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)

REPLY MEMORANDUM IN SUPPORT OF THE DEPARTMENT OF DEFENSE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RELATED RELIEF, IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN SUPPORT OF THE DEPARTMENT OF DEFENSE'S MOTION TO SEAL PORTIONS OF PLAINTIFFS' OPPOSITION BRIEF

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel: (212) 637-2679
Fax: (212) 637-2717

JEAN-DAVID BARNEA
Assistant United States Attorney
– Of Counsel –

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PRELIMINARY STATEMENT

Defendant the Department of Defense ("DoD"),[1] by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum in support of its motion for partial summary judgment and related relief, in opposition to the cross-motion of Plaintiffs American Civil Liberties Union and the American Civil Liberties Union Foundation, and in support of its motion to seal portions of Plaintiffs' opposition brief. For the reasons explained in DoD's initial motion papers and herein, this Court should uphold DoD's determination that the Document is properly classified and order Plaintiffs to return all copies of the Document to DoD. *See infra* Section I. This Court should also maintain under seal certain portions of Plaintiff's opposition brief (as well as related correspondence and further papers submitted by Plaintiffs). *See infra* Section II. Accompanying this memorandum is a supplemental declaration from William K. Lietzau, the Deputy Assistant Secretary of Defense for Detainee Policy and Rule of Law, the classified portions of which have been filed *in camera* and *ex parte* (the "Reply Lietzau Decl.").

[1] Unless otherwise specified, this memorandum uses the abbreviations defined in DoD's opening memorandum of law. In addition, this memorandum cites DoD's opening partial summary judgment brief [Docket No. 56] as "Mot." and Plaintiffs' opposition and cross-motion papers [Docket No. 78] as "Opp."

ARGUMENT

I. PLAINTIFFS' OBJECTIONS TO DOD'S ARGUMENTS ARE MERITLESS

Plaintiffs' opposition papers make several arguments, all of which this Court should reject, for the reasons explained below:

- First, Plaintiffs mistakenly argue that the Court should apply a standard of review to DoD's classification determination that is explicitly different from (and less deferential than) the standard of review this and all other federal courts apply in FOIA cases simply because Plaintiffs identify a First Amendment interest they claim to be protecting. *See infra* Section I.A.

- Next, they argue that this Court should apply the so-called "secret law" doctrine — which forbids federal agencies from keeping from the public their standards for what they view as violations of the laws they administer — to a wholly inapposite scenario: classified discretionary criteria used by an agency to categorize the potential future threats posed by detainees, as opposed to determining whether they may be lawfully detained. *See infra* Section I.B.

- Third, Plaintiffs wrongly assert that DoD has not demonstrated that its threat-evaluation criteria constitute "military plans . . . or operations," or sufficiently justified its reliance on the "foreign relations" component of the classification standard, disregarding the declaration of Mr. Lietzau, who has explained that the military uses these criteria to inform detainee release and transfer determinations and who stated that disclosure of the Document "would likely complicate . . . discussions [with other countries regarding potential detainee transfers], for reasons [he] could share with the Court *ex parte* and *in camera*, if requested," Lietzau Decl. ¶ 17. Mr. Lietzau now provides some of this reasoning in his the classified portion of his supplemental declaration. *See infra* Section I.C.

- Fourth, Plaintiffs claim that various sources of publicly known information either officially disclose the content of the Document or expose a flaw in DoD's reasoning for maintaining the Document's classified status, but this argument lacks merit. *See infra* Section I.D.

- And fifth, Plaintiffs claim that any order by this Court ordering them to return the Document would infringe their First Amendment rights, despite the fact that they received the Document only as a result of a Court order, and thus, the Court has the authority to restrict Plaintiffs' use of the Document because it was produced as a result of judicial process. *See infra* Section I.E.

A. This Court Should Apply the FOIA Standard of Review to DoD's Classification Determination in This FOIA Case

As this Court explained in its prior decision in this case, and as summarized in DoD's opening brief, "[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.'" *ACLU v. DoD*, 752 F. Supp. 2d 361, 364 (S.D.N.Y. 2010) (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); *see also* Mot. at 7 ("'[A] 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.' . . . [A] district court[] [should not] use . . . 'its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure.'" (quoting *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), and *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990))).

