

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
By: SEAN H. LANE
PETER M. SKINNER
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2601
Fax: (212) 637-2730

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, et al.,

Defendants.
----- X

ELECTRONICALLY FILED

04 Civ. 4151 (AKH)

**FOURTH DECLARATION OF
STEVEN G. BRADBURY**

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

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, AND ITS
COMPONENT OFFICE OF LEGAL COUNSEL,

Defendants.
----- X

05 Civ. 9620 (AKH)

I, Steven G. Bradbury, declare as follows:

1. I am the Principal Deputy Assistant Attorney General for the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”). No one currently holds the position of Assistant Attorney General for OLC. Consequently, in my capacity as Principal Deputy Assistant Attorney General for OLC, I am the head of OLC and

supervise all OLC operations, including its response to requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. This Declaration supplements, and hereby incorporates, three previous declarations that I submitted in this matter, the first dated May 15, 2005, the second dated September 8, 2006, and the third dated June 7, 2007. This Declaration also supplements and incorporates three declarations that OLC Special Counsel Paul P. Colborn has submitted in this case. Mr. Colborn’s three declarations are dated November 5, 2007, December 13, 2007, and September 12, 2008.

2. I submit this declaration in response to the Court’s orders dated August 28, 2008, and October 29, 2008, which directed OLC either to produce three memoranda—two dated May 10, 2005, and one dated May 30, 2005—described in Mr. Colborn’s November 2007 declaration or to “produce a detailed Vaughn declaration identifying each document and the [FOIA] Exemptions” protecting the documents from disclosure. See Order Granting Prelim. Inj. in Part and Den. in Part at 5 (Aug. 28, 2008); Order Denying Mot. For Part. Reconsideration at 2 (Oct. 29, 2008). This declaration is based on my personal knowledge, information, and belief, and on information disclosed to me in my official capacity.

Three Memoranda at Issue

3. The three memoranda at issue are described in the attached Vaughn index. (See Exhibit A.) As set forth in that index, two of the memoranda are dated May 10, 2005; the third is dated May 30, 2005. Each of the memoranda is addressed to John A. Rizzo, then the Senior Deputy General Counsel of the Central Intelligence Agency (“CIA” or “Agency”), and I signed each of the memoranda in my capacity as Principal Deputy Assistant Attorney General for OLC. Each memoranda is classified at the TOP SECRET//SCI level, meaning that each

document contains exceptionally sensitive information, the disclosure of which could damage the Nation's security. Collectively, the memoranda total 106 pages.

4. By delegation from the Attorney General, OLC's principal function is to provide legal advice to the President and the agencies and departments of the Executive Branch. See 28 C.F.R. § 0.25(a). In this capacity, OLC frequently provides confidential written legal advice to Executive Branch departments and agencies on a variety of complex and unsettled questions, including issues related to national security operations.

5. OLC acted in its legal adviser capacity when it drafted each of the withheld memoranda. In particular, the Office prepared each memorandum in response to a request for legal advice and assistance from the CIA. Specifically, the Agency requested the Office's advice and analysis on whether its procedures for interrogating high-level al Qaeda operatives complied with a particular federal law and a treaty provision. Each memorandum contains confidential—and highly classified—factual information the CIA provided to OLC in the course of seeking legal advice, including detailed descriptions of interrogation techniques proposed to be used.

6. Each memorandum, in turn, analyzes the application of different federal laws and legal principles to the specific interrogation techniques described by the CIA. Each memorandum reflects the Office's frank, candid, and thoughtful legal analysis of whether the techniques, as described by the Agency, would comply with a specific federal statute or a treaty provision.

7. As is reflected in the fact that the documents are highly classified, OLC prepared each of the memoranda with the expectation that it would be held in confidence, and that the facts and advice in the document would not be disclosed to the public. Although the CIA and the Department have acknowledged the existence of the three memoranda, to the best of my

knowledge the information and advice contained in the documents remains confidential. The Department has not published or otherwise made public any of the three documents. To the contrary, it has maintained the confidentiality of all three of these memoranda, including the details of the legal advice and analysis contained within them.

Application of FOIA Exemption Five

8. As explained in Mr. Colborn's declaration dated September 12, 2008, the CIA previously determined in another FOIA lawsuit pending before the United States District Court for the Southern District of New York, Amnesty International USA, et al. v. Central Intelligence Agency, et al., No. 07 Civ. 5435 (LAP), that each of these same three memoranda is exempt from disclosure under FOIA Exemptions One, Three, and Five, 5 U.S.C. §§ 552(b)(1), (3), & (5). See Third Decl. of Paul P. Colborn at ¶¶ 3-4 (explaining status of document in Amnesty International litigation). I also understand that the CIA is submitting a declaration and Vaughn index supporting the withholding of the documents under these exemptions. This declaration explains why the three memoranda are protected from disclosure under FOIA Exemption Five by the deliberative process and attorney-client privileges.

