

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 3 OF 3 (JA553-JA625)

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

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

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 12-cv-794 (CM)

SECOND 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. Through the exercise of my official duties, as detailed in my declaration filed on 3 October 2014, which I hereby incorporate by reference, I have become familiar with this civil action and the underlying Freedom of Information Act ("FOIA") request submitted by the ACLU. This declaration will explain, to the greatest extent possible on the public record,¹ the Agency's decision to withhold certain responsive records in this case.

¹I am also submitting a classified declaration for the Court's *ex parte*, *in camera* review that contains additional information justifying the CIA's claims of exemption that cannot be filed on the public record.

I. BACKGROUND

2. 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 disclosed 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 memorandum authored by the Department of Justice's Office of Legal Counsel ("OLC") 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.² Additionally, the Second Circuit ordered the government to provide other responsive OLC memoranda to the Court for *in camera* inspection. In accordance with that ruling, the government submitted declarations to this Court to explain why all but one of these memoranda³ are wholly exempt under the FOIA and to demonstrate that no waiver of privilege or exemptions applicable to the information contained in these records had occurred by virtue of the disclosure of portions of the legal reasoning contained in the OLC-DOD Memorandum. By order dated

² The Second Circuit permitted the government to make redactions to the OLC-DOD Memorandum in order to protect certain classified and privileged information.

³ In advance of this filing, the government also released in part a second OLC opinion that pertained to a proposed lethal operation against Anwar Aulaqi.

30 September 2014, this Court held that no waiver of classification or privilege had occurred for the nine remaining OLC memoranda.

3. The Second Circuit also ordered disclosure of certain portions of an index prepared by OLC that documented the records which that office had located in connection with this litigation. OLC has publicly released a version of this index, redacting the material that the Second Circuit indicated could be withheld in its order dated 11 August 2014. Following remand to this Court, the American Civil Liberties Union ("ACLU") identified certain entries on the OLC index for which it sought the corresponding documents. On 3 October 2014, the government submitted public and *in camera*, *ex parte* declarations to explain why the records corresponding to those entries were properly withheld in full.⁴

4. In its 23 June 2014 opinion, the Second Circuit also required the CIA to provide this Court with a classified *Vaughn* index listing the documents responsive to the ACLU's request and to submit affidavits to justify its decision to withhold specific listings. The purpose of the instant declaration is to

⁴ In advance of that filing, the government also released portions of a DOJ Classified White Paper dated 25 May 2011. As explained in my first declaration, this paper, which was prepared by DOJ for Congress, discussed the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen. Although the paper did not mention the citizen by name -- the target of the contemplated operation was Anwar al-Aulaqi.

address those documents. In light of the Second Circuit's decision, the CIA has prepared both classified and unclassified *Vaughn* indices, documenting the records that are responsive to the ACLU's FOIA request.⁵ Upon review of the records, the Agency determined that two documents -- a copy of an unclassified declaration by former CIA Director Leon Panetta submitted in a separate civil matter and portions of the accompanying classified declaration filed in that case -- could be released. However, the CIA has determined that disclosure of the other records at issue, and the redacted portions of the classified Panetta declaration, would compromise classified, statutorily-protected and privileged CIA equities. Accordingly, as discussed below, the Agency has asserted Exemptions (b)(1), (b)(3) and (b)(5) to protect this material.

II. FOIA REQUEST

5. By letter dated 18 October 2011, the ACLU submitted a FOIA request seeking several categories of records pertaining to the legality and related processes concerning the U.S. Government's potential use of lethal force against U.S. citizens. In short, the ACLU's request sought five types of records: (1) records pertaining to the legal basis in

⁵ The attached *Vaughn* index describes the unique records located by the CIA in the course of its searches. However, it excludes any documents previously identified by OLC as responsive to plaintiff's request, since the propriety of withholding those records is already before this Court, to the extent the ACLU challenged their withholding.

domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, (2) records 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) records pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Aulaqi was authorized and upon which he was killed, (4) records pertaining to the factual basis for the targeted killing of Aulaqi, (5) records pertaining to the factual basis for the killing of Samir Khan, and (6) records pertaining to the factual basis for the killing of Abdulraham al-Aulaqi (Anwar al-Aulaqi's son). (See Bennett Decl., filed 20 June 2012, ¶ 8 & Ex. A.)

III. DESCRIPTION OF RESPONSIVE RECORDS

6. The responsive records located by the CIA fall into four broad categories consisting of intelligence products, classified inter-agency correspondence, classified correspondence with Congress, and CIA internal discussions and deliberations. The intelligence products at issue contain sensitive reporting on Anwar Aulaqi and his associates, which were used to assess the threat that he posed to U.S. persons and interests. The inter-agency correspondence consists of legal analysis, some of which was already processed in connection with

this litigation, such as copies of the OLC opinions on Aulaqi and the DOJ Classified White Paper. These communications also include draft versions of those documents and discussions and comments related to that analysis. Other responsive correspondence relates to a civil action brought by Anwar al-Aulaqi's father. As noted above, the CIA has released documents related to that litigation -- specifically, the unclassified declaration of Director Panetta and portions of the corresponding classified declaration. Both of these declarations were submitted in that civil action in order to support the government's assertion of the state secrets privilege. The CIA also located records that reflect communications with Congress, including discussions related to the DOJ Classified White Paper, which was prepared by DOJ for Congress. Records in this category include drafts of the paper and pre-decisional exchanges reflecting the comments and input of different agencies. Lastly, the CIA identified certain records containing internal discussions among Agency officials regarding the matters discussed above.

7. To the extent possible, the CIA has provided descriptions of these responsive records on the attached public *Vaughn* index. However, many details, such as the dates, individuals involved, and fuller descriptions of the records at issue cannot be disclosed on the public record because they

would reveal information that is currently and properly classified, statutorily protected and/or privileged.

Accordingly, the CIA submits a classified declaration and Vaughn index for the Court's *ex parte*, *in camera* review, which contain additional information about the documents at issue.

IV. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION

8. As explained below, all of the records for which the CIA asserted Exemption (b) (1) are currently and properly classified. I respectfully refer the court to the first Lutz Declaration, filed on 3 October 2014, see ¶¶ 7-18, for a full discussion of the procedural and substantive requirements of Executive Order 13526. I have determined that these documents satisfy the procedural requirements - they contain government information, are classified for a proper purpose, and are properly marked. Likewise, I have determined that these records also meet the substantive requirements of the Executive Order. As outlined below, release of this information could lead to the identification of intelligence sources, methods and activities of the CIA and/or cause damage to foreign relations or foreign activities of the United States, including confidential sources within the meaning of sections 1.4(c) and 1.4(d) of Executive Order 13526. Accordingly, I have determined that disclosure of this information could reasonably be expected to result in damage, including exceptionally grave damage, to national

security and therefore this information is currently and properly classified at the TOP SECRET level.

9. In addition, the CIA asserted Exemption (b)(3) in conjunction with the National Security Act of 1947, as amended, 50 U.S.C. § 3093(e) (the "National Security Act") to withhold these records. This statute, which protects "intelligence sources and methods from unauthorized disclosure," applies because disclosure of the records at issue would tend to reveal intelligence sources and methods. Releasing the sensitive intelligence reporting at issue here would directly reveal the sources and methods of that collection. Disclosure of this information would also impair the CIA's intelligence collection capabilities because sources would be less inclined to share information for fear that the Agency would not be able to effectively control against its unauthorized dissemination. Accordingly, as noted on the attached *Vaughn* index, Exemption (b)(3) and the National Security Act were invoked, along with Exemption (b)(1) to protect all of the classified information at issue in this litigation.

10. The CIA also invoked Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507 (the "CIA Act"), in conjunction with Exemption (b)(3). Section 6 of the CIA Act protects from disclosure information that would reveal the CIA's organization, functions, including

the function of protecting intelligence sources and methods, names, official titles, salaries, or numbers of personnel employed by the CIA. The CIA Act has been widely recognized by courts to be a federal statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In this case, the CIA Act was asserted to protect the names of CIA personnel mentioned throughout the records.

