UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, including its component the Office of Legal Counsel, U.S. DEPARTMENT OF DEFENSE, including its component U.S. Special Operations Command, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO DOCUMENTS WITHHELD BY CIA AND DOD, AND IN OPPOSITION TO THE ACLU'S CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

In opposing the government's motion for summary judgment with regard to the documents withheld by the Central Intelligence Agency ("CIA") and Department of Defense ("DOD"), the ACLU largely relies on arguments that have been advanced and addressed in prior motions in this case. Contrary to the ACLU's contentions, the information withheld by CIA and DOD in response to the ACLU's Freedom of Information Act ("FOIA") request has not been officially acknowledged. As explained in the government's classified and unclassified declarations, the withheld information—including classified legal analysis as well as factual material—is exempt from public disclosure under FOIA because it is properly classified, statutorily protected and/or privileged.[1]

In addition, CIA and DOD have properly provided a "Glomar" response to those portions of the ACLU's FOIA request that seek records pertaining to the "factual basis" for the killing of Samir Khan and Abdulrahman al-Aulaqi, who were killed in U.S. strikes but not intentionally targeted. To confirm or deny whether the agencies have responsive documents would reveal whether or not the United States had specific intelligence information regarding these two individuals at the time of the strikes—information that has never been officially acknowledged and remains properly classified and statutorily protected from disclosure. The government's justification for withholding this information is certainly "logical or plausible," particularly given the "substantial weight" owed to the agencies' national security judgments. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citations and internal quotation marks omitted). The Glomar response accordingly should be upheld.

[1] The ACLU has withdrawn its request for many of the documents withheld by CIA and DOD; only 40 documents remain in dispute. ACLU Br. at 4 (listing documents remaining at issue).

A. The Information Withheld by CIA and DOD Has Not Been Officially Acknowledged

The ACLU's discussion of the standards for official acknowledgment of classified information, *see* ACLU Br. at 6-8, mirrors the argument that the ACLU made in the pending motion with regard to the responsive OLC documents other than legal memoranda. ACLU Br. at 6 n.4 (citing Dkt. No. 92, at 6-17). Defendants respectfully refer the Court to their earlier response to this argument. *See* Dkt. No. 105, at 1-6 & n.2. Although the ACLU speculates that "[m]any of the records withheld by the CIA and DOD here likely contain legal analysis and factual information that meets the Second Circuit's standard for official acknowledgment," ACLU Br. at 9, as explained in the government's opening brief and its supporting declarations, the information withheld by CIA and DOD goes well beyond the disclosures identified either in the Second Circuit's decision or in the sources cited by the ACLU. *See* Dkt. No. 99, at 9-11. For example, the ACLU insists that the information withheld from the classified Panetta declaration submitted to the district court *ex parte* in *Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C.) (dismissed December 7, 2010), is "likely to contain" legal analysis and factual information that the United States has since acknowledged. ACLU Br. at 9-10, 17. But much of the information redacted from that declaration is similar to information that this Court has held was properly withheld from the OLC memoranda. *See, e.g.*, Decision on Remand With Respect to Issue (3), Dkt. No. 90 ("First Remand Decision"), at 3.[2]

Because the withheld information is not as specific as the information previously released, does not match the information previously disclosed, and was not made public through an official

[2] The ACLU notes that then-Secretary of Defense Robert Gates also submitted a classified declaration in the *Aulaqi* litigation, which was not produced or listed in DOD's *Vaughn* index. This document was not identified during DOD's search. DOD has since located this document and will process it for release in redacted form.

and documented disclosure, *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), it remains exempt from public disclosure under FOIA. *See New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 120 (2d Cir. 2014) (applying *Wilson*'s three-part test for official disclosure); First Remand Decision at 12 (same).

