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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

-against-

DEPARTMENT OF JUSTICE, et al.,

Defendants.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/16/15

12 Civ. 794 (CM)

MEMORANDUM DECISION AND ORDER RULING ON THE
MOTIONS FOR SUMMARY JUDGMENT BY THE CENTRAL
INTELLIGENCE AGENCY, THE DEPARTMENT OF DEFENSE
AND THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL

McMahon, J.:

The United States Court of Appeals for the Second Circuit, in its opinion dated June 23, 2014, rejected the use by the Central Intelligence Agency (CIA) and the Department of Defense (DoD) (collectively, "the Agencies") of so-called Glomar responses¹ and No Name-No Number responses to the request by Plaintiff American Civil Liberties Union (ACLU) for Vaughn Indices relating to the ACLU's FOIA request as directed to the Agencies. The Circuit directed the Agencies to provide this court with Vaughn Indices (the Indices) for review. The Agencies did so, providing both classified (court's eyes only) and non-classified versions of the Indices. The Agencies also moved for summary judgment dismissing the ACLU's complaint insofar as it sought documents

¹ A Glomar response in FOIA parlance refers to an agency's refusal to "confirm or deny" existence of records where to answer the FOIA inquiry would cause harm cognizable under FOIA exception. 5 U.S.C.A. § 552.

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listed on those Indices. The ACLU has responded to the motions for summary judgment and has withdrawn its request for certain documents on the Indices.

The Second Circuit also directed this court to review and inspect certain "other legal memoranda prepared by" the Office of Legal Counsel of the Department of Justice, as well as other entries that appear on OLC's classified Vaughn Index, in view of its determination that the Government had waived FOIA exemptions with respect to certain materials. OLC has also moved for summary judgment dismissing the ACLU's complaint insofar as it sought documents listed on those Indices, and the ACLU has responded.

This opinion disposes of all remaining aspects of the mandate.²

I. Material Considered When Deciding These Motions

In keeping with the requirements in this Circuit, the Agencies supported their motions for summary judgment with declarations. *Wilner v. NSA*, 592 F. 3d 60, 68 (2d Cir. 2009). I have and had no quarrel with this. However, the Agencies' failure to provide the court with a single summary document, or to properly cross-reference arguments relating to documents listed on the Indices on a document-by-document basis (as I had previously requested), made review of the Indices virtually impossible -- or, at least, overly time consuming.

Accordingly, on January 7, 2015, I issued an order directing the CIA and DoD to present the information in support of their argument that the listed documents were exempt from FOIA disclosure in a different format -- one that explained, on a document-by-document basis, the reasons why each claimed FOIA exemption applied to that

² In a written decision rendered on September 30, 2014, the Court disposed of one item in the mandate item Three—in a separate ruling that is presently on appeal.

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document. The Government protested that it had to rely on evidentiary declarations in order to comply with *Wilner*.

I did not mean to suggest by my order that the declarations previously filed in support of the motions for summary judgment should not have been filed or were not to be considered part of the record on the motions. They are part of the record, and I reviewed them comprehensively prior to issuing the January 7 order. The problem was in trying to correlate information in the declarations with the documents listed on the Indices. The document that I directed to be filed in the January 7 Order was intended to supplement and summarize the evidentiary material already presented to the court – not to replace it. The Government’s concern about providing the court with a summary document is, therefore, misplaced.

On January 20, 2015, the CIA and DoD filed a document that complies with my January 7, 2015 order – one that, on a document by document basis, explains the basis on which the Agencies resist disclosure of the indexed documents.

On or about February 24, 2015, my senior law clerk contacted the Government and asked that it prepare an identically-formatted summary document relating to the remaining items on the OLC Vaughn Index. The Government provided such a document, albeit not until April 23, 2015.

In this opinion I will first address the OLC’s comprehensive motion for summary judgment – which addresses not only its own concerns but those of the CIA and DoD with respect to documents of concern to all three Agencies. It will then take up the separate motions of the CIA and DoD. Prior to deciding any of the motions, I will issue a few overarching rulings applicable to all documents listed on all three Indices.

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II. Standards for Summary Judgment

The applicable standards for summary judgment on a motion resisting FOIA disclosure have not changed since this court issued its original opinion in *New York Times* on January 3, 2013. They are incorporated herein by reference.

I emphasize the following aspect of the court's review-- summary judgment in favor of the agency is appropriate where:

the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.

Wilner, 592 F. 3d at 73. In the national security context, agency declarations are entitled to substantial deference. *CIA v. Sims*, 471 U.S. 159, 179 (1985).

Furthermore, with respect to responses from the CIA, one of the Agencies here at issue, *in camera* review of documents is discouraged, because 50 U.S.C. § (f) (2) directs that "the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties." I have to the fullest extent practicable determined issues of fact on the basis of the CIA's sworn written submissions; however, I have, as will be seen, asked the CIA to produce a few documents for *in camera* inspection.

III. Rulings Applicable to All Documents on All Indices

The following rulings are applicable to all documents listed on all three indices.

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A. Classification

All documents appearing on all three Vaughan Indices that are identified as classified are currently and properly classified, as attested by the various declarations of Sinclair M. Harris (DoD), John E. Bies (OLC) and Martha M. Lutz (CIA). No evidence suggests the contrary. In the absence of evidence tending to show waiver, there is, frankly, very little the court can do to avoid the (b) (1) exemption.

B. Official Acknowledgement

The ACLU asserts that otherwise applicable FOIA exemptions have been waived with regard to all documents on the three Vaughn Indices (classified or not) because the matters discussed therein have been "officially acknowledged" by relevant Government officials

All parties agree (and if they did not, the Second Circuit has held in this very case) that voluntary disclosure by the Government of all or part of a document may waive an otherwise valid FOIA exemption. *New York Times*, 756 F. 3d at 114. The "official acknowledgement doctrine" applies in the context of all three exemptions asserted by the agencies in this case: Exemptions 1, 3 and 5. *Wilson v. CIA*, 586 F. 3d 171, 186 (2d Cir. 2009); *New York Times*, 756 F. 3d at 114.

I deeply regret that the Court of Appeals was not more definitive in its discussion of how closely an official acknowledgement had to track information contained in a document that would otherwise be exempt from disclosure. *Wilson* – described as "the law of this Circuit" by the panel in *New York Times* – holds that the doctrine applies where the withheld information is "as specific as the information previously released" and "matches the information previously disclosed." In *New York Times*, the Circuit

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suggested that an "overly stringent" application of *Wilson* "may not be warranted" (*New York Times*, 756 F. 3d at 120, n.19), but it did not say that a "stringent" application "was not warranted." This court generally finds it prudent to apply Second Circuit precedent rather stringently, especially as I am in no position to overturn "the law of this Circuit." What the Second Circuit did not do in *New York Times* was explain where the line between "stringent" and "overly stringent" could be found. I will do my best to take my cues from what the Court of Appeals did in on the first appeal in this case.

I do not read *Wilson* as requiring that the withheld information correspond verbatim to information previously released, or that the prior release have been made by the very official whose statement appears in the withheld document, or by an official in the agency where the discloser works, or even by an official in the branch of Government where the discloser works. The Government is the Government; and if, for example, the Attorney General makes a factual assertion about the Defense Department, then that fact has been "officially acknowledged" by the Government for purposes of the *Wilson* rule – but only to the extent of the specificity of the public statement.

The exception to what I just wrote is that the "law will not infer official disclosure of information classified by the CIA from... release of information by another agency, or even by Congress." *Wilson*, 586 F. 3d at 186-87. That is the "law of this Circuit." I recognize that the panel in this very case included public statements by members of Congress about the CIA's role in drone strikes as some evidence of official acknowledgement of that fact. However, the principal "official acknowledger," according to the Court of Appeals, was the Director of the CIA. The statements of Senator Feinstein and Congressman Rogers about the CIA's role in the use of drones appear to have been

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entirely confirmatory of Director Pannetta's disclosures. Indeed, the Circuit's very point was that if the Chairmen of the Senate and House Select Committees on Intelligence felt free to discuss a fact publicly, it meant that the fact was no secret – even at the CIA. I do not read the Circuit's reference to these public statements as overturning the quoted ruling in *Wilson* concerning who can and cannot officially disclose information that has been classified by the CIA.

The ACLU takes the position that official acknowledgement of a fact constitutes waiver with respect to the any information that is "similar" to the information disclosed. The ACLU's position is overbroad; "similar" is not a synonym for "matching." Certainly, if what the ACLU means is that official acknowledgement of a particular fact (for example, the CIA's operational involvement in the drone strike that killed Aulaji) waives FOIA exemptions for all details about the CIA's operational involvement in the Aulaji mission, it goes too far. Nothing in the Second Circuit's opinion in *New York Times* can be read to suggest that acknowledgement of the CIA's "operational role" in the Aulaji killing – including its statement that two senior members of Congress "publicly discussed CIA's role in targeted killings by drone strikes" -- mandates disclosure of such details as the names of any CIA personnel who were involved, or what exactly each of them did; or where they were located when they did it; or what equipment was used, or who (if anyone) in Yemen or elsewhere offered assistance. All the Second Circuit said was that the "identity of the agency, in addition to DOD, that had an operational role in the drone strike that killed Aulaji" had been officially acknowledged – and, more generally, "It is no secret that the CIA has a role in the use of drones." *New York Times*, 765 F.3d at 119. Acknowledgement of operational *involvement*, in other words, does not eviscerate the

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privilege for operational *details*. I very much doubt that the Court of Appeals meant for this court to disregard *Wilson* or to conclude that disclosure of a specific fact entailed waiver of exemption for all information about the subject to which that fact pertains. Otherwise, it would not have redacted significant portions of the OLC-DOD Memorandum – a document that indisputably qualifies as “legal analysis” – due to the mention of facts relating to intelligence gathering activities. If I am incorrect, the Circuit will have to be much more explicit in its direction to this lower court.

That said, I take up the ACLU's argument. Plaintiff takes the position that the following information has been “officially acknowledged” by Government, so that any “matching” information contained in the documents identified in the Vaughn Indices must be disclosed:

1. The fact that the Government uses drones to carry out targeted killings overseas;
2. The fact that both DOD and CIA have an intelligence interest in the use of drones to carry out targeted killings;
3. The fact that both DOD and the CIA have an operational role in conducting targeted killings;
4. Information about the legal basis (constitutional, statutory, common law, international law and treaty law) for engaging in the targeted killings abroad, including specifically the targeted killing of a U.S. national.
5. The fact that the Government carried out the targeted killing of Aulagi;
6. At least some information about why it killed Aulagi: his leadership role in al-Qaeda in the Arabian Peninsula, including as an operational planner, recruiter and money-raiser; his role in the failed attempt to bomb the Northwest Airlines jetliner on December 2009 (the Detroit bombing attempt); and his role in planning other attacks (which never took place), including specifically attacks on two US-bound cargo planes in October 2010;
7. The fact that the Government believed that Samir Khan was involved in jihad.

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The ACLU supports its argument with fourteen exhibits – White Papers, speeches, news articles that quote Government sources, Congressional Committee hearing transcripts – all of which are in the public domain, and all of which unequivocally support exactly what the ACLU asserts about the seven specific facts listed above.

As to six of these seven facts (all but #6) -- as well as the fact that Aulaqi was killed in Yemen, which the Second Circuit held to have been officially acknowledged -- I have no difficulty holding that they have been officially acknowledged by the United States Government. **Therefore, to the extent that these specific facts appear in documents on the agencies' Vaughn Indices and can be segregated from other, properly exempt information, those portions of all documents on the OLC, CIA and DoD Vaughn Indices must be disclosed.**

Then we turn to Listed Fact #6, the reasons why Aulaqi was selected for targeting by his own government. Every item listed in that paragraph—his leadership role in al-Qaeda in the Arabian Peninsula, including as an operational planner, recruiter and money-raiser; his role in the failed attempt to bomb the Northwest Airlines jetliner on December 2009 (the Detroit bombing attempt); and his role in planning other attacks that never took place, including specifically attacks on two US-bound cargo planes in October 2010—is disclosed by an executive branch official in one or more of the exhibits to the Colin Wicker Affirmation. These disclosures appear in Wicker Ex. 7 (Jake Tapper's June 27, 2010 Interview with Leon Panetta, see page 5 of 15), Wicker Ex. 8 (U.S., Department of Treasury Press Release dated July 16, 2010), Wicker Ex. 9 (letter, Attorney General

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Holder to The Hon. Patrick Leahy, dated May 22, 2013, at 3-4 of 16); Wicker Ex. 10 (Transcript of Hearing Before the Committee on Homeland Security of the House of Representatives, Feb. 9, 2011, at 25 of 35); Wicker Ex. 11 (Remarks by the President at the "Change of Office" Ceremony for the Chairman of the Joint Chiefs of Staff, Sept. 30, 2011); and Wicker Ex. 12 (Government's Sentencing Memorandum in *United States of America v. Umar Farouk Abdulmutallab*, No. 10 CR 20005, United States District Court, Eastern District of Michigan, at 3).

All but one of those documents was created before this court issued its original ruling; the one created after -- Attorney General Holder's Letter to Senator Leahy -- was virtually contemporaneous with the post-opinion documents that the Second Circuit considered and found dispositive when it held that there had been waiver with respect to the legal analysis in the OLC-DOD Memorandum.

If I were writing on a clean slate, I would rule that the [redacted]

[redacted] have been "officially acknowledged," and that [redacted] FOIA protection is accordingly waived.

[redacted] I believe

it is for the Circuit to decide in the first instance [redacted]

[redacted] waive FOIA protection for documents discussing those [redacted] The Court of Appeals now has the benefit of my view on the matter.

As to Listed Fact #7: the ACLU mischaracterizes what has been officially acknowledged -- not that the Government "believed" Khan was involved in jihad, but that

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he was under investigation by the FBI because he blogged about jihad. The FBI's files on Khan (heavily redacted) were publicly released after his death, pursuant to a FOIA request. They revealed the fact that he had been under investigation by that agency (which is not a defendant in this case) since 2006, and that the FBI and Justice Department were trying to build a terrorism case against him. Nothing in the FBI files, as reported in the article attached as Wicker Ex. 14, mentions the interest of any other agency in Khan. I thus conclude that the Government has "officially acknowledged" that the FBI was investigating Khan's involvement in terrorism/jihad – nothing more. As so modified, Listed Fact 7 is deemed "officially acknowledged."

All of the document-by-document rulings I am making are informed by this ruling about official acknowledgement. Thus, any reference to Listed Facts 1-5 and 7 (as modified), as well as to the fact that Aulaqi was killed in Yemen, in any document on each agency's Vaughn Index must be disclosed to plaintiffs, to the extent that it is reasonably segregable. All rulings on individual documents are subject to this ruling, except for documents that the court has examined *in camera*. As to those documents, I myself have applied this ruling during my *in camera* review, so there is no need for OLC, CIA or DOD to review these documents in order to ascertain whether segregable references to acknowledged facts exist.

C. *Segregability*

The CIA asserts that it has conducted a line-by-line review of all the documents on its Vaughn Index, and has concluded that no reasonably segregable, non-exempt portions of the document could be released without compromising those portions of the document that are exempt from disclosure. Lutz, Third Classified Declaration, ¶ 36. The few CIA

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documents that I am directing be produced for *in camera* review are documents as to which it seems possible, based on the limited information presently known to me, that portions of those documents might be segregable.

In addition, the CIA will have to conduct a new segregability review, in light of the court's conclusion that certain Listed Factors have been officially acknowledged by relevant officials. I am not prepared to accept anything other than a document-by-document representation that (1) the document contains no "officially acknowledged" information; or (2) while it contains "officially acknowledged" information, that information cannot reasonably be segregated from other information that has not been "officially acknowledged" and so remains exempt from FOIA disclosure. To the extent that "officially acknowledged" information can reasonably be segregated, the CIA should propose appropriate redactions to the court. The CIA has 30 days from the date on which this decision is released for security review (which is to say, the date at the end of this decision) to complete that review for any documents not otherwise ordered produced, and to provide the necessary certifications.

For its part, DoD summarily dismisses the notion that it could reasonably segregate any non-exempt information from the documents it has withheld. Second Classified Declaration of Sinclair M. Harris, ¶ 31. In view of the court's ruling with respect to what has been "officially acknowledged," DoD also needs to conduct a segregability review; it is ordered to complete that review within 30 days of the date this decision is released to the Government for security review (not the date when a redacted version of this decision is released publicly). It, too, must provide the court, on a document-by-document basis, with a representation that (1) the document contains no

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officially acknowledged information; or (2) while it contains officially acknowledged information, that information cannot reasonably be segregated from other information that has not been officially acknowledged and so remains exempt from FOIA disclosure. To the extent that officially acknowledged information can reasonably be segregated, DOD should propose appropriate redactions to the court. As is the case with the CIA, the court will identify, at the end of this opinion, a limited number of documents that DOD must produce for *in camera* review without regard to its recertification of segregability.

Finally, OLC represents that the withheld documents have been reviewed and that there is "no reasonably segregable, non-exempt information [that] can be provided beyond the unredacted portions already provided to Plaintiffs from Documents 4, 5, and 9." Third Classified Declaration of John E. Bies, ¶ 106. OLC must produce a much larger number of documents for *in camera* inspection than the other agencies; as to the rest of the documents on its Vaughn Index, it must also undertake the above-described exercise and provide the court, within 30 days, with a document-by-document certification of non-segregability or with proposed redactions.

IV. Analysis of the Documents Requests by the ACLU

I know of no way to get through this mass of material except document by document as listed on each Agency's Vaughn Index – the method endorsed by the Second Circuit in *New York Times*, 756 F.3d at 124.

A. Documents Appearing on the OLC Vaughn Index

There is a preliminary issue to discuss before diving into the OLC Vaughn Index on a document-by-document basis.

In *New York Times*, the Second Circuit issued the following ruling:

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No reason appears why the number, title, or description of the remaining listed documents needs to be kept secret. Listing number 5 is the OLC-DOD Memorandum; listing numbers 7-9, 50, 250, 262-65 and 269-71 describe documents and attorney notes concerning legal advice; listing numbers 57-68, 70, 71, 73-79, 83, 88-91, 93, 95-100, 102, 105, 110, 113, 116-22 and 144-45 are described as including factual information concerning Aulahi, listing numbers 123-30 are described as unclassified open source materials; listing numbers 131-43 and 148-237 are described as drafts of the OLC-DOD Memorandum; listing numbers 238-43 are described as drafts of other documents; listing numbers 146-47 are described as drafts of Document 86A, a listing that does not appear on the OLC'd Vaughn index; and listing numbers 252-54 are described as including [redacted].

Some, perhaps all, of the information in many of these documents might be protected as classified intelligence information or predecisional. If the plaintiffs challenge the applicability of a cited exemption, the District Court, after *in camera* inspection, will be able to determine which of these documents need to be withheld and which portions of these documents need to be redacted as subject to one or more exemptions that have not been waived.

I read this as a directive ordering this court to conduct an *in camera* review of any and all of the listed documents – well over half of the documents appearing on OLC's original Vaughn Index.

Since *New York Times* was handed down, the ACLU has withdrawn its request for certain emails and certain other documents (Classified Declaration of John E. Bies, ¶¶ 9-12), so a number of the documents identified by the Second Circuit are no longer sought and need not be produced for review: 105, 113, 116, 123-30, 131-43, 148-242, 144-47. However, as to those document listed by the Second Circuit that it continues to seek, the ACLU challenges the applicability of any exemptions to any of these documents and demands that this court engage in the prescribed *in camera* inspection.

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In its second (and infinitely more detailed) submission in response to the motion for summary judgment, OLC offers an extended rationale for why each of these documents should not be disclosed – and should not even be subject to *in camera* inspection. To take one example:

[REDACTED]

The

Court of Appeals ordered all references to [REDACTED] [REDACTED] redacted from the publicly-available version of *New York Times*. When the Court of Appeals included these eight documents on the list of documents to be reviewed *in camera*, it did not know that [REDACTED] [REDACTED] because the OLC's original Vaughn Index was so cryptic that this important detail was omitted. It apparently did not occur to the Government to ask the Circuit to eliminate these documents from the list of documents that it ordered this court to review *in camera*. However, the Government now argues, at great length and to me, that none of these documents need be produced (even for *in camera* review), because if only the Second Circuit had known a little more about their subject matter, the panel would never have included them in the list of documents designated by the Court of Appeals for *in camera* review by this court.

I wish I could comply with the Government's request – I have no particular interest in prolonging this exercise. But in view of the mandate rule, I have little choice but to order OLC to produce all of the documents listed in the above-quoted paragraph that are still sought by the ACLU for *in camera* review. OLC has 30 days from the date

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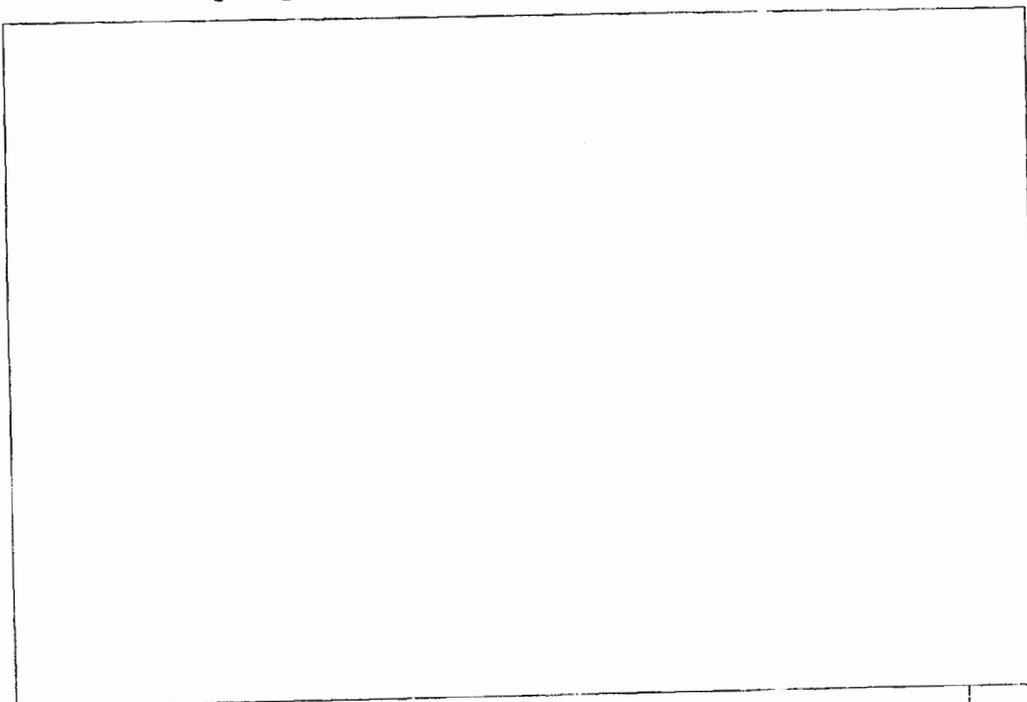
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this decision is submitted for classification review to get those documents to New York. Prior to producing the documents to the court, OLC must conduct a segregability review and either propose redactions for any as to which portions can and must be disclosed in view of the court's ruling on what has been "officially acknowledged" or certify, on a document-by-document basis, that redaction is impossible.