V. DAMAGE TO NATIONAL SECURITY

A. Glomar Response

11. The ACLU requested records pertaining to the "factual basis for the killing" of Samir Khan and Abdulhahman al-Aulaqi (Anwar al-Aulaqi's son). Specifically, the ACLU seeks records that would show whether these individuals were "intentionally targeted," "whether U.S. Government personnel were aware of" their presence when missiles were launched, whether Aulaqi's son was "targeted on the basis of his kinship," whether "the United States took measures to avoid [their] death[s]," and any other factors "relevant to the decision to kill [them] or the failure to avoid causing [their] death[s]." (See Bennett Decl. ¶ 8 & Ex. A.) I note that, in advance of his speech at the National Defense University on 23 May 2013, the President directed the Attorney General to disclose information that until that point remained properly classified. In a letter to the Senate

Judiciary Committee dated 22 May 2013, the Attorney General publicly acknowledged that Samir Khan and Aulaqi's son were among four U.S. citizens killed in the course of U.S. counterterrorism operations. However, the Attorney General further noted that, unlike Anwar al-Aulaqi, "these individuals were not specifically targeted by the United States." The next day, in his speech at the National Defense University, President Obama explained that he had declassified these pieces of information in order "to facilitate transparency and debate on the issue, and to dismiss some of the more outlandish claims," but still emphasized the "necessary secrecy" involved in such operations. Thus, notwithstanding the limited official acknowledgment that Khan and Aulaqi's son were killed in the course of U.S. counterterrorism operations, the specifics of those operations remain classified.

12. Accordingly, the CIA can neither confirm nor deny having responsive records pertaining to these individuals. The existence of such records would tend to reveal that these individuals were contemplated as targets of an operation and/or that the CIA gathered intelligence on these individuals. Conversely, if records did not exist, it would tend to show that the CIA did not have such authorities or did not specifically track information about Samir Khan or Abdulrahman al-Aulaqi. In either case, confirming the existence or nonexistence of the

CIA's authorities in connection with individual counterterrorism operations or the subjects of the Agency's foreign intelligence collection would disclose details about the CIA's intelligence activities, methods, and functions. It would benefit hostile groups, including terrorist organizations such as al-Qa'ida and Al-Qa'ida in the Arabian Peninsula ("AQAP"), to know with certainty the activities for which the CIA has or has not been specifically authorized or to learn the targets of intelligence collection. To reveal such information would provide valuable insight into the CIA's authorities, capabilities, priorities, and interests, which could be used by adversaries to inhibit the effectiveness of the CIA's intelligence operations. In addition, terrorists could use this information to assess the CIA's capabilities vis-à-vis its resource allocation. These individuals could take steps to avoid detection or provide false information to frustrate the Agency's intelligence collection efforts. For these reasons, the CIA cannot confirm or deny the existence of any responsive records regarding these individuals and, accordingly, asserts FOIA exemptions (b)(1) and (b)(3) over this information.

B. Classified Records

13. As with the documents located by OLC in the course of this litigation, the records in the CIA's *Vaughn* index are replete with sensitive classified information reflecting

intelligence activities, sources and methods - which serve as the principal means by which the CIA accomplishes its mission. As discussed in my earlier declaration, the protection of intelligence sources and methods is crucial 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 foreign intelligence services or terrorist organizations. 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 value in that situation is neutralized and the ability to utilize that source or apply that method in other situations is significantly impaired.

14. Because revealing additional details about the records at issue would disclose classified equities involved, I am limited in my ability to describe the specific intelligence activities, sources and methods involved or the harm that would be occasioned by their disclosure on the public record. However, 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 Aulaqi and other terrorists, 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 myriad 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 records at issue reasonably could be expected to cause serious -- and in some cases, exceptionally grave -- damage to the national security.

15. Although the U.S. Government has officially acknowledged some information about Anwar al-Aulaqi -- namely, that he was considered an imminent threat to national security and was targeted in a U.S. Government operation in which CIA played an unidentified role -- the redacted information goes

beyond what has been publicly disclosed. These records reveal the methods by which intelligence about Aulagi was collected and would reveal undisclosed details about his terrorist activities -- all of which remain classified. Releasing this information would indicate human sources and/or the technical collection used to obtain intelligence. Among other things, this information could be used by Aulagi's associates in AQAP and other terrorist organizations to defeat the U.S. Government's counterterrorism efforts abroad. There has been no official acknowledgement of this information, which is far more specific than the general statements made by government officials about Aulagi and the threat he posed. I refer the Court to the classified declarations for a more detailed description of the information at issue and the explanations as to why it is properly withheld.

16. 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. Additionally, the names of CIA officials were protected. This information falls within the ambit of the CIA Act. Although no harm rationale is required, as noted

above, the release of this information could significantly damage the ability of the 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 and CIA Act.

VI. PRIVILEGED MATERIAL

17. Additionally, for particular documents, the CIA asserted Exemption (b) (5) to protect certain information covered by the attorney-client, deliberative process and the attorney-work product privileges. I note that all of the privileged information discussed below is also withheld on the grounds that it is currently and properly classified in accordance with Exemption (b) (1) and protected by statute pursuant to Exemption (b) (3).

18. The deliberative process privilege was invoked to protect certain documents that are pre-decisional and deliberative in nature, including drafts. All of the material for which the deliberative process privilege was asserted reveals an interim stage in intra- and inter-agency discussions, which preceded a final decision of the CIA or other agency or component of the Executive Branch. Disclosure of this

information would inhibit the frank communications and the free exchange of ideas that the privilege is designed to protect.

19. Additionally, the CIA has asserted the attorney-client privilege to protect certain communications between the CIA and DOJ in connection with a request for the provision of legal advice as well as information provided by Agency personnel in furtherance of that advice. In all instances for which the attorney-client privilege was asserted, the confidentiality of these communications was maintained. If this type of confidential information were to be disclosed, it would inhibit open communication between client-agencies and their lawyers, thereby depriving the Agency of the full and candid counsel of its attorneys.

20. The CIA also asserted the attorney work-product privilege to protect documents that were prepared by, or at the direction of, CIA and DOJ attorneys in reasonable anticipation of litigation. As applied in this case, the privilege was asserted to withhold communications concerning the civil case brought by the father of Anwar al-Aulaqi, which was pending in a U.S. District Court. If this information were to be released, it would expose the attorneys' preparation to scrutiny and provide parties filing claims against the Agency an unfair advantage in litigation.

21. Additionally, for the reasons discussed in my classified declaration, certain documents are covered by the presidential communications privilege. These documents reflect communications between Executive Branch agencies and presidential advisors for the purpose of presidential decision-making.

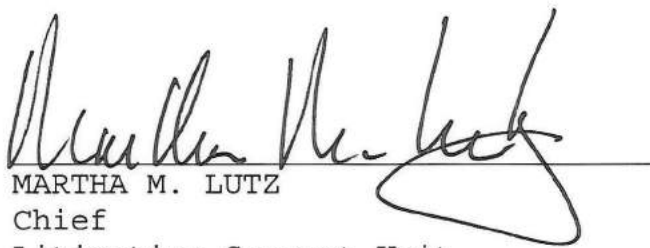
VII. SEGREGABILITY

22. In evaluating responsive documents, the CIA conducted a page-by-page and line-by-line review and determined that there is no reasonably segregable, non-exempt portions of documents that can be released without potentially compromising classified information, intelligence sources and methods, and/or material protected by privilege. Accordingly, each withheld record is wholly exempt pursuant to Exemptions (b) (1), (b) (3), and/or (b) (5). I respectfully refer the Court to the *in camera*, *ex parte* submissions in this case which provide detailed explanations of classified, statutorily-protected, and privileged 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 14th day of November 2014.


