

15-2956

IN THE
United States Court of Appeals
FOR THE
Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellants,

– v. –

UNITED STATES DEPARTMENT OF JUSTICE, including its component OFFICE OF LEGAL
COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE, and CENTRAL INTELLIGENCE
AGENCY,
Defendants–Appellees.

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

JOINT APPENDIX: VOLUME 1 OF 3 (JA1-JA260)

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***ACLU v. DOJ*, No. 15-2956 (2d Cir.)**

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**U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:12-cv-00794-CM**

American Civil Liberties Union et al v. U.S. Department of Justice et al
Assigned to: Judge Colleen McMahon
Related Cases: [1:11-cv-09336-CM](#)
[1:15-cv-01954-CM](#)
Cause: 05:552 Freedom of Information Act

Date Filed: 02/01/2012
Date Terminated: 07/22/2015
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

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V.

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JA3

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Defendant

Central Intelligence Agency

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Date Filed	#	Docket Text
02/01/2012	<u>1</u>	COMPLAINT against Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Filing Fee \$ 350.00, Receipt Number 465401028481) Document filed by The American Civil Liberties Union Foundation, American Civil Liberties Union.(mro) (Entered: 02/01/2012)
02/01/2012		SUMMONS ISSUED as to Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice, U.S. Attorney and U.S. Attorney General. (mro) (Entered: 02/01/2012)
02/01/2012		CASE REFERRED TO Judge Colleen McMahon as possibly related to 11-cv-9336. (mro) (Entered: 02/01/2012)
02/01/2012		Case Designated ECF. (mro) (Entered: 02/01/2012)
02/02/2012		CASE ACCEPTED AS RELATED. Create association to 1:11-cv-09336-CM. Notice of Assignment to follow. (pgu) (Entered: 02/02/2012)
02/02/2012	<u>2</u>	NOTICE OF CASE ASSIGNMENT to Judge Colleen McMahon. Judge Unassigned is no longer assigned to the case. (pgu) (Entered: 02/02/2012)
02/02/2012		Magistrate Judge James C. Francis IV is so designated. (pgu) (Entered: 02/02/2012)
02/02/2012	<u>3</u>	ORDER SCHEDULING AN INITIAL PRETRIAL CONFERENCE: Initial Conference set for 2/24/2012 at 11:30 AM in Courtroom 14C, 500 Pearl Street, New York, NY 10007 before Judge Colleen McMahon. (Signed by Judge Colleen

JA4

		McMahon on 2/2/2012) (mro) (Entered: 02/02/2012)
02/03/2012	4	NOTICE OF APPEARANCE by Sarah Sheive Normand on behalf of Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice (Normand, Sarah) (Entered: 02/03/2012)
02/08/2012	11	MOTION for Eric A.O. Ruzicka to Appear Pro Hac Vice. Document filed by The American Civil Liberties Union Foundation.(sjo) (Entered: 02/16/2012)
02/08/2012	12	MOTION for Colin Wicker to Appear Pro Hac Vice. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (sjo) (Entered: 02/16/2012)
02/08/2012	13	MOTION for Michael P. Weinbeck to Appear Pro Hac Vice. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (sjo) (Entered: 02/16/2012)
02/09/2012	5	SUMMONS RETURNED EXECUTED. U.S. Department of Justice served on 2/3/2012, answer due 2/24/2012. Service was made by Mail. Document filed by The American Civil Liberties Union Foundation; American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	6	SUMMONS RETURNED EXECUTED. Central Intelligence Agency served on 2/3/2012, answer due 2/24/2012. Service was made by mail. Document filed by The American Civil Liberties Union Foundation; American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	7	SUMMONS RETURNED EXECUTED. U.S. Department of Defense served on 2/3/2012, answer due 2/24/2012. Service was made by mail. Document filed by The American Civil Liberties Union Foundation; American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	8	SUMMONS RETURNED EXECUTED. Service was made by mail. Document filed by The American Civil Liberties Union Foundation, American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	9	CERTIFICATE OF SERVICE of Summons Returned Executed served on United States Attorney for the Southern District of New York on 2/3/12. Service was made by Mail. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/10/2012	10	SUMMONS RETURNED EXECUTED. Service was made by mail. Document filed by The American Civil Liberties Union Foundation, American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/10/2012)
02/16/2012		CASHIERS OFFICE REMARK on 13 Motion to Appear Pro Hac Vice, 11 Motion to Appear Pro Hac Vice, 12 Motion to Appear Pro Hac Vice in the amount of \$600.00, paid on 02/08/2012, Receipt Number 1029168,1029169,1029170. (jd) (Entered: 02/16/2012)
02/17/2012	14	ORDER FOR ADMISSION PRO HAC VICE granting 13 Motion for Michael P. Weinbeck to Appear Pro Hac Vice. (Signed by Judge Colleen McMahon on 2/17/2012) (tro) (Entered: 02/17/2012)

02/17/2012	15	ORDER FOR ADMISSION PRO HAC VICE granting 12 Motion for Colin Wicker to Appear Pro Hac Vice. (Signed by Judge Colleen McMahon on 2/17/2012) (tro) (Entered: 02/17/2012)
02/17/2012	16	ORDER FOR ADMISSION PRO HAC VICE granting 11 Motion for Eric A.O. Ruzicka to Appear Pro Hac Vice. (Signed by Judge Colleen McMahon on 2/17/2012) (tro) (Entered: 02/17/2012)
02/24/2012		Minute Entry for proceedings held before Judge Colleen McMahon: Initial Pretrial Conference held on 2/24/2012. Decision: Initial conference held. A briefing schedule was entered. The Government must move before April 13, 2012; responses to its motion are due May 11, 2012, at which time the opponents are free to cross-move; and the Governments reply and, if appropriate, opposition to the cross-motion is due May 25, 2012. Cross-movants should not file a reply unless instructed to do so by the Court. (Submitted By Scott Danner). (mde) (Entered: 02/24/2012)
03/05/2012	17	ANSWER to 1 Complaint,. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice.(Normand, Sarah) (Entered: 03/05/2012)
04/04/2012	18	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A.O. Ruzicka dated 4/3/2012 re: I am writing pursuant to Rule IV.C of this Court's Individual Practices and Procedures to request a page-limit extension to the ACLU's briefing in this matter. The ACLU respectfully requests that the Court permit it to submit a brief not to exceed 40 pages. ENDORSEMENT: OK. (Signed by Judge Colleen McMahon on 4/4/2012) (rjm) (Entered: 04/04/2012)
04/09/2012	19	ENDORSED LETTER addressed to Judge Colleen McMahon from Sarah S Normand dated 4/9/2012 re: Request for a ten day extension of time to file a motion for summary judgment and to file a consolidated brief of up to 40 pages in both cases. ENDORSEMENT: Ok, but dont ask for any more time. If government official can give speeches about this matter without creating security problem, any involved agency can. (Signed by Judge Colleen McMahon on 4/9/2012) (cd) (Entered: 04/09/2012)
04/20/2012	20	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated 4/19/2012 re: Counsel requests a ten-day extension of Plaintiff ACLU's deadline to file its Response to the Government's Motion for Summary Judgment. ENDORSEMENT: Yes, everything moves back 10 days. (Signed by Judge Colleen McMahon on 4/19/2012) (djc) (Entered: 04/20/2012)
04/23/2012	21	ENDORSED LETTER addressed to Judge Colleen McMahon from Stuart Delery and Preet Bharara dated 4/23/2012 re: We write respectfully on behalf of the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the "Government") to seek a further extension, until May 21, 2012, of the Government's deadline to file its consolidated motion for summary judgment. ENDORSEMENT: I have read Director Clapper's declaration (which must remain under seal - believe me, I appreciate the irony) and I will grant the extension requested by the government. The time to file its motion is extended to May 21, 2012. (Motions due by 5/21/2012.) (Signed by Judge Colleen McMahon on 4/23/2012) (rjm) (Entered: 04/23/2012)

04/23/2012	22	ENDORSED LETTER addressed to Judge Colleen McMahon from Stuart Delery and Preet Bharara dated 4/23/12 re: Counsel for the defendant requests a further extension, until 5/21/12, of the Government's deadline to file his consolidated motion for summary judgment. ENDORSEMENT: I have read Director Clepper's declaration (which must remain under seal-believe me, I appreciate the irony) and I will grant the extension requested by the government. The time to file its motion is extended to May 21, 2012. (Motions due by 5/21/2012.) (Signed by Judge Colleen McMahon on 4/23/2012) (mro) (Entered: 04/24/2012)
05/21/2012		Minute Entry for proceedings held before Judge Colleen McMahon: Telephone Conference held on 5/21/2012. Decision: Phone conference held. Defendants must move on or before June 20, 2012. Plaintiffs have four weeks thereafter to file responses.(Submitted By Benjamin T. Alden). (mde) (Entered: 05/21/2012)
06/19/2012	23	ENDORSED LETTER addressed to Judge Colleen McMahon from Susan S. Normand dated 6/18/12 re: Counsel for the Government seeks leave to file a consolidated brief of up to fifty pages in both cases in support of the Government's motion for summary judgment. ENDORSEMENT: Ok. (Signed by Judge Colleen McMahon on 6/19/2012) (mro) (Entered: 06/19/2012)
06/20/2012	24	MOTION for Summary Judgment. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice.(Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	25	MEMORANDUM OF LAW in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	26	DECLARATION of Sarah S. Normand in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	27	DECLARATION of John F. Hackett in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	28	DECLARATION of John Bennett in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	29	DECLARATION of John E. Bies in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	30	DECLARATION of Robert R. Neller in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8

		Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	31	DECLARATION of Douglas R. Hibbard in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F) (Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	32	NOTICE of Classified Filing re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/21/2012)
07/18/2012	33	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated 7/17/2012 re: I am writing today to request that the page limit for the American Civil Liberties Union and American Civil Liberties Union Foundation's (collectively, the ACLU) memorandum of law in support of their motion for summary judgment and in opposition to the government's motion for summary judgment be increased by ten pages to a total of fifty pages.ENDORSEMENT: Ok. (Signed by Judge Colleen McMahon on 7/18/2012) (ama) (Entered: 07/18/2012)
07/18/2012	34	MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>]. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Wicker, Colin) (Entered: 07/18/2012)
07/18/2012	35	MEMORANDUM OF LAW in Support re: 34 MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>]. [<i>MEMORANDUM IN SUPPORT OF PLAINTIFFS THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</i>]. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Wicker, Colin) (Entered: 07/18/2012)
07/18/2012	36	DECLARATION of COLIN WICKER in Support re: 34 MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>]. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit EXHIBITS 1-5, # 2 Exhibit EXHIBITS 6-10, # 3 Exhibit EXHIBITS 11-17, # 4 Exhibit EXHIBIT 18, # 5 Exhibit EXHIBITS 19 AND 20, EX 20, PART 1 OF 2, # 6 Exhibit EXHIBIT 20, PART 2 OF 2, # 7 Exhibit EXHIBIT 21-24)(Wicker, Colin) (Entered: 07/18/2012)
07/20/2012	37	ENDORSED LETTER addressed to Judge Colleen McMahon from Sarah S. Normand dated 7/20/2012 re: We write respectfully on behalf of defendants the Department of Justice and its component, the Office of Legal Counsel; the Department of Defense and its component, the United States Special Operations Command; and the Central Intelligence Agency (collectively, the "Government") in the above-named related cases brought pursuant to the Freedom of Information Act ("FOIA") to request that the Court set a deadline of August 8, 2012, for the filing of the Government's reply and opposition to plaintiffs' respective cross-motions in these cases. ENDORSEMENT: OK., (Responses due by 8/8/2012.,

		Replies due by 8/8/2012.) (Signed by Judge Colleen McMahon on 7/20/2012) (lmb) (Entered: 07/20/2012)
08/08/2012	38	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/08/2012	39	DECLARATION of Mark Herrington in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/08/2012	40	DECLARATION of Douglas Hibbard in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/09/2012	41	MEMORANDUM OF LAW in Opposition re: 34 MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>].. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	42	DECLARATION of Mark Herrington in Opposition re: 34 MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>].. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	43	DECLARATION of Douglas Hibbard in Opposition re: 34 MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>].. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/16/2012	44	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i> . Document filed by American Civil Liberties Union. (Attachments: # 1 Affidavit of Michael P. Weinbeck in Support of Application to Withdraw as Counsel, # 2 Affidavit of Service, # 3 proposed Order)(Weinbeck, Michael) Modified on 8/16/2012 (db). (Entered: 08/16/2012)
08/16/2012		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael P Weinbeck to RE-FILE Document 44 MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i>. ERROR(S): Supporting Documents are filed separately, each receiving their own document #. (db) (Entered: 08/16/2012)
08/16/2012	45	MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i> . Document filed by American Civil Liberties Union.(Weinbeck, Michael) (Entered: 08/16/2012)
08/16/2012	46	AFFIDAVIT of MICHAEL P. WEINBECK in Support re: 45 MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i> .. Document filed by American Civil Liberties Union. (Weinbeck, Michael) (Entered: 08/16/2012)

08/16/2012	47	AFFIDAVIT OF SERVICE of APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL served on Sarah S. Normand on 08/16/12. Service was accepted by BY ECF FILING SYSTEM. Document filed by American Civil Liberties Union. (Weinbeck, Michael) (Entered: 08/16/2012)
08/22/2012	48	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated 8/13/2012 re: request leave to file a reply brief of no more than 10 pages by 8/24/2012 also ask that an oral argument be scheduled for this matter. ENDORSEMENT: Ok. (Replies due by 8/24/2012.) (Signed by Judge Colleen McMahon on 8/20/2012) (jar) (Entered: 08/22/2012)
08/24/2012	49	REPLY MEMORANDUM OF LAW in Support re: 34 MOTION for Summary Judgment [<i>PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT</i>]. [<i>REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT</i>]. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 08/24/2012)
08/24/2012	50	AFFIDAVIT OF SERVICE of Reply Memorandum served on Sarah S. Normand on 08/24/2012. Service was accepted by by ECF filing system. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 08/24/2012)
10/02/2012	51	ENDORSED LETTER addressed to Judge Colleen McMahon, from Sarah S. Normand, dated 10/1/2012, re: on behalf of defendants, request an unopposed extension of time, until October 10, 2012, for the parties to submit simultaneous supplemental letter briefs addressing the Second Circuit's recent decision in Brennan Center v. Department of Justice, No. 11-4599 (2d Cir. Sept. 20, 2012). ENDORSEMENT: OK. (Signed by Judge Colleen McMahon on 10/2/2012) (ja) (Entered: 10/02/2012)
10/04/2012	52	APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL: granting 45 Motion to Withdraw as Attorney. Attorney Michael P Weinbeck terminated.ENDORSEMENT: GRANTED. (Signed by Judge Colleen McMahon on 10/04/2012) (ama) (Entered: 10/04/2012)
10/05/2012	53	NOTICE OF APPEARANCE by Brett Max Kaufman on behalf of American Civil Liberties Union, The American Civil Liberties Union Foundation (Kaufman, Brett) (Entered: 10/05/2012)
10/10/2012	54	MOTION for Nathan Freed Wessler to Withdraw as Attorney. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Wessler, Nathan) (Entered: 10/10/2012)
01/02/2013	55	ORDER terminating 34 Motion for Summary Judgment; terminating 24 Motion for Summary Judgment. The Government's motion for summary judgment is granted except to the extent of permitting the DoD to submit a supplemental and more fulsome justification for why the deliberative process privilege applies to the two Unclassified Memos on its Vaughn Index. Plaintiffs' cross motions for summary judgment are denied except as to the open issue described above. This constitutes the decision and order of the Court. The Clerk of the Court is directed to remove the motions at Docket 11 Civ. 9336 # 10 and 19 and Docket 12 Civ. 794 # 24 and 34 from the Court's list of open motions.(Signed by Judge Colleen

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		McMahon on 1/2/2013) (ago) (Additional attachment(s) added on 1/2/2013: # 1 Order) (mde). (Entered: 01/02/2013)
01/03/2013	56	CORRECTED OPINION GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT: The Government's motion for summary judgment is granted except to the extent of permitting the DoD to submit a supplemental and more detailed justification for why the deliberative process privilege applies to the two Unclassified Memos on its Vaughn Index. Plaintiffs' cross motions for summary judgment are denied except as to the open issue described above. This constitutes the decision and order of the Court. The Clerk of the Court is directed to remove the motions at Docket 11 Civ. 9336 # 10 and 19 and Docket 12 Civ. 794 # 24 and 34 from the Court's list of open motions. (Signed by Judge Colleen McMahon on 1/3/2013) Copies Sent By ECF By Chambers. (cd) (Entered: 01/03/2013)
01/09/2013	57	MOTION OF NATHAN FREED WESSLER TO WITHDRAW AS COUNSEL granting 54 Motion to Withdraw as Attorney. Attorney Nathan Freed Wessler terminated. ENDORSEMENT: GRANTED Remove name from Docket. (Signed by Judge Colleen McMahon on 1/09/2013) (ama) Modified on 1/15/2013 (ama). Modified on 1/17/2013 (ama). (Entered: 01/10/2013)
01/17/2013	58	FILING ERROR - ELECTRONIC FILING OF NON-ECF DOCUMENT - DECLARATION of Brigadier General Richard C. Gross in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) Modified on 1/18/2013 (db). (Entered: 01/17/2013)
01/18/2013		***NOTE TO ATTORNEY THAT THE ATTEMPTED FILING OF Document No. 58 HAS BEEN REJECTED. Note to Attorney Sarah Sheive Normand : THE CLERK'S OFFICE DOES NOT ACCEPT LETTERS FOR FILING, either through ECF or otherwise, except where the judge has ordered that a particular letter be docketed. Letters may be sent directly to a judge. (db) (Entered: 01/18/2013)
01/18/2013	59	DECLARATION of Brigadier General Richard C. Gross in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 01/18/2013)
01/18/2013	62	ORDER: The Government has until 6 PM on February 1, 2013 to submit supplemental declarations justifying the applicability of the deliberative process privilege to the two Unclassified Memos on the Department of Defense's Vaughn Index. (Signed by Judge Colleen McMahon on 1/18/2013) Copies Sent By ECF TO ALL COUNSEL (pl) (Entered: 01/30/2013)
01/22/2013	60	DECISION AND ORDER: Accordingly, the Government's motion for summary judgment with respect to the Unclassified Memos is granted and Plaintiffs' cross motions for summary judgment are denied. The Clerk of the Court is directed to enter judgment for the Government and to close both cases. This constitutes the decision and order of the Court. (Signed by Judge Colleen McMahon on 1/22/2013) (djc) (Entered: 01/22/2013)
01/24/2013	61	CLERK'S JUDGMENT That for the reasons stated in the Court's Decision and

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		Order dated January 22, 2013, the Governments motion for summary judgment with respect to the Unclassified Memos is granted and Plaintiffs cross motions for summary judgment are denied; accordingly, both of the cases are closed. original Document # 35 filed in 11 Civ. 9336. (Signed by Clerk of Court Ruby Krajick on 1/24/13) (Attachments: # 1 Notice of Right to Appeal)(dt) (Entered: 01/24/2013)
02/01/2013	63	FILING ERROR - NO ORDER SELECTED FOR APPEAL - NOTICE OF APPEAL. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. Filing fee \$ 455.00, receipt number 0208-8197154. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Ruzicka, Eric) Modified on 2/1/2013 (nd). (Entered: 02/01/2013)
02/01/2013		***NOTE TO ATTORNEY REGARDING DEFICIENT APPEAL. Note to Attorney Eric Ruzicka to RE-FILE Document No. 63 Notice of Appeal. The filing is deficient for the following reason: the Order being appealed was NOT selected. Re-file the document as a Corrected Notice of Appeal event and select the correct Order being appealed. (nd) (Entered: 02/01/2013)
02/01/2013	64	CORRECTED NOTICE OF APPEAL re: 63 Notice of Appeal, 61 Clerk's Judgment,. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 02/01/2013)
02/01/2013		Appeal Fee Paid electronically via Pay.gov: for 64 Corrected Notice of Appeal. Filing fee \$ 455.00. Pay.gov receipt number r 0208-8197154, paid on 2/1/2013. (nd) (Entered: 02/01/2013)
02/01/2013		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 64 Corrected Notice of Appeal. (nd) (Entered: 02/01/2013)
02/01/2013		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 40 Declaration in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 33 Endorsed Letter, Set Deadlines/Hearings,,,,, 29 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 13 MOTION for Michael P. Weinbeck to Appear Pro Hac Vice. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 7 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 48 Endorsed Letter, Set Deadlines/Hearings,, 16 Order on Motion to Appear Pro Hac Vice, 22 Endorsed Letter, Set Deadlines,,,,, 17 Answer to Complaint filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 62 Order, 31 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 5 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 45 MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i> . filed by American Civil Liberties Union, 60 Order, 51 Endorsed Letter, 18 Endorsed Letter, 43 Declaration in Opposition to Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 14 Order on Motion to Appear Pro Hac Vice, 55 Order on Motion for Summary Judgment,,,,,,, 2 Notice of Case Assignment/Reassignment, 58 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of

Justice, Central Intelligence Agency, [19](#) Endorsed Letter, [6](#) Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [25](#) Memorandum of Law in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [64](#) Corrected Notice of Appeal filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [15](#) Order on Motion to Appear Pro Hac Vice, [35](#) Memorandum of Law in Support of Motion, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [10](#) Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [34](#) MOTION for Summary Judgment [*PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT*]. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [3](#) Order for Initial Pretrial Conference, [63](#) Notice of Appeal, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [61](#) Clerk's Judgment, [28](#) Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [24](#) MOTION for Summary Judgment. filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [42](#) Declaration in Opposition to Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [26](#) Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [44](#) MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL*. filed by American Civil Liberties Union, [30](#) Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [57](#) Order on Motion to Withdraw as Attorney, [27](#) Declaration in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [20](#) Endorsed Letter, [47](#) Affidavit of Service Other filed by American Civil Liberties Union, [54](#) MOTION for Nathan Freed Wessler to Withdraw as Attorney. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [50](#) Affidavit of Service Other filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [23](#) Endorsed Letter, [32](#) Notice (Other) filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [8](#) Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [38](#) Reply Memorandum of Law in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [49](#) Reply Memorandum of Law in Support of Motion, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [1](#) Complaint, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [9](#) Certificate of Service Other, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [4](#) Notice of Appearance filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [41](#) Memorandum of Law in Opposition to Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [21](#) Endorsed Letter, Set Deadlines,,,,, [46](#) Affidavit in Support of Motion filed by American Civil Liberties Union, [39](#) Declaration in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, [53](#) Notice of Appearance filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, [37](#) Endorsed Letter, Set

		Deadlines,,,,,, 36 Declaration in Support of Motion,, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 59 Declaration in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 11 MOTION for Eric A.O. Ruzicka to Appear Pro Hac Vice. filed by The American Civil Liberties Union Foundation, 12 MOTION for Colin Wicker to Appear Pro Hac Vice. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 52 Order on Motion to Withdraw as Attorney, 56 Memorandum & Opinion,,, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 02/01/2013)
04/21/2014	65	OPINION of USCA as to 64 Corrected Notice of Appeal filed by American Civil Liberties Union, The American Civil Liberties Union Foundation USCA Case Number 13-445(con). Appeal from the January 24, 2013, judgment of the United States District Court for the Southern District of New York (Colleen McMahon, District Judge), dismissing, on motion for summary judgment, a suit under the Freedom of Information Act seeking documents relating to targeted killings of United States citizens carried out by drone aircraft. We conclude that (1) a redacted version of the OLC-DOD Memorandum must be disclosed, (2) a redacted version of the classified Vaughn index (described below) submitted by OLC must be disclosed, (3) [redacted], (4) the Glomar and "no number, no list" responses are insufficiently justified, (5) DOD and CIA must submit Vaughn indices to the District Court for in camera inspection and determination of appropriate disclosure and appropriate redaction, and (6) the OIP search was sufficient. We therefore affirm in part, reverse in part, and remand. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 04/21/2014. (nd) (Entered: 04/21/2014)
06/26/2014	66	[PARTIAL] MANDATE of USCA (Certified Copy) as to 64 Corrected Notice of Appeal filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. USCA Case Number 13-445(con). The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court record and the parties' briefs. Upon consideration thereof, IT IS HEREBY ORDERED, ADJUDGED and DECREED that a partial judgment is entered and the matter is REMANDED as directed in the Court's order of June 26, 2014, and consistent with paragraph (3) of the "Conclusion" section of the Court's June 23, 2014, revised opinion. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 06/26/2014. (nd) (Additional attachment(s) added on 6/27/2014: # 1 Revised Opinion, # 2 Opinion of rehearing) (nd). (Entered: 06/27/2014)
06/30/2014	67	ORDER: This court has received a partial mandate from the United States Court of Appeals for the Second Circuit, directing that, at this time: (3) other legal memoranda prepared by OLC and at issue here must be submitted to the District Court for in camera inspection and determination of waiver of privileges and appropriate redaction; New York Times Co. v. US. Dep't of Justice, 13-422 L, 2014 WL 2838861 (2d Cir. June 23, 2014) (Mandate issued on June 26, 2014). Accordingly, the Government is directed to comply with Paragraph 3 of the conclusion of the Second Circuit's amended opinion of June 23, 2014, by providing this court with the following requests as set forth herein this Order. The Government has 21 days to comply. SO ORDERED. (Signed by Judge Colleen McMahon on 6/30/2014) (ja) (Entered: 06/30/2014)

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07/07/2014	68	FIRST LETTER MOTION for Extension of Time to File <i>Motion in Response to 6/30/14 Order</i> addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 07/07/14. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice.(Normand, Sarah) (Entered: 07/07/2014)
07/08/2014	69	LETTER RESPONSE to Motion addressed to Judge Colleen McMahon from Jameel Jaffer dated 07/08/2014 re: 68 FIRST LETTER MOTION for Extension of Time to File <i>Motion in Response to 6/30/14 Order</i> addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 07/07/14. . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Jaffer, Jameel) (Entered: 07/08/2014)
07/08/2014	70	LETTER REPLY to Response to Motion addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 07/08/14 re: 68 FIRST LETTER MOTION for Extension of Time to File <i>Motion in Response to 6/30/14 Order</i> addressed to Judge Colleen McMahon from AUSA Sarah S. Normand dated 07/07/14. . Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 07/08/2014)
07/09/2014	71	ORDER denying 68 Letter Motion for Extension of Time to File: This court has already settled on a procedure for conducting the in camera review necessitated by the mandate; the June 30 order explains that procedure to the parties. That process gives the Government an opportunity to explain, under seal and in camera, why it has not waived potentially applicable privileges with respect to all or any portion of the documents that the court is required to review. It also permits the Government to suggest other redactions that may be necessary before the opinions can be produced to plaintiffs. I expect the Government to comply with the procedure set by the Court. The parties have apparently agreed to a short postponement of the date by which the Government must produce the documents contemplated by the mandate. I am agreeable to their chosen date, which is August 15, 2014. (Signed by Judge Colleen McMahon on 7/9/2014) (tn) (Entered: 07/09/2014)
08/15/2014	72	NOTICE of Lodging of Classified Documents. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/15/2014)
08/18/2014	73	MANDATE of USCA (Certified Copy) as to 64 Corrected Notice of Appeal filed by American Civil Liberties Union, The American Civil Liberties Union Foundation USCA Case Number 13-445(con). Ordered, Adjudged and Decreed that the final judgment is entered and the matter is REMANDED as directed in the Court's opinion of July 10, 2014. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 08/18/2014. (Attachments: # 1 Opinion of rehearing motion)(nd) (Entered: 08/18/2014)
08/18/2014		Transmission of USCA Mandate to the District Judge re: 73 USCA Mandate,. (nd) (Entered: 08/18/2014)
09/05/2014	74	MOTION for Brett Max Kaufman to Withdraw as Attorney . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.

		(Kaufman, Brett) (Entered: 09/05/2014)
09/05/2014	75	ENDORSED LETTER addressed to All Counsel in New York Times v. Department of Justice and ACLU v. Department of Justice from Judge McMahon dated 9/5/2014 re: Scheduling. ENDORSEMENT: I have begun work on carrying out the first mandate received from the Court of Appeals, relating to Item (3) of that court's Conclusion. I hope to have a decision well before the end of the month. Meanwhile, I have received a second mandate, this one relating to Item (5) of the Court's conclusion, which directs the production of Vaughn indices by the Department of Defense and the Central Intelligence Agency for in camera inspection. I expect to receive said Vaughn indices by September 25, 2014, together with any affidavits or briefs the agencies wish to file concerning the protectability or disclosability of particular listings on these indices. Finally, to the extent that the plaintiffs seek the production of any documents on the OLC Vaughn Index that was ordered to be disclosed in redacted form (See Item (2) of the Second Circuit's Conclusion), they must file a request for production, specifying the identifying number of each item they wish disclosed, by September 19, 2014. The Government may have until October 3, 2014 to provide the court with affidavits and briefs explaining the following herein. (Signed by Judge Colleen McMahon on 9/5/2014) (kgo) Modified on 9/5/2014 (kgo). (Entered: 09/05/2014)
09/19/2014	76	LETTER addressed to Judge Colleen McMahon from Plaintiff ACLU dated 09/19/2014 re: Plaintiffs' Request for Production and Parties' Proposed Briefing Schedule. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Shamsi, Hina) (Entered: 09/19/2014)
09/22/2014	77	MEMO ENDORSEMENT granting 74 Motion to Withdraw as Attorney. ENDORSEMENT: granted (***)Attorney Brett Max Kaufman terminated.) (Signed by Judge Colleen McMahon on 9/22/2014) (kgo) (Entered: 09/22/2014)
09/22/2014	78	MEMO ENDORSEMENT on re: 76 Letter, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. ENDORSEMENT: 1. The schedule are acceptable 2. You will have my decision, referenced on page 2 of this letter, this week (at least, the government will have it) - no issues will remain unreached. 3 The government should prepare for me a modified OCC Vaughn index, eliminating all documents not sought by the ACLU (including draft memorandum) and the documents listed in the carryover paragraph. (Signed by Judge Colleen McMahon on 9/22/2014) (kgo) (Entered: 09/22/2014)
09/22/2014		Set/Reset Deadlines: Cross Motions due by 12/3/2014. Motions due by 11/14/2014. Responses due by 12/19/2014. Replies due by 1/9/2015. (kgo) (Entered: 09/22/2014)
10/03/2014	79	MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> . Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. Responses due by 10/31/2014(Normand, Sarah) (Entered: 10/03/2014)
10/03/2014	80	MEMORANDUM OF LAW in Support re: 79 MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> . . Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 10/03/2014)

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10/03/2014	81	DECLARATION of John E. Bies in Support re: 79 MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> .. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Bies Declaration Part 2, # 2 Exhibit A (Part 1), # 3 Exhibit A (Part 2), # 4 Exhibit A (Part 3))(Normand, Sarah) (Entered: 10/03/2014)
10/03/2014	82	DECLARATION of Martha M. Lutz in Support re: 79 MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> .. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 10/03/2014)
10/03/2014	83	DECLARATION of Rear Admiral Sinclair M. Harris in Support re: 79 MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> .. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 10/03/2014)
10/03/2014	84	NOTICE of Notice of Lodging of Classified Documents re: 79 MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> .. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 10/03/2014)
10/20/2014	85	LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated October 20, 2014 re: Parties' Proposed Briefing Schedule. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 10/20/2014)
10/21/2014	86	MEMO ENDORSEMENT on re: 85 Letter filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. ENDORSEMENT: OK - but I anticipate that the release of the opinion's unclassified portions may not be particularly helpful to you, but I am OK with the extension. It is difficult to make rulings about the in camera review of classified documents in an unclassified manner.... (Signed by Judge Colleen McMahon on 10/21/2014) (kgo) (Entered: 10/22/2014)
10/24/2014	87	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION for Michael Weinbeck to Appear Pro Hac Vice . Filing fee \$ 200.00. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) Modified on 10/24/2014 (bcu). (Entered: 10/24/2014)
10/24/2014		>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice regarding Document No. 87 MOTION for Michael Weinbeck to Appear Pro Hac Vice . Filing fee \$ 200.00. Motion and supporting papers to be reviewed by Clerk's Office staff.. The filing is deficient for the following reason(s): Missing Certificate of Good Standing.Missing Proposed Order. Re-file the document as a Corrected Motion to Appear Pro Hac Vice and attach a valid Certificate of Good Standing, issued within the past 30 days and attach a Proposed Order. (bcu) (Entered: 10/24/2014)
10/24/2014	88	MOTION for Michael Weinbeck to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.