Turning now to the individual documents on the OLC Vaughn Index: OLC grouped those documents into categories.³ Rather than re-sort the documents in numerical order, I, too, will discuss the documents in their assigned categories. Where justifications for withholding apply to all documents in a particular category, they are listed at the beginning of the discussion of the documents in that category.



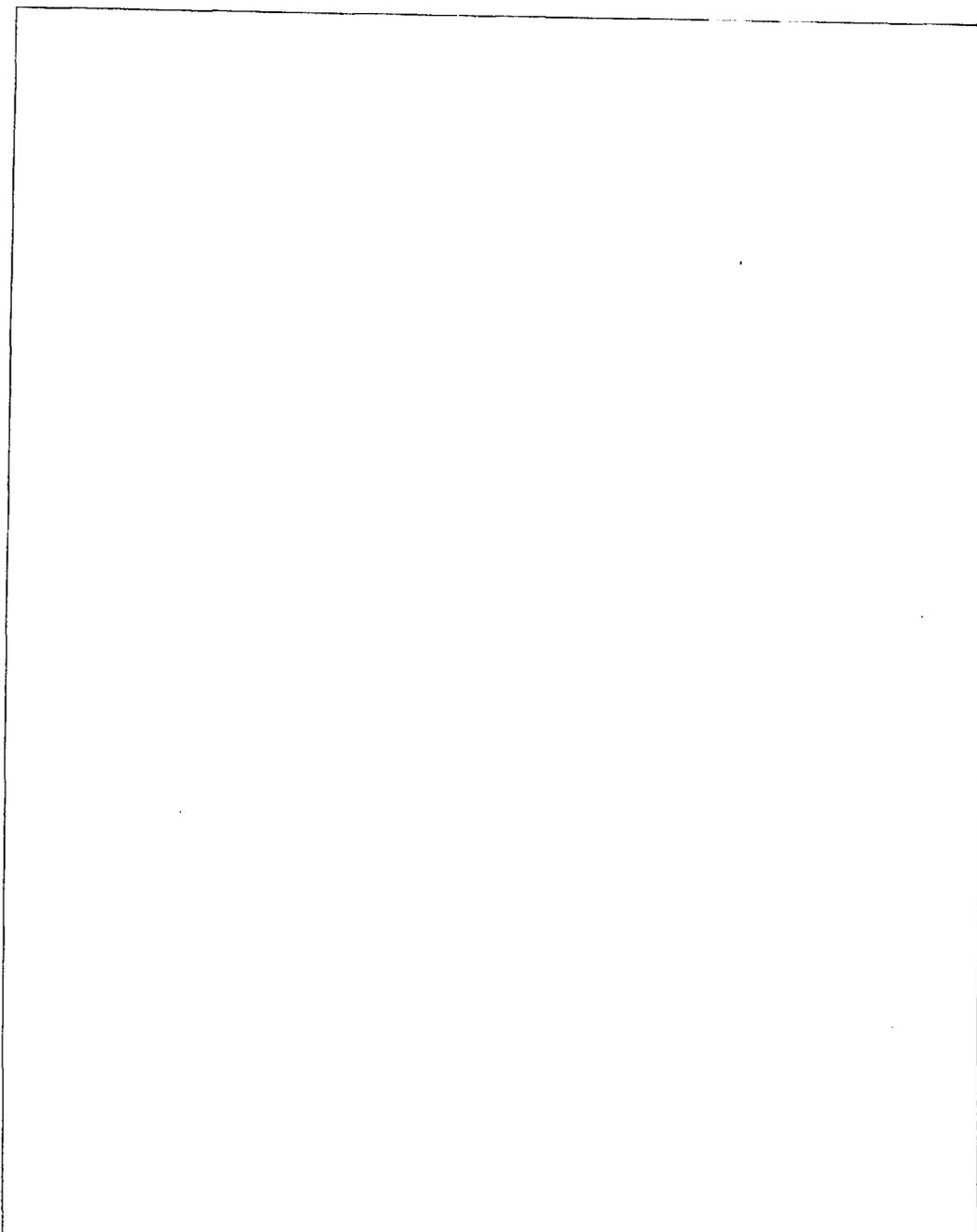
³ Some document could fall into more than one category, but OLC placed them into just one category, so as to eliminate redundant discussion.

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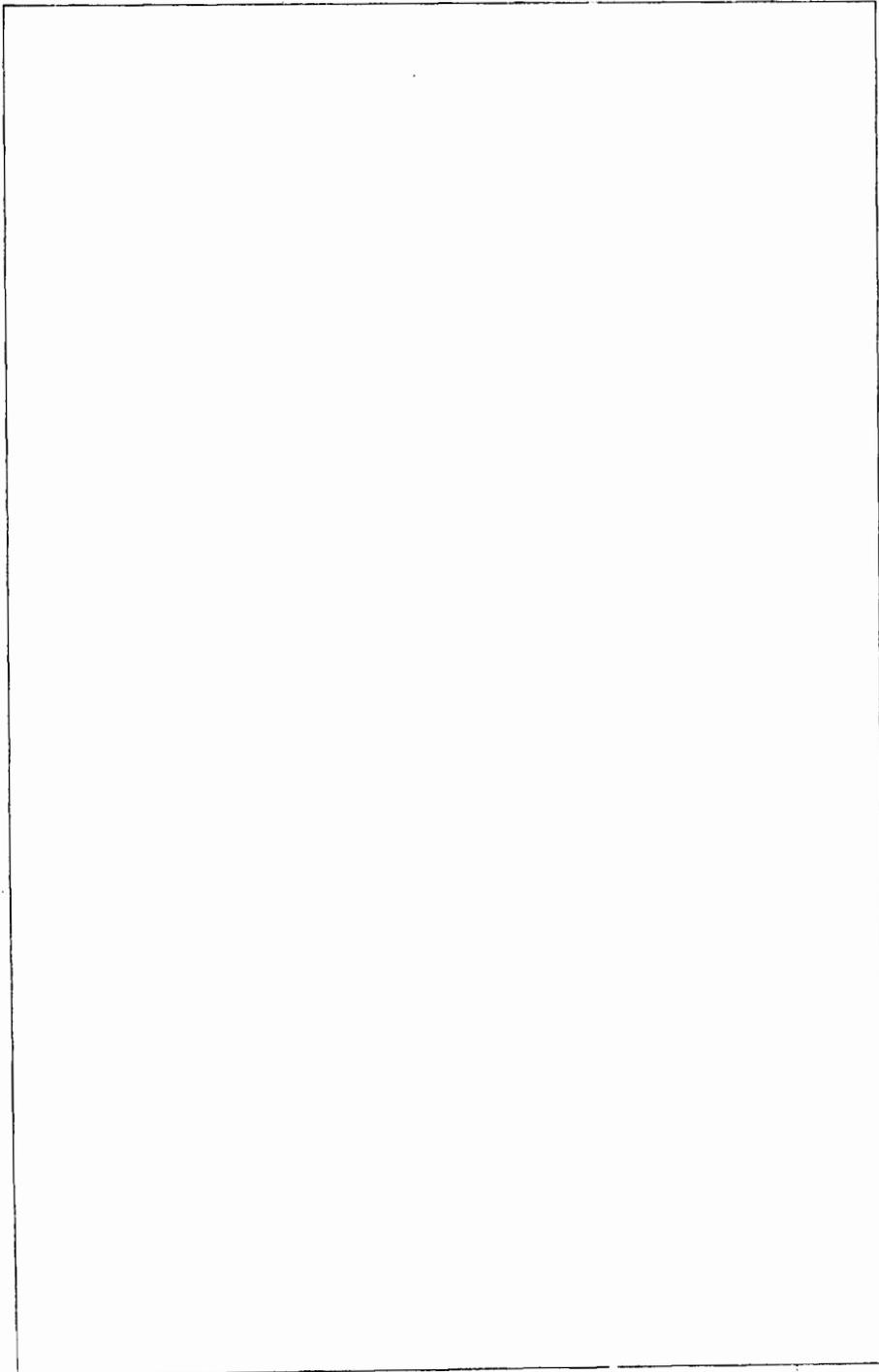


⁴ To speed the preparation of this opinion I have chosen simply to quote verbatim the Government's arguments, rather than to try to summarize them in my own words. This has the advantage of presenting the reviewing court with a single document in which all information necessary to a decision is contained.

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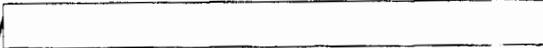
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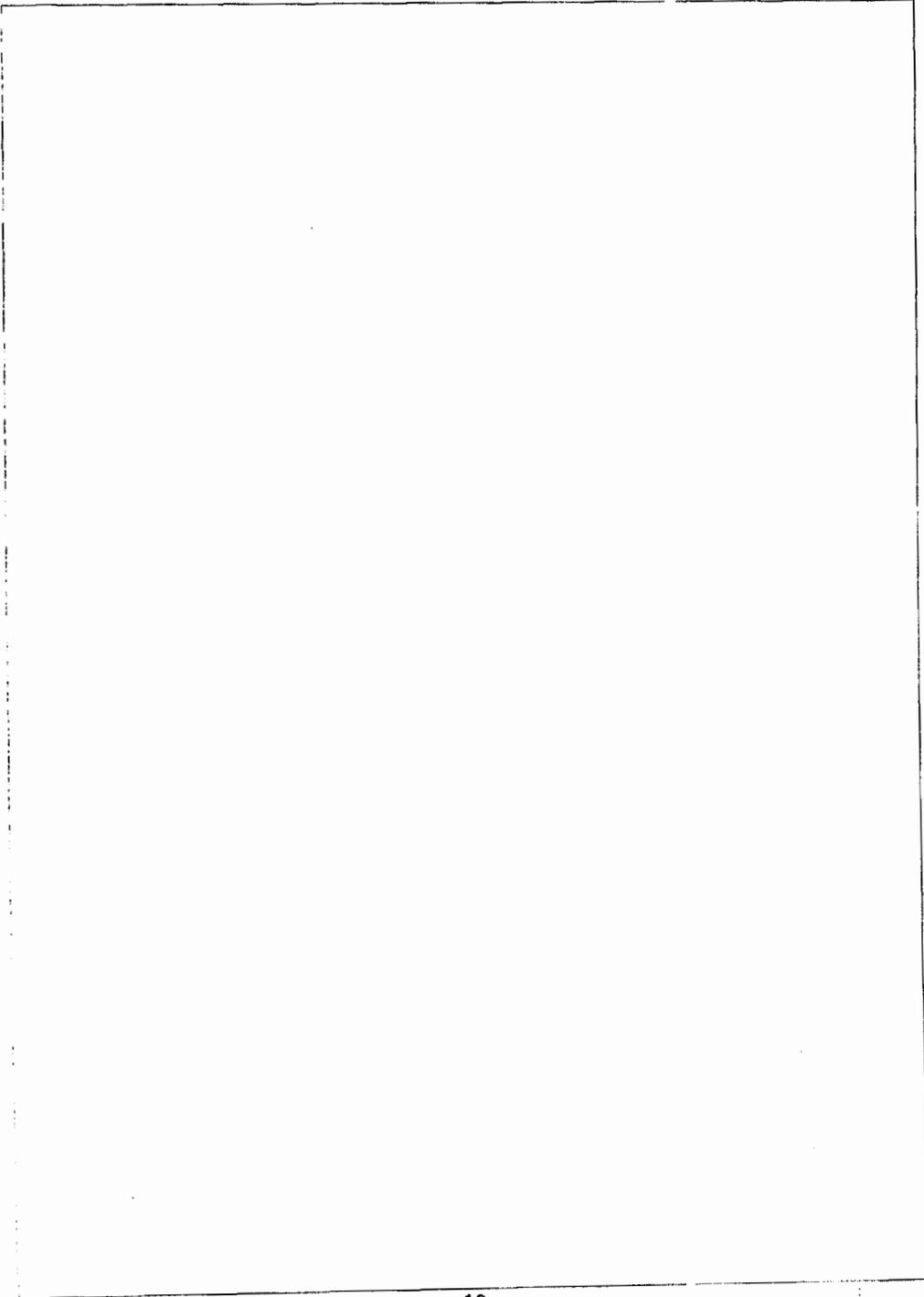


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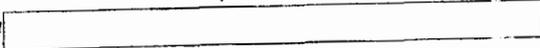
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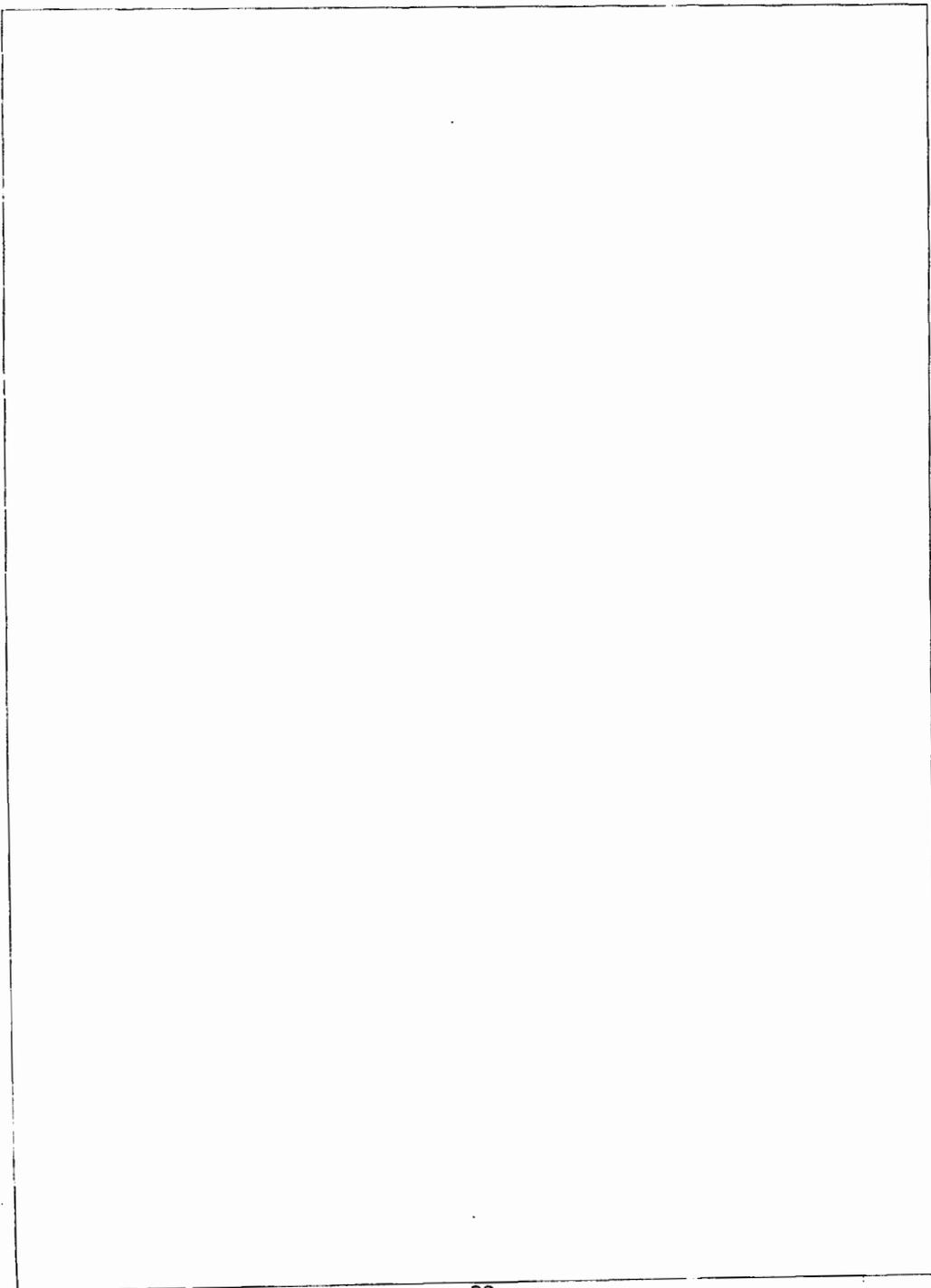


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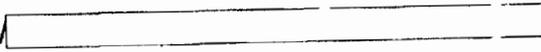
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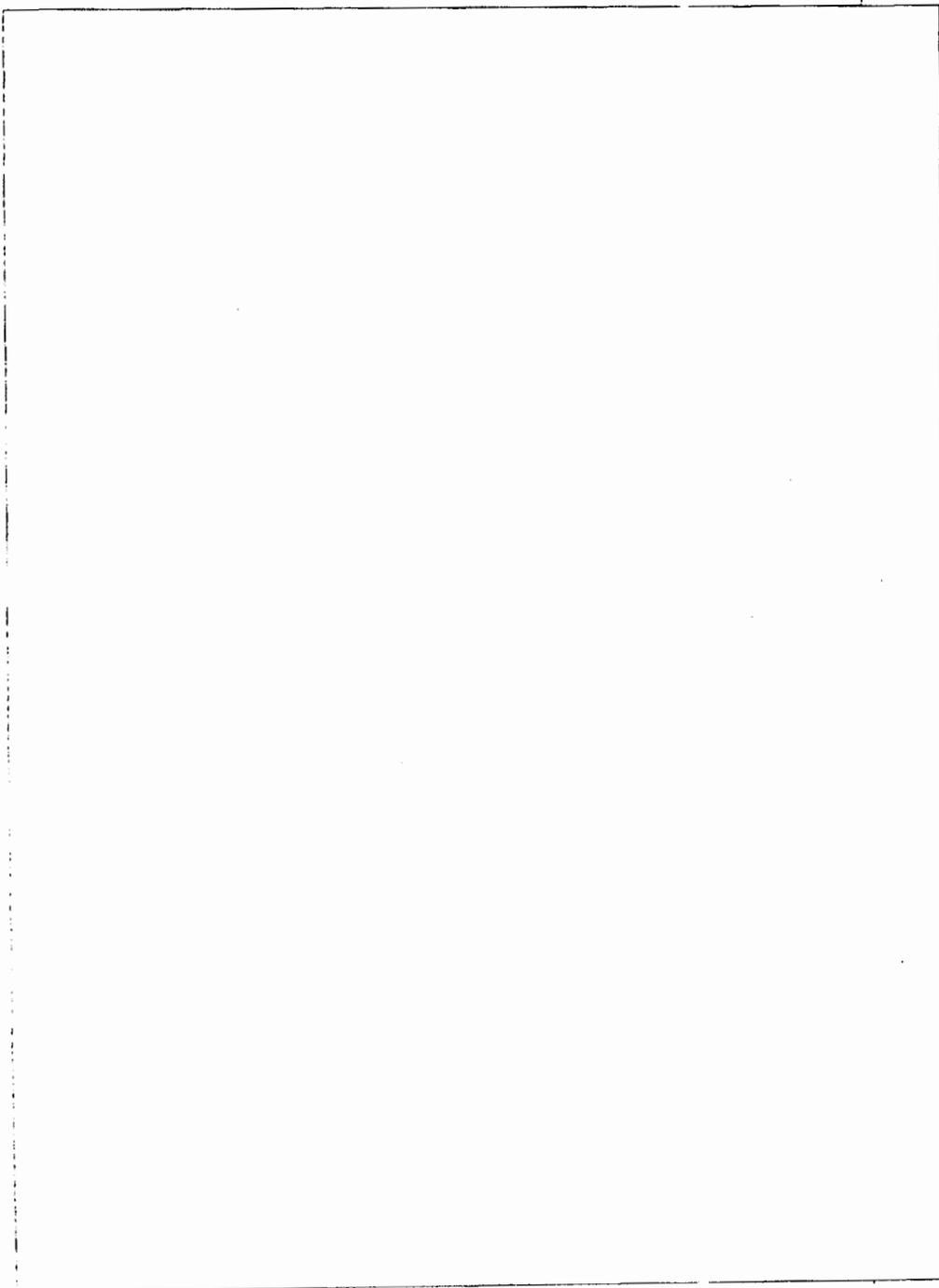


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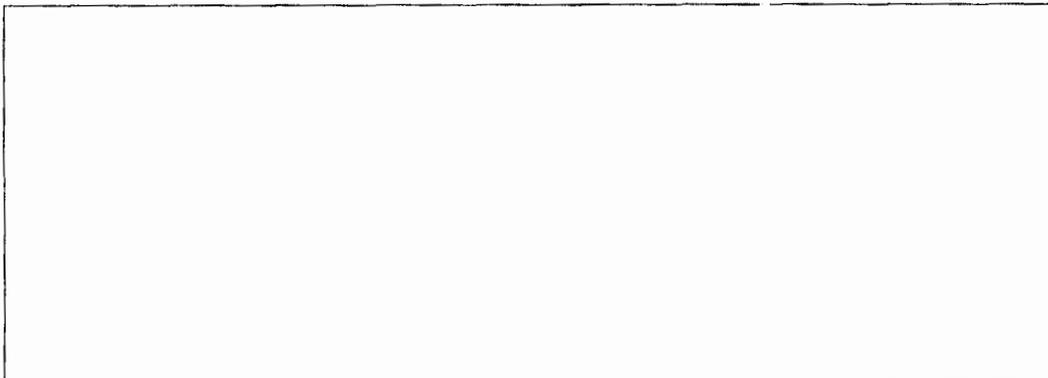
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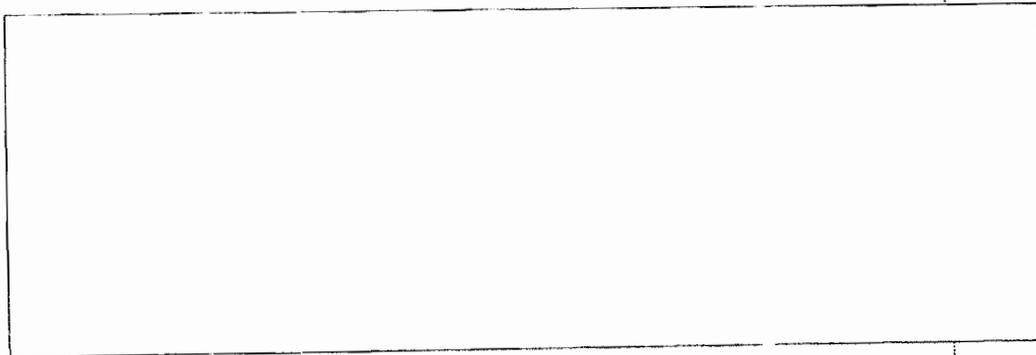
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However, I did not end the inquiry there.