MARTHA M. LUTZ
Chief
Litigation Support Unit
Central Intelligence Agency

Doc. No.	Title / Description of Document	Exemptions
1	Classified draft letter.	(b)(1), (b)(3), (b)(5)
2	Classified report prepared by the CounterTerrorism Center.	(b)(1), (b)(3), (b)(5)
3	Two classified CIA finished intelligence products.	(b)(1), (b)(3), (b)(5)
4	Classified fax.	(b)(1), (b)(3), (b)(5)
5	Classified memorandum.	(b)(1), (b)(3), (b)(5)
6	Classified fax.	(b)(1), (b)(3), (b)(5)
7	Draft of Document No. 5.	(b)(1), (b)(3), (b)(5)
8	Classified letter.	(b)(1), (b)(3)
9	Classified letter.	(b)(1), (b)(3), (b)(5)
10	Classified fax from OLC to various recipients forwarding a draft excerpt of the "OLC-DOD Memorandum."	(b)(1), (b)(3), (b)(5)
11	Classified fax.	(b)(1), (b)(3), (b)(5)
12	Classified memorandum.	(b)(1), (b)(3), (b)(5)
13	Classified fax forwarding classified correspondence.	(b)(1), (b)(3), (b)(5)
14	Classified memorandum from CIA General Counsel to various recipients in connection with a litigation matter, specifically, al-Aulaqi v. Obama.	(b)(1), (b)(3), (b)(5)
15	Classified memorandum.	(b)(1), (b)(3), (b)(5)

16	Classified letter from Director of CIA and Director of National Intelligence to Secretary of Defense regarding al-Aulaqi v. Obama.	(b)(1), (b)(3), (b)(5)
17	Draft of Document No. 16.	(b)(1), (b)(3), (b)(5)
18	Classified letter from CIA General Counsel to DOJ Assistant Attorney General in connection with al-Aulaqi v. Obama litigation.	(b)(1), (b)(3), (b)(5)
19	Draft of Document No. 18.	(b)(1), (b)(3), (b)(5)
20	Classified fax containing classified excerpts of draft response marked as a "draft" and containing in-line comments.	(b)(1), (b)(3), (b)(5)
21	Unclassified Declaration and Formal Claim of State Secrets Privilege and Statutory Privileges by Leon E. Panetta, Director, Central Intelligence Agency.	Released in full.
22	Classified In Camera, Ex Parte Declaration and Formal Claim of State Secrets Privilege and Statutory Privileges by Leon E. Panetta, Director, Central Intelligence Agency.	Released in part. (b)(1), (b)(3)
23	Classified fax from CIA General Counsel to attorneys at DOJ and a classified note conveying CIA's views regarding the draft DOJ brief in the Aulaqi litigation.	(b)(1), (b)(3), (b)(5)
24	Classified email exchange between CIA General Counsel and ODNI General Counsel.	(b)(1), (b)(3), (b)(5)
25	Classified email exchange between attorneys from various agencies.	(b)(1), (b)(3), (b)(5)
26	Classified email exchange between attorneys from various agencies.	(b)(1), (b)(3), (b)(5)
27	Classified email exchange between attorneys from various agencies.	(b)(1), (b)(3), (b)(5)
28	Classified email exchange between attorneys from various agencies.	(b)(1), (b)(3), (b)(5)
29	Letter from Principal Deputy Assistant Attorney General to unlisted recipients requesting input regarding release of DOJ White Paper to the Senate Select Committee on Intelligence.	(b)(5)

30	Draft classified note from CIA General Counsel providing comments on draft Classified DOJ White Paper.	(b)(1), (b)(3), (b)(5)
31	Draft classified note sent from CIA General Counsel to CIA attorneys for comment.	(b)(1), (b)(3), (b)(5)
32	Classified note from CIA General Counsel to other agencies providing comments on draft Classified DOJ White Paper.	(b)(1), (b)(3), (b)(5)
33	Classified memorandum.	(b)(1), (b)(3), (b)(5)
34	Classified memorandum.	(b)(1), (b)(3), (b)(5)
35	Classified memorandum and classified attachments.	(b)(1), (b)(3), (b)(5)
36	Classified memorandum.	(b)(1), (b)(3), (b)(5)
37	Classified fax containing classified chart.	(b)(1), (b)(3), (b)(5)
38	Classified fax containing classified talking points.	(b)(1), (b)(3), (b)(5)
39	Classified fax containing classified chart with handwritten notations.	(b)(1), (b)(3), (b)(5)
40	Internal classified email.	(b)(1), (b)(3)
41	Classified email discussing legal advice.	(b)(1), (b)(3), (b)(5)
42	Classified email exchange.	(b)(1), (b)(3), (b)(5)
43	Classified email exchange.	(b)(1), (b)(3), (b)(5)
44	Classified email exchange.	(b)(1), (b)(3), (b)(5)
45	Classified communication.	(b)(1), (b)(3),

		(b)(5)
46	Email exchange between CIA and DOJ regarding the OLC analysis.	(b)(5)
47	Classified email.	(b)(1), (b)(3), (b)(5)
48	Classified email.	(b)(1), (b)(3), (b)(5)
49	Classified email.	(b)(1), (b)(3), (b)(5)
50	Classified email.	(b)(1), (b)(3), (b)(5)
51	Classified email.	(b)(1), (b)(3), (b)(5)
52	Classified email.	(b)(1), (b)(3), (b)(5)
53	Classified email.	(b)(1), (b)(3), (b)(5)
54	Classified email.	(b)(1), (b)(3), (b)(5)
55	Classified email.	(b)(1), (b)(3), (b)(5)
56	Email attaching revised draft DOJ white paper and related discussion.	(b)(5)
57	Classified email.	(b)(1), (b)(3), (b)(5)
58	Classified email.	(b)(1), (b)(3), (b)(5)
59	Classified memorandum forwarding various classified attachments.	(b)(1), (b)(3), (b)(5)
60	Classified fax with draft document.	(b)(1), (b)(3), (b)(5)
61	Classified memorandum and classified attachment.	(b)(1), (b)(3),

		(b)(5)
62	Classified memorandum and classified attachments.	(b)(1), (b)(3), (b)(5)
63	Classified fax forwarding a classified letter.	(b)(1), (b)(3), (b)(5)
64	Classified fax.	(b)(1), (b)(3), (b)(5)
65	Classified fax.	(b)(1), (b)(3), (b)(5)
66	Classified email.	(b)(1), (b)(3), (b)(5)
67	Classified letter.	(b)(1), (b)(3)
68	Classified internal email containing outline for discussion for classified phone call.	(b)(1), (b)(3), (b)(5)
69	Classified email forwarding draft classified document.	(b)(1), (b)(3), (b)(5)
70	Classified draft correspondence.	(b)(1), (b)(3), (b)(5)
71	Classified letter.	(b)(1), (b)(3)
72	Classified draft of document no. 83.	(b)(1), (b)(3), (b)(5)
73	Classified draft of document nos. 84 and 85.	(b)(1), (b)(3), (b)(5)
74	Classified draft of document nos. 86 and 87.	(b)(1), (b)(3), (b)(5)
75	Draft classified letter.	(b)(1), (b)(3), (b)(5)
76	Classified draft of document nos. 81 and 82.	(b)(1), (b)(3), (b)(5)
77	Classified draft of document no. 88.	(b)(1), (b)(3),