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		(Attachments: # 1 Affidavit Certificate of Good Standing, # 2 Text of Proposed Order Proposed Order)(Weinbeck, Michael) (Entered: 10/24/2014)
10/24/2014		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 88 MOTION for Michael Weinbeck to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (bcu) (Entered: 10/24/2014)
10/31/2014	89	ORDER DIRECTING RELEASE OF UNREDACTED VERSION OF REMAND OPINION #1 (RELATING TO ITEM 3): I have received and reviewed the October 17, 2014 ex parte submission from the Department of Justice following its classification review of the court's first decision on remand from the United State Court of Appeals for the Second Circuit. The decision was submitted to the Government on September 30, 2014. I disagree with the Government's redaction of the bulk of the first full paragraph and the second and third paragraphs on page 9, which as drafted by this court contain not a whit of classified material (the Government does not suggest otherwise), and which I do not believe would tend to reveal any classified information. In order to preserve that issue for appellate review, I will release on the public docket the opinion with all the Government's proposed redactions today, along with this cover note indicating my conclusion about this material. Should the Second Circuit agree with the Government that the material was properly redacted, nothing will be lost; should it agree with my view that nothing the Government has redacted on page 9 should be redacted, it will so indicate. The full opinion will remain under seal. Looking to the future: I have before me the ACLU's letter of September 19, 2014, in which it indicates what additional documents from the OLC Vaughn Index it wishes disclosed, as well as the Government's sealed, ex parte response to that request and its motion for summary judgment with respect to the OLC documents. (Item 2 on Remand; Court's Order of September 5, 2014, Docket# 75; Motion for Summary Judgment dated October 3, 2014, Docket #79). Consistent with the parties' briefing schedule, I hope to have that decision out before Christmas. Finally, I will not be able to address Remand, Item 5, the Vaughn Indices from the Department of Defense and the CIA, until early next year, as briefing will not be complete until January 9. I had hoped to get all of this work done this year, as I have a heavy trial calendar for the first half of 2015. I will, therefore, not grant any extensions of the already generous briefing schedule with respect to these long-overdue Vaughn Indices. (Signed by Judge Colleen McMahon on 10/31/2014) (kgo) (Entered: 10/31/2014)
10/31/2014	90	DECISION ON REMAND WITH RESPECT TO ISSUE (3)(REDACTED): (U) This constitutes the decision and order of the court. Before releasing this decision to plaintiffs and to the public, I am providing a copy to the Government, to check classification status (which we have tried our best to get right on a paragraph by paragraph basis) and to propose redactions. (U) To the extent it should be necessary, the court certifies that an immediate entry of partial judgment as to this aspect of the case would be appropriate, pursuant to Fed. R. Civ. P.54(b), because (1) this order finally disposes of a discrete and severable issue in this action, to wit the disclosability of one specific type of legal document (legal opinions from the OLC) sought from one party defendant (the Department of Justice); and (2) there is no just reason for delay. These FOIA requests were made nearly three years ago, and it is in the public interest that any disclosable documents become public

		as without further delay. Also, there are many open issues in this case, which are completely severable from Remand Issue 3; and (if the parties' briefing schedule is any indication) it will take many months to resolve those issues. (U) The mandate directs that any appeal from this order and the partial judgment to be entered thereon be referred to a panel consisting of Judges Newman, Cabranes, and Pooler. (Signed by Judge Colleen McMahon on 9/30/2014) (kgo) (Entered: 10/31/2014)
11/07/2014	91	MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Wicker, Colin) (Entered: 11/07/2014)
11/07/2014	92	MEMORANDUM OF LAW in Support re: 91 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Wicker, Colin) (Entered: 11/07/2014)
11/07/2014	93	DECLARATION of Colin Wicker in Support re: 91 MOTION for Summary Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment..</i> Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit 1-A, # 2 Exhibit 1-B, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10-A, # 12 Exhibit 10-B, # 13 Exhibit 11, # 14 Exhibit 12, # 15 Exhibit 13, # 16 Exhibit 14)(Wicker, Colin) (Entered: 11/07/2014)
11/12/2014	94	ORDER FOR ADMISSION PRO HAC VICE granting 88 Motion for Michael Weinbeck to Appear Pro Hac Vice. (Signed by Judge Colleen McMahon on 11/12/2014) (kgo) (Entered: 11/12/2014)
11/13/2014	95	MOTION for Reconsideration <i>Plaintiffs' Notice of Motion for Reconsideration</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Weinbeck, Michael) (Entered: 11/13/2014)
11/13/2014	96	MEMORANDUM OF LAW in Support re: 95 MOTION for Reconsideration <i>Plaintiffs' Notice of Motion for Reconsideration. .</i> Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) (Entered: 11/13/2014)
11/14/2014	97	ORDER DIRECTING LIMITED GOVERNMENT RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION AND OTHERWISE DENYING THE MOTION: The ACLU has moved for reconsideration of the court's September 30 order (released in redacted form on October 31). The ACLU asks the court to reconsider the September 30 ruling "insofar as that ruling was predicated on a determination that the ACLU had waived its right to seek release of information relating to the factual basis for the government's targeting of Anwa-al-Aulaqi (the "Factual Basis Information"); that the government's withholding of the Factual Basis Information was lawful; or that the Second Circuit resolved the question of whether the withholding of the Factual-Basis Information was lawful." (Brief in Support of Motion for Reconsideration at pp. 1-

		2). I am directing that the Government respond to the motion by next Friday, November 21. After reviewing the September 30 opinion, in its classified and unredacted form (to which, of course, plaintiffs are not privy), I direct that the Government limit its response to addressing the ACLU's argument in the context of Bies Ex. B, the unredacted version of Bies Exhibit K, which the court ordered disclosed in the September 30 decision. There is no need to address any other document; the ACLU's motion is summarily and sua sponte denied as to all other documents. As is customary with this court on motions for reconsideration, no reply will be accepted. Once I receive the Government's response, you will have an immediate decision. (Responses due by 11/21/2014.) (Signed by Judge Colleen McMahon on 11/14/2014) (kgo) (Entered: 11/14/2014)
11/14/2014	98	MOTION for Summary Judgment . Document filed by Central Intelligence Agency, U.S. Department of Defense. Responses due by 12/3/2014(Normand, Sarah) (Entered: 11/14/2014)
11/14/2014	99	MEMORANDUM OF LAW in Support re: 98 MOTION for Summary Judgment . . Document filed by Central Intelligence Agency, U.S. Department of Defense. (Normand, Sarah) (Entered: 11/14/2014)
11/14/2014	100	DECLARATION of Martha M. Lutz in Support re: 98 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, U.S. Department of Defense. (Attachments: # 1 Part 2 of Declaration, # 2 Exhibit A)(Normand, Sarah) (Entered: 11/14/2014)
11/14/2014	101	DECLARATION of Rear Admiral Sinclair M. Harris in Support re: 98 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, U.S. Department of Defense. (Attachments: # 1 Exhibit A)(Normand, Sarah) (Entered: 11/14/2014)
11/14/2014	102	DECLARATION of John E. Bies in Support re: 98 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, U.S. Department of Defense. (Normand, Sarah) (Entered: 11/14/2014)
11/14/2014	103	NOTICE of Lodging of Classified Documents re: 98 MOTION for Summary Judgment .. Document filed by Central Intelligence Agency, U.S. Department of Defense. (Normand, Sarah) (Entered: 11/14/2014)
11/21/2014	104	MEMORANDUM OF LAW in Opposition re: 95 MOTION for Reconsideration <i>Plaintiffs' Notice of Motion for Reconsideration</i> . . Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 11/21/2014)
11/28/2014	105	REPLY MEMORANDUM OF LAW in Support re: 79 MOTION for Summary Judgment <i>as to Remaining OLC Documents</i> . . Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 11/28/2014)
12/03/2014	106	MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Weinbeck, Michael) (Entered: 12/03/2014)
12/03/2014	107	FILING ERROR - WRONG EVENT TYPE SELECTED FROM MENU -

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		MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Weinbeck, Michael) Modified on 12/4/2014 (db). (Entered: 12/03/2014)
12/03/2014	108	FILING ERROR - DEFICIENT DOCKET ENTRY - DECLARATION of Michael Weinbeck in Support re: 107 MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD</i> .. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit 1)(Weinbeck, Michael) Modified on 12/4/2014 (db). (Entered: 12/03/2014)
12/04/2014		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - EVENT TYPE ERROR. Note to Attorney Michael P Weinbeck to RE-FILE Document 107 MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD</i>. Use the event type Memorandum in Support of Motion found under the event list Replies, Opposition and Supporting Documents, then link to 106 Motion. (db) (Entered: 12/04/2014)
12/04/2014		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael P Weinbeck to RE-FILE Document 108 Declaration in Support of Motion. ERROR(S): Document linked to filing error. Refile and link to 106 Motion. (db) (Entered: 12/04/2014)
12/04/2014	109	MEMORANDUM OF LAW in Support re: 106 MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD</i> . . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) (Entered: 12/04/2014)
12/04/2014	110	DECLARATION of Michael Weinbeck in Support re: 106 MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD</i> .. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit 1)(Weinbeck, Michael) (Entered: 12/04/2014)
12/09/2014	111	ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION denying 95 Motion for Reconsideration. For substantially the reasons set forth in the Government's Memorandum of Law in Opposition to the ACLU's Motion for Reconsideration of Court's Decision on Remand (Docket #104), the motion for reconsideration is denied insofar as it addresses Bies Ex. B/K. The motion has already been denied insofar as it relates to the other documents reviewed by the court this go-around. The only thing I really need to note before this aspect of the case is handed off to the Second Circuit is that I read the Second Circuit's decision in the same way the Government does - that is, the Court of Appeals has concluded that the Government has waive FOIA exemptions only to the extent of legal analysis. If I misunderstand the Court of Appeals, am sure the panel will correct me. The Clerk of Court should remove the motion at Docket # 95 from the court's list of open motions. (Signed by Judge Colleen McMahon on 12/9/2014) (kgo) Modified on 12/9/2014 (kgo). (Entered: 12/09/2014)
12/19/2014	112	REPLY MEMORANDUM OF LAW in Support re: 91 MOTION for Summary

		Judgment <i>Plaintiffs' Notice of Motion for Partial Summary Judgment. and in Opposition to Defendants' Motion for Summary Judgment.</i> Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) (Entered: 12/19/2014)
12/19/2014	113	REPLY MEMORANDUM OF LAW in Support re: 98 MOTION for Summary Judgment . <i>and in Opposition to Plaintiffs' Cross-Motion for Summary Judgment.</i> Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 12/19/2014)
12/24/2014	114	NOTICE OF INTERLOCUTORY APPEAL from 90 Order,,,,,. Document filed by American Civil Liberties Union. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Jaffer, Jameel) (Entered: 12/24/2014)
12/24/2014		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 114 Notice of Interlocutory Appeal. (nd) (Entered: 12/24/2014)
12/24/2014		Appeal Fee Due: for 114 Notice of Interlocutory Appeal. \$505.00 Appeal fee due by 1/7/2015. (nd) (Entered: 12/24/2014)
12/24/2014		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 114 Notice of Interlocutory Appeal filed by American Civil Liberties Union were transmitted to the U.S. Court of Appeals. (nd) (Entered: 12/24/2014)
12/30/2014		Appeal Fee Payment: for 114 Notice of Interlocutory Appeal. Filing fee \$ 505.00, receipt number 0208-10450157. (Jaffer, Jameel) (Entered: 12/30/2014)
01/08/2015	115	ORDER REQUIRING REVISED SUBMISSIONS: The in camera submission received from the CIA and the Department of Defense on November 14, 2014, is not readily reviewable (notwithstanding the representation that it was formatted "for the convenience of the court"). It must, therefore, be redone, and promptly. I understand that the Index I am requesting may be somewhat repetitive, and will likely be considerably longer than what the Government has heretofore provided. However, it will be easy for the court to follow, and will, therefore, serve the "convenience of the court." The CIA and the Defense Department have until January 20 to get me a document for review that conforms to the parameters I have set. For future reference, OLC and any other agency should follow the same format. (Signed by Judge Colleen McMahon on 1/7/2015) (kgo) (Entered: 01/08/2015)
01/09/2015	116	REPLY MEMORANDUM OF LAW in Support re: 106 MOTION for Summary Judgment <i>and in Opposition to the Motion for Summary Judgment Submitted by the CIA and DOD.</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) (Entered: 01/09/2015)
01/20/2015	117	NOTICE of Lodging of Classified Document re: 98 MOTION for Summary Judgment ., 115 Order,,,,. Document filed by Central Intelligence Agency, U.S. Department of Defense. (Normand, Sarah) (Entered: 01/20/2015)
03/23/2015	118	ORDER REGARDING EX PARTE PROCEEDINGS: IT IS HEREBY ORDERED that the Clerk of Court note the following proceedings on the public

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		docket of this case: On January 7, 2015, the Court issued an Order Requiring Revised Submissions, see Dkt. No. 115, directing the defendants to provide a revised classified submission with regard to the documents withheld by the Central Intelligence Agency ("CIA") and Department of Defense ("DOD") (the "January 7 Order Requiring Revised Submission"); On January 20, 2015, the government lodged with the Classified Information Security Officer, for secure transmission to the Court, a classified response to the January 7 Order Requiring Revised Submission; On January 29, 2015, the Court issued a classified ex parte Order directing the defendants to provide certain information to the Court (the "January 29 Ex Parte Order"); On February 24, 2015, the Court directed the government to provide a revised classified submission with regard to the remaining documents withheld by the Office of Legal Counsel (the "February 24 Order Requiring Revised Submission"); and On March 3, 2015, the government lodged with the Classified Information Security Officer, for secure transmission to the Court, a classified response to the January 29 Ex Parte Order. SO ORDERED. (Signed by Judge Colleen McMahon on 3/23/2015) (ajs) (Entered: 03/23/2015)
04/21/2015	119	NOTICE OF APPEARANCE by Matthew Douglas Spurlock on behalf of American Civil Liberties Union, The American Civil Liberties Union Foundation. (Spurlock, Matthew) (Entered: 04/21/2015)
05/08/2015	120	MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) (Entered: 05/08/2015)
05/08/2015	121	FILING ERROR - WRONG EVENT TYPE SELECTED FROM MENU - MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>AFFIDAVIT OF MICHAEL P. WEINBECK IN SUPPORT OF APPLICATION TO WITHDRAW AS COUNSEL</i> . Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Weinbeck, Michael) Modified on 5/12/2015 (db). (Entered: 05/08/2015)
05/12/2015		***NOTICE TO ATTORNEY TO RE-FILE DOCUMENT - EVENT TYPE ERROR. Notice to Attorney Michael P Weinbeck to RE-FILE Document 121 MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>AFFIDAVIT OF MICHAEL P. WEINBECK IN SUPPORT OF APPLICATION TO WITHDRAW AS COUNSEL</i>. Use the event type Affidavit in Support of Motion found under the event list Replies, Opposition and Supporting Documents. (db) (Entered: 05/12/2015)
05/12/2015	122	AFFIDAVIT of Michael P. Weinbeck in Support re: 120 MOTION for Michael P. Weinbeck to Withdraw as Attorney <i>APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL</i> .. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Weinbeck, Michael) (Entered: 05/12/2015)
05/13/2015	123	ORDER OF NOTIFICATION: The court intends to issue a supplemental opinion after reviewing the items produced in response to (1) and (2), at which time the court will also enter a Final Order and Judgment that disposes of the entire case. I am doing this to avoid further piecemeal appeals. I specifically direct the Agencies to gather or create and produce the requested materials immediately,

		even though it will probably be several weeks until the May 13 opinion can be filed in full under seal and made publicly available in redacted form. Additional delay is in no one's interest. The Clerk of the Court is directed to remove the motions at Docket #79, 91, 98 and 106 from the Court's list of open motions. (Signed by Judge Colleen McMahon on 5/13/2015) (kgo) (Entered: 05/13/2015)
06/23/2015	137	INTERNET CITATION NOTE: Material from decision with Internet citation re: 128 Order. (Attachments: # 1 1, # 2 2, # 3 3, # 4 4) (rj) (Entered: 12/29/2015)
06/24/2015	124	NOTICE TO THE PARTIES: In the draft decision dated May 13, 2015 that was provided to the Government for security clearance review, the court identified a number of documents that OLC, CIA and DOD were required to produce for in camera review. The agencies did provide those documents to the court, and they have been reviewed. While it was originally my intention to draft a separate opinion containing those rulings, it quickly became clear that it would be much easier to insert those rulings into the May 13 draft decision, and I did so. The original rulings (the ones requiring the in camera production of the documents) remain in the text, followed by a "Ruling After In Camera Review." The court is today providing the Government with a revised decision for security review; I assume that can happen in a matter of days, since the Government has been working off the old draft for more than a month. I would like to sign off on a final version with all security notations before the end of this month. (Signed by Judge Colleen McMahon on 6/23/2015) (kgo) (Entered: 06/24/2015)
06/29/2015	125	NOTICE of Lodging of Classified Documents re: 124 Order,,,,, 123 Order,,,,. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/29/2015)
07/01/2015	126	LETTER MOTION for Extension of Time to <i>Complete Classification Review of June 23, 2015 Decision</i> addressed to Judge Colleen McMahon from Sarah S. Normand dated 07/01/2015. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice.(Normand, Sarah) (Entered: 07/01/2015)
07/06/2015	127	ORDER granting 126 Letter Motion for Extension of Time. OK. (Signed by Judge Colleen McMahon on 7/6/2015) (kgo) (Entered: 07/06/2015)
07/16/2015	128	MEMORANDUM DECISION AND ORDER RULING ON THE MOTIONS FOR SUMMARY JUDGMENT BY THE CENTRAL INTELLIGENCE AGENCY, THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL: To summarize the court's rulings: FOIA exemptions have been waived as to the following "officially acknowledged material" herein. The agencies have 45 days from the date on which this opinion is submitted for classification review (May 13, 2015) to submit to the court, on a document-by-document basis, (1) a certification that the document does not contain any "officially acknowledged material", or (2) a certification that the document contains "officially acknowledged material", OLC, CIA, and DOD have thirty days from May 13, 2015 to produce for in camera review the following documents herein. (As further set forth in this Order.) (Signed by Judge Colleen McMahon on 6/23/2015) (Attachments: # 1 Text of Proposed Order, # 2 Text of Proposed Order, # 3 Text of Proposed Order)(kgo) (Entered: 07/16/2015)
07/16/2015	129	ORDER WITH RESPECT TO THE GOVERNMENT'S SUBMISSION OF JULY

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1, 2015: Notwithstanding my disinclination to second-guess myself, I did re-review a document already reviewed in camera. After reading the OLC affidavit and the Response to Order dated June 23, 2015, I retrieved and reviewed Documents 144 and 145. The document referred to in the Fifth Classified Bies Declaration at the bottom of page 17 is, according to my records, Document 145, not Document 144 (as stated in the Bies Declaration). After a second in camera review, I revise my earlier ruling by directing the redaction of two sentences from the first bullet point prior to disclosure. Accordingly, I will revise the June 23 opinion (when I receive a copy with full security legending from the Government) before its final release, so that it states, at page 66, that the first sentence, the fourth sentence and the last sentence in the bullet point should be redacted, and the rest of the bullet point disclosed. As far as this court is concerned, this completes the record with respect to the documents listed on the Vaughn Indices that were provided to this court following remand from the United States Court of Appeals for the Second Circuit. The case can go up on appeal and after appeal it can finally be closed. Or not quite. In its Response to Order Dated June 23, 2015 (Submitted Ex Parte and in Camera), the Government has indicated an intent to move for reargument as to the seven documents that the court ordered released in whole or in part. Much of the Response reads like just such a motion. There comes a point when this exercise must end. I have spent literally hundreds of hours locked in a secure facility reviewing first Vaughn Indices and then documents, and drafting a 160 page opinion. I have no interest in addressing yet another motion as to which no opposition can be filed. I believe that my decision is clear, and I have certainly attempted to be internally consistent. Rather than waste time and precious resources trying to convince me that I made a mistake in ordering the Government to disclose all or some part of seven documents out of the hundreds originally listed on the Vaughn Indices, I suggest that the Government simply take this matter back to the Court of Appeals, where it can try to convince the panel that I erred, or was inconsistent, or whatever. I appreciate that the revisions from the May 13 draft in the June 23 opinion are complicating the Government's effort to finish the classification exercise. Get it done as quickly as possible. That is all I ask. (As further set forth in this Order.) (Signed by Judge Colleen McMahon on 7/6/2015) (kgo) (Entered: 07/16/2015)

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ENDORSED LETTER addressed to Sarah Normand, AUSA from Judge Colleen McMahon dated 6/23/2015 re: Attached decision. ENDORSEMENT: The final decision, incorporating the in camera review rulings as to documents recently produced to me, is attached. I will refer to it hereafter as the "June 23 Decision." (As further set forth in this letter.) (Signed by Judge Colleen McMahon on 6/23/2015) (kgo) (Entered: 07/17/2015)

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ORDER AMENDING DECISION OF JUNE 23, 2015, DIRECTING THE UNSEALING OF CERTAIN ORDERS PREVIOUSLY FILED, DIRECTING THE ENTRY OF JUDGMENT, AND CLOSING CASE: The court, for its final order in this case: The court's Memorandum Decision and Order dated June 23, 2015, (the "June 23 Decision"), together with paragraph-by-paragraph classification notations as subsequently inserted by the Government, is the final decision and order of the court after remand, and is hereby ordered filed under seal in the manner used for highly classified material. A redacted copy of the June 23 Decision was publicly filed yesterday (Docket #128), and the following as further set forth herein. This order ends the case. The Clerk of the Court shall enter

		judgment directing that: 1. OLC produce redacted versions of OLC Documents 46, 144 and 145, and the complete text of Document 150; 2. CIA produce Tab C to Document 59 and redacted versions of Documents 109 and 113; to Plaintiffs, and otherwise GRANTING the motions of OLC and CIA for summary judgment dismissing the case as against them; and GRANTING in its entirety the motion of DOD for summary judgment dismissing the case as against it. The Clerk of the Court shall thereafter close the file. (As further set forth in this Order.) (Signed by Judge Colleen McMahon on 7/17/2015) (kgo) (Entered: 07/17/2015)
07/17/2015		Transmission to Judgments and Orders Clerk. Transmitted re: 131 Order of Dismissal, to the Judgments and Orders Clerk. (kgo) (Entered: 07/17/2015)
07/22/2015	132	CLERK'S JUDGMENT: That for the reasons stated in the Court's Order dated July 17, 2015, judgment is entered as follows:1.OLC shall produce redacted versions of the OLC Documents 46, 144 and 145, and the complete text of Document 150; 2.CIA shall produce Tab C to Document 59 and redacted versions of Documents 109 and 113; to Plaintiffs, and otherwise the motions of the OLC and CIA for summary judgment dismissing the case as against them are granted; the motion of DOD for summary judgment dismissing the case against it is granted in its entirety; accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 7/22/2015) (Attachments: # 1 Notice of Right to Appeal, # 2 Notice of Right to Appeal)(dt) (Main Document 132 replaced on 7/23/2015) (dt). (Entered: 07/23/2015)
09/17/2015	133	NOTICE OF APPEARANCE by Brett Max Kaufman on behalf of American Civil Liberties Union, The American Civil Liberties Union Foundation. (Kaufman, Brett) (Entered: 09/17/2015)
09/18/2015	134	NOTICE OF APPEAL from 132 Clerk's Judgment,,, Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. Filing fee \$ 505.00, receipt number 0208-11405536. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Wicker, Colin) (Entered: 09/18/2015)
09/18/2015		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 134 Notice of Appeal. (tp) (Entered: 09/18/2015)
09/18/2015		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 134 Notice of Appeal, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation were transmitted to the U.S. Court of Appeals. (tp) (Entered: 09/18/2015)
10/02/2015	135	NOTICE OF CROSS APPEAL from 132 Clerk's Judgment,,, Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Normand, Sarah) (Entered: 10/02/2015)
10/02/2015		Appeal Fee Not Required for 135 Notice of Cross Appeal. Appeal filed by U.S. Government. (tp) (Entered: 10/02/2015)
10/02/2015		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 135 Notice of Cross Appeal. (tp) (Entered: 10/02/2015)
10/02/2015		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on

		Appeal Electronic Files for 135 Notice of Cross Appeal, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency were transmitted to the U.S. Court of Appeals. (tp) (Entered: 10/02/2015)
11/23/2015	136	OPINION of USCA as to 114 Notice of Interlocutory Appeal filed by American Civil Liberties Union. USCA Case Number 14-4764-cv. Appeal from the October 31, 2014, decision and order of the United States District Court for the Southern District of New York (Colleen McMahon, District Judge), adjudicating, pursuant to a remand from this Court, Freedom of Information Act requests for documents prepared by the Office of Legal Counsel of the United States Department of Justice concerning targeted killings by drone aircraft. The District Court ordered disclosure of all or portions of some documents and denied disclosure of other documents. The appeal also concerns disclosure of redacted portions of the District Court's sealed opinion and disclosure of redacted portions of the transcript of the June 23, 2015, oral argument present by the Government to the Court ex parte and in camera. Judgment AFFIRMED; redacted portions of District Court opinion to remain UNDISCLOSED, except for three paragraphs (as redacted pursuant to Part IV of this opinion) that the District Court wishes to disclose; and redacted portions of transcript of June 23, 2015, oral argument to remain UNDISCLOSED; case REMANDED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Certified: 11/23/2015. (nd) (Entered: 11/23/2015)

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October 19, 2011

Information Officer
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Directorate for Executive Services and Communications
FOIA/Privacy Branch
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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 Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, the President’s Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General’s Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the “ACLU”).¹

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This Request seeks records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki² (“al-Awlaki”) and two other U.S. citizens by the United States Government. According to news reports, al-Awlaki, a United States citizen, was killed in Yemen on or around September 30, 2011, by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)—commonly referred to as “drones”—operated by the Central Intelligence Agency (CIA) and/or Joint Special Operations Command (JSOC). *See, e.g.*, Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Greg Miller, *Strike on Aulaqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0la0>. Samir Khan

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, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

² Al-Awlaki’s name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to al-Awlaki using any spelling or transliteration of his name.

(“Khan”), also a U.S. citizen, was killed in the same attack. See Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>. Press reports indicate that on or around October 14, 2011, a third U.S. citizen, Abdulrahman al-Awlaki,³ was killed in a drone strike in southern Yemen. Abdulrahman al-Awlaki, the son of Anwar al-Awlaki, was 16 years old at the time of his death. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>.

We seek information about the legal basis in domestic, foreign, and international law for authorizing the targeted killing of al-Awlaki. Specifically, we request any memoranda produced by the Department of Justice Office of Legal Counsel (OLC) analyzing the legal basis for killing al-Awlaki and authorizing the use of lethal force against him. We request information regarding the rules and standards used to determine when, where, and under what circumstances al-Awlaki could be killed, as well as what measures were required to avoid civilian casualties. We also request information about whether Samir Khan was specifically targeted for killing and what the legal basis was for killing him.

Beginning immediately after al-Awlaki was killed, the media began reporting the existence of a legal memorandum drafted by the OLC that provided legal justification for killing al-Awlaki (hereinafter “OLC memo”). The memorandum was reportedly completed around June 2010 and signed by David Barron. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. According to the New York Times, the OLC memo “concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him.” Savage, *supra*. We seek release of this memorandum, as well as any other memoranda describing the legal basis for killing al-Awlaki or any other U.S. citizen.

³ Abdulrahman al-Awlaki’s first name is sometimes spelled “Abdelrahman” or “Abdul-Rahman” and his family name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to Abdulrahman al-Awlaki using any spelling or transliteration of his name.

Since al-Awlaki was killed, there have been numerous calls for the release of the OLC memo and any other documents explaining the government's asserted legal basis for killing al-Awlaki. See, e.g., Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, <http://wapo.st/n6l3vK> (“A bipartisan chorus of political and legal voices is calling on the Obama administration to release a declassified version of the Justice Department memo that provided the legal analysis sanctioning the killing in Yemen last week of Anwar al-Awlaki, a U.S. citizen.”); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare (Oct. 4, 2011, 3:07 PM), <http://bit.ly/r42x0f>; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, Lawfare (Oct. 3, 2011, 7:45 AM), <http://bit.ly/mRUMg0>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4> (“The Justice Department reportedly wrote an advisory memo on the legality of targeting an American citizen with lethal force absent a trial or other due process, but the administration has kept the memo classified. Keeping the legal rationale secret amplifies the voices that argue that Mr. Obama assassinated an American citizen.”); Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>. The public has a vital interest in knowing the legal basis on which U.S. citizens may be designated for extrajudicial killing and then targeted with legal force.

Reports indicate that the OLC memo “does not independently analyze the quality of the evidence against [al-Awlaki].” *Savage, supra*. We therefore also seek information about the factual basis for authorizing the killing of al-Awlaki. Such information includes the basis for asserting that al-Awlaki was operationally involved in al Qaeda planning, and that he posed an imminent threat of harm to the United States, United States citizens, or others. We also seek information about the legal and factual bases for targeting Khan and Abdulrahman al-Awlaki.

Press reports have revealed that Executive Branch officials engage in a process of assessing the factual basis for determining whether an individual, including U.S. citizens, should be targeted for killing. See Mark Hosenball, *Secret Panel Can Put Americans on “Kill List”*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/qZ0Q4q> (“Hidden behind walls of top-secret classification, senior U.S. government officials meet in what is essentially a star chamber to decide which enemies of the state to target for assassination.”). However, the government has not revealed the factual basis for targeting al-Awlaki for killing, and press reports suggest that the evidence against him is subject to significant dispute. See Hosenball, *supra*

(“[O]fficials acknowledged that some of the intelligence purporting to show Awlaki’s hands-on role in plotting attacks was patchy.”). The public also lacks information about the killings of Khan and Abdulrahman al-Awlaki, including whether they were intentionally targeted.

Without information about the legal and factual basis for the targeted killing of al-Awlaki and others, the public is unable to make an informed judgment about the policy of authorizing targeted killings of United States citizens. We make the following requests for information in hopes of filling that void.

I. Requested Records

1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles (“UAVs” or “drones”) or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
 - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
 - B. The protections and requirements imposed by the Fifth Amendment Due Process Clause;
 - C. The reasons why international-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
 - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
 - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of al-Awlaki;

- F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
 - G. Any requirement that the U.S. government first attempt to capture al-Awlaki before killing him.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki, including:
- A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
 - B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
 - C. Facts indicating that there was a legal justification for killing persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
 - D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
 - E. Any other facts relevant to the decision to authorize and execute the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 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* 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 public interest.” 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”).

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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); 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/national-security/predator-drone-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>; 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, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. The webpage also 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.⁴

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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 targeted killing of Anwar al-Awlaki, allegedly collateral killing of Samir Khan, and potential killing of other U.S. citizens in Yemen and elsewhere using unmanned aerial vehicles or other means. The records sought will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, 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 targeted killings using drones in Afghanistan, Pakistan, Yemen and elsewhere. More particularly, there has been extensive media coverage of the killing of al-Awlaki and Khan. *See, e.g.*, Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Scott Shane & Thom Shanker, *Yemen*

⁴ 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.

Strike Reflects U.S. Shift To Drones as Cheaper War Tool, N.Y. Times, Oct. 2, 2011, at A1, available at <http://nyti.ms/ogznLt>; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>; Greg Miller, *Strike on Aulaqi Demonstrates Collaboration Between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. There has also been widespread reporting of the killing of Abdulrahman al-Awlaki. See, e.g., Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>; Brian Bennett, *U.S. Drone Strikes Kill Al Qaeda Operative in Yemen*, L.A. Times, Oct. 16, 2011, <http://lat.ms/mWffAn>; Hamza Hendawi, *Yemen: U.S. Strike Kills 9 al-Qaeda Militants*, Associated Press, Oct. 15, 2011, <http://abcn.ws/p3HqbA>.

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The Obama Administration's refusal to release the OLC memo or other documents describing the legal basis for killing al-Awlaki has also been the subject of intense media coverage. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2007, <http://wapo.st/n6l3vK>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4>; Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. There is also significant interest in the details of the process by which the government authorized the killing of al-Awlaki. See, e.g., Bruce Ackerman, *Obama's Death Panel*, Foreign Policy, Oct. 7, 2011, <http://bit.ly/qZ0Q4q>; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>.

Significant and pressing questions about the basis for the targeted killing of al-Awlaki and other U.S. citizens remain unanswered. Therefore, the subject of this Request will remain a matter of widespread and exceptional media interest. The public has an urgent need for information about the subject of this Request.

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); *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, and the Central Intelligence Agency with regard to the targeted killings of Anwar al-Awlaki and other U.S. citizens. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d)(i); 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)(II). 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); 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.⁵

* * *

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); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

Please be advised that because we are requesting expedited processing under the Department of Justice implementing regulations section 16.5(d)(1)(ii) and section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Notwithstanding Ms. Schmalzer’s determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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.

⁵ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in August 2011 the Department of Justice granted a fee waiver to the ACLU with respect to a request for information related to the proxy detention of detainees of U.S. naval vessels. 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 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 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.

We also request that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

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

Nathan Freed Wessler
National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

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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Sincerely,



Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7847
Fax: (212) 549-2654

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 CIV 0794

Civil Action No. _____

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

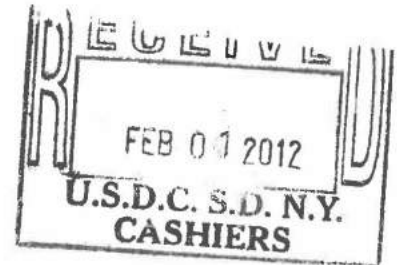
Plaintiffs,

v.

U.S. Department of Justice, including its component
the Office of Legal Counsel, U.S. Department of
Defense, including its component U.S. Special
Operations Command, and Central Intelligence
Agency,

Defendants.

COMPLAINT



COMPLAINT FOR INJUNCTIVE RELIEF

1. This is a lawsuit seeking the release of records related to the U.S. government's "targeted killing" of U.S. citizens overseas.
2. These targeted killings have been the subject of sustained media coverage. Media reports reveal that at least three American citizens have been killed over the last four months by unmanned aerial vehicles—commonly known as "drones"—on the basis of unilateral decisions made by the executive branch.
3. Media reports about the targeted killing program routinely quote anonymous government officials describing details of the program. High-ranking government officials, including the President of the United States and the Secretary of Defense, have discussed publicly the use of drones and the targeted killing of U.S. citizens.

Defense, have discussed publicly the use of drones and the targeted killing of U.S. citizens.

4. For example, in a recent interview, President Barack Obama, referring to the use of drones by the United States to carry out targeted killings, said that “this is a targeted, focused effort at people who are on a list of active terrorists” Former Central Intelligence Agency Director and current Secretary of Defense Leon Panetta, when asked to describe how the decision was made to order the targeted killing of a U.S. citizen, said that “the President of the United States obviously reviews these cases and reviews the legal justification, and in the end says go or no go.”
5. Despite requests from legal scholars, human rights organizations, members of the media, and elected officials, the U.S. government has not disclosed the process by which it adds names to so-called “kill lists;” the standards under which it determines which Americans may be put to death; or the evidentiary bases on which it concludes that those standards were satisfied in any particular case.
6. This action is brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking injunctive and other appropriate relief, the immediate processing and release of records sought by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively “ACLU”) from Defendants U.S. Department of Justice (“DOJ”), U.S. Department of Defense (“DOD”), and Central Intelligence Agency (“CIA”) (collectively “Defendants”) through a FOIA request (“Request”) made by the ACLU on October 19, 2011.

The Request sought records related to the factual and legal bases for the targeted killing of U.S. citizens.

7. The Request was directed to the DOJ, DOD, and CIA. The Request was also directed at specific components of those agencies, including the DOD's U.S. Special Operations Command ("USSOCOM"), which oversees the Joint Special Operations Command ("JSOC"), and the DOJ's Office of Legal Counsel ("OLC"). The Request sought expedited processing and a fee waiver.
8. Defendants have provided varying responses to the Request, either denying it or delaying a response to it. No agency has released any record in response to the Request. The Defendants have responded inconsistently to the ACLU's request for expedited processing and fee reductions and waivers.
9. The Request relates to a topic of vital importance: the power of the U.S. government to kill U.S. citizens without presentation of evidence and without disclosing legal standards that guide decision makers. Given the momentous nature of the governmental powers that are the subject of the Request, the fullest possible transparency and disclosure is vital.

Jurisdiction and Venue

10. This Court has subject matter jurisdiction 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.

11. 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

12. 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.
13. 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.
14. 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). One subcomponent of DOJ is the OLC, from which the ACLU has also requested records.

15. 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). One subcomponent of DOD is USSOCOM, from which the ACLU has also requested records.
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).

Factual Background

17. Since at least 2002, the U.S. government has carried out targeted killings overseas using drones and other means. Many of the individuals subjected to targeted killings have been foreign nationals, but media reports have indicated that citizens of the United States have also been killed.
18. Both JSOC and the CIA participate in the targeted killing program.
19. The press began reporting in early 2010 that Anwar al-Awlaki, a U.S. citizen born in New Mexico, had been placed on CIA and JSOC “kill lists” that authorized his targeted killing. In the fall of 2011, the media reported on the existence of a legal memorandum drafted by the OLC (“OLC memo”) that provided a legal analysis to support al-Awlaki’s killing.
20. On or around September 30, 2011, al-Awlaki was killed in a joint CIA-JSOC drone strike in northern Yemen. American and international news organizations reported that Samir Khan, also a U.S. citizen, was killed in the same attack.

21. On or around October 14, 2011, Abdulrahman al-Awlaki, a U.S. citizen born in Colorado, was killed in a JSOC drone attack in southeastern Yemen. Abdulrahman was sixteen years old.
22. Statements by President Barack Obama confirmed the death of Anwar al-Awlaki and indicated that al-Awlaki was the intended target of the September 30 attack. The President described the killing of al-Awlaki as a “success” that is a “tribute to our intelligence community.” On October 25, 2011, the President, describing the attack on al-Awlaki, said “we were able to remove him from the field.”
23. Although U.S. government officials, including the President and the Secretary of Defense, have made statements on the record confirming the existence of the targeted killing program, the government has not disclosed the process by which it adds names to so-called “kill lists;” the standards under which it determines which Americans may be put to death; or the evidentiary bases on which it concluded that those standards were satisfied in any particular case.
24. The government has refused to release its legal or evidentiary bases for the September 30 and October 14 strikes. It has not explained whether Samir Khan and Abdulrahman al-Awlaki were killed “collaterally” or were targeted themselves. It has not said what measures, if any, it took to minimize the possibility that individuals not targeted would be killed incidentally.
25. Since the existence of the OLC memo was disclosed in the media, there has been intense and sustained public interest in its contents. Members of Congress and former attorneys in the OLC—including Jack Goldsmith, a former assistant

attorney general who headed the OLC—have urged that the OLC memo or the legal reasoning it contains be released to the public.