In *New York Times*, the Second Circuit flatly stated, "It is no secret that the CIA has a role in the use of drones." *New York Times*, 765 F.3d at 119. The Circuit concluded that various statements made by then-Director Panetta, and confirmed by Senator Dianne Feinstein and Congressman Mike Rogers, led inexorably to the conclusion that the Government had waived any FOIA exemptions with respect to that fact. *Id.* Indeed, the Court of Appeals observed, "We can be confident that neither Senator Dianne Feinstein, Chairman of the Senate Select Committee on Intelligence, nor Representative Mike Rogers, Chairman of the House Select Committee on Intelligence, thought they were revealing a secret when they publically discussed CIA's role in targeted killings by drone strikes." *Id.*

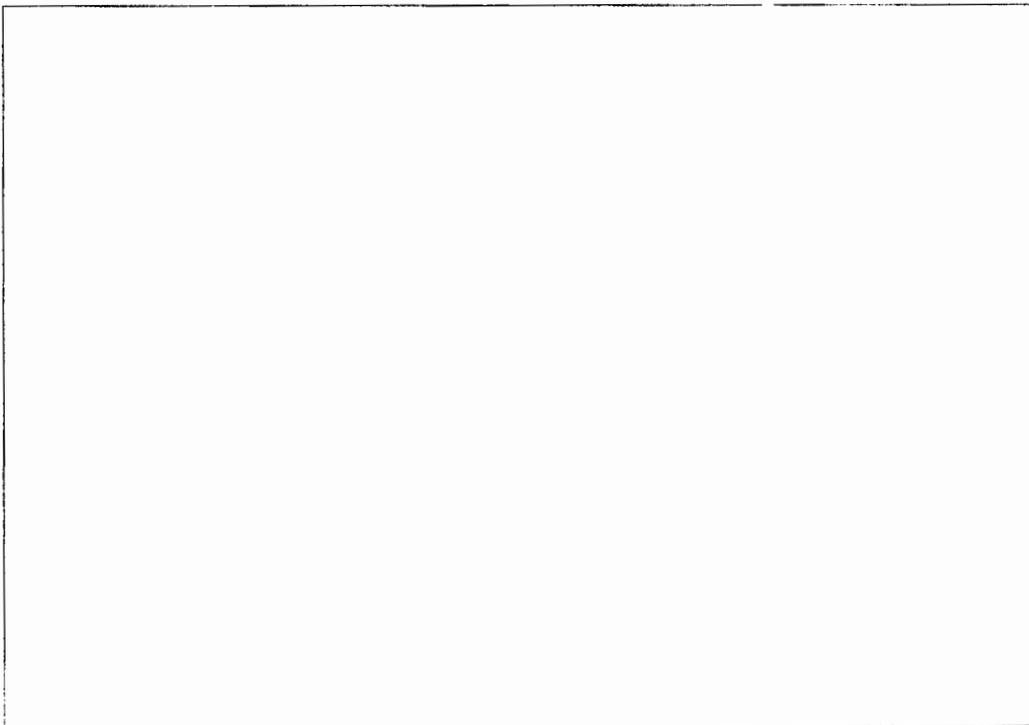


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The issue of who should conduct drone strikes became part of public discourse no later than May 2013,⁶ when President Obama gave a widely-publicized speech at the National Defense University (“NDU”). In that speech, the President was perceived by press and commentators as suggesting that responsibility for drone strikes should reside with the military, not elsewhere. To be fair, the President said nothing of the sort; as one commentator remarked, he simply, “offered some clues into the status of the program” and “opaquely signal[ed]” that these operations should be assumed by the United States military. *See*, John Bennet, “White House Quietly Shifts Armed Drone Program,” *Defense News*, May 24, 2013; *see also*, Patrick Baker, “Pivoting From a War Footing,

⁶ The ACLU, in its opposition to the Agencies’ motion to dismiss, submitted exhibits to demonstrate that FOIA exemptions had been waived as to certain issues. None of the citations discussed in these pages was included in the ACLU’s submission.

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Obama Acts to Curtail Drones," New York Times, May 23, 2013, <http://www.nytimes.com/2013/05/24/us/politics/pivoting>. But the press picked up on his clues and signals, and both of these sources specifically mentioned a classified policy guidance, recently signed by the President, that included a "drone-program shift," so the CIA could return to its "core mission" of gathering intelligence. Bennet, *supra*.

The NDU Speech was preceded and followed by extensive comments from members of Congress on the subject of who should have responsibility for drone strikes. The Congressional commentators did not beat around the bush about the subject of their comments. In particular, Senator John McCain immediately indicated support for "Obama's decision to shift the program from the CIA to the military" – consistent with his oft-expressed position that "It's not the job of the Central Intelligence Agency [to conduct drone strikes]. . . . It's a military job." Bennett, *supra*; see also Julian Hatterm and Martin Matishak, "Drone Fight Simmers in Congress," May 2, 2015, The Hill, <http://thehill.com/policy/technology/240853>. On the other side of the question, Senator Diane Feinstein, Chairwoman of the Senate Select Committee on Intelligence, reinforced her previously-expressed skepticism about whether the military would or could exercise the same degree of "patience and discretion" that had characterized the CIA's operation of the drone program. Bennett, *supra*; see also Ken Dilanian, "Debate grows over proposal for CIA to turn over drones to Pentagon," May 11, 2014, <http://www.latimes.com/world/middleeast/la-fg-yemen-drones>.

The debate over who should have the primary "operational role" in lethal targeted actions has not abated during the past two years. Even as I work on this opinion – two full years after the NDU speech -- The Hill reports that, "Congress may finally be on the

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verge of transferring control of the nation's drone program from CIA to the Pentagon;" Hattem/Matishak, *supra*. Meanwhile, CNN recently reported that McCain and Ohio Governor (and former Senator) John Kasich were insistent that the CIA get out of the business of running the targeted killing program. Jim Acosta, "Obama to make new push to shift control of drones from CIA to Pentagon," April 27, 2015, <http://www.cnn.com/2015/04/27/politics/drones-cia-pentagon-whitehouse>. However, Senator Feinstein and others remain skeptical that the military would have the CIA's capability to carry out targeted drone strikes with minimal collateral damage. See Hattem/Matishak, *supra*. Still others in Government seem indifferent as to which agency prosecutes the strikes, even in light of the revelation that a recent strike inside Pakistan killed an American and an Italian being held hostage by al Qaeda: "We're not going to terminate this drone program. I'm sorry these two innocent civilians were killed, I'm glad the two Americans collaborating with the enemy were. Please understand we're at war. It's a nasty, terrible business—but I'm in it to win it." Shane Harris, "CIA Drones Target al Qaeda Meeting—and killed Hostages Instead," April 23, 2015, quoting Senator Lindsey Graham, <http://thedailybeast.com/articles/2015/04/23cia-drones>.

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[redacted]

In view of this, I feel obliged at least to consider whether my earlier ruling [redacted]

[redacted] remains valid. [redacted]

[redacted]

But while the extensive and explicit publicity about whether the CIA should continue to play any "operational role" in targeted killings using drones give me great pause on the subject, I am unable to conclude that the Government has waived FOIA exemptions for this document, for three reasons.

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[REDACTED]

[REDACTED] That Congress acting in its official capacity [REDACTED] behaves differently than individual members of Congress in their dealings with the press should come as no surprise.

Furthermore, where CIA classified material is concerned, Congress has no role to play in "official acknowledgement," so individual members' willingness to discuss this subject openly, despite its status as classified, has no *legal* significance.

[REDACTED]

[REDACTED] The court has carefully reviewed certain statements, called to its attention by the ACLU, that were made by officials at OLC, in order to ascertain whether these statements disclose the nature of the CIA's "operational role" in these matters. They do not [REDACTED]

[REDACTED]

This court has not located any, either.

Executive Branch silence on this subject contrasts with the situation that confronted the Second Circuit when it was deciding *New York Times*. Then-Director Panetta was the person who acknowledged the CIA's "operational role" in drone strikes generally, and in the Aulahi drone strike in particular. *New York Times*, 756 F.3d 118-

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119. Disclosure by a Government official is the necessary predicate for the waiver of FOIA exemptions; and that Government official must be from the CIA in order for exemptions for CIA classified material to be deemed waived. *See infra* at 4. Panetta's nod was the necessary predicate to the Circuit's conclusion that the wall of secrecy had been breached. Had there been only comments by members of Congress, *Wilson's* requirement that disclosures about the CIA must come from the CIA would not have been satisfied.

Third, even though the Court of Appeals held that the Government had waived FOIA protection for the fact that the CIA had some sort of operational role in drone strikes, it granted the Government's request to withhold disclosure of anything about the [redacted] from the publicly-available version of its opinion in *New York Times*. The panel made that call at a time when the NDU speech and the ensuing debate about who should run the drone program were a matter of public record. I have previously expressed the view that this court feels bound by the Second Circuit's decision to keep [redacted] a secret (*New York Times v. U.S. Dep't of Justice*, 11 CV 9336 (CM), "Classified Decision on Remand with Respect to Issue (3)," September 30, 2014, at 3). That deference compels me to conclude that I must do now as the Court of Appeals did previously on this particular question.

[redacted]

However, the justifications are amply grounded, both in FOIA law and in the Court of Appeals' actions in this very case. I thus conclude that there has been no waiver of FOIA exemption for [redacted]

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[redacted] must remain shielded from public view. This justifies withholding all or any non-segregable portion of documents that discuss [redacted] under both FOIA Exemptions b(1) (classification) and b(3) (statutory authority, in this case the National Security Act, which requires the withholding information about intelligence sources or methods [redacted]

[redacted]

I hasten to add that my skepticism about [redacted]

[redacted]

It

does not extend to any operational details about [redacted] details of any particular strikes, including the Aulaqi strike. It does not extend to information about [redacted]

[redacted] And it does not extend to information about methods used to minimize collateral damage. All such details fall inarguably within Exemption (b)(3), for matters covered by the National Security Act, which bars disclosure of intelligence sources and methods. As to those details, I cannot see that there has been any waiver of exemptions; indeed, not a scintilla of evidence supports any such conclusion.

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[redacted]
According to the Government, this group of documents consists of [redacted]

[redacted] Several of the documents in this category have already been ruled upon, either by the Second Circuit (Document 5, the July 2010 OLC-DOD Memorandum) or by this Court in its First Remand Decision (Documents 3, 4 and 6).

The Government argues that [redacted] are exempt from disclosure for the following reasons:

- [redacted]

⁷ Document numbers refer to the numbered entries on the Revised Classified *Ex Parte* Index of Office of Legal Counsel Documents, October 3, 2014. See Exhibit A to the Third Classified Bies Declaration. A redacted version of this index, with redactions as directed by the Second Circuit, has been filed publicly. See Dkt. No. 81, Exh. A. The document descriptions contained in this submission in many cases provide substantially more detail than the Second Circuit was willing to disclose publicly in *New York Times* or in documents disclosed in conformity with that decision. (U)

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- The documents are exempt under Exemption (b)(5) because it is covered by the presidential communications privilege. It is legal advice provided to a senior-level aide to the President to assist that aide in advising the President as to a contemplated decision. Disclosure of documents reflecting confidential legal advice provided to senior-level presidential aides, like this one, would inhibit the President's ability to engage in effective communication and decisionmaking. (U)
- The documents are also exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. This document is predecisional because it was prepared in connection [redacted]. It is deliberative because it constitutes advice used by decisionmakers, [redacted] who received legal advice during interagency deliberations. Compelled disclosure of this document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to the Department of Justice's mission and the deliberative processes of the Executive Branch that the development of the Department's considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters. Protecting this document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. (U)
- The documents are also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document constitutes or reflects final legal advice provided by DOJ to Executive Branch decisionmakers regarding the legality of [redacted]. The considerations regarding the need for confidential Executive Branch deliberations discussed

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above are particularly compelling in the context of the provision of legal advice by DOJ to its Executive Branch clients. This document reflects confidential communications among OLC, the Department of Justice, and Executive Branch clients made for the purpose of requesting and providing legal advice. In providing the legal advice contained in the document, the Department of Justice was serving in an advisory role as legal counsel to the Executive Branch. Having been requested to provide counsel on the law, the Department of Justice stood in a special relationship of trust with the various Executive Branch agencies, departments, and officials seeking the advice. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust. In addition, the factual information reflected in the document was provided to OLC and the Department in connection with a request for legal advice. These client confidences are likewise protected by the attorney-client privilege. (U)

The Government argues against production of Document 46 for additional reasons, which I will identify when I discuss that document.

I will begin the analysis of

[REDACTED]

[REDACTED]

Document No. 2:

[REDACTED]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

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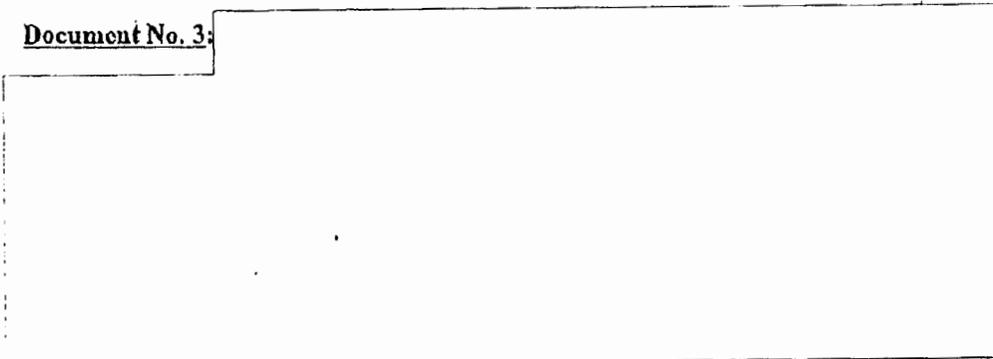
[REDACTED]

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Document No. 3:



Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 4: Classified legal memorandum dated February 19, 2010, from OLC to the Attorney General, providing legal advice regarding legal authority to use lethal force directed against Shaykh Anwar Aulaqi, a U.S. citizen. A redacted version of this memorandum was released to the plaintiffs on August 15, 2014.

Ruling: This Court has already ruled on the status of this document, in the September 30, 2014 Order. That Order is the subject of a pending appeal in the Second Circuit.

Document No. 5: Classified legal memorandum dated July 16, 2010, from OLC to the Attorney General, providing legal advice regarding the application of U.S. federal criminal law and the Constitution in connection with the use of lethal force directed against Shaykh Anwar Aulaqi, a U.S. citizen (the "OLC-DOD Memorandum").

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Ruling: In *New York Times*, the Second Circuit ordered a redacted version of this document disclosed. Nothing more need be said on the subject.

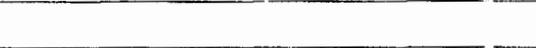
Document No. 6: [REDACTED]

Ruling: [REDACTED]

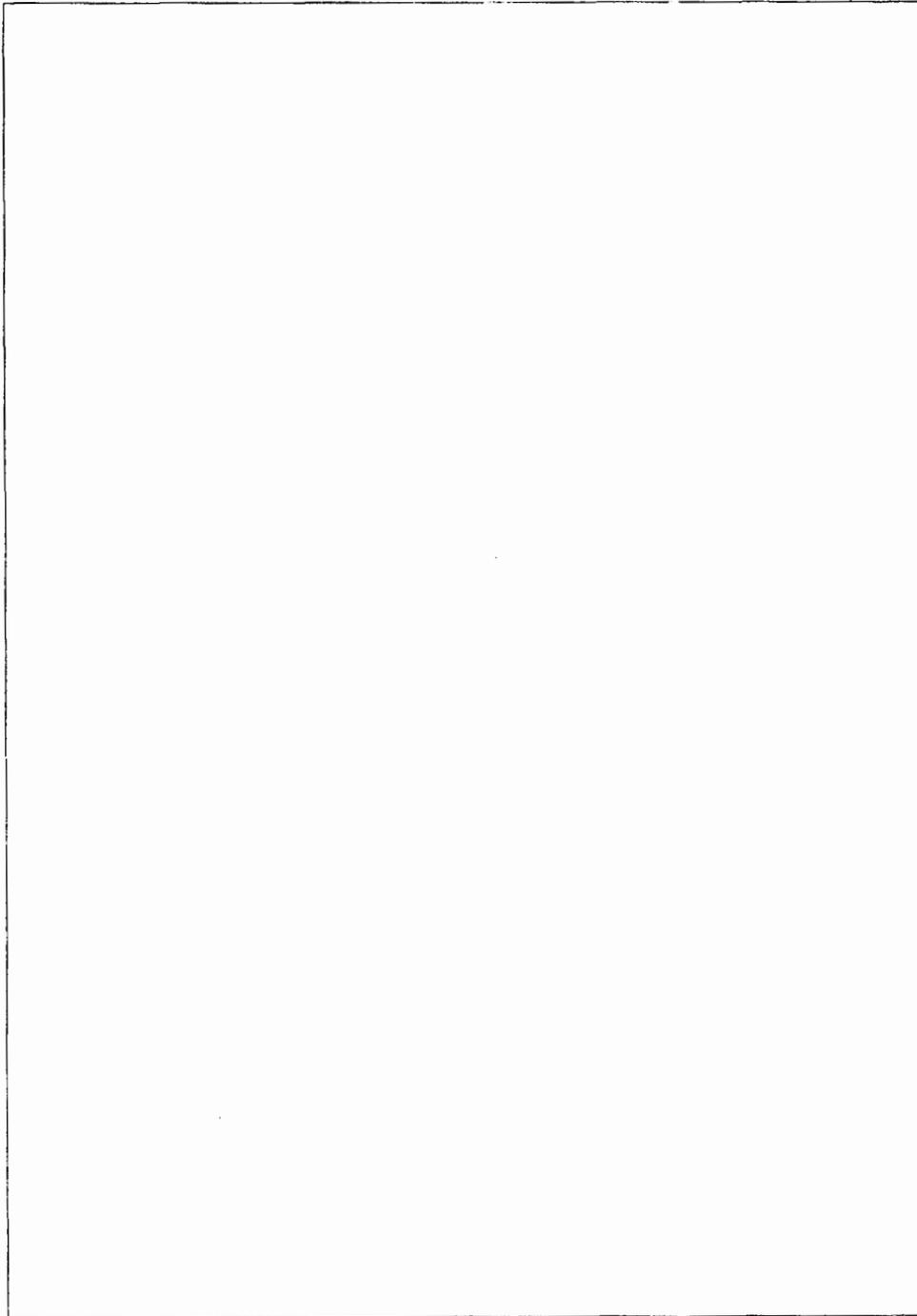
Document No. 46: [REDACTED]

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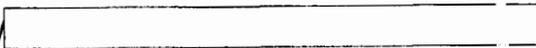
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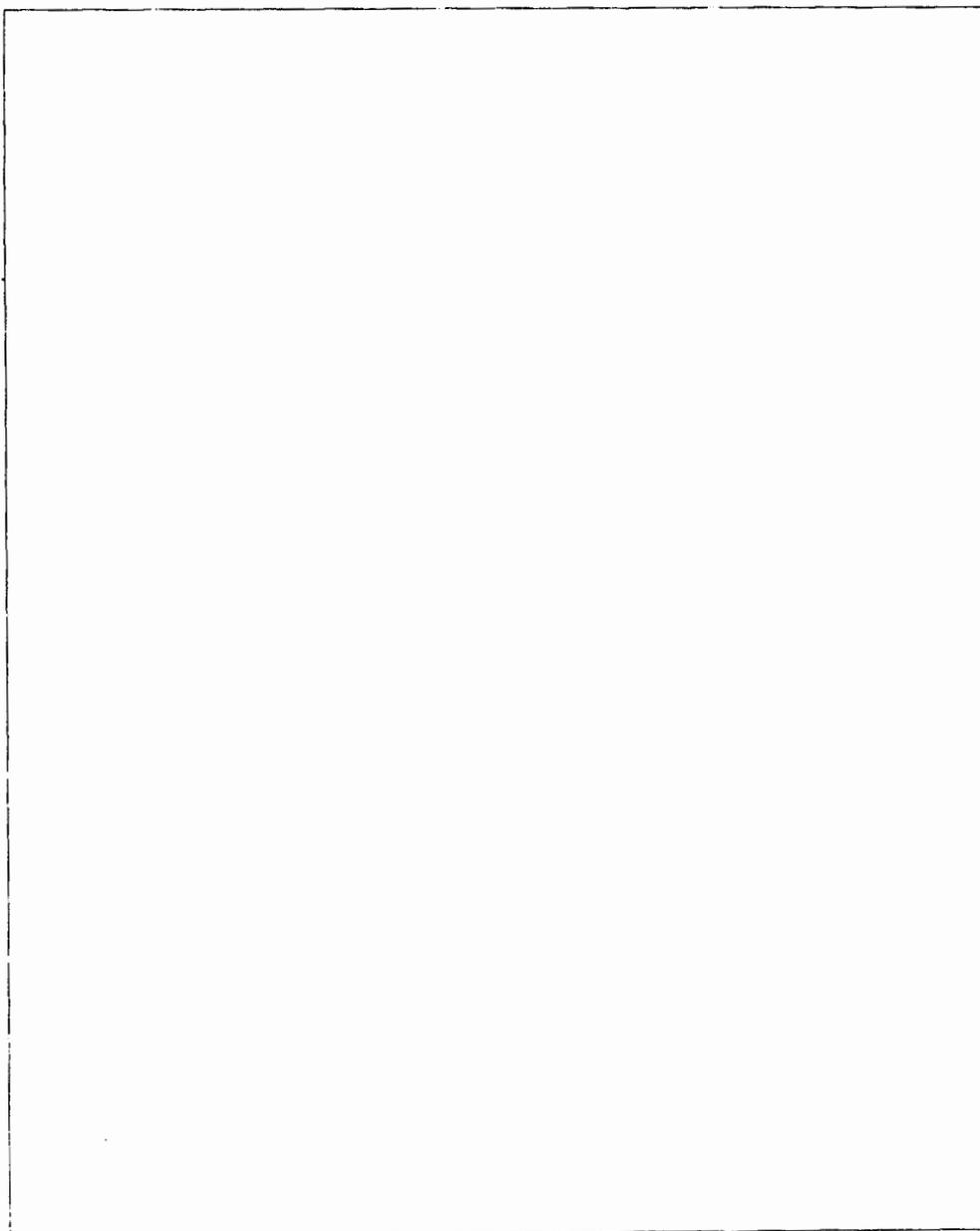


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[REDACTED]

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Ruling. In addition to the reasons applicable to [REDACTED]

[REDACTED], the Government argues that this document is exempt from production for the a number of independent reasons, most of which related to the fact that there has been no

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"official acknowledgement" of

Those reasons are highly

persuasive, but they need not be discussed at any length, because the Second Circuit directed that this document be reviewed *in camera*, so of course it will be.