B. CIA and DOD Properly Provided a Glomar Response to the ACLU's Requests for Information Pertaining to "the Factual Basis for the Killing of" Samir Khan and Abdulrahman al-Aulaqi

The ACLU challenges the agencies' Glomar response to those portions of the FOIA request seeking records "pertaining to the factual basis for the killing of" Samir Khan and Abdulrahman al-Aulaqi, contending that the government has acknowledged that "it conducts both before- and after-the-fact factual analyses to determine the lawfulness of the drone strikes it conducts." ACLU Br. at 13; *see also id.* (arguing that responsive records "would include pre-strike analyses in which the government considered the possibility that the strikes would result in bystander casualties, as well as pre- and post-strike analyses assessing compliance with the requirements of international law"). But the ACLU's FOIA request in this case did not seek documents pertaining to the lawfulness of drone strikes generally, or records generally addressing bystander casualties.[3] Instead, the ACLU here requested records "pertaining to the factual basis for the killing of" two specific individuals: Samir Khan and Abdulrahman al-Aulaqi.

By focusing on only an excerpt of its FOIA request, *see* ACLU Br. at 12-13, the ACLU ignores that the request sought specific information about the government's knowledge, or lack of

[3] The ACLU filed a separate FOIA request seeking this type of information, which is presently the subject of litigation in the U.S. District Court for the District of Columbia. *See ACLU v. CIA*, 808 F. Supp. 2d 280, 285 (D.D.C. 2011) (describing FOIA request as seeking, *inter alia*, information concerning "civilian casualties in drone strikes," including "measures to limit civilian casualties," as well as "assessment or evaluation of individual drone strikes after the fact"), *rev'd*, 710 F.3d 422 (D.C. Cir. 2013).

knowledge, about Samir Khan and Abdulrahman al-Aulaqi at the time that the strikes occurred. With regard to Samir Khan, the ACLU sought records pertaining to "whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death." Similarly, the ACLU sought records pertaining to "whether U.S. Government personnel were aware of [Abdulrahman al-Aulaqi's] presence when they launched a missile or missiles at his location, . . . whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death."

For the reasons set forth in the government's opening brief and supporting declarations, confirming or denying whether the government has records responsive to these requests would reveal classified and statutorily protected information. Although the United States has acknowledged that it conducted the strikes that killed Samir Khan and Abdulrahman al-Aulaqi, and that the United States did not intentionally target them, the details of those strikes—including the specific intelligence information available at the time of the strike— remain classified and statutorily protected. Second Declaration of Martha M. Lutz ("Second Lutz Decl.") ¶ 12; Second Declaration of Rear Admiral Sinclair M. Harris ("Second Harris Decl.") ¶ 19. Thus, it would reveal classified and statutorily protected information concerning intelligence sources and methods to reveal whether or not U.S. government personnel were aware of Khan's or Abdulrahman al-Aulaqi's presence in the area at the time of the strikes, made a "decision" to kill Khan or Abdulrahman al-Aulaqi specifically, or "took measures" to avoid their deaths. Confirmation that responsive records exist would reveal that the United States had specific intelligence relating to these individuals at the time of the strikes; confirmation that no responsive

records exist would indicate a lack of such intelligence.

Confirming or denying the existence of responsive records would therefore reveal substantially more than the simple fact that the United States conducted analyses regarding "bystander casualties" before and after the strikes. ACLU Br. at 13. Indeed, documents that address bystander casualties generally, without regard for the "factual basis" for killing Khan or Abdulrahman al-Aulaqi specifically, would not be responsive to the FOIA request at all. The agencies' searches for documents—which have already been upheld by this Court, *see New York Times Co. v. Dep't of Justice*, 915 F. Supp. 2d 508, 533 (S.D.N.Y. 2013) —were not calculated to, and did not, locate the types of general "pre- and post-strike analyses" that the ACLU now claims to seek.

The government has proffered an entirely logical and plausible justification for providing a Glomar response: any other response would reveal that the United States either had or did not have specific intelligence regarding these two individuals at the time the strikes occurred. Because this information has not been officially acknowledged, and remains properly classified and protected from disclosure by statute, the Glomar response is appropriate. *See Wilner*, 592 F.3d at 70 ("An agency only loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed.").

