

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

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.

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**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 Qaeda 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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.

A handwritten signature in black ink, appearing to read 'SMH', with a long horizontal line extending to the right.

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