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

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| AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,<br><br>*Plaintiffs*,<br><br>v.<br><br>DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and the OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,<br><br>*Defendants*. | No. 15 Civ. 1954 (CM)<br><br>**ECF CASE** |

# MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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## INTRODUCTION

This litigation concerns a Freedom of Information Act ("FOIA") request filed by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, the "ACLU") for records concerning the government's "targeted killing" of suspected militants and terrorists. These killings, often carried out by unmanned aerial vehicles, are deeply controversial and have been the subject of extraordinary public debate. To promote and defend the targeted-killing program, the government has released selected records, and senior government officials have engaged in what this Court termed a "relentless public relations campaign" meant to assure the public that the program is effective, lawful, and necessary. *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013), *rev'd on other grounds*, 756 F.3d 100 (2d Cir. 2014). Separately, this Court, the Second Circuit, and the D.C. Circuit have compelled the government to release or acknowledge some information that the government sought to withhold. Still, the government continues to closely control the information that is released to the American public. It continues to withhold, among other things, records concerning the scope of the government's purported authority to conduct lethal attacks; the constraints the government has adopted as a matter of discretion or policy; the administrative process by which individuals are added to government "kill lists"; and bystander casualties.

Of particular relevance to the instant motion, the government continues to withhold information that it has officially acknowledged—that is, information that is the same as, or closely related to, information that it has disclosed or discussed in other contexts. The withholding of this information is unlawful. As the Second Circuit explained last year, once the government has officially acknowledged information, it may not lawfully withhold related information—whether legal analysis or factual discussion—unless it is *materially* different from

the information it has already disclosed. Plaintiffs submit that this means, at a minimum, that the government cannot lawfully withhold a given piece of information unless it can establish that the disclosure of that information would disclose legitimately protected information that has not already been disclosed.

In accordance with the Court's orders in this case, the ACLU has limited the focus of this brief, and of its attached Waiver Table, *see infra* Appendix, to the issues of official acknowledgement and waiver. The ACLU's Waiver Table provides a detailed list of the sources in which the government has disclosed information about the targeted-killing program, with citations to the relevant pages or passages. The ACLU presumes that the government will argue in its forthcoming brief that the withheld information has not been officially acknowledged and that this information falls within one of FOIA's exemptions. In accordance with this Court's instructions, the ACLU anticipates responding to the government's exemption arguments in its joint opposition and reply brief.

## PROCEDURAL HISTORY

### I. The FOIA Request and Subsequent Narrowing

In 2013, the ACLU submitted the FOIA request underlying this suit (the "Request," attached as Ex. 1 to Decl. of Matthew Spurlock) as part of its continuing effort to help the public assess the wisdom and lawfulness of the government's so-called "targeted killing" program against alleged militants and terrorists away from the battlefield. *See* Compl. ¶ 17 (Mar. 16, 2015), ECF No. 1. The ACLU submitted the Request to the Department of Justice ("DOJ") components the Office of Legal Counsel ("OLC") and Office of Information Policy; the Department of Defense ("DOD"); the Department of State ("DOS"); and the Central Intelligence Agency ("CIA"). The Request sought, in essence:

(1) the legal basis for the targeted-killing program;

(2) the standards and evidentiary processes the government uses to evaluate (and approve or reject) the use of lethal force (including the Presidential Policy Guidance applicable to targeted killings outside "areas of active hostilities");

(3) before-the-fact and after-action assessments of civilian and bystander causalities; and

(4) the number, identities, legal status, and suspected affiliations of those killed (intentionally or not).

*See* Request at 5–6.

The CIA—the only agency to respond in substance to the Request, *see* Compl. ¶¶ 20–42—issued a hybrid Glomar and "no number no list" response, stating that "if any records existed, the volume or nature of such records would be currently or properly classified" and relying on FOIA Exemptions 1 and 3. *Id.* ¶ 40. The ACLU timely filed an administrative appeal of the CIA's determination; the CIA failed to respond. *See id.* ¶¶ 41–42. On March 16, 2015, the ACLU filed this action. *See* Compl.

Subsequently, after conferring multiple times with the government, and in an effort to focus the government's search and to narrow the issues before the Court, the ACLU clarified and agreed to narrow prongs (1) and (2) of the Request as follows:

Prongs (1) and (2) of the Request **encompass**:

- all targeted-killing strikes, against individuals or groups, outside of Iraq, Afghanistan, or Syria.