9. FOIA Exemption Five exempts from disclosure "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." This exemption has been construed to protect information privileged in the civil discovery context, including information protected by the deliberative process and attorney-client privileges.

10. The deliberative process privilege protects the internal deliberations of the Government by exempting from release pre-decisional documents that reflect advisory opinions, recommendations, analysis, opinions, speculation, or other non-factual information prepared to

assist policymakers in arriving at decisions. Similarly, the attorney-client privilege protects confidential communications between an attorney and his client for the purpose of obtaining or providing legal advice or assistance.

11. The three memoranda fall squarely within the deliberative process and attorney-client privileges. As discussed above, each of the documents is deliberative in nature—each reflects the Office’s confidential legal advice to the CIA regarding the development of interrogation policies for al Qaeda terrorists. Moreover, the memoranda contain classified and highly sensitive information that OLC received from the Agency for the purpose of preparing its legal advice.

12. The legal advice memoranda are also pre-decisional. Although OLC’s legal advice and analysis may inform decisionmaking, the legal advice is not itself dispositive as to any policy adopted by the Executive Branch, including the CIA. OLC itself does not purport, and in fact lacks authority, to make any policy decisions. OLC’s role is to provide advice and analysis as to, inter alia, the legal implications of particular policy proposals, not to mandate that an agency adopt any particular policy. In this case, OLC prepared the three memoranda to assist the CIA as it deliberated about the detention and interrogation of high value al Qaeda terrorists. The documents advised the CIA on certain legal issues related to particular practices under consideration by the Agency. Nothing in the memoranda, however, compelled a particular decision by the CIA.

13. . Compelled disclosure of these advisory and pre-decisional memoranda would cause serious harm to the deliberative processes of the CIA and the Executive Branch more generally and would disrupt the attorney-client relationship between OLC and the CIA and other Executive Branch entities. Executive Branch officials often ask OLC for legal advice and analysis on very

difficult and unsettled legal issues. Frequently, such issues arise (as in this case) in connection with highly complex and sensitive operations that implicate national security interests. It is essential to the mission of the Executive Branch that OLC's legal advice be uninhibited by concerns about public disclosure. Preserving the confidentiality of deliberative, advisory documents such as the three memoranda ensures that Executive Branch officials continue to request legal advice on sensitive matters and that the Executive Branch continues to examine creative and even controversial legal arguments and theories candidly, effectively, and in writing. In light of the public interest in guaranteeing the legality and effectiveness of the Nation's ongoing efforts to combat global terrorism, the Executive Branch has a particularly compelling need for candid, thoroughly considered legal advice in this area. Disclosure of the documents, however, would deter future officials from seeking written legal advice about complex and controversial legal issues.

Segregability

14. I have carefully reviewed the documents for segregation of non-exempt information, and I have determined that no portions of the documents can be released without disclosing information protected under FOIA Exemption Five.

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

Executed: Washington, D.C.
November 7, 2008


Steven G. Bradbury

EXHIBIT A

United States District Court for the Southern District of New York

ACLU, et al., v. Department of Defense
Case No. 04 Civ. 4151 (AKH)

and

ACLU, et al., v. Department of Justice and its Component Office of Legal Counsel
Case No. 05 Civ. 9620 (AKH)

Vaughn Index

May 2005 Memoranda withheld by the Office of Legal Counsel

All Records Are Withheld in Full under FOIA Exemption Five, 5 U.S.C. § 552(b)(5)

Document Number	Date	Description	Privilege	Pages
1	May 10, 2005	Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency ("CIA"), from Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, providing confidential legal advice and analysis prepared at the request of, and based on facts provided by, the CIA for use in reaching a policy decision	Deliberative Process ("DP") & Attorney-Client ("AC")	46
2	May 10, 2005	Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, providing confidential legal advice and analysis prepared at the request of, and based on facts provided by, the CIA for use in reaching a policy decision	DP & AC	20
3	May 30, 2005	Memorandum for John A. Rizzo, Senior Deputy General Counsel, CIA, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, providing confidential legal advice and analysis prepared at the request of, and based on facts provided by, the CIA for use in reaching a policy decision	DP & AC	40