I would also point out that the Government's analysis about why this document need not be reviewed *in camera* or disclosed is internally inconsistent.

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[REDACTED] The legal advice contained in the document cannot be both "predecisional" and "final;" it is either one or the other.

[REDACTED]

To the extent that the legal advice

[REDACTED] it has not been "officially acknowledged" and nothing in the opinion in *New York Times* requires that it be produced. However, that cannot be ascertained without in camera review, as the Second Circuit anticipated in *New York Times*.

Ruling After In Camera Review: The document was produced for in camera review. Information that has not been officially acknowledged [REDACTED] [REDACTED] can in fact be segregated from information that has been publicly acknowledged (which is legal analysis about the targeting of Aulagi). Everything in the document except the paragraph that begins "Second" should be redacted; only the paragraph that begins "Second" should be produced.

[REDACTED]
[REDACTED] requests for legal advice received by OLC from its Executive Branch clients.

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Document No. 75: Classified and confidential attorney-client communication from

[redacted]

requesting legal advice from the Attorney General regarding a

[redacted]

and conveying factual information relevant to

interagency request for legal advice [redacted]

(U) The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains classified factual information relating to terrorist organizations and particular individuals obtained through sensitive intelligence sources and methods, which was provided to OLC and the Department of Justice in connection with a request for legal advice. [redacted]

- The document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods [redacted]

- The document is exempt under Exemption (b)(5) because it is covered by the presidential communications privilege. [redacted]

seeking legal advice from the

Attorney General regarding [redacted]

[redacted] which attaches a classified factual memorandum containing intelligence.

[redacted] disclosure of documents reflecting confidential legal advice provided to senior-level presidential aides or reflecting senior-level presidential aides' requests for such advice would inhibit the President's ability to engage in effective communication and decisionmaking. (U)

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- The document is also exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. Requests by Executive Branch officials seeking legal advice from OLC, such as this document, are part of Executive Branch deliberative processes, and disclosing such requests would tend to harm the same deliberative interests as disclosing the resulting advice, as discussed above. The document is predecisional because it was prepared in connection with [redacted]. It is deliberative because it constitutes an input both to OLC's internal deliberative process for rendering legal advice, and to the broader Executive Branch policymaking process. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will have full access to facts and legal arguments necessary to provide through, candid, and accurate written legal advice, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. Moreover, the factual information contained therein reflects Executive Branch deliberations regarding what particular information is relevant to Executive Branch decisions about the potential use of force [redacted]. Accordingly, the fact that OLC has possession of the particular factual information contained in the document is protected by the deliberative process privilege. (U)
- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The considerations regarding the need for confidential Executive Branch deliberations discussed above are particularly compelling in the context of requests for confidential legal advice of OLC or the Department of Justice by their Executive Branch clients. The document reflects confidential communications among OLC, the Department of Justice, and Executive Branch clients made for the purpose of requesting and providing legal advice. Disclosure of client confidences offered in the course of requesting such advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients. Moreover, the factual information reflected in the document was provided to OLC in confidence in connection with a request for legal advice. (U)

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Ruling: The Second Circuit ordered *in camera* review of this document, and this court would have done so on its own initiative. It is not possible to ascertain whether the privileges with respect to some, or all, of this document have been waived – or whether there are reasonably segregable portions of the document that could be disclosed because the legal analysis mirrors the analysis that has been waived – without reviewing the document. Accordingly, the Government must produce Document 75 for *in camera* review.

Ruling After In Camera Review: There is no reasonably segregable portion of

[REDACTED] that can be produced. Tab A, which is the bulk of the document, consists of

[REDACTED]

There is no reasonably segregable portion of Tab

A that can be produced. The document is exempt under Exemptions (b)(1) and (b)(3).

There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

I remind the reader that my ruling with respect to this document, and similar rulings relating to documents that have been examined *in camera* by the court, is not “subject to the ruling concerning officially acknowledged facts that is applicable to all documents,” because the court took those facts into account when reviewing the document.

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Document No. 84:

The Government

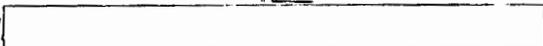
asserts that:

- The document is exempt under Exemption (b)(1) because it contains classified factual information relating to
- The document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods, including specific intelligence reporting
- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. Requests by Executive Branch officials seeking legal advice from OLC, such as this document, are part of Executive Branch deliberative processes, and disclosing such requests would tend to harm the same deliberative interests as disclosing the resulting advice, as discussed above. The document is predecisional because it was prepared in connection with
It is deliberative because it constitutes an input both to OLC's internal deliberative process for rendering legal advice, and to the broader Executive Branch policymaking process. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will have full access to facts and legal arguments necessary to provide thorough, candid, and accurate written legal advice, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

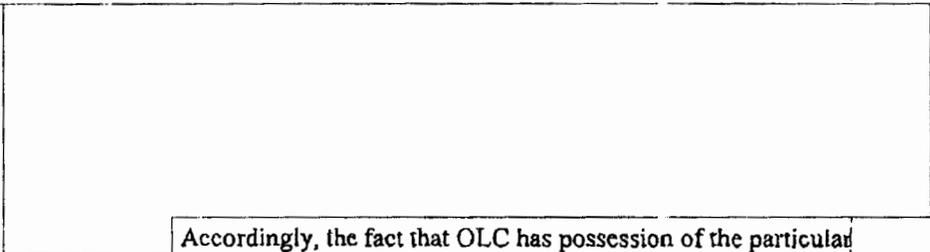
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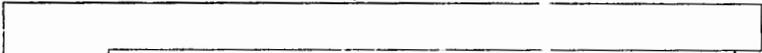
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Accordingly, the fact that OLC has possession of the particular factual information contained in the document is protected by the deliberative process privilege. (TS/NF)

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The considerations regarding the need for confidential Executive Branch deliberations discussed above are particularly compelling in the context of requests for confidential legal advice of OLC or the Department of Justice by their Executive Branch clients. The document reflects confidential communications among OLC, the Department of Justice, and Executive Branch clients made for the purpose of requesting and providing legal advice. Disclosure of client confidences offered in the course of requesting such advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients. Moreover, the factual information reflected in the document was provided to OLC in confidence in connection with a request for legal advice. Again, the attorney-client privilege protects such client confidences. (U)

Ruling:

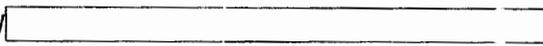


there has been no waiver of exemptions by virtue of the

release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

However, to ascertain whether segregable portions of the document could be disclosed, OLC must produce Document 84 for *in camera* review.

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Ruling After In Camera Review: There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. The document was produced for in camera inspection to deal with segregability, but I conclude, after review, that there is nothing to segregate, because [redacted]

[redacted]

and so is arguably

non-responsive. Accordingly, I conclude that the document need not be produced.

(3) Legal Analysis [redacted] (Doc. Nos. 8 and 9)

This category consists of two documents containing legal analysis that OLC

[redacted] One document (Document 8) is withheld in full; the other (Document 9) has already been released to plaintiffs in redacted form.

Document No. 8:

[redacted]

The Government asserts that:

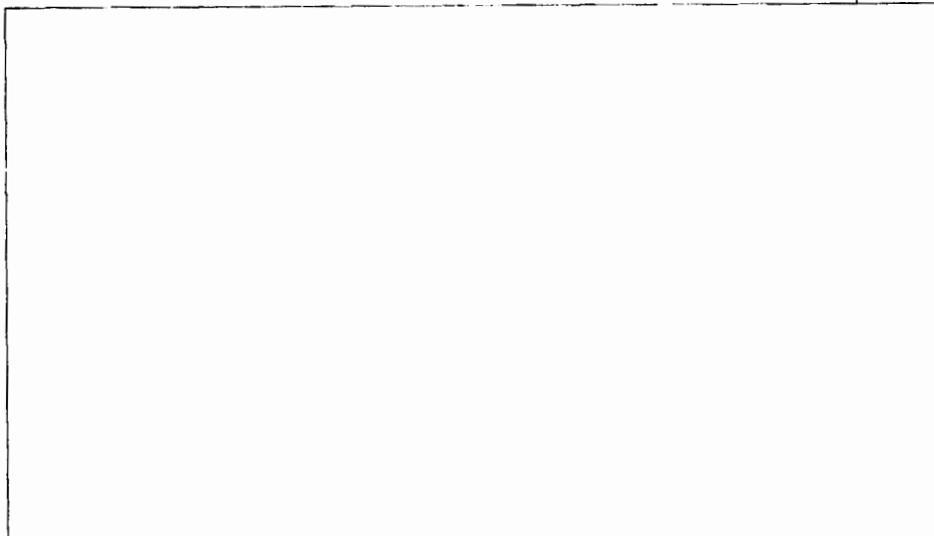
- The document is exempt under Exemption (b)(1) because it consists of classified legal analysis

[redacted]

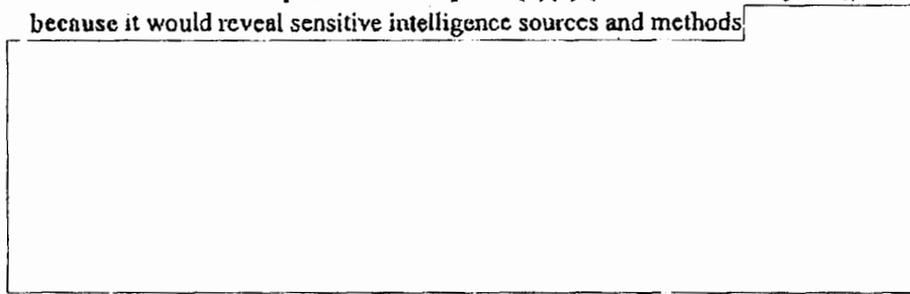
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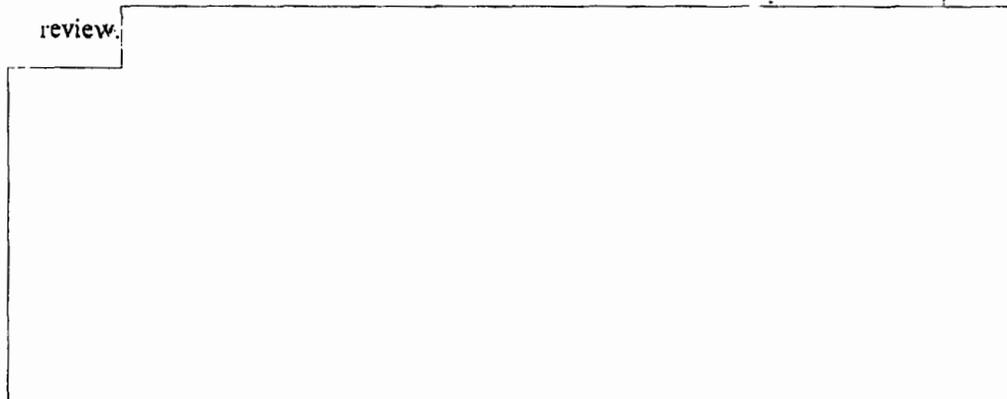


- The document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods



Ruling: The Second Circuit ordered this document produced for *in camera*

review.

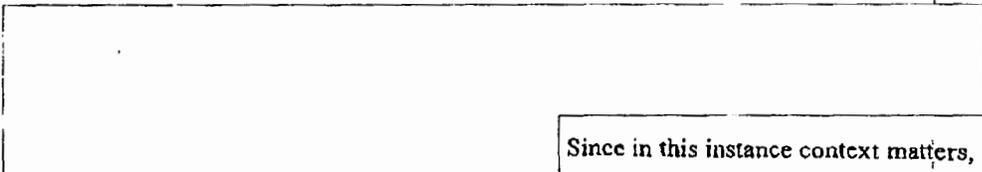


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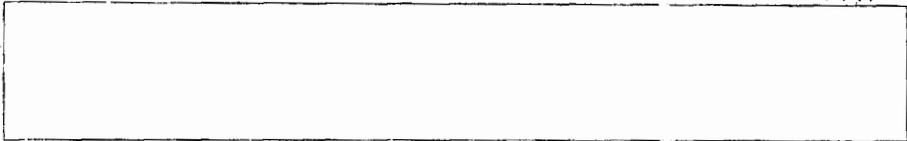
Since in this instance context matters,

I do not believe the bullet points can reasonably be segregated from the sentence beginning "Second" that precedes them, and as to that sentence (and the rest of the document) there has been no waiver of FOIA exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU.. Therefore, Document 8 need not be produced.

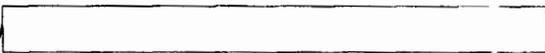
If the Court of Appeals were to disagree with my conclusion that context matters, then it is obvious that the bullet points at the bottom of page 5 and the top of page 6 could be extracted and produced. I see no reason to do that; it appears that all, or nearly all, of that information is contained in the portions of Document 9 that the Government has already produced.

Document No. 9: Classified DOJ white paper dated May 25, 2011, entitled *Legality of a Lethal Operation by the CIA Against a U.S. Citizen*, drafted for Congress and presenting legal analysis regarding the legal basis for the CIA to use lethal force against a U.S. citizen abroad in certain circumstances. A redacted version of this document has been released to plaintiffs. (U) The Government asserts that:

- The withheld portions of this document are exempt under Exemption (b)(1)



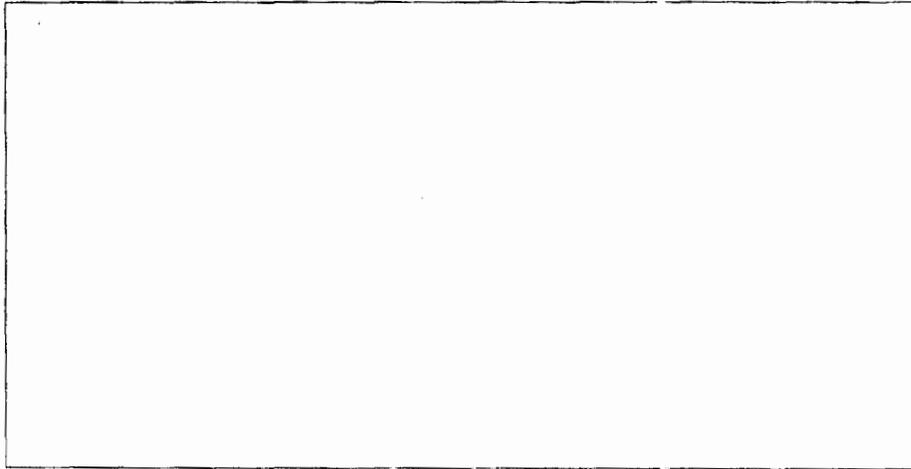
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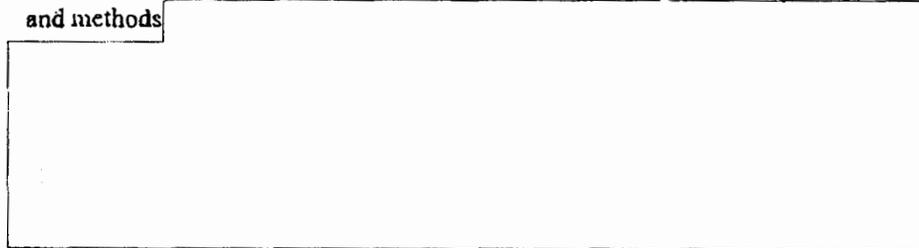
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- The withheld portions of this document are exempt under Exemption (b)(3) (National Security Act) because they would reveal sensitive intelligence sources and methods



Ruling: The Second Circuit ordered *in camera* review of this document. I note that the Government's rationale for releasing a redacted version of Document 9 and withholding the rest of the document rests entirely on the finding that there has been no waiver of FOIA exemptions for [redacted]

Ruling After In Camera Review: The portions of the document that have not already been produced by the Government need not be produced.

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(4) Documents Reflecting Internal Executive Branch Legal Deliberations
(Doc. Nos. 7, 10-11, 13, 54)

This group consists of documents that were received by OLC from its Executive Branch clients; they assertedly reflect views, comments on drafts, and other deliberations regarding the appropriate legal and factual analysis of the use of targeted lethal force against a U.S. citizen in certain circumstances. (U)

Document No. 7: Classified legal memorandum [redacted]

[redacted] containing deliberations regarding the appropriate legal analysis of [redacted]

The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains classified factual information relating to [redacted]

- The document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods [redacted]

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[redacted]

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. [redacted]

[redacted]

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice. The document also reflects a back-and-forth between OLC and its Executive Branch clients concerning the content of particular OLC advice, and such give-and-take inevitably reflects OLC's view regarding the appropriate legal analysis in the circumstances under deliberation, as well as the client's response. As such, the document is also protected by the attorney-client privilege. (U)

Ruling: The Second Circuit ordered *in camera* review of this document. To the extent that this document discusses [redacted]

[redacted] there has been no waiver of exemptions by virtue of the release of the

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OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU [redacted]

[redacted]

It is also possible that any such discussion cannot reasonably be segregated from discussion [redacted], as to which there has been no waiver. It is not possible to reach any sort of conclusion without seeing the document.

Ruling After In Camera Review: [redacted]

[redacted]

I conclude that

this memorandum should not be produced. It does not reproduce the legal analysis as to which there has been waiver [redacted]. It is a quintessential deliberative document. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

Document No. 10: [redacted]

[redacted]

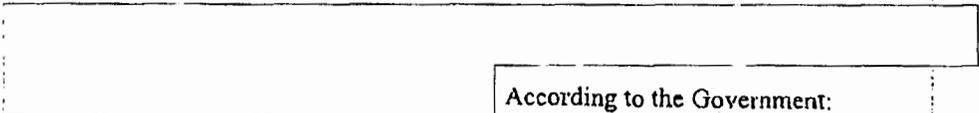
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According to the Government:

- The document is exempt under Exemption (b)(1) because it contains classified factual information concerning the [redacted]. The Second Circuit redacted such information from the OLC-DOD Memorandum. (TS/[redacted]NF)
- The document is exempt under Exemption (b)(3) because it would reveal sensitive intelligence sources and methods protected from disclosure under the National Security Act, [redacted].
- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was prepared in connection [redacted]. It is deliberative because it constitutes advice, views, and legal deliberations used by decisionmakers, [redacted] and others who received legal advice from the Attorney General during interagency deliberations. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. Importantly, although the Second Circuit concluded that there had been a waiver of privilege as to the *final* legal analysis in the OLC-DOD Memorandum, nothing in the Second Circuit's opinion suggests that the waiver could extend to undisclosed attorney-client communications or inter-agency deliberations concerning the legal analysis in the document. (U)
- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made in connection with a request for legal advice. As such, the document is also protected by the attorney-client privilege. (U)

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Ruling: The Second Circuit did not order *in camera* review for this document, but it must be produced for such review nonetheless. Again, the issue is segregability;

[redacted]

OLC must produce Document 10 for *in*

camera segregability review.

Ruling After In Camera Review: Information as to which exemptions have been waived is not reasonably segregable – indeed, is not segregable at all – from information [redacted] as to which there has been no waiver of exemptions. The document need not be produced.

Document No. 11: [redacted]

The Government

asserts that:

- The document is exempt under Exemption (b)(1) because it contains classified intelligence reporting about [redacted]
- The document is exempt under Exemption (b)(3) [redacted]

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- [REDACTED]
- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was prepared in connection with [REDACTED]. It is deliberative because it constitutes advice, views, and legal deliberations used by decisionmakers, [REDACTED] and others who received legal advice from the Attorney General during interagency deliberations. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. Importantly, although the Second Circuit concluded that there had been a waiver of privilege as to the *final* legal analysis in the OLC-DOD Memorandum, nothing in the Second Circuit's opinion suggests that the waiver could extend to undisclosed drafts of that document, comments on drafts, or related intra- or inter-agency deliberations concerning the legal analysis in the document, let alone comments on the factual section of the document, which the Second Circuit redacted in its entirety. (U)
- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice. As such, the document is also protected by the attorney-client privilege. (U)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. This document was prepared a month before the OLC-DOD Memorandum was finalized, and it contains

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obviously predecisional comments about an earlier draft of that document. Drafts of the OLC-DOD Memorandum are not comprehended in the Second Circuit's ruling, which applies to final legal advice that was disclosed publicly by virtue of the Draft White Paper. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 12: [REDACTED]

The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains classified factual information concerning [REDACTED]. The Second Circuit redacted such information from the OLC-DOD Memorandum. (TS/[REDACTED]NF)
- The document is exempt under Exemption (b)(3) because it would reveal sensitive intelligence sources and methods protected from disclosure under the National Security Act, [REDACTED]. (TS/[REDACTED]NF)
- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was prepared in connection with [REDACTED]. It is deliberative because it constitutes advice, views, and legal deliberations used by OLC in its preparation of legal advice for decisionmakers. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. Importantly, although the Second Circuit concluded that there had been a waiver of privilege as to the *final* legal analysis in the OLC-DOD Memorandum, nothing in the Second Circuit's opinion suggests that the waiver could extend to undisclosed attorney-client

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communications or inter-agency deliberations concerning the legal analysis in the document. (U)

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice in connection with a request for legal advice. As such, the document is also protected by the attorney-client privilege. (U)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. This document was prepared prior to the release of the OLC-DOD Memorandum and it contains obviously predecisional comments about a draft of that document. Drafts of the OLC-DOD Memorandum are not comprehended in the Second Circuit's ruling, which applies to final legal advice that was disclosed publicly by virtue of the Draft White Paper. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 13: [redacted]

[redacted] providing comments on an excerpt of a draft of Document 5, the OLC-DOD Memorandum. Although this document originally was classified, it no longer contains classified information. However, the Government argues that:

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was prepared in connection with a contemplated future counterterrorism operation. It is deliberative because it constitutes advice, views, and legal deliberations provided to OLC to assist in OLC's preparation of final legal advice for decisionmakers. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting

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the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. Importantly, although the Second Circuit concluded that there had been a waiver of privilege as to the *final* legal analysis in the OLC-DOD Memorandum, nothing in the Second Circuit's opinion suggests that the waiver could extend to undisclosed drafts of that document, comments on drafts, or related intra- or inter-agency deliberations concerning the legal analysis in the document. (U)

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice. The document also reflects a back-and-forth between OLC and its Executive Branch clients. Such give-and-take inevitably reflects OLC's view regarding the appropriate legal analysis in the circumstances under deliberation, and thus contains implicit legal advice from OLC to those clients. As such, the document is also protected by the attorney-client privilege. (U)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. This document was prepared prior to the release of the OLC-DOD Memorandum and it contains obviously predecisional comments about a draft of that document. Drafts of the OLC-DOD Memorandum are not comprehended in the Second Circuit's ruling, which applies to final legal advice that was disclosed publicly by virtue of the Draft White Paper. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 54:

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[REDACTED] The attached draft DOJ White Paper is dated October 25, 2011, and contains handwritten notes. Although this document originally was classified, it no longer contains classified information. However, the Government asserts that:

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was prepared in connection with contemplated future decisions about potential disclosures to Congress regarding this topic. It is deliberative because it constitutes advice, views, and legal deliberations used by decisionmakers, including the Attorney General, the National Security Advisor, and others. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. Importantly, although a draft version of the DOJ White Paper, dated November 2011, has been officially acknowledged, the version attached to this document is an earlier version, dated October 25, 2011, that contains handwritten notes and comments. Nothing in the Second Circuit's opinion suggests that the waiver as to the legal analysis in the version released to the public could extend to undisclosed drafts of that document, comments on drafts, or related intra- or inter-agency deliberations concerning the legal analysis in the document. (U)
- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice, and the document may also reflect a back-and-forth between OLC and its Executive Branch clients, and such give-and-take inevitably reflects OLC's view regarding the appropriate legal analysis in the circumstances under deliberation, and thus contains implicit legal advice from OLC to those clients. As such, the document is also protected by the attorney-client privilege. (U)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject

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to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

(5) Documents Containing Draft OLC Legal Analysis or Other Preliminary OLC Work Product (Doc. Nos. 50, 120-22, 144-47, 243)

As all of these documents were ordered produced by the Second Circuit for in camera inspection, I will first set out the Government's argument for why each one need not be produced, and at the end of that I will discuss and rule on them as a group.