26. The former legal adviser to the U.S. Department of State in the Bush Administration, John B. Bellinger III, said that it is “important to domestic audiences and international audiences for the administration to explain how the targeting and killing of an American complies with applicable constitutional standards.”
27. Peter Hoekstra, former U.S. representative and former chair of the House Select Committee on Intelligence, has said that “the targeting of Americans—it is a very sensitive issue, but again there’s been more information in the public domain than what has been shared with this committee. There is no clarity. Where is the legal framework?”
28. Senator Carl Levin, chair of the Senate Armed Services Committee has said, “I would urge them to release the memo. I don’t see any reason why they shouldn’t.”
29. Senator Dianne Feinstein, chair of the Senate Select Committee on Intelligence, called on the administration to “make public its analysis on counterterrorism authorities” because “for transparency and to maintain public support of secret operations, it is important to explain the general framework for counterterrorism actions.”

The ACLU's FOIA Request

30. On October 19, 2011, the ACLU submitted a FOIA request for records related to the “legal authority and factual basis for the targeted killing” of al-Awlaki, Abdulrahman, and Khan. The Request was submitted to the designated FOIA offices of the DOJ, DOD, CIA, USSOCOM, and OLC.
31. The Request seeks expedited processing on the basis of a “compelling need” for these records because the information is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government Activity. *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). In addition, the records relate 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).
32. The Request seeks a waiver of search, review, and duplication fees on the basis 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); *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 Request seeks the waiver also on the basis that the ACLU constitutes a “representative of the news media” and that the records are 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 FOIA Request

33. On October 27, 2011, the DOJ Office of Information Policy granted the ACLU's request for expedited processing. The DOJ also determined that the Request fell within "unusual circumstances" and informed the ACLU that it would not be able to respond to the Request within the statutory deadline. The DOJ deferred determination of whether the ACLU qualified for a fee waiver.
34. No further response or correspondence has been received from the DOJ. No records responsive to the Request have been released by the DOJ.
35. On October 31, 2011, the DOD denied the ACLU's request for expedited processing, determined that the Request fell within "unusual circumstances," and extended the time limit to respond to the Request. The DOD also denied the ACLU's request for a limitation of fees based on its status as a representative of the news media and failed to address the request for a public-interest fee waiver.
36. By letter dated December 16, 2011, the ACLU timely filed an administrative appeal of the DOD's determinations. The ACLU urged the appellate authority to expedite processing and grant the requested fee waivers.
37. On December 27, 2011, the DOD indicated that it was unable to process the administrative appeal within the statutory timeframe. No further response or correspondence has been received from the DOD. No records responsive to the Request have been released by the DOD.

38. By letter dated November 17, 2011, the CIA stated that the Request “is denied pursuant to FOIA exemptions (b)(1) and (b)(3).” The CIA stated that the “fact of the existence or nonexistence of requested records is currently and properly classified” and protected from disclosure.
39. By letter dated December 6, 2011, the ACLU timely filed an administrative appeal of the CIA’s determination. The ACLU urged the appellate authority to reconsider its denial of the Request on the basis that the denial was overbroad and impermissible under FOIA.
40. By letter dated January 18, 2012, the CIA indicated that it would be unable to respond to the administrative appeal within the statutory timeframe. No records responsive to the Request have been released by the CIA.
41. On November 7, 2011, USSOCOM denied the ACLU’s request for expedited processing, determined that the Request fell within “unusual circumstances,” and extended the time limit to respond to the Request. The DOD also denied the ACLU’s request for a limitation of fees based on its status as a representative of the news media and failed to address the request for a public-interest fee waiver.
42. By letter dated December 16, 2011, the ACLU timely filed an administrative appeal of USSOCOM’s determinations. The ACLU urged the appellate authority to expedite processing and grant the requested fee waivers.
43. By letter dated December 27, 2011, the DOD appellate authority responsible for processing FOIA appeals for DOD component agencies, including USSOCOM,

indicated that it would be unable to process the administrative appeal within the statutory timeframe. No records responsive to the Request have been released by USSOCOM.

44. By letter dated November 14, 2011, the OLC denied the Request pursuant to FOIA exemptions (b)(1), (b)(3), and (b)(5). The OLC stated that it “neither confirms nor denies the existence of the documents described in your request.”
45. By letter dated December 6, 2011, the ACLU timely filed an administrative appeal of the OLC’s determination. The ACLU urged the appellate authority to reconsider its denial of the Request on the basis that the denial was overbroad and impermissible under FOIA.
46. No further response or correspondence has been received from the OLC. No records responsive to the Request have been released by the OLC.

Causes of Action

47. 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.
48. 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.

49. The failure of the DOD to grant the ACLU's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E) and the DOD's corresponding regulations.
50. The DOD's failure 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 DOD's corresponding regulations.
51. The failure of the DOD to grant the ACLU's request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and the DOD's corresponding regulations.

Prayer for 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

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

Dated: February 1, 2012

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EXHIBIT E

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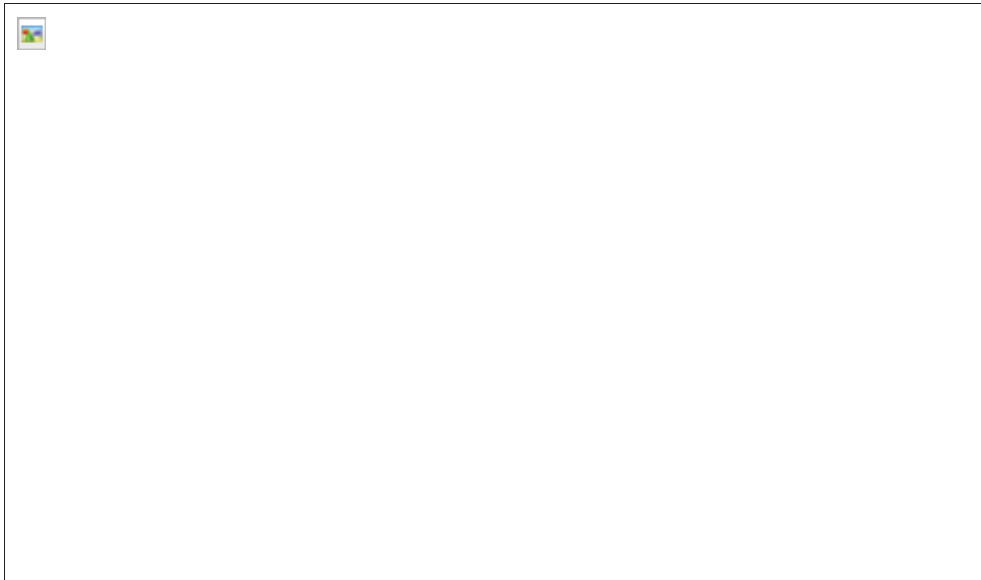
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Events

The Efficacy and Ethics of U.S. Counterterrorism Strategy

April 30, 2012 // 12:00pm — 1:15pm

■ Event Speakers



Transcript of Remarks by John O. Brennan

Assistant to the President for Homeland Security and Counterterrorism

“The Ethics and Efficacy of the President’s Counterterrorism Strategy”

Jane Harman:

Good afternoon, everyone. Welcome to the Wilson Center, and a special welcome to our chairman of the board Joe Gildenhorn and his wife Alma, who are very active on the Wilson -- who is very active on the Wilson council. This afternoon’s conversation is, as I see it, a great tribute to the kind of work we do here. We care intensely about having our most important policymakers here, and in getting objective accounts of what the United States government and other governments around the world are doing. On September 10th, 2001, I had lunch with L. Paul

Bremer. Jerry Bremer, as he is known, had chaired the congressionally chartered Commission on Terrorism on which I served.

It was one of three task forces to predict a major terror attack on U.S. soil. At that lunch, we lamented that no one was taking our report seriously. The next day, the world changed. In my capacity as a senior Democrat on the House intelligence committee, I was headed to the U.S. Capitol at 9:00 a.m. on 9/11 when an urgent call from my staff turned me around. To remind, most think that the Capitol, in which the intelligence committee offices were then located was the intended target of the fourth hijacked plane. Congress shut down. A terrible move, I thought, and 250 or so members mingled on the Capitol lawn, obvious targets if that plane had arrived. I frantically tried to reach my youngest child, then at a D.C. high school, but the cell towers were down.

I don't know where John Brennan was that day, but I do know that the arch of our lives came together after that when he served as deputy executive director of the CIA, when I became the ranking member on the House intelligence committee, when he became the first director of the Terrorist Threat Integration Center, an organization that was set up by then-President Bush 43, when I was the principle author of legislation which became the Intelligence Reform and Terrorism Prevention Act, a statute which we organized our intelligence community for the first time since 1947, and renamed TTIC, the organization that John had headed, the National Counter Terrorism Center, when he served as the first director of the NCTC, when I chaired the intelligence subcommittee of the homeland security committee, when he moved into the White House as deputy national security advisor for homeland security and counterterrorism, and assistant to the president, and when I succeeded Lee Hamilton here at the Wilson Center last year.

Finally, when he became President Obama's point person on counterterrorism strategy, and when the Wilson Center commenced a series of programs which as still ongoing, the first of which we held on 9/12/2011 to ask what the next 10 years should look like, and whether this country needs a clearer legal framework around domestic intelligence.

Clearly, the success story of the past decade is last May's takedown of Osama bin Laden. At the center of that effort were the senior security leadership of our country. I noticed Denis McDonough in the audience, right here in the front row, and certainly it included President Obama and John Brennan. They made the tough calls.

But I also know, and we all know, how selfless and extraordinary were the actions of unnamed intelligence officials and Navy SEALs. The operation depended on their remarkable skills and personal courage. They performed the mission. The Wilson Center is honored to welcome John Brennan here today on the eve of this first

anniversary of the bin Laden raid. President Obama will headline events tomorrow, but today we get an advance peek from the insider's insider, one of President Obama's most influential aides with a broad portfolio to manage counterterrorism strategy in far-flung places like Pakistan, Yemen, and Somalia. Activities in this space, as I mentioned, at the Wilson Center are ongoing, as are terror threats against our country.

I often say we won't defeat those threats by military might alone, we must win the argument. No doubt our speaker today agrees that security and liberty are not a zero sum game. We either get more of both, or less. As Ben Franklin said, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." So, as we welcome John Brennan, I also want to congratulate him and President Obama for nominating the full complement of members to the Privacy and Civil Liberties Board, another part of the 2004 intelligence reform law, and a key part of assuring that America's counterterrorism efforts also protect our constitution and our values. At the end of today's event, we would appreciate it if everyone would please remain seated, while Mr. Brennan departs the building. Thank you for coming, please welcome John Brennan.

[applause]

John Brennan:

Thank you so much Jane for the very kind introduction, and that very nice and memorable walk down memory lane as our paths did cross so many times over the years, but thank you also for your leadership of the Wilson Center. It is a privilege for me to be here today, and to speak at this group. And you have spent many years in public service, and it continues here at the Wilson Center today, and there are few individuals in this country who can match the range of Jane's expertise from the armed services to intelligence to homeland security, and anyone who has appeared before her committee knew firsthand just how extensive and deep that expertise was. So Jane, I'll just say that I'm finally glad to be sharing the stage with you instead of testifying before you. It's a privilege to be next to you. So to you and everyone here at the Woodrow Wilson Center, thank you for your invaluable contributions, your research, your scholarship, which help further our national security every day.

I very much appreciate the opportunity to discuss President Obama's counterterrorism strategy, in particular its ethics and its efficacy.

It is fitting that we have this discussion here today at the Woodrow Wilson Center. It was here in August of 2007 that then-Senator Obama described how he would bring the war in Iraq to a responsible end and refocus our efforts on "the war that has to be won," the war against al-Qaeda, particularly in the tribal regions of Afghanistan and Pakistan.

He said that we would carry on this fight while upholding the laws and our values, and that we would work with allies and partners whenever possible. But he also made it clear that he would not hesitate to use military force against terrorists who pose a direct threat to America. And he said that if he had actionable intelligence about high-value terrorist targets, including in Pakistan, he would act to protect the American people.

So it is especially fitting that we have this discussion here today. One year ago today, President Obama was then facing the scenario that he discussed here at the Woodrow Wilson Center five years ago, and he did not hesitate to act. Soon thereafter, our special operations forces were moving toward the compound in Pakistan where we believed Osama bin Laden might be hiding. By the end of the next day, President Obama could confirm that justice had finally been delivered to the terrorist responsible for the attacks of September 11th, 2001, and for so many other deaths around the world.

The death of bin Laden was our most strategic blow yet against al-Qaeda. Credit for that success belongs to the courageous forces who carried out that mission, at extraordinary risk to their lives; to the many intelligence professionals who pieced together the clues that led to bin Laden's hideout; and to President Obama, who gave the order to go in.

Now one year later, it's appropriate to assess where we stand in this fight. We've always been clear that the end of bin Laden would neither mark the end of al-Qaida, nor our resolve to destroy it. So along with allies and partners, we have been unrelenting. And when we assess that al-Qaida of 2012, I think it is fair to say that, as a result of our efforts, the United States is more secure and the American people are safer. Here's why.

In Pakistan, al-Qaida's leadership ranks have continued to suffer heavy losses. This includes Ilyas Kashmiri, one of al-Qaida's top operational planners, killed a month after bin Laden. It includes Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri, al-Qaida's deputy leader. It includes Younis al-Mauritani, a planner of attacks against the United States and Europe, until he was captured by Pakistani forces.

With its most skilled and experienced commanders being lost so quickly, al-Qaida has had trouble replacing them. This is one of the many conclusions we have been able to draw from documents seized at bin Laden's compound, some of which will be published online, for the first time, this week by West Point's Combating Terrorism Center. For example, bin Laden worried about, and I quote, "The rise of lower leaders who are not as experienced and this would lead to the repeat of mistakes."

Al-Qaida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer

places to train and groom the next generation of operatives. They're struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qaida is losing badly. And bin Laden knew it at the time of his death. In documents we seized, he confessed to "disaster after disaster." He even urged his leaders to flee the tribal regions, and go to places, "away from aircraft photography and bombardment."

For all these reasons, it is harder than ever for al-Qaida core in Pakistan to plan and execute large-scale, potentially catastrophic attacks against our homeland. Today, it is increasingly clear that compared to 9/11, the core al-Qaida leadership is a shadow of its former self. Al-Qaida has been left with just a handful of capable leaders and operatives, and with continued pressure is on the path to its destruction. And for the first time since this fight began, we can look ahead and envision a world in which the al-Qaida core is simply no longer relevant.

Nevertheless, the dangerous threat from al-Qaida has not disappeared. As the al-Qaida core falters, it continues to look to affiliates and adherents to carry on its murderous cause. Yet these affiliates continue to lose key commanders and capabilities as well. In Somalia, it is indeed worrying to witness al-Qaida's merger with al-Shabaab, whose ranks include foreign fighters, some with U.S. passports. At the same time, al-Shabaab continues to focus primarily on launching regional attacks, and ultimately, this is a merger between two organizations in decline.

In Yemen, al-Qaida in the Arabian Peninsula, or AQAP, continues to feel the effects of the death last year of Anwar al-Awlaki, its leader of external operations who was responsible for planning and directing terrorist attacks against the United States. Nevertheless, AQAP continues to be al-Qaida's most active affiliate, and it continues to seek the opportunity to strike our homeland. We therefore continue to support the government of Yemen in its efforts against AQAP, which is being forced to fight for the territory it needs to plan attacks beyond Yemen. In north and west Africa, another al-Qaida affiliate, al-Qaida in the Islamic Maghreb, or AQIM, continues its efforts to destabilize regional governments and engages in kidnapping of Western citizens for ransom activities designed to fund its terrorist agenda. And in Nigeria, we are monitoring closely the emergence of Boko Haram, a group that appears to be aligning itself with al-Qaida's violent agenda and is increasingly looking to attack Western interests in Nigeria, in addition to Nigerian government targets.

More broadly, al-Qaida's killing of innocents, mostly Muslim men, women and children, has badly tarnished its image and appeal in the eyes of Muslims around the world.

John Brennan:

Thank you. More broadly, al-Qaida's killing of innocents, mostly men women and children, has badly tarnished its appeal and image in the eyes of Muslims around the world. Even bin Laden and his lieutenants knew this. His propagandist, Adam Gadahn, admitted that they were now seen "as a group that does not hesitate to take people's money by falsehood, detonating mosques, and spilling the blood of scores of people." Bin Laden agreed that "a large portion" of Muslims around the world "have lost their trust" in al-Qaida.

So damaged is al-Qaida's image that bin Laden even considered changing its name. And one of the reasons? As bin Laden said himself, U.S. officials "have largely stopped using the phrase 'the war on terror' in the context of not wanting to provoke Muslims." Simply calling them al-Qaida, bin Laden said, "reduces the feeling of Muslims that we belong to them."

To which I would add, that is because al-Qaida does not belong to Muslims. Al-Qaida is the antithesis of the peace, tolerance, and humanity that is the hallmark of Islam.

Despite the great progress we've made against al-Qaida, it would be a mistake to believe this threat has passed. Al-Qaida and its associated forces still have the intent to attack the United States. And we have seen lone individuals, including American citizens, often inspired by al-Qaida's murderous ideology, kill innocent Americans and seek to do us harm.

Still, the damage that has been inflicted on the leadership core in Pakistan, combined with how al-Qaida has alienated itself from so much of the world, allows us to look forward. Indeed, if the decade before 9/11 was the time of al-Qaida's rise, and the decade after 9/11 was the time of its decline, then I believe this decade will be the one that sees its demise. This progress is no accident.

It is a direct result of intense efforts made over more than a decade, across two administrations, across the U.S. government and in concert with allies and partners. This includes the comprehensive counterterrorism strategy being directed by President Obama, a strategy guided by the President's highest responsibility, to protect the safety and the security of the American people. In this fight, we are harnessing every element of American power: intelligence, military, diplomatic, development, economic, financial, law enforcement, homeland security, and the power of our values, including our commitment to the rule of law. That's why, for instance, in his first days in office, President Obama banned the use of enhanced interrogation techniques, which are not needed to keep our country safe. Staying true to our values as a nation also includes upholding the transparency upon which our democracy depends.

A few months after taking office, the president travelled to the National Archives where he discussed how national security requires a delicate balance between

secrecy and transparency. He pledged to share as much information as possible with the American people “so that they can make informed judgments and hold us accountable.” He has consistently encouraged those of us on his national security team to be as open and candid as possible as well.

Earlier this year, Attorney General Holder discussed how our counterterrorism efforts are rooted in, and are strengthened by, adherence to the law, including the legal authorities that allow us to pursue members of al-Qaida, including U.S. citizens, and to do so using technologically advanced weapons.

In addition, Jeh Johnson, the general counsel at the Department of Defense, has addressed the legal basis for our military efforts against al-Qaida. Stephen Preston, the general counsel at the CIA, has discussed how the agency operates under U.S. law.

These speeches build on a lecture two years ago by Harold Koh, the State Department legal adviser, who noted 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.”

Given these efforts, I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification. Still, there continues to be considerable public and legal debate surrounding these technologies and how they are sometimes used in the fight against al-Qaida.

Now, I want to be very clear. In the course of the war in Afghanistan and the fight against al-Qaida, I think the American people expect us to use advanced technologies, for example, to prevent attacks on U.S. forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform. What has clearly captured the attention of many, however, is a different practice, beyond hot battlefields like Afghanistan, identifying specific members of al-Qaida and then targeting them with lethal force, often using aircraft remotely operated by pilots who can be hundreds, if not thousands, of miles away. And this is what I want to focus on today.

Jack Goldsmith, a former assistant attorney general in the administration of George W. Bush and now a professor at Harvard Law School, captured the situation well. He wrote:

“The government needs a way to credibly convey to the public that its decisions about who is being targeted, especially when the target is a U.S. citizen, are sound. First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions. The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of

its legal ones. All of this information can be disclosed in some form without endangering critical intelligence.”

Well, President Obama agrees. And that is why I am here today.

I stand here as someone who has been involved with our nation’s security for more than 30 years. I have a profound appreciation for the truly remarkable capabilities of our counterterrorism professionals, and our relationships with other nations, and we must never compromise them. I will not discuss the sensitive details of any specific operation today. I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost. At the same time, we reject the notion that any discussion of these matters is to step onto a slippery slope that inevitably endangers our national security. Too often, that fear can become an excuse for saying nothing at all, which creates a void that is then filled with myths and falsehoods. That, in turn, can erode our credibility with the American people and with foreign partners, and it can undermine the public’s understanding and support for our efforts. In contrast, President Obama believes that done carefully, deliberately and responsibly we can be more transparent and still ensure our nation’s security.

So let me say it as simply as I can. Yes, in 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. And I’m here today because President Obama has instructed us to be more open with the American people about these efforts.

Broadly speaking, the debate over strikes targeted at individual members of al-Qaida has centered on their legality, their ethics, the wisdom of using them, and the standards by which they are approved. With the remainder of my time today, I would like to address each of these in turn.

First, these targeted strikes are legal. Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length. To briefly recap, as a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack. The Authorization for Use of Military Force, the AUMF, passed by Congress after the September 11th attacks authorized the president “to use all necessary and appropriate forces” against those nations, organizations, and individuals responsible for 9/11. There is nothing in the AUMF that restricts the use of military force against al-Qaida to Afghanistan.

As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this

purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Second, targeted strikes are ethical. Without question, the ability to target a specific individual, from hundreds or thousands of miles away, raises profound questions. Here, I think it's useful to consider such strikes against the basic principles of the law of war that govern the use of force.

Targeted strikes conform to the principle of necessity, the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.

Targeted strikes conform to the principles of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.

Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

For the same reason, targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering. For all these reasons, I suggest to you that these targeted strikes against al-Qaida terrorists are indeed ethical and just.

Of course, even if a tool is legal and ethical, that doesn't necessarily make it appropriate or advisable in a given circumstance. This brings me to my next point.

Targeted strikes are wise. Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there just may be only minutes to act.

They can be a wise choice because they dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether. Yet they are also a wise choice

because they dramatically reduce the danger to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond their intended target.

In addition, compared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.

There's another reason that targeted strikes can be a wise choice, the strategic consequences that inevitably come with the use of force. As we've seen, deploying large armies abroad won't always be our best offense.

Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into al-Qaida's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment, and inspire the next generation of terrorists. In comparison, there is the precision of targeted strikes.

I acknowledge that we, as a government, along with our foreign partners, can and must do a better job of addressing the mistaken belief among some foreign publics that we engage in these strikes casually, as if we are simply unwilling to expose U.S. forces to the dangers faced every day by people in those regions. For, as I'll describe today, there is absolutely nothing casual about the extraordinary care we take in making the decision to pursue an al-Qaida terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life.

Still, there is no more consequential a decision than deciding whether to use lethal force against another human being, even a terrorist dedicated to killing American citizens. So in order to ensure that our counterterrorism operations involving the use of lethal force are legal, ethical, and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.

This reflects his approach to broader questions regarding the use of force. In his speech in Oslo accepting the Nobel Peace Prize, the president said that "all nations, strong and weak alike, must adhere to standards that govern the use of force." And he added:

"Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe 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 a source of our strength."

The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology, and any more nations are seeking it, and more will succeed in acquiring it. President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of those nations may -- and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.

If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do ourselves. President Obama has therefore demanded that we hold ourselves to the highest possible standards, that, at every step, we be as thorough and as deliberate as possible.

This leads me to the final point I want to discuss today, the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan. What I hope to do is to give you a general sense, in broad terms, of the high bar we require ourselves to meet when making these profound decisions today. That includes not only whether a specific member of al-Qaida can legally be pursued with lethal force, but also whether he should be.

Over time, we've worked to refine, clarify, and strengthen this process and our standards, and we continue to do so. If our counterterrorism professionals assess, for example, that a suspected member of al-Qaida poses such a threat to the United States to warrant lethal action, they may raise that individual's name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for a decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of al-Qaida is authorized under both international and U.S. law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qaida, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.

Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands. Even if it were

possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources.

As a result, we have to be strategic. Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.

For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action. We do not engage in legal action -- in lethal action in order to eliminate every single member of al-Qaida in the world. Most times, and as we have done for more than a decade, we rely on cooperation with other countries that are also interested in removing these terrorists with their own capabilities and within their own laws. Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat, to stop plots, prevent future attacks, and to save American lives.

And what do we mean when we say significant threat? I am not referring to some hypothetical threat, the mere possibility that a member of al-Qaida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qaida or one of its associated forces. Or perhaps the individual is himself an operative, in the midst of actually training for or planning to carry out attacks against U.S. persons and interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plans and his plots before they come to fruition.

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qaida members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever and wherever feasible.

For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way. In fact, the members of al-Qaida that we or other nations have captured have been one of our greatest sources of information about al-Qaida, its plans, and its intentions. And once in U.S. custody, we often can prosecute them in our federal courts or reformed military commissions, both of which are used for gathering intelligence and preventing future terrorist attacks.

You see our preference for capture in the case of Ahmed Warsame, a member of al-Shabaab who had significant ties to al-Qaida in the Arabian Peninsula. Last year,

when we learned that he would be traveling from Yemen to Somalia, U.S. forces captured him in route and we subsequently charged him in federal court.

The reality, however, is that since 2001 such unilateral captures by U.S. forces outside of hot battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.

Moreover, after being subjected to more than a decade of relentless pressure, al-Qaida's ranks have dwindled and scattered. These terrorists are skilled at seeking remote, inhospitable terrain, places where the United States and our partners simply do not have the ability to arrest or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Oftentimes, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might be the only remaining option to address the threat, prevent an attack, and save lives.

Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.

Those are some of the questions we consider; the high standards we strive to meet. And in the end, we make a decision, we decide whether a particular member of al-Qaida warrants being pursued in this manner. Given the stakes involved and the consequences of our decision, we consider all the information available to us, carefully and responsibly.

We review the most up-to-date intelligence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands, we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the intelligence community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

We listen to departments and agencies across our national security team. We don't just hear out differing views, we ask for them and encourage them. We discuss. We debate. We disagree. We consider the advantages and disadvantages of taking action. We also carefully consider the costs of inaction and whether a decision not to carry out a strike could allow a terrorist attack to proceed and potentially kill scores of innocents.

Nor do we limit ourselves narrowly to counterterrorism considerations. We consider the broader strategic implications of any action, including what effect, if any, an action might have on our relationships with other countries. And we don't simply make a decision and never revisit it again. Quite the opposite. Over time, we refresh the intelligence and continue to consider whether lethal force is still warranted.

In some cases, such as senior al-Qaida leaders who are directing and planning attacks against the United States, the individual clearly meets our standards for taking action. In other cases, individuals have not met our standards. Indeed, there have been numerous occasions where, after careful review, we have, working on a consensus basis, concluded that lethal force was not justified in a given case.

As President Obama's counterterrorism advisor, I feel that it is important for the American people to know that these efforts are overseen with extraordinary care and thoughtfulness. The president expects us to address all of the tough questions I have discussed today. Is capture really not feasible? Is this individual a significant threat to U.S. interests? Is this really the best option? Have we thought through the consequences, especially any unintended ones? Is this really going to help protect our country from further attacks? Is this going to save lives?

Our commitment to upholding the ethics and efficacy of this counterterrorism tool continues even after we decide to pursue a specific terrorist in this way. For example, we only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing. This is a very high bar. Of course, how we identify an individual naturally involves intelligence sources and methods, which I will not discuss. Suffice it to say, our intelligence community has multiple ways to determine, with a high degree of confidence, that the individual being targeted is indeed the al-Qaida terrorist we are seeking.

In addition, we only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances. The unprecedented advances we have made in technology provide us greater proximity to target for a longer period of time, and as a result allow us to better understand what is happening in real time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.

I can tell you today that there have indeed been occasions when we decided against conducting a strike in order to avoid the injury or death of innocent civilians. This reflects our commitment to doing everything in our power to avoid civilian casualties, even if it means having to come back another day to take out that terrorist, as we have done previously. And I would note that these standards, for identifying a target and avoiding the loss of innocent -- the loss of lives of innocent civilians, exceed

what is required as a matter of international law on a typical battlefield. That's another example of the high standards to which we hold ourselves.

Our commitment to ensuring accuracy and effectiveness continues even after a strike. In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths. There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception.

As the president and others have acknowledged, there have indeed been instances when, despite the extraordinary precautions we take, civilians have been accidentally killed or worse -- have been accidentally injured, or worse, killed in these strikes. It is exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war. And when it happens we take it very, very seriously. We go back and we review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

Ensuring the ethics and efficacy of these strikes also includes regularly informing appropriate members of Congress and the committees who have oversight of our counterterrorism programs. Indeed, our counterterrorism programs, including the use of lethal force, have grown more effective over time because of congressional oversight and our ongoing dialogue with members and staff.

This is the seriousness, the extraordinary care, that President Obama and those of us on his national security team bring to this weightiest of questions: Whether to pursue lethal force against a terrorist who is plotting to attack our country.

When that person is a U.S. citizen, we ask ourselves additional questions. Attorney General Holder has already described the legal authorities that clearly allow us to use lethal force against an American citizen who is a senior operational leader of al-Qaida. He has discussed the thorough and careful review, including all relevant constitutional considerations, that is to be undertaken by the U.S. government when determining whether the individual poses an imminent threat of violent attack against the United States.

To recap, the standards and processes I've described today, which we have refined and strengthened over time, reflect our commitment to: ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to U.S. interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that

innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaida terrorist is a U.S. citizen.

Going forward, we'll continue to strengthen and refine these standards and processes. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities. As the president said in Oslo, in the conduct of war, America must be the standard bearer.

This includes our continuing commitment to greater transparency. With that in mind, I have made a sincere effort today to address some of the main questions that citizens and scholars have raised regarding the use of targeted lethal force against al-Qaida. I suspect there are those, perhaps some in this audience, who feel we have not been transparent enough. I suspect there are those, both inside and outside our government, who feel I have been perhaps too open. If both groups feel a little bit unsatisfied, then I probably struck the right balance today.

Again, there are some lines we simply will not and cannot cross because, at times, our national security demands secrecy. But we are a democracy. The people are sovereign. And our counterterrorism tools do not exist in a vacuum. They are stronger and more sustainable when the American people understand and support them. They are weaker and less sustainable when the American people do not. As a result of my remarks today, I hope the American people have a better understanding of this critical tool, why we use it, what we do, how carefully we use it, and why it is absolutely essential to protecting our country and our citizens.

I would just like to close on a personal note. I know that for many people in our government and across the country the issue of targeted strikes raised profound moral questions. It forces us to confront deeply held personal beliefs and our values as a nation. If anyone in government who works in this area tells you they haven't struggled with this, then they haven't spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain in counterterrorism.

But I am certain about one thing. We are at war. We are at war against a terrorist organization called al-Qaida that has brutally murdered thousands of Americans, men, women and children, as well as thousands of other innocent people around the world. In recent years, with the help of targeted strikes, we have turned al-Qaida into a shadow of what it once was. They are on the road to destruction.

Until that finally happens, however, there are still terrorists in hard-to-reach places who are actively planning attacks against us. If given the chance, they will gladly strike again and kill more of our citizens. And the president has a Constitutional and solemn obligation to do everything in his power to protect the safety and security of the American people.

Yes, war is hell. It is awful. It involves human beings killing other human beings, sometimes innocent civilians. That is why we despise war. That is why we want this war against al-Qaida to be over as soon as possible, and not a moment longer. And over time, as al-Qaida fades into history and as our partners grow stronger, I'd hope that the United States would have to rely less on lethal force to keep our country safe.

Until that happens, as President Obama said here five years ago, if another nation cannot or will not take action, we will. And it is an unfortunate fact that to save many innocent lives we are sometimes obliged to take lives, the lives of terrorists who seek to murder our fellow citizens.

On behalf of President Obama and his administration, I am here to say to the American people that we will continue to work to safeguard this nation -- this nation and its citizens responsibly, adhering to the laws of this land and staying true to the values that define us as Americans, and thank you very much.

Jane Harman:

Thank you, Mr. Brennan. As it is almost 1:00, I hope you can stay a few extra minutes to take questions, and I would just like to make a comment, ask you one question, and then turn over to our -- turn it over to our audience for questions. Please no statements. Ask questions. First your call for greater transparency is certainly appreciated by me. I think that the clearer we can make our policies, and the better we can explain them, and the more debate we can have in the public square about them, the more: one, they will be understood; and two, they will persuade the would-be suicide bomber about to strap on a vest that there is a better answer. We do have to win the argument in the end with the next generation, not just take out those who can't be rehabilitated in this generation, and I see you nodding, so I know you agree and I'm not going to ask you a question about that. I also want to say how honored we are that you would make this important speech at the Wilson Center. There is new material here, for those who may have missed it. The fact that the U.S. conducts targeted strikes using drones has always been something that I, as a public official, danced around because I knew it had not been officially acknowledged by our government. I was one of those members of Congress briefed on this program, I have seen the feed that shows how we do these things, I'm not going to comment on specific operations or areas of the world, but I do think it is important that our government has acknowledged this, and set out, as carefully as possible, the reasons why we do it, and I want to commend you personally as well as Eric Holder, Jeh Johnson, and Harold Koh for carefully laying out the legal framework, and also add that at the Wilson Center, we will continue to debate these issues, and see what value we can add free from spin on a non-partisan basis to helping to articulate even more clearly the reasons why, as you said, war is hell, and why, as you said, there is no decision more consequential than deciding to use legal force, so thank you very much for making those remarks here.

My question is this: One thing I don't think you mentioned in that enormously important address was the rise of Islamist parties, which have been elected in Tunisia, Egypt, and probably will be elected, and exist in Turkey and other countries. Do you think that having Islamist inside the tent, in a political sphere, also helps diminish the threat of outside groups like al-Qaida?

John Brennan:

Well, hopefully political pluralism is breaking out in the Middle East, and we're going to find in many countries the ability of various constituencies to find expression through political parties. And certainly, we are very strong advocates of using the political system, the laws, to be able to express the views of individual groups within different countries, and so rather than finding expression through violent extremism, these groups have the opportunity now, and since they've never had before in countries like Tunisia, and in Egypt, Yemen, other places, where they can in fact participate meaningfully in the political system. This is going to take some time for these systems to be able to mature sufficiently so that there can be a very robust and democratic system there, but certainly those individuals who are parties -- who are associated with parties that have a religious basis to them, they can find now the opportunity now to be able to participate in that political system.

Jane Harman:

My second and final question, and I see all of you with your hands about to be raised, and again, please just state a question as I'm about to do. You just mentioned Yemen, that has been part of your broader portfolio, I know you made many trips there, and you were a key architect of the deal to get Saleh to agree to -- the 40 year autocrat ruler -- to agree to accept immunity, leave the country, and then to be replaced by an elected leader, in this case, his vice president in a restructured government. Do you think a Yemen-type solution could work in Syria? Do you think there's any possibility of getting the Bashar family out of Syria and structuring a new government there, and perhaps in having the -- Russia lead the effort to do that, because of its close ties to Syria, and the fact that it is still unfortunately arming and supporting the Syrian regime?

John Brennan:

Well, each of these countries in the Middle East are facing different types of circumstances, and they have unique histories. Yemen was fortunate that they do -- did have a degree of political pluralism there, Ali Abdullah Saleh in fact allowed certain political institutions to develop, and we were very fortunate to have a peaceful transition from the previous regime to the government of President Hadi now. Certainly, there needs to be some way found for progress in Syria. It's outrageous what's happening in that country, the continued death of Syrian citizens at the hands of a brutal authoritarian government. This is something that needs to stop, and the international community has come together on it, so I'd like to be able to see something that would be able to transition peacefully, but the sooner it can be done, obviously, the more lives we've saved.

Jane Harman:

Thank you very much. Please identify yourselves, and ask a question only. The woman straight ahead of me, yes. Just wait for the mic.

Tara McKelvy:

Hi, my name is Tara McKelvy, I'm a scholar here, and I'm a correspondent for Newsweek and The Daily Beast, and you talked a little bit about the struggle that you have in this process of the targeted strikes, and General Cartwright talked to me about the question of surrender, that's not really an option when you use a Predator drone, for instance. I'm wondering if you can talk about which kinds of issues that you found most troubling when you think about these strikes.

