

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION and THE	)	
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	15 Civ. 1954
	)	
U.S. 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.	)	

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**DECLARATION OF ANDREW L. LEWIS**

I, Andrew L. Lewis, Rear Admiral, United States Navy, pursuant to 28 U.S.C. § 1746, make the following declaration.

1. I am the Vice Director of Operations for the Joint Staff at the Pentagon and have served in this capacity since August 17, 2015. In my capacity as the Vice Director of Operations I assist in the execution of all Department of Defense (DoD) operational matters outside of the continental United States. As such, I coordinate and communicate frequently with the staffs of the Unified Combatant Commands, to include U.S. Africa Command, U.S. Central Command, U.S. European Command, U.S. Pacific Command, U.S. Southern Command, U.S. Strategic Command, U.S. Transportation Command and U.S. Special Operations Command, as well as with the Intelligence Community, to ensure on behalf of the Chairman of the Joint Chiefs of Staff that the President of the United States' and Secretary of Defense's direction and guidance

are conveyed and executed, and that combatant command concerns are addressed by the Joint Staff. I evaluate and synthesize such concerns and advise and make recommendations to the Chairman of the Joint Chiefs of Staff regarding our worldwide military operations.

2. I make the following statements based upon my years of service and experience in the United States military, personal knowledge, and information made available to me in my official capacity. I have served in the United States Armed Forces for over thirty years at various levels of command and staff. As a commander of U.S. forces, I commanded the Carrier Strike Group 12 and served as the Commander of the Naval Strike and Air Warfare Center. As the Vice Director of Operations, I receive and review daily operational plans and briefings, reports, and intelligence analyses from the Combatant Commands, the Joint Staff, and the Intelligence Community. I assist with the supervision of the National Military Command Center, which is responsible for monitoring worldwide events affecting national security and U.S. interests twenty-four hours a day, seven days a week. I have traveled in an official capacity to a number of countries where U.S. forces are conducting ongoing operations against al Qa'ida and associated terrorist groups, engaging with senior military and government officials. As a result of my experiences, I have extensive knowledge of our military forces and their capabilities, current operations, and the conventional and unconventional forces and capabilities of the enemies arrayed against us.

3. I am familiar with the Freedom of Information Act (FOIA) request, dated October 15, 2013, which plaintiffs sent to the DoD Office of Freedom of Information (OFOI) seeking 1) “[a]ny 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,” 2) “[a]ny and all records pertaining to the process by which the government designated individuals or groups for targeted killing,” 3) “[a]ny and all records pertaining to the 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) [a]ny and all records pertaining to the number and identities of individuals killed or injured in targeted-killing strikes. The request was also sent to the Department of Justice and its components Office of Legal Counsel (OLC) and Office of Information Policy (OIP), the Department of State (DOS), and the Central Intelligence Agency (CIA).

4. The purpose of this declaration is to detail DoD’s search for responsive records and articulate the basis for the withholding of documents located in the DoD search for records and referred to DoD from other defendant agencies.

#### **Administrative Background**

5. On July 9, 2015, this Court stayed the government’s obligation to respond to requests (3) and (4), and affirmed that stay by denying plaintiffs’ motion for reconsideration on July 27, 2015.

6. Regarding requests 1) and 2), plaintiffs’ have agreed to narrow the scope to i) exclude records already processed in connection with their other FOIA requests that are currently the subject of litigation, ii) limit records to strikes outside of Afghanistan, Iraq, and Syria, iii) exclude publically available documents, iv) exclude draft documents as long as the drafts were finalized and are listed on the public *Vaughn* index, v) exclude documents from other defendant agencies, as long as those documents are listed on the other Agency’s public *Vaughn* index, vi) exclude documents that were prepared for litigation or in connection with processing or litigation

of FOIA requests, and vii) for DoD, limit responsive documents to those dated after March 1, 2012.

