UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE; CENTRAL INTELLIGENCE AGENCY; DEPARTMENT OF STATE; DEPARTMENT OF JUSTICE,

Defendants.

ECF Case

09 Civ. 8071 (BSJ) (FM)

MEMORANDUM OF LAW IN SUPPORT OF THE DEPARTMENT OF DEFENSE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RELATED RELIEF

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PRELIMINARY STATEMENT

Defendant the Department of Defense ("DoD"), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its motion for partial summary judgment and related relief — limited to the issues described below — in this action brought under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). The FOIA request at issue in this litigation, made by the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, "Plaintiffs"), seeks information about the detention of prisoners at the Detention Facility in Parwan, which replaced the Bagram Theater Internment Facility in Afghanistan ("Bagram"), and is located in a U.S. military base in an active theater of war.

As part of a recent production of documents by DoD relating to the Detention Review Boards ("DRB"), which conduct semi-annual assessments of Bagram detainees, DoD mistakenly provided to Plaintiffs two copies of a document classified at the SECRET level (the "Document"). The Document lists the criteria used by the DRB to determine whether a particular detainee meets the standard to be classified an "Enduring Security Threat" ("EST") — the highest threat category. The parties have held discussions regarding this matter, but have been unable to reach agreement on the Document's return. The parties' dispute centers around Plaintiffs' contentions that DoD did not properly classify the Document (and thus could not have properly withheld it from the production pursuant to FOIA Exemption 1, *see* 5 U.S.C. § 552(b)(1)), and that this Court lacks the authority to order Plaintiffs to return the Document once it was mistakenly produced.

As explained in the attached declaration of William K. Lietzau, the Deputy Assistant Secretary of Defense, dated July 13, 2011 ("Lietzau Decl."), the Document contains information

that, if released publicly, would reasonably be expected to cause serious damage to national security because of its potential use by insurgents in Afghanistan and elsewhere to undermine efforts by U.S. forces to categorize potential detainees based on the threat level they pose to the United States, to its allies and to the local population; such use of the information contained in the Document could thus frustrate military and intelligence-gathering efforts. DoD moves for partial summary judgment on the ground that the Document was exempt from disclosure under FOIA Exemption 1.[1]

In light of the mistaken release of the Document to Plaintiffs, DoD seeks further relief from the Court through this motion: an order compelling Plaintiffs to return all copies of the Document to DoD. This Court has inherent authority to make such an order, and should exercise it here to avoid the serious damage to the national security that would result if the Document were publicly released. DoD thus asks that the Court issue an order requiring Plaintiffs to return the mistakenly produced — and properly classified — document.

STATEMENT OF FACTS

By letter dated April 23, 2009, Plaintiffs submitted a FOIA request to the DoD and other agencies (the "FOIA Request").[2] The FOIA request seeks, among other things, records "pertaining to the process for determining and reviewing Bagram prisoners' status, the process

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[1] In accordance with the general practice in this District — because summary judgment in FOIA cases generally do not turn on the existence or nonexistence of factual disputes — DoD has not submitted a Local Civil Rule 56.1 statement, but will, of course, do so if the Court determines that such a submission would be helpful. *See, e.g.*, *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996).

[2] The FOIA Request was attached as Exhibit A to the Declaration of Wendy M. Hilton, [Docket No. 15], in connection with the Government's previous motion for partial summary judgment in this case. The Government will provide an additional copy of this and other documents from the record in this case to the Court upon request.

for determining whether their detention is appropriate, and the process for determining who should be released." *See id.* at 5.

On September 22, 2009, Plaintiffs filed the instant lawsuit, seeking an injunction compelling DoD, among others, to process their FOIA Request and to release responsive records. *See* Complaint [Docket No. 1] ¶ 4. The parties subsequently agreed that they would submit for the Court's approval detailed schedules that would govern the processing and production of documents that are responsive to the FOIA Request. The parties ultimately entered into a series of court-ordered stipulations pursuant to which DoD (and other government agency defendants) agreed to provide to Plaintiffs a narrowed subset of the documents requested in the original FOIA Request in exchange for a judicially enforceable timetable for the documents' production and a court-approved mechanism for post-production dispute resolution regarding withheld or redacted documents.