In urging a "more searching" standard of review upon this Court, Plaintiffs cite *non-FOIA* cases in which courts "'fe[lt] compelled to go beyond the FOIA standard of review.'" Opp. at 9 (quoting *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (pre-publication review case)); *see also id.* (citing *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009) (pre-publication review case), *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) (national-security letter case), and

other cases).[2] These cases are thus inapposite on their face to this, or any, FOIA case. Certainly, it is not unusual for courts to apply one standard of review when reviewing claims under a particular statute, and a different standard of review in other circumstances. Plaintiffs identify no *FOIA* cases in which any court has used a standard of review different from the traditional FOIA standard for evaluating an agency's claim that a document is exempt from disclosure pursuant to FOIA Exemption 1.

Lacking any authority for applying their less deferential standard in the FOIA context, Plaintiffs argue that such a standard is somehow warranted by alluding generally to their First Amendment rights, and noting that the other cases in which a heightened standard is used involved strong First Amendment interests. But the comparison is flawed. Even if the presence of a strong First Amendment interest could justify applying a different standard of review in a FOIA case — which it cannot — these other cases involved potential government intrusion on quintessential First Amendment rights: in the pre-publication review cases, the Government was preventing the publication of its former employees' writings based on a contractual arrangement (*McGehee, Wilson*), and in the national-security letter cases, the Government was enforcing a statute that forbade subpoena recipients from speaking publicly about the requests they had received (*John Doe, Inc.*).

Here, however, Plaintiffs have no First Amendment interests whatsoever in opposing the portion of DoD's motion regarding the withholding of the Document. DoD's motion in this case has two separate components. First, it seeks summary judgment regarding its decision to

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[2] A more in-depth discussion of the pre-publication review cases and the national-security letter cases cited by Plaintiffs is set forth in DoD's memorandum of law to this Court regarding whether Plaintiff's opposition brief could cite the Document. *See* Memorandum of Law in Opposition to Plaintiffs' Rule 72(a) Objections to the Magistrate Judge's July 28, 2011 Order [Docket No. 65] ("DoD 72(a) Opp."), at 21-23.

withhold the Document pursuant to FOIA Exemption 1, based on the fact the Document has properly been classified. If the Court concludes that DoD properly classified the Document and Exemption 1 applies, the second part of DoD's motion is directed toward Plaintiffs' return of the inadvertently produced Document to DoD. The standard of review at issue applies only to the Court's first inquiry, used to evaluate whether DoD has properly classified the Document. Plaintiffs have no First Amendment right regarding DoD's classification determination. Rather, Plaintiffs' only asserted First Amendment interest pertains solely to their refusal to return the Document to DoD (discussed below), and is thus simply not relevant to this first inquiry.

Indeed, Plaintiffs identify no First Amendment right involving the Court's determination as to whether the Document is classified in the first instance. Nor could they, as Plaintiffs, like all other FOIA requesters, have no constitutional interest in obtaining documents from the Government. *See ACLU v. DoD*, 664 F. Supp. 2d 72, 79 (D.D.C. 2009) ("Plaintiffs[] claim that defendants' withholding of certain information in the documents produced in response to their FOIA request violates plaintiffs' First Amendment right to receive information. This argument is without merit. . . . [F]irst, there is obviously no First Amendment [r]ight to receive classified information, and second, were plaintiffs correct, every FOIA exemption would likely be unconstitutional." (citations, brackets, and internal quotation marks omitted)).

Thus, even if the presence of a First Amendment interest were sufficient to change the standard of review in a FOIA case — which it is not — Plaintiffs have not articulated any First Amendment interest they have in the relevant court determination: whether DoD may properly withhold the Document. The Court must thus apply the FOIA standard of review to DoD's classification decision.

B. The Document Does Not Contain "Secret Law" and Does Not Lose Its Classified Status Because of Plaintiffs' Contrary View

Plaintiffs' next misplaced argument is based on their own speculation about how DoD uses the EST criteria, which is directly at odds with the statements by the agency official who actually oversees their use. Mr. Lietzau, the Deputy Assistant Secretary of Defense for Detainee Policy, has described how the DoD employs the EST criteria, expressly explaining why the categorization of a detainee as an EST does not have "implications related to the lawfulness of detention," but rather simply serves as "a means of identifying the highest-threat detainees for purposes of implementing the U.S.'s discretionary transfer and release determinations." Lietzau Decl. ¶ 9. In response, Plaintiffs stake out a different, albeit unsubstantiated, position: that DoD uses these criteria in order to determine which detainees it may legally detain. *See* Opp. at 11-14.