		(b)(5)
78	Draft classified background paper with handwritten notations.	(b)(1), (b)(3), (b)(5)
79	Classified email forwarding draft classified letter.	(b)(1), (b)(3), (b)(5)
80	Classified letter.	(b)(1), (b)(3)
81	Classified letter.	(b)(1), (b)(3)
82	Classified letter.	(b)(1), (b)(3)
83	Classified letter.	(b)(1), (b)(3)
84	Classified letter.	(b)(1), (b)(3)
85	Classified letter.	(b)(1), (b)(3)
86	Classified letter.	(b)(1), (b)(3)
87	Classified letter.	(b)(1), (b)(3)
88	Classified letter.	(b)(1), (b)(3)
89	Classified letter.	(b)(1), (b)(3)
90	Classified internal CIA email.	(b)(1), (b)(3), (b)(5)
91	Classified letter.	(b)(1), (b)(3)
92	Classified letter.	(b)(1), (b)(3)
93	Classified email.	(b)(1), (b)(3)
94	Classified draft outline.	(b)(1), (b)(3)
95	Classified document.	(b)(1), (b)(3)
96	Classified document	(b)(1), (b)(3), (b)(5)
97	Draft classified briefing.	(b)(1), (b)(3)
98	Classified talking points.	(b)(1), (b)(3), (b)(5)
99	Classified email summarizing phone call.	(b)(1), (b)(3)
100	Classified email.	(b)(1), (b)(3)

101	Classified email forwarding proposed background material.	(b)(1), (b)(3), (b)(5)
102	Classified email containing draft piece.	(b)(1), (b)(3), (b)(5)
103	Classified internal memorandum.	(b)(1), (b)(3)
104	Draft classified document.	(b)(1), (b)(3), (b)(5)
105	Classified document containing handwritten notations.	(b)(1), (b)(3)
106	Classified memorandum with attachment (doc. no. 105).	(b)(1), (b)(3)
107	Classified memorandum with attachment (doc. no. 105).	(b)(1), (b)(3)
108	Classified email.	(b)(1), (b)(3), (b)(5)
109	Classified internal outline.	(b)(1), (b)(3), (b)(5)
110	Classified draft memorandum.	(b)(1), (b)(3), (b)(5)
111	Classified background paper.	(b)(1), (b)(3), (b)(5)
112	Classified document.	(b)(1), (b)(3), (b)(5)
113	Rough classified outline.	(b)(1), (b)(3), (b)(5)
114	Classified email.	(b)(1), (b)(3), (b)(5)
115	Classified email.	(b)(1), (b)(3), (b)(5)
116	Classified email and attachment.	(b)(1), (b)(3), (b)(5)
117	Classified draft document.	(b)(1), (b)(3), (b)(5)

118	Classified memorandum.	(b)(1), (b)(3), (b)(5)
119	Classified memorandum.	(b)(1), (b)(3)
120	Classified document.	(b)(1), (b)(3)
121	Classified email forwarding draft classified memorandum.	(b)(1), (b)(3), (b)(5)
122	Classified email.	(b)(1), (b)(3), (b)(5)
123	Classified draft outline.	(b)(1), (b)(3), (b)(5)
124	Classified memorandum.	(b)(1), (b)(3)
125	Classified slides.	(b)(1), (b)(3)
126	Classified email.	(b)(1), (b)(3), (b)(5)
127	Classified email.	(b)(1), (b)(3), (b)(5)
128	Classified email.	(b)(1), (b)(3), (b)(5)
129	Classified email exchanges between CIA attorneys providing comments on OLC's draft white paper.	(b)(1), (b)(3), (b)(5)
130	Classified email exchanges between CIA attorney and CIA General Counsel providing comments on OLC's draft white paper.	(b)(1), (b)(3), (b)(5)
131	Classified email.	(b)(1), (b)(3), (b)(5)
132	Classified email.	(b)(1), (b)(3), (b)(5)
133	Classified email exchange between CIA General Counsel and other OGC attorneys.	(b)(1), (b)(3), (b)(5)
134	Classified email exchange involving CIA General Counsel and other OGC attorneys.	(b)(1), (b)(3),

		(b)(5)
135	Classified email containing comments by OGC attorney on OLC's draft white paper.	(b)(1), (b)(3), (b)(5)
136	Classified email from CIA General Counsel providing comments on DOJ'S draft unclassified white paper.	(b)(1), (b)(3), (b)(5)
137	Classified email from CIA attorney to CIA General Counsel providing comments on DOJ's latest draft white paper.	(b)(1), (b)(3), (b)(5)
138	Classified draft email.	(b)(1), (b)(3), (b)(5)
139	Classified email.	(b)(1), (b)(3), (b)(5)
140	Classified memorandum.	(b)(1), (b)(3)
141	Classified email.	(b)(1), (b)(3), (b)(5)
142	Classified memorandum.	(b)(1), (b)(3), (b)(5)
143	Classified email.	(b)(1), (b)(3), (b)(5)
144	Classified email.	(b)(1), (b)(3), (b)(5)

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 killing," 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

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 located in the DoD search for records. That search was described in earlier declarations in this litigation by Lieutenant General Robert R. Neller, USMC, dated June 20, 2012, and Mark Herrington, dated August 8, 2012. That search located 80 responsive documents. All of the responsive documents are classified and exempt from disclosure pursuant to 5 U.S.C. § 552(b)(1). Certain of the responsive documents are also protected by the deliberative process privilege, the attorney/client privilege and/or the presidential communications privilege, and thus exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5).

APPLICABLE EXEMPTIONS

5. 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.

6. 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.”

7. 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.

8. 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.

9. FOIA Exemption 5, 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 deliberative process, attorney-client and presidential communications privileges.

DOCUMENTS WITHHELD BY DOD

Copies of the Disclosed OLC Memoranda

10. Documents 5 and 7 are copies of the two OLC memoranda that have been partially released in this litigation. See OLC Index nos. 5, 4. These documents have already been litigated and the propriety of the redactions in the released versions has been upheld by the Second Circuit and this Court. Documents 8, 14, and 19-21 are additional copies of those memoranda, which also contain highlights or written notes by DoD attorneys. Those notes are exempt from disclosure under Exemption 5 as deliberative process privileged. These notes were made in preparation for briefing senior DoD leadership regarding legal analysis to inform possible military operations, and disclosure would have a chilling effect on operational planning discussions and impede military decision-making. Document 1 is a classified cover memo from the DoD General Counsel to the Secretary of Defense with the two OLC memoranda attached. The cover memo is an attorney/client privileged communication and is properly withheld under Exemption 5. This communication was from an attorney to his client intended to be privileged and has not previously been disclosed. The cover memo also contains classified information regarding intelligence and possible military operations and has also been withheld pursuant to Exemption 1. Document 15 is a draft version of the cover memo; in addition to the bases for withholding document 1, this draft document is predecisional and deliberative and its disclosure would have a chilling effect on operational planning discussions and impede military decision-making.

Discussions Regarding the Disclosed OLC Memoranda

11. Documents 2-4, 18, and 22 are email communications and notes within DoD and between DoD and other Government agencies regarding the two disclosed OLC memoranda.

These communications concern draft legal analysis and factual questions posed during the preparation of those memoranda. These communications are both attorney/client and deliberative process privileged. Even though portions of the final legal advice in these memoranda have been deemed waived by the Second Circuit and released, the communications and deliberations undertaken to reach those opinions remain privileged. These communications were intended to be privileged and have not previously been disclosed. Further, they are predecisional and deliberative and their disclosure would have a chilling effect on operational planning discussions and impede military decision-making. These documents also contain currently and properly classified material regarding intelligence sources and methods and military plans, weapons, or systems, which material is also withheld under Exemption 1.

Drafts, Communications, and Notes Regarding the Classified DOJ White Paper

12. Documents 10 and 17 are draft versions of the classified DOJ white paper that has previously been redacted and released in this matter. See OLC Index no. 9. Documents 11-13 are communications and notes regarding the drafts of the classified DOJ white paper. These documents contain currently and properly classified information and are withheld pursuant to Exemption 1. Additionally, they are predecisional and deliberative in nature and contain attorney/client communications and are also withheld under Exemption 5. These communications were intended to be privileged and have not previously been disclosed. Further, they are predecisional and deliberative, and their disclosure would have a chilling effect on intra and interagency deliberations.