On August 2, 2010, this Court "so-ordered" the "Second Stipulation and Order Regarding Document Searches, Processing, and Production by the U.S. Department of Defense" [Docket No. 44] (the "Production Order").[3] The Production Order required DoD to review and produce several categories of documents related to the DRB by specified deadlines. *See id.* ¶ 2. These documents included, for certain detainees, the DRB's "Recommendation Memoranda," *i.e.*, the "written report of the [DRB's] determinations and recommendations" as described in DoD's *Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan*

[3] *See also* First Stipulation and Order Regarding Document Searches, Processing, and Production by the U.S. Department of Defense (Mar. 16, 2010) [Docket No. 24]; Third Stipulation and Order Regarding Document Processing and Production by the U.S. Department of Defense (Nov. 10, 2010) [Docket No. 50].

(approved by Dep. Sec'y of Def. July 2, 2009).[4] *See id.* ¶¶ 2-3. The order further provided deadlines for the parties to meet and confer after DoD's productions "regarding the documents withheld in whole or in part by DoD," to the extent that "Plaintiffs . . . wish to object to any of these withholdings," and set forth a schedule for the parties to agree on for "brief[ing] to the Court the propriety of the relevant withholdings." *Id.* ¶ 4.

DoD made several productions of documents responsive to the Production Order, as well as other stipulated production orders that the Court had approved in this case, in late 2010 and 2011, totaling several thousand pages. *See* Lietzau Decl. ¶ 6. Prior to any such productions, DoD reviewed the documents to determine whether they were covered by any FOIA exemptions — including whether they were properly classified and thus subject to FOIA Exemption 1. *See id.* On May 13, 2011, DoD made the latest, and final, production to Plaintiffs pursuant to Paragraph 2 of the Production Order, enclosing 330 pages of documents. *See* Declaration of AUSA Jean-David Barnea ("Barnea Decl."), Ex. A.

Due to a an error during DoD's review process, the May 13 production erroneously included two copies of the Document — which is entitled "Detainee Review Board Report of Findings and Recommendations (Classified Annex – Enduring Security Threat)" — a blank form used by the DRB to determine whether to categorize Bagram detainees as "Enduring Security Threats." Lietzau Decl. ¶¶ 4, 7, 9. On the produced copies of the Document, some of the classification markings were erroneously crossed out. *See id.* ¶ 7. DoD had withheld information about this same threat-level category from previous productions it had made to Plaintiffs pursuant to the Production Order. *See id.* ¶ 10 & Ex. A.

[4] This document is attached as Exhibit A to the Lietzau Declaration.

As explained in the attached declaration, a DRB "is an administrative board of military officers charged with (a) determining whether the criteria are satisfied to subject an individual to detention by U.S. Armed Forces pursuant to the Authorization for Use of Military Force, as informed by law-of-war principles; and, if so, (b) making a disposition recommendation to the convening authority (e.g., continued internment, transfer to Afghanistan authorities for prosecution or participation in a reintegration program)." *Id.* ¶ 9 (citing Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541)). As part of the second assessment — that of the detainee's threat level — DRBs consider "whether the detainee meets the criteria for classification as an Enduring Security Threat ("EST"), as that term is defined in policy guidance authored by the Deputy Secretary of Defense." *Id.* Categorization of a detainee as an EST does not have "implications related to the lawfulness of detention," but is simply "a means of identifying the highest-threat detainees for purposes of implementing the U.S.'s discretionary transfer and release determinations," because "the transfer or release of ESTs must be approved at a higher level than is required to approve the transfer or release of non-ESTs." *Id.*