John Brennan:

Well, as I said, one of the considerations that we go through is the feasibility of capture. We would prefer to get these individuals so that they can be captured. Working with local governments, what we like to be able to do is provide them the intelligence that they can get the individuals, so it doesn't have to be U.S. forces that are going on the ground in certain areas. But if it's not feasible, either because it's too risky from the standpoint of forces or the government doesn't have the will or the ability to do it, then we make a determination whether or not the significance of the threat that the person poses requires us to take action, so that we're able to mitigate the threat that they pose. I mean, these are individuals that could be involved in a very active plot, and if it is allowed to continue, you know, it could result in attacks either in Yemen against the U.S. embassy, or here in the homeland that could kill, you know, dozens if not hundreds of people. So what we always want to do, though, is look at whether or not there is an option to get this person and bring them to justice somehow for intelligence collection purposes, as well as to try them for their crimes.

Jane Harman:

Thank you, man in the green shirt right here.

Robert Baum:

Robert Baum from the Wilson Center and the University of Missouri. Thank you for your comments. I did want to ask about one area where we seem to be less successful, the events in Mali and Nigeria seem to suggest that we've been less successful in containing al-Qaida, and I was wondering if you could talk a little bit about your efforts in West Africa and also urge you to emphasize the importance of economic development as a way of -- the strategic development of economic development in combating the terrorism. Thank you.

John Brennan:

You raised two important points. One is what are we doing in terms of confronting the terrorist threat that emanates in places like Mali and Nigeria, and other areas,

and then what we need to do further upstream as far as the type of development assistance, and assistance to these countries, so they can build the institutions that are going to be able to address the needs of the people. Nigeria's a particularly dangerous situation right now with Boko Haram that has the links with al-Qaida, but also has links with al-Shabaab, as well AQIM. It has this radical offshoot, Ansaru, that really is focused on U.S. or Western interests, and so there is a domestic challenge that Boko Haram poses to Nigeria, and as we well know, there's the north-south struggle within Nigeria, and tensions between the Christian-Muslim communities. So we are trying to work with the Nigerian government as well as other governments are, as well, to try to give them the capabilities they need to confront the terrorist threat, but then also the issue is the building up those political institutions within Nigeria so that they can deal with this, not just from a law enforcement or internal security perspective, but also to address those needs that are fueling some of these fires of violent extremism.

Mali, you know, because of the recent coup, we've been trying to work across the Sahel with Mali, and Niger, and Mauritania, and other countries to address the growing phenomenon and threat of al-Qaida Islamic Maghreb that is a unique organization because it has a criminal aspect to it. You know, it kidnaps these individuals for large ransoms. We're outraged whenever, you know, countries or organizations pay these huge sums to al-Qaida, whether it be in the Sahel or in Yemen because it just is able to feed their activities, but Mali right now, with the coup, and then you have the Tuareg rebellion up in the north, and then that area that basically is such a large expansive territory, that also, you know, requires both a balancing of addressing the near-term threats that are posed by al-Qaida, but also trying to give the government in Mali, in Bamako, the ability to build up those institutions, address the development needs, they have the different sort of ethnic and tribal rivalries that are there, so it's a complicated area. I've worked very closely with the -- talking with my French and British colleagues as well as with others in the region, about how there might be some way to address some of these broader African issues that manifest themselves, unfortunately, in the kidnappings, and the piracy, and the criminal activities, and terrorist attacks, so there's an operational cadence in Africa now that is concerning in a number of parts of the continent.

Jane Harman:

Back there, middle, yeah.

John Brennan:

I can take another 10 minutes [inaudible].

Leanne Erdberg:

Hi there, Leanne Erdberg [spelled phonetically] from the State Department. How can we ensure that executive interagency actors, when they are undertaking counterterrorism actions, are held to appropriate standards, and processes as we

ask them to act as prosecutors, judges, and juries, and how we can ensure that intelligence is held to the same standards and processes that evidence is?

John Brennan:

Okay, well as I tried to say in my remarks, we're not carrying out these actions to retaliate for past transgressions. We are not a court, we're not trying to determine guilt or innocence, and then carry out a strike in retaliation. What we're trying to do is prevent the loss of lives through terrorist attacks, so it's not as though we're, you know, sort of judge and jury on, again, their involvement in past activities. We see a threat developing, we follow it very carefully, we identify the individuals who are responsible for allowing that plot and that plan to go forward, and then we make a determination about whether or not we have the solid intelligence base, and that's why I tried to say in my remarks, we have standards. You know, the intelligence is brought forward, we evaluate that, there's interagency meetings that a number of us are involved in on an ongoing basis, scrutinizing that intelligence, determining whether or not we have a degree of confidence that that person is indeed involved in carrying out this plan to kill Americans. If it reaches that level, then what we do is we look at it according to the other standards that I talked about in terms of infeasibility of capture, determination that we are able to have the intelligence that will give us, you know, a high degree of confidence that, you know, we can track an individual and find them, and be confident that we're taking action against an individual who really is involved in carrying out an attack. You know, if we -- if we didn't have to take these actions, and we still had -- and we had confidence that there wasn't going to be a terrorist attack, I think everybody would be very, very pleased. We only decide to take that action if there is no other option available, if there is not the option of capture, if the local government will not take action, if we cannot do something that will prevent that attack from taking place, and the only available option is taking that individual off of the battlefield, and we're going to do it in a way that gives us the confidence that we are not going to, in fact, inflict collateral damage. So again, it really is a very rigorous system of standards and processes that we go through.

Jane Harman:

Thank you. In the far back. Yes, you.

Jon Harper:

Sir, I was wondering if you could tell us --

Jane Harman:

Identify yourself, please.

Jon Harper:

Oh, sorry, Jon Harper with the Asahi Shimbun. It's a Japanese paper. I was wondering if you could tell me how many times or what percentage of the time have

proposals to target a specific individual been denied, and also if you could address the issue of signature strikes, which I guess aren't necessarily targeted against specific individuals, but people who are engaging in suspicious activities. Could you comment on what the criteria is for targeting them? Thank you.

John Brennan:

Well, I'm not going to go into sort of how many times, what proportion of instances there have been sort of either approvals or declinations of these recommendations that come forward, but I can just tell you that there have been a -- numerous times where individuals that were put forward for consideration for this type of action was declined. You make reference to signature strikes that are frequently reported in the press. I was speaking here specifically about targeted strikes against individuals who are involved. Everything we do, though, that is carried out against al-Qaida is carried out consistent with the rule of law, the authorization on the use of military force, and domestic law. And we do it with a similar rigor, and there are various ways that we can make sure that we are taking the actions that we need to prevent a terrorist attack. That's the whole purpose of whatever action we use, the tool we use, it's to prevent attack, and to save lives. And so I spoke today, for the first time openly, about, again, what's commonly referred to in the press as drones, remotely piloted aircraft, that can give you that type of laser-like precision that can excise that terrorist or that threat in a manner that, again, with the medical metaphor, that will not damage the surrounding tissue, and so what we're really trying to do -- al-Qaida's a cancer throughout the world, it has metastasized in so many different places, and when that metastasized tumor becomes lethal and malignant, that's when we're going to take the action that we need to.

Jane Harman:

Last question will be the woman in the back at the edge.

Homai Emdah:

Sorry. What about in a country like Pakistan --

Jane Harman:

Could you identify yourself please.

Homai Emdah:

Homai Emdah [spelled phonetically], Express News. Mr. Brennan, what about in a country like Pakistan where drone strikes are frequently carried out, and the Pakistani government has, over the last few months, repeatedly protested to the U.S. government about an end to drone strikes, which is also the subject of discussion between Ambassador Grossman when he was in Islamabad. You mentioned that countries can be incapable or unwilling to carry out -- to arrest militants, so how do you deal with a country like Pakistan which doesn't accept drone strikes officially?

John Brennan:

We have an ongoing dialogue with many countries throughout the world on counterterrorism programs, and some of those countries we are involved in very detailed discussions about the appropriate tools to bring to bear. In the case of Pakistan, as you pointed out, Ambassador Grossman was there just very recently. There are ongoing discussions with the government of Pakistan about how best to address the terrorist threat that emanates from that area, and I will point out, that, you know, so many Pakistanis have been killed by that malignant tumor that is within the sovereign borders of Pakistan. It's -- and many, many brave Pakistanis have given their lives against these terrorist and militant organizations. And so, as the parliament recently said in its resolution, that Pakistan needs to rid itself of this -- these foreign militants and these foreign terrorists that have taken root inside of Pakistan. So we are committed to working very closely on an ongoing basis with the Pakistani government which includes, you know, the various components, intelligence, security, and various civilian departments and agencies in order to help them address the terrorist threat, but also so that they can help us make sure that Pakistan and that area near Afghanistan is never, ever again used as a launching pad for attacks here in the United States.

Jane Harman:

Thank you. Let me just conclude by saying that former CIA director Mike Hayden used to use the analogy of a football field, the lines on the football field, and he talked about our intelligence operatives and others as the players on the field, and he said, "We need them to get chalk on their cleats." Go up right up to the line in carrying out what are approved policies of the United States, and if you think about it that way, it is really important to have policies that are transparent, so that those who are carrying out the mission and those in the United States, and those around the world who are trying to understand the mission, know where the lines are. If we don't know where the lines are, some people will be risk-averse, other will commit excesses, and we've certainly seen a few of those, Abu Ghraib comes to mind, over recent years which are black eyes on our country. And so I just want to applaud the fact that John Brennan has come over here from the White House, spent over an hour with us laying out in great detail what the rules are for something that has been revealed today, which is the use of drones in certain operations, targeted operations. The debate will continue, no question, people in this audience and listening in have different points of view, we certainly know that one young woman did during his remarks, but that's why the Wilson Center's here. To offer a platform free of spin and partisan rhetoric to debate these issues thoroughly, and you honored us by coming here today, Mr. Brennan, thank you very much.

John Brennan:

Thank you very much Jane, thank you.

[applause]

[end of transcription]

Event Speakers List:

- **John O. Brennan** //
Assistant to the President for Homeland
Security and Counterterrorism

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EXHIBIT I

FINAL – EMBARGOED UNTIL 4:30pm on 2/22

**Dean's Lecture at Yale Law School
"National security law, lawyers and lawyering
in the Obama Administration"**

**By Jeh Charles Johnson
General Counsel of the Department of Defense**

February 22, 2012

Thank you for this invitation, and thank you, in particular, Professor Hathaway for your work in the national security legal field. Since we first met last fall I have appreciated your scholarship and our growing friendship. I was pleased to welcome you to the Pentagon in December to introduce you to a number of my civilian and military colleagues there. I would like to count on you as someone with whom I can consult from time to time on the very difficult legal issues we wrestle with in national security.

I am a student of history and, as you will hear throughout my remarks tonight, I like to try to put things in the broader perspective.

I have been General Counsel of the Department of Defense now for exactly 3 years and 12 days, having been appointed to that position by President Obama on February 10, 2009. I have been on an incredible journey with Barack Obama for longer than that, over five years, going back to November 2006, when he recruited me to the presidential campaign he was about to launch. I remember thinking then, "this is a long-shot, but it will be exciting, historic, and how many times in my life will someone personally ask me to help him become President." For the young people here, no matter your political affiliation, I can tell you that involvement in a presidential campaign was exciting -- not for the chance to personally interact with the candidate or help develop his positions on issues; the best experiences were canvassing door to door with my kids in northwest Des Moines and northeast Philadelphia; personally observing the Iowa caucus take place in a high school cafeteria; and passing out leaflets at the train station in my hometown of Montclair, New Jersey.

Involvement in the Obama campaign in 2007-08 was one of the highlights of my personal life.

Involvement in the Obama Administration has been the highlight of my professional life. Day to day, the job I occupy is all at once interesting, challenging, and frustrating. But, when I take a step back and look at the larger picture, I realize that I have witnessed many transformative events in national security over the last three years:

We have focused our efforts on Al Qaeda, and put that group on a path to defeat. We found bin Laden. Scores of other senior members of Al Qaeda have been killed or captured. We have taken the fight to Al Qaeda: where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Though the fight against Al Qaeda is not over, and multiple arms of our government remain vigilant in the effort to hunt down those who want to do harm to Americans, counterterrorism experts state publicly that Al Qaeda senior leadership is today severely crippled and degraded.

Thanks to the extraordinary sacrifices of our men and women in uniform, we have responsibly ended the combat mission in Iraq.

We are making significant progress in Afghanistan, and have begun a transition to Afghan-led responsibility for security there.

We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.

We worked with the Congress to bring about a number of reforms to military commission, reflected in the Military Commissions Act of 2009 and the new Manual for Military Commissions. By law, use of statements obtained by cruel, inhuman and degrading treatment – what was once the most controversial aspect of military commissions – is now prohibited.

We are working to make that system a more transparent one, by reforming the rules for press access to military commissions proceedings, establishing close circuit TV, and a new public website for the commissions system.

We have ended Don't Ask, Don't Tell, which I discussed last time I was here.

Finally, we have, in these times of fiscal austerity, embarked upon a plan to transform the military to a more agile, flexible, rapidly deployable and technologically advanced force, that involves reducing the size of the active duty Army and Marine Corps, and the defense budget by \$487 billion over 10 years.

Perhaps the best part of my job is I work in the national security field with, truly, some of the best and brightest lawyers in the country. In this illustrious and credentialed group, I often ask myself "how did I get here?"

Many in this group are graduates of this law school: My special assistant and Navy reservist Brodi Kemp, who is here with me today (class of '04); Caroline Krass at OLC (class of '93); Dan Koffsky at OLC (class of '78); Marty Lederman, formerly of OLC (class of '88); Greg Craig, the former White House Counsel (class of '72); Bob Litt, General Counsel of ODNI (class of '76); Retired Marine Colonel Bill Lietzau (class of '89); Beth Brinkman at DOJ (class of '85); Sarah Cleveland, formerly at State Legal (class of '92); David Pozen at State Legal (class of '08); Steve Pomper (class of '93) and my Deputy Bob Easton (class of '90). I also benefit from working with a number of Yale law students as part of my office's internship and externship programs.

Last but not least -- your former Dean. Like many in this room, I count myself a student of Harold Koh's. Within the Administration, Harold often reminds us of many of the things Barack Obama campaigned on in 2007-08. As I wrote these remarks, I asked myself to settle on the one theme from the 2008 campaign that best represents what Harold has carried forward in his position as lawyer for the State Department. The answer was easy: "The United States must lead by the power of our example and not by the example of our power."

There have been press reports that, occasionally, Harold and I, and other lawyers within the Obama Administration, disagree from time to time on national security legal issues. I confess this is true, but it is also true that we actually agree on issues most of the time.

The public should be reassured, not alarmed, to learn there is occasional disagreement and debate among lawyers within the Executive Branch of government.

From 2001 to 2004, while I was in private practice in New York City, I also chaired the Judiciary Committee of the New York City Bar Association, which rates all the nominees and candidates for federal, state and local judicial office in New York City. In June 2002, our bar committee was in the awkward position of rejecting the very first candidate the new Mayor's judicial screening committee had put forth to the Mayor for the Family Court in New York City. On very short notice, I was summoned to City Hall for a meeting with Mayor Michael Bloomberg and the chair of his judicial screening committee, who was called on to defend his committee's recommendation of the judge. The Mayor wanted to know why our committees had come out differently. The meeting was extremely awkward, but I'll never forget what Mayor Bloomberg said to us: "if you guys always agree, somebody's not doing their job."

Knowing that we must subject our national security legal positions to other very smart lawyers who will scrutinize and challenge them has made us all work a lot harder to develop and refine those positions. On top of that, our clients are sophisticated consumers of legal advice. The President, the Vice President, the National Security Adviser, the Vice President's national security adviser, the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security -- are themselves all lawyers. They are not engaged in the practice of law, but in the presentation to them of our legal advice, any weakness in the logic chain will be seized upon and questioned immediately, usually with a statement that begins with the ominous preface: "I know I'm not supposed to play lawyer here, but . . . "

By contrast, "group think" among lawyers is dangerous, because it makes us lazy and complacent in our thinking, and can lead to bad results. Likewise, shutting your eyes and ears to the legal dissent and concerns of others can also lead to disastrous consequences.

Before I was confirmed by the Senate for this job Senator Carl Levin, the chairman of the Armed Services Committee, made sure that I

read the Committee's November 2008 report on the treatment and interrogation of detainees at Guantanamo.

The report chronicles the failure of my predecessor in the Bush Administration to listen to the objections of the JAG leadership about enhanced interrogation techniques, the result of which was that the legal opinion of one Lieutenant Colonel, without more, carried the day as the legal endorsement for stress positions, removal of clothing, and use of phobias to interrogate detainees at Guantanamo Bay,¹

Just before becoming President, Barack Obama told his transition team that the rule of law should be one of the cornerstones of national security in his Administration. In retrospect, I believe that President Obama made a conscious decision three years ago to bring in to his Administration a group of strong lawyers who would reflect differing points of view. And, though it has made us all work a lot harder, I believe that over the last three years the President has benefited from healthy and robust debate among the lawyers on his national security team, which has resulted in carefully delineated, pragmatic, credible and sustainable judgments on some very difficult legal issues in the counterterrorism realm – judgments that, for the most part, are being accepted within the mainstream legal community and the courts.

Tonight I want to summarize for you, in this one speech, some of the basic legal principles that form the basis for the U.S. military's counterterrorism efforts against Al Qaeda and its associated forces. These are principles with which the top national security lawyers in our Administration broadly agree. My comments are general in nature about the U.S. military's legal authority, and I do not comment on any operation in particular.

First: in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality,

¹ See *Inquiry into the Treatment of Detainees in U.S. Custody*, Report of the Committee on Armed Services, United States Senate (110th Congress, 2d Session, Nov. 20, 2008).

historic precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment.

Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge. As I told the Heritage Foundation last October, over-reaching with military power can result in national security setbacks, not gains. Particularly when we attempt to extend the reach of the military on to U.S. soil, the courts resist, consistent with our core values and our American heritage – reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus unless expressly authorized by Congress or the Constitution.

Second: in the conflict against al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by the Congress one week after 9/11.² "The AUMF," as it is often called, is Congress' authorization to the President to:

"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."

Ten years later, the AUMF remains on the books, and it is still a viable authorization today.

In the detention context, we in the Obama Administration have interpreted this authority to include:

"those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are

² Pub. L. No. 107-40, 115 Stat. 224 (2001).

engaged in hostilities against the United States or its coalition partners.”³

This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantanamo detainees,⁴ and in 2011 Congress joined the Executive and Judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year’s National Defense Authorization Act, 10 years after enactment of the original AUMF.⁵ (A point worth noting here: contrary to some reports, neither Section 1021 nor any other detainee-related provision in this year’s Defense Authorization Act creates or expands upon the authority for the military to detain a U.S. citizen.)

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,⁶ 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 decentralized, 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 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

³ See Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, at 1 (D.D.C. March 13, 2009).

⁴ See *e.g.*, *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

⁵ Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 (December 31, 2011).

⁶ See, *e.g.*, *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the "hot" battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks – al Qaeda and the Taliban -- without a geographic limitation.

The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe we are in any "Global War on Terror," or that we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.

Fourth: I want to spend a moment on what some people refer to as "targeted killing." Here I will largely repeat Harold's much-quoted address to the American Society of International Law in March 2010. In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice. What is new is that, with advances in technology, we are able to target military objectives with much more precision, to the point where we can identify, target and strike a single military objective from great distances.

Should the legal assessment of targeting a single identifiable military objective be any different in 2012 than it was in 1943, when the U.S. Navy targeted and shot down over the Pacific the aircraft flying Admiral Yamamoto, the commander of the Japanese navy during World War Two, with the specific intent of killing him? Should we take a dimmer view of the legality of lethal force directed against individual

members of the enemy, because modern technology makes our weapons more precise? As Harold stated two years ago, the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the law of war on the use of technologically advanced weapons systems in armed conflict, so long as they are employed in conformity with the law of war. Advanced technology can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

On occasion, I read or hear a commentator loosely refer to lethal force against a valid military objective with the pejorative term "assassination." Like any American shaped by national events in 1963 and 1968, the term is to me one of the most repugnant in our vocabulary, and it should be rejected in this context. Under well-settled legal principles, lethal force against a valid *military* objective, in an armed conflict, is consistent with the law of war and does not, by definition, constitute an "assassination."

Fifth: as I stated at the public meeting of the ABA Standing Committee on Law and National Security, belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives. Reiterating principles from *Ex Parte Quirin* in 1942,⁷ the Supreme Court in 2004, in *Hamdi v. Rumsfeld*,⁸ stated that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'"

Sixth: contrary to the view of some, targeting decisions are not appropriate for submission to a court. In my view, they are core functions of the Executive Branch, and often require real-time decisions based on an evolving intelligence picture that only the Executive Branch may timely possess. I agree with Judge Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.⁹

⁷ 317 U.S. 1 (1942).

⁸ 542 U.S. 507 (2004).

⁹ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

As I stated earlier in this address, within the Executive Branch the views and opinions of the lawyers on the President's national security team are debated and heavily scrutinized, and a legal review of the application of lethal force is the weightiest judgment a lawyer can make. (And, when these judgments start to become easy, it is time for me to return to private law practice.)

Finally: as a student of history I believe that those who govern today must ask ourselves how we will be judged 10, 20 or 50 years from now. Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow.

I'm going to tell one more story. There's a movie out now called "Red Tails," that remind us all about the exploits and courage of the famed Tuskegee Airmen of World War Two. In March 1945 about 100 Tuskegee Airmen were sent to train at Freeman Field in Indiana. At the time Army Regulation 210-10 prohibited segregated officers' clubs in the Army. Determined to continue a system of segregation despite this rule, the base commander devised two different officers' clubs: one for all the Tuskegee airmen "instructors" (all of whom happened to be white), and another for the Tuskegee airmen "trainees" (all of whom happened to be black). Over the course of two days in April 1945, 61 Tuskegee airmen were arrested for challenging the segregated clubs, in what is now known in the history books as the "Freeman Field Mutiny." Several days later, all the Tuskegee Airmen on the base were rounded up, read the base regulation, and told to sign a certification that they had read it and understood it. Every one of them refused to sign. Next, with the legal help of a JAG from First Air Force, every Tuskegee airman on base was interviewed one by one in the base legal office and given three choices: (1) sign the certification, (2) write and sign your own certification, or (3) be arrested for disobeying a direct order.¹⁰ Almost all of them, again, refused to sign.

As a result, my uncle 2dLt Robert B. Johnson and over 100 other Tuskegee airmen became detainees of the U.S. military, arrested and

¹⁰ See "The Freeman Field Mutiny: A Study in Leadership," A Research Paper Presented to the Research Department Air Command and Staff College by Major John D. Murphy (March 1997).

charged with a violation of Article 64 of the Articles of War, disobeying a direct order in a time of war, a capital offense. Eventually, once the public learned of the episode, the Tuskegee airmen were released, but Lt Johnson was denied the opportunity to serve in combat and given a letter of reprimand from the U.S. Army. But, he never regretted his actions.

My legal colleagues and I who serve in government today will not surrender to the national security pressures of the moment. History shows that, under the banner of “national security,” much damage can be done – to human beings, to our laws, to our credibility, and to our values. As I have said before, we must adopt legal positions that comport with common sense, and fit well within the mainstream of legal thinking in the area, consistent with who we are as Americans.

I have talked today about legally sustainable and credible ways to wage war, not to win peace. All of us recognize this should not be the normal way of things, and that the world is a better place when the United States does indeed lead by the power of an example, and not by the example of its power.

In addition to my uncle, one of my personal heroes is my former law partner Ted Sorensen, who died a little over a year ago. Ted was John F. Kennedy’s speechwriter, one of his closest advisors, and himself one of the most eloquent communicators of our time.

In May 2004 Ted Sorensen gave one of the best speeches I’ve ever heard. It was right after the Abu Ghraib scandal broke. He said this, which I will never forget:

“Last week a family friend of an accused American guard in Iraq recited the atrocities inflicted by our enemies on Americans and asked: Must we be held to a different standard? My answer is YES. Not only because others expect it. We must hold ourselves to a different standard. Not only because God demands it, but because it serves our security. Our greatest strength has long been not merely our military might but our moral authority. Our surest protection against assault from abroad has been not all our guards,

gates and guns or even our two oceans, but our essential goodness as a people.”

My goal here tonight was to inform and to educate. My other reason for being here is to appeal directly to the students, to ask that you think about public service in your career. Law students become trained in the law for many different reasons, with many different traits and interests. Some are naturally suited for transactions, to help structure deals. Others want to be in the courtroom, and love advocacy. There are so many facets of the law -- and people who want to pursue them -- that help make our profession great.

Over the years, one of my big disappointments is to see a law student or young lawyer who went to law school motivated by a desire for public service, but who gave up the pursuit because of student loans, lack of a readily available opportunity, or the lure of a large law firm and a large starting salary.

To those law students who are interested in public service, I hope you do not lose that interest as your career progresses. We need talented lawyers serving in government at all levels, you will find every day interesting and rewarding, and, in the end, you and others will assess the sum total of your legal career, not by what you got, but by what you gave.

Thank you for listening.

Exhibit 23
to the Declaration of Colin Wicker



U.S. DEPARTMENT OF STATE

DIPLOMACY IN ACTION

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International Law

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'ammr 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 *intergovernmental* 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. interogatory 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 this is 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.

[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).

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JAMEEL JAFFER
DEPUTY LEGAL DIRECTOR



USDC SDNY
DOCUMENT
ELECTRONICALLY FILED

DOC #
FILED 9/22/14

MEMO ENDORSED

September 19, 2014

The Honorable Colleen McMahon
United States District Court
Southern District of New York
Room 1350
500 Pearl Street
New York, NY 10007

Re: *ACLU v. DOJ et al.* Case No. 12 Civ. 794

Dear Judge McMahon:

On September 5, 2014 the Court directed the ACLU to file a "request for production" indicating which documents identified on the Office of Legal Counsel's *Vaughn* index it "wish[e]d to be disclosed." I am writing in response to that direction and also to propose briefing schedules for resolution of issues relating to documents still withheld (in their entirety or in part) by OLC, CIA, and DOD. The ACLU has conferred with the government about these briefing schedules, which are proposed by the parties jointly.

Request for Production of Records Listed on OLC *Vaughn*

The ACLU seeks disclosure of all records listed on the OLC's *Vaughn* index except for

- records identified as drafts of Doc Nos. 4 and 5 (Doc Nos. 113; 131-143; 148-237; 238-242); and
- records identified as "open source media materials" (Doc Nos. 123-130).

The ACLU is willing to forgo its claim to other draft legal memoranda listed on the OLC's *Vaughn* index where the index also lists a final version of those memoranda. Because of redactions on the index, however, the ACLU is not able to identify these draft legal memoranda by number.

The ACLU is also willing to forgo its claim to records identified as Doc Nos. 57-66; 68-71; 73-74; 81; 83; 87-93; 96-100; 102-104; 110; 117; 118; 120-122 if the government can represent to the ACLU that these

9/22/2014
 1) The schedule all acceptable
 2) You will have my decision, reference on page 2 of this letter, the government will have week (at least, all remain unresolved issues)
 3) The government should prepare a modified OLC Vaughn index, all documents not single by the ACLU including draft memoranda, and the document listed in the carriage paragraph.

AMERICAN CIVIL LIBERTIES
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

documents do not mention Abdulrahman al-Aulaqi (or any spelling variant of that name).

Proposed Briefing Schedule for OLC Documents

The parties understand that the Court intends to rule shortly regarding issues relating to the set of OLC memoranda that the government has provided to the Court *in camera*. The parties jointly propose that the Court set the following briefing schedule for resolution of (i) the OLC's withholding of records other than the memoranda already provided to the Court *in camera*; and (ii) as to the memos already provided to the Court *in camera*, any issues not resolved by the Court's anticipated decision:

- **Oct. 3:** OLC to file its motion for summary judgment, including public *Vaughn* declarations.¹
- **Oct. 31:** ACLU to file its opposition and cross-motion.
- **Nov. 21:** OLC to file its reply and opposition.
- **Dec. 12:** ACLU to file its reply.

Proposed Briefing Schedule for CIA/DOD Documents

The Court has directed the CIA and DOD to file *Vaughn* indices *in camera* by September 25. The parties respectfully submit that the Court's interest in efficient adjudication of the case would be served by the agencies' filing of public *Vaughn* declarations as well as *ex parte* indices, even if the production of public *Vaughn* declarations requires that the agencies be afforded more time.² Accordingly, the parties respectfully propose that the Court set the following briefing schedule for resolution of issues relating to the CIA's and DOD's responses to the ACLU's FOIA request:

- **Nov. 14:** CIA and DOD to file their motion for summary judgment together with *ex parte Vaughn* indices and public *Vaughn* declarations.
- **Dec. 3:** the ACLU to file its opposition and cross-motion.
- **Dec. 19:** the CIA and DOD to file their reply and opposition.
- **Jan. 9:** the ACLU to file its reply.

¹ The ACLU believes that the OLC has an obligation to provide public *Vaughn* indices, not just *Vaughn* declarations, and reserves its right to seek public indices if they are not provided.

² The ACLU believes that the CIA and DOD have an obligation to provide public *Vaughn* indices, not just *Vaughn* declarations, and reserves its right to seek public indices if they are not provided.

* * *

The parties appreciate the Court's attention to this matter.

Respectfully,

/s/ Jameel Jaffer

*Counsel for Plaintiffs American Civil Liberties
Union and American Civil Liberties Union
Foundation*

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....X

THE NEW YORK TIMES COMPANY,
CHARLIE SAVAGE, and SCOTT SHANE,

Plaintiffs,

v.

11 Civ. 9336 (CM)

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

.....X

AMERICAN CIVIL LIBERTIES UNION and
THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, including its
component the Office of Legal Counsel, U.S.
DEPARTMENT OF DEFENSE, including its
component U.S. Special Operations Command,
and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....X

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, upon the Declarations of John E. Bies, Martha M. Lutz, and Rear Admiral Sinclair M. Harris, and the accompanying memorandum of law, as well as the classified declarations and memorandum filed for the Court’s *ex parte* and *in camera* review, defendants the Department of Justice, the Department of Defense, and the Central Intelligence Agency, by their attorneys, Preet Bharara, United States Attorney for the Southern District of New York, and Joyce R. Branda, Acting Assistant Attorney General, 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 10007, for an order granting summary judgment in favor of defendants with regard to the remaining documents sought from DOJ's Office of Legal Counsel.

Dated: New York, New York
October 3, 2014

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Acting Assistant Attorney General

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Southern District of New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	11 Civ. 9336 (CM)
)	
U.S. DEPARTMENT OF JUSTICE, et al.,)	
)	
Defendants.)	
)	
AMERICAN CIVIL LIBERTIES UNION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	12 Civ. 794 (CM)
)	
U.S. DEPARTMENT OF JUSTICE, et al.,)	
)	
Defendants.)	
)	

SECOND DECLARATION OF JOHN E. BIES

I, John E. Bies, declare as follows:

1. As explained in my prior declaration in this case, I am a Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) of the United States Department of Justice. My responsibilities include the supervision of OLC’s responses to requests it receives under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). I submit this declaration pursuant to the Court’s September 19, 2014 Order, in support of the Government’s decision to withhold certain classified and privileged documents in OLC’s possession, and in support of the Government’s determination that such privileges have not been waived. These statements are based on my personal knowledge, on information provided to me by OLC attorneys and staff

working under my direction, and on information provided to me by others within the Executive Branch of the Government.

2. As explained more fully in paragraphs 8 through 17 of my first unclassified declaration in this case, *see* Declaration of John E. Bies, dated June 20, 2012 (“First Bies Decl.”), in connection with these two consolidated cases, OLC received three FOIA requests:

- a. On June 24, 2010, OLC received a request dated June 11, 2010 from New York Times reporter Scott Shane seeking “copies of all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing . . . of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States Government.” *See* First Bies Decl. ¶ 8 & Ex. A (the “Shane Request”);
- b. On October 7, 2011, OLC received a request dated the same day from New York Times reporter Charlie Savage seeking “a copy of all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for the United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist.” *See id.* ¶ 10 & Ex. C (the “Savage Request”); and
- c. On October 24, 2011, OLC received a FOIA request dated October 19, 2011, from Nathan Freed Wessler on behalf of the American Civil Liberties Union Foundation (together with the American Civil Liberties Union, collectively hereinafter the “ACLU”), requesting *inter alia* all records “pertaining to the legal basis in domestic, foreign, and international law upon which U.S.

citizens can be subjected to targeted killings.” *See id.* ¶ 14 & Ex. E (the “ACLU Request”).

3. As explained more fully in paragraphs 18 through 28 of my unclassified declaration dated June 20, 2012, OLC conducted a search for records responsive to the New York Times and ACLU FOIA requests.

4. As described in paragraphs 23 to 28 and 38 of my June 20, 2012 public declaration, in addition to the unclassified documents discussed in that declaration, OLC searched classified electronic and paper files for documents responsive to the American Civil Liberties Union (“ACLU”) request, both by reviewing secure locations identified by OLC attorneys as locations that potentially might contain responsive documents, and by running key word searches on classified electronic mail systems.

5. As a result of that search, OLC located documents responsive to the ACLU request that are either classified or protected from disclosure under FOIA by statute. As explained in my June 20, 2012 classified declaration, OLC determined that all but two of these documents are exempt from disclosure under FOIA pursuant to Exemption Five, 5 U.S.C. § 552(b)(5), which exempts from disclosure documents or information normally privileged in the civil discovery context, including documents or information protected by the deliberative process and attorney-client privileges. Because OLC had been informed that disclosing additional information about the number or nature of these responsive records could tend to reveal information that was exempt because it was classified or protected from disclosure by statute, OLC did not provide such information in its public response to the ACLU’s FOIA request, but instead provided a no-number, no-list response with regard to these responsive documents. On June 20, 2012, I provided the Court with classified and unclassified declarations supporting the

decision to withhold these documents pursuant to Exemption Five. In order to aid the Court's understanding of the issues before it, my classified declaration was also accompanied by a classified index of the documents responsive to the ACLU request but subject to the Government's no-number, no-list response.

6. Also on June 20, 2012, the Government filed declarations in support of the decision to withhold these documents, as well as additional information relating to the number and nature of these documents, pursuant to FOIA Exemptions One and/or Three, 5 U.S.C. § 552(b)(1) & (3).

7. I understand that the Second Circuit panel's June 23, 2014 opinion concluded that subsequent to the Court's January 2013 decision on summary judgment in favor of the Government, as a result of certain public statements and the release in February 2013 of a draft Department of Justice white paper, titled "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," dated November 8, 2011 (the "draft white paper"), a waiver of applicable privileges occurred as to certain portions of the legal analysis contained in one of these responsive documents, the July 16, 2010 memorandum from David J. Barron, the Acting Assistant Attorney General of OLC, to the Attorney General, which has been referred to during this litigation as the "OLC-DoD Memorandum," and which is identified in OLC's classified index of documents responsive to the ACLU request as Document 5.

8. Pursuant to the Court's July 9, 2014 Order, the Government on August 15, 2014 submitted the outstanding documents responsive to the New York Times requests to the Court for *in camera* review. My second classified declaration, filed with those documents, explains why they remain privileged and exempt from disclosure. I understand that, in its Order dated

September 30, 2014, the Court resolved the status of the outstanding documents responsive to the New York Times requests.¹

9. The Court's September 5, 2014 Order directed Plaintiffs to identify the documents they seek from OLC's redacted index. On September 19, 2014, pursuant to that Order, the ACLU indicated that it is challenging the withholding of all listed documents except those identified on the OLC index as Documents 113, 116, 123 to 143, and 148 to 242. In addition, I understand from a subsequent e-mail communication between the ACLU and the government's counsel that the ACLU has agreed to exclude documents consisting of e-mails that do not contain attachments. Based on this understanding, we have identified Documents 12, 14 to 39, 41 to 45, 47 to 49, 51 to 53, 55, 56, 85, 86, 104, 105, 107 to 109, 111, 112, 115, 259, 261, 266, and 267, which are e-mails containing interagency legal deliberations that do not have attachments, as documents that the ACLU is no longer seeking. Thus, taken together, I understand that the ACLU is not challenging the withholding of Documents 12, 14 to 39, 41 to 45, 47 to 49, 51 to 53, 55, 56, 85, 86, 104, 105, 107 to 109, 111 to 113, 115, 116, 123 to 143, 148 to 242, 259, 261, 266, and 267. I have attached as Exhibit A a copy of the OLC index that was provided to Plaintiffs after being redacted pursuant to the Second Circuit's orders, revised to reflect only those entries for which I understand that the ACLU continues to challenge the underlying withholding.