Document No. 50: Internal OLC draft insert to draft legal analysis of the legal basis for the use of lethal force against a U.S. citizen abroad in certain circumstances. The document consists of a draft two-paragraph insert, dated October 24, 2011, to the draft DOJ White Paper. Although this document originally was classified, it no longer contains classified information. However, the Government asserts that:

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document contains attorneys' informal views and preliminary thoughts and reactions, and is integral to the development of OLC's final legal analysis of the issue at hand. The document is thus predecisional to both the final legal analysis of the question at hand, and to contemplated future decisions about potential disclosures to Congress or the public regarding this topic. And it is deliberative, because is a draft or compilation of preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions regarding potential disclosures. It does not fall within the scope of the waiver found by the Second Circuit because, although the Department of Justice subsequently acknowledged a November 2011 draft of a DOJ White Paper, this document consists of draft language for possible inclusion in an earlier draft of the White Paper. Nothing in the Second Circuit's opinion suggests that in acknowledging the November 2011 draft DOJ White Paper, the Department or OLC had waived privileges as to earlier drafts or other work product relating to that legal analysis. (U)
- The document is exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. Although the document may not have been actually conveyed to OLC's Executive Branch clients, disclosure of this internal work

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product would disclose the confidential fact that OLC's legal advice had been requested with regard to the draft DOJ White Paper. In addition, most of this internal draft work product contains confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. (U)

Document 50 is an email from Virginia Seitz of OLC to herself. It consists of a proposed insert to the Draft White Paper, between its first and second sentences. It consists of a brief précis of the legal reasoning that it explicated in greater detail in the Draft White Paper and the OLC-DOD Memorandum. Every statement in this document appears elsewhere in one or both of those documents, one of which was leaked to NBC News, the other of which the Second Circuit found to be ineligible for protection from FOIA disclosure because of the Government's waiver of all FOIA exemptions. It must be disclosed.

Document Nos. 120 and 243: Document 120 is an undated internal OLC outline of classified factual information pertaining to Aulahi and AQAP, provided in confidence in connection with interagency request for legal advice, and prepared in connection with drafting legal advice regarding a contemplated operation against Aulahi. The document also contains a brief outline of topics to be addressed in legal analysis, as well as a list of "outstanding issues" to be discussed. Document 243 is an electronic draft of Document 120. The Government asserts that:

- The documents are exempt under Exemption (b)(1) because they contain classified information about intelligence sources and methods [REDACTED] [REDACTED] as a basis for its legal analysis. The document includes detailed intelligence about al-Qa'ida, AQAP, and leaders of those groups, including Aulahi, which has not been officially acknowledged. Disclosure of this information would tend to reveal the nature of the intelligence sources utilized, as well as the specific information obtained from these sources, which could reasonably be expected to harm national security. [REDACTED]

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[REDACTED]

[REDACTED] The information in this document is a precursor to the factual background and analysis that the Second Circuit redacted from the OLC-DOD Memorandum. [REDACTED]

- The documents are exempt under Exemption (b)(3) and the National Security Act because disclosure would reveal sensitive intelligence sources and methods

[REDACTED]

- The documents are exempt under Exemption (b)(5) because they are covered by the deliberative process privilege. Such informal OLC attorney work product generated in connection with the preparation and provision of OLC legal advice is quintessential deliberative material. The document contains attorneys' informal views and preliminary thoughts and reactions, and is integral to the development of OLC's final legal analysis of the issue at hand. The document is thus predecisional to both the final legal analysis of the question at hand, and to the contemplated future counterterrorism operation to which the analysis relates. And it is deliberative, because it is a draft or collection of preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions regarding operations or potential disclosures. Importantly, although the Second Circuit found a waiver as to final legal analysis in the OLC-DOD Memorandum, nothing in its analysis suggests that the waiver extends to preliminary attorney work product that preceded the final document. (U)
- The documents are also exempt under Exemption (b)(5) because they are covered by the attorney-client privilege. Although it may not have actually been conveyed to OLC's Executive Branch clients, disclosure of this internal work product would disclose facts and information deemed significant by OLC in the preparation of its legal advice. In addition, this internal draft work product contains confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. (U)

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Document No. 121: Undated internal OLC outline of classified factual information provided in confidence in connection with interagency request for legal advice, and prepared in connection with drafting legal advice regarding a contemplated operation against Aulahi. The outline contains a list of topics to be discussed with, and questions to be posed to, clients in connection with drafting legal advice. The Government asserts that:

- The document is exempt under Exemption (b)(1) and the National Security Act because it contains classified information about intelligence sources and methods [redacted] as a basis for its legal analysis. Disclosure of this information would tend to reveal the nature of the intelligence sources utilized, as well as the specific information obtained from these sources, which could reasonably be expected to harm national security. The document also contains [redacted].
[redacted] This document contains information that is similar to information in the factual background and analysis that the Second Circuit redacted from the OLC-DOD Memorandum. [redacted]

- The document is exempt under Exemption (b)(3) and the National Security Act because it would reveal sensitive intelligence sources and methods [redacted]

[redacted]

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. Such informal OLC attorney work product generated in connection with the preparation and provision of OLC legal advice is quintessential deliberative material. The document contains attorneys' informal views and preliminary thoughts and reactions, and is integral to the development of OLC's final legal analysis of the issue at hand. The document is thus predecisional to both the final legal analysis of the question at hand, and to the

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contemplated future counterterrorism operation to which the analysis relates. And it is deliberative, because it is a draft or collection of preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions regarding operations or potential disclosures. Importantly, although the Second Circuit found a waiver as to final legal analysis in the OLC-DOD Memorandum, nothing in its analysis suggests that the waiver extends to preliminary attorney work product that that preceded the final document. (U)

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. Although it may not have actually been conveyed to OLC's Executive Branch clients, disclosure of this internal work product would disclose facts and information deemed significant by OLC in the preparation of its legal advice. In addition, this internal draft work product contains confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. (U)

Document No. 122: Undated internal OLC outline containing classified factual information provided in confidence in connection with interagency request for legal advice, prepared in connection with drafting legal advice, and identifying "follow up" to be done in connection with drafting legal advice, regarding a contemplated operation against Aulajqi. The Government asserts that:

- The document is exempt under Exemption (b)(1) and the National Security Act because it contains classified information about intelligence sources and methods [redacted] as a basis for its legal analysis. The document also contains specific information regarding [redacted]

[redacted]

- The document is exempt under Exemption (b)(3) and the National Security Act because it would reveal sensitive intelligence sources and methods [redacted]

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- [REDACTED]
- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. Such informal OLC attorney work product generated in connection with the preparation and provision of OLC legal advice is quintessential deliberative material. The document contains attorneys' informal views and preliminary thoughts and reactions, and is integral to the development of OLC's final legal analysis of the issue at hand. The document is thus predecisional to both the final legal analysis of the question at hand, and to the contemplated future counterterrorism operation to which the analysis relates. And it is deliberative, because it is a draft or collection of preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions regarding operations or potential disclosures. Importantly, although the Second Circuit found a waiver as to final legal analysis in the OLC-DOD Memorandum, nothing in its analysis suggests that the waiver extends to preliminary attorney work product that preceded the final document. (U)
 - The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. Although it may not have actually been conveyed to OLC's Executive Branch clients, disclosure of this internal work product would disclose facts and information deemed significant by OLC in the preparation of its legal advice. In addition, this internal draft work product contains confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. (U)

Document No. 144: Undated, internal, draft talking points entitled "Legal Basis for Use of Force Against Al Qaeda." Although this document originally was classified, it no longer contains classified information. The Government asserts that:

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. It is an internal OLC outline prepared in connection with the drafting of legal advice. Such informal OLC attorney work product generated in connection with the preparation and provision of OLC legal advice is quintessential deliberative material. The document contains attorneys' informal views and preliminary thoughts and reactions, and is integral to the development of OLC's final legal analysis of the issue at hand. The document is thus predecisional to both the final legal analysis of the question at hand, and to

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the contemplated future counterterrorism operation to which the analysis relates. And it is deliberative, because it is a draft or collection of preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions regarding operations or potential disclosures. Importantly, although the Second Circuit found a waiver as to final legal analysis in the OLC-DOD Memorandum, nothing in its analysis suggests that the waiver extends to preliminary attorney work product that that preceded the final document. (U)

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. Although it may not have actually been conveyed to OLC's Executive Branch clients, disclosure of this internal work product would disclose facts and information deemed significant by OLC in the preparation of its legal advice. In addition, this internal draft work product contains confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. (U)

Document Nos. 145-147: Document 145 is an undated internal outline of classified facts and legal analysis prepared in connection with the drafting of legal advice, and entitled "Outline of Analysis: Possible Lethal Operation Against Anwar Aulaqi."

Document 146 is a copy of Document 145 with handwritten attorney notations.

Document 147 is a copy of Document 145 with different attorney handwritten notations.

The Government asserts that:

- These documents are exempt under Exemption (b)(1) because they contain classified information about intelligence sources and methods [redacted] as a basis for its legal analysis. The outline includes detailed intelligence about al-Qa'ida, AQAP, leaders of those groups, including Aulaqi, which has not been publicly acknowledged. Disclosure of this information would tend to reveal the nature of the intelligence sources utilized, as well as the specific information obtained from these sources, which could reasonably be expected to harm national security. [redacted]

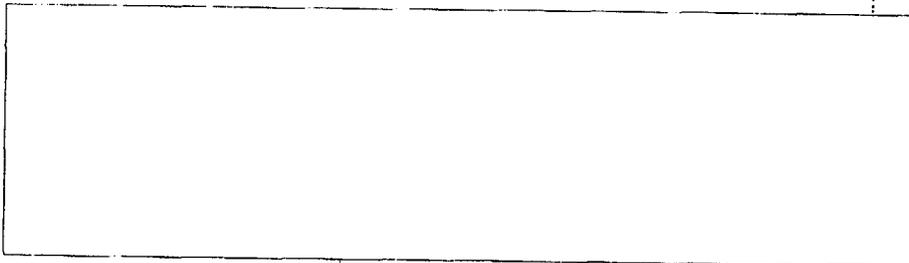
- The documents are exempt under Exemption (b)(3) and the National Security Act because they would reveal sensitive intelligence sources and methods [redacted]

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- The documents are exempt under Exemption (b)(5) because they are covered by the deliberative process privilege. Such informal OLC attorney work product generated in connection with the preparation and provision of OLC legal advice is quintessential deliberative material. The outline contains attorneys' informal views and preliminary thoughts and reactions, and is integral to the development of OLC's final legal analysis of the issue at hand. The outline is thus predecisional to both the final legal analysis of the question at hand, and to the contemplated future counterterrorism operation to which the analysis relates. And it is deliberative, because it is a draft or collection of preliminary thoughts regarding legal advice to be used by decisionmakers regarding such future decisions regarding operations or potential disclosures. Importantly, although the Second Circuit found a waiver as to final legal analysis in the OLC-DOD Memorandum, nothing in its analysis suggests that the waiver extends to undisclosed drafts or other attorney work product that preceded the final document. In addition, the handwritten notations on Documents 146 and 147 are part of OLC's deliberative process of preparing draft legal advice, and thus are also protected by the deliberative process privilege. (U)
- The documents are also exempt under Exemption (b)(5) because they are covered by the attorney-client privilege. Although it may not have actually been conveyed to OLC's Executive Branch clients, disclosure of this internal work product would disclose the confidential fact that OLC's legal advice had been requested on these topics. In addition, this internal draft work product contains confidential information provided to OLC in connection with a request for legal advice. The attorney-client privilege protects such client confidences. (U)

Ruling After In Camera Review: The only documents in this group that require extended discussion are 144 and 145. Documents 120/243, 121 and 122 consist of intelligence information and analysis, or questions about the same; to the extent that there are any references to legal matters [REDACTED] they are inextricably intertwined

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with this analysis and cannot reasonably be segregated. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced, They need not be produced.

Document 144 consists of a set of draft talking points concerning the legal basis for using force against Al Qaeda. Most of the document actually does not address that issue. [REDACTED]

[REDACTED] The rest of the document may touch on legality, but it does not track the information disclosed in the OLC-DOD Memorandum or the Draft White Paper. However, it does touch on matters falling under Listed Fact # 4 of the "officially acknowledged" information as found by the court earlier in this decision. Accordingly, I conclude that Document 144 should be produced in redacted form. The last paragraph should be redacted.

Document 145 is an outline of analysis of a possible lethal operation against Aulahi. Under the heading [REDACTED]

[REDACTED] However, this court has concluded that such information need not be produced, albeit only because the Second Circuit redacted such information in *New York Times*. (See *supra.*, at pages 9-10) In any event, that information (much of which has been publicly disclosed in other documents) is too inextricably intertwined with information as to which there has been no waiver of

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exemptions by virtue of the release of the OLC-DOD Memorandum and the Draft White Paper to permit it to be reasonably segregated.

That said, there is material here that can be disclosed. Under the heading "Potential Constitutional Issues," the first bullet point on page 2 is derived directly from the legal analysis as to which exemptions have been waived; with the exception of the last sentence of that paragraph [REDACTED], it should be produced. The rest of the bullet points under that heading do not address potential constitutional issues, but issues about [REDACTED] [REDACTED] those portions of the document do not need to be produced.

Documents 146 and 147 need not be produced, since they are simply 145 with handwritten notes on them, which handwritten notes fall within Exemption (b)(5), and as to which there has been no waiver.

(6) Documents Containing Factual Information Provided to OLC In Connection with Requests for Legal Advice (Doc. Nos. 57-74, 76-83, 87-103, 106, 110, 114, 117-119)

According to the Government, this category of documents consists of classified factual information provided to OLC in connection with requests for legal advice (as well as inter-agency comments on draft factual excerpts of OLC legal advice, which excerpts were derived from classified factual information provided to OLC in connection with requests for legal advice).

The Government represents that the documents in this group contain the underlying factual material on which OLC relied in drafting the February 2010 and July

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2010 legal memoranda concerning a contemplated operation against Anwar Aulaqi, [REDACTED]

[REDACTED]

The Second Circuit redacted from the July 2010 OLC-DOD Memorandum (Document No. 5) the entire factual background section of that memorandum. *See The New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014) (“We . . . recognize that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts. Aware of that possibility, we have redacted . . . the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities.”); *Id.* at 115 & 125 (redacting all of Part I of OLC-DOD Memorandum, [REDACTED]

[REDACTED]

id. at 113 (agreeing with this

court’s conclusions that the OLC-DOD Memorandum “was properly classified and that no waiver of any operational details in that document has occurred”). [REDACTED]

[REDACTED]

In its First Remand Decision, and also in its denial of reconsideration of that decision, this Court recognized that the Second Circuit “repeatedly rejected any contention that the protections of FOIA Exemptions 1, 3 and 5 had been waived as to

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operational details . . . or other intelligence information.” First Remand Decision at 11⁹; see also Order dated December 9, 2014 (“the Court of Appeals has concluded that the Government has waived FOIA exemptions *only* to the extent of legal analysis” (emphasis in original)).

[redacted]

The Government thus argues that all of the documents in this category are exempt for the same reasons that

[redacted]

Specifically, the Government asserts that:

- The documents in this category are exempt under Exemption (b)(1) because they contain currently and properly classified information pertaining to intelligence sources and methods. The documents contain specific intelligence

[redacted]

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- To the extent the documents contain information derived from human sources, the release of such information also could place such human sources at risk and could impede the CIA's ability to obtain time-sensitive intelligence and to recruit additional similarly-positioned assets in the future. (U)
- To the extent the documents contain information derived from signals intelligence, the release of such information also would tend to reveal the nature and technical capabilities and limitations of the U.S. government's signals intelligence. (U)

○

○

- For all of these reasons, release of these documents could reasonably be expected to cause damage, including exceptionally grave damage, to national security. (U)
- The documents in this category are exempt under Exemption (b)(3) and the National Security Act because they would reveal sensitive intelligence sources

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and methods employed by the CIA and the rest of the Intelligence Community for the reasons described above. (U)

[redacted]

- Some of the documents in this category contain names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. (U)
- The documents in this category are exempt under Exemption (b)(5) because they are covered by the deliberative process privilege. The fact that these documents are in OLC's possession reflects Executive Branch deliberations regarding what information is relevant to Executive Branch decisions about the [redacted]. Disclosing the documents would reveal that OLC and its Executive Branch clients considered the information contained in the documents potentially relevant to the determination

[redacted]

The fact that OLC has possession of the particular factual information contained in the documents in this category is therefore protected by the deliberative process privilege. In some of the documents are deliberative for the additional reason that they consist of answers to specific questions posed by OLC regarding factual matters relevant to OLC's advice (Doc. Nos. 94 and 95) or comments on factual excerpts of draft OLC advice, including redlined comments (Doc. Nos. 106 and 114). [redacted]

- The documents in this category are also exempt under Exemption (b)(5) because they are covered by the attorney-client privilege. The factual information in these documents was provided to OLC by its Executive Branch clients in confidence and in connection with requests for legal advice. The documents therefore are privileged attorney-client communications. [redacted]

[redacted]

Again, the attorney-client privilege protects such client confidences. In some of the documents are attorney-client privileged for

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the additional reason that they consist of answers to specific questions posed by OLC to its Executive Branch clients regarding factual matters relevant to OLC's advice (Doc. Nos. 94 and 95) or client comments on factual excerpts of draft OLC advice, including redlined comments (Doc. Nos. 106 and 114). [REDACTED]

- As to Document 81 only, the Government offers an additional reason why it need not be produced: [REDACTED]

It contends that this information was compiled for law enforcement purposes, so that its disclosure would adversely affect ongoing law enforcement proceedings (Exemption 7(A)). The Government also argues that this document contains information the disclosure of which would present a danger to individuals (Exemption 7(F)) and reasonably could be expected to constitute (Exemption 7(C)) and/or would constitute a clearly established (Exemption 6) invasion of personal property. (S [REDACTED])

Ruling: Based on the Government's Vaughn Index description, this court would not have directed *in camera* review of any of these documents, for substantially the reasons articulated by the Government. However, most of them appear on the list of documents as to which the Second Circuit ordered *in camera* review. Accordingly, with the exception of Documents 69, 72, 80, 81, 82, 87, 91, 92, 94, 101, 103, 106 and 114, the documents in this group must be produced for *in camera* review.

As to the documents listed in the preceding sentence, I conclude that, as to each of them individually, there has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that Documents 69, 72, 80, 81, 82, 87, 91, 92, 94, 101, 103, 106 and 114 need not be produced.

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Ruling After In Camera Review: The Government produced the rest of the documents in this group for *in camera* review, following which this court declines to order the release of any of these documents, or any portion thereof, for substantially the reasons articulated by the Government, which are reprinted above. Many, perhaps most, of these documents contain nothing (or almost nothing) but raw intelligence data --

[redacted]

as well as assessment of that information, principally about the [redacted]

[redacted]

A large number of these documents, including all those prepared [redacted]

[redacted] do not mention Aulaqi, [redacted] let alone deal with the

issues comprehended in the FOIA requests. For documents prepared [redacted]

[redacted] mention of Aulaqi and his role in AQAP become more frequent and more

lengthy, as he grows in prominence in connection with AQAP. That is only to be

expected, since OLC obtained these documents in the course of its preparation of the

OLC-DOD Memorandum. In particular, Documents 64, 65, 66, 70, 71, 73, 76, 83, 89, 90,

91 and 95 assess, in increasing detail as the date becomes later, the role of Aulaqi in

AQAP and various of its prior and perceived potential plots. They contain, for example,

speculation about his involvement in the Christmas 2009 failed airplane bombing, which

[redacted]

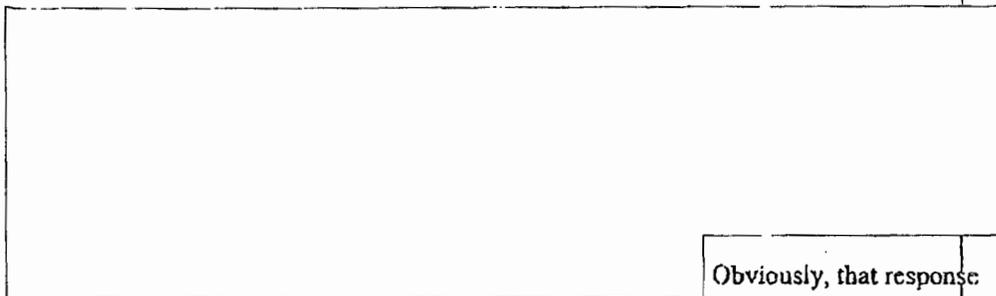
They fall within this court's ruling on Listed Fact #6.