Documents Explained in Other Declarations

13. Document 9 is a copy of Document 1 on the OLC index and document 16 is a copy of document 14 on the CIA index. The propriety of the withholding of these documents is

already fully addressed in other submissions before this Court, and other declarants have fully addressed the applicable exemptions.

Documents Containing Factual Information Regarding Anwar al-Aulaqi

14. The documents withheld by DOD also include factual information regarding Aulaqi. This information is similar to the intelligence information and operational details in the OLC-DOD Memorandum that the Second Circuit held remain properly classified and exempt from disclosure, and that this Court determined could be properly withheld from the February 2010 Aulaqi memorandum. Compromising such 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.

15. Additionally, to the extent these factual documents were provided to attorneys in connection with a request for legal advice, they are further exempt as confidential attorney/client communications and are properly withheld under Exemption 5.

Other Documents Withheld by DoD

16. I cannot discuss, in an unclassified forum, the bases for withholding the remaining responsive DoD documents. Those documents are described in my second classified, *ex parte* declaration, and in the classified index of responsive records that is annexed to my classified declaration. The classified index includes details, such as dates and specific descriptions of documents, which remain classified.

17. Annexed hereto is an unclassified index that omits these classified details. Beyond the listings in the annexed unclassified index and the descriptions of the documents contained in this unclassified declaration, DoD cannot further describe the types or dates of

responsive records because to do so would reveal the classified information described above, and in my classified, *ex parte* declaration.

Partial Glomar

18. Plaintiffs' request includes records pertaining to the "factual basis for the killing" of Samir Khan and Ahdulrahman al-Aulaqi. In a letter to the Senate Judiciary Committee dated May 22, 2013, the Attorney General disclosed that Samir Khan and Abdulrahman al-Aulaqi were killed in the course of U.S. counterterrorism operations, but stated that "these individuals were not specifically targeted by the United States." In a later speech at the National Defense University, President Obama emphasized the "necessary secrecy" of these operations. Notwithstanding the limited official acknowledgment that these two individuals were killed in the course of U.S. counterterrorism operations, the specifics of those operations remain classified.

19. Accordingly, DoD can neither confirm nor deny having responsive records pertaining to these individuals without revealing classified information, and asserts Exemption 1 as to whether or not it has records responsive to those portions of Plaintiffs' request. The existence or nonexistence of such records could indicate whether DoD had an intelligence interest in the two individuals and/or whether DoD had an operational role in specific counterterrorism operations, and if so, could demonstrate the nature, depth, and breadth of those interests or activities. Additionally, confirming or denying the existence of responsive records could reveal whether CIA did or did not have authority to participate in particular counterterrorism operations or gather intelligence on particular individuals. Revealing the sensitive specifics of U.S. counterterrorism activities, including whether DOD had information regarding specific individuals or an operational role in specific operations, could provide

valuable insight to terrorist organizations and allow them alter their activities in order to frustrate U.S. efforts to combat terrorism.

20. All of the documents and information withheld by DoD are currently and properly classified. The information is owned by and under the control of the U.S. government. I have determined that the information has not been classified in order to conceal violations of law, inefficiency, administrative error; prevent embarrassment to a person, organization, or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

21. I am familiar with the Second Circuit's opinion in this litigation, and the waiver that was found by that Court does not apply to these documents, beyond those portions of the two OLC memoranda previously released. There is no additional reasonably segregable non-exempt information among the documents withheld by DoD.

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

Executed this 14 day of November 2014 in Arlington, VA.



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

UNCLASSIFIED DOD INDEX

Doc #	Description	Exemptions
1	Classified info memo describing both released OLC opinions with opinions attached	(b)(1) , (3) & (5)
2	Classified e-mail with questions relevant to drafting OLC memorandum	(b)(1) & (5)
3	Classified response to questions from document #2	(b)(1) & (5)
4	Classified further response to questions in document #2	(b)(1) & (5)
5	Classified OLC memorandum	(b)(1) , (3) & (5)
6	Classified DoD memorandum	(b)(1) & (5)
7	Classified OLC memorandum	(b)(1) , (3) & (5)
8	Classified duplicate of document #5 with highlights	(b)(1) , (3) & (5)
9	Classified duplicate of OLC index #1	
10	Draft classified DOJ white paper	(b)(1) , (3) & (5)
11	Comments on classified draft DOJ white paper	(b)(1) & (5)
12	Comments on classified draft DOJ white paper	(b)(1) & (5)
13	Comments on classified draft DOJ white paper	(b)(1) & (5)
14	Duplicate of document #7 with margin notes	(b)(1) , (3) & (5)
15	Draft of document #1	(b)(1) & (5)
16	Classified duplicate of CIA index #14	
17	Copy of classified draft DOJ white paper with margin notes	(b)(1) , (3) & (5)
18	Classified draft response to questions from document #2	(b)(1) & (5)
19	Duplicate of document #5 with tabs	(b)(1) , (3) & (5)
20	Duplicate of document #7 with margin notes	(b)(1) , (3) & (5)
21	Duplicate of document #5 with margin notes	(b)(1) , (3) & (5)
22	Classified attorney notes	(b)(1) , (3) & (5)
23	Classified e-mail	(b)(1) & (5)
24	Classified e-mail w/3 attachments (docs 25-27)	(b)(1) & (5)
25	Classified slide presentation	(b)(1) & (5)
26	Classified slide presentation	(b)(1) & (5)
27	Classified slide presentation	(b)(1) & (5)
28	Classified e-mail	(b)(1) & (5)
29	Classified e-mail chain	(b)(1) & (5)
30	Classified e-mail, with two attachments (Docs 31-32)	(b)(1) & (5)

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31	Classified word document	(b)(1) & (5)
32	Classified slide presentation	(b)(1) & (5)
33	Classified e-mail	(b)(1) & (5)
34	Classified e-mail with attachment (doc 35)	(b)(1) & (5)
35	Classified slide presentation	(b)(1) & (5)
36	Classified e-mail	(b)(1) & (5)
37	Classified e-mail	(b)(1) & (5)
38	Classified draft document	(b)(1) & (5)
39	Classified draft document	(b)(1) & (5)
40	Classified slide presentation	(b)(1) & (5)
41	Classified slide presentation	(b)(1) & (5)
42	Classified e-mail	(b)(1) & (5)
43	Classified e-mail	(b)(1) & (5)
44	Classified e-mail	(b)(1) & (5)
45	Classified e-mail	(b)(1) & (5)
46	Classified word document	(b)(1) & (5)
47	Classified e-mail	(b)(1) & (5)
48	Classified e-mail	(b)(1) & (5)
49	Classified memo	(b)(1) & (5)
50	Classified e-mail	(b)(1)
51	Classified e-mail	(b)(1) & (5)
52	Classified e-mail	(b)(1) & (5)
53	Classified slide presentation	(b)(1) & (5)
54	Classified e-mail, with doc 55 attached	(b)(1) & (5)
55	Classified memo	(b)(1) & (5)
56	Classified e-mail	(b)(1)
57	Classified e-mail	(b)(1) & (5)
58	Classified e-mail	(b)(1) & (5)
59	Classified e-mail	(b)(1) & (5)
60	Classified e-mail	(b)(1) & (5)
61	Classified e-mail	(b)(1) & (5)
62	Classified e-mail	(b)(1) & (5)
63	Classified e-mail	(b)(1) & (5)

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64	Classified e-mail	(b)(1) & (5)
65	Classified e-mail	(b)(1) & (5)
66	Classified e-mail	(b)(1) & (5)
67	Classified e-mail	(b)(1) & (5)
68	Classified e-mail	(b)(1) & (5)
69	Classified e-mail	(b)(1) & (5)
70	Classified e-mail	(b)(1) & (5)
71	Classified e-mail	(b)(1) & (5)
72	Classified e-mail	(b)(1) & (5)
73	Classified e-mail	(b)(1) & (5)
74	Classified e-mail	(b)(1) & (5)
75	Classified e-mail	(b)(1) & (5)
76	Classified e-mail	(b)(1) & (5)
77	Classified e-mail	(b)(1) & (5)
78	Classified e-mail	(b)(1) & (5)
79	Classified e-mail	(b)(1) & (5)
80	Classified e-mail	(b)(1) & (5)

JA591

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

.....X
THE NEW YORK TIMES COMPANY, et al.,

Plaintiffs,

v.