Plaintiffs' conjecture on the topic is emphatically incorrect, as Mr. Lietzau explains in greater depth in the attached supplemental declaration and summarized below. Moreover, as discussed below, the "secret law" doctrine identified by Plaintiffs simply does not apply to the EST criteria because the doctrine is inapplicable to FOIA Exemption 1. Finally, the circumstances that have led courts to compel disclosure under this doctrine are not present here because the Document addresses a discretionary determination in which detainees have no legal interest (authority within DoD for discretionary release or transfer determination) rather than any question regarding the legality of their detention.

As Mr. Lietzau explains, the DRB, a "non-judicial, administrative body," is charged with making three separate assessments for each detainee at Bagram. Reply Lietzau Decl. ¶¶ 6-9. First, the DRB determines whether a detainee meets the AUMF criteria for detention and therefore may be lawfully detained. *Id.* ¶ 7. Then, for those detainees regarding whom the DRB concludes that the AUMF criteria are satisfied (*i.e.*, they may be lawfully detained), the DRB

proceeds to engage in a threat assessment to guide its discretionary recommendation as to whether, notwithstanding the fact that a detainee may be lawfully detained, the detainee may nevertheless be released or transferred. In this second assessment, the risks associated with the detainee's release are weighed against the potential for his rehabilitation and reconciliation. *Id.* ¶ 8. The third assessment made by the DRB (the EST assessment at issue in the Document) is a recommendation on whether the detainee meets further discretionary criteria which, in turn, govern the level of DoD official who may ultimately approve any release or transfer of the detainee: the Commander of the U.S. Central Command is permitted to delegate without restriction to lower-ranked officers his authority to release or transfer non-EST detainees within Afghanistan, but he is limited in his ability to delegate his authority to release or transfer detainees who are designated as ESTs. *Id.* ¶ 9 & n.2.

In support of Plaintiffs' contrary view, they make several unavailing arguments. For instance, they claim that the AUMF includes several ambiguous terms, and that the EST criteria provide DoD's official views on how these terms are actually interpreted with respect to whether a Bagram detainee may lawfully be detained. *See* Opp. at 11-12. This is simply incorrect: as Mr. Lietzau explains, the EST criteria are not used in this manner. *See* Reply Lietzau Decl. ¶ 9 n.4.

Plaintiffs also cite public DoD documents and statements regarding the EST determination and suggest that they support Plaintiffs' understanding of the function of the criteria, when they in fact are wholly consistent with DoD's position that the EST criteria are separate from a determination of the lawfulness of an individual's detention. It is indeed true that DoD instructs the DRBs that they "'shall consider whether detainees'" meet the EST standards, Opp. at 13 (quoting Shamsi Decl. Ex. D, at 40), but there is nothing unusual in *requiring* a body to conduct a deliberation about whether each person it evaluates meets criteria that will later be

used as a basis for a *discretionary* determination. As for the "'limitations on the approval authority of a transfer or release decision'" for ESTs mentioned in a DoD memorandum, *id.* (quoting Shamsi Decl. Ex. D, at 40), this simply refers to the differing levels of authority within DoD needed to approve the discretionary releases and transfers of ESTs and non-ESTs, as discussed above. *See* Reply Lietzau Decl. ¶ 9 & n.3.

Furthermore, the statement to the *Wall Street Journal* more than a year ago by Vice Admiral Robert S. Harward, Jr., formerly the commander of detention operations at Bagram, that DoD may not be able to transfer all Bagram detainees, including ESTs, to the Afghan authorities, *see* Opp. at 14 (citing Shamsi Decl. Ex. N), is not inconsistent with DoD's position that the EST criteria guide discretionary determinations regarding the potential release or transfer of detainees, for the reasons explained in a classified portion of the accompanying declaration, *see* Reply Lietzau Decl. ¶ 11 n.6.

