget cuts?

SEC. GATES: Well, right now I think that we're in a pretty good place. I went to the Congress -- to the president and the Congress [inaudible] in 2009 with recommendations to cap or cancel 33 different programs. At this point, 32 of them have been implemented. The one that remains -- still completely -- still somewhat undecided is the fate of what I call the extra engine for the F-35.

And I think we'll know the outcome of that fairly shortly. The House budget bill does not contain any money for the extra engine. The Senate voted against it two years ago, so my hope is we can finally shed this potential extra $3 billion expenditure that we don't need.

The major program change for the 2012 budget is the cancellation of the Marines Expeditionary Fighting Vehicle. We've invested -- the program originated in the Reagan administration. We've spent $3 billion. It's many years overdue. And to complete the program would cost another $12 billion. And that's to move 4,000 Marines from ship to shore. And the Marine Corps has decided it can't afford it. It basically would eat the entire ground vehicle budget for the Marine Corps between now and 2025.

So they are basically going to accelerate the Marine Personnel Carrier. They're going to upgrade some of the amphibious assault vehicles they have now, and then they're going to start a new program for a new amphibious assault vehicle that doesn't have all the bells and whistles of the EFV [Expeditionary Fighting Vehicle].

I think that's probably the biggest program change in the FY [fiscal year] '12 budget. As we look out over the next number of years, depending on what -- I think that's -- I think we're in pretty good place right now because of the measures that we've taken over the last couple of years. We've cut or curtailed programs that, if completed, would have cost the taxpayers about $330 billion.

So I think we've done a good job of imposing some discipline internally. I think we will have to make some very difficult choices probably in the next -- toward the latter part of this decade. The president and the Congress and the services are going to face some real challenges.

For example, how can -- a lot of the ships that were built -- surface ships that were built in the Reagan era will be aging out in the 2020s, and I worry about whether the Navy can afford to continue building both the number of surface ships that it needs and also fund building and deploying a brand-new ballistic missile submarine. But we've cut that down a lot. It's now -- the original estimate was $7 billion a boat. We've got that down now to a little below $5 billion. It's still a very expensive boat. But whether they can do the same -- do both of them at the same time, I think, is going to be a challenge.

The Air Force is going to face a big challenge. Whether we can fund a new tanker, F-35s, a new bomber and all of these other capabilities simultaneously, I think, is going to be a tough question that people will have to confront. But my view is if I don't get these programs started now, a future Congress and a president, and you as senior officers, in the future won't have any options or won't have any choices. So I think it's important to get these things started.

It's a long answer to your question. My view is that from my perspective at this point, I don't see other major programs on the block for the next year or two, but we'll just have to see how serious the budget situation gets.

Thank you all very much. (Applause)

COL. LARSON: Sir, thank you so much for coming and speaking to us -- with us today. On behalf of the superintendent, the cadet wing and all of us here at the Air Force Academy, I have the two class presidents to present you with gifts: a coin from the class of 2012, and the book the "Spirit and Flight" from the class of 2011.

CADET: Sir, thank you very much for your remarks today. We really appreciate it, so thanks.

SEC. GATES: Thanks a lot.

COL. LARSON: Ladies and gentlemen, please join me in a round of applause in thanking Secretary Gates for his time, his message and his continued service and unwavering dedication to our great nation.

Exhibit 11

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