11 Civ. 9336 (CM)

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

.....X
AMERICAN CIVIL LIBERTIES UNION et al.,

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

.....X

THIRD DECLARATION OF JOHN E. BIES

I, John E. Bies, declare as follows:

1. As explained in my prior declarations in this case, I am a Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”). My responsibilities include the supervision of OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Motion for Summary Judgment with respect to documents identified as responsive by the Central Intelligence Agency (“CIA”) and the Department of Defense (“DoD”) to FOIA requests received by those agencies from the

American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the “ACLU”). 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. I have also provided an additional classified declaration *ex parte* and under seal with additional information for the Court in connection with today’s filing.

The Documents at Issue

2. As explained more fully in the Second Declaration of Martha M. Lutz of the CIA, filed November 14, 2014, the CIA searched for documents responsive to the ACLU FOIA request and identified responsive records. Likewise, as explained more fully in the Second Declaration of Sinclair M. Harris of DoD, filed November 14, 2014, DoD searched for documents responsive to the ACLU FOIA request and identified responsive records. CIA and DoD identified for OLC responsive records located by the CIA and DoD respectively that implicate OLC equities. I am personally familiar with the responsive records identified by the CIA and DoD as implicating OLC equities, and which are at issue in this case. (I will refer to this subset of the CIA and DoD’s responsive documents collectively as “the withheld records.”)

3. The withheld records include documents falling in the following categories:
- a. Documents containing or reflecting confidential, predecisional legal advice provided by OLC or the Department of Justice to Executive Branch policymakers;
 - b. Draft legal analysis, including draft white papers and draft OLC attorney work product generated during the preparation of OLC advice, such as sections of draft OLC memoranda circulated for review and comments;

- c. Requests from Executive Branch officials for legal advice, and including confidential and classified factual information potentially relevant to the requests;
- d. Interagency Executive Branch communications reflecting legal deliberations regarding the appropriate legal analysis of potential actions or legal determinations, including communications seeking and providing factual information determined to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations; and
- e. Intelligence products containing classified factual information regarding terrorist organizations and individuals involved with such organizations provided to OLC in connection with a request for legal advice.

4. The withheld records would be protected from disclosure in civil 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 and attorney-client privileges. The withheld records may also be protected under FOIA Exemptions One and Three, 5 U.S.C. § 552(b)(1), (3), as addressed in the declarations filed today on behalf of the CIA and DoD, and for additional reasons under Exemption Five as identified in those declarations. I am also filing a classified, *ex parte* declaration today providing additional information regarding the withheld records that involve OLC equities.

Applicable Privileges

5. The withheld records 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, or in interagency deliberations regarding the appropriate legal analysis. Accordingly, such records are covered by the deliberative process and/or attorney-client privileges, and therefore are exempt under FOIA Exemption Five, unless those privileges have been waived.

6. The deliberative process privilege protects documents that are (a) predecisional, in that they were generated prior to decisions or potential decisions, such as decisions regarding contemplated counterterrorism operations or decisions regarding the drafting of contemplated opinions or legal analyses; 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.

7. As discussed below, the withheld records are protected by the deliberative process privilege in whole or in part. They are predecisional, 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 communications 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 the 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 withheld documents

from compelled disclosure is central 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.

8. The attorney-client privilege protects documents that contain or reflect confidential legal advice provided by an attorney to a 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.

9. As discussed below, certain of the withheld records are protected by the attorney-client privilege in whole or in part. Many of the documents contain or reflect legal advice or drafts of legal advice that was ultimately communicated in confidence from OLC to Executive Branch clients, or disclose confidential client requests for legal advice. In addition, many of the documents also contain factual information that was communicated in confidence by Executive Branch clients to OLC for the purpose of obtaining confidential legal advice, and the existence of confidential legal advice documents reflects the privileged fact that a client requested confidential legal advice on a particular subject. Having been asked to provide legal advice, OLC attorneys stood in a relationship of trust with their Executive Branch clients. Just as disclosure of client confidences provided in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice for their clients, so too would disclosure of the legal advice itself undermine that trust.

10. For the reasons discussed in paragraphs 23 to 31 of my Second Declaration, filed October 3, 2014, the privileges applicable to the withheld records have not been lost.

The Categories of Withheld Records

11. As discussed above in paragraph 3(a), the withheld records include documents containing or reflecting confidential, predecisional legal advice provided by OLC or the Department of Justice to Executive Branch policymakers. For the reasons discussed regarding such documents in paragraphs 32 to 44 of my Second Declaration, filed October 3, 2014, these documents are protected by the deliberative process and attorney-client privileges.

12. As discussed above in paragraph 3(b), the withheld records include draft legal analysis, including draft white papers and draft OLC attorney work product generated during the preparation of OLC advice, such as sections of draft OLC memoranda circulated for review and comments. Given that these documents reflect internal Executive Branch deliberations, attorney-client confidences, or facts conveyed in the course of seeking legal advice, for the reasons discussed regarding such documents in paragraphs 32 to 38 of my Second Declaration, these documents are protected by the deliberative process and attorney-client privileges. Furthermore, for the reasons discussed regarding such documents in paragraphs 49 to 52 of my Second Declaration, the fact that these documents contain draft legal analysis provides an additional basis for their protection under the deliberative process privilege.

13. As discussed above in paragraph 3(c), the withheld records include requests from Executive Branch officials for legal advice, and including confidential and classified factual information potentially relevant to the requests. For the reasons discussed regarding such documents in paragraphs 39 to 44 of my Second Declaration, these documents are protected by the deliberative process and attorney-client privileges.

14. As discussed above in paragraph 3(d), the withheld records include interagency Executive Branch communications reflecting legal deliberations regarding the appropriate legal

analysis of potential actions or legal determinations, including communications seeking and providing factual information determined to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations. Given that these documents contain interagency legal deliberations, for the reasons discussed regarding such documents in paragraphs 45 to 48 of my Second Declaration, these documents are protected by the deliberative process and attorney-client privileges. To the extent that these documents reflect confidential factual information conveyed for the purposes of obtaining legal advice, for the reasons discussed regarding such documents in paragraphs 39 to 44 and 53 to 55 of my Second Declaration, this provides an additional basis for concluding that they are protected by the deliberative process and attorney-client privileges. Furthermore, for the reasons discussed regarding such documents in paragraphs 49 to 52 of my Second Declaration, the fact that these documents contain draft legal analysis provides an additional basis for their protection under the deliberative process privilege.

15. As discussed above in paragraph 3(e), the withheld records include intelligence products containing classified factual information regarding terrorist organizations and individuals involved with such organizations provided to OLC in connection with a request for legal advice. For the reasons discussed regarding such documents in paragraphs 39 to 44 and 53 to 55 of my Second Declaration, any portions of these records revealing the fact that these particular records were provided to OLC in connection with a request for legal advice—including facsimile lines, cover pages, routing slips, or other indications regarding distribution to OLC—are protected by the deliberative process and attorney-client privileges. Accordingly,

those portions of these records are exempt from release. I understand that the CIA and DoD have concluded that these records are also exempt in full under Exemptions One, Three, and/or Five for additional reasons.

16. With the exception of the unredacted portions of the February 19, 2010 and the July 16, 2010 memoranda regarding Aulaqi, which have been released in redacted form, the legal advice or deliberations reflected in the withheld records has not been made public, and to the extent that such documents have been shared with others in the Government, the individuals who received them would have been aware of the need for confidentiality. In addition, the withheld records are classified (or were classified at the time of their circulation) and 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.