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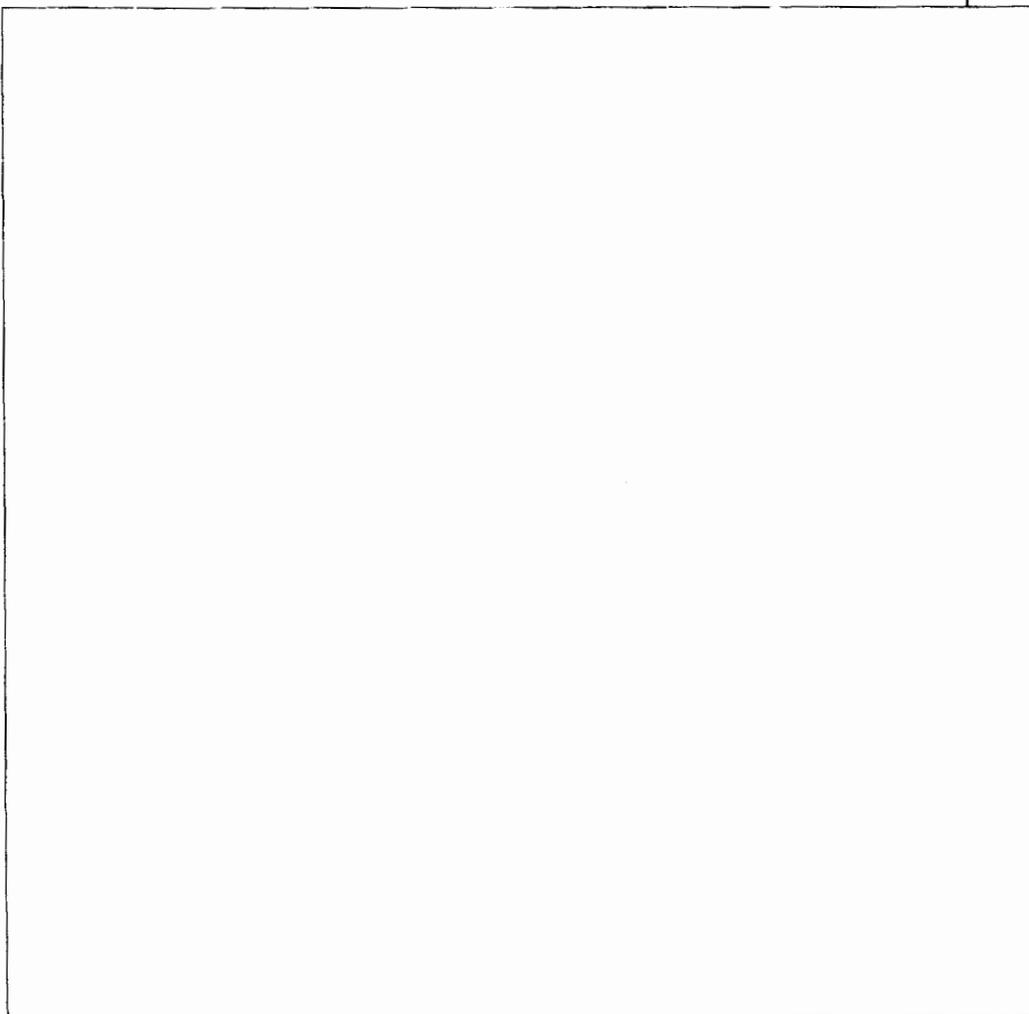
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Obviously, that response

has nothing whatever to do with the FOIA requests presently before the court.



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and contains attorney-client privileged material that does not relate to anything that was waived within the ambit of the Second Circuit's first decision in *New York Times*. Most of the material in these documents is of the sort that was redacted from the OLC-DOD Memorandum prior to its release in accordance with the Second Circuit's ruling in *New York Times*.

In sum, these documents are exactly what the Government says they are. The very fact that they were given to OLC in connection with the preparation of the OLC-DOD Memorandum places them within the ambit of *Lead Industries Ass'n, Inc., v. Occupational Safety and Health Administration*, 610 F. 2d 70, 85 (2d Cir. 1979) (discussed more fully at page 110, *infra*.) As far as this court is concerned, there has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

[REDACTED]

(Document Nos. 40, 244-258, 260, 262-265, 268-293)

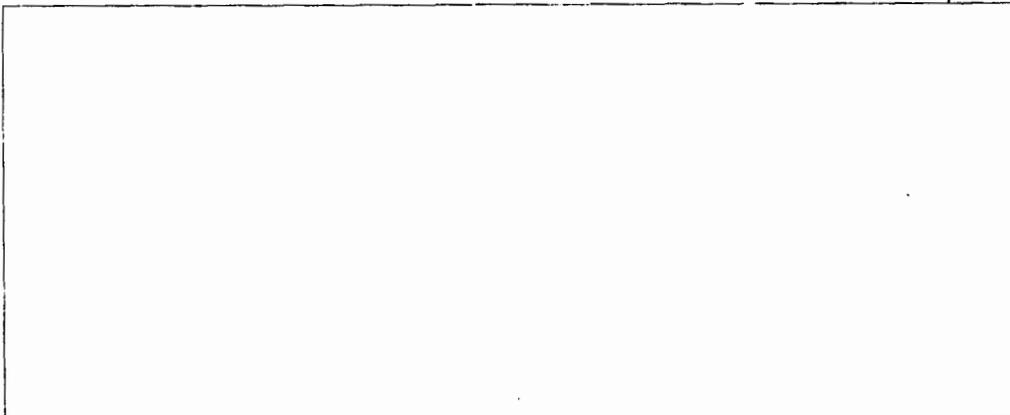
[REDACTED]

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Ruling: The Second Circuit allowed the government to redact from the classified OLC index [redacted] See *New York Times*, 756 F.3d at 123 (permitting complete redaction of entries 244-49, 251-61, 266-68, and all listings after 271). At the government's request, the Second Circuit also removed from its opinion a reference to [redacted] See *id.* at 123 & n.23 (referring to redaction implementing Second Circuit's May 28, 2011 order). Since the Second Circuit has held even the index entries relating to these documents need not be disclosed, the Government argues that the documents themselves are plainly exempt from disclosure in their entirety. (S/NF)

However, the Second Circuit required the Government to produce the numbers, titles and descriptions in the index listings for documents 250, 262-265, and 269-71, and directed this court to review those documents *in camera* as long as the ACLU contested the applicability of any FOIA exemptions. *Id.* at 123. While I appreciate that the Circuit might have ruled differently had the panel known [redacted]

[redacted] I have done as commanded and reviewed those documents *in camera*.

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To short-circuit matters, I agree with the Government, for the reasons stated by the Government, that the documents in this group other than 250, 262-265 and 269-71 need not be produced (with the exception of Document 253, which will be discussed separately below). The Second Circuit specifically refused to order OLC to produce number, title and descriptive information about Documents 252-254 and 268 on the ground that

[REDACTED]

Nothing [REDACTED]

provided to the court by the ACLU, broadens the scope of what has been officially acknowledged. OLC's Vaughn Index description of these documents and its analysis of applicable FOIA exemptions indicates that none of these documents deals with those two discrete points.

Therefore, as to the documents in this group other than those that have been produced for *in camera* review, all of the exemptions claimed by the Government apply and none of those exemptions has been waived, whether by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, the documents in this group other than Documents 250, 253, 262-265 and 269-71 need not be produced.

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I have specific rulings about three documents in this group; Documents 40, 244 and 253.

Document No. 40:



- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was

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prepared in connection with [REDACTED] It is deliberative because it constitutes advice, views, and legal deliberations used by decisionmakers [REDACTED] and others who received legal advice during interagency deliberations. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. There has been no official acknowledgement [REDACTED]

(S//NF)

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice, and the document also reflects the back-and-forth between OLC and its Executive Branch clients. As such, the document is also protected by the attorney-client privilege. (U)

Ruling:

[REDACTED]

¹⁰ See Lewis Carroll, *Alice's Adventures In Wonderland*, "When I use a word, Humpty Dumpty said in rather a scornful tone, it means just what I choose it to mean-- neither more nor less."

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[Redacted]

They need not be produced.

Document No. 244:

[Redacted]

The Government

asserts that:

- The document is exempt under Exemption (b)(1) because,

[Redacted]

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[Redacted]

- The document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege.

[Redacted]

- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege.

[Redacted]

Ruling:

[Redacted]

I will not order its production

now.

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Document No. 253 [redacted]

The Government asserts that:

- This document is exempt under Exemption (b)(5) because it is covered by the deliberative process privilege. The document is predecisional because it was prepared in connection with [redacted] It is deliberative because it constitutes advice used by decisionmakers, including [redacted] and others who received legal advice from the Attorney General during interagency deliberations. Compelled disclosure of the document would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. Protecting the document from compelled disclosure is critical to ensuring that Executive Branch attorneys will examine legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters. (U)
- The document is also exempt under Exemption (b)(5) because it is covered by the attorney-client privilege. The document reflects confidential client communications to OLC and the Department of Justice made for the purpose of seeking legal advice. The document also reflects a back-and-forth between OLC and its Executive Branch clients, and such give-and-take inevitably reflects OLC's view regarding the appropriate legal analysis in the circumstances under deliberation, and thus implicitly would reveal legal advice from OLC to those clients. As such, the document is also protected by the attorney-client privilege. (U)

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Ruling: The Second Circuit did not require the Government to disclose the number, title or description of this document, [redacted]

[redacted]

However, to the extent that this document contains the legal advice contained in the OLC-DOD Memorandum, it would not be exempt from disclosure, assuming [redacted] could reasonably be segregated from that legal advice. [redacted]

[redacted]

So while the Second Circuit did not direct production of this document for *in camera* review, this court orders it produced for that purpose.

[redacted]

Ruling After *In Camera* Review: The Government did not take the court up on its suggestion that it figure out how to redact this document so that portions of it could be produced, but instead produced the document for *in camera* review. Having reviewed the document, I understand why. [redacted]

[redacted]

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[REDACTED]

Obviously, that

is not the view that the Government eventually adopted. As such, this predecisional, deliberative document, [REDACTED]

[REDACTED] is exempt under Exemption (b)(5). There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White

"It is only a guess, but I conjecture that the attachment was prepared [REDACTED]"

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Paper, or any other public statement that has been brought to the attention of the court by the ACLU. The document need not be produced.

I now turn to the OLC documents in this group that the Court of Appeals asked me to review:

Document 250 consists of [redacted]

[redacted]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5). It is obviously predecisional and deliberative; it is probably attorney client privileged; and it contains [redacted] of the sort redacted by the Second Circuit in *New York Times I*. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. It need not be produced.

Document 262 consists of [redacted]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), for the same reasons as Document 250. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. It need not be produced.

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Document 263

[Redacted]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), for the same reasons as Document 250. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other statement that has been made public.

Document 264

[Redacted]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), for the same reasons as Document 250. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

Document 265

[Redacted]

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Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), for the same reasons as Document 250. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

Document 269 consists of [REDACTED]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), for the same reasons as Document 250. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

Document 270 consists of [REDACTED]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), for the same reason as Document 250. There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

Document 271 [REDACTED]

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[REDACTED]

Ruling After In Camera Review: The document is exempt under Exemptions (b)(1) and (b)(5), principally as attorney-client privileges, secondarily because the attachment is not a final document, and otherwise for the same reasons as Document 250.

[REDACTED]

There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

This court has provided sufficient information about the contents of each of these documents so that the Court of Appeals can ascertain that [REDACTED]

[REDACTED]

redacted from the first *New York Times* opinion, and no new waiver having occurred, this court is quite comfortable in concluding that the Second Circuit would not want any of these documents produced. [REDACTED]

[REDACTED]

I believe that the Court of Appeals would not have wasted this court's time with in camera review of these documents had it known that [REDACTED]

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[REDACTED]

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This concludes the court's review of the OLC Classified Vaughn Index and documents appearing thereon. To summarize: OLC must produce Documents 46, 144 and 145 with the redactions ordered by this court. Document 50 must be produced in full.

*B. Documents Appearing on the CIA Vaughn Index*¹²

(1) Documents on the Index

In preparing this portion of the decision, the court has relied on the classified Vaughn Index prepared by the CIA and submitted on November 14, 2014. In addition to the documents discussed below, some 77 "documents of interest" to the CIA were addressed in the court's discussion of the OLC Vaughn Index.

Document No. 2: Classified report, [REDACTED] prepared by the CIA Counterterrorism Center;

[REDACTED]

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information pertaining to intelligence sources and methods.

[REDACTED]

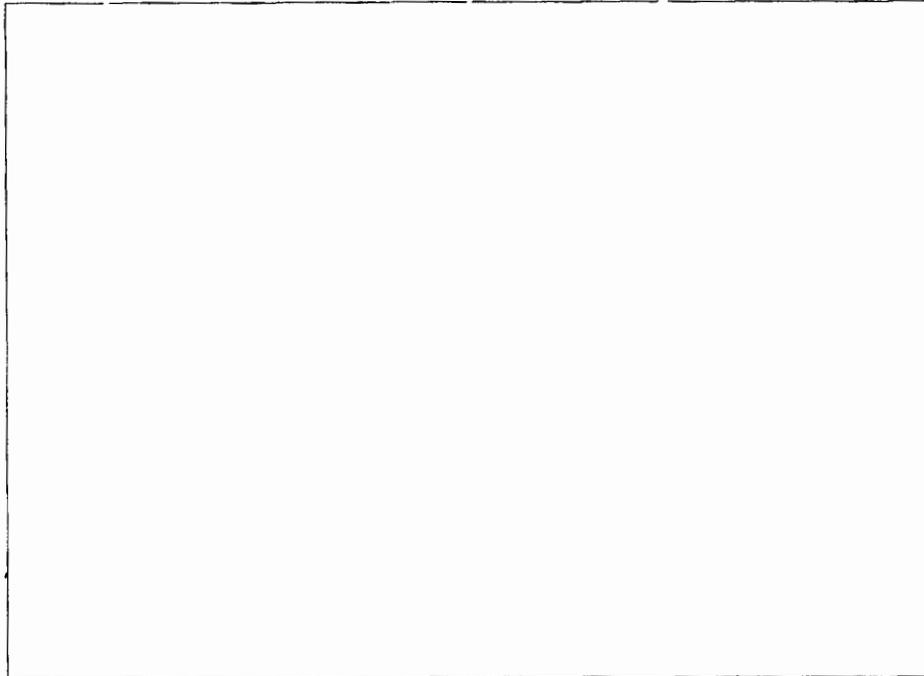
¹² Since Defendants filed their motion for summary judgment on November 14, 2014, plaintiffs have withdrawn their request for some of the documents identified by CIA and DOD as responsive. Accordingly, only those documents that plaintiffs continue to seek are addressed. Those documents are set forth on page 4 of plaintiffs' memorandum in support of their motion for partial summary judgment and in opposition to the motion for summary judgment submitted by the CIA and DOD, filed December 3, 2014.

[REDACTED]

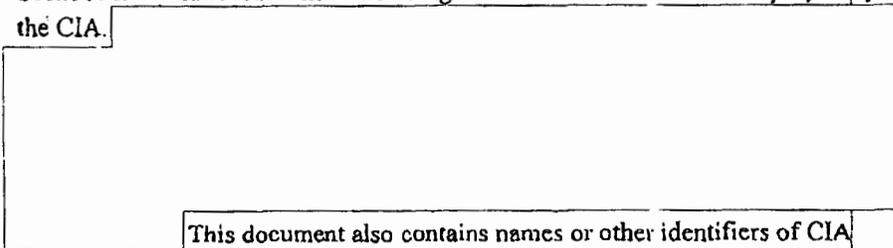
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- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA.



This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act.

- Although not noted in the CIA's initial submissions, this document is also protected by the attorney-client privilege and Exemption (b)(5) because it consists



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Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced. I specifically note that this exact type of "intelligence gathering" information was redacted from the OLC-DOD Memorandum by the Second Circuit.

Document No. 3: This document consists of two separate finished CIA intelligence products

- These intelligence products are exempt under Exemption (b)(1) because they contain currently and properly classified information

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~~(TS//NF)~~

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA. This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. (TS//NF)
- This document is protected by the attorney-client privilege and Exemption (b)(5) because it consists

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning specific facts that is applicable to all documents, I conclude that the document need not be produced. I note that this exact type of "intelligence gathering" information was redacted from the OLC-DOD Memorandum by the Second Circuit.

Document No. 12: Classified memorandum

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- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA.

- This document is protected by the deliberative process privilege and Exemption (b)(5) because

Ruling:

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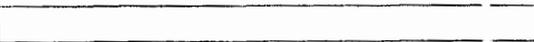
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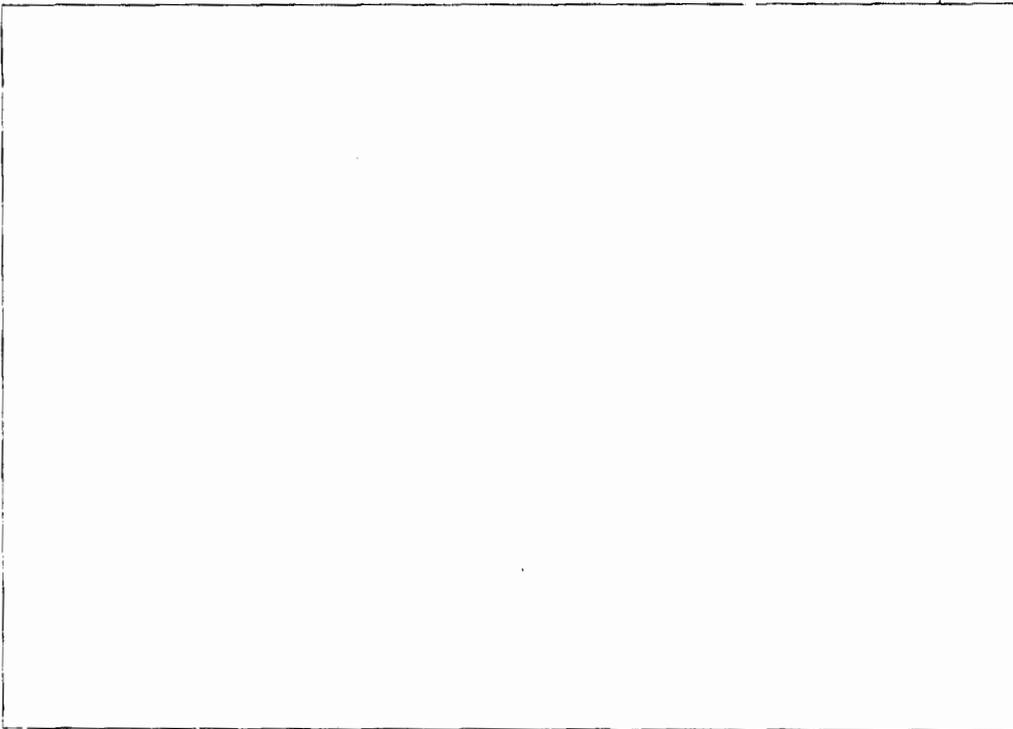
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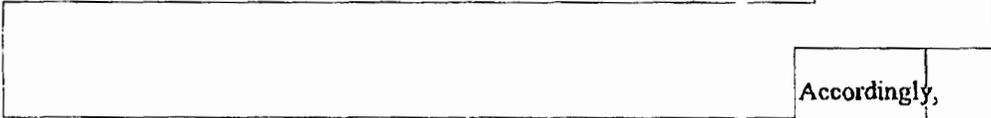
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I thus conclude that there has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU.



Accordingly,

and subject to the ruling concerning specific facts that is applicable to all documents, I conclude that this document need not be produced. I further note that this exact type of "intelligence gathering" information was redacted from the OLC-DOD Memorandum by the Second Circuit.

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Document No. 14: Classified memorandum [redacted]

The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA. [redacted]

- This document is protected by the attorney-client privilege and Exemption (b)(5) because it consists of communications between [redacted]

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[Redacted]

- This document is protected by the deliberative process privilege and Exemption (b)(5) because represents an interim stage in inter-agency discussions preceding a government decision on a litigation matter in the civil case described

[Redacted]

- This document is protected by the attorney work-product privilege and Exemption (b)(5) because it was prepared in reasonable anticipation of litigation in the civil case described above, and would reveal the attorneys' mental impressions

[Redacted]

Ruling: This document is exempt from disclosure because it is attorney work product prepared in reasonable anticipation of litigation. The other exemptions need not even be considered. There has been no waiver of the applicable exemption by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU.

Document No. 15: Classified memorandum,

[Redacted]

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[Redacted]

The

Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information

[Redacted]

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA.

[Redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act.

[Redacted]

- This document is protected by the deliberative process privilege and Exemption (b)(5) because it reflects a pre-decisional communication

[Redacted]

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- This document is protected by the presidential communications privilege and Exemption (b)(5) because it reflects a communication



Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 22: Classified *In Camera*, *Ex Parte* Declaration and Formal Claim of State Secrets Privilege and Statutory Privileges from Leon E. Panetta, CIA Director, dated 23 September 2010, discussing the specific types of classified information over which the CIA Director asserted the state secrets privilege.

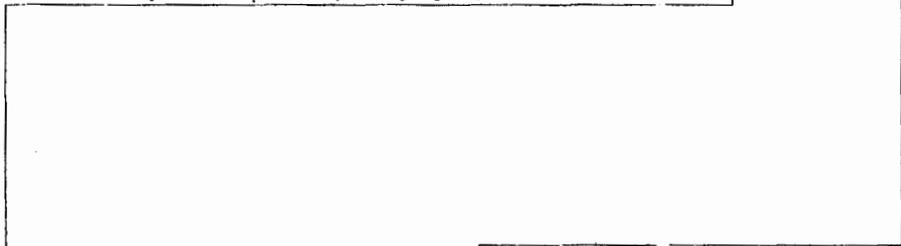


Portions of this document have been released to plaintiffs:



The Government asserts that:

- The withheld portions of the document are exempt under Exemption (b)(1) because they contain currently and properly classified information



The document also includes detailed classified intelligence reporting on Aulahi. Disclosure of this information would

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tend to reveal the sources and the methods involved in the collection, as well as the extent or limitations of the United States' knowledge of Aulahi's activities and associates. Revealing this information would compromise the human assets and the technical collection methods used to obtain specific intelligence. Release of this information could reasonably be expected to cause damage, including exceptionally grave damage, to national security. [REDACTED]

- The withheld portions of the document are exempt under Exemption (b)(3) (National Security Act) because they would reveal sensitive intelligence sources and methods employed by the CIA. [REDACTED]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

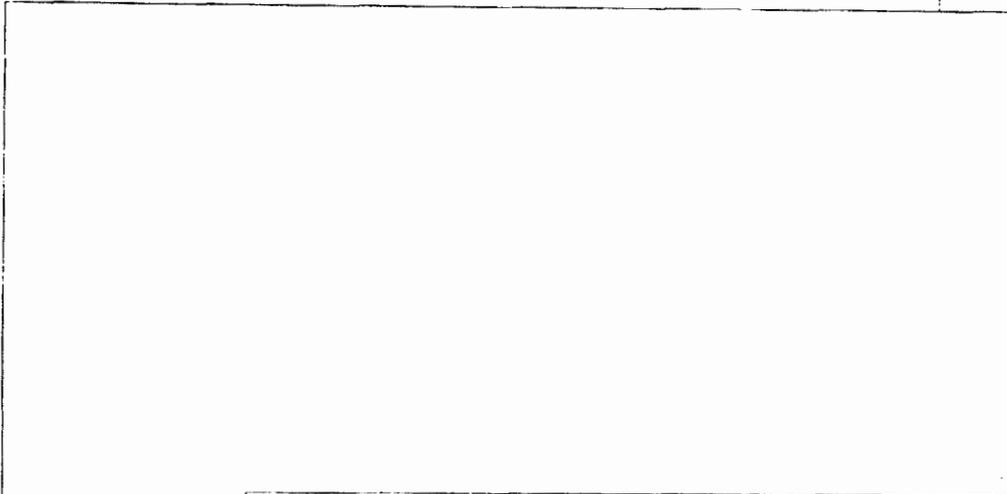
Document No. 33: Classified memorandum, [REDACTED]

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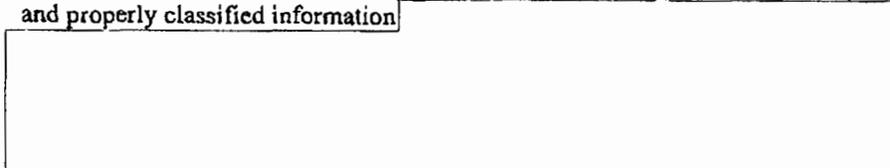
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The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information



- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. (TS//NF)

- This document is protected by the deliberative process privilege and Exemption (b)(5) because



It is therefore predecisional and deliberative. (TS//NF)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement

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that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 34: Classified memorandum, [redacted]

[redacted]

The

Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

[redacted]

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA. [redacted]

[redacted]

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[Redacted]

- This document is protected by the deliberative process privilege and Exemption (b)(5) because it reflects a pre-decisional communication that represents an interim stage in inter-agency discussions preceding a final decision

[Redacted]

- [Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 35: Classified memorandum

[Redacted]

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including two attachments [redacted]

The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA. [redacted]

- This document is protected by the deliberative process privilege and Exemption (b)(5) because it represents an interim stage in inter-agency discussions preceding a final decision [redacted]

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[Redacted]

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[Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 36: Classified memorandum,

[Redacted]

The Government asserts that:

- The Government asserts that this document is exempt under Exemption (b)(1) because

[Redacted]

- The Government also asserts that this document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence

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sources and methods employed by the CIA.