Prongs (1) and (2) of the Request **exclude**:

- records dated before September 11, 2001;
- records that are publicly available;
- records related to the raid that resulted in the death of Osama bin Laden;

- records already processed and identified as responsive to previous ACLU FOIA requests concerning the government's targeted-killing program, *see ACLU v. DOJ*, No. 12 Civ. 794 (S.D.N.Y. filed Feb. 1, 2012); *ACLU v. CIA*, No. 10 Civ. 436 (D.D.C. filed Mar. 16, 2010);

- records that are purely internal OLC communications (but not communications between DOJ components, between DOJ components and other agencies, or between DOJ components and the Attorney General);

- drafts of records that were eventually finalized, *but only where* the final versions of the drafts have been disclosed or are listed individually on the relevant agency's public *Vaughn* index in this litigation;

- records created by another defendant agency, *but only where* the documents have been disclosed or are listed individually on the other relevant agency's public *Vaughn* index in this litigation; and

- with respect to DOS *only*, any records not pertaining to the process described in the penultimate paragraph of Attorney General Holder's May 23, 2013 letter to Senator Patrick Leahy and other members of Congress.

Over the ACLU's objection, this Court stayed litigation concerning prongs (3) and (4) of the Request for all agencies pending appellate review of the district court's decision in *ACLU v. CIA*, No. 10 Civ. 436, 2015 WL 3777275 (D.D.C. June 18, 2015), *appeal docketed*, No. 15-5217 (D.C. Cir. Aug. 3, 2015). *See* Order Modifying Scheduling Order ¶ 2 (July 9, 2015), ECF No. 16.

## II. This Brief

As instructed by the Court, the ACLU has limited the issues presented in this brief and the accompanying Waiver Table, *see infra* Appendix, to the government's waiver through public disclosure of otherwise-applicable FOIA exemptions. *See* Order Modifying Scheduling Order ¶ 2.

The ACLU understands that in connection with the government's September 30, 2015 submission on its cross-motion for summary judgment, the government will: provide *Vaughn* indices (or Glomar or "no number no list" responses) with respect to records responsive to

prongs (1) and (2) of the Request; attempt to justify its withholdings under FOIA's exemptions; and address the disclosures identified by the ACLU in this brief and the accompanying Waiver Table. *See id.* ¶ 3; *see* Order Modifying Apr. 30, 2015 Scheduling Order & Otherwise Issuing Directions for the Further Conduct of This Action ¶ 1 (July 9, 2015), ECF No. 25 (excusing defendant agencies from producing preliminary *Vaughn* indices before the filing of this brief). In accordance with the Court's scheduling orders, the ACLU will therefore defer its arguments concerning the applicability of any of the government's relied-upon FOIA exemptions to its joint opposition and reply brief, due on October 30, 2015.

**STANDARD OF REVIEW**

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA is "a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (quotation marks omitted). Accordingly, courts enforce a "strong presumption in favor of disclosure." *Associated Press v. DOD*, 554 F.3d 274, 28 (2d Cir. 2009) (quotation marks omitted). The statute requires disclosure of responsive records unless a specific exemption applies, and the exemptions are given "a narrow compass." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) (quotation marks omitted). With the exception of information "inextricably intertwined" with properly withheld material, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 249 n.10 (2d Cir. 2006) (citing *Mead Data Cent., Inc. v. Dep't of Air Force*, 566

F.2d 242, 260–61 (D.C. Cir. 1977)).

At summary judgment, the heavy burden of justifying the withholding of responsive records belongs to the government. *See Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The court's review of an agency's claimed withholdings is *de novo*, and "all doubts [are] resolved in favor of disclosure." *Id.*; *see* 5 U.S.C. § 552(a)(4)(B). The agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. DOS*, 565 F.3d 857, 864 (D.C. Cir. 2009).