#### DoD Searches

7. After plaintiffs' FOIA request became the subject of litigation, the DoD General Counsel's Office (Office of Litigation Counsel) (DoD OGC), based upon discussions with DoD personnel familiar the subject matter of the request, determined that certain offices within DoD OGC were most likely to contain records responsive to requests 1) and 2). Those offices were Legal Counsel, International Affairs, and Intelligence. Due to the specialized and classified subject matter of the request, litigation counsel spoke directly with attorneys that had the proper clearances and responsibility for the subject matter of the FOIA requests. Those attorneys searched their electronic and paper files and provided potentially responsive material to litigation counsel, who reviewed the documents and determined whether they were within the scope of the request. Litigation counsel also asked the office of Legal Counsel to the Chairman of the Joint Chiefs of Staff to review their electronic and paper files for potentially responsive documents.

8. Searches of all of the listed DoD offices involved searches for both electronic, including email, and paper records, including all levels of classification. The review of the electronic records employed key word searches using such terms as: "Presidential Policy Guidance," "targeted killing(s)," and "associated force." Because of the specialized knowledge of the individuals searching their records, search terms also included names and/or code names of persons known to them to be a contemplated target of a counterterrorism operation. Those names and/or code names cannot be listed in this unclassified declaration.

9. In addition to documents located in the searches conducted by DoD, responsive material located by other defendant agencies, which either originated within DoD or contained

DoD equities, were referred to DoD for its review. Pursuant to this Court's order of April 30, 2015, the government submitted a classified index listing the 50 documents located by or referred to DoD. The classified index details the exemptions and basis therefore for all documents withheld by the government in full or in part. In this declaration, I will describe the types of documents located by the defendant agencies with DoD equities and the basis for withholding certain information.

**Documents Released in Full**

10. DoD released, in full, the prepared statement by then DoD General Counsel Stephen Preston to the Senate Foreign Relations Committee on May 21, 2014, regarding the framework under U.S. law for ongoing military counterterrorism and detention operations. DoD also released a transcript of that hearing.

**Documents Released in Part**

11. The National Defense Authorization Act for fiscal year 2014 included requirements, under sections 1041-1043, that DoD brief certain members of Congress on the definitions and the process to determine if an entity is an affiliate, associated force, and/or an adherent of al Qaeda or the Taliban, provide an explanation of the legal and policy considerations and approval process used in determining whether an individual or group of individuals could be a target of a lethal or capture operation conducted by the Armed Forces outside of the United States and outside of Afghanistan, and provide quarterly briefings outlining DoD counterterrorism operations and related activities.

12. DoD released, in part, three reports to Congress that were created pursuant to these requirements. DoD reviewed those three documents line by line and released all segregable material. The remaining portions of those three reports were withheld under FOIA Exemption 1,

5 U.S.C. § 552(b)(1), which provides that the FOIA disclosure provisions do not apply to matters that are: (A) specifically authorized under criteria established by an Executive Order to be kept from disclosure in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such an Executive Order.

13. Executive Order (E.O.) E.O. 13526 establishes a framework for “classifying” and “safeguarding” national security information, “including information relating to defense against transnational terrorism.” Section 6.1(i) of E.O. 13526 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(cc) of E.O. 13526 defines “national security” as the “national defense or foreign relations of the United States.”

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

15. In Section 1.3(a)(2) of E.O. 13526, the President authorized agency heads to designate officials that may classify information originally as TOP SECRET. In turn, and pursuant to Section 1.3(c) of E.O. 13526, the Deputy Secretary of Defense, acting pursuant to a

delegation from the Secretary of Defense, has authorized me to exercise TOP SECRET original classification authority.

16. The withheld portions of the reports detail classified military operations and plans, including the process for determining whether groups of individuals are proper targets lethal or combat operations, the policy considerations important in making those determinations, and factors considered in developing potential military operations. These portions are currently and properly classified, and must be withheld under E.O. 13526 Sections 1.4(a) (military plans, weapons systems, or operations). Al Qaeda and other adversaries review publicly available information to attempt to disrupt or avoid U.S. intelligence-gathering and counterterrorism operations. Disclosure of the classified factors and procedures for potential targeting decisions would assist adversaries in avoiding justice. Further, identifying whether a group is or is not currently considered an associated force could afford an operational advantage to those groups.