On May 25, 2011, counsel for the Government in this case received an email from Plaintiffs alerting DoD to the presence of the Document in DoD's production and noting Plaintiff's understanding that "[DoD] may . . . believe that [the] production [of the Document] [wa]s inadvertent." *See* Barnea Decl. ¶ 3 & Ex. B. After conferring with DoD, counsel for the Government contacted Plaintiffs and asked Plaintiffs to return the mistakenly produced Document. *See id.* ¶ 4. Despite several discussions between the parties regarding this issue, the parties have been unable to agree on a resolution. *See id.* Specifically, Plaintiffs have informed the Government that they are unwilling to return the Document to DoD absent a court order to that effect. *See id.*; Letter to the Court, dated July 8, 2011 ("July 8 Letter") [Docket No. 54]. In

the interim, however (*i.e.*, until this motion is decided by this Court and, if the Court denies this motion, any appellate review is completed), Plaintiffs have agreed to maintain the Document in a locked cabinet, to restrict access to it to those persons working on this case and their supervisors, and not to discuss its contents publicly or outside the group of persons working on this case and their supervisors. *See* July 8 Letter. Further, Plaintiffs have agreed that they will return the Document to DoD should this Court (or any appellate court, in the event of an appeal) order them to do so. *See id.*

ARGUMENT

I. FOIA AND SUMMARY JUDGMENT STANDARDS

As this Court explained in its earlier decision in this case, "[s]ummary judgment is proper [in a FOIA case] where the agency's '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.' '[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden.' 'Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.'" *Am. Civil Liberties Union v. Dep't of Defense*, 752 F. Supp. 2d 361, 364 (S.D.N.Y. 2010) ["*ACLU v. DoD*"] (quoting *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 387 (2010), and *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009)) (internal quotation marks omitted).

Courts must "'accord *substantial weight* to an agency's affidavit concerning the details of the classified status of'" requested records. *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)) (emphasis in

original); *see also Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983). "[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court's use of "its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"). Thus, absent evidence of bad faith, where a court has enough information to understand why an agency classified information, it should not second-guess the agency's facially reasonable classification decisions. *See Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security).

II. DOD HAS PROPERLY DETERMINED THAT THE DOCUMENT IS CLASSIFIED AND IS THUS EXEMPT FROM DISCLOSURE UNDER EXEMPTION 1

Exemption 1 protects records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to [an] Executive order." 5 U.S.C. § 552(b)(1). As of June 2010, Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (reproduced at 50 U.S.C. § 435 note), governs the classification of national security information.[5] Section 1.1 of the Executive Order lists four requirements for the classification of national

[5] Prior to June 2010, classification decisions were governed by Executive Order 12,958, as amended, and thus many cases cited, including certain passages in the Court's prior decision in this case, refer to this previous Executive Order. The current Executive Order does not differ from its predecessor in any respect that is relevant to the resolution of the instant motion, though some provisions cited herein have been renumbered.

security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or [be] under the control of the United States Government"; (3) the information must fall within one of eight protected categories of information listed in Section 1.4 of the Executive Order; and (4) the original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." Exec. Order No. 13,526, § 1.1(a); *see ACLU v. DoD*, 752 F. Supp. 2d at 364.

With respect to the Document, there is no genuine issue that these criteria have been met, particularly given the "substantial weight" the Court must accord to an agency's affidavits justifying classification. *Military Audit Project*, 656 F.2d at 738; *see also Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977). Specifically, as Deputy Assistant Secretary of Defense ("DASD") William K. Lietzau explains, the Document was classified because its content was derived from other classified documents, and DASD Lietzau, himself an OCA, has reviewed it and confirmed that it is in fact classified. *See* Lietzau Decl. ¶¶ 3, 8.[6] The information contained in the Document is "owned by and was produced by and for the United States Government, and, since its inception, has at all times remained under the control of the United States Government, other than the mistaken release to [Plaintiffs] presently at issue." *Id.* ¶ 8. Further, as DASD Lietzau explains, the Document relates to "military plans . . . or operations" and the "foreign relations or foreign activities of the United States," which are listed as a protected categories in Sections 1.4(a) and 1.4(d) of the Executive Order, and as described in detail in his declaration

[6] Indeed, DoD has withheld information about the same standard, under FOIA Exemption 1, from documents previously released to Plaintiffs in this action. *See id.* ¶ 10 & Ex. A.

(and summarized below), its public release "reasonably could be expected to result in serious damage to the national security." *Id.*; *see also id.* ¶¶ 11-18.