The government's burden—and this Court's obligation to review the agency's withholdings *de novo*—is equally present in cases invoking national-security concerns. *See CIA v. Sims*, 471 U.S. 159, 188–89 (1985) ("[T]his sort of judicial role is essential if the balance that Congress believed ought to be struck between disclosure and national security is to be struck in practice." (citation omitted)); *Goldberg v. DOS*, 818 F.2d 71, 77 (D.C. Cir. 1987) (explaining that courts do not "relinquish[] their independent responsibility" to review agency's withholdings *de novo* in national-security context); *ACLU v. DOD*, 389 F. Supp. 2d 547, 552 (S.D.N.Y. 2005). To ensure that federal judges are able to effectively address agencies' improper withholdings in the national-security context, Congress overrode both a Supreme Court decision and a presidential veto to empower federal judges to review national-security withholdings *de novo*. *See Ray v. Turner*, 587 F.2d 1187, 1190–91 (D.C. Cir. 1978). Congressional lawmakers, in authorizing *de novo* review, "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Id.* at 1194.

## ARGUMENT

### I. The government may not withhold information under FOIA unless it is materially different from information that has been officially acknowledged.

#### A. The Second Circuit has instructed that official acknowledgment under FOIA does not require a precise "match" between the information the government seeks to withhold and the information it has previously disclosed.

The government cannot withhold information that it has already officially acknowledged. *See N.Y. Times Co.*, 756 F.3d at 114; *see also Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Thus, even if one assumes that all the information the ACLU seeks could *once* have been withheld under one of FOIA's statutory exemptions—an assumption that the ACLU will contest in its October 30 filing, *see supra* PROCEDURAL HISTORY § II—the government cannot withhold information here unless it is materially different from information the government has publicly disclosed in other contexts. *See N.Y. Times*, 756 F.3d at 114. Moreover, the burden of demonstrating that information is materially different belongs to the government. *See Inner City Press/Cmty. on the Move*, 463 F.3d at 245 (While a "party who asserts that material is publicly available carries the burden of production on the issue" of official acknowledgment, "the government retains the burden of persuasion that information is not subject to disclosure under FOIA." (emphasis removed)).

In *N.Y. Times* the Second Circuit properly characterized *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009), as "the law of this Circuit," *N.Y. Times*, 756 F.3d at 120 n.19, but the court made quite plain, both in describing and applying the official-acknowledgment doctrine, that the doctrine would "make little sense" if it "require[d] absolute identity" between the information that the government has previously disclosed and the information the government seeks to keep secret. *Id.* at 120. Indeed, the Second Circuit explained that it understood any "matching" requirement suggested by earlier cases to be, effectively, dicta—running all the way back to the

test's origins in the D.C. Circuit.

First, the Second Circuit emphasized that *Wilson* itself (which was not a FOIA case but a suit in which the plaintiff asserted a First Amendment right to publish portions of her memoir) did not actually apply any "matching" requirement. *See id.* at 120 n.19; *see also Wilson*, 586 F.3d at 187–89. Rather, the court in *Wilson* applied only the third prong of its three-part test, concluding merely that a private letter sent from the CIA to the plaintiff did not constitute an official government disclosure of the plaintiff's employment status with the CIA. *See* 586 F.3d at 187–89; *see also N.Y. Times*, 756 F.3d at 120 n.19.

Second, in *N.Y. Times*, the court noted that the only Second Circuit case cited in *Wilson* in connection with the three-part test did not involve a "matching" requirement at all. Instead, *Hudson River Sloop Clearwater, Inc. v. Department of Navy*, 891 F.2d 414 (2d Cir. 1989), turned on the fact that the purported official acknowledgment involved an entirely different (and still undisclosed) secret. *Id.* at 421–22 (concluding only that Navy officials' statement that certain ships were *capable* of carrying nuclear weapons did not officially acknowledge that the Navy *intended to deploy* nuclear weapons on those ships); *see N.Y. Times*, 756 F.3d at 120 n.19.