10. Also pursuant to that Order, the Government today submits a legal memorandum and declarations in support of those withholdings which the ACLU has indicated that it intends to challenge. I am submitting this unclassified declaration in support of the conclusion that the documents whose withholdings the ACLU challenges are exempt from disclosure pursuant to

¹ It is my understanding that the government received this classified order on October 2, 2014 and that it is currently undergoing a classification review.

FOIA Exemption Five, 5 U.S.C. § 552(b)(5). Because of the classified and privileged nature of the documents at issue, I am also submitting an *ex parte*, in camera declaration in further support of that conclusion. I understand that the Government is filing additional classified *ex parte* declarations in support of the conclusion that most of the challenged documents are also exempt from disclosure pursuant to Exemptions One and/or Three of FOIA, 5 U.S.C. § 552(b)(1), (3).

The Documents at Issue

11. I am personally familiar with the OLC documents whose withholding the ACLU has challenged.

12. These documents include:

- a. Predecisional OLC and/or Department of Justice legal advice documents (see, e.g., Documents 4 and 5);
- b. Internal Executive Branch documents reflecting predecisional OLC and/or Department of Justice legal advice;
- c. Internal and confidential Executive Branch documents conveyed to OLC for the purpose of requesting or obtaining confidential legal advice, and including privileged and/or classified factual information potentially relevant to the request for legal advice (see, e.g., Document 75);
- d. Internal Executive Branch legal deliberations (see, e.g., Document 7);
- e. Internal OLC attorney work product, such as draft OLC legal analysis or excerpts of draft legal analysis, generated during the preparation of OLC advice, which often include confidential and classified factual information provided to OLC in connection with a request for legal advice, and other more informal internal attorney work product generated during the preparation of

OLC advice, such as preliminary outlines of legal analysis or questions to consider and handwritten notes, either standing alone or in the margins of client communications or drafts of advice, some of which also include confidential and classified factual information provided to OLC in connection with a request for legal advice (see, e.g., Documents 50, 120 to 122, 144 to 147, 243, 269, and 270);

- f. Classified and/or privileged factual information provided to OLC in connection with a request for legal advice, including input and comments relating to draft factual sections of draft legal advice (see, e.g., Documents 57-66, 68-71, 73, and 74); and
- g. Classified legal analyses prepared for oversight purposes (see, e.g., Document 9).

13. All but two of these documents would be protected from disclosure in civil litigation discovery because of the applicability of one or more privileges. Accordingly, they are properly withheld from disclosure under FOIA pursuant to Exemption Five, 5 U.S.C. § 552(b)(5). These privileges include the deliberative process privilege and the attorney-client privilege.

14. Following the Second Circuit panel's opinion and the associated disclosures, I understand that the Government conducted a classification review of Document 9 in connection with a separate FOIA matter in litigation with a different requester, and following that review, a redacted version of Document 9 has been provided to the ACLU. Document 8 and the redacted portions of Document 9 are not being withheld pursuant to Exemption Five, but are being

withheld only pursuant to Exemptions One and Three, 5 U.S.C. § 552(b)(1), (3), for reasons stated in classified declarations being submitted today.

15. In addition, certain documents listed on the classified OLC index are also responsive to the New York Times requests. Although it is my understanding that the status of these documents was resolved by the Court's September 30, 2014 Order, I understand from the ACLU's September 19, 2014 submission to the Court that it may intend to challenge the withholdings and redactions of these documents.

16. Document 5 is the July 16, 2010 memorandum. Although it is my understanding that the status of this memorandum was fully resolved by the Second Circuit panel's June 23, 2014 opinion, I understand from the ACLU's September 19, 2014 submission to the Court that it may intend to challenge the withholding of portions of Document 5 redacted consistent with the Second Circuit's opinion.

Applicable Privileges

17. As explained below, the withheld records challenged by the ACLU consist primarily of records conveyed in the course of preparing confidential, predecisional OLC legal advice to assist Executive Branch clients in making policy decisions, or memorializing such advice. Accordingly, such records are covered by the deliberative process and/or attorney-client privileges, and are therefore exempt from disclosure under FOIA Exemption Five, unless those privileges have been waived.

18. The deliberative process privilege protects documents that are (a) predecisional, in that they were generated prior to decisions or potential decisions regarding contemplated future counterterrorism operations; and (b) deliberative, in that they contain, reflect, or reveal

discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative processes.

19. Except as noted in paragraph 14, the documents sought by the ACLU are protected by the deliberative process privilege. They are predecisional, in that they were generated prior to contemplated Executive Branch policy decisions. They are deliberative, in that they contain, reflect, or reveal discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative processes. Requiring disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to OLC’s mission and the deliberative processes of the Executive Branch that the development of OLC’s considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters, including factual information necessary to develop accurate and relevant legal advice, and draft analyses reflecting preliminary thoughts and ideas. Protecting the challenged withholdings from compelled disclosure is critical to ensuring that Executive Branch attorneys will be able to examine relevant facts and analysis, and draft and vet legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

20. The attorney-client privilege protects documents that contain or reflect confidential legal advice provided by an attorney to the client, and confidential client requests for legal advice and other confidential communications and facts conveyed by the client to the attorney for the purpose of receiving legal advice.

21. Except as noted in paragraph 14, the documents sought by the ACLU are protected by the attorney-client privilege. Many of the documents at issue contain legal advice or drafts of legal advice that was ultimately communicated in confidence from OLC to Executive Branch clients. In addition, the existence and content of some of the documents may reflect the privileged fact that a client requested confidential legal advice on a particular subject. Many of the documents at issue also contain factual material that was communicated in confidence by Executive Branch clients to OLC for the purpose of obtaining confidential legal advice. Having been asked to provide legal advice, OLC attorneys stood in a special relationship of trust with their Executive Branch clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, so too would disclosure of the legal advice itself undermine that trust.

22. In addition, the challenged withholdings also include one or more records covered by the presidential communications privilege, which protects confidential communications that relate to presidential decisionmaking and involve the President or his senior advisors. The privilege protects both the advice or recommendations conveyed to the President by his advisers and communications among those presidential advisers made in the course of formulating such advice or recommendations, and direct, confidential communications from the President to senior officials on sensitive topics where disclosure would inhibit the President's ability to engage in effective communications and decisionmaking.

Loss of Applicable Privileges

23. It is my understanding, as explained more fully below, applying the Second Circuit's reasoning as I understand it, the Executive Branch has not waived applicable privileges

with respect to either the legal advice or the factual material contained in the challenged withholdings, which therefore remain exempt from disclosure pursuant to Exemption Five, 5 U.S.C. § 552(b)(5).

24. I understand that the Second Circuit panel found that a waiver occurred with respect to certain portions of the legal analysis contained in an OLC opinion. My understanding is that the Second Circuit panel reached this conclusion primarily due to the release of a draft Department of Justice white paper in February 2013 containing some legal analysis similar to the OLC opinion at issue, and also due to certain public statements officially acknowledging the identity of the relevant target and the existence of relevant OLC advice. Given the materials that formed the basis for the panel's finding of waiver and official acknowledgement, in considering how to apply that finding of waiver to other documents, OLC understood the waiver found by the Second Circuit panel to apply only to legal analysis embodied in a final OLC legal advice document, such as an OLC opinion, where the analysis is the same as or closely related to legal analysis contained in the draft white paper, and where the target at issue has been officially acknowledged by the Government. As I will describe in greater detail, I do not believe that this standard has been satisfied with respect to any of the documents the ACLU now seeks.

25. To begin, the Second Circuit panel indicated that its finding of waiver did not extend to privileged and/or classified factual information provided by clients in the course of seeking confidential OLC legal advice. The Second Circuit panel recognized that this confidential factual material remains exempt from disclosure, and its opinion permitted the redaction, in its entirety, of the section of the July 16, 2010 memorandum containing factual material. Applying the same principle, I understand that all privileged and/or classified factual

material contained in the challenged withholdings, and all documents consisting entirely of privileged and/or classified factual material, remain exempt from disclosure.

26. Nor do I understand the Second Circuit to have found that applicable privileges have been waived with respect to confidential and classified communications from clients made in the course of requesting or obtaining OLC legal advice. These communications are deliberative and predecisional components not only of the Executive Branch policymaking process, but also of OLC's own internal deliberative process, such as OLC's internal deliberative process that resulted in the July 16, 2010 memorandum. In other words, these documents are predecisional, deliberative communications that OLC considers in the course of preparing its own final legal advice—legal advice that is itself a predecisional, deliberative input to an Executive Branch policymaking process. Even if waiver may have occurred as to portions of OLC opinions containing legal analysis that is the same as or closely related to legal analysis in the draft white paper, and that pertains to an officially acknowledged potential target, the waiver found by the Second Circuit panel did not extend to OLC's own internal deliberative process, of which confidential requests for legal advice are a part, such as related requests for legal advice, nor would it extend to separate and distinct deliberations from the one in issue here.

27. Likewise, I do not understand the waiver found by the Second Circuit to extend to other confidential and classified deliberative materials, such as the interagency exchange of legal views and arguments. The Second Circuit panel's analysis focused on the effect the February 2013 release of the draft Department of Justice white paper and certain other public statements regarding relevant OLC legal analysis had on the privileged status of certain final OLC legal advice. I am aware of no suggestion in the panel's opinion or from review of the materials on which the panel relied that any waiver occurred with respect to other aspects of the

normal predecisional interagency exchange of legal views and arguments. Moreover, to the extent that any confidential and classified deliberative materials in issue pertained to separate decisionmaking processes than that for which the Second Circuit panel found a waiver to have occurred, that fact would form a separate, independently sufficient basis for concluding that no waiver occurred with respect to such documents.

28. Nor do I understand the Second Circuit to have found that applicable privileges have been waived with respect to OLC drafts, notes, and outlines containing legal thoughts, ideas, theories, and preliminary analysis. As discussed above, these notes, drafts, and outlines are part of OLC's internal deliberative process, to which the waiver found by the Second Circuit panel did not extend. Moreover, I understand the Second Circuit panel to have found a waiver with respect to certain final OLC advice relating to the lawfulness of using lethal force against al-Aulaqi in certain circumstances, and to the extent that any of the notes, drafts, and outlines the ACLU seeks pertain to deliberative processes separate and distinct from that deliberative process, that fact forms a separate, independently sufficient basis for concluding that no waiver occurred with respect to such documents. In addition, in considering how to apply the Second Circuit's finding of waiver when processing other documents, it was OLC's understanding that the mere fact that some notes or a draft or outline contain language or analysis that ultimately winds up in a final, formal OLC opinion does not mean that there is any waiver of applicable privileges over the draft document, just as the use of language derived from a law clerk's bench memo in a judicial opinion does not effect a waiver of privileges applicable to the bench memo.

29. In addition, where one final OLC opinion or memorandum contains citations to other, previous OLC opinions or memoranda, or contain discussions that reflect the deliberations in such other memoranda, I do not understand the Second Circuit to have found that applicable

privileges have been waived with respect to references to the date, title, and recipient of or analysis contained in other nonpublic OLC opinions and memoranda that simply happen to be cited or discussed in any of the challenged withholdings. Even if the legal analysis in a final OLC opinion or memorandum itself has been waived, any citations and references to other OLC legal advice relate to entirely independent deliberative processes and reflect the content of confidential legal advice provided to OLC's Executive Branch clients in other contexts would not have been waived unless there is a separate basis for finding such a waiver. Neither the draft white paper nor the public statements relied upon by the Second Circuit refer to or otherwise disclose the contents any other confidential legal memoranda that happen to be cited in challenged withholdings, and I am aware of no basis for concluding that there has been any waiver of applicable privileges with respect to this separate OLC legal advice.

30. Finally, in considering how to apply the Second Circuit's finding of waiver to other documents, it has been OLC's understanding that a waiver in the context of one deliberative decisionmaking process does not effect a waiver regarding the existence or content of other, separate deliberations or for other undisclosed attorney-client confidences. Thus, OLC routinely cites to its prior published opinions in later memoranda providing confidential legal advice, and I do not believe that there is a waiver regarding such a discussion of a prior published opinion's analysis in the context of subsequent legal advice by virtue of the publication of the initial opinion. Similarly, OLC often confronts similar legal questions in the context of separate and distinct deliberative processes. I do not understand that a waiver regarding the content of OLC's analysis of a particular legal issue in the context of one deliberative process waives the existence or the content of a similar analysis in other contexts. Based on my experience at OLC, a contrary rule would have a substantial chilling effect on the

willingness of OLC's Executive Branch clients to seek confidential OLC legal advice in the many contexts in which such a waiver might arise; finding waiver in these circumstances could also deter OLC from providing written legal advice and would present incentives that could harm the robust presentation of all competing considerations in the drafting of written legal advice in such contexts, to the detriment of the quality of the Executive Branch's policy deliberations and the rule of law.

31. In my view, the government has also not waived any applicable privileges with respect to any remaining portions of the challenged withholdings. I will address any additional issues regarding possible waiver in the context of my discussion of each category of document below.

Documents Reflecting Legal Advice

32. It is my understanding that, apart from the withholding of the redacted portions of Document 5, which was upheld by the Second Circuit's June 23, 2014 opinion, the Court's review and September 30, 2014 Order has fully resolved the status of any OLC legal memoranda providing advice responsive to the ACLU's request, including the redacted portions of Document 4. In any event, confidential legal advice provided by OLC or the Department of Justice is quintessential material covered by the deliberative process and attorney-client privileges.

33. Documents consisting of or containing legal advice provided to Executive Branch decisionmakers in connection with their policymaking deliberations fall squarely within the deliberative process privilege because they would be both predecisional and deliberative. Such documents are predecisional because they were prepared in connection with contemplated Executive Branch policy decisions. They are deliberative because they constituted advice used

by decisionmakers during interagency deliberations. Compelled disclosure of such documents would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters. Protecting such documents from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

34. Documents providing legal advice are also protected by the attorney-client privilege. As confidential legal advice provided to Executive Branch clients, such documents are protected by the attorney-client privilege. The considerations regarding the need for confidential Executive Branch deliberations discussed in paragraph 33 above are particularly compelling in the context of the provision of legal advice by OLC or the Department of Justice to their Executive Branch clients. Such documents reflect confidential communications among OLC, the Department of Justice, and Executive Branch clients made for the purpose of requesting and providing legal advice. In providing the legal advice contained in such documents, OLC and the Department of Justice was serving in an advisory role as legal counsel to the Executive Branch. Having been requested to provide counsel on the law, OLC and the Department of Justice stood in a special relationship of trust with the various Executive Branch agencies, departments, and officials seeking the advice. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate

legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust.

35. The advice or deliberations reflected in any such documents has not been made public, and to the extent that such documents have been shared with others in the Government, these individuals would, pursuant to Executive Order 13,526, only have been persons with appropriate security clearances and a need to know—that is, individuals whose job responsibilities relate to national security. There is no question that anyone who reviewed such documents would have understood the need for confidentiality.

36. In addition, the factual information reflected in any such documents would have been provided in connection with a request for legal advice. Moreover, the factual information contained in these documents is primarily classified information. Such client confidences are likewise protected by the attorney-client privilege.

37. For reasons stated in paragraph 30, waiver of applicable privileges has not occurred with respect to any documents conveying or memorializing predecisional legal advice that have not been released.

38. In addition, for the reasons stated in paragraph 25, applicable privileges have not been waived with respect to any statement and discussion of classified facts found in any such legal advice documents.

**Documents Reflecting Information Conveyed in the Course of
Requesting or Obtaining Legal Advice**

39. Requests by Executive Branch officials seeking legal advice from OLC and conveying information and materials relevant to those requests are part of Executive Branch deliberative processes, and disclosing such documents would tend to harm the same deliberative interests as disclosing the resulting advice, as discussed in paragraph 33 above. These

documents are predecisional because they were prepared in connection with contemplated future counterterrorism operations or gathered and selected in connection with seeking recommendations about such contemplated future counterterrorism operations. They are deliberative because they constitute inputs both to OLC's internal deliberative process for rendering legal advice, and inputs to the broader Executive Branch decisionmaking process. In addition, the information or documents provided to OLC are also deliberative to the extent that the decisions to provide them to OLC for its consideration reflect judgments by OLC and/or its Executive Branch clients regarding what information and factors are relevant to OLC's deliberation regarding a particular legal question. Compelled disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters. Protecting these documents from compelled disclosure is critical to ensuring that Executive Branch attorneys will have full access to facts and legal arguments necessary to provide through, candid, and accurate written legal advice, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

40. Such documents are also protected by the attorney-client privilege. The considerations regarding the need for confidential Executive Branch deliberations discussed in paragraph 39 above are particularly compelling in the context of requests for confidential legal advice of OLC or the Department of Justice by their Executive Branch clients. These documents reflect confidential communications among OLC, the Department of Justice, and Executive

Branch clients made for the purpose of requesting and providing legal advice. Disclosure of client confidences offered in the course of requesting such advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients.

41. These documents have not been made public, and to the extent that they have been shared with others in the Government, these individuals would, pursuant to Executive Order 13,526, only have been persons with appropriate security clearances and a need to know—that is, individuals whose job responsibilities relate to national security. There is no question that anyone who reviewed these documents would have understood the need for confidentiality.

42. In addition, the factual information contained in these documents is primarily classified information provided to OLC in connection with a request for legal advice. Such client confidences are likewise protected by the attorney-client privilege.

43. For the reasons discussed in paragraph 26, no waiver has occurred with respect to confidential and classified documents conveying information in the process of requesting or obtaining confidential legal advice.

44. For the reasons discussed in paragraph 25, no waiver has occurred with respect to classified factual material contained in such documents.

Documents Reflecting Internal Executive Branch Legal Deliberations

45. Documents reflecting internal Executive Branch legal deliberations all fall squarely within the deliberative process privilege because they are both predecisional and deliberative. These documents are predecisional because they were prepared in connection with contemplated future Executive Branch policy decisions. They are deliberative because they constitute advice used by decisionmakers. Compelled disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank

communication necessary for effective governmental decisionmaking. As discussed above, protecting these documents from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

46. These documents are also protected by the attorney-client privilege. They reflect confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice, and many also reflect a back-and-forth between OLC and its Executive Branch clients, and such give-and-take inevitably reflects OLC's view regarding the appropriate legal analysis in the circumstances under deliberation, and thus contains implicit legal advice from OLC to those clients. As such, these documents are all also protected by the attorney-client privilege. The legal deliberations reflected in any such documents has not been made public, and to the extent that such documents have been shared with others in the Government, these individuals would, pursuant to Executive Order 13,526, only have been persons with appropriate security clearances and a need to know—that is, individuals whose job responsibilities relate to national security. There is no question that anyone who reviewed such documents would have understood the need for confidentiality.

47. For the reasons described in paragraph 27, no waiver of applicable privileges has occurred with respect to these documents, which contain internal Executive Branch legal deliberations and interagency comments on draft legal analysis.

48. For the reasons discussed in paragraph 25, no waiver has occurred with respect to classified factual material contained in these documents.

Documents Containing Draft Legal Analysis or Other Preliminary Attorney Work Product

49. Preliminary attorney work product, such as drafts, notes, and outlines, generated in connection with the preparation of OLC legal advice, is quintessential deliberative material. Such documents contain attorneys' informal views and preliminary thoughts and reactions, and are integral to the development of OLC's final legal analysis of the issue at hand. These documents are thus predecisional to both the final legal analysis of the question at hand, and to the contemplated future Executive Branch decisions to which the analysis relates. And they are deliberative, because they are drafts or preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions.

50. These documents are also protected by the attorney-client privilege. Disclosure of this internal work product would disclose confidential facts regarding the nature and subject of requests for OLC legal advice. In addition, much of this internal draft work product would contain confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. The disclosure of internal draft work product would also tend to disclose the content of related legal advice provided by OLC to its clients, which is also protected by the attorney-client privilege. The internal work product and attorney-client confidences reflected in any such documents have not been made public, and to the extent that such documents have been shared with others in the Government, these individuals would, pursuant to Executive Order 13,526, only have been persons with appropriate security clearances and a need to know—that is, individuals whose job responsibilities relate to national security. There is no question that anyone who reviewed such documents would have understood the need for confidentiality.

51. For reasons discussed in paragraph 28, no waiver of applicable privileges has occurred with respect to these documents containing draft legal analysis and other preliminary attorney work product.

52. For the reasons discussed in paragraph 25, no waiver has occurred with respect to classified factual material contained in these documents.

Documents Containing Classified Factual Information for Deliberations

53. Documents containing privileged and/or classified factual information provided to OLC in connection with a request for legal advice, or the fact of OLC's possession of them, is likewise protected by the deliberative process privilege. The fact that these documents are in OLC's possession reflects Executive Branch deliberations regarding what information is relevant to certain Executive Branch policy decisions. Disclosing these documents would reveal privileged and confidential information about the nature and subject of those decisions, and that OLC and its Executive Branch clients considered the information contained in the documents potentially relevant to that determination. Accordingly, the fact that OLC has possession of the particular factual information contained in these documents is protected by the deliberative process privilege.

54. These documents are also protected by the attorney-client privilege. This factual information was provided to OLC in confidence in connection with a request for legal advice. Moreover, disclosing OLC's possession of these documents would reveal confidential facts regarding the nature and subject of requests for OLC legal advice. Again, the attorney-client privilege protects such client confidences. The classified and/or privileged factual information reflected in any such documents has not been made public, and to the extent that such documents have been shared with others in the Government, these individuals would, pursuant to Executive

Order 13,526, only have been persons with appropriate security clearances and a need to know—that is, individuals whose job responsibilities relate to national security. There is no question that anyone who reviewed such documents would have understood the need for confidentiality.

55. For reasons discussed in paragraph 25, no waiver of applicable privileges has occurred with respect to documents that consist of privileged and/or classified factual material.

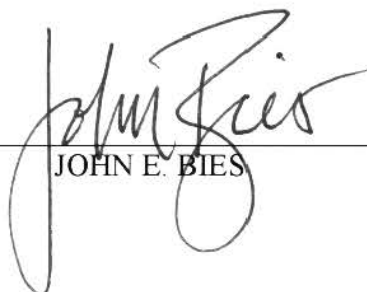
* * * * *

56. As directed by the Court, I have reviewed the withheld documents individually and have determined that no reasonably segregable, non-exempt information can be provided beyond the unredacted portions already provided to Plaintiffs from Documents 4, 5, and 9.

57. In conclusion, for the reasons discussed herein and in my third classified declaration, I respectfully submit that all but two of the documents whose withholding ACLU is challenging are exempt from disclosure pursuant to FOIA Exemption Five, because they are protected by the deliberative process and attorney-client privileges. The compelled disclosure of these documents, or any unreleased portions thereof, would harm the deliberative processes of the government and would disrupt the attorney-client relationship between OLC and the Department of Justice and their clients throughout the Executive Branch. I also understand that one document and redacted portions of another not covered by FOIA Exemption Five are exempt from disclosure under FOIA Exemption One and Three.

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

Executed: October 3, 2014



JOHN E. BIES

Exhibit A

All redactions pursuant to Second Circuit Order of August 11, 2014

Revised Classified *Ex Parte* Index of Office of Legal Counsel Documents, October 3, 2014¹
 ACLU FOIA 12-013

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
1						b(1), b(3), b(5)
2				[REDACTED]		b(1), b(3), b(5)
3						b(1), b(3), b(5)
4	2/19/2010	David J. Barron, Acting Assistant Attorney General, OLC	The Attorney General	Lethal Operations Against Shaykh Anwar Aulaqi	Classified legal memorandum from OLC to the Attorney General providing legal advice regarding legal authority to use lethal force directed against Shaykh Anwar Aulaqi, a U.S. citizen.	b(1), b(3), b(5)

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¹ This index has been modified to omit the entries whose withholding the ACLU is not challenging, *see* Second Bies Decl. ¶ 9, and to correct minor errors.

All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
5	7/16/2010	David J. Barron, Acting Assistant Attorney General, OLC	The Attorney General	Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi	Classified legal memorandum from OLC to the Attorney General providing legal advice regarding the application of U.S. federal criminal law and the Constitution in connection with the use of lethal force directed against Shaykh Anwar Aulaqi, a U.S. citizen.	b(1), b(3), b(5)
6	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
7	[REDACTED]	[REDACTED]	[REDACTED]	Analysis of 18 U.S.C. § 1119	Classified legal memorandum [REDACTED] to OLC containing legal deliberations regarding the appropriate legal analysis of the application of U.S. federal criminal law in connection with the use of lethal force directed against a U.S. citizen.	[REDACTED]
8	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3)
9	5/25/2011	The Department of Justice	[REDACTED]	Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen	Classified legal analysis regarding the legal basis for the CIA to use lethal force against a U.S. citizen abroad in certain circumstances.	b(1), b(3)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
10-11, 13	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
40	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
46	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
50	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Internal OLC draft insert to draft legal analysis of the legal basis for the CIA to use lethal force against a U.S. citizen abroad in certain circumstances.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
54	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
57	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and Al-Qa'ida in the Arabian Peninsula (AQAP), provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
58	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
59	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
60	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
61	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
62	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
63	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
64	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
65	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
66	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
67	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
68	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
69	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
70	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
71	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
72	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
73	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
74	[REDACTED]	[REDACTED]	[REDACTED]	Al-Qa'ida in the Arabian Peninsula	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
75	[REDACTED]	[REDACTED]	[REDACTED]	Request for Views on Legality of Targeting for Lethal Action United States Citizen, Shaykh Anwar Aulaqi	Classified and confidential attorney-client communication requesting legal advice from the Attorney General and conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)
76	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified and confidential attorney-client communication conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
77	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified and confidential attorney-client communication conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)
78	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified and confidential attorney-client communication conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)
79	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified and confidential attorney-client communication conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)
80	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified and confidential attorney-client communication conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)
81	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
82	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified and confidential attorney-client communication conveying factual information relevant to interagency request for legal advice and relied upon in the preparation of Documents 4 & 5.	b(1), b(3), b(5)
83	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
84	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
87	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
88	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
89	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
90	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
91	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
92	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
93	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
94	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
95	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Memorandum [REDACTED] to OLC providing additional classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
96	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
97	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
98	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
99	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
100	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
101	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
102	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
103	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
106	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
110	[REDACTED]	[REDACTED]	[REDACTED]	The Evolution of Al-Qa'ida's Node in the Arabian Peninsula	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
114	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

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All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
117	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED] Response on DOJ Questions	Classified factual information [REDACTED] relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
118	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Classified factual information relating to Anwar al-Aulaqi and AQAP, provided in connection with a request for legal advice regarding the potential use of lethal force against Anwar al-Aulaqi.	b(1), b(3), b(5)
119	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
120	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Internal OLC outline of classified factual information provided in confidence in connection with interagency request for legal advice, prepared in connection with drafting legal advice.	b(1), b(3), b(5)

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
121	[REDACTED]			List of Verification Topics	Internal OLC outline of classified factual information provided in confidence in connection with interagency request for legal advice, prepared in connection with drafting legal advice.	b(1), b(3), b(5)
122	[REDACTED]			Add'l Follow-Up	Internal OLC outline of classified factual information provided in confidence in connection with interagency request for legal advice, prepared in connection with drafting legal advice.	b(1), b(3), b(5)
144	[REDACTED]			Draft Talking Points on Legal Basis for Use of Force Against Al Qaeda	Internal outline of classified facts and legal analysis prepared in connection with the drafting of legal advice.	b(1), b(3), b(5)
145	[REDACTED]			Outline of Analysis: Possible Lethal Operation Against Anwar al-Aulaqi	Internal outline of classified facts and legal analysis prepared in connection with the drafting of legal advice.	b(1), b(3), b(5)
146	[REDACTED]			Outline of Analysis: Possible Lethal Operation Against Anwar al-Aulaqi	Draft of Document 145 with handwritten markings by an attorney.	b(1), b(3), b(5)
147	[REDACTED]			Outline of Analysis: Possible Lethal Operation Against Anwar al-Aulaqi	Draft of Document 145 with different handwritten markings by an attorney.	b(1), b(3), b(5)
243					Electronic draft of Document 120.	b(1), b(3), b(5)

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
244	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
245	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
246	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
247	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
248	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
249	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
250	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
251	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
252	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
253	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
254	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

All redactions pursuant to Second Circuit Order of August 11, 2014

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
255	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
256	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
257	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
258	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
260	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

All redactions pursuant to Second Circuit Order of August 11, 2014

Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
262	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
263	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
264	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
265	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)
268	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

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Doc. No(s).	Date(s)	From	To	Title/Subject	Description	Exemptions
269	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Handwritten attorney notes regarding legal deliberations in connection with the preparation of possible legal advice.	b(1), b(3), b(5)
270	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Handwritten attorney notes regarding legal deliberations in connection with the preparation of possible legal advice.	b(1), b(3), b(5)
271	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	b(1), b(3), b(5)

[Remainder of Index Withheld Pursuant to Second Circuit Opinion of June 23, 2014]

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY,
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 11-cv-9336 (CM)

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 12-cv-794 (CM)

DECLARATION OF MARTHA M. LUTZ
CHIEF OF THE LITIGATION SUPPORT UNIT
CENTRAL INTELLIGENCE AGENCY

I, MARTHA M. LUTZ, hereby declare and state:

1. I am the Chief of the Litigation Support Unit of the Central Intelligence Agency ("CIA" or "Agency"). I have held this position since October 2012. Prior to assuming this position, I served as the Information Review Officer ("IRO") for the Director's Area of the CIA for over thirteen years. In that capacity, I was responsible for making classification and

release determinations for information originating within the Director's Area, which includes, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 1989.

2. As the Chief of the Litigation Support Unit, I am responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order No. 13526. Because I hold original classification authority at the TOP SECRET level, I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations.

3. Pursuant to authority delegated by the Executive Director of the CIA, I also have been appointed as a Records Validation Officer ("RVO"). As a RVO, I am authorized to sign on behalf of the CIA regarding searches for records and the

contents of any located or referred records that are under the cognizance of any or all CIA directorates or areas.

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

I. BACKGROUND

5. In its opinion dated 23 June 2014, the U.S. Court of Appeals for the Second Circuit held that the CIA's "operational role" in the lethal use of drones generally, and in the strike that killed Anwar al-Aulaqi specifically, have been official acknowledged by virtue of statements made by certain government officials. As part of that holding, the Second Circuit ordered disclosure of portions of a 16 July 2010 Department of Justice Office of Legal Counsel ("OLC") memorandum that discussed the legal bases for targeting Aulaqi (referred to as the "OLC-DOD Memorandum"). The Second Circuit released a redacted version of this OLC-DOD Memorandum with the Court's 23 June 2014 opinion.

6. The Second Circuit also ordered disclosure of certain portions of an index prepared by OLC that documented the responsive classified records which that office had located in connection with this litigation. OLC has publicly released a version of this index, redacting certain material that the

Second Circuit indicated could be withheld as set forth in its order dated 11 August 2014. In support of the government's motion for summary judgment on the OLC records still in dispute, the CIA provides the following explanation as to why the CIA records and the CIA information contained in records generated by other government agencies remain exempt from disclosure pursuant to Exemptions (b) (1), (b) (3) and (b) (5).

II. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION

A. Exemption (b) (1)

7. Exemption (b) (1) provides that the FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b) (1). As explained below, the Exemption (b) (1) withholdings in the responsive documents satisfy the procedural and the substantive requirements of Executive Order 13526.

8. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order if 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 Executive Order 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. The Executive Order also mandates that records be properly marked and that the records have not been classified for an improper purpose.

i. Procedural Requirements

9. Original classification authority. Pursuant to a written delegation of authority in accordance with Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification decisions. I have determined that certain records or portions of records responsive to the ACLU's request are currently and properly classified.

10. U.S. Government information. The information at issue is owned by the U.S. Government, was produced by or for the U.S. Government, and is under the control of the U.S. Government.

11. Classification categories in Section 1.4 of the Executive Order. Exemption (b)(1) is asserted in this case to protect information that concerns "intelligence activities

(including covert action), intelligence sources or methods, or cryptology," pursuant to § 1.4(c) of the Executive Order.

12. Damage to the national security. I have determined that the CIA information contained in the responsive records is classified TOP SECRET, because it constitutes information the unauthorized disclosure of which could reasonably be expected to result in exceptionally grave damage to the national security.

13. Proper purpose. With respect to the information for which Exemption (b) (1) is asserted in this case, I have determined that this information has not 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.

14. Marking. The documents are properly marked in accordance with section 1.6 of the Executive Order.

ii. Substantive Requirements

15. In processing the documents for this litigation, I have reviewed the records containing CIA equities that are listed on the index provided by OLC and determined that they contain information that is currently and properly classified.

16. Specifically, I have determined that this information was properly withheld because its disclosure could be expected

to lead to the identification of intelligence sources, methods and activities of the CIA within the meaning of § 1.4(c) of Executive Order 13526. Additionally, the CIA found that disclosure of this information could reasonably be expected to result in exceptionally grave damage to national security and therefore that information is currently and properly classified at the TOP SECRET level.

B. Exemption (b) (3)

17. Exemption (b) (3) protects information that is specifically exempted from disclosure by statute. A withholding statute under Exemption (b) (3) must (A) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b) (3).

18. Here, the CIA has determined that Section 102A(i) (1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i) (1) (the "National Security Act"), which provides that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure," also applies to the information for which Exemption (b) (1) was asserted. As an initial matter, the National Security Act has been widely recognized to be a withholding statute under Exemption (b) (3) that refers to particular types of matters to

be withheld, and "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552 (b) (3) .

III. DAMAGE TO NATIONAL SECURITY

19. During the course of this litigation, DOJ released portions of a DOJ Classified White Paper dated May 25, 2011 (described as Document 9 on the OLC index). This paper was prepared by DOJ for Congress and discusses the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen. Although this paper does not mention the U.S. citizen by name - the target of the contemplated operation was Anwar Aulagi. Considering the information acknowledged by virtue of the disclosure of portions of the OLC-DOD Memorandum, the CIA reviewed the DOJ Classified White Paper and determined that certain information, consistent with that earlier disclosure, could be released. As with the other records addressed in the declaration, I conducted a page-by-page, line-by-line review to produce all reasonably segregable, nonexempt information in this record. However, I determined that some information in the paper remains currently and properly classified. I cannot provide additional details about the redacted information in the DOJ Classified White Paper on the public record except to say that the disclosure of this information could reasonably be expected to cause harm to

national security. I respectfully refer the Court to my *in camera*, *ex parte* declaration, which provides an additional justification for these redactions. Additionally, I note that Exemption (b)(3) in conjunction with the National Security Act also applies to this information.

20. With respect to the remaining OLC records in which CIA equities are at issue, I have determined that each of these documents contains information that is currently and properly classified pursuant to the criteria laid out in Executive Order 13526. The CIA asserted Exemption (b)(1) here to protect the classified factual information provided to OLC and the analysis incorporating those details. The CIA information withheld in those materials consists of intelligence activities, sources, and methods - which serve as the principal means by which the CIA accomplishes its mission. The protection of intelligence sources and methods is particularly critical in situations such as this one, where the source of information, and the capabilities, techniques and applications of certain methods are unknown to others, such as a foreign intelligence service or terrorist organization. Secret collection techniques and sources of intelligence are effective from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. Once the nature of an intelligence source or method, or the fact of its use in a certain situation, is

discovered, its usefulness in that situation is neutralized and the ability to utilize that source or apply that method in other situations is significantly impaired.