As an overarching concern, DASD Lietzau notes that, in DoD's experience, insurgents in Afghanistan and elsewhere are able to synthesize publicly available U.S. Government information in order to "adapt their behavior and responses to post-capture interrogations accordingly, with a goal of evading determinations that might result in detention." *Id.* ¶ 11. In particular, detainees can and do "fabricate cover stories designed to obscure or minimize their involvement in terrorist or insurgent activity." *Id.* ¶ 12. Thus, with respect to the important military function of threat classification of detainees, if the Document were publicly revealed, this would "allow detainees to engage in conduct and manipulation specifically intended to undermine" DoD's evaluative process, with an attendant decrease in the U.S. military's ability "to correctly identify . . . detained individual[s], or to determine accurately [their] organizational position in enemy forces or [their] threat to U.S. forces, allied forces, and the civilian population in the area of operations." *Id.* ¶¶ 11-12.

As DASD Lietzau goes on to explain, DoD's ability to accurately assess a detainee's threat level is important for a number of "strategic and operational reasons." *Id.* ¶ 12.

First, these assessments are used when DoD decides to release detainees who may be lawfully detained but for whose release there may be policy reasons, such as to "support [DoD] counter-insurgency and reconciliation initiatives . . . at the local or national level." *Id.* ¶ 13. Absent an accurate threat assessment, DoD is unable to properly weigh the potential policy benefit of the release against the potential threat that the detainee's release might cause. *Id.*

Second, prior to recommending that a detainee be transferred or released, within Afghanistan or outside it, DoD assesses whether the risk posed by such a release or transfer can

be mitigated by the authorities in the destination. *Id.* ¶ 14. To be successful, such assessments must be based on an accurate view of the detainee's threat level to ensure that the receiving authorities are capable of putting "appropriate safeguards" into place. *Id.*

Third, detainee threat assessments are used in determinations regarding detention of detainees at the DFIP. *See id.* ¶ 15. More dangerous detainees are segregated from "less violent and radicalized" detainees, and the guard force takes more precautions when dealing with detainees that pose a higher threat. *Id.* Accurate threat assessments are required to make such detainee categorizations. *Id.*

Fourth, DoD uses threat-level evaluations as part of its intelligence-gathering efforts. *See id.* ¶ 16. A detainee could use his knowledge of DoD's EST criteria to escape categorization as such a threat by "mak[ing] a statement that denies or minimizes his role in a particular activity that could be relevant to the EST determination." *Id.* Such a statement would "not only result in an inaccurate EST assessment about this individual, but could also interfere with the ability of coalition forces to understand his position within the organization to which he belongs, and the planning and activities in which the organization engages. As a result, such misinformation could ultimately result in the misapplication of force by DoD." *Id.*

Finally, public disclosure of the EST criteria could complicate the United States' diplomatic relations with Afghanistan and other nations. *See id.* ¶ 17. The United States does not discuss its EST assessments of particular detainees in its "sensitive" discussions with the governments of countries who are considering accepting custody of those detainees. *Id.* Release of the EST criteria "would likely complicate those discussions, for reasons [DASD Lietzau] could share with the Court *ex parte* and *in camera*, if requested." *Id.*

DASD Lietzau further anticipates the potential argument that detainees might always try to minimize their perceived threat level when being questioned by the U.S. military — and thus that a public revelation of the EST criteria would not significantly affect detainee behavior — and explains why it is flawed. *See id.* ¶ 18. He states that detainees have learned not simply to deny their involvement in all insurgent activity, which a seasoned interrogator would be able to see through, but instead to "fabricate a story that admits to sufficient culpability to make his story believable while avoiding criteria that would make him an EST." *Id.* Thus, detainees with knowledge of the EST standards might be "ab[le] to effectively falsify information on the threat and [their] role in it" in a way that "puts the accuracy of a DRB's determination at risk." *Id.*

As there is no evidence that this declaration is "'controverted by contrary evidence in the record or by evidence of agency bad faith,'" *ACLU v. DoD*, 752 F. Supp. 2d at 364 (quoting *Wilner*, 592 F.3d at 73), DoD was entitled to withhold the Document pursuant to Exemption 1.