Third, the Second Circuit explained that the "ultimate source of the three-part test," the D.C. Circuit's opinion in *Afshar v. DOS*, 702 F.2d 1125 (D.C. Cir. 1983), fails even to "mention a requirement that the information sought" must match the "information previously disclosed." *N.Y. Times*, 756 F.3d at 120 n.19 (quotation marks omitted); *see Afshar*, 702 F.2d at 1133.[1]

Moreover, the Second Circuit's application of *Wilson* in *N.Y. Times* demonstrates that the appellate court did not consider the test for official acknowledgment to be a rigid one. Of course,

[1] *Wilson* took the three-part test from *Wolf*, 473 F.3d at 378; *Wolf* took it from *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); and *Fitzgibbon* took it from *Afshar*. *See N.Y. Times*, 756 F.3d at 120 n.19.

as this Court recently explained, "disclosure of a specific fact" does not necessarily "entail[] waiver of exemption for all information about the subject to which that fact pertains." *ACLU v. DOJ*, No. 12 Civ. 794, 2015 WL 4470192, at *4 (S.D.N.Y. July 16, 2015). But the Second Circuit's conclusions in *N.Y. Times* illustrate its operative principle: the government may not shield through FOIA information that is not materially different from information the government has already publicly disclosed. *See Afshar*, 702 F.2d at 1132 (framing official-acknowledgment inquiry as whether the withheld information was "in some *material respect* different from" publicly disclosed information (emphasis added)). Indeed, had the Second Circuit applied any less forgiving standard than that in *N.Y. Times*, it could not have ordered the disclosures it did.

Thus, in *N.Y. Times*, the Second Circuit ordered disclosure of information in the July 2010 OLC Memorandum that did not precisely match information that the government had previously disclosed.[2] For example, the court concluded that the government had waived its right to withhold portions of the memorandum discussing 18 U.S.C. § 956(a) even though the government's previous public analysis of the statute in the context of targeted killing was limited to a single footnote in the government's November 2011 White Paper.[3] *See* 756 F.3d at 116 ("Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLC–DOD Memorandum considers, the *substantial overlap* in the legal analyses in the two documents *fully establishes* that the Government may no longer validly claim that the legal analysis in the

[2] *See* David Barron, Acting Assistant Attorney Gen., OLC, *Memorandum for the Attorney Gen. Re: Applicability of Fed. Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar Aulaqi [REDACTED]* (July 16, 2010) (attached as Ex. 8 to Decl. of Matthew Spurlock).

[3] *See* DOJ, *White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force* (Nov. 8, 2011) (attached as Ex. 15 to Decl. of Matthew Spurlock).

Memorandum is a secret." (emphases added)). Although the Second Circuit was mistaken that the November 2011 White Paper did not discuss 18 U.S.C. § 956 at all, *see* November 2011 White Paper at 13 n.8 (summarily discussing the statute), its error only underscores Plaintiffs' argument. As the Second Circuit explained, once the government had made public legal analysis "discussing why the targeted killing of al-Awlaki would not violate several statutes," the court did not consider the additional release of legal analysis—even of statutes the court believed had not yet been publicly analyzed—to "add" anything "to the risk" of harm under FOIA. *N.Y. Times*, 756 F.3d at 120. Under both the court's reasoning and its application of the doctrine, unless disclosure of withheld information would have the effect of disclosing properly classified information that has not yet been revealed, the withholding of the information is improper.

Because the government has so far failed to describe or justify any of its withholdings, *see supra* PROCEDURAL HISTORY § II, the ACLU is limited in its ability to address the effect of the government's public disclosures on specific responsive records. However, the government cannot justify its withholdings merely by contending that the withheld information is different or more extensive than the information it has already disclosed. The relevant question is whether, in light of all the information the government has already released concerning the targeted-killing program, "additional" disclosure of responsive information "adds [anything] to the risk" of harm to an interest still protected by one of FOIA's exemptions. *N.Y. Times*, 756 F.3d at 120. To meet its burden, the government must demonstrate that the information it seeks to withhold would disclose properly exempt information that remains secret. *See Inner City Press/Cmty. on the Move*, 463 F.3d at 245 (explaining that the government "retains the burden of persuasion" under the official-acknowledgment doctrine).