21. Although the U.S. Government has officially acknowledged some information about the continuing and imminent threat that Aulagi posed to the United States, the information contained in these records goes beyond what has been disclosed. These records show the means by which this intelligence about Aulagi was obtained as well as undisclosed details about Aulagi's terrorist activities - all of which remain classified. Although Aulagi is deceased, many of his associates in al-Qa'ida in the Arabian Peninsula ("AQAP") remain at large and continue to plot attacks against the United States and U.S. interests abroad. Additionally, these records also contain CIA intelligence on other subjects, disclosure of which would reveal the sources and methods of that collection. Likewise, there has been no official acknowledgement of this information.

22. Because revealing additional details would disclose classified equities involved, I am limited in my ability to describe the intelligence activities, sources and methods at issue and the harm from their disclosure on the public record. Accordingly, I refer the Court to the classified declarations for a more detailed description of the information at issue and why it is properly withheld. However, publicly, I can say that

it would greatly benefit AQAP and other terrorist organizations to know which clandestine sources and methods were used to obtain information about Aulahi and other subjects, as well as the specific intelligence that these techniques produced. This information could be used by AQAP and other terrorist organizations to uncover current collection activities and take countermeasures to avoid future detection by Intelligence Community agencies, thereby harming national security. In some instances, even indirect references to information obtained by classified sources and methods must be protected. Terrorist organizations and other hostile groups have the capacity and ability to gather information from a myriad of public sources, analyze it, and determine the means and methods of intelligence collection from disparate details. This type of disclosure could defeat the specific collection efforts of the CIA and, more broadly, the Intelligence Community. Accordingly, even seemingly innocuous, indirect references to an intelligence method could have significant adverse effects when coupled with other publicly-available data. For these reasons and the reasons set forth in the classified submissions, I have determined that disclosure of the CIA information in the records at issue reasonably could be expected to cause serious -- and in some cases, exceptionally grave -- damage to the national security.

23. For the same reasons outlined above, the information at issue here also is exempt from disclosure pursuant to Exemption (b)(3). In reviewing the records that contain CIA information, I have determined that the information constitutes protected intelligence sources and methods -- information that falls squarely within the scope of Section 102A(i)(1) of the National Security Act. Although no harm rationale is required, as noted above, the release of this information could significantly damage the ability of CIA and other members of the Intelligence Community to collect and analyze foreign intelligence information. Disclosure of this information is prohibited by statute and having reviewed the material, I find it to be properly exempt from disclosure under the National Security Act.

24. Upon conducting a page-by-page, line-by-line review, I have determined that there are no segregable portions of the records withheld in full and that each record is wholly exempt pursuant to the combination of FOIA Exemptions 1, 3, and/or 5.¹ The records located by OLC consist of classified, statutorily protected, and attorney-client privileged information, which is wholly integrated in the documents. I respectfully refer the Court to the *in camera*, *ex parte* submissions in this case which provide detailed explanations of classified and statutorily-


¹ The Bies Declaration, filed herewith, discusses the application of Exemption (b)(5) to these records.

protected material contained in the documents - information for which a complete discussion on the public record is not possible.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 23rd day of October 2014.


MARTHA M. LUTZ
Chief
Litigation Support Unit
Central Intelligence Agency

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and THE)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,)
)
Plaintiffs,)
)
v.) 12 Civ. 794 (CM)
)
U.S. DEPARTMENT OF JUSTICE, including its component)
the Office of Legal Counsel, U.S. DEPARTMENT OF)
DEFENSE, including its component U.S. Special Operations)
Command, and CENTRAL INTELLIGENCE AGENCY,)
)
Defendants.)

DECLARATION OF SINCLAIR. M HARRIS

I, Sinclair M. Harris, 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 April 28, 2014. 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 Expeditionary Strike Group 5 and served as the Commander of U.S. Naval Forces Southern Command and U.S. 4th Fleet. 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 FOIA request, dated October 19, 2011, which plaintiffs sent to the DoD Office of Freedom of Information (OFOI) and Headquarters, United States Special Operations Command (SOCOM), seeking 1) the legal basis upon which U.S. citizens can be subjected to "targeted killings," 2) the process by which U.S. citizens can be designated for "targeted killing," 3) the legal basis upon which the targeted killing of Anwar al-Aulaqi was

“targeted killing,” 3) the legal basis upon which the targeted killing of Anwar al-Aulaqi was authorized, 4) the factual basis for the targeted killing of al-Aulaqi, 5) the factual basis for the killing of Samir Khan, and 6) the factual basis for the killing of Ahdulrahman al-Aulaqi. The request was also sent to the Department of Justice and its component Office of Legal Counsel (OLC), and the Central Intelligence Agency (CIA).

4. The purpose of this declaration is to address the Department of Defense's withholding of documents in the possession of the Department of Justice's Office of Legal Counsel (OLC) in support of their motion for summary judgment in this litigation. Certain classified documents responsive to plaintiffs' FOIA request are exempt, pursuant to 5 U.S.C. § 552(b)(1), and the deliberative process privilege and attorney/client privilege, pursuant to 5 U.S.C. § 552(b)(5).

PROCEDURAL HISTORY

5. On June 23, 2014, the United States Court of Appeals for the Second Circuit reversed, in part, the January 24, 2013, decision by this Court which granted summary judgment for Defendants. The 2nd Circuit ordered, among other things, that “a redacted version of the classified Vaughn index submitted by OLC must be disclosed.” Plaintiffs have informed this Court that it seeks to challenge the withholding of certain documents contained on that index. DoD is withholding, in full, any document contained in the classified OLC index that contains DoD equities under FOIA exemption 1, 5 U.S.C. § 552(b)(1) and/or 5 U.S.C. § 552(b)(5).

APPLICABLE EXEMPTIONS

6. FOIA exemption 1, 5 U.S.C. § 552(b)(1), 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.

7. 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.”

8. 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.

9. 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.

10. 5 U.S.C. § 552(b)(5) 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.” Exemption 5 allows an agency to exempt information that is normally privileged in the civil discovery context. These privileges include the pre-decisional, deliberative process privilege; the work product privilege; and the attorney-client privilege.

DOCUMENT 5: OLC-DOD MEMORANDUM

11. Document 5 of the redacted OLC index is the document that a prior Director for Operations, Lieutenant General Robert R. Neller, USMC, identified in a previous declaration in this litigation. General Neller attested that this OLC opinion must be withheld in full because the content of the document contains information about military operations, intelligence sources and methods, foreign government information, foreign relations, and foreign activities. He explained that the document was exempt from disclosure under exemptions 1 and 5. This Court held that those exemptions were applicable. Although the 2nd Circuit partially overturned that decision and found that the applicable privileges had been waived with respect to certain portions of that document, it unequivocally held that the “OLC-DOD Memorandum was properly classified and that no waiver of any operational details in that document has occurred.” Specifically, the 2nd Circuit held that Part I was exempt from disclosure under exemption 1, as were certain portions of the remainder of the document. For example, the Court specifically held that “the OLC-DOD Memorandum contains some references to the Yemeni government that are entitled to secrecy and will be redacted.”

12. As an original classification authority, consistent with Section 1.1(a) of E.O. 13526, and as described below, I have determined that those sections of the OLC opinion, which were held to be exempt by the 2nd Circuit, continue to be properly classified as they concern E.O. 13526 Sections 1.4(a) (military plans, weapons systems, or operations), (b) (foreign government information), (c) (intelligence activities and intelligence sources and methods) and (d) (foreign

relations of the U.S.). This information is owned by and under the control of the U.S. government. I also have determined that the information contained within the OLC opinion 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. Finally, there is no reasonably segregable non-exempt information among the material redacted by the 2nd Circuit.

13. Unauthorized disclosure of this information reasonably could be expected to result in serious damage to the national security. Revealing intelligence sources and methods, military operational details, or relationships with a foreign government would provide valuable information to our enemies, including AQAP, and provide them the opportunity to alter their behavior in ways to avoid detection and surveillance, or elude justice.

OTHER DOCUMENTS WITH DOD EQUITIES

14. There are other documents listed in the classified OLC index which are similarly classified. These include classified factual material related to legal advice. I will speak of them generally, but not provide specific numbered entries for documents containing DoD equities. The 2nd Circuit held that certain portions of the classified OLC index could be withheld in order to avoid releasing classified information. For example, it held that “with respect to documents concerning a contemplated military operation, disclosure of the number of such documents must remain secret because a large number might alert the enemy to the need to increase efforts to defend against attacks or to avoid detection and a small number might encourage a lessening of such efforts.” Similarly, revealing precisely which documents in the classified OLC index contain DoD equities could reveal the nature, depth, or breadth of DoD’s interest and in turn

expose the nature, depth, or breadth of DoD's operational activities, which would enable this sophisticated adversary to more effectively thwart our efforts. Further, although the 2nd Circuit held that the CIA had acknowledged some operational role in the drone strike that killed Aulaqi, the extent or details of that role remain properly classified and have not been revealed by the United States Government. More detailed identification of these documents will be provided in a supplemental classified, *ex parte* declaration.

15. The OLC-DOD Memorandum contains references to source documents provided by the intelligence community, including DoD. It is axiomatic that the source documents are properly withheld given that references to and summaries of those documents have been held by the 2nd Circuit and this Court to be exempt from disclosure. These source documents provide even greater detail of the intelligence sources and methods and other classified information that the 2nd Circuit held was exempt. Compromising sensitive intelligence sources and methods would harm national security by permitting adversaries to thwart U.S. intelligence collection and counterterrorism measures. There is no reasonably segregable non-exempt material contained within any of these documents. They are therefore properly withheld under exemption 1.

16. Additionally, as the underlying factual documents were provided in connection with a request for legal advice, they are further exempt as confidential attorney/client communications and are properly withheld under exemption 5.

17. In addition to source documents containing classified factual information, the classified OLC index also lists communications between DoD and OLC in preparation of the OLC-DOD Memorandum. The vast majority of these documents contains classified factual information like the documents described above, and therefore must be withheld under exemption 1. They are all withheld under exemption 5.

18. The communications between DoD and OLC include reviews of drafts and answers to specific questions in preparation of legal advice. Although the 2nd Circuit held that the United States had waived privilege as to the legal advice provided in the final OLC-DOD Memorandum, it does not follow that deliberations and attorney/client communications in the preparation of that document were also waived. Even if a final decision is released to the public, the deliberations involved in reaching that decision are exempt from disclosure. These documents contain advice to clients, reflect information communicated by clients in confidence to attorneys, and contain communications that were intended to be confidential, and there is no indication that the intended confidentiality was not maintained. There is no reasonably segregable non-exempt information contained in these documents.

19. Finally, there are DoD equities contained within the classified OLC index which I cannot discuss in an unclassified forum. Therefore, I will address those equities in my classified, *ex parte* declaration.

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

Executed this 3 day of October 2014 in Arlington, VA.



Rear Admiral Sinclair M. Harris, USN
Vice Director of Operations, J-3, Joint Staff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....X

THE NEW YORK TIMES COMPANY,
CHARLIE SAVAGE, and SCOTT SHANE,

Plaintiffs,

11 Civ. 9336 (CM)

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

.....X

AMERICAN CIVIL LIBERTIES UNION and
THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

12 Civ. 794 (CM)

v.

U.S. DEPARTMENT OF JUSTICE, including its
component the Office of Legal Counsel, U.S.
DEPARTMENT OF DEFENSE, including its
component U.S. Special Operations Command,
and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....X

NOTICE OF LODGING OF CLASSIFIED DOCUMENTS

In accordance with the Court’s Orders dated September 5 and September 22, 2014, defendants in the above-captioned matters hereby provide notice that they are lodging on this date classified documents for the Court’s *in camera, ex parte* review. These documents are classified pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), and cannot be disclosed without proper authorization. The submissions will be lodged with Classified Information Security Officer Michael Macisso, with the United States Department of Justice Litigation

Security Group (202-514-9016), for secure transmission to the Court.

Dated: New York, New York
October 3, 2014

JOYCE R. BRANDA
Acting Assistant Attorney General

PREET BHARARA
United States Attorney for the
Southern District of New York

By: /s/ Elizabeth J. Shapiro
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

1:12-cv-00794-CM

American Civil Liberties Union and The
American Civil Liberties Union
Foundation

Plaintiffs,

-v-

U.S. Department of Justice, including its
component the Office of Legal Counsel,
U.S. Department of Defense, including its
component U.S. Special Operations
Command, and Central Intelligence
Agency

Defendants.

-----X

**PLAINTIFFS THE AMERICAN CIVIL
LIBERTIES UNION AND THE
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION’S NOTICE OF MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND IN OPPOSITION TO
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

PLEASE TAKE NOTICE THAT, upon the accompanying memorandum of law, the Declaration of Colin Wicker, and all exhibits thereto, and all prior pleadings and proceedings heretofore had herein, Plaintiffs American Civil Liberties Union and The American Civil Liberties Union Foundation (collectively, “the ACLU”) will move this Court, before the Honorable Colleen McMahon, at Courtroom 14C of the United States Courthouse, 500 Pearl Street, New York, New York 10007, on a date to be determined by the Court, for an Order granting the ACLU partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. The ACLU respectfully requests the Court to deny the government’s motion for summary judgment and to review the withheld records of the Department of Justice’s Office of Legal Counsel *in camera* to determine:

1. Which portions of the records must be released because they consist of information that has been officially acknowledged; and

2. Which portions of the records must be released because they consist of legal analysis.

Dated: November 7, 2014

DORSEY & WHITNEY LLP

By: s/ Colin Wicker

Eric A.O. Ruzicka (*pro hac vice*)

Colin Wicker (*pro hac vice*)

50 South Sixth Street

Minneapolis, MN 55402-1498

612-340-2600

Joshua Colangelo-Bryan

51 West 52nd Street

New York, NY 10019-6119

212-415-9234

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Jameel Jaffer

Hina Shamsi

125 Broad Street, 18th Floor

New York, NY 10004

212-549-2500

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Civil Action No. 12 CIV 0794

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

Plaintiffs,

v.

U.S. Department of Justice, including its component
the Office of Legal Counsel, U.S. Department of
Defense, including its component U.S. Special
Operations Command, and Central Intelligence
Agency,

Defendants.

DECLARATION OF COLIN WICKER

I, Colin Wicker, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an attorney for Dorsey & Whitney LLP, co-counsel for Plaintiffs American Civil Liberties Union and the American Civil Liberties Union Foundation.

2. Attached hereto as Exhibit 1 is a true and correct copy of *Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency*, Feb. 7, 2013, as retrieved from the U.S. Senate Select Committee on Intelligence website on Nov. 7, 2014, <http://www.intelligence.senate.gov/130207/transcript.pdf>.

3. Attached hereto as Exhibit 2 is a true and correct copy of *Department of Justice 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) ("Nov. 2011 White Paper"), as retrieved from the Federation of American Scientists website on Nov. 7, 2014, <http://fas.org/irp/eprint/doj-lethal.pdf>.

4. Attached hereto as Exhibit 3 is a true and correct copy of *Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen ...* (May 25, 2011) (“May 2011 White Paper”), as retrieved from the Vice News website, Nov. 7, 2014, <https://news.vice.com/article/a-justice-department-memo-provides-the-cias-legal-justification-to-kill-a-us-citizen>.

5. Attached hereto as Exhibit 4 is a true and correct copy of *Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, Jul. 16, 2010, as released by the Second Circuit Court of Appeals on June 23, 2014, Case No. 13-422, Docket No. 229.

6. Attached hereto as Exhibit 5 is a true and correct copy of Ryan J. Reilly, *Seven Other Targeted-Killing Memos Still Undisclosed*, Feb. 13, 2013, as retrieved from Huffington Post on Nov. 7, 2014, http://www.huffingtonpost.com/2013/02/13/targeted-killing-memos_n_2679397.html?utm_hp_ref=tw#.

7. Attached hereto as Exhibit 6 is a true and correct copy of Keith Johnson, *U.S. Seeks Cleric Backing Jihad: Preacher radicalized Activists with Writings, Officials Say*, Mar. 26, 2010, as retrieved from the Wall Street Journal website, Nov. 7, 2014, <http://online.wsj.com/articles/SB10001424052748704094104575144122756537604>.

8. Attached hereto as Exhibit 7 is a true and correct copy of a transcript of *Jake Tapper Interviews CIA Director Leon Panetta*, June 27, 2010, as retrieved from ABC News website on Nov. 7, 2014, <http://abcnews.go.com/ThisWeek/week-transcript-panetta/print?id=11025299>.

9. Attached hereto as Exhibit 8 is a true and correct copy of *Treasury Designates Anwar al-Aulaqi, Key Leader of Al-Qa'ida in the Arabian Peninsula*, July 16, 2010, as retrieved

from the U.S. Department of Treasury website on Nov. 7, 2014, <http://www.treasury.gov/press-center/press-releases/Pages/tg779.aspx>.

10. Attached hereto as Exhibit 9 is a true and correct copy of a letter from Attorney General Eric Holder to the Honorable Patrick J. Leahy, Committee on the Judiciary, May 22, 2013, retrieved from the U.S. Department of Justice website on Nov. 7, 2014, <http://www.justice.gov/sites/default/files/ag/legacy/2013/05/28/AG-letter-5-22-13.pdf>.

11. Attached hereto as Exhibit 10 is a true and correct copy of *Understanding the Homeland Threat Landscape – Considerations for the 112th Congress, Hearing Before the Committee on Homeland Security, House of Representatives*, Feb. 9, 2011, as retrieved from the U.S. Government Printing Office on Nov. 7, 2014, <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg72212/pdf/CHRG-112hrg72212.pdf>.

12. Attached hereto as Exhibit 11 is a true and correct copy of *Remarks by the President at the “Change of Office” Chairman of the Joint Chiefs of Staff Ceremony*, Sept. 30, 2011, as retrieved from the White House website on Nov. 7, 2014, <http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>.

13. Attached hereto as Exhibit 12 is a true and correct copy of Government’s Sentencing Memorandum in *United States v. Umar Farouk Abdulmutallab*, No. 2:10-cr-2005 (E.D. Mich. Feb. 10, 2012).

14. Attached hereto as Exhibit 13 is a true and correct copy of *Attorney General Eric Holder Speaks at Northwestern University School of Law*, March 5, 2012, retrieved from the U.S. Department of Justice, Office of Public Affairs website on Nov. 7, 2014,

<http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

15. Attached hereto as Exhibit 14 is a true and correct copy of Jason Leopold, *An Exclusive Look Inside the FBI's Files on the US Citizen Who Edited Al Qaeda's Official Magazine*, Sept. 22, 2014, as retrieved from Vice News on Nov. 7, 2014, <https://news.vice.com/article/an-exclusive-look-inside-the-fbis-files-on-the-us-citizen-who-edited-al-qaedas-official-magazine>.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on the 7th day of November 2014 in Minneapolis, Minnesota.

s/ Colin Wicker
COLIN WICKER

Exhibit 1-A

To the Declaration of Colin Wicker

**OPEN HEARING ON THE NOMINATION OF
JOHN O. BRENNAN
TO BE
DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY**

* * *

Thursday, February 7, 2013

**United States Senate
Select Committee on Intelligence
Washington, D.C.**

The Committee met, pursuant to notice, at 2:30 p.m., in Room SH-216, Hart Senate Office Building, the Honorable Dianne Feinstein, Chairman of the Committee, presiding.

MEMBERS PRESENT:

Senators Feinstein, Chambliss, Rockefeller, Burr, Wyden, Risch, Mikulski, Coats, Udall, Rubio, Warner, Collins, Heinrich, King, & Levin

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P R O C E E D I N G S

* * *

CHAIRMAN FEINSTEIN: We will begin this hearing. And let me say right up front that the process is that people are respectful; that they don't cheer, they don't hiss, they don't show signs; that this is to listen. If that's a problem for anybody, I ask you to leave the room *now*, because what we will do is remove you from the room -- let there be no doubt.

So, if I may, I would like to begin. The Committee meets today in open session to consider the nomination of John Brennan to be the 21st Director of the Central Intelligence Agency and the first director to have risen through the Agency's ranks since Bob Gates.

Mr. Brennan, congratulations on your nomination. I see Senator Warner has come in; Senator, I will make opening comments, the Vice Chairman will make opening comments, and then we will turn to you for your introduction, if that's agreeable.

Mr. Brennan, congratulations on your nomination. As you can see, it's going to be lively. I'd like to welcome your family, as well, and hope you'll introduce them so the Committee can give them its thanks.

This is the first opportunity, also, to welcome our new Members -- Senator Heinrich, who is on my right; Senator King, who is due any moment; Senator Collins, who is on my left; and Senator Coburn, who is not here at

1 the moment, but will be, who is returning to the Committee. And we have a
2 new Ex-Officio Member, Senator Inhofe. So, welcome to all of you.

3 The Director of the CIA is among the most critical national security
4 positions in the United States Government, both because of the role the CIA
5 plays in collecting and analyzing intelligence relevant to every national
6 security challenge we face, and because of the added importance of having
7 steady leadership at an organization that conducts most of its business
8 outside of the public arena.

9 Intelligence is critical to the successful drawdown in Afghanistan; to the
10 brutal war going on within Syria's borders, across North Africa, where the
11 attacks in Benghazi and the hostage situation in Algeria threaten to spread
12 into the next front against al-Qa'ida and its affiliated groups; for
13 counterterrorism operations around the world; in the efforts by the United
14 States and others to prevent the gain and spread of weapons of mass
15 destruction in Iran, North Korea, and other states; and in addressing
16 emerging threats in space, cyberspace, and elsewhere around the globe.

17 To confront these challenges, and to lead the CIA through a difficult
18 budgetary period after a decade of major budget increases, President Obama
19 nominated John Brennan, his closest advisor on intelligence and
20 counterterrorism matters for the past four years.

21 Mr. Brennan is, without a doubt, qualified for this position. He served

1 at the CIA for 25 years in analytic, operational, and managerial capacities.
2 He has seen the Agency from just about every angle -- as a line analyst, as
3 Chief of Station, as Chief of Staff to the Director, and as the Deputy
4 Executive Director -- among many others.

5 People who have worked closely with him regularly cite his work ethic,
6 his integrity, and his determination. In nominating John Brennan, President
7 Obama spoke of his "commitment to the values that define us as Americans."
8 DNI Clapper, in a letter of support, noted his "impeccable integrity" and that
9 "his dedication to country is second to none."

10 **CHAIRMAN FEINSTEIN:** So, with that, with unanimous consent, I would
11 like to insert into the record the letters the Committee has received in regard
12 to Mr. Brennan's nomination.

13 *(Whereupon, letters received by the Committee regarding the*
14 *nomination of Mr. Brennan, were submitted for the record. Copies of*
15 *the letters follow.)*

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1 **CHAIRMAN FEINSTEIN:** John Brennan, by all accounts, will be a strong
2 leader, guided firmly by the law and his strong ethical code. He has assured
3 the Committee, in his response to pre-hearing questions, that he will be
4 independent from political influence; he will seek only to provide the
5 President, the Congress, and other leaders with his best analysis and advice.

6 His responses to the Committee's questions are available on the
7 Committee's website, at www.intelligence.senate.gov. Of course, the
8 Committee must conduct its due diligence on such an important nominee,
9 so Members are going to have questions in a range of topics, including his
10 plans for directing the Agency, major national security challenges we face,
11 and positions and actions he has taken in his current and past jobs.

12 Also of interest will be Mr. Brennan's views on the use of targeted lethal
13 force in counterterrorism operations. Mr. Brennan has been one of the few
14 administration officials able to speak publicly about such issues; Members
15 will certainly want to understand his views on this, to include the importance
16 of Congress receiving all of the relevant legal analyses from the Office of
17 Legal Counsel at the Department of Justice.

18 While the disclosure earlier this week of a 16-page unclassified White
19 Paper on the government's legal analysis of the use of targeted force against
20 a United States citizen, who was a senior operational leader of al-Qa'ida --
21 there is finally more information available to the public.

1 I have been calling, and others have been calling -- the Vice Chairman
2 and I -- for increased transparency on the use of targeted force for over a
3 year, including the circumstances in which such force is directed against U.S.
4 citizens and noncitizens alike. I have also been attempting to speak publicly
5 about the very low number of civilian casualties that result from such strikes;
6 I have been limited in my ability to do so.

7 But for the past several years, this Committee has done significant
8 oversight of the government's conduct of targeted strikes and the figures we
9 have obtained from the Executive Branch -- which we have done our utmost
10 to verify -- confirm that the number of civilian casualties that have resulted
11 from such strikes each year has typically been in the single digits.

12 When I ask to give out the actual numbers, I'm told, "You can't." And I
13 say, "Why not?" "Because it's classified" ... "It's a covert program" ... "For the
14 public, it doesn't exist." Well, I think that rationale, Mr. Brennan, is long
15 gone, and I'm going to talk to you, in my questions, a little bit about that
16 because I think it's very important that we share this data with people.

17 This Committee will continue to perform significant oversight of
18 targeted strikes. We received, this morning, an Office of Legal Counsel
19 opinion on the topic. Actually, we received a short one and a long one. And
20 while I was there, I was delighted to see Senator Wyden reading, Senator
21 King in the room, and Senator Udall came in the room. And I'm hopeful that

1 every Member will avail of themselves of this opportunity to review those
2 OLC opinions.

3 I also intend to review proposals for legislation to ensure that drone
4 strikes are carried out in a manner consistent with our values, and the
5 proposal to create an analogue of the Foreign Intelligence Surveillance Court
6 to review the conduct of such strikes.

7 Finally, I will want to know how the nominee intends to lead an agency
8 that's had four directors since DCI Tenet resigned in July of '04, now in a
9 budget downturn, and what he sees as the major challenges before the CIA.

10 For the information of Members, we will have rounds of questions of
11 eight minutes each, and Members will be recognized by seniority, alternating
12 between the sides.

13 Members have requested the opportunity to ask Mr. Brennan questions
14 that will require classified answers, as well, so we have the ability to move to
15 a classified session following this hearing, if it is timely and we're able to do
16 so. So my suggestion is that we play that ear by ear, Mr. Vice Chairman, and
17 see if it's possible to do so. If it isn't, we will have our closed session on
18 Tuesday at our next hearing.

19 Finally, before turning to the Vice Chairman, I'd like to conclude my
20 remarks the same way I did at the confirmation for General Petraeus. Again
21 this time, the transition between CIA directors has been managed by Acting

1 Director Michael Morell. I'd like to thank Mr. Morell for keeping the Agency
2 on firm footing and for his agreement to remain as Deputy Director after the
3 confirmation process. He continues to be a top notch CIA officer, a friend of
4 the Committee, and I'm sure he will be an excellent deputy, Mr. Brennan.

5 Mr. Vice Chairman, please proceed.

6 **VICE CHAIRMAN CHAMBLISS:** Thank you very much, Madam Chair.

7 And Mr. Brennan, I join the Chair in congratulating you on your
8 nomination and welcoming you to the Committee today. And I don't have to
9 remind you -- because you are a career individual -- of the importance of
10 your nomination to head the Central Intelligence Agency. I also want to
11 welcome your family and thank them for their support of you during your
12 years of commitment to our government.

13 Also, I want to just say, as the Chairman did, how much we appreciate
14 Mike Morell. And I'm very pleased to see in your prepared statement that
15 you mention Mike and his contribution to the Central Intelligence Agency,
16 and that you intend to keep Mike in place. He is a very valued public
17 servant, and a guy who has stepped into a very difficult situation now *twice*
18 and has led with great commitment and has provided the kind of leadership
19 the Agency has needed.

20 Mr. Brennan, if confirmed as the next Director, it will be your
21 responsibility to lead the CIA as our nation continues to face significant

1 national security challenges. While we've heard a lot in recent months about
2 al-Qa'ida being decimated and on the run, it is by no means destroyed, and
3 the threat of terrorism from its affiliates, especially in Yemen and North
4 Africa, remains very real.

5 Just in the past few months, terrorist attacks in Algeria and Benghazi
6 have claimed American lives, so it is clear that our vigilance must not waver.
7 At the same time, our attention focused beyond these threats posed by al-
8 Qa'ida and other terrorist organizations, from Iran to North Korea to
9 Venezuela. From nuclear proliferation, to cyber intrusions, to
10 counterintelligence, the challenges are constant and immense, and the CIA is
11 at the point of the spear.

12 As your predecessors faced similar challenges, they recognized the
13 importance of working hand in hand with Congress, especially the
14 Congressional intelligence committees. I appreciated your commitment to
15 me to be open and transparent with this Committee, if you are in fact
16 confirmed as the next Director.

17 I expect this commitment to actually be born out and practiced,
18 regardless of political pressures, and not just become words spoken during
19 the confirmation process. Far too often, the Committee is facing
20 unnecessary and, frankly, legally-questionable obstacles, in receiving needed
21 oversight information from the Intelligence Community.

1 As we hear from you this afternoon, I also believe it is important for
2 you to set the record straight on a few matters relating to detention policy
3 and the CIA's detention and interrogation program. We know that the 2009
4 Executive Order removed the CIA from the detention business. But the
5 current framework is simply not working to get real-time access to
6 intelligence from terrorist detainees.

7 I reviewed elements of the 9/11 Commission report in preparation for
8 this hearing, and I am concerned that the administration is making the same
9 mistakes that were made before 9/11, when the CIA missed vital information
10 on KSM, the mastermind of the attacks, and decided to forego a capture
11 operation of Osama bin Laden. The Commission cited the administration's
12 focus on using the Article 3 court process as factors in both instances.

13 You and I also discussed the Committee's report on the CIA's detention
14 and interrogation program, which was approved in December by a slim
15 majority. You told me that you had completed your review of the report's
16 Executive Summary, and the Findings and Conclusions, and you'll have an
17 opportunity to express your observations and the concerns that you
18 expressed to me with the rest of the Committee today.

19 Mr. Brennan, I thank you once again for your dedication and your
20 service to our country, and we look forward to your testimony and to your
21 response to questions submitted by the Committee.

1 Thanks, Madam Chair.

2 **CHAIRMAN FEINSTEIN:** Thank you very much, Mr. Vice Chairman. And
3 now we will turn to the distinguished senator from Virginia, Senator Mark
4 Warner.

5 **SENATOR WARNER:** Thank you, Chairman Feinstein, Vice Chairman
6 Chambliss, and colleagues. It's my honor to introduce John Brennan as the
7 President's nominee to be the next Director of the Central Intelligence
8 Agency.

9 Like so many thousands of other professionals in the United States
10 Intelligence Community, John now calls Virginia home. It has been my
11 privilege, as a Member of this Committee for the last two years, to represent
12 many of the thousands of men and women in our intelligence agencies who
13 also call Virginia home.

14 I would also make mention of the fact, very briefly, since we don't get
15 this many opportunities in front of this kind of public audience, to recognize
16 an action that Senator Mikulski and I took last Congress that many of you
17 joined with us on that we will reintroduce this year -- a joint resolution to
18 mark *U.S. Intelligence Professionals Day* -- to bring respectful attention to
19 these quiet professionals who keep our nation safe every day. And I, again,
20 look forward to working with all of you to make sure that we do this
21 resolution again.

1 These same qualities -- dedication, selflessness, intelligence, and
2 patriotism -- are well represented in John Brennan, whom the men and
3 women of the CIA will find a dedicated leader in public service, should he be
4 confirmed. While I have not had the opportunity to work with Mr. Brennan as
5 much as some of the other Members, I've enjoyed our meeting together.
6 And as the Chairman has already indicated, John Brennan's long career of
7 public service and his record have prepared him to be Director of the CIA.

8 He served for 25 years at the Agency in the field and at Headquarters,
9 including as Deputy Executive Director in Saudi Arabia, and as briefer to two
10 presidents since 9/11. He's been on the front lines in the fight against al-
11 Qa'ida, including standing up the National Counterterrorism Center. He has
12 enormous appreciation for the men and women of the CIA and the work they
13 do -- often in the shadows -- to keep our nation safe.

14 One thing that I was also impressed in our meeting was that Mr.
15 Brennan has been an advocate for greater transparency in our
16 counterterrorism policy and for adherence to the rule of law. As a Member
17 and a new Member of this oversight committee, I appreciate that.

18 As the President said, the imperative to secure the nation must not
19 come at the sacrifice of our laws or ideals. This needs never be an *either/or*
20 choice. We can protect the nation and stay true to our principles. As has
21 been raised by the Chair and the Vice Chair, I think it is also important -- and

1 these are questions that I'll be asking, as well -- to ensure that while we look
2 at the programs of the CIA, that these programs' effectiveness be measured
3 objectively and not simply by those who are charged with implementing
4 them.

5 So, the Chairman has already gone through other parts of your
6 background; I again want to congratulate you on this nomination, the service
7 you've provided to our nation so far, and, in the aftermath of this hearing,
8 hopefully the service that you'll provide on a going-forward basis.

9 With that, Madam Chairman, I'll come back to the dais and look forward
10 to my chance to ask the nominee questions, as well.

11 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator Warner. Mr.
12 Brennan, please stand, raise your right hand, and I'll administer the oath.

13 "I, John Brennan, do solemnly swear --"

14 **MR. BRENNAN:** I, John Brennan, do solemnly swear --

15 **CHAIRMAN FEINSTEIN:** "-- that I will give this Committee the truth, the
16 full truth, and nothing but the truth, so help me God."

17 **MR. BRENNAN:** -- that I will give this Committee the truth, the full
18 truth, and nothing but the truth, so help me God.

19 **CHAIRMAN FEINSTEIN:** Thank you very much. And we look forward to
20 hearing your testimony.

21 *(The prepared Statement for the Record of Mr. Brennan follows.)*

1 **STATEMENT BY JOHN O. BRENNAN,**
2 **NOMINEE FOR DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY**

3 * * *

4 **MR. BRENNAN:** Chairman Feinstein, Vice Chairman Chambliss,
5 Members of the Committee, I am honored to appear before you today as the
6 President's nominee --

7 *(Disruption by a protestor in the audience.)*

8 **CHAIRMAN FEINSTEIN:** Would you hold, please?

9 I will ask the Capitol Police officers to please remove this woman.

10 *(Protest continues.)*

11 **CHAIRMAN FEINSTEIN:** Please remove --

12 *(Protestor is removed from the Hearing Room.)*

13 **CHAIRMAN FEINSTEIN:** I'm going to say, once again, that we welcome
14 everyone here, that we expect no clapping, we expect no hissing, we expect
15 no demonstration in this room. This is a very serious hearing. I will stop the
16 hearing and I will ask the room to be cleared. So, know that.

17 Please continue, Mr. Brennan.

18 **MR. BRENNAN:** Thank you, Chairman. I am honored to appear before
19 you today as the President's nominee to lead the Central Intelligence Agency.
20 I am deeply grateful to President Obama for the confidence he has placed in
21 me by sending my name forward to the Senate for consideration.

1 Senator Warner, thank you for your generous introduction, for your
2 service to our nation, and for your strong support for those who defend it.
3 This includes the extraordinary men and women of the CIA and the
4 Intelligence Community, so many of whom, like me, call Virginia home, and
5 call you our Senator.

6 I would not be here today without the love and support of my wife,
7 Kathy, who has been my life partner for 34 years, and who, like the spouses
8 of many other public servants and intelligence professionals -

9 *(Disruption by another protestor in the audience.)*

10 **MR. BRENNAN:** -- has made numerous sacrifices over the years.

11 **CHAIRMAN FEINSTEIN:** Would you -- would you pause, Mr. Brennan?

12 If you would remove that individual, please, as quickly as you can.

13 Thank you.

14 *(Protestor is removed from the Hearing Room.)*

15 **CHAIRMAN FEINSTEIN:** Mr. Brennan, please proceed.

16 **MR. BRENNAN:** -- my wife, Kathy, who, like the spouses of many other
17 public servants and intelligence professionals, has made numerous sacrifices
18 over the years, bearing the brunt of family responsibilities because of my
19 chosen profession.