In sum, the Lietzau Declaration provides a reasonably detailed explanation as to why the information contained in the Document is properly classified, the disclosure of which reasonably could be expected to cause serious damage to the national security. The Court must accord substantial weight to DoD's declaration. *See Wilner*, 592 F.3d at 68, 76 ("Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding questions such as whether disclosure of terrorist-related surveillance records would pose a threat to national security." (internal quotation marks and citation omitted)).[7]

[7] As this Court noted in its earlier decision, "in light of the substantial weight accorded to agency affidavits," it is not always necessary for a court to "conduct a detailed inquiry to determine whether it agrees with [an agency's] explanation" for classifying a document by conducting an *in camera* review. *ACLU v. DoD*, 752 F. Supp. 2d at 374 (internal quotation marks omitted). The D.C. Circuit, in a different case involving the same parties, has been even

Significantly, DoD's mistaken production of the Document to Plaintiffs does not change — or waive — its classified status. As the Executive Order specifically states, "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information." Exec. Order No. 13,526, § 1.1(c); *see Azmy v. U.S. Dep't of Defense*, 562 F. Supp. 2d 590, 605 n.12 (S.D.N.Y. 2008). Nor does the fact that some of the classification markings on the Document were mistakenly crossed out before it was produced to Plaintiffs operate to declassify the Document or its contents. Again, this issue is squarely addressed in the Executive Order, which provides that "[i]nformation assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings." Exec. Order No. 13,526, § 1.6(f); *see Wilson v. CIA*, 586 F.3d 171, 190 (2d Cir. 2009). As the Second Circuit concluded recently in the *Wilson* case, classified information did not lose its classified status even when it was erroneously included in an unmarked document and sent via unclassified channels (U.S. mail). *See Wilson*, 586 F.3d at 177-78, 190. Only an "official[] and public[] disclos[ure]" of the precise information at issue by an authorized agency representative can operate to declassify the information. *ACLU v. DoD*, 752 F. Supp. 2d at 366 (quoting *Wilner*, 592 F.3d at 70, and citing *Wilson*, 586 F.3d at 186). There can be no argument that this occurred here.

Accordingly, DoD is entitled to withhold the Document under FOIA Exemption 1.

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more forceful in its pronouncement: "[w]hen the agency meets its burden by means of affidavits, *in camera* review [of the underlying documents] is neither necessary nor appropriate. *In camera* inspection is particularly a last resort in national security situations . . . — a court should not resort to it routinely on the theory that it can't hurt." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 626 (D.C. Cir. 2011) (citations and internal quotation marks omitted).

III. THE COURT SHOULD ORDER PLAINTIFFS TO RETURN THE DOCUMENT TO DOD

Assuming that the Court concludes that the Document was properly classified, and is thus subject to Exemption 1, DoD respectfully requests that the Court order Plaintiffs to return all copies of the Document in their possession. Although the Government has repeatedly requested that Plaintiffs return the Document of their own volition, Plaintiffs have insisted on retaining the Document until such time as a Court orders them to do so. *See* July 8 Letter. Because the Document was produced to Plaintiffs as part of a court-ordered and -supervised FOIA production, the Court has inherent authority to enter an order compelling the Document's return. Here, the Court should exercise this authority to avoid the harm — the "serious damage to the national security" described above, Exec. Order No. 13,526, § 1.2(a)(2) — that would result from the public release of the Document.

"It has long been recognized that federal courts possess certain implied or inherent powers that 'are necessary to the exercise of all others.' Inherent powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *United States v. Moussaoui*, 483 F.3d 220, 236 (4th Cir. 2007) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), and *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)) (citation omitted). In particular, "[f]ederal courts . . . have 'inherent equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.'" *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 568 (S.D.N.Y. 2008) (quoting *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 408 (2d Cir. 1963), in turn quoting *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888)) (internal quotation marks omitted). Courts may "rely upon their inherent authority" when "'the conduct at

issue is not covered'" by other statutes or rules, such as the Federal Rules of Civil Procedure; this arises, for instance, when the conduct at issue took place "prior to the filing of the litigation," "outside the normal discovery process," or outside the explicit scope of "court orders." *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), and citing *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 325 (S.D.N.Y.1997)).[8] Furthermore, "[c]ourts have the inherent authority to enforce their orders." *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 417 (E.D.N.Y. 2007), *aff'd sub nom. Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010).