**B. Continued withholding of information that is not materially different from officially acknowledged information undermines Congress' purposes in enacting FOIA.**

Plaintiffs' argument concerning the reach of the official-acknowledgment doctrine in this Circuit is not only supported by *N.Y. Times* and other case law but is grounded in the purposes of FOIA. The justification for any application of FOIA exemptions—whether to particular records, in the standard case, or to the very existence of records, in a Glomar case—lies in the connection between the reasons for a withholding and the harms that the exemptions were intended to protect against. *See, e.g.*, *Afshar*, 702 F.2d at 1130 ("[R]elease of information cannot be expected to cause damage to the national security or disclose intelligence sources and methods if the information is already publicly known."); *ACLU v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) (explaining that a Glomar response is permissible "only when confirming or denying the existence of records would itself cause harm cognizable under an FOIA exception" (quotation marks omitted)). And the official-acknowledgment doctrine itself is grounded in the recognition that official confirmation of a fact can sometimes cause harm distinct from that caused by "mere public speculation, no matter how widespread." *Wolf*, 473 F.3d at 378; *see United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972) ("Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially."). As an esteemed member of this Court explained decades ago, "[t]he 'sunshine' purposes of the FOIA would be thwarted if information remained classified after it became part of the public domain." *Lamont v. DOJ*, 475 F. Supp. 761, 772 (S.D.N.Y. 1979) (Weinfeld, J.). Thus, as the Second Circuit observed in *N.Y. Times*, where disclosure of further information "adds nothing to the

risk" of harm to interests protected by FOIA's exemptions, the government cannot justify its continued withholding. 756 F.3d at 120.

It bears emphasis that when Congress enacted FOIA in 1966, it was concerned not only about government secrecy but about selective disclosure by the government as well. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974). Selective disclosure—the practice of disclosing information that paints government policy in the most favorable possible light while denying the public access to additional information required to assess the validity of the government's claims—is inimical to a statute whose animating purpose is to provide "a means for citizens to know what their Government is up to," *Favish*, 541 U.S. at 171 (quotation marks omitted). And the government's disclosures relating to the targeted-killing program raise precisely this concern. For several years now, government officials have been engaged in a "relentless public relations campaign" meant to assure the public that the program is effective, lawful, and necessary. *N.Y. Times*, 915 F. Supp. 2d at 535; *see ACLU v. CIA*, 710 F.3d at 429–31. They have said that the program is tightly supervised, and they have dismissed or minimized concerns about civilian casualties. When many Americans questioned whether the government's killing of three American citizens was justified, government officials disclosed facts and legal analysis meant to convey that the killings were lawful.

FOIA was meant to be an answer to exactly these kinds of strategic disclosures, and to ensure that the American public would have the information it needed to evaluate the

government's policies and practices for itself. An "absolute identity" requirement would prevent FOIA from serving this purpose. Indeed, it would render the statute impotent in precisely those contexts in which the statute is especially important. The public's interest in disclosure of legal analysis would be especially great if the legal rationales the government had offered publicly for its actions did not precisely match the legal rationales in the records still withheld.[4] Far from a penalty for previous disclosure, the Second Circuit's flexible understanding of the official-acknowledgment doctrine is a "structural necessity in a real democracy," *Favish*, 541 U.S. at 172.

## II. Much of the information the government is withholding has been officially acknowledged.[5]

The Court has asked the ACLU to accompany this brief with "exhibits indicating each and every Public Disclosure on which [it] intend[s] to rely to argue that the Withheld Documents must be disclosed because any otherwise-applicable FOIA exemptions have been waived . . . ." Order Modifying Scheduling Order ¶ 2. The ACLU has therefore provided, as an Appendix to

[4] The concern that agencies will engage in selective disclosure in order to manipulate public opinion and debate is not, unfortunately, fantastical. A recently released report of the Senate Select Committee on Intelligence discusses an episode in which the CIA prepared a "media campaign" that contemplated "off the record disclosures" about issues that the agency was claiming in court could not be addressed publicly without grave danger to national security. *See* Senate Select Comm. on Intelligence, Committee Study of the CIA's Detention and Interrogation Program: Executive Summary, Dec. 3, 2014, http://1.usa.gov/1hfYcQa. Some CIA personnel were troubled by the inconsistency between the agency's contemplated disclosures about the interrogation program and the representations the agency was making in court. The SSCI Report cites an internal agency communication in which one agency attorney expressed concern that "[o]ur Glomar figleaf is getting pretty thin." *Id.* at 405. It also points to another communication in which "another CIA attorney noted . . . 'the [legal] declaration I just wrote about the secrecy of the interrogation program [is] a work of fiction.'" *Id.*

[5] Moreover, "[n]on-exempt portions of a document may only be withheld if they are 'inextricably intertwined' with the exempt portions." *N.Y. Times*, 915 F. Supp. 2d at 532. Given the extensive official acknowledgments at issue in this case, Plaintiffs urge the Court to conduct an *in camera* review of the withheld records in order to review the government's segregability decisions.

this brief, a Waiver Table that details: (1) the subject of waiver; (2) the source of each official disclosure; (3) the Exhibit number and pin cite of each relevant source; and (4) relevant language, where length permits. The ACLU has also provided "a copy of each and every relevant Disclosure," as requested by the Court. Order Modifying Scheduling Order ¶ 2; *see* Ex. 2–50 to Decl. of Matthew Spurlock.