* * * * *

17. I have reviewed the withheld records individually and determined that no reasonably segregable, non-exempt information can be provided. I have noted above and in my classified declaration where the exemption under Exemption Five relating to OLC's equities only supports withholding a portion of the documents. I understand that the CIA and DoD have concluded that these records are also exempt in full under Exemptions One, Three, and/or Five for additional reasons.

18. In conclusion, as explained above and for reasons elaborated in my in my classified *ex parte* declaration filed today, I respectfully submit that the withheld records (or identified portions of the withheld records) are covered by the deliberative process privilege

and/or the attorney-client privilege, and accordingly fall squarely within Exemption Five. The compelled disclosure of these records (or portions of records) would harm the deliberative processes of the government and would disrupt the attorney-client relationship between OLC and its clients throughout the Executive Branch.

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

Executed: November 14, 2014



JOHN E. BIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....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 LODGING OF CLASSIFIED DOCUMENTS

In accordance with the Court’s Orders dated September 5 and September 22, 2014,
defendants in the above-captioned matter hereby provide notice that they have lodged 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 have been 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
November 14, 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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AMY POWELL
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By: /s/ Sarah S. Normand
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Sarah.Normand@usdoj.gov

**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 MOTION FOR
PARTIAL SUMMARY JUDGMENT AND
IN OPPOSITION TO THE MOTION FOR
SUMMARY JUDGMENT SUBMITTED
BY THE CIA AND DOD**

PLEASE TAKE NOTICE THAT, upon the accompanying memorandum of law, the Declaration of Michael Weinbeck, 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 that the Court:

1. Deny the government’s motion for summary judgment;
2. Review certain records *in camera* to determine whether redacted portions contain information which the government may not withhold under the Freedom of Information Act; and

3. Direct the government to file *laughn* indices and declarations enumerating and describing documents relating to the strikes that killed Samir Khan and Abdulrahman al-Aulaqi.

Dated: December 3, 2014

DORSEY & WHITNEY LLP

By: s/Michael Weinbeck
Eric A.O. Ruzicka (*pro hac vice*)
Colin Wicker (*pro hac vice*)
Michael Weinbeck (*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**

-----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

DECLARATION OF MICHAEL WEINBECK

I, Michael Weinbeck, 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 *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operation Outside the United States and Areas of Active Hostilities*, dated May 23, 2013, as retrieved from the White House website on December 3, 2014, <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

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 3rd day of December 2014 in Minneapolis, Minnesota.

s/ Michael Weinbeck
Michael Weinbeck

Exhibit 1

To the Declaration of Michael Weinbeck

JA607

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The White House

Office of the Press Secretary

For Immediate Release

May 23, 2013

Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities

Since his first day in office, President Obama has been clear that the United States will use all available tools of national power to protect the American people from the terrorist threat posed by al-Qa'ida and its associated forces. The President has also made clear that, in carrying on this fight, we will uphold our laws and values and will share as much information as possible with the American people and the Congress, consistent with our national security needs and the proper functioning of the Executive Branch. To these ends, the President has approved, and senior members of the Executive Branch have briefed to the Congress, written policy standards and procedures that formalize and strengthen the Administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities. Additionally, the President has decided to share, in this document, certain key elements of these standards and procedures with the American people so that they can make informed judgments and hold the Executive Branch accountable.

This document provides information regarding counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time. As Administration officials have stated publicly on numerous occasions, we are continually working to refine, clarify, and strengthen our standards and processes for using force to keep the nation safe from the terrorist threat. One constant is our commitment to conducting counterterrorism operations lawfully. In addition, we consider the separate question of whether force should be used as a matter of policy. The most important policy consideration, particularly when the United States contemplates using lethal force, is whether our actions protect American lives.

Preference for Capture

The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.

Standards for the Use of Lethal Force

Any decision to use force abroad – even when our adversaries are terrorists dedicated to killing American citizens – is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:

First, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

Second, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

Third, the following criteria must be met before lethal action may be taken:

1. Near certainty that the terrorist target is present;
2. Near certainty that non-combatants^[1] will not be injured or killed;
3. An assessment that capture is not feasible at the time of the operation;



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December 02, 2014 4:18 PM EST

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President Obama pens an op-ed explaining why he decided to do what he could to fix our broken immigration system.

December 02, 2014 2:26 PM EST

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The President's new three-year, \$263 million Community Policing Initiative investment package expands programs within his FY 2015 Budget, and builds on them by adding more resources to help integrate the federal government with state and local law enforcement to build and sustain trust between communities and those who serve and protect these communities.

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4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
5. An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

Finally, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force. The United States respects national sovereignty and international law.

U.S. Government Coordination and Review

Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials – including the deputies and heads of key departments and agencies – will consider proposals to make sure that our policy standards are met, and attorneys – including the senior lawyers of key departments and agencies – will review and determine the legality of proposals.

These decisions will be informed by a broad analysis of an intended target's current and past role in plots threatening U.S. persons; relevant intelligence information the individual could provide; and the potential impact of the operation on ongoing terrorism plotting, on the capabilities of terrorist organizations, on U.S. foreign relations, and on U.S. intelligence collection. Such analysis will inform consideration of whether the individual meets both the legal and policy standards for the operation.

Other Key Elements

U.S. Persons. If the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.

Reservation of Authority. These new standards and procedures do not limit the President's authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.

Congressional Notification. Since entering office, the President has made certain that the appropriate Members of Congress have been kept fully informed about our counterterrorism operations. Consistent with this strong and continuing commitment to congressional oversight, appropriate Members of the Congress will be regularly provided with updates identifying any individuals against whom lethal force has been approved. In addition, the appropriate committees of Congress will be notified whenever a counterterrorism operation covered by these standards and procedures has been conducted.

[1] Non-combatants are individuals who may not be made the object of attack under applicable international law. The term "non-combatant" does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....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 LODGING OF CLASSIFIED DOCUMENT

In accordance with the Court’s Order dated January 7, 2015, defendants in the above-captioned matter hereby provide notice that they are lodging on this date a classified document for the Court’s *in camera, ex parte* review. This document is classified pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), and cannot be disclosed without proper authorization. The document 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
January 20, 2015

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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Sarah.Normand@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....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

ORDER REGARDING *EX PARTE* PROCEEDINGS

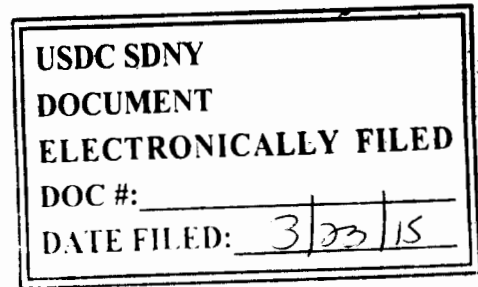
McMahon, J.:

IT IS HEREBY ORDERED that the Clerk of Court note the following proceedings on the public 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”);

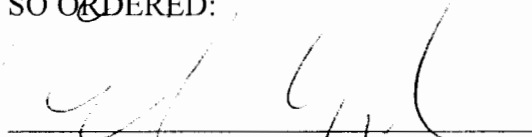


On February 24, 2015, the Court directed the government to provide a revised classified submission with regard to the remaining documents withheld by the Office of Legal Counsel (the “February 24 Order Requiring Revised Submission”); and

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.

Dated: March 23, 2015

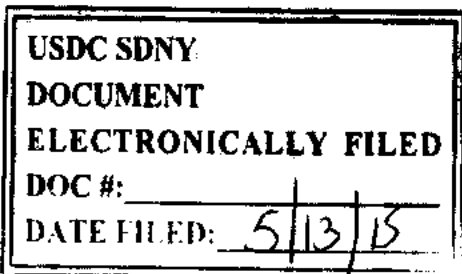
SO ORDERED:



Hon. Colleen McMahon, U.S.D.J.