Because "'[a] court's inherent power is limited by the necessity giving rise to its exercise,'" courts must exercise "'restraint in resorting to inherent power'"; that is, the use of such power must be "'a reasonable response to the problems and needs that provoke it.'" *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 270 (2d Cir. 2007) (quoting *Degen v. United States*, 517 U.S. 820, 823-24, 829 (1996)). Thus, courts must use their discretion to exercise their inherent authority reasonably. *See Eli Lilly*, 617 F.3d at 191 (reviewing order issued by district court pursuant to district court's inherent authority for abuse of discretion).

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[8] When a document protected by the attorney-client or work-product privilege is inadvertently produced as part of *civil discovery*, district courts' authority to order the receiving party to return such documents is now governed by the federal rules of evidence and procedure, *see, e.g.*, *Valentin v. Bank of N.Y. Mellon Corp.*, No. 09 Civ. 9448(GBD)(JCF), 2011 WL 1466122, at *2-3 (S.D.N.Y. Apr. 14, 2011) (citing Fed. R. Evid. 502(b)); *Fuller v. Interview, Inc.*, No. 07 Civ. 5728(RJS)(DF), 2009 WL 3241542, at *2-7 & n.1 (S.D.N.Y. Sept. 30, 2009) (citing Fed. R. Civ. P. 26(b)(5)(B)), though previously this Court and others had fashioned common-law principles providing for such return, *see LaSalle Bank Nat'l Ass'n v. Merrill Lynch Mortg. Lending, Inc.*, No. 04 Civ. 5452(PKL), 2007 WL 2324292, at *4 (S.D.N.Y. Aug. 13, 2007) (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985)). Courts also rely on these common-law principles when ordering the return of inadvertently produced documents protected by other types of privileges and protections. *See, e.g.*, *Flores v. Albertson's, Inc.*, No. CV 01-0515 PA(SHX), 2004 WL 3639290, at *1-5 (C.D. Cal. Apr. 9, 2004) (citing *Lois Sportswear*, 104 F.R.D. at 105) (payroll documents containing employees' Social Security numbers).

As relevant here, courts have exercised their inherent authority to order parties (and non-parties) to return documents they have obtained, but should not have obtained, outside the discovery process. Indeed, there is a small body of cases in which courts have ordered one party to return documents it had obtained from the other party, either prior to the commencement of litigation or otherwise outside the discovery process, as a result of some type of misconduct or unethical behavior. *See United States v. Comco Mgmt. Corp.*, No. SACV 08-0668-JVS (RNBx), 2009 WL 4609595, at *4-5 (C.D. Cal. Dec. 1, 2009) (Government must return privileged documents improperly obtained by the Internal Revenue Service prior to the commencement of litigation); *see id.* at *3 & n.2 (collecting cases in which parties were ordered to return privileged documents obtained through improper *ex parte* communications with their adversaries' employees outside the discovery process or otherwise obtained improperly prior to litigation or outside the discovery process); *Pure Power*, 587 F. Supp. 2d at 566 (same).

But misconduct on the part of the receiving party is not a necessary predicate for the exercise of a court's inherent authority to order a document's return, particularly when dealing with sensitive government documents or documents to which a person obtained access only through the operation of a court order. In a case bearing some similarities to this one, a court ordered that a party had to surrender to the court (and could not continue to access thereafter) a classified document that an agency had inadvertently produced to it as part of a pre-litigation administrative process. *See Al-Haramain Islamic Found., Inc. v. Bush*, 451 F. Supp. 2d 1215, 1228-29 (D. Or. 2006), *rev'd in part on other grounds*, 507 F.3d 1190 (9th Cir. 2007). Furthermore, courts have ordered third parties to return documents they obtained from parties to litigation. *See, e.g.*, *In re Zyprexa*, 474 F. Supp. 2d at 424-25 (ordering third parties to return sealed documents provided to them in violation of protective order); *United States v. Visa U.S.A.,*

Inc., No. 98 Civ. 7076(BSJ), 2000 WL 1682753 (S.D.N.Y. Nov. 9, 2000) (ordering third parties to return unredacted trial exhibits that had been inadvertently posted on a Department of Justice website).