20 Similarly, I would like to pay tribute to my three children, who, like the
21 children of many CIA officers and other national security professionals, have

1 had to deal with the disappointments associated with an absentee parent far
2 more often than they should.

3 And I'm very pleased to be joined today by my wife, Kathy, and my
4 brother, Tom.

5 *(Disruption by another protestor in the audience.)*

6 **CHAIRMAN FEINSTEIN:** All right, we will stop again.

7 **CHAIRMAN FEINSTEIN:** Please remove that woman.

8 *(Protest continues.)*

9 **CHAIRMAN FEINSTEIN:** If you could please expedite the removal --

10 *(Protest continues.)*

11 *(Protestor is removed from the Hearing Room.)*

12 **CHAIRMAN FEINSTEIN:** Please proceed, Mr. Brennan. The next time,
13 we're going to clear the chamber and bring people back in one by one. This
14 witness is entitled to be heard, ladies and gentlemen. So please give him
15 that opportunity.

16 **MR. BRENNAN:** Thank you. A heartfelt "thank you" also goes to my
17 family in New Jersey, especially my 91-year-old mother, Dorothy, and my 92-
18 year-old father, Owen, who emigrated from Ireland nearly 65 years ago --

19 *(Disruption by another protestor in the audience.)*

20 **CHAIRMAN FEINSTEIN:** All right, I'm going to ask -- we're going to halt
21 the hearing. I'm going to ask that the room be cleared and that the

1 CODEPINK associates not be permitted to come back in. We've done this five
2 times now, and five times are enough. So, we will recess for a few minutes.

3 *(Protest continues.)*

4 **CHAIRMAN FEINSTEIN:** Ladies and gentlemen, if you would mind
5 leaving, we will then have you come back in, but it's the only way I think
6 we're going to stop this. We will recess for a few minutes.

7 *(Whereupon, the Committee recessed briefly.)*

8 **CHAIRMAN FEINSTEIN:** Okay, we will reconvene the hearing. If the
9 press would please take their places --

10 Mr. Brennan, please proceed.

11 **MR. BRENNAN:** Thank you, Chairman Feinstein.

12 I was talking about my parents: my 91-year-old mother, Dorothy, and
13 my 92-year-old father, Owen -- who emigrated to this country 65 years ago --
14 and who, together, raised my sister, my brother, and I to cherish the
15 opportunity known as America.

16 As I appear before you today, I would additionally like to extend a
17 special salute to David Petraeus, a patriot who remains -- as do all former
18 directors -- one of the staunchest advocates of the Agency's mission and
19 workforce.

20 I want to express my admiration for my close friend and colleague,
21 Michael Morell, who has twice guided the CIA as Acting Director with a

1 steady hand, integrity, and exceptional skill. If confirmed, it would be a
2 distinct privilege for me to work side by side with Michael -- my friend, and
3 the epitome of an intelligent professional -- in the months and years ahead.

4 It also would be a tremendous privilege to serve with the Director of
5 National Intelligence, Jim Clapper, who has mentored literally *legions* of
6 intelligence professionals ever since his service in Vietnam.

7 As the President's principal intelligence advisor and the head of the
8 Intelligence Community, Jim is a person of longstanding and deep
9 experience and integrity. He and I share identical views on the role of
10 intelligence and the importance of giving current and future generations of
11 intelligence professionals the support they need and that they so richly
12 deserve.

13 It would be the greatest honor of my professional life to lead the
14 women and men of the Central Intelligence Agency -- the Agency where I
15 started my career nearly 33 years ago and where I served for a quarter-
16 century. A 24-year-old fresh out of graduate school, I arrived at Langley in
17 August 1980 as a GS-9 career trainee, determined to do my part for national
18 security as one of this nation's intelligence officers.

19 When I joined the CIA in August 1980, world events were unsettled.
20 Our Embassy in Tehran had been overrun the year before, and 52 Americans
21 were still being held hostage by a radical new government in Iran. The

1 Soviet invasion of Afghanistan was less than a year old, and the next decade
2 would witness the slow but steady crumbling of the Soviet Union. Nuclear
3 proliferation and the spread of weapons of mass destruction were a constant
4 concern. And U.S. officials were hard at work around the globe, trying to
5 prevent regional tensions and animosities from turning into full-scale wars.

6 And, ominously, the United States was about to face an upsurge in
7 terrorist attacks that would claim hundreds of American lives in Lebanon,
8 including a 49-year-old CIA officer named Bob Ames, who was killed during a
9 brief visit to our Embassy in Beirut, and who, at the time, was my boss at
10 CIA.

11 During my 25-year career at CIA, I watched up close, and even
12 participated, in history being made in far off corners of the world, as CIA
13 fulfilled its critical intelligence roles -- collecting intelligence, uncovering
14 secrets, identifying threats, partnering with foreign intelligence and security
15 services, analyzing opaque and complicated developments abroad, carrying
16 out covert action, and attempting to forecast events yet to happen -- all in an
17 effort to protect our people and to strengthen America's national security.

18 And throughout my career, I had the great fortune to experience first-
19 hand, as well as witness, what it means to be a CIA officer: such as an
20 analyst, who has the daunting task and tremendous responsibility to take
21 incomplete and frequently contradictory information and advise the senior-

1 most policy-makers of our government about foreign political, military, and
2 economic developments.

3 Or an operations officer, whose job it is to find and obtain those elusive
4 secrets that provide advanced warning of strategic surprise, political
5 turbulence, terrorist plots, impending violence, cyber attacks, and persistent
6 threats such as nuclear, chemical, and biological weapons proliferation.

7 Or a technical expert, who seeks new and creative ways to find nuggets
8 of intelligence in tremendous volumes of data, provides secure, and even
9 stealthy, intelligence collection and communication systems, and counters
10 the latest technological threats to our nation.

11 Or a support officer or manager with the responsibility to ensure that
12 the core missions of the Agency -- collecting intelligence, providing all
13 source analysis, and, when directed by the President, conducting covert
14 action -- are carried out with the requisite skill, speed, agility, and
15 proficiency.

16 From the Middle East to the Central Caucasus; from Sub-Saharan Africa
17 to Central and South America; from the vast expanses of Asia to the great
18 cities of Europe, and all countries and regions in between, CIA officers were
19 there -- sometimes in force, and sometimes virtually standing alone. And for
20 those 25 years, it was a great honor for me to be a CIA officer, as I knew that
21 the Agency's contributions to this country's security were as invaluable as

1 they were innumerable.

2 Following my retirement from the CIA in 2005, I had the good fortune
3 to experience other professional opportunities. For three years, I served as
4 President and Chief Executive Officer of a private-sector company, where I
5 learned, first-hand, some very important lessons about fiduciary
6 responsibility and sound business practices. And for the past four years I've
7 had the privilege to serve as the President's principal policy advisor on
8 Homeland Security and Counterterrorism.

9 In that role, I have had the opportunity to work daily with some of the
10 finest Americans I have ever met from the intelligence, military, homeland
11 security, law enforcement, and diplomatic communities, who have dedicated
12 their lives to the safety and security of their fellow Americans. It is because
13 of the work of those Americans -- serving domestically, and especially, those
14 serving in dangerous places abroad -- that we are able to experience the
15 freedom and security that are the hallmarks of our nation.

16 I believe my CIA background and my other professional experiences
17 have prepared me well for the challenge of leading the world's premier
18 intelligence agency at this moment in history, which is as dynamic and
19 consequential as any in recent decades, and will continue to be in the years
20 ahead. Simply stated, the need for accurate intelligence and prescient
21 analysis from CIA has never been greater than it is in 2013 or than it will be

1 in the coming years.

2 Historic political, economic, and social transformations continue to
3 sweep through the Middle East and North Africa, with major implications for
4 our interests, Israel's security, our Arab partners, and the prospects for
5 peace and stability throughout the region. We remain at war with al-Qa'ida
6 and its associated forces, which, despite the substantial progress we have
7 made against them, still seek to carry out deadly strikes against our
8 homeland and our citizens, and against our friends and allies.

9 U.S. computer networks and databases are under daily cyber attack by
10 nation states, international criminal organizations, sub-national groups, and
11 individual hackers. And the regimes in Tehran and Pyongyang remain bent
12 on pursuing nuclear weapons and intercontinental ballistic missile delivery
13 systems, rather than fulfilling their international obligations or even meeting
14 the basic needs of their people.

15 Yes, the CIA's mission is as important to our nation's security today as
16 at any time in our nation's history. In carrying out their mission, the men
17 and women of the CIA are frequently asked to undertake challenging,
18 perilous, and, yes, controversial actions, on behalf of the American people.
19 The CIA is not immune from scrutiny of these efforts, and I welcome a
20 discussion of CIA's past and present activities.

21 If I am confirmed, one of my highest priorities would be the

1 Committee's lengthy report on the CIA's former rendition, detention, and
2 interrogation program that involved now-banned interrogation techniques. I
3 have read the Findings and Executive Summary of the 6,000-page report,
4 which raises a number of very serious issues. Given the gravity and
5 importance of this subject, I would look forward to further dialogue with
6 Members of the Committee on the report and its Findings, if I am confirmed.

7 In addition, some of our government's current counterterrorism policies
8 and operations have sparked widespread debate -- domestically,
9 internationally, and in this room. I have publicly acknowledged that our
10 fight against al-Qa'ida and associated forces have sometimes involved the
11 use of lethal force outside the hot battlefield of Afghanistan.

12 Accordingly, it is understandable that there is great interest in the legal
13 basis, as well as the thresholds, criteria, processes, procedures, approvals,
14 and reviews of such actions. I have strongly promoted such public
15 discussions with the Congress and with the American people, as I believe
16 that our system of government and our commitment to transparency
17 demands nothing less.

18 As the elected representatives of the American people and as Members
19 of this Committee, you have the obligation to oversee the activities of the
20 CIA and the other elements of the Intelligence Community to ensure that
21 they are being carried out effectively, lawfully, successfully, and without

1 regard to partisanship. If confirmed, I would endeavor to keep this
2 Committee fully and currently informed, not only because it is required by
3 law, but because you can neither perform your oversight function nor
4 support the mission of the CIA if you are kept in the dark.

5 And I know that irrespective of the fullness of that dialogue, there will
6 be occasions when we disagree, just as you disagree among *yourselves* at
7 times, on aspects of past, current, and future activities of the CIA. Such
8 disagreement is healthy, and is a necessary part of our democratic process.
9 But such disagreements should never prevent us from carrying out our
10 national security and intelligence responsibilities, as a failure to do so could
11 have devastating consequences for the safety and security of all Americans.

12 During my courtesy calls with many of you, I also heard repeated
13 references to a "trust deficit" that has, at times, existed between this
14 Committee and the CIA. If I am confirmed, a trust deficit between the
15 Committee and the CIA would be wholly unacceptable to me, and I would
16 make it my goal on Day One of my tenure, and every day thereafter, to
17 strengthen the trust between us.

18 I have a reputation for speaking my mind, and, at times, doing so in a
19 rather direct manner, which some attribute to my New Jersey roots. I like to
20 think that my candor and bluntness will reassure you that you will get
21 straight answers from me -- maybe not always the ones you like, but you will

1 get answers, and they will reflect my honest views. That's the commitment I
2 made to you.

3 I would like to finish by saying a few words about the importance of
4 taking care of the women and men who serve in the CIA. Because of the
5 secrecy that intelligence work requires, few Americans will ever know the
6 extraordinary sacrifices that these professionals and their families make
7 every day. Many of them risk their lives and, at times, have *given* their lives
8 to keep us safe.

9 If confirmed, I would make it my mission, in partnership with the
10 Congress, to ensure that the men and women have the training, tradecraft,
11 linguistic skills, technical tools, guidance, supervision, and leadership they
12 need to do their jobs. They also need assurance that we will do all we can to
13 protect our nation's secrets and prevent leaks of classified information.
14 These leaks damage our national security -- sometimes gravely -- putting
15 these CIA employees at risk and making their missions much more difficult.

16 The men and women of the CIA are a national treasure, and I will
17 consider it one of my most important responsibilities to take care of them,
18 just as others took care of me when I first arrived at Langley as a young
19 trainee in 1980.

20 Chairman, Vice Chairman, and Members of the Committee, as you well
21 know, when you arrive at CIA Headquarters in Langley and enter the main

1 lobby, you immediately see the marble Memorial Wall. On it are stars -- each
2 one representing a Member of the CIA family who gave his or her life in the
3 service of this nation. Today, there are 103 stars on that wall.

4 To me, and to everyone in the CIA, they are not simply stars, nor are
5 they only visible remembrances of dearly departed colleagues and friends.
6 The stars represent heroic and unsung patriots; Americans who lived their
7 lives loving this country and who died protecting it.

8 That Memorial Wall means something very special to me and to every
9 other American who has proudly served at the Agency. I want all CIA
10 employees always to be proud of the organization to which they belong, and
11 to be proud of its activities.

12 And if given the honor to serve as the 21st Director of the CIA, I would
13 take it as a sacred obligation to do everything in my ability to make sure the
14 Central Intelligence Agency is the absolute best intelligence service it can be,
15 and one that makes all Americans proud.

16 Thank you very much, and I look forward to taking your questions.

17 **CHAIRMAN FEINSTEIN:** Thank you very much, Mr. Brennan.

18 I have five short questions that we traditionally ask; if you would just
19 answer them yes or no.

20 Do you agree to appear before the Committee here or in other venues
21 when invited?

1 **MR. BRENNAN:** Yes.

2 **CHAIRMAN FEINSTEIN:** Do you agree to send officials from the CIA
3 and designated staff when invited?

4 **MR. BRENNAN:** Yes.

5 **CHAIRMAN FEINSTEIN:** Do you agree to provide documents or any
6 other materials requested by the Committee in order for it to carry out its
7 oversight and legislative responsibilities?

8 **MR. BRENNAN:** Yes; all documents that come under my authority as
9 Director of CIA, I absolutely would.

10 **CHAIRMAN FEINSTEIN:** We'll talk to you more about that in a minute.

11 **MR. BRENNAN:** Yes, Senator.

12 **CHAIRMAN FEINSTEIN:** Will you ensure that the CIA and its officials
13 provide such material to the Committee when requested?

14 **MR. BRENNAN:** Yes.

15 **CHAIRMAN FEINSTEIN:** Do you agree to inform and fully brief, to the
16 fullest extent possible, *all* Members of this Committee, of intelligence
17 activities and covert actions, rather than only the Chairman and Vice
18 Chairman?

19 **MR. BRENNAN:** Yes, I will endeavor to do that.

20 **CHAIRMAN FEINSTEIN:** Thank you. Now, let me -- we are now going
21 to go into eight-minute rounds. And we'll do it by seniority, and alternate

1 from side to side.

2 I wanted to talk about, just for a moment, the provision of documents --
3 Senator Wyden and others have had much to do about this. But our job is to
4 provide oversight to try to see that the CIA and Intelligence communities
5 operate legally. In order to do that, it is really necessary to understand what
6 the official legal interpretation is, so the Office of Legal Counsel opinions
7 become very important.

8 We began during the Bush administration, with Mr. Bradbury, to ask for
9 OLC opinions. Up until last night, when the President called the Vice
10 Chairman, Senator Wyden, and myself, and said that they were providing the
11 OLC opinions, we had not been able to get them. It makes our job -- to
12 interpret what is legal or not legal -- much more difficult if we do not have
13 those opinions.

14 The staff has asked for eight additional opinions. What I want to know
15 is will you become our advocate with the administration, so that we can
16 obtain those opinions?

17 **MR. BRENNAN:** The National Security Act, as amended, requires that
18 the heads of intelligence agencies provide the Committee with the
19 appropriate legal documentation to support covert actions. I would certainly
20 be an advocate of making sure that this Committee has the documentation it
21 needs in order to perform its oversight functions. I have been an advocate

1 of that position; I will continue to be.

2 **CHAIRMAN FEINSTEIN:** I take that as a yes, and I'm counting on you to
3 provide eight OLC opinions.

4 Second question on this: when the opinion came over, our staff were
5 banned from seeing it -- this morning. We have lawyers. We have very good
6 staff. This is upsetting to a number of Members. We depend on our staff,
7 because you can't take material home, you can't take notes with you. So the
8 staff becomes very important.

9 Do you happen to know the reason why our staff are not permitted,
10 when we are permitted, to see an OLC?

11 **MR. BRENNAN:** Senator -- Chairman, I understand fully your interest in
12 having your staff have access to this documentation; fully understandable.
13 The reason for providing information just to Committee Members at times is
14 to ensure that it is kept in a limited basis.

15 It is rather exceptional, as I think you know, that the Office of Legal
16 Counsel opinions, or advice, would be shared directly with you. And this, I
17 think, was determined because of the rather exceptional nature of the issue
18 and in a genuine effort to try to meet the Committee's requirements. I
19 understand your interest in having the staff access to it --

20 **CHAIRMAN FEINSTEIN:** If you would relay the request, officially --

21 **MR. BRENNAN:** Absolutely.

1 **CHAIRMAN FEINSTEIN:** -- we'd appreciate it very much.

2 **MR. BRENNAN:** Absolutely; I will.

3 **CHAIRMAN FEINSTEIN:** Second thing: when I spoke with you in my
4 office, we talked about our report on detention and interrogation -- the
5 6,000-page report you mentioned. I asked you if you would please read it;
6 you said you would -- you said you would, for *sure*, read the 300-page
7 summary. Have you done so?

8 **MR. BRENNAN:** Yes, Chairman, I have read the first volume, which is
9 300 pages.

10 **CHAIRMAN FEINSTEIN:** Then, let me ask you this question: were the
11 EITs key to the takedown of Osama bin Laden?

12 **MR. BRENNAN:** Chairman, the report right now still remains classified.
13 And the report has been provided to the Agency and Executive Branch for
14 comments.

15 There clearly were a number of things, *many* things, that I read in that
16 report that were very concerning and disturbing to me, and ones that I would
17 want to look into immediately, if I were to be confirmed as CIA Director.

18 It talked about mismanagement of the program, misrepresentations of
19 the information, providing inaccurate information. And it was rather
20 damning in a lot of its language, as far as the nature of these activities that
21 were carried out.

1 I am eager to see the Agency's response to that report. I read those
2 300 pages; I look forward, if confirmed, to reading the entire 6,000-page
3 volume, because it is of such gravity and importance.

4 But, Chairman, I do not yet -- and nor has the CIA finished its review of
5 this information. The Committee's report was done, obviously, over an
6 extended period of time; a tremendous amount of work that's gone into it.
7 Based on the review of the documentary information that was available -- the
8 documents, there were not interviews conducted with CIA officers.

9 I very much look forward to hearing from the CIA on that and then
10 coming back to this Committee and giving you my full and honest views.

11 **CHAIRMAN FEINSTEIN:** Well, thank you. You will have that
12 opportunity, I assure you.

13 I'd like to ask you about the status of the administration's efforts to
14 institutionalize rules and procedures for the conduct of drone strikes; in
15 particular, how you see your role as CIA Director in that approval process.

16 **MR. BRENNAN:** Chairman, as this Committee knows -- and I'm sure
17 wants to continue to protect certain covert action activities -- but let me talk,
18 generally, about the counterterrorism program and the role of CIA, and this
19 effort to try to institutionalize and to ensure we have as rigorous a process
20 as possible, that we feel that we're taking the appropriate actions at the
21 appropriate time.

1 The President has insisted that any actions we take will be legally
2 grounded, will be thoroughly anchored in intelligence, will have the
3 appropriate review process, approval process, before any action is
4 contemplated, including those actions that might involve the use of lethal
5 force.

6 The different parts of the government that are involved in this process
7 are involved in the interagency, and my role as the President's
8 counterterrorism advisor was to help to orchestrate this effort over the past
9 four years to ensure, again, that any actions we take fully comport with our
10 law and meet the standards that I think this Committee and the American
11 people expect of us, as far as taking actions we need to protect the
12 American people, but at the same time ensuring that we do everything
13 possible before we need to resort to lethal force.

14 **CHAIRMAN FEINSTEIN:** Thank you.

15 Mr. Vice Chairman?

16 **VICE CHAIRMAN CHAMBLISS:** Thanks very much, Madam Chair.

17 Mr. Brennan, the 9/11 Commission report describes a canceled 1998
18 CIA operation to capture Osama bin Laden using tribal groups in
19 Afghanistan.

20 The former head of CIA's bin Laden Unit told staff that you convinced
21 Director Tenet to cancel that operation. He says that following a meeting

1 you had in Riyadh with Director Tenet, the bin Laden Unit Chief, and others,
2 that you cabled National Security Advisor Sandy Berger, saying the operation
3 should be canceled in favor of a different approach, described by the 9/11
4 Commission as "an all-out secret effort to persuade the Taliban to expel bin
5 Laden."

6 Now, as we know, bin Laden was not expelled. Three months later, the
7 bin Laden wrath was unleashed with the attack on our embassies. Did you
8 advise Director Tenet and National Security Advisor Berger against this
9 operation; and if so, why?

10 **MR. BRENNAN:** I had conversation with George Tenet at the time. But I
11 must point out, Senator, that every single CIA manager -- George Tenet, his
12 deputy, the head of the Director of Operations at the time, and other
13 individuals -- the Chief of the Counterterrorism Center -- argued against that
14 operation, as well, because it was not well grounded in intelligence and its
15 chances of success were minimal. And it was likely that other individuals
16 were going to be killed.

17 And so, when I was involved in those discussions, I provided the
18 Director and others my professional advice about whether or not I thought
19 that that operation should go forward. I also was engaged in discussions
20 with the Saudi government at the time and encouraged certain actions to be
21 taken so that we could put pressure on the Taliban, as well as on bin Laden.

1 **VICE CHAIRMAN CHAMBLISS:** So, I'm taking it that your answer to my
2 question is you did advise against -- in favor of the cancellation of that
3 operation?

4 **MR. BRENNAN:** Based on what I had known at the time, I didn't think
5 that it was a worthwhile operation and it didn't have a chance of success.

6 **VICE CHAIRMAN CHAMBLISS:** The 9/11 Commission reported that no
7 capture plan before 9/11 ever again attained the same level of detail and
8 preparation; do you have any second thoughts about your recommendation
9 to the Director to cancel that operation?

10 **MR. BRENNAN:** Senator, I have no second thoughts whatsoever about
11 my advice, which was to look carefully at this operation because the chances
12 of success were minimal. I was not in the chain of command at that time. I
13 was serving abroad as Chief of Station.

14 **VICE CHAIRMAN CHAMBLISS:** As Deputy Executive Director, you
15 received the daily updates from the time of Abu Zubaydah's capture
16 throughout his interrogation, including the analysis of the lawfulness of the
17 techniques, putting you in a position to express any concerns you had about
18 the program before any of the most controversial techniques, including
19 waterboarding, were ever used.

20 Now, we found a minimum of 50 memos in the documents within the
21 6,000 pages, on which you were copied. What steps did you take to stop the

1 CIA from moving to these techniques you now say you found objectionable
2 at the time?

3 **MR. BRENNAN:** I did not take steps to stop the CIA's use of those
4 techniques. I was not in the chain of command of that program. I served as
5 Deputy Executive Director at the time. I had responsibility for overseeing the
6 management of the Agency and all of its various functions. And I was aware
7 of the program; I was cc'd on some of those documents, but I had no
8 oversight of it. I wasn't involved in its creation.

9 I had expressed my personal objections and views to some Agency
10 colleagues about certain of those IETs, such as waterboarding, nudity, and
11 others, where I professed my personal objections to it, but I did not try to
12 stop it, because it was, you know, something that was being done in a
13 different part of the Agency under the authority of others, and it was
14 something that was directed by the administration at the time.

15 **VICE CHAIRMAN CHAMBLISS:** Now, you say you expressed your
16 objection to other colleagues; did you ever express any concern to Director
17 Tenet, to John McLaughlin, Executive Director Krongard, or any other of the
18 CIA leaders?

19 **MR. BRENNAN:** I had a number of conversations with my Agency
20 colleagues on a broad range of issues during that period of time -- not just
21 on this program, but other ones. We would have personal conversations on

1 that.

2 **VICE CHAIRMAN CHAMBLISS:** Well, my reason, particularly, for
3 naming those individuals, Mr. Brennan, is that they were the ones directly
4 above you. Mr. McLaughlin has been quoted in the press as saying he never
5 heard from you; he doesn't doubt that you did this, but he says he never
6 heard from you. And we just have not seen anybody who has come forward
7 and said they ever heard any objections from you with respect to these
8 programs.

9 Moving on -- Mr. Krongard, your boss at the CIA, told the Wall Street
10 Journal that you had a role in setting the parameters of the program, and I
11 quote, "Helping to seek Justice Department approval for the techniques." He
12 went on to say that "John would have been part and parcel of that process."
13 How does that comport with your response to the Committee that you
14 played no role in the program's -- and I quote again, your answer -- "its
15 creation, execution, or oversight"?

16 **MR. BRENNAN:** I respectfully disagree with my former colleague, Buzzy
17 Krongard. I was not involved in establishing the parameters of that
18 program. I think in that same Wall Street Journal article, he goes on to say,
19 in fact, that I was not involved in a lot of elements of that program.

20 But I was not involved in the establishment of that program. Again, I
21 had awareness that the Agency was being asked to do this; I had awareness

1 that the Agency was going forward on it. I had some visibility into some of
2 the activities there, but I was not part of any type of management structure
3 or aware of most of the details.

4 **VICE CHAIRMAN CHAMBLISS:** That being the case, why would you be
5 the recipient of a minimum of 50 e-mails, Mr. Brennan, on the progress of
6 the interrogation of Abu Zubaydah, including the techniques used in that
7 interrogation?

8 **MR. BRENNAN:** Senator, that was probably a standard e-mail
9 distribution. I was on thousands upon thousands of e-mail distributions, as
10 Deputy Executive Director. I think I was just cc'd on them; I wasn't an action
11 officer on it. I know of no action I took at the Agency that in any way
12 authorized or reprogrammed funds, or anything along those lines.

13 **VICE CHAIRMAN CHAMBLISS:** Executive Director Krongard is said to
14 have been an advocate of using SERE techniques. Did he discuss with you a
15 proposal to move to SERE techniques with Abu Zubaydah; and if so, did you
16 raise any objection?

17 **MR. BRENNAN:** I don't recall a conversation with Mr. Krongard about
18 that particular issue.

19 **VICE CHAIRMAN CHAMBLISS:** When you reviewed the intelligence that
20 the CIA was getting on Abu Zubaydah *after* the use of EITs, did you think the
21 information was valuable?

1 **MR. BRENNAN:** The reports that I was getting subsequent to that, and
2 in the years after that, it was clearly my impression that there was valuable
3 information that was coming out.

4 **VICE CHAIRMAN CHAMBLISS:** In a November 2007 interview, you said
5 that information from the interrogation techniques, quote, "saved lives." But
6 you also say that CIA should be out of the detention business.

7 The main benefit that I saw in CIA's program was the ability to hold and
8 question individuals about whom there was significant intelligence that they
9 were terrorists, but not necessarily evidence that could be used in a court of
10 law.

11 Your view seems to be that even if we could save American lives by
12 detaining more terrorists, using only traditional techniques, it would be
13 better to kill them with a drone or let them go free rather than detain them.
14 Can you explain the logic in that argument?

15 **MR. BRENNAN:** I respectfully disagree, Senator. I never believe it's
16 better to kill a terrorist than to detain him. We *want* to detain as many
17 terrorists as possible so we can elicit the intelligence from them in the
18 inappropriate manner so that we can disrupt follow-on terrorist attacks. So,
19 I'm a strong proponent of doing everything possible short of killing
20 terrorists, bringing them to justice, and getting that intelligence from them.

21 I clearly had the impression, as you said, when I was quoted in 2007,

1 that there was valuable intelligence that came out from those interrogation
2 sessions. That's why I did say that they save lives. I must tell you, Senator,
3 that reading this report from the Committee raises serious questions about
4 the information that I was given at the time, and the impression I had at the
5 time.

6 Now I have to determine, based on that information, as well as what
7 CIA says, what the truth is. And at this point, Senator, I do not know what
8 the truth is.

9 **VICE CHAIRMAN CHAMBLISS:** How many high value targets have been
10 captured during your service with the administration?

11 **MR. BRENNAN:** There have been a number of individuals who have
12 been captured, arrested, detained, interrogated, debriefed, and put away by
13 our partners overseas, which is -- we have given them the capacity now, we
14 have provided them the intelligence. And, unlike in the immediate aftermath
15 of 9/11 when a lot of these countries were both unwilling and unable to do
16 it, we have given them that opportunity. And so, that's where we're working
17 with our partners.

18 **VICE CHAIRMAN CHAMBLISS:** How many high-value targets have been
19 arrested and detained, and interrogated by the United States, during *your*
20 four years with the administration?

21 **MR. BRENNAN:** I'll be happy to get that information to you, in terms of

1 those high-value targets that have been captured with U.S. intelligence
2 support.

3 **VICE CHAIRMAN CHAMBLISS:** I submit to you the answer to that is
4 *one*. And it's Warsame, who was put on a ship for 60 days and interrogated.

5 Thank you.

6 **CHAIRMAN FEINSTEIN:** Thank you very much, Mr. Vice Chairman.

7 I want to point out that I'm going to try and enforce the eight minutes.
8 If you hear a tapping, it is not personal.

9 Senator Rockefeller?

10 **SENATOR ROCKEFELLER:** Thank you, Madam Chair.

11 Welcome, Mr. Brennan. And if confirmed, you're going to lead an
12 extraordinary agency with extraordinary people who perform extraordinary
13 services, most of them totally unknown by the American people. Most
14 people don't think about that -- what it is to do a life of public service and
15 never have anything known. Those of us who sit up here do a life of public
16 service and want everything that we do to be known. It's how we get
17 elected. It's a very different ethic in the Central Intelligence Agency and all
18 intelligence agencies, and I respect it very much.

19 I want to go to the EITC -- sorry; that's *Earned Income Tax Credit* -- to
20 the enhanced interrogation techniques. Well, I'm for both. Well, I'm not for
21 the second, but for the first.

1 You talk about the 6,000 pages. What I want to say, and when the
2 second round comes, I will, I'm going to pour out my frustration on dealing
3 with the Central Intelligence Agency, and dealing with various
4 administrations, about trying to get information.

5 Why was it that they felt that we were so unworthy of being trusted?
6 Why was it they were willing to talk to Pat Roberts and me, or Saxby
7 Chambliss and Dianne Feinstein, but not anybody else, until we literally
8 bludgeoned them -- Kit Bond and I -- into agreeing to include everybody?
9 Like, Carl Levin's not trustworthy? You know? I mean, it's amazing.

10 And I pursue Dianne Feinstein's point about staff. When you go and
11 you have, under the previous administration, a briefing with the President or
12 the Vice President, or the head of the CIA, or others, you're not allowed to -- I
13 can remember driving with Pat Roberts, when he was Chairman and I was
14 Vice Chairman, and we weren't allowed to talk to each other driving up or
15 driving back. You weren't allowed to do that.

16 Staff were a part of *nothing*. You have to understand that you're
17 surrounded by people who work with you and fill you in -- people who are
18 experts. We are, too. But they've got to be part of this. They've got to be
19 part of -- when the OLC comes, it should come to them, also. I strongly
20 support the Chairwoman's view on that.

21 Now, in the enhanced interrogation techniques matter, a handful of

1 former senior CIA officials who were personally invested -- and *are*
2 personally invested -- in defending the CIA's detention and interrogation
3 program, largely because their professional reputations depend on it,
4 depend on it.

5 (Inaudible) to speak for the CIA and its workforce on this issue, and I
6 think it does all a great disservice. In my office, you and I discussed the
7 Committee's landmark report on this program. You do understand that this
8 took six years to write -- not just 6,000 pages, but six years to write,
9 perhaps longer -- 23,000, 30,000 footnotes. Why did we do this? We did
10 this because we heard *nothing* from the Intelligence Agency. We had no way
11 of being briefed. They would not tell us what was going on. So we had to
12 do our own investigation, and we're pretty good at it.

13 And when you read those first 350 pages, you told me that you were
14 shocked at some of what you read. You did not know that. And that, to me,
15 is shocking -- but not to condemn anybody; simply says that has to be fixed,
16 and changed forever. There never can be that kind of situation again, where
17 we have to tell *you* what's going wrong in your Agency, and thus
18 demoralizing some of the people in your Agency who want to be relieved of
19 the burden and the taint of bad techniques in interrogation. They suffer
20 from that.

21 And yet, nobody would talk with us about that. We had to get that

1 information on our own. It's a magnificent piece of work, and I think it's a
2 piece of history; it'll go down in history because it will define the separation
3 of powers as between the intelligence committees of the House and Senate,
4 and the Agency and others that relate to it.

5 I'm also very aware that this is all crucial to the President's authority.
6 Not just on the more modern question of the day about drones. But, you
7 know, that determination is made by one person and one person alone. And
8 if there is a breakdown in protocol, if there is a breakdown in line of
9 command in reacting, therefore, into something which is not good, where
10 there's too much collateral damage, I think, for the most part, I would agree
11 with the Chairwoman -- I believe she said this -- that the work of the drone
12 had been fairly safe. However, any collateral damage is unacceptable. And
13 that has to be the purpose of the Agency.

14 And therefore, this detention and interrogation program, I've got to
15 say, it was -- the people who ran it were ignorant of the topic; executed by
16 personnel without relevant experience, managed incompetently by senior
17 officials who did not pay attention to crucial details, and corrupted by
18 personnel with pecuniary conflicts of interest. It was sold to the
19 policymakers and lawyers of the White House, the Department of Justice, and
20 Congress with grossly-inflated claims of professionalism and effectiveness;
21 so-called "lives saved."

1 It was a low point in our history. And this document, this book, should
2 change that forever. I would hope very much that you would, if you are
3 confirmed, which I hope you will be, that you will make parts of this at your
4 discretion, required reading for your senior personnel so they can go
5 through the same experience that you went through. Are you willing to do
6 that?

7 **MR. BRENNAN:** Yes, Senator. I am looking forward to taking
8 advantage of whatever lessons come out of this chapter in our history and
9 this Committee's report.

10 **SENATOR ROCKEFELLER:** How do you cross-reference --
11 -- and tell me when I'm out of time.

12 **CHAIRMAN FEINSTEIN:** Eight seconds. No -- a *minute* and eight
13 seconds.

14 **SENATOR ROCKEFELLER:** A minute and eight seconds, yes.

15 **CHAIRMAN FEINSTEIN:** Right -- a long time.

16 **SENATOR ROCKEFELLER:** The cross-referencing of the EIT disaster
17 and the future of the drone, and the decisions that -- only the President, of
18 course, can authorize that -- but the decision sometimes is passed down,
19 and it has to be passed down in a very accurate manner. And there have to
20 be a protocol, which is exact -- more exact, even, than the interrogation
21 techniques, because I think that's probably been put to bed just a bit; it's

1 beginning to get straightened out.

2 But the drones are going to grow. There's going to be more and more
3 of that warfare -- not just by us, but by other countries, including, perhaps,
4 by people from within our own country. So the protocol of that, insofar as it
5 would refer to a particular agency, is going to have to be exact, and directed,
6 and of particular excellence and exactitude. How will that happen?

7 **MR. BRENNAN:** Senator, you make an excellent point, and that's what
8 I'm most interested in -- is finding out what went wrong. If this report is, as
9 stated, accurate, what went wrong in the system where there were systemic
10 failures; where there was mismanagement or inaccurate information that was
11 put forward?

12 Because there are covert activities that are taking place, you know,
13 today, under the direction and management of the CIA. And I would have
14 the obligation to make sure I could say to this Committee that all of those
15 covert action programs are being run effectively, they're being well
16 managed, they're being overseen, and that the measures of effectiveness,
17 the results of those programs, are an accurate and fair representation of
18 what actually is happening.

19 This report raises serious questions about whether or not there are
20 serious systemic issues that are at play here. I would need to get my arms
21 around that, and that would be one of my highest priorities, if I were to go

1 to the Agency.