Plaintiffs are incorrect that the "secret law" doctrine applies to the Document. Plaintiffs also misunderstand the scope of this doctrine in arguing that it could encompass a document of this type. Under the "secret law" doctrine, certain FOIA exemptions can give way to permit disclosure of "materials that define standards for determining whether the law has been violated." *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 252 (D.C. Cir. 1993); *accord Caplan v. ATF*, 587 F.2d 544, 548 (2d Cir. 1978) (material that "set[s] forth the [agency's] interpretation of substantive or procedural law"); *Audubon Soc'y v. U.S. Forest Serv.*, 104 F.3d 1201, 1204 (10th Cir. 1997) ("information withheld from the public which defines the legal standards by which the public's conduct is regulated").

First of all, the "secret law" doctrine simply does not apply to documents withheld pursuant to FOIA Exemption 1. Plaintiffs assume — but cite no law whatsoever — in support of

the contrary proposition, but cite only cases applying this doctrine pertain to FOIA Exemptions 2, 5(E), and 7. Opp. at 14. In doing so, Plaintiffs ignore the fundamental distinction between the types of information to which this doctrine has been applied, and classified information which, by its very nature is "secret" (sometimes even "top secret") and thus its nonpublic nature cannot be said to offend the democratic order.

In any event, the same factors that motivated courts to disallow withholdings of "secret law" in these very different contexts do not apply here. With respect to Exemption 7(E) and the no-longer-extant Exemption 2 "high," Plaintiffs focus on cases in which courts ordered that prosecutorial or other law-enforcement guidelines be released. *See* Opp. at 16 (citing *Hawkes v. IRS*, 507 F.2d 481, 482 (6th Cir. 1974) (Internal Revenue Manual and tax-return classification handbook); *Jordan v. Dep't of Justice*, 591 F.2d 753, 755 (D.C. Cir. 1978) ("documents relating to the exercise of prosecutorial discretion by the United States Attorney for the District of Columbia")). And in the Exemption 5 context, the secret law doctrine appears to be used primarily to forbid agencies from claiming that a document is an internal draft or memorandum when it in fact represents the agency's final thinking on an enforcement matter. *See* Opp. at 15 (collecting cases).

More importantly, there is a fundamental distinction between the documents at issue in those circumstances and the Document. The Document does not contain prosecutorial guidelines that instruct military prosecutors at Bagram what charges to bring against detainees or how to decide who to prosecute for various offenses that they previously committed. Nor, as explained above, does the Document prescribe which individuals DoD has the legal authority to detain at Bagram. Instead, the Document prescribes a mechanism for the DRB to assess — after it has already concluded that particular detainees may be legally held — whether those detainees meet

the further discretionary criteria which, in turn, govern who within DoD should have the discretionary authority to release or transfer the detainee. This distinction remains significant: the Government has revealed the criteria it uses to determine who it has the authority to detain at Bagram, but it need not reveal the criteria that guide its discretionary release and transfer determinations, and who within DoD is responsible for making them, for those individuals which it has already determined it may legally detain.

C. DoD Properly Classified the Document with Reference to the "Military Plans" and "Foreign Relations" Categories in the Executive Order

As reviewed in DoD's opening brief, one of the requirements for the Government to classify information is for the information to "fall within one of eight protected categories of information listed in Section 1.4 of the Executive Order." Mot. at 8 (citing Executive Order No. 13,526, § 1.1(a), 75 Fed. Reg. 707 (Dec. 29, 2009) (reproduced at 50 U.S.C. § 435 note)). DoD determined that the Document fell into two of these categories, "military plans . . . or operations" and the "foreign relations or foreign activities of the United States." *Id.* (citing Lietzau Decl. ¶ 8 and Executive Order 13,526, §§ 1.4(a), 1.4(d)). Plaintiffs challenge DoD's categorization of the Document with respect to both categories, both unsuccessfully. *See* Opp. at 12-13, 17-19.

With respect to the "military plans . . . or operations" provision, Plaintiffs are certainly correct that information about the operational readiness of military units and videotapes of military operations are covered by this category. *See* Opp. at 13 (collecting cases). But this does not mean that this category does not cover operations of the Department of Defense (*i.e.*, the "military") that are further removed from the battlefield. Indeed, this Court has previously upheld DoD's withholding of information concerning the Bagram detainees' *citizenships and lengths of detention* as relating, among other things, to "military plans . . . or operations," though these categories of information do not constitute battle plans in the traditional sense. *See ACLU*

v. DoD, 752 F. Supp. 2d at 369-70. There is similarly no reason why DoD's plans as to how it categorizes the detainees — which, after all, were captured on a battlefield of some kind — cannot constitute "military plans . . . or operations."