#### **Presidential Policy Guidance**

17. DoD located a copy of a classified document, which provides detailed guidance from the President to his most senior advisors on the standards and processes to be applied for approval of direct action against terrorist targets.

18. This document is currently and properly classified and exempt, in part, from disclosure under E.O. 13526 Sections 1.4(a) (military plans, weapons systems, or operations) and 1.4(c) (intelligence sources and methods). Providing our adversaries with information about the process for the approval of military action would help terrorist organizations modify their profile and behavior to avoid potential targeting by the United States. Further, revealing nonpublic



details of the PPG could be used by adversaries to design countermeasures or deduce intelligence sources and methods.

19. Finally, portions of the PPG that discuss sensitive intelligence sources and methods are exempt pursuant to Exemption 3, 5 U.S.C. § 552(b)(3), which allows for the withholding of information specifically referenced by statute. In this case, the National Security Act of 1947, as amended, 50 U.S.C. § 3093(e) (the National Security Act), protects “intelligence sources and methods from unauthorized disclosure.”

20. Parts of this document have been publicly acknowledged in a Public Fact Sheet. The acknowledged information, however, cannot reasonably be segregated from material that has not been officially acknowledged and as to which FOIA exemptions have not been waived. Specifically, the PPG is protected in its entirety under the presidential communications privilege, as described in the unclassified Declaration of John Bies.

#### **Other Documents Withheld in Full**

21. DoD asserted Exemption 1, 5 U.S.C. § 552(b)(1), over the remaining 46 responsive documents withheld in full because all of the records contain currently and properly classified information. The National Security Act similarly exempts from disclosure intelligence sources and methods, and therefore, DoD asserted Exemption 3, 5 U.S.C. § 552(b)(3), over 30 of the responsive documents denied in full. Moreover, 40 of the records withheld in full are protected under Exemption 5, 5 U.S.C. § 552(b)(5), which permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Thus, Exemption 5 allows an agency to exempt information that is normally privileged in the civil discovery context. These privileges include



the deliberative process privilege, the attorney-client privilege, and the presidential communications privilege, among others.

#### Operational Plans

22. DoD identified responsive documents that pertain to operational plans for potential military strikes, created in accordance with the PPG. These documents include final operational plans and draft operational plans for military strikes against individuals and terrorist organizations in various geographic regions and countries.

23. All of these documents are currently and properly classified and exempt from disclosure under E.O. 13526 Section 1.4(a) (military plans, weapons systems, or operations). Again, providing our enemies with information regarding operational details of potential strikes would assist our adversaries in avoiding future counterterrorism operations by either letting them know that the U.S. considers them a target or, alternatively, by letting individuals know that their activities, to date, have not warranted a response. And similarly, disclosure of these documents would provide information to organizations and individuals about the sort of conduct that would make them susceptible to a U.S. counterterrorism operation, allowing our enemies to adapt and avoid detection. Moreover, disclosing this information would notify individuals or terrorist organizations that the United States government has approved counterterrorism operations in a particular country or geographic region.

24. Further, information contained in some of these documents is currently and properly classified and exempt from disclosure under E.O. 13526 Section 1.4(c) (intelligence sources and methods). Disclosure of this information could lead to the identification of sources and methods of DoD's underlying intelligence collection efforts. Disclosure of this information could also

reflect the facts available to DoD at a specific point in time, which could show the breadth, capabilities, and limitations of the U.S. military and its intelligence collection apparatus.

25. For many of the same reasons, Exemption 3 and the National Security Act exempt intelligence sources and methods referenced in the classified records.

26. In addition to being properly classified, some of these documents are protected under Exemption 5 and the deliberative process privilege. As noted above, DoD identified drafts of operational plans, which represent an interim stage in the intra-agency decision-making process before a final plan has been formulated. If draft documents are routinely made public, DoD officials will be less likely to recommend changes to drafts or review drafts for accuracy and completeness on account of concerns that their preliminary recommendations would be made public. The disclosure of such drafts could also lead to confusion about the ultimate composition of the plan, if any, and thus, they are privileged and exempt from disclosure.