C. Legal Analysis Can Be Withheld Under FOIA If Its Disclosure Would Reveal Classified, Statutorily Protected or Privileged Information

The ACLU argues, as it did in response to the government's pending motion for summary judgment with regard to the OLC documents, that legal analysis can never be withheld under Exemptions 1 or 3. ACLU Br. at 15-17; *see also id.* at 15 n.15 (noting that the ACLU's argument

"mirrors the argument . . . submitted to the Court in connection with the OLC's withholdings"). This argument is simply incorrect, as the government previously explained. *See* Dkt. No. 105, at 6-7; *New York Times Co.*, 756 F.3d at 119 (noting that legal analysis can be properly classified where its disclosure would reveal the likelihood of a planned operation or where the legal analysis is otherwise so intertwined with classified facts that disclosure of the legal analysis would disclose such facts). Indeed, this Court has upheld the withholding of the responsive OLC memoranda, all of which contain legal analysis, under Exemptions 1 and 3. *See* First Decision on Remand at 2-19 (upholding withholding in full of nine memoranda and partial withholding of one memorandum); *see also* Dkt. No. 111 (Order dated Dec. 9, 2014, denying reconsideration).

The ACLU erroneously contends that the government has not met its burden of establishing the applicability of Exemption 5 and the deliberative process, attorney-client or presidential communications privileges. ACLU Br. at 18-19. While the government is unable to describe the responsive documents in detail on the public record without revealing classified and statutorily privileged information, *see* Lutz Decl. ¶¶ 7, 20; Harris Decl. ¶ 16, the government's classified declarations provide ample information to allow the Court to assess the applicability of the relevant privileges, and thus satisfy the government's burden under FOIA. *See Wilner*, 592 F.3d at 73; *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994).

Because the government's declarations provide sufficient information to allow the Court to ascertain the applicability of FOIA's exemptions, *in camera* review of the documents is unnecessary. If the Court were to determine that *in camera* review is warranted, however, that review would have to be conducted by the Court. The ACLU's suggestion, in a footnote in its brief, that such review could be conducted by a "cleared special master," ACLU Br. at 20 n.22, is

manifestly inappropriate. It is well established that, under the separation of powers established by the Constitution, the Executive Branch is responsible for the protection and control of national security information. *See Dept. of the Navy v . Egan*, 484 U.S. 518, 527 (1988). The decision to grant or deny access to classified information lies squarely within the discretion of the Executive. *See id.* at 529.

Accordingly, although, as here, an Article III judge may be provided with classified information in order to facilitate review of FOIA exemption claims, any order of the Court that purports to grant access to classified information to a special master, or that directs the United States to do so, would raise serious separation of powers questions, and would unnecessarily risk the compromise of classified information vital to the national security. *See Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) ("It is not to slight lawyers, judges or anyone else to suggest that any [] disclosure [of classified information] carries with it the serious risk that highly sensitive information may be compromised."); *Colby v. Halperin*, 656 F.2d 70, 72 (4th Cir. 1981) (finding that "[d]isclosure to one person . . . may seem of no great moment, but information may be compromised inadvertently as well as deliberatively," and, thus, "no one should be given access to such information who does not have a strong, demonstrated need for it").[4]

[4] The ACLU cites *In re U.S. Department of Defense*, 848 F.2d 232 (D.C. Cir. 1988), *see* ACLU Br. at 20 n.22, but the United States did not raise a separation of powers objection in that case, and hence the constitutional implications of the matter were not addressed. As the D.C. Circuit subsequently recognized in *Stillman v. Central Intelligence Agency*, 319 F.3d 546 (D.C. Cir. 2003), a court confronted with a request to provide classified materials to third parties must "determine whether it can, . . . with the appropriate degree of deference owed to the Executive Branch concerning classification decisions, resolve the classification issue without the assistance of plaintiff's counsel [or other third party]. If not, then the court should consider whether its need for such assistance outweighs the concomitant intrusion upon the Government's interest in national security." Only after making such determinations may a court even consider entering an

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of defendants CIA and DOD.

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Respectfully submitted,

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order allowing a third party access to classified materials, and even then, the D.C. Circuit recognized, "the Government may appeal and we will have to resolve [any] constitutional question." *Id*. at 548-49. In *ACLU v. Department of Defense*, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004), although Judge Hellerstein cited *In re U.S. Department of Defense* for the proposition that "procedures can be established to identify [responsive] documents *in camera* or to a special master with proper clearance," no special master was ever appointed in that case. No classified documents were at issue in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), also cited by the ACLU.