[Redacted]

- And the Government asserts that this document is protected by the deliberative process privilege and Exemption (b)(5) because it represents an interim stage in inter-agency discussions

[Redacted]

The communication represents a pre-decisional stage in the decision-making process.

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC/DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 45: Classified facsimile communication,

[Redacted]

The Government

asserts that.

- The document is exempt under Exemption (b)(1)

[Redacted]

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[Redacted]

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[REDACTED] NOFORN

[REDACTED]

- To the extent that Exemption (b)(1) applies, the Government claims the document is also exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA;

[REDACTED]

- Finally, the Government claims that the document is protected in full by the deliberative process privilege and Exemption (b)(5) because it represents an interim stage in inter-agency discussions

[REDACTED]

[REDACTED] The communication represents a draft that comprised part of the back and forth of the decision-making process.

[REDACTED]

Ruling After In Camera Review: Especially in view of the fact that portions of this document are no longer classified, I directed the CIA to produce this document for *in camera* review. After review, I conclude that the document is exempt under all three exemptions, for the reasons articulated by the Government. There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft

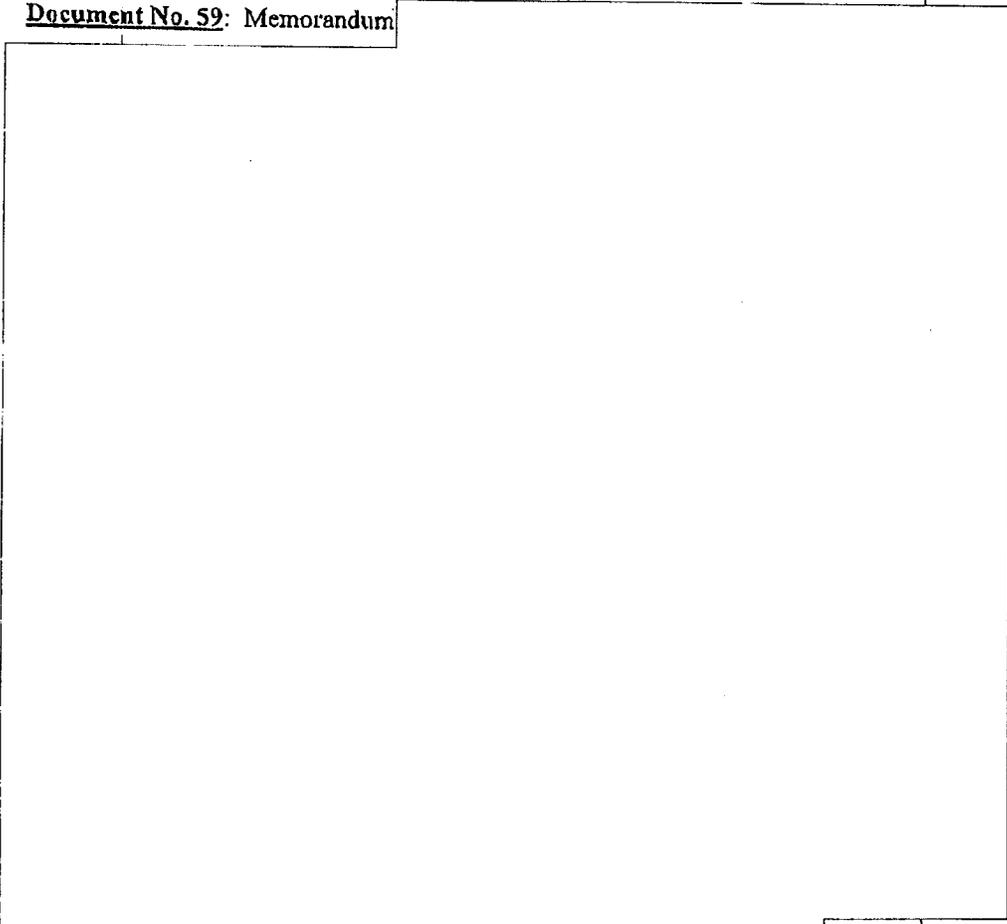
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[REDACTED] NOFORN

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White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. The document need not be produced.

Document No. 59: Memorandum



The

document was originally classified TOP SECRET, although the draft white paper, at Tab B, has now been released publicly, and the remaining attachments no longer contain classified information. (U) The Government asserts that:

- The document is exempt in full under the deliberative process privilege and Exemption (b)(5) because it constitutes a predecisional options paper presented

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to superiors as part of a deliberative process.

As a result, there has been no waiver of the exemption – though the court fails to see how disclosure of this document would harm national security or much of anything else. Nonetheless, the exemption applies. (U)

Ruling After In Camera Review: In the May 13, 2015 draft of this opinion that was submitted for security review, the court ruled that the document “in full” could not possibly be exempt under Exemption (b)(5), because Tab B (the draft White Paper) had already been released publicly, the Second Circuit having concluded that FOIA exemptions applicable to it had been waived. That being so, the CIA was directed to produce the entire document, including all attachments, for *in camera* inspection by the Court.

CIA did produce the document – or at least most of it. It also produced a letter, which is asked the court to accept as a “supplement” to its description of this document on the *ex parte* Vaughn Index. CIA announced that it had treated the cover memo and the four attachments thereto as a single document when assessing FOIA exemptions, on the ground that the fact that particular attachments had been selected and included in the transmission under cover of the covering memo constituted a core part of the deliberative process. For this proposition it cited *Lead Industries Ass'n Inc. v. Occupational Safety and Health Administration*, 610 F. 2d 70, 85 (2d Cir. 1979).

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Tab B has already been disclosed to the public. Considering simply the text of Tab C, without regard to the fact that it is an attachment to a different memorandum, FOIA exemptions have been waived, for the same reason that they were waived with regard to Tab B. The fact that Tab C is a draft is of no moment; so is Tab B, the Draft White Paper, which was obtained by NBC News in February 2013. Both set forth the

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legal framework for targeting U.S. citizens who are engaged in terrorist activities;

It is ironic that this court is spending any time on this document at all,

so the cover memorandum is not responsive to the FOIA request. Were it responsive to the FOIA request it would be subject to the deliberative privilege (Exemption (b)(5)) and would not have to be produced. Similarly, the list of its attachments remains subject to the deliberative privilege, as articulated in *Lead Industries*.

Tab C, like Tab B, is another matter, however; there is no reason why this document should not be produced, since there is absolutely no FOIA privilege appurtenant to it that has not been waived. That said, the document should be produced

¹⁴ The cover memo does contain a brief summary of Tab D, the [redacted] that has been redacted from the version of the cover memo provided to the court by the Government.

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simply as what it is - [redacted]

¹⁵ -- without

any reference to the fact that it is an attachment to anything else. Releasing the document in this way will not reveal anything about any deliberations in which it may have been used. Tab C is completely segregable from the rest of the document, including from references to the fact that it was attached to another document and was reviewed during a deliberative process. It must be produced.

Document No. 61: Classified memorandum, [redacted]

[redacted] Document 61 also attaches a paper

[redacted] The Government asserts that:

- The document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

¹⁵ [redacted]

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[redacted]

- This document is exempt under Exemption (b)(3) (National Security Act and CIA Act) because it would reveal sensitive intelligence sources and methods employed by the CIA as well as the names or other identifiers of CIA personnel.

[redacted]

- This document is protected by the deliberative process privilege and Exemption (b)(5) because it reflects a pre-decisional, deliberative communication

[redacted]

- This document is protected by the presidential communications privilege and Exemption (b)(5) because it reflects a communication

[redacted]

- This document is protected by the attorney-client privilege and Exemption (b)(5) because it reflects confidential communications

[redacted]

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[Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC/DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 62: Classified memorandum,

[Redacted]

The document has classified attachments

[Redacted]

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[redacted] The Government

asserts that:

- The document is exempt under Exemption (b)(1) [redacted]

- To the extent that Exemption (b)(1) applies, this document is also exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA, [redacted]

- This document is protected by the deliberative process privilege and Exemption (b)(5) because it represents an interim stage in inter-agency discussions preceding a final decision [redacted]

- This document is also protected by the attorney-client and attorney work product privileges and Exemption 5 because the materials reflect communications [redacted]

- The document is also exempt in full under presidential communications privilege and Exemption (b)(5) because it reflects a communication [redacted]

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~~TOP SECRET~~ [REDACTED]

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[REDACTED]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 78: Draft classified background paper with handwritten notations

[REDACTED]

The Government asserts that:

- The document is exempt under Exemption (b)(1) because

[REDACTED]

- This document is exempt under Exemption (b)(3) (National Security Act) because it would reveal sensitive intelligence sources and methods employed by the CIA.

[REDACTED]

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- This document is protected by the deliberative process privilege and Exemption (b)(5) because it is a draft document that represents an interim stage in inter-agency discussions preceding a final decision

Ruling After In Camera Review: In its May 13 draft of this opinion, the court concluded that the document was likely exempt, principally because it is a predecisional draft, and there is no indication that this document was ever finally approved

The issue that remained was whether there had been a waiver by virtue of the release of the Draft White Paper (which was also a draft) and the public statements. The CIA was directed to produce this document

to the court for *in camera* review.

The court has reviewed the document.

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As I suspected, the document is exempt under Exemption (b)(5). There has been no waiver of the exemption by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. The document need not be disclosed

Document No. 94: Classified draft outline

The Government asserts that:

- The document is exempt under Exemption (b)(1) because

[Redacted]

- This document is exempt under Exemption (b)(3) (National Security Act and CIA Act) because it would reveal sensitive intelligence sources and methods employed by the CIA, as well as the names or other identifiers of CIA personnel.

[Redacted]

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- This document is protected by the deliberative process privilege and Exemption (b)(5) because it is a draft document that represents an interim stage preceding a final decision

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 95: Classified document

The Government asserts that:

- The document is exempt under Exemption (b)(1) because

- This document is exempt under Exemption (b)(3) (National Security Act and the CIA Act) because it would reveal sensitive intelligence sources and methods employed by the CIA, as well as the names and other identifiers of CIA personnel.

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[redacted]

- Although not noted in the CIA's initial submissions, portions of this document are also exempt under the deliberative process and attorney-client privileges and Exemption 5 because

[redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 96: Classified document.

[redacted]

The Government asserts that:

- The document is exempt under Exemption (b)(1) because

[redacted]

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[redacted]

- This document is exempt under Exemption (b)(3) (National Security Act and the CIA Act) because it would reveal sensitive intelligence sources and methods employed by the CIA, as well as the names or other identifiers of CIA personnel.

[redacted]

- Although not noted in the CIA's initial submissions, portions of this document are also exempt under the deliberative process and attorney-client privileges and Exemption 5 because

[redacted]

Ruling:

[redacted]

Otherwise, subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced. The CIA must either provide the document for an *in camera* inspection or provide the court with a sworn representation that the document contains no legal advice as set forth in (1) and (2) above.

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Supplement to Ruling: The CIA did not produce this document for *in camera* inspection. As of the time of this writing, the CIA has not provided the court with the sworn representation that was ordered in the alternative.

Documents Nos. 105, 106 and 107: These documents each include a classified document

[Large redacted area]

The Government asserts

that:

- These documents are exempt under Exemption (b)(1) because they contain currently and properly classified information

[Redacted area]

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[Redacted]

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[Redacted]

- For the same reasons, these documents are also exempt under Exemption (b)(3) (National Security Act) because they contain information pertaining to intelligence sources and methods.

[Redacted]

These documents also contain names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [Redacted]

Ruling: There has been no waiver of these exemptions, either by the release of the OLC-DOD Memorandum or the Draft White Paper or by virtue of any public statements that have been brought to the attention of the court. [Redacted] They need not be produced.

Document No. 109: Classified internal outline [Redacted]

[Redacted]

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[Redacted]

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[redacted]
The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

[redacted]

- This document is exempt under Exemption (b)(3) (National Security Act) because, for the reasons discussed above, it contains information pertaining to intelligence sources, methods and activities. [redacted]

[redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [redacted]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege. It is predecisional and deliberative because it is an internal, personal outline. [redacted]

[redacted]

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Ruling After In Camera Review: The court was initially unable to tell from the information provided whether the above exemptions had been waived, or whether relevant portions of the document were segregable. The CIA was directed to produce the document for *in camera* review, specifically indicating any portions of the document that are unclassified.

After reviewing the document, I conclude that, with certain redactions, the document must be produced.

I start with the first two pages, which specifically address Aulahi. The Government's invocation of Exemption (b)(1) rests principally [REDACTED] [REDACTED] but these are easily excised from the document, by (1) redacting the bullet point on page 1 that begins with the words [REDACTED] (2) redacting the phrase beginning with the words [REDACTED] in the bullet point on page 2 that begins with the words [REDACTED]; (3) redacting the first sentence of the next bullet point, which begins with the words [REDACTED]. The rest of the first two pages of this document consists of information about the legality of the Aulahi operation that is already in the public domain, by virtue of the various speeches of Administration members, by virtue of the leaking of the Draft White Paper, and by virtue of the Second Circuit's decision that portions of the OLC-DoD Memorandum had to be released, and that the fact that Aulahi was killed in Yemen was a matter of public knowledge. That information is entirely segregable [REDACTED].

The Government makes several misstatements in its justification for relying on Exemption (b)(3). The first two pages of this document do not disclose any information

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[Redacted]

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regarding sources. No names of CIA personnel appear anywhere in this document; the

[Redacted]

There is

absolutely no indication on the document that it is predecisional (indeed, it is talking points about the legality of an operation that has already taken place) or a draft of any sort, let alone a discussion draft.

The third page of the document addresses

[Redacted]

[Redacted]

Therefore, and following the Second Circuit in *New York Times*, the court concludes that the Government need not disclose this information.

The last bullet point on page 3 of this document addresses

[Redacted]

[Redacted]

As to that information, there

has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Nor has anything on that subject been officially acknowledged. That bullet point must be redacted in its entirety; it need not be disclosed.

Subject to the specific redactions ordered by the court, the rest of this document should be disclosed.

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[Redacted]

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Document No. 110: Classified draft memorandum [REDACTED]

[REDACTED]

The Government asserts that:

- This document is exempt under Exemption (b)(1) because [REDACTED]

[REDACTED]

- This document is exempt under Exemption (b)(3) (National Security Act) because, for the reasons discussed above, it contains information concerning intelligence sources and methods.

[REDACTED]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [REDACTED]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process and attorney-client privileges. It is protected by the deliberative process privilege because it is predecisional, as it is a draft

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recommendation (which contains tracked changes) to a decisionmaker regarding deliberative, in that it provides a recommended course of action for consideration in the decisionmaking process. [redacted]

[redacted] The confidentiality of this draft communication was maintained and the contents of this document were not shared beyond the interested parties. [redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced

Document No. 111: Classified background paper [redacted]

[redacted] The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

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[REDACTED]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it would reveal intelligence sources and methods.

[REDACTED]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act.

[REDACTED]

[REDACTED]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege.

[REDACTED]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU.

[REDACTED]

[REDACTED]

Accordingly, and subject to the ruling concerning officially acknowledged

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[REDACTED]

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facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 112: Classified document [redacted]

[redacted] The Government asserts

that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

[redacted]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it would reveal intelligence sources and methods. [redacted] This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. (TS//NF)

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege. [redacted]

[redacted]

The document is also protected by Exemption (b)(5) and the attorney-client privilege because it consists of a confidential communication from an attorney to the client, and would reveal client confidences as well as attorney recommendations and advice. The confidentiality of these

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communications was maintained and the contents of this document were not shared beyond the interested parties. (TS//NF)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 113: Classified rough outline [redacted]

[redacted]
The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it would reveal intelligence sources and methods. [redacted]

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[redacted] This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [redacted]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege. [redacted]

[redacted]

Ruling After In Camera Review: This court directed the CIA to produce this document for *in camera* review, since it was impossible to tell from the information provided whether it fell within the scope of what has been waived, [redacted]

[redacted]

Most of the contents of this document can be disclosed, since it simply repeats information contained in the Draft White Paper and the OLC-DoD Memorandum.

References [redacted] are easily redacted: [redacted]

[redacted]

There is no indication that this document is a draft, or predecisional, or that it was prepared in advance of the Aulajqi operation; it appears to be an after-the-fact summary of the legal bases for the operation, just as other documents that have been released or ordered.

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released arc. In fact, its text adds nothing to the quantum of information already known by the public.

The question arises whether the second half of the second page [REDACTED]

[REDACTED] since they do not discuss matters as to which there has been waiver by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. I conclude that this portion of the document is exempt from disclosure under Exemption (b)(3), because it would reveal intelligence methods.

Document No. 117: Classified draft document [REDACTED]

[REDACTED]

The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [REDACTED]

[REDACTED]

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[redacted]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it contains information concerning intelligence sources and methods.

[redacted]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege.

[redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 118: Classified Memorandum

[redacted]

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[redacted]
The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information.

[redacted]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it contains information concerning intelligence sources and methods.

[redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [redacted]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege. [redacted]

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[Redacted]

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[Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 119: Classified Memorandum

[Redacted]

[Redacted]

The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information

[Redacted]

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[Redacted]

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[Redacted]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it contains information concerning intelligence sources and methods.

[Redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [Redacted]

[Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 120: Classified Memorandum, [Redacted]

[Redacted]

The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [Redacted]

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[Redacted]

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[REDACTED]

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[REDACTED]

- For the same reasons, this document is exempt under Exemption (b)(3) (National Security Act) because it contains information concerning intelligence sources and methods.

[REDACTED]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 123: Classified outline

[REDACTED]

[REDACTED]

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[REDACTED]

The outline contains handwritten notations and questions, as well as typewritten questions within the textual discussion. Attached to the outline is a document entitled "Qs&As," which identifies possible questions and, for some but not all questions, draft answers.

[REDACTED]

The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information

[REDACTED]

- This document is exempt under Exemption (b)(3) (National Security Act) because, for the reasons discussed above, it contains information concerning intelligence sources and methods.

[REDACTED]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act.

[REDACTED]

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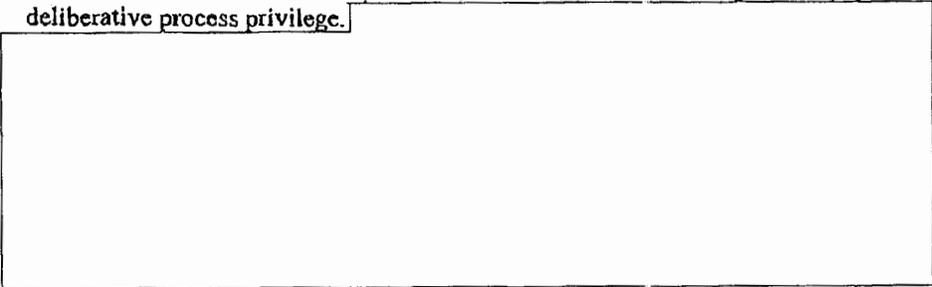
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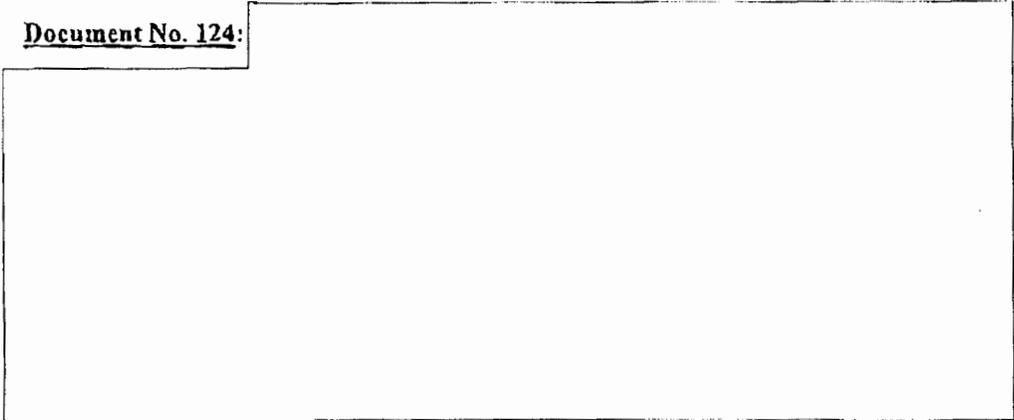
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- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege.