And, in at least one case that the Government has been able to locate, a court has ordered a party to return a document inadvertently produced to it through a FOIA release. *See Hersh & Hersh v. U.S. Dep't of Health & Human Servs.*, No. C 06-4234 PJH, 2008 WL 901539, at *9 (N.D. Cal. Mar. 31, 2008); *see also Piper v. U.S. Dep't of Justice*, 294 F. Supp. 2d 16, 27 n.5 (D.D.C. 2003) ("the Court expects plaintiff to deliver [a photograph inadvertently produced through FOIA] to [the Government] if [it] so request[s]"), *aff'd on other grounds*, 222 F. App'x 1 (D.C. Cir. 2007); *Public Citizen Health Research Group v. FDA*, 953 F. Supp. 400 (D.D.C. 1996) (placing a protective order on a document containing confidential business information inadvertently released through FOIA pending court determination as to whether document is properly subject to FOIA exemption).

A discussion of the facts of some of these cases is instructive here. In *Al-Haramain Islamic Foundation, Inc. v. Bush*, the Department of the Treasury's Office of Foreign Assets Control had designated the Oregon chapter of a Saudi charity as a Specially Designated Global Terrorist, and as part of the administrative designation process had sent to the charity's counsel documents relating to this determination — which included, it later turned out, a highly classified document that was inadvertently produced due to an agency employee's error. *See Al-Haramain*, 451 F. Supp. 2d at 1218-19; *see also* Supp. Decl. of Frances R. Hourihan, FBI Special Agent at 2-3, *Al-Haramain*, No. 06 Civ. 274 (KI) (D. Or. filed May 12, 2006) [Docket No. 32-3 (available

on PACER)][9] (describing FBI investigation of release). When the Government discovered the inadvertent disclosure, it made immediate efforts to seek voluntary return of the document from individuals inside the United States. *See* Hourihan Decl. at 4; *see also Al-Haramain*, 451 F. Supp. 2d at 1219. When the organization later filed suit against the Government, alleging that it had been the subject of a warrantless wiretap, it sought to rely on the classified document and attached it to their complaint under seal. *See Al-Haramain*, 451 F. Supp. 2d at 1218-19. The Government again immediately objected that plaintiffs remained in possession of the inadvertently disclosed classified document, and filed a motion seeking its return and barring plaintiffs from further access to the document. *See id.* at 1228. The court ultimately ordered the plaintiffs who had not previously returned their copies of the document to the Government to surrender them to the Court, and further denied their request for continued access to the document, despite the fact that plaintiffs sought to rely on the document to establish their standing to bring the action. *See id.* at 1228-29.[10]

In *Hersh & Hersh v. U.S. Department of Health and Human Services*, the agency's Office of Inspector General made productions in response to FOIA requests seeking documents related to the agency's investigation of a medical-technology company. *See* 2008 WL 901539, at *1. The agency made two document productions (one before the complaint was filed and one

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[9] This court record, as well as other such records cited in this brief that are available on PACER but not in official reporters or through commercial services such as Westlaw and Lexis, is attached to the Barnea Declaration for the Court's reference.

[10] The district court in the *Al-Haramain* case initially ruled that plaintiffs would be permitted to make sealed court filings that relied on their recollections of the contents of the classified document in the subsequent phases of the litigation. *See id.* However, on appeal, the Ninth Circuit reversed this portion of the district court's order, excluded the document from further litigation based on the state-secrets privilege, and in particular barred plaintiffs from attempting to rely on their memory of what the document contained. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204-05 (9th Cir. 2007).

afterwards), releasing well over a thousand pages of documents. *See id.* Several months later, the agency realized that it had inadvertently included in these productions documents that disclosed the technology company's trade secrets. *See id.* at *9. The agency notified plaintiffs of this erroneous production, requested the return of the improperly released documents, and provided them with a substitute release set from which the exempt documents had been removed. *See id.* When the plaintiffs nevertheless refused to return the documents, the court ordered them to do so. *See id.*

And in *United States v. Visa U.S.A., Inc.*, the Department of Justice's Antitrust Division erroneously posted on its website unredacted copies of exhibits it had used in a prior trial — where the exhibits in question had been admitted into evidence in redacted form so as not to reveal the defendant's sensitive business information. *See* 2000 WL 1682753, at *1. The DOJ was able to identify at least some persons who accessed the information from its website. *See id.* This Court ordered all third parties who had accessed the information from the website to destroy all copies of it, stating that "third parties who gain access to sealed material inadvertently disclosed cannot be allowed to retain those documents." *Id.*