27. Moreover, some of these documents are protected under Exemption 5 and the presidential communications privilege. These documents reflect communications between DoD and senior administration officials for the purpose of presidential decision-making. Disclosure of such presidential communications would inhibit the President's ability to engage in effective communication and decision-making on matters of national security.

#### Documents Addressing the Application of the PPG

28. DoD identified responsive documents that discuss DoD's application of the PPG. These documents include: (1) the Secretary of Defense's classified guidance for implementation of the PPG, (2) analysis of the implementation of the PPG, and (3) deliberations regarding whether any changes to the PPG should be considered.

29. All of these documents are currently and properly classified and exempt from disclosure under E.O. 13526 Section 1.4(a) (military plans, weapons systems, or operations). Providing our adversaries with information about the process for the approval of military action would help terrorist organizations modify their profile and behavior to avoid potential targeting by the United States. Indeed, revealing documents that spell out requirements of the PPG, analyze the efficacy of the PPG, and suggest changes to the PPG would provide terrorist entities valuable information about how the United States approves and conducts counterterrorism operations, which would undermine national security.

30. In addition, some of the documents in this category are protected under Exemption 5 and the deliberative process privilege. Specifically, several records make recommendations regarding changes to the PPG, which constitute an interim stage in the decision-making process about improving the process by which the U.S. government approves military action in response to terrorist threats. Disclosure of these documents would inhibit the frank communications and free exchange of ideas that the privilege is designed to protect. And the release of these pre-decisional suggestions would chill the candid discussions that are necessary to strengthen such an important government policy by making individual criticisms publicly known. In addition, disclosing the preliminary recommendations for alterations to the process could cause confusion about the true composition of the PPG requirements. These deliberative documents, therefore, remain privileged and exempt from disclosure.

#### Legal Analysis

31. Many of the responsive records also include legal analysis by the DoD General Counsel and other legal advisors, including legal reviews of proposed operational plans against individuals or groups and legal analysis of terrorist organizations in consideration of whether

they are lawful targets under domestic and international law. This analysis exists in the form of informal e-mails or formal memoranda, and includes both internal DoD discussions as well as larger discussions across Executive Branch attorneys involved in national security. The precise number of documents containing legal analysis remains currently and properly classified.

32. These legal discussions are deliberative in nature, and thus, protected under Exemption 5 and the deliberative process privilege. The legal analysis often takes the form of legal recommendations from DoD about whether a military strike can be conducted under the Authorization for the Use of Military Force ("AUMF"). But this legal opinion constitutes only one interim step in the larger inter-agency process for approving a counterterrorism operation. Indeed, dialogue between officials delegated to make national security decisions form an integral part of the give-and-take of inter-agency deliberations, which would be curtailed should such deliberative records be revealed. As a consequence, such legal memoranda and informal e-mail are both pre-decisional and deliberative, and therefore, properly privileged and exempt from disclosure.

33. Like the operational plans, some of the documents containing legal analysis are protected under Exemption 5 and the presidential communications privilege. As stated above, these documents reflect communications between DoD and senior administration officials for the purpose of presidential decision-making. Disclosure of such presidential communications would inhibit the President's ability to engage in effective communication and decision-making on matters of national security.

34. Moreover, much of the legal analysis is protected by Exemption 5 and the attorney-client privilege. In these instances, the records consist of communication between DoD officials and the Department of Justice or other Executive Branch components in connection with a

request for the provision of legal advice, as well as information provided by agency personnel in furtherance of that advice, which has since remained confidential. The disclosure of this type of record would inhibit open communication between client-agencies and their lawyers, thereby depriving the agencies of the full and frank counsel. Accordingly, these confidential communications remains protected under the attorney-client privilege.

35. Further, the legal analysis often contains classified factual information protected from disclosure under Exemption 1. First, some of the classified factual information would tend to reveal intelligence sources and methods, and therefore, the information is exempt under E.O. 13526 Section 1.4(c) (intelligence sources and methods). Second, all of these documents concern potential military operations, and are also properly withheld under E.O. 13526 Section 1.4(a) (military plans, weapons systems, or operations). The release of information regarding which groups or individuals are contemplated targets of U.S. governmental action would harm national security by either informing those groups and individuals to heighten security and evasive techniques or by implying to other terrorist organizations that their actions will not elicit a response from the United States, thus emboldening their activities.