BY ECF TO ALL COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



_____ x

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

Plaintiff,

12 Civ. 794 (CM)

-against-

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

_____ x

ORDER OF NOTIFICATION

McMahon, J.:

On May 13, 2015, the court notified the Government that the opinion on the pending motions for summary judgment was ready for classification review.

In that opinion, in addition to making final rulings as to most entries contained on the Vaughn Indices submitted by the defendant Agencies and addressing the Glomar responses interposed by the CIA and the DoD, the court's May 13 opinion:

- (1) directed the production of certain documents within 30 days from May 13 for *in camera* review, and
- (2) directed that all three defendant Agencies (the Office of Legal Counsel at the Department of Justice, the Central Intelligence Agency, and the Department of Defense) conduct further segregability reviews in view of certain rulings made by the court, and directed that either documents or new certifications be produced within 45 days from May 13.

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.

Dated: May 13, 2015



U.S.D.J.

BY ECF TO ALL COUNSEL

JA615

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/24/15

_____ x
AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

-against-

12 Civ. 794 (CM)

DEPARTMENT OF JUSTICE, et al.,

Defendants.

_____ x

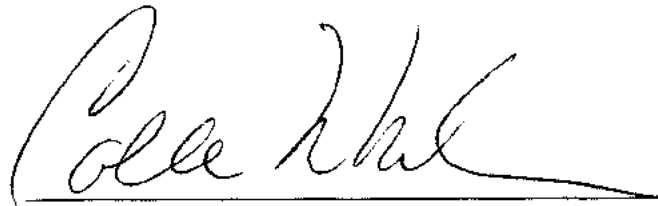
NOTICE TO THE PARTIES

McMahon, J.:

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.

Dated: June 23, 2015



U.S.D.J.

BY ECF TO ALL COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/24/15

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

-against-

12 Civ. 794 (CM)

DEPARTMENT OF JUSTICE, et al.,

Defendants.

NOTICE TO THE PARTIES

McMahon, J.:

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.

Dated: June 23, 2015


U.S.D.J.

BY ECF TO ALL COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....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 LODGING OF CLASSIFIED DOCUMENTS

In accordance with the Court’s Memorandum Decision and Order dated May 12, 2015, and revised June 23, 2015, defendants in the above-captioned matter hereby provide notice that they are lodging on this date, for the Court’s *in camera, ex parte* review, classified declarations by John E. Bies, Deputy Assistant Attorney General in the Office of Legal Counsel, Department of Justice; Rear Admiral Sinclair M. Harris, U.S. Navy, Department of Defense; and Martha M. Lutz, Information Review Officer, Central Intelligence Agency. 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 documents 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
June 29, 2015

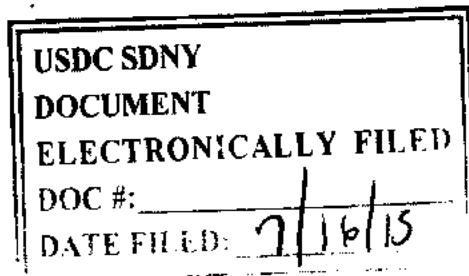
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

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
AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

-against-

12 Civ. 794 (CM)

DEPARTMENT OF JUSTICE, et al.,

Defendants.

_____ X

ORDER WITH RESPECT TO THE GOVERNMENT'S
SUBMISSION OF JULY 1, 2015

McMahon, J.:

The court has received and reviewed classified supplemental declarations from representatives of the Defendants OLC, CIA and DoD (collectively, the Agencies) concerning the segregability, in certain documents on their respective Vaughn Indices, of certain "officially acknowledged material" (as found by this court in its yet-to-be-officially released decision of June 23, 2015) from other material as to which FOIA privileges continue to attach. These documents do not include documents that the court ordered for in camera review in a May 13, 2015, pre-security clearance draft of the June 23, 2015 decision.

I thank the Agencies for their prompt response.

Not surprisingly, as to each document, the Agencies either (1) indicate that any "officially acknowledged material" cannot be segregated from the rest of the document, or in some cases (2) indicate that the document does not in fact contain "officially acknowledged material."

For the most part, the declarations comport with the requirements of FOIA and the relevant decisions. I see no need to confirm their contents by reviewing still more documents in camera.

I recognize that the Government "interpreted" the court's June 23 order in light of its own views concerning the relationship between "officially acknowledged facts" and privilege. The Government needs to understand that the "officially acknowledged facts" were derived from public statements by relevant Government officials that were presented to this court by the ACLU in the exhibits to the Wicker Affidavit, and are not

restricted in scope to what the Second Circuit found to have been “officially acknowledged” in *New York Times*. To the extent the Government disagrees with my finding as to the official acknowledgement of these facts, it can take the matter up with the Circuit – with the full participation of the ACLU.

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 its 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.

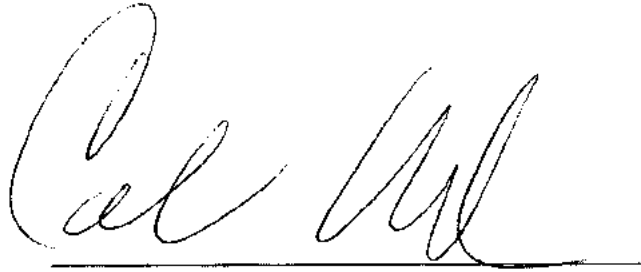
As far as this court is concerned, this completes the record with respect to the documents listed on the Vaughn Indices that were provided to this court following remand from the United States Court of Appeals for the Second Circuit. The case can go up on appeal and after appeal it can finally be closed.

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.

Dated: July 6, 2015

A handwritten signature in black ink, appearing to read "Cal M.", written over a horizontal line.

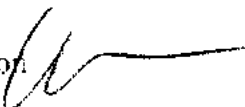
U.S.D.J.

BY ECF TO ALL COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NEW YORK 10007-5841
(212) 805-6325

USDC SDNY
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DOC #:
DATE FILED: 7/17/15

CHAMBERS OF
COLLEEN MCMAHON
UNITED STATES DISTRICT JUDGE

MEMO IN CAMERA TO: Sarah Normand, AUSA
FROM: Judge McMahon 
RE: Attached decision (12-cv-794) (CM)
DATED: June 23, 2015

Ms. Normand:

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."

I am sorry there is no redlined version of the May 13 Draft decision. Frankly, I never learned how to do that, and I was working on a rather primitive computer in any event (thankfully it is being replaced). There are actually very few changes in the text, other than the insertion of the "*Rulings After In Camera Review*." The one that you will find of moment is that, upon further review, I have revised my original decision about what the Government has officially acknowledged with respect to Samir Khan. In the May 13 Draft Decision, I ruled that official acknowledgement extended to "The fact that the Government believed Samir Khan was involved in jihad." After re-reading Wicker Exhibit 14, I conclude that official acknowledgement is more properly described as relating to the fact that the FBI was investigating Samir Khan's involvement in terrorism/jihad.

This change may affect the Government's response to the court's order of May 13, 2015: I am granting the Government two weeks to re-review any documents as to which Listed Fact #7 is relevant, in order to conform to my revised reading of what has been officially acknowledged.

This in camera memorandum will have to be unsealed once the Government concludes its security review of this decision.

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

----- X

American Civil Liberties Union and American
Civil Liberties Union Foundation

Plaintiffs,

-v-

12-CV-00794 (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,

NOTICE OF APPEAL

Defendants.

----- X

Notice is hereby given that the American Civil Liberties Union and the American Civil Liberties Union Foundation appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on July 22, 2015 [Docket # 132], granting in part and denying in part Plaintiffs' motions for summary judgment and Defendants' motions for summary judgment.

Dated: September 18, 2015

Respectfully submitted,

DORSEY & WHITNEY LLP

By: /s/ Colin Wicker

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