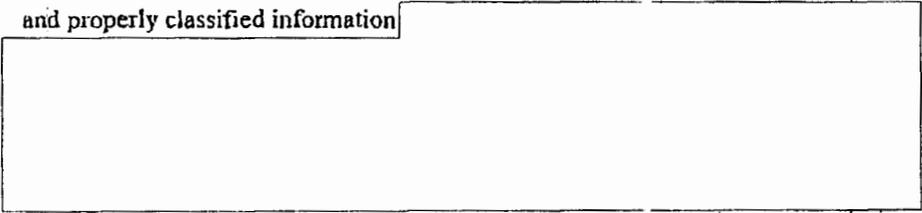
Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 124:



The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information



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[redacted]

- This document is exempt under Exemption (b)(3) (National Security Act) because, for the reasons discussed above, it contains information concerning intelligence sources and methods.

[redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act. [redacted]

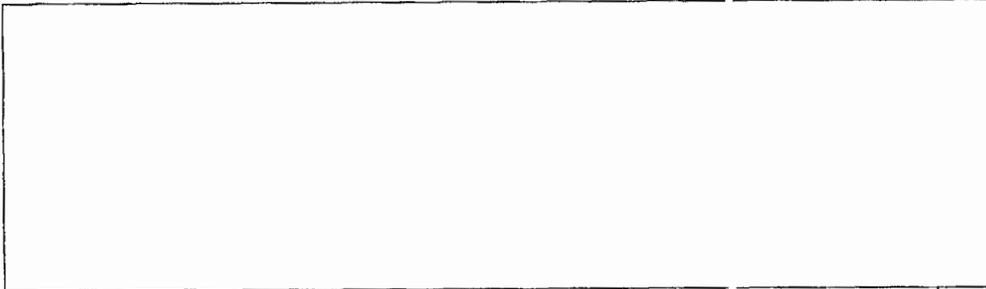
Ruling After In Camera Review: The CIA was ordered to produce this document for *in camera* review.

[redacted]

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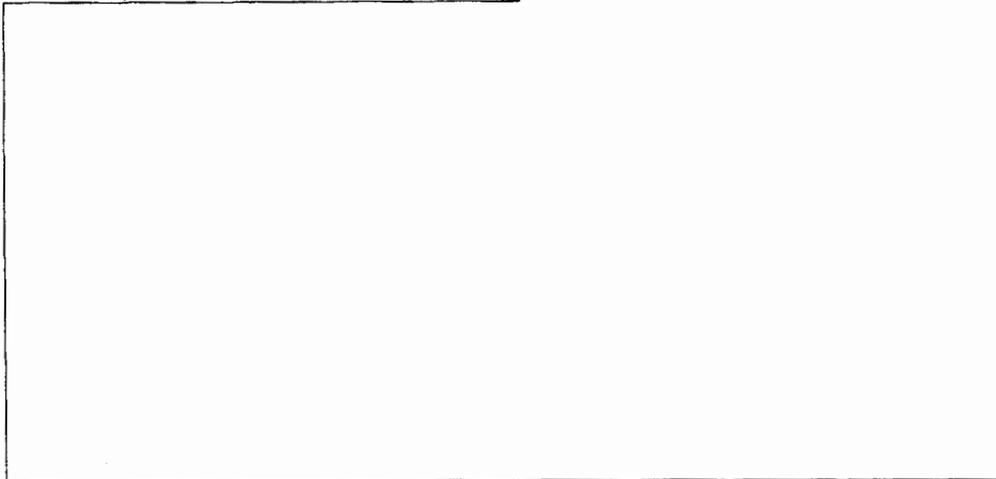
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The document is Exempt under Exemptions (b)(1) and (b)(3). There has been no waiver of exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, I conclude that the document need not be produced.

Document No. 140: Classified Memorandum [redacted]



The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information [redacted]



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[Redacted]

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[Redacted]

- This document is exempt under Exemption (b)(3) because, for the reasons discussed above, it contains information concerning intelligence sources and methods.

[Redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act.

[Redacted]

[Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

Document No. 142: Classified Memorandum

[Redacted]

[Redacted]

The Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information

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[Redacted]

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[Redacted]

- This document is exempt under Exemption (b)(3) because, for the reasons discussed above, it contains information concerning intelligence sources and methods.

[Redacted]

This document also contains names or other identifiers of CIA personnel that are exempt from disclosure under Exemption (b)(3) and the CIA Act.

[Redacted]

- This document is exempt under Exemption (b)(5) because it is protected by the deliberative process privilege,

[Redacted]

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

In sum, the CIA is directed to produce Tab C to Document 59 and Documents 109 and 113 as redacted.

(2) *Glomar* Reponse

The CIA has filed a *Glomar* response to so much of the ACLU's FOIA request as seeks records "pertaining to the factual basis for the killing of" Samir Khan and

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Abdulrahman Aulaqi. A *Glomar* response neither confirms nor denies the existence of documents responsive to the request. CIA thus neither confirms nor denies the existence of any documents that discuss a factual basis for the killing of these two individuals who, according to the Attorney General, were not targeted for killing but were killed accidentally: Khan along with Aulaqi, and Abdulrahman in an entirely different drone strike.

An agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exemption. *Wilner v. NSA*, 592 F.3d at 68. It is the law of this Circuit that a *Glomar* response may be interposed by an agency even where the Executive Branch has officially acknowledged the existence and contours of a program concerning which records are sought. *Id.* at 69. However, the agency must "tether" its refusal to respond to one of the nine FOIA exemptions; "a government agency may...refuse to confirm or deny the existence of certain records...if the FOIA exemption would itself preclude the acknowledgement of such documents." *Id.* at 68

In the context of this case, the Second Circuit in *New York Times* specifically ruled that the CIA's right to assert a *Glomar* response could itself be waived – and to a limited extent had been waived. But the only matter identified by the Court of Appeals as to which the CIA had waived *Glomar* was the fact that the CIA had an operational role in targeted drone killings – a fact that had been disclosed by Former CIA Director Panetta, who, as an official of the CIA, had authority to waive FOIA exemptions on behalf of the CIA. As to that fact and that fact alone, CIA's *Glomar* response was deemed "insufficiently justified." *New York Times*, 756 F.3d at 124.

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By contrast, the CIA has demonstrated that a *Glomar* response is appropriate as to any information about the "factual basis for the killing of" Khan and Abdulrahman. CIA's *Glomar* response is "tethered" to Exemption 3, in that disclosure is barred by the CIA Act. Responding to the ACLU's request could reveal whether the U.S. Government was aware of facts that the ACLU assumes to be true: that the CIA was aware of Khan's presence with Aulagi; that the Government either took measures to avoid his death or did not do so; and that CIA had an intelligence interest in Khan, Abdulrahman, or both.

The basis for a *Glomar* response is no less persuasive in this instance than it was in *Wilner*. In both cases, there is a specific statute (here the CIA Act, in *Wilner* the NSA Act) that bars disclosure of whether the information sought even exists, and in both cases the invocation is supported by affidavits to which this court is required to give "substantial weight."

Furthermore, there has been no waiver of the CIA's right to invoke *Glomar* (as there was in *New York Times*), because (1) there has been no disclosure by anyone of any "factual basis for the killing of" either of those two individuals (the only disclosure, made by Attorney General Holder, is that both were killed accidentally); and (2) there has been no disclosure of the existence of any records relating to any Executive Branch evaluation of any factual basis that might exist for killing either of them. ACLU has not identified any source, including specifically anyone affiliated with the CIA, who has publicly disclosed the existence of anything at all relating to Abdulrahman Aulagi that might exist in CIA files, and the court is not independently aware of any such source. ACLU also has not identified any public disclosure about what it describes as "the factual basis" for killing Samir Khan. The only public disclosure plaintiff has identified is a public

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acknowledgement that Khan was under surveillance by the FBI because he was blogging about jihad. (Wicker Ex. 14). That discrete fact, I have already held, has been publicly acknowledged. But public disclosure that someone is under surveillance is not the same thing as public acknowledgement that anyone ever looked into a factual basis for targeting that person for death -- let alone that *the CIA* (which is not the FBI) has documents relating to such an analysis in its files. Frankly, there has been far less public disclosure about the information sought by the ACLU here than was the case in *Wilner*.

Of course, "what waives *Glomar* is an acknowledgement that records do in fact exist," *New York Times v. United States Department of Justice*, 915 F. Supp. 2d 508, 552 (S.D.N.Y. 2013) -- not disclosure about the matters discussed in those records. The ACLU argues that there has been a waiver of *Glomar* because the Government has already acknowledged that "it conducts both before and after-the-fact factual analyses to determine the lawfulness of the drone strikes it conducts." ACLU argues that such an inquiry must have been conducted following the strikes that killed both Khan and Abdulrahman, and records must have been created in connection with those inquiries. This means that the Government -- by acknowledging that it conducts after-the-fact reviews--has effectively acknowledged that documents relevant to that inquiry exist.

The first reason why this argument does not work is that nothing in the record indicates that *anyone at the CIA* ever publicly acknowledged any Agency involvement in the conduct of either before-or-after-the-fact inquiries into the lawfulness of drone strikes. It bears repeating: only the CIA can waive FOIA protections (including *Glomar*) on behalf of the CIA. *Wilson*, 586 F.3d at 186-87.

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The second reason is that I, like the Government, conclude that the ACLU is straying beyond the bounds of the FOIA request here under review.¹⁶ ACLU is not here asking for records about the lawfulness of the drone strikes that killed Khan and Abdulrahman. Rather, the request that was *Glomared* seeks records "pertaining to the *factual basis* for the killing of" two specific individuals – including specifically as to Khan (who was killed in the attack on Aulaqi) information about the Government's knowledge of his whereabouts on the day when Aulaqi was targeted, whether measures were taken to avoid Khan's death, or any other fact relevant to "the decision to kill Khan or the failure to avoid causing his death." (Emphasis added).

Putting to one side the fact that the ACLU's request "assumes facts not in evidence" (i.e., that the Government ever made a decision either to kill Kahn or not to avoid causing his death), absolutely nothing in the record suggests that anyone associated with the CIA (the only agency that can waive FOIA exemptions on behalf of the CIA) has ever publicly acknowledged *anything* about Khan – still less that a decision was made either to kill him or to risk doing so. Nothing in the record of public disclosures by CIA officials indicates that anyone involved operationally in the Aulaqi takedown knew anything about Khan's whereabouts on that day, let alone that the CIA has records addressing that issue. This contrasts starkly with the situation confronting the Second

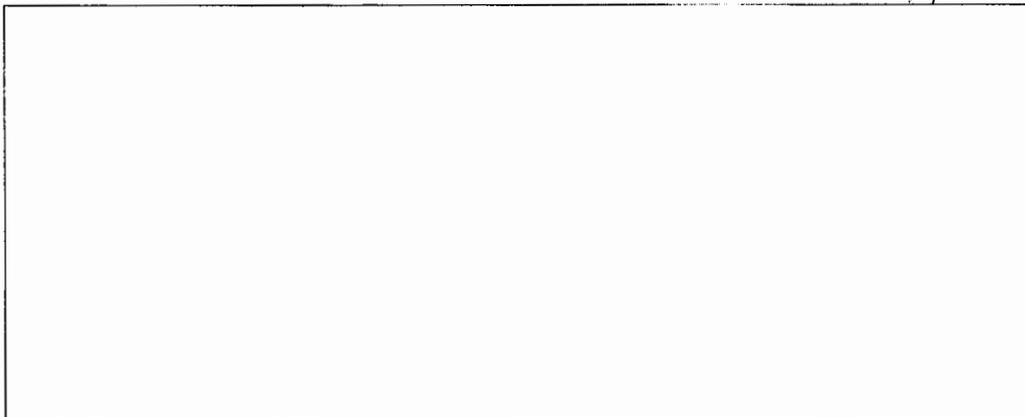
¹⁶ I understand that the ACLU has filed FOIA requests in the District of Columbia District Court seeking information about the lawfulness of drone strikes generally and addressing bystander casualties. The ACLU has also filed another FOIA lawsuit in this district, *American Civil Liberties Union et. Al., v. Department of Justice, et. al.*, 15 Civ. 1954 (CM), seeking records "pertaining to (1) the legal basis in foreign, domestic, and international law upon which the government may use lethal force against individuals or groups; (2) the process by which the government designates individuals or groups for targeted killing; (3) before-the-fact assessment of civilian or bystander casualties in targeted-killing strikes and any and all records concerning after action investigations into individual targeted-killing strikes; and (4) the number and identities of individuals killed or injured in targeted killings. I am sure this precise issue, which is not comprehended in the FOIA requests here at issue, will have to be addressed in one or both of those cases.

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Circuit on the first appeal in this case, when it concluded that the CIA Director's acknowledgement of his agency's operational involvement in targeted drone killings eliminated the possibility that *Glomar* could shield the CIA from identifying documents that would respond to the ACLU's request for opinions addressing the legality of such operations.



Therefore, applying the Second Circuit's reasoning in *Wilner*, I conclude that official acknowledgement that (1) Khan and Abdulrahman were killed, coupled with (2) after-the-fact analysis is routinely done to determine the lawfulness of *all* drone strikes (including, presumably, the ones that killed these two individuals) does not constitute "official acknowledgement" of "the existence or nonexistence of the specific records sought by the FOIA request."

B. Documents on the Department of Defense Vaughn Index

(1) Documents on the Index

Document No. 1: Classified memorandum from [REDACTED]

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[Redacted]

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[Redacted]

discussing two Office of Legal Counsel ("OLC") opinions (attached to memorandum),
regarding the [Redacted]

[Redacted]

The

Government asserts that:

- This document is exempt under Exemption (b)(1) because it contains currently and properly classified information regarding [Redacted]

[Redacted]

- This document is exempt under Exemption (b)(5) and the attorney-client privilege because the memorandum constitutes a communication between an attorney, [Redacted], and his client, [Redacted] which the parties intended to be privileged, conveys legal advice and has not previously been disclosed.

[Redacted]

(S//NF)

Ruling After In Camera Review: DoD was directed to produce this document for
in camera review, which it did.

[Redacted]

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[Redacted]

The document is covered by the attorney-client privilege ((b)(5)). There has been no waiver of these exemptions by disclosure of the Draft White Paper, the OLC-DOD Memorandum, or any public statement called to the attention of the court. It need not be produced.

Document No. 31: Classified talking points from [Redacted]

[Redacted], undated, discussing [Redacted]

[Redacted] (S//NF). The Government argues that:

- This document is exempt under Section (b)(1) because it discusses currently and properly classified [Redacted] details concerning [Redacted]. Specifically, the talking points discuss [Redacted]

The talking points also summarize [Redacted]

[Redacted] (S//NF)

- This document is exempt under Section (b)(5) and the deliberative process privilege because it [Redacted]

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[redacted] and is therefore predecisional and deliberative. The document represents an interim stage in intra-agency discussions preceding a final decision of the Executive Branch concerning a [redacted]. The disclosure of such internal deliberations would have a chilling effect [redacted] (S//NF)

Ruling After In Camera Review: This document was produced for *in camera* review. It consists entirely of [redacted] and contains no discussion of legal matters whatsoever. It is exempt under Exemption (b)(1). There has been no waiver of these exemptions by disclosure of the Draft White Paper, the OLC-DOD Memorandum, or any public statement called to the attention of the court. It need not be produced.

Document No. 38: Classified draft [redacted] (S//NF)

The Government asserts that:

- This document is exempt under Section (b)(1) because the document discusses currently and properly classified [redacted] details concerning [redacted] (S//NF)
- This document is exempt under Section (b)(5) and the deliberative process privilege because it is a draft document discussing [redacted] [redacted] which represents an interim stage in intra-agency discussions preceding a final decision of the Executive Branch concerning [redacted]

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[Redacted] The disclosure of such internal deliberations would have a chilling effect [Redacted] (S//NF)

Ruling. There has been no waiver of these exemptions by disclosure of the Draft White Paper, the OLC-DOD Memorandum, or any public statement called to the attention of the court. Furthermore, as it deals with [Redacted] it does not appear to this court to be responsive to the FOIA request. In any event, this document need not be produced.

Document No. 39: Classified draft [Redacted] [Redacted], undated, [Redacted] (S//NF).

The Government asserts that:

- This document is exempt under Section (b)(1) because the document discusses currently and properly classified [Redacted] details concerning [Redacted]

[Redacted] (S//NF)

- This document is exempt under Section (b)(5) and the deliberative process privilege because it is a draft document discussing [Redacted] which represents an interim stage in intra-agency discussions preceding a final decision of the Executive Branch concerning [Redacted]. The disclosure of such internal deliberations would have a chilling effect [Redacted] (S//NF)

Ruling. Same ruling as Document 38.

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[Redacted]

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Document No. 46: Classified draft [redacted]

[redacted] (S//NF). The Government asserts that:

- This document is exempt under Section (b)(1) because the document contains currently and properly classified information concerning [redacted]

[redacted]

[redacted] (S//NF)

- This document is exempt under Section (b)(5) and the deliberative process privilege because it is a draft document discussing [redacted] [redacted] which represents an interim stage in intra-agency discussions preceding a final decision of the Executive Branch concerning [redacted] [redacted]. The disclosure of such internal deliberations would have a chilling effect [redacted]

[redacted] (S//NF)

Ruling: There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. While the document deals with [redacted]

[redacted] and the document – by its terms, a draft – would reveal interim discussions. Accordingly, and subject to the ruling concerning officially acknowledged facts that is applicable to all documents, I conclude that the document need not be produced.

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Document No. 55: Classified memorandum

(S//NF). The Government asserts that:

- This document is exempt under Section (b)(1) because the document contains currently and properly classified information concerning

(S//NF)

- This document is exempt under Section (b)(5) and the presidential communications privilege because the memorandum consists of communications between

(S//NF)

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Ruling After In Camera Review: In order to facilitate segregability review, the DOD was directed to provide the court, for *in camera* review, those portions of the document that discuss [REDACTED]

[REDACTED] No other portions of the document were required to be provided to the court.

After *in camera* review, I conclude that the document is exempt under Exemption (b)(1) for the reasons outlined by the Government and reprinted above. The legality of conducting a counterterrorism operation against Aulaqi is not discussed at all in this memorandum; [REDACTED]

[REDACTED] There

has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. As material responsive to the ACLU's request is not included in this document, there is really nothing to segregate, and in any event no portion of this document is reasonably segregable. The document need not be produced.

Document No. 81: Classified *In Camera*, *Ex Parte* Declaration and Formal Claim of Military and State Secrets Privilege by Robert M. Gates, Secretary of Defense, dated 23 September 2010, discussing the specific types of classified information over which the Secretary of Defense asserted military and states secret privilege; [REDACTED]

[REDACTED]

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[REDACTED] (S//NF). Portions of this document are voluntarily being produced to plaintiff. The Government asserts that:

- The withheld portions of the document are exempt under Exemption (b)(1) because they contain currently and properly classified information pertaining to military operations against al-Qai'da in the Arabian Peninsula and Anwar Aulaqi. The document contains an extended discussion about previous [REDACTED]

(S//NF)

Ruling: DoD did not originally identify this document on its Vaughn Index. Having belatedly located it, the agency advised that it was "processing the document for release to plaintiffs in redacted form." DOD was ordered to provide the court with both redacted and unredacted versions of this document for *in camera* review as soon as possible. It did so.

After *in camera* review of the unredacted version of this document against the publicly filed redacted version, I conclude that the withheld portions of the document are exempt under Exemption (b)(1) for substantially the reasons asserted by the Government and reprinted above. There has been no waiver of these exemptions by virtue of the release of the OLC-DOD Memorandum, or the Draft White Paper, or any other public statement that has been brought to the attention of the court by the ACLU. There is no discussion of the legal basis for conducting any operation against Aulaqi, so there is

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nothing responsive to the ACLU's FOIA request to segregate. The document need not be disclosed.

(2) DoD Glomar Response

DoD has also interposed a Glomar response to the ACLU's request for information about the "factual basis" for the accidental killing of Samir Khan and Abdulrahman Aulaqi. The above discussion upholding the propriety of the Glomar response interposed by the CIA applies equally to DoD.

The principal difference between the two agencies is that a disclosure by any Executive Branch official can be sufficient to waive privilege with respect to the DoD, whereas only disclosure by an official of the CIA itself waives privilege with respect to the CIA. However, there is no evidence in the record that any official of the Executive Branch, from any agency, has ever said anything publicly about the killing of Khan and Abdulrahman, other than to disclose that they were killed accidentally rather than by design (as Aulaqi was). Since the record contains no disclosure that anyone said anything that would have waived Glomar as to this issue on behalf of the Defense Department, DoD, no less than the CIA, is free to stand on its Glomar response, and neither confirm nor deny that it has any documents responsive to the ACLU's request.

CONCLUSION

To summarize the court's rulings:

I. FOIA exemptions have been waived as to the following "officially acknowledged material:"

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1. The fact that the Government uses drones to carry out targeted killings overseas;
2. The fact that both DOD and CIA have an intelligence interest in the use of drones to carry out targeted killings;
3. The fact that both DOD and the CIA have an operational role in conducting targeted killings;
4. Information about the legal basis (constitutional, statutory, common law, international law and treaty law) for engaging in the targeted killings abroad, including specifically the targeted killing of a U.S. national;
5. The fact that the Government carried out the targeted killing of Aulagi;
6. The fact that the FBI was investigating Samir Khan's involvement in jihad.

II. The agencies have 45 days from the date on which this opinion is submitted for classification review (May 13, 2015) to submit to the court, on a document-by-document basis, (1) a certification that the document does not contain any "officially acknowledged material," or (2) a certification that the document contains "officially acknowledged material," but any such material cannot reasonably be segregated from material that has not been "officially acknowledged" and as to which FOIA exemptions have not been waived; or (3) as to any document containing "officially acknowledged material" that can be segregated from FOIA-exempt material, a copy of the document with proposed redactions.

III. OLC has thirty days from May 13, 2015 to produce for *in camera* review the following documents: 7, 8, 9, 10, 46, 50, 57-68, 70, 71, 73-79, 83, 84, 88-91, 93, 95-100, 102, 110, 117-22, 144-147, 243, 250, 253, 262-65 and 269-71. After *in camera* review, the court orders OLC to produce redacted versions of Documents 46, 144 and 145 and the complete text of Document 50 to plaintiffs.

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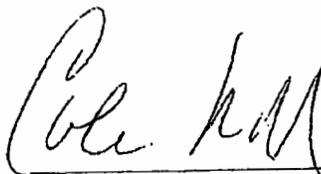
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IV. CIA has thirty days to produce for *in camera* review the following documents: 45, 59, 78, 96¹⁷, 109, 113, 124. After *in camera* review, the court orders CIA to produce Tab C to Document 59 and redacted versions of Documents 109 and 113 to plaintiffs.

V. DOD has thirty days from May 13, 2015 to produce for *in camera* review the following documents: 1, 31, 55 (in part). After *in camera* review, the court declines to order production of any of these DOD documents to plaintiffs.

This constitutes the decision and order of the court.

Dated: June 23, 2015



U.S.D.J.

¹⁷ CIA may either produce the document or produce a certification that it contains no responsive material. See above text.

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