In each of these cases, courts recognized that they had the authority to protect the dissemination of legally protected information that had been disclosed inadvertently to another party in connection with court proceedings, and to order the receiving party to return the documents to their rightful owner. Likewise, here, the Document in question was inadvertently produced to Plaintiffs as part of a court-sanctioned process designed by the parties to narrow the issues in dispute between them. In other words, as the parties anticipated, DoD's disclosure of documents pursuant to the Production Order has served to narrow the issues in need of judicial resolution. Indeed, the Court has entered numerous orders (including the Production Order) to

facilitate this process, and DoD and the other defendants have produced thousands of documents to the Plaintiffs as a consequence. *See* Lietzau Decl. ¶ 6. The process was not designed, however, to afford Plaintiffs access to documents that DoD would maintain were exempt from disclosure under FOIA. To provide such access to Plaintiffs without a court ruling was certainly not what was intended by this court-sanctioned process. The Court thus has the inherent authority to supervise the parties' conduct in complying with this order.

Significantly, the instant litigation is not ordinary civil litigation, nor is this dispute of concern only to the parties. In this litigation, Plaintiffs seek, and have received, the Court's assistance in compelling Government agencies to reveal publicly documents relating to their policies for detaining enemy insurgents as part of the war in Afghanistan. The Document at issue was classified at the SECRET level by the U.S. Department of Defense, meaning that its public release "reasonably could be expected to cause serious damage to the national security." Exec. Order No. 13,526, § 1.2(a)(2). The Court must thus take into account the potential public harm that would be occasioned by Plaintiffs' continued possession of — and public dissemination of — the Document.

It is unfortunate that classified information will occasionally be inadvertently provided to persons not authorized to receive it, in connection with court proceedings. In addition to the *Al-Haramain* case discussed above, this has occurred in a handful of criminal cases involving national-security offenses that have resulted in publicly available court decisions addressing such disclosures. In each of those cases, courts have ordered defense counsel to return the classified information to the Government. *See, e.g.*, *United States v. Holy Land Found.*, No. 04 Cr. 240 (N.D. Tex. Order dated January 30, 2006) [Docket No. 267 (available on PACER)] (directing the return of classified material, including applications submitted to and orders issued by the Foreign

Intelligence Surveillance Court, inadvertently provided to defense counsel in a criminal case); *see also id.* [Docket No. 205 (Sept. 16, 2005) (available on PACER)] (Government's motion for return of classified material);[11] *United States v. Moussaoui*, No. CR. 01-455-A, 2002 WL 32001771 (E.D. Va. Sept. 26, 2002) (unsealing prior court order directing U.S. Marshal to retrieve inadvertently released classified documents from criminal defense counsel); *United States v. Rezaq*, 899 F. Supp. 697, 707-08 (D.D.C. 1995) (order "requir[ing] [criminal] defense counsel to return to the government any classified information that the court determines are not 'material' to defendant's defense").

The determination that a mistakenly produced document is properly classified should thus carry a great deal of weight in determining its fate. As explained above, for a document to be properly classified at the SECRET level, a responsible government official must certify, and be able to explain, what national-security harm would result from its public release. As DASD Lietzau explained in his declaration, if publicly revealed, the Document's contents might be used by insurgents in Afghanistan and elsewhere to evade proper identification and classification, potentially undermining U.S. military operations. Because Plaintiffs insist that they will not return the Document absent an order from this Court compelling them to do so, DoD has no choice but to seek such an order.

The Court should thus exercise its inherent authority to order Plaintiffs to return the Document.

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[11] The *Holy Land* court later denied defendants' motion to require the Government to provide defendants with access to the classified documents. *See United States v. Holy Land Found. for Relief & Development*, No. 3:04-CR-240-G, 2007 WL 2011319, at *2-5 (N.D. Tex. July 11, 2007).

CONCLUSION

For the foregoing reasons, the Court should grant DoD's motion for partial summary judgment, and order Plaintiffs to return the properly classified document to DoD.

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July 13, 2011

Respectfully submitted,

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