36. Similarly, Exemption 3 and the National Security Act exempt intelligence sources and methods referenced in the documents reflecting legal analysis.

37. The documents mentioned herein and listed on the classified index are all currently and properly classified. The information is owned by and under the control of the U.S. government. I also have determined that the information has not been classified in order to conceal violations of law, inefficiency, 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.

**Exemption 6**

38. Exemption 6, 5 U.S.C. § 552(b)(6), permits the government to withhold information about individuals when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” DoD has a policy, which has been consistently upheld by District Courts, to withhold personally identifying information of those members of DoD who are at the military rank of Colonel (O6) or below and the rank of GS-15 or below. The rationale for this policy is that disclosing the names of the individuals involved could subject such individuals to annoyance or harassment in their private lives. Moreover, release of these low-level individuals’ names would not serve the core purpose of the FOIA, as it would not show “what the government is up to.” Thus, there is no public interest outweighing the significant personal privacy interests involved.

39. This policy impacts many documents located by the defendant agencies, both those released in part and withheld in full. DoD attempted to consistently redact any personally identifying information of personnel that were not senior level employees. These redactions included email addresses, names within emails or other documents, phone numbers, and office locations.

**Officially Acknowledged Material**

40. I am aware that this Court previously identified six “Listed Facts” that it determined to be “officially acknowledged material,” discussed by the Court on Pages 5-11 of the revised Memorandum Decision and Order, dated June 23, 2015, issued in *ACLU v. U.S. Dep’t of Justice*, Civil No. 12-794. The six facts that this Court ruled had been officially acknowledged are: (1) the fact that the government uses drones to carry out targeted killing overseas; (2) the fact that both the Central Intelligence Agency and DOD have an intelligence interest in the use of drones

to carry out targeted killings; (3) the fact that the Central Intelligence Agency and DoD have an operational role in conducting targeted killings; (4) information about the legal basis (constitutional, statutory, common law, international law and treaty law) for engaging in the targeted killings abroad, including specifically the targeted killing of a U.S. national; (5) the fact that the Government carried out the targeted killing of Anwar al-Aulaqi; and (6) the fact that the FBI was investigating Samir Khan's involvement in Jihad. I am also familiar with the purported "disclosures" identified by the ACLU in its motion in this case, many of which do not constitute official disclosures for the reasons explained in the government's memorandum of law. I certify that each of the documents (or portions of documents) withheld by DoD either does not contain any officially acknowledged material, or if such material is contained within the withheld documents (or portions of documents), it is not reasonably segregable from material that is exempt from disclosure, as discussed in greater depth in the classified index.

41. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 2nd day of October, 2015, in Arlington, VA.



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Rear Admiral Andrew L. Lewis, USN  
Vice Director of Operations, J-3, Joint Staff



## DEPARTMENT OF DEFENSE INDEX

	Document	FOIA Exemption(s)
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4	Classified Memorandum	b(1), b(3), b(5)
5	Classified Memorandum	b(1), b(3)
6	Classified Memorandum	b(1)
7	Letters to Congress forwarding Classified Report Submitted in accordance with the National Defense Authorization Act of Fiscal Year 2014 (partial release)	b(1) – Released in Part
8	Report Submitted in accordance with the National Defense Authorization Act of Fiscal Year 2014 (partial release)	b(1) – Released in Part
9	Report Submitted in accordance with the National Defense Authorization Act of Fiscal Year 2014 (partial release)	b(1) – Released in Part
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11	Classified E-mail Chain	b(1), b(5), b(6)
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13	Classified E-mail Chain	b(1), b(5), b(6)
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50	Classified Memorandum	b(1), b(3), b(5)
51	Prepared Statement of Stephen W. Preston, DoD General Counsel, Committee on Foreign Relations, United States Senate, May 21, 2014	Released in Full
52	Congressional Transcript, Senate Foreign Relations Committee, Hearing on the Authorization for Use of Military Force, May 21, 2014	Released in Full