2 **SENATOR ROCKEFELLER:** I thank you. Thank you, Chair.

3 **CHAIRMAN FEINSTEIN:** Thank you, Senator Rockefeller.

4 Senator Burr?

5 **SENATOR BURR:** Thank you, Chair.

6 Mr. Brennan, welcome. Thank you for your long history of public
7 service; and more importantly, to your family -- thank you for your
8 willingness to put up with his hobby.

9 Most, if not all, of the intelligence that our Committee receives is the
10 finished analysis that's derived from source reports and other raw
11 intelligence materials that we don't see -- and I might say, we don't *need* to
12 see -- all of.

13 In order to ensure that we can perform our oversight duties of the
14 Intelligence Committee, would you agree that the Committee should be able
15 to review all analytical product, if requested?

16 **MR. BRENNAN:** On the face of that question, yes. My answer would be
17 yes. However, I would have to take a look at the issues it involved in terms
18 of, you know, what are we talking about, in terms of access to that analytic
19 product -- whether it's all staff, all Committee Members, whatever.

20 I just can't make a commitment to that. But your intention, and what I
21 think your objective is, I fully support, in terms of making sure this

1 Committee has the breadth of analytic expertise available from the Agency.

2 **SENATOR BURR:** As we go forward, there may be times that the
3 Committee will need the raw intelligence to judge the accuracy of analytical
4 product that we're provided. If confirmed, will you provide the raw
5 intelligence on those occasions when the Committee requests it?

6 **MR. BRENNAN:** Senator, I would give every request from this
7 Committee for access to that information full consideration. That's my
8 commitment to you.

9 **SENATOR BURR:** Do you agree that it's a function of this Committee's
10 oversight that occasionally we would need to look at it?

11 **MR. BRENNAN:** I would agree that it is probably a function of your
12 oversight that you would have interest in doing that, and it would be my
13 obligation, I think, as Director of CIA, to try to be as accommodating as
14 possible to that interest, while at the same time trying to respect whatever
15 considerations need to be taken into account as we do that.

16 **SENATOR BURR:** Mr. Brennan, as you know, the Committee is
17 conducting a thorough inquiry into the attacks in Benghazi, Libya. In the
18 course of this investigation, the CIA has repeatedly delayed, and in some
19 cases, flatly refused, to provide documents to this Committee. If confirmed,
20 will you assure this Committee that this refusal will never happen again?

21 **MR. BRENNAN:** I can commit to you, Senator, that I would do

1 everything in my ability and my authority to be able to reach an
2 accommodation with this Committee that requests documents, because an
3 impasse between the Executive Branch and the Legislative Branch on issues
4 of such importance is not in the interest of the United States Government.
5 And so, it would be my objective to see if we could meet those interests.

6 At the same time, our founding fathers did, sort of, separate the
7 branches of government -- Judicial, Legislative, and Executive. And so, I
8 want to be mindful of that separation, but at the same time, meet your
9 legitimate interests.

10 **SENATOR BURR:** They also gave us the "power of the purse."

11 **MR. BRENNAN:** They certainly did, Senator; I'm fully aware of that.

12 **SENATOR BURR:** I would suggest that that's the only tool, and it's one
13 we hate to use.

14 **MR. BRENNAN:** Yes.

15 **SENATOR BURR:** Do you think that there's any situation where it's
16 legal to disclose to the media, or to the public, details of covert action
17 programs?

18 **MR. BRENNAN:** I do not think it is ever appropriate to improperly
19 disclose classified information to anybody who does not have legitimate
20 access to it and has the clearances for it.

21 **SENATOR BURR:** Let me clarify. I didn't ask for classified information.

1 I specifically said "covert action programs."

2 **MR. BRENNAN:** By definition, covert action programs are classified,
3 Senator.

4 **SENATOR BURR:** I realize that.

5 **MR. BRENNAN:** Right. So, I do not believe it is appropriate to
6 improperly disclose any of those details related to covert action programs.

7 **SENATOR BURR:** Let me point out that in the Committee pre-hearing
8 questions, you didn't really answer a question that dealt with specific
9 instances where you were authorized to disclose classified information to a
10 reporter. So, could you provide for the Committee any times that you were
11 given the authority to release classified information?

12 **MR. BRENNAN:** I have never provided classified information to
13 reporters. I engaged in discussions with reporters about classified issues
14 that they might have had access to because of unfortunate leaks of classified
15 information, and I frequently work with reporters, if not editors, of
16 newspapers, to keep out of the public domain some of this country's most
17 important secrets.

18 And so I engage with them on those issues. But after working in the
19 intelligence profession for 30 years and being at the CIA for 25 years, I know
20 the importance of keeping those secrets *secret*.

21 **SENATOR BURR:** Have any of your conversations with those reporters

1 or media consultants about intelligence matters been recorded, or were
2 there transcriptions of it?

3 **MR. BRENNAN:** I believe there have been. I've been on news network
4 shows, and I have been, you know, engaged in conversations on the
5 telephone and other things that I presume -- and I know -- that they have
6 been recorded on occasion.

7 **SENATOR BURR:** Have you specifically asked for them not to be
8 recorded?

9 **MR. BRENNAN:** Whenever I talk to reporters, I do so at the request of
10 the White House Press Office, and there are ground rules that are established
11 there. And I'm not the one to establish those ground rules about whether or
12 not they would be recorded or not.

13 **SENATOR BURR:** You said in your responses to pre-hearing questions
14 that in exceptional circumstances, it may be necessary to acknowledge
15 classified information to a member of the media.

16 Did you tell media commentators that the United States had, and I
17 quote, "inside control" or "inside information" on the AQAP bomb plot in May
18 of last year?

19 **MR. BRENNAN:** I think what you're referring to, Senator, is when I had
20 a teleconference with some individuals, former government officials from
21 previous administrations, who were going to be out on talk shows on the

1 night that an IED was intercepted.

2 And so, I discussed with them that some of the aspects of that --
3 because I was going on the news network shows the following day -- I
4 wanted to make sure they understood the nature of the threat, and what it
5 was, and what it wasn't.

6 And so, what I said at the time -- because I said I couldn't talk about
7 any operational details, and this was shortly after the anniversary of the bin
8 Laden takedown -- I said there was never a threat to the American public as
9 we had said so publicly, because we had inside control of the plot, and the
10 device was never a threat to the American public.

11 **SENATOR BURR:** Did you think that that comment actually exposed
12 sources or methods?

13 **MR. BRENNAN:** No, Senator, I did not. And there is an ongoing
14 investigation, I must say, right now about the unfortunate leak of
15 information that was very, very damaging. And I voluntarily cooperated with
16 the Department of Justice on that and have been interviewed on it.

17 **SENATOR BURR:** Well, let me just say, as one that was overseas shortly
18 after that, I certainly had, on numerous occasions, U.S. officials who
19 expressed to me the challenges they've gone through to try to make
20 apologies to our partners. And I personally sat down in London to have that
21 apology conversation, and it was very disruptive.

1 Very quickly -- did you provide any classified or otherwise sensitive
2 information to reporters or media consultants regarding the details of the
3 Abbottabad raid?

4 **MR. BRENNAN:** No, I did not, Senator.

5 **SENATOR BURR:** Then, do you know *who* disclosed information that
6 prompted the Secretary of Defense, Robert Gates, to advise the White House
7 to tell people to shut up?

8 **MR. BRENNAN:** You would have to ask Senator Gates what he was
9 referring to at that time, because I don't know.

10 **SENATOR BURR:** In conclusion, let me just go back to the initial
11 questions that the Chair referred to. And in that, I think you might have
12 taken her request on documents to be the documents that we've got
13 outstanding right now; I think she was referring to the future.

14 But let me just say I hope that you take the opportunity, if you haven't
15 already, to take back to the administration that it is absolutely essential that
16 the documents this Committee has requested on Benghazi be supplied
17 before the confirmation moves forward. I realize -- I'm not saying that you
18 were part of it, but it is absolutely essential that we get those documents
19 before we begin a new administration at the CIA. And I hope you will deliver
20 that message. I thank you.

21 **MR. BRENNAN:** Thank you, Senator.

1 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator.

2 Senator Wyden?

3 **SENATOR WYDEN:** Thank you, Madam Chair. And Mr. Brennan, thank
4 you for our discussions and for the joint meeting that you had with several
5 of us on the Committee last week.

6 As we discussed then, I believe the issues before us really have nothing
7 to do with political party, and have everything to do with the checks and
8 balances that make our system of government so special.

9 Taking the fight to al-Qa'ida is something every Member of this
10 Committee feels strongly about. It's the idea of giving any president
11 unfettered power to kill an American without checks and balances that's so
12 troubling. Every American has the right to know when their government
13 believes it's allowed to kill them.

14 And ensuring that the Congress has the documents and information it
15 needs to conduct robust oversight is central to our democracy. In fact, the
16 Committee was actually created, in large part, in response to lax oversight of
17 programs that involved targeted killings.

18 So it was encouraging last night when the President called and
19 indicated that, effective immediately, he would release the documents
20 necessary for Senators to understand the full legal analysis of the President's
21 authority to conduct the targeted killing of an American. What the President

1 said is a good first step towards ensuring the openness and accountability
2 that's important, and you heard that reaffirmed in the Chair's strong words
3 right now.

4 Since last night, however, I have become concerned that the
5 Department of Justice is not following through with the President's
6 commitment just yet. Eleven United States Senators asked to see any and all
7 legal opinions, but when I went to read the opinions this morning, it is not
8 clear that that is what was provided.

9 And moreover on this point, with respect to lawyers, I think the concern
10 is that there's a double standard. As the National Security Advisor -- you
11 volunteered, to your credit, you weren't a lawyer -- you ask your lawyers and
12 your experts to help you. And we're trying to figure out how to wade
13 through all these documents, and one of the reasons why I'm concerned that
14 it's not yet clear that what the President committed to has actually been
15 provided.

16 And finally on this point, the Committee has been just *stonewalled* on
17 several other requests, particularly with respect to secret law. And I'm going
18 to leave this point simply by saying I hope you'll go back to the White House
19 and convey to them the message that the Justice Department is not yet
20 following through on the President's commitment. Will you convey that
21 message?

1 **MR. BRENNAN:** Yes, I will, Senator.

2 **SENATOR WYDEN:** Very good.

3 Let me now move to the public side of oversight -- making sure that the
4 public's right to know is respected. One part of oversight is Congressional
5 oversight, and our doing our work here. The other is making sure that the
6 American people are brought into these debates; just like James Madison
7 said -- this is what you need to preserve a republic.

8 And I want to start with the drone issue. In a speech last year, the
9 President instructed you to be more open with the public about the use of
10 drones to conduct targeted killings of al-Qa'ida members.

11 So, my question is what should be done next, to ensure public
12 conversation about drones, so that the American people are brought into
13 this debate and have a full understanding of what rules the government is
14 going to observe when it conducts targeted killings?

15 **MR. BRENNAN:** Well, I think this hearing is one of the things that can
16 be done, because I think this type of discourse between the Executive and
17 the Legislative Branch is critically important.

18 I believe that there need to be continued speeches that are going to be
19 given by the Executive Branch to explain our counterterrorism programs. I
20 think there is a misimpression on the part of some of American people who
21 believe that we take strikes to punish terrorists for past transgressions --

1 nothing could be further from the truth. We only take such actions as a last
2 resort to save lives when there's no other alternative to taking an action
3 that's going to mitigate that threat.

4 So we will need to make sure that there is an understanding. And the
5 people that were standing up here today, I think they really have a
6 misunderstanding of what we do as a government, and the care that we
7 take, and the agony that we go through to make sure that we do not have
8 any collateral injuries or deaths.

9 And as the Chairman said earlier, the need to be able to go out and say
10 that publicly and openly, I think, is critically important, because people are
11 reacting to a lot of falsehoods that are out there. And I do see it as part of
12 my obligation, and I think it's the obligation of this Committee, to make sure
13 the truth is known to the American public and to the world.

14 **SENATOR WYDEN:** Mr. Brennan, I'm also convinced there are parts of
15 drone policy that can be declassified consistent with national security. And I
16 hope that you will work with me on that if you are confirmed.

17 Let me ask you several other questions with respect to the President's
18 authority to kill Americans. I've asked you how much evidence the President
19 needs to decide that a particular American can be lawfully killed, and
20 whether the administration believes that the President can use this authority
21 inside the United States. In my judgment, both the Congress and the public

1 needs to understand the answers to these kinds of fundamental questions.

2 What do you think needs to be done to ensure that Members of the
3 public understand more about when the government thinks it's allowed to
4 kill them, particularly with respect to those two issues -- the question of
5 evidence, and the authority to use this power within the United States?

6 **MR. BRENNAN:** I have been a strong proponent of trying to be as open
7 as possible with these programs as far as our explaining what we're doing.
8 What we need to do is optimize transparency on these issues, but at the
9 same time, optimize secrecy and the protection of our national security. I
10 don't think that it's one or the other; it's trying to optimize *both* of them.

11 And so, what we need to do is make sure we explain to the American
12 people: what *are* the thresholds for action; what *are* the procedures, the
13 practices, the processes, the approvals, the reviews.

14 The Office of Legal Counsel advice establishes the legal boundaries
15 within which we can operate. It doesn't mean that we operate at those outer
16 boundaries. And, in fact, I think the American people would be quite
17 pleased to know that we've been very disciplined and very judicious, and we
18 only use these authorities and these capabilities as a last resort.

19 **SENATOR WYDEN:** One other point with respect to public oversight: if
20 the Executive Branch makes a mistake and kills the wrong person or a group
21 of the wrong people, how should the government acknowledge that?

1 **MR. BRENNAN:** I believe we need to acknowledge it. I believe we need
2 to it knowledge it to our foreign partners. We need to acknowledge it
3 publicly.

4 There are certain circumstances where there are considerations to be
5 taken into account, but as far as I'm concerned, if there is this type of action
6 that takes place, in the interest of transparency, I believe the United States
7 Government should acknowledge it.

8 **SENATOR WYDEN:** And acknowledge it publicly?

9 **MR. BRENNAN:** That would be ideal, and that would be the objective of
10 the program.

11 **SENATOR WYDEN:** One last question if I might: in my letter to you
12 three weeks ago, I noted that I've been asking for over a year to receive the
13 names of any and all countries where the Intelligence Community has used
14 its lethal authorities.

15 If confirmed, would you provide the full list of countries to the
16 Members of this Committee and our staff?

17 **MR. BRENNAN:** I know that this is an outstanding request on your part.
18 During our courtesy call, we discussed it. If I were to be confirmed as
19 Director of CIA, I would get back to you, and it would be my intention to do
20 everything possible to meet this Committee's legitimate interests and
21 requests.

1 **SENATOR WYDEN:** Well, I'm going to wrap up just with one sentence
2 on this point, Chair Feinstein.

3 It's a matter of public record, Mr. Brennan, that the raid that killed
4 Osama bin Laden was carried out under the authority of CIA Director Leon
5 Panetta. So that tells you right there that the Intelligence Community's lethal
6 authorities have been used in at least one country.

7 I want to hear you say that if these authorities have been used in any
8 *other* countries, that you'll provide this Committee with the full list. Now,
9 will you give us that assurance?

10 **MR. BRENNAN:** You're talking about a historical list; are you not,
11 Senator Wyden -- as far as anytime, anywhere, that the CIA was involved in
12 such a lethal provision?

13 **SENATOR WYDEN:** Yes.

14 **MR. BRENNAN:** I would have to go back and take a look at that
15 request. Certainly, anything that -- if I were to go to CIA, and the CIA was
16 involved in any type of lethal activity, I would damn well make sure that this
17 Committee had that information; absolutely.

18 **SENATOR WYDEN:** That's a good start.

19 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator Wyden.
20 Senator Risch?

21 **SENATOR RISCH:** Thank you, Madam Chairman.

1 Mr. Brennan, thank you for your service over the years.

2 I want to follow up on a conversation you and I had in my office, and it
3 touches on what Senator Burr asked you about a little bit, and that is the
4 question of leaks.

5 I was glad to hear you acknowledge in your opening statement how
6 important it is that we avoid leaks of any kind, because they are dangerous,
7 they endanger the lives of Americans, and they can't be tolerated in the
8 business that we're in. And you agree with that, I gather?

9 **MR. BRENNAN:** Absolutely, Senator.

10 **SENATOR RISCH:** Okay. Well, I want to talk to you about a person who
11 I believe, and I think you acknowledge, is one of the most dangerous people
12 on the planet, and that's Ibrahim al-Asiri. And the conversation that you had
13 with Senator Burr was referring to the interview that you gave that talked
14 about the plot that was uncovered that involved him. Do you recall that
15 conversation with Senator Burr?

16 **MR. BRENNAN:** Yes, I do, Senator.

17 **SENATOR RISCH:** Okay. And I have in front of me the Reuters article
18 that's dated May 18, 2012, describing your engagement with the media
19 regarding Mr. Asiri and the plot; you're familiar with that article, I would
20 assume?

21 **MR. BRENNAN:** I have read many articles, so I presume I read that one.

1 **SENATOR RISCH:** Well, this particular one is one that's similar, I think,
2 as far as the leak itself and how we got to where we are on this.

3 I want to quote from the article. It says, "At about 5:45 p.m., Eastern
4 Daylight Time, on Monday, May 7, just before the evening newscasts, John
5 Brennan, President Barack Obama's top White House advisor on
6 counterterrorism, held a small, private teleconference to brief former
7 counterterrorism advisors who have become frequent commentators on TV
8 news shows."

9 Is that an accurate statement?

10 **MR. BRENNAN:** That is an accurate statement, Senator. Yes.

11 **SENATOR RISCH:** And can you tell me -- who was involved in that
12 conversation; who was involved in that interview?

13 **MR. BRENNAN:** I believe that the people who were on that phone
14 included one of my predecessors, Fran Townsend; Roger Cressey; Juan
15 Zarate; Richard Clarke. I think these are individuals who have served in the
16 government and are counterterrorism professionals.

17 **SENATOR RISCH:** Any others you can think of?

18 **MR. BRENNAN:** I do not remember the others.

19 **SENATOR RISCH:** Do you have notes from that conversation?

20 **MR. BRENNAN:** There are notes, yes -- that people took at that, yes.

21 **SENATOR RISCH:** Have those been turned over to the Justice

1 Department?

2 **MR. BRENNAN:** The Justice Department -- as I said, I voluntarily and
3 eagerly engaged in that investigation, and they have --

4 **SENATOR RISCH:** That wasn't the question. Were those notes turned
5 over?

6 **MR. BRENNAN:** Everything that was available on that has been turned
7 over to the Department of Justice; absolutely, Senator.

8 **SENATOR RISCH:** Did *you* turn those notes over?

9 **MR. BRENNAN:** My office turned over everything that was available
10 about that, yes.

11 **SENATOR RISCH:** Who took those notes?

12 **MR. BRENNAN:** Senator, I was not taking notes at the time. There were
13 people, also, from the White House, who were on that conversation, as we do
14 with all of these types of engagements.

15 **SENATOR RISCH:** And who were the people that were involved in that
16 conversation?

17 **MR. BRENNAN:** Aside from the reporters? There was somebody from
18 the White House Press Office and someone from the Counterterrorism
19 directorate.

20 **SENATOR RISCH:** You don't know the peoples' names?

21 **MR. BRENNAN:** I do. They were Nick Rasmussen and Caitlin Hayden.

1 **SENATOR RISCH:** Those are the two people from the White House that
2 were involved; is that --

3 **MR. BRENNAN:** That's my recollection of who was involved in that
4 conference call, yes.

5 **SENATOR RISCH:** May 7th was the date that the incident occurred; is
6 that correct?

7 **MR. BRENNAN:** The date of the conversation with those reports?

8 **SENATOR RISCH:** Excuse me -- the date of the underlying event that
9 you were talking about involving Mr. Asiri.

10 **MR. BRENNAN:** Now you're talking about Mr. Asiri -- in terms of being
11 the person who was responsible for putting together the IED?

12 **SENATOR RISCH:** Correct.

13 **MR. BRENNAN:** I believe May 7th was about the right date, yes.

14 **SENATOR RISCH:** And can you tell me why you felt compelled to
15 release that information to these people on May 7, 2012?

16 **MR. BRENNAN:** Well, as I explained on the network news the following
17 morning, and as we said publicly, that device was not a threat to the
18 American public at the time of the bin Laden anniversary --

19 **SENATOR RISCH:** I don't want to cut you off, but that's not the
20 question.

21 **MR. BRENNAN:** I thought it was, Senator. But go ahead.

1 **SENATOR RISCH:** No. The question was why did you feel compelled to
2 hold this press conference and divulge that information at that time on that
3 day?

4 **MR. BRENNAN:** It wasn't a press conference; it was a teleconference
5 with these individuals. And I know they were going out on TV that evening
6 and I wanted to make sure that these individuals with that background on
7 counterterrorism were able to explain appropriately to the American people
8 as we've been talking about -- the importance of making sure the American
9 people were aware of the threat environment and what we're doing on the
10 counterterrorism front.

11 **SENATOR RISCH:** And they were going to go on TV that evening to
12 discuss this event?

13 **MR. BRENNAN:** Yes, because it had already broken. The news reports
14 had broken that afternoon, Senator, and so there was a flurry of activity and
15 press reporting that was going on. These individuals reached out to us, as
16 they normally do. So this was just a routine engagement with the press, as
17 we normally do when these things are made public.

18 **SENATOR RISCH:** The next paragraph says, "According to five people
19 familiar with the call, Brennan stressed that the plot was never a threat to the
20 U.S. public or air safety because Washington had inside control over it."

21 Is that an accurate statement?

1 **MR. BRENNAN:** Inside control of the plot, yes, that's exactly right.

2 **SENATOR RISCH:** Okay. So, based on that, one would know that we
3 had something inside; is that a fair statement?

4 **MR. BRENNAN:** From that statement, it is known that that IED, at the
5 time, was not a threat to the traveling public, because we had said publicly
6 that there was no active plot at the time of the bin Laden anniversary. That's
7 correct.

8 **SENATOR RISCH:** Would you agree with me that that disclosure
9 resulted in the outing of an asset that shouldn't have been outed?

10 **MR. BRENNAN:** Absolutely not, Senator. I do not agree with you,
11 whatsoever.

12 **SENATOR RISCH:** Well, how can you say that?

13 **MR. BRENNAN:** What I'm saying is that we were explaining to the
14 American public why that IED was not, in fact, a threat at the time that it was
15 in the control of individuals. When we say "positive control," "inside control,"
16 that means that we have, in fact, that operation, either environmentally or
17 any number of ways. It did not in any way reveal any type of classified
18 information.

19 And I told those individuals -- and there are transcripts that are
20 available of that conversation -- "I cannot talk to you about the operational
21 details of this, whatsoever."

1 **SENATOR RISCH:** Having used the words that you used of "inside
2 control," it isn't much of a leap to determine that somehow you had a handle
3 on it.

4 **MR. BRENNAN:** It's not much of a leap to know that if in fact we said
5 this IED was, in fact, obtained, and it was not a threat at the time, that there
6 was some type of inside control. It is almost a truism.

7 **SENATOR RISCH:** Well, having said that, it seems to me that the leak
8 that the Justice Department is looking for is right here in front of us. And
9 you disagree with that?

10 **MR. BRENNAN:** I disagree with you vehemently, Senator. And I've
11 talked to the Department of Justice. As I said, I conducted interviews with
12 them. And, you know, I am a witness in that, as many other people are. And
13 as you know, there's witness and subject and target. I'm not a subject. I'm
14 not a target. I am a witness. Because I want to make sure whoever leaked
15 this information that got out to the press and that seriously did disrupt
16 some very sensitive operational equities on the part of some of our
17 international partners -- that never should have happened.

18 **SENATOR RISCH:** And you're in agreement with that -- that this was a
19 serious flaw in what *should* have happened; is that correct?

20 **MR. BRENNAN:** It's a serious flaw that it got out to the press before
21 that operation was, in fact, concluded; absolutely. And my discussion with

1 those individuals that night, it already was out in the press.

2 **SENATOR RISCH:** You would agree with me that on the day that we get
3 Mr. Asiri, it's going to be either a very, very good day, or, if he gets us first,
4 it's going to be a very, very bad day for the American people, and particularly
5 for anyone who was involved in a leak concerning him.

6 **MR. BRENNAN:** Senator, I live this every day and night.

7 **SENATOR RISCH:** I understand.

8 **MR. BRENNAN:** I go to bed at night worrying that I didn't do enough
9 that day to make sure I could protect the American people. So, when Mr.
10 Asiri is brought to justice, one way or another, it will be because of the work
11 that's been done over the past number of years by some very brave
12 Americans in CIA and other places.

13 So, believe me, I am focused as a laser on the issue of the IED threat,
14 AQAP, and Mr. al-Asiri.

15 **SENATOR RISCH:** I have more, but my time is up.

16 Thank you, Madam Chairman.

17 **CHAIRMAN FEINSTEIN:** Thank you, Senator Risch.

18 Senator Mikulski?

19 Before you start, Senator, a vote is due to start at four. It's now five
20 after four. Senator Chambliss went to vote; as soon as he returns, I will go.
21 And we will just keep this going. So, Members, be guided by that.

1 The vote just started. Please go ahead.

2 **SENATOR MIKULSKI:** Mr. Brennan, first of all, welcome to the
3 Committee. And in the short time I have -- you mentioned your wife, Kathy;
4 could you introduce us to her?

5 **MR. BRENNAN:** Yes, this is my wonderful, beautiful wife, Kathy, who's
6 been my spouse for 34 years and my partner in my work. And my brother,
7 Thomas, also is here, from New Jersey.

8 **SENATOR MIKULSKI:** Well, we'd like to welcome you. And we know
9 that not only will you serve, but your entire family has served, and will
10 continue to serve. And I'm going to echo the remarks of my colleague,
11 Senator Warner, thanking the people of the Central Intelligence Agency for
12 what they do every day in every way, working often in a way that is not
13 known, not recognized, and quite frankly, not always appreciated.

14 So, let me get to my questions. I have been concerned for some time
15 that there is a changing nature of the CIA, and that instead of it being
16 America's top human spy agency to make sure that we have no strategic
17 surprises, that it has become, more and more, executing paramilitary
18 operations.

19 And I've discussed this with you in our conversation. How do you see
20 this? I see this as mission-creep. I see this as overriding the original mission
21 of the CIA, for which you're so well versed, and more a function of the

1 Special Operations Command.

2 Could you share with me how you see the CIA and what you think
3 about this militarization of the CIA that's going on?

4 **MR. BRENNAN:** Thank you, Senator, and thank you --

5 **SENATOR MIKULSKI:** You might disagree with me, and I welcome your
6 disagreement is you so do so.

7 **MR. BRENNAN:** Senator, the principal missions of the Agency is to
8 collect intelligence, uncover those secrets, as you say, to prevent those
9 strategic surprises, and to be the best analytic component within the U.S.
10 Government, to do the all-source analysis that CIA has done so well for
11 many, many years.

12 At times, the President asks and directs the CIA to do covert action.
13 That covert action can take any number of forms, to include paramilitary.
14 And, as we've discussed here today on the counterterrorism front, there are
15 things that the Agency has been involved in since 9/11 that, in fact, have
16 been a bit of an aberration from its traditional role.

17 One of the things that I would do if I would go back to the Agency is to
18 take a look at that allocation of mission within CIA -- the resources that are
19 dedicated to this, and, as we had the discussion when I paid my courtesy
20 call, I am concerned that looking at the world, which is a very big place, we
21 need to make sure we have the best intelligence collection capabilities

1 possible and the best analytic capabilities possible. And the CIA should not
2 be doing traditional military activities and operations.

3 **SENATOR MIKULSKI:** Well, I appreciate that and look forward to
4 working with you on this to really identify what's up with the CIA, and to
5 DoD, which then takes me to the issue of cyber threat.

6 Both Secretary Panetta, General Dempsey, and so on -- and we, in your
7 current role at the White House -- have talked about the cyber threat. You
8 were a big help in trying to help us get the cyber legislation passed.

9 Now, tell us what you think is the role of the CIA in dealing with the
10 cyber threat in the area of human intelligence with the CIA? You have a
11 unique insight into it. We know what NSA does; we know what Homeland
12 Security is supposed to do; tell us where you see the CIA in this.

13 **MR. BRENNAN:** Well, first of all, the cyber threat that this country faces
14 is one of the most insidious and one of the most consequential to our
15 national security, and one that I think that our government as a whole and
16 this body, the Congress, really needs to be focused on and do everything
17 possible to prevent a devastating attack against this country because of our
18 vulnerabilities on the cyber front.

19 CIA's traditional mission on the collection front is to try to determine
20 the plans and intentions of foreign governments, foreign groups, sub-
21 national groups, and others.

1 Learning about those plans and intentions, and the development of
2 capabilities in the cyber world, is something that CIA, I think, is best placed
3 to do, so that we have an understanding of what foreign countries are doing,
4 what organized criminal organizations are doing, what sub-national groups
5 are doing, and the nature of the threat to us.

6 Then, in addition, the analysts at CIA can take that information,
7 working with the rest of the Community, to make sure that policymakers
8 have a good sense of the nature of the threat and some potential mitigation
9 strategies. And then, working with NSA, Department of Homeland Security,
10 and others, put together that structure that's going to make this country
11 resistant and resilient to those attacks.

12 **SENATOR MIKULSKI:** Well, Mr. Brennan, I really look forward to
13 working with you on this, because this cuts across all the agencies -- those
14 that have responsibility for work outside of this country, inside this country,
15 and yet, we all have to be doing -- what we're -- to use the Marine Corp
16 saying -- the best that we're best at and best that we're most needed for.

17 I consider this one of the greatest threats and one of the greatest
18 vulnerabilities, because we failed to pass the legislation ourselves. We can't
19 stop what foreign predators want to do. I mean, we can divert; identify an
20 attack. But we are making ourselves vulnerable.

21 Now, I want to get to the job of the CIA Director. I'm going to be blunt

1 -- and this will be no surprise to you, sir -- but I've been on this Committee
2 for more than 10 years, and with the exception of Mr. Panetta, I feel I've
3 been jerked around by every CIA Director. I've either been misled,
4 misrepresented, had to pull information out -- often at the most minimal
5 kind of way; from Tenet, with his little aluminum rods, to tell us that we had
6 weapons of mass destruction in Iraq, to Porter Goss -- not forthcoming.

7 You know the problems we've had with torture. The Chair has spoken
8 eloquently about it, all the way. And quite frankly, during those questions,
9 they were evaded; they were distorted, et cetera.

10 So, my question to you is: knowing your background, knowing your
11 Jesuit education, knowing what I think your values are, can I have your word
12 that you're going to be very forthcoming with this Committee, to speak truth
13 to power, to speak truth *about* power, even when it's uncomfortable, or
14 where we're going to have to probe in a way that is not an easy way to go?

15 **MR. BRENNAN:** Honesty, truthfulness, was a value that was inculcated
16 in me in my home in New Jersey, from my parents, Owen and Dorothy. It
17 still is to this day.

18 Honesty is the best policy. None of us are perfect beings. I'm far from
19 perfect. But, Senator, I would commit that I would be honest with this
20 Committee and do everything possible to meet your legitimate needs and
21 requirements. As I think I've told you before, I know that you are a very

1 proud senator of one of the jewels in the Intelligence Community, NSA,
2 which resides in Maryland, but it would be my objective to make CIA your
3 favorite intelligence agency and push Keith Alexander aside.

4 (LAUGHTER.)

5 **SENATOR MIKULSKI:** Well, I think you're pushing your luck now.

6 Thank you very much.

7 **VICE CHAIRMAN CHAMBLISS:** Senator Levin?

8 **SENATOR LEVIN:** Thank you.

9 Thank you for your willingness to serve here, Mr. Brennan.

10 You've said publicly that you believe waterboarding is inconsistent with
11 American values; it's something that should be prohibited, and it goes
12 beyond the bounds of what a civilized society should employ.

13 My question is this: in your opinion, does waterboarding constitute
14 torture?

15 **MR. BRENNAN:** The attorney general has referred to waterboarding as
16 torture. Many people have referred to it as torture. The attorney general,
17 premiere of law enforcement officer and lawyer of this country. And as you
18 well know, and as we've had the discussion, Senator, the term "torture" has a
19 lot of legal and political implications. It is something that should have been
20 banned long ago. It never should have taken place in my view. And,
21 therefore, if I were to go to CIA, it would never, in fact, be brought back.

1 **SENATOR LEVIN:** Do you have a personal opinion as to whether
2 waterboarding is torture?

3 **MR. BRENNAN:** I have a personal opinion that waterboarding is
4 reprehensible, and it's something that should not be done. And, again, I am
5 not a lawyer, Senator, and I can't address that question.

6 **SENATOR LEVIN:** Well, you've read opinions as to whether or not
7 waterboarding is torture. And I'm just -- do you accept those opinions of the
8 attorney general? That's my question.

9 **MR. BRENNAN:** Senator, you know, I've read a lot of legal opinions.
10 I've read an Office of Legal Counsel opinion in the previous administration
11 that said in fact waterboarding could be used. So, from the standpoint of
12 that, you know, I cannot point to a single legal document on this issue.

13 But, as far as I'm concerned, waterboarding is something that never
14 should have been employed, and, as far as I'm concerned, never will be, if I
15 have anything to do with it.

16 **SENATOR LEVIN:** Is waterboarding banned by the Geneva
17 Conventions?

18 **MR. BRENNAN:** I believe the attorney general also has said that it's
19 contrary, in contravention, of the Geneva Convention.

20 Again, I am not a lawyer, or a legal scholar, to make a determination
21 about what is in violation of an international convention.

1 **SENATOR LEVIN:** Mr. Rodriguez, the former CIA Deputy Director for
2 Operations, was asked about his personal moral or ethical perspective on
3 these enhanced interrogation techniques, including waterboarding.

4 He said that he knew of -- and these are his words -- "I know that many
5 of these procedures were applied to our own servicemen. Tens of thousands
6 of U.S. soldiers had gone through this."

7 Now, as we investigated, at Senate Armed Services Committee, in our
8 2008 report, these so-called "Survival, Evasion, Resistance, and Escape" -- or
9 "SERE" -- techniques referred to by Mr. Rodriguez were used to train
10 members of our military. They were never intended to be used by U.S.
11 interrogators.

12 These techniques were based on Chinese Communist interrogation
13 techniques used during the Korean War to elicit confessions, were developed
14 to expose U.S. -- and the use of or the training of U.S. personnel and
15 exposing of them for a few moments to these techniques which helped to --
16 was meant to help them survive in the event they were captured and the
17 event they were subjected to these techniques.

18 My question to you is this: is there any comparability between a friendly
19 trainer in the United States exposing our troops to abuses -- these SERE
20 techniques, including waterboarding -- for a few moments under close
21 supervision; is there any possible comparability to that to using these

1 techniques on an enemy in an effort to extract intelligence?

2 **MR. BRENNAN:** They are for completely different purposes and
3 intentions. I do not see any comparability there.

4 **SENATOR LEVIN:** Now, the Chairman and I issued a report, or made a
5 statement, on April 27, 2012. This also began with a statement of Mr.
6 Rodriguez.

7 And here's what he said: "Information provided by CIA detainees Khalid
8 Sheikh Mohammed and Abu Faraj al-Libbi about bin Laden's courier being
9 the lead information that eventually led to the location of bin Laden's
10 compound and the operation that led to his death."

11 That's what Rodriguez said. We said that statement is wrong. The
12 original lead information had no connection to CIA detainees. The CIA had
13 significant intelligence on the courier that was collected from a variety of
14 classified sources. While the CIA's enhanced interrogation techniques were
15 used against KSM and al-Libbi, the pair provided false and misleading
16 information during their time in CIA custody.

17 Now, my question to you is: are you aware of any intelligence
18 information that supports Mr. Rodriguez's claim that the lead information on
19 the courier came from KSM and al-Libbi?

20 **MR. BRENNAN:** I have not reviewed the intelligence thoroughly, but I
21 am unaware of any.