Through public disclosure, the government has waived any right to withhold, under FOIA, **legal analysis** of:

- the Fourth and Fifth Amendments to the U.S. Constitution and their application to the targeted killing of U.S. citizens, *see* Waiver Table at 1;
- the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("2001 AUMF"), *see* Waiver Table at 1–2;
- the definition of "associated force" under the 2001 AUMF, *see* Waiver Table at 2–4;
- 18 U.S.C. § 1119, which prohibits the killing or attempted killing of a U.S. national outside the United States, *see* Waiver Table at 4;
- 18 U.S.C. § 956(a), which criminalizes conspiracy to commit murder abroad, *see* Waiver Table at 4;
- the War Crimes Act, 18 U.S.C. § 2441(a), including discussion of Common Article 3 of the Geneva Convention, *see* Waiver Table at 5;
- the "public authority" doctrine, *see* Waiver Table at 5;
- the assassination ban in Executive Order 12333, *see* Waiver Table at 5–7;
- the definition and requirements for the existence of non-international armed conflicts, *see* Waiver Table at 7–8;
- the use of force in self-defense under international law, *see* Waiver Table at 8–10;
- international humanitarian law principles, including the requirements of necessity, distinction, proportionality, and humanity, *see* Waiver Table at 11–13;
- the term "imminence," *see* Waiver Table at 13–15;
- the term "feasibility of capture," *see* Waiver Table at 15–17; and

- international legal principles governing respect for other countries' national sovereignty, *see* Waiver Table at 17–18.

Moreover, by public disclosure, the government has waived any right to withhold, under FOIA, the following **facts**:

- that the government uses drones to carry out targeted killings, *see* Waiver Table at 19;
- that the government uses manned aircraft to carry out targeted killings, *see* Waiver Table at 19;
- that the CIA and DOD have operational roles in targeted killings, *see* Waiver Table at 20–25;
- that the government conducts targeted killings in Pakistan, including through the use of drones, *see* Waiver Table at 25–26;
- that the CIA conducts targeted killings in Pakistan, including through the use of drones, *see* Waiver Table at 26–27;
- that the government conducts targeted killings in Yemen, including through the use of drones, *see* Waiver Table at 27;
- that the CIA conducts targeted killings in Yemen, including through the use of drones, *see* Waiver Table at 28–29;
- that the government conducts targeted killings in Somalia, including through the use of drones, *see* Waiver Table at 29–31;
- that the government conducts targeted killings in Libya, including through the use of drones, *see* Waiver Table at 31–32;
- that a September 17, 2001 Memorandum of Notification signed by President Bush authorizes the CIA to take lethal action against suspected terrorists, *see* Waiver Table at 32–34;
- that the OLC provides advice establishing the legal boundaries of the targeted-killing program, *see* Waiver Table at 34–35;
- that the government conducts before- and after-the-fact legal and factual analysis of lethal strikes, *see* Waiver Table at 35–40; and
- that innocent bystanders have died or been injured as a result of U.S. drone or other targeted-killing strikes, *see* Waiver Table at 40.

## CONCLUSION

As a result of the disclosures listed above and detailed in the Waiver Table, the government must release records, or portions thereof, that contain information that is not materially different than the information it has officially acknowledged, irrespective of the application of any FOIA exemption. Specifically, the ACLU respectfully asks the Court to (1) review the withheld records *in camera* to determine which portions must be released because they consist of information that has been officially acknowledged or is otherwise not withholdable under any FOIA exemption, and (2) order the release of records and portions thereof that consist of information that has been officially acknowledged or is not otherwise withholdable under any FOIA exemption.

Dated: August 28, 2015

Respectfully submitted,

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