

Exhibit 5



January 13, 2009

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Department of Defense
1155 Defense Pentagon, Room 2C757
Washington, D.C. 20301-1155

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

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

To Whom it May Concern:

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

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RICHARD ZACKS
TREASURER

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

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

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

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

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

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

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

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

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

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

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

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

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I. Requested Records

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

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

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

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

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

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

- C. the total number (including estimates) of individuals killed in drone strikes since September 11, 2001 and the total number (including estimates) of individuals of each particular status or affiliation killed, including those whose status or affiliation is unknown.
9. All records created after September 11, 2001 pertaining to who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings, including but not limited to any records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel in the use of UAVs for the purpose of executing targeted killings.
10. All records created after September 11, 2001 pertaining to the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone, including but not limited to CIA personnel, government contractors, and military personnel.²

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II. Application for Expedited Processing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Application for Waiver or Limitation of Fees

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

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

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

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

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

* * *

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

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

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

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

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

Sincerely,



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AMERICAN CIVIL LIBERTIES
UNION FOUNDATION