Furthermore, as Mr. Lietzau explains, the threat assessments made using the EST criteria are used to inform very operational goals: "whether, when, where, and under what conditions the[se] . . . detainees might be safely transferred or released in support of counter-insurgency strategies and other operational objectives." Reply Lietzau Decl. ¶ 10.

As for "foreign relations," Plaintiffs fault Mr. Lietzau's declaration explaining why the Document falls into this category, for being "bare, speculative, and inadequate." Opp. at 17. The spare nature of the declaration in this regard should not be surprising considering that Mr. Lietzau stated that release of the Document would likely "complicate" the "sensitive" discussions between the United States and countries regarding detainee transfers. Lietzau Decl. ¶ 17. Nevertheless, as Mr. Lietzau stated, he could share the reasons why such discussions would be complicated only "*ex parte* and *in camera*, if requested." *Id.* Thus, while Plaintiffs' brief suggests that DoD has simply failed to justify its categorization, DoD has actually offered to provide such a justification to the Court upon request. In any event, Mr. Lietzau, in the classified portion of his reply declaration, now addresses this issue in greater detail, and supplies the rationale for this categorization to the Court. *See* Reply Lietzau Decl. ¶¶ 11-12.

D. Plaintiffs' Arguments that the Contents of the Document Have Been Officially Disclosed and Are Known to Bagram Detainees Are Meritless

Plaintiffs' next set of arguments is that the EST criteria have been officially disclosed and that they are known to the Bagram detainees, thus obviating DoD's rationale for classifying them. *See* Opp. at 19-26. As this Court has previously explained, "'A strict test applies to claims of official disclosure. . . . [C]lassified information that a party seeks to obtain . . . is deemed to

have been officially disclosed only if it (1) is as specific as the information previously disclosed, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure.'" *ACLU v. DoD*, 752 F. Supp. 2d at 366 (quoting *Wilson*, 586 F.3d at 186 (brackets and internal quotation marks omitted)). Plaintiffs cannot satisfy this legal standard, for the reasons explained in a classified section of the accompanying declaration, *see* Reply Lietzau Decl. ¶¶ 17-28, except with respect to a single phrase, as discussed below.

One of the documents cited by Plaintiffs is a July 2, 2009 DoD memorandum entitled "Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan." *See* Opp. at 24 (quoting Shamsi Decl. Ex. D). This memorandum states, among other things, that "[a]n 'Enduring Security Threat' is an individual who, assessed by capability and commitment, [redacted]." *Id.* at Bagram-Policy-40. The phrase "by capability and commitment" also appears in the Document. *See* Reply Lietzau Decl. ¶ 16. Thus, DoD has prepared a heavily redacted version of the Document in which this four-word phrase and additional unclassified background information are not redacted, which is hereby attached to Mr. Lietzau's supplemental declaration. *See id.* & Ex. A.

E. An Order Requiring Plaintiffs to Return a Classified Document that Was Inadvertently Produced to Them Will Not Violate the First Amendment and Is Within This Court's Inherent Authority

Plaintiffs argue that this Court lacks the authority to order them to return to DoD the classified Document that Plaintiffs acknowledge was inadvertently produced to them, and that such an order would violate their constitutional rights. *See* Opp. at 26-31. They are wrong on both counts. Plaintiffs' arguments rest on three faulty premises: First, that DoD's production — which was made pursuant to the Production Order entered by this Court after Plaintiffs sued DoD seeking judicial intervention to compel just such a production — was not made "under

compulsion of a court order," and thus that this Court lacks authority to supervise the parties' conduct in their attempts to comply with its order. *See id.* at 28-29. Second, that federal courts lack the ability to supervise the conduct of the parties before it except with regard to information obtained through the discovery process or otherwise only in the case of misconduct. *See id.* at 27-28, 30-31 & n.12. And third, that the First Amendment does not countenance the type of order sought by DoD. *See id.* at 30-31.

With respect to the Court's role in DoD's production, Plaintiffs' position cannot be squared with the procedural history of this case. As Plaintiffs detailed in their complaint, they filed the instant action and thereby invoked this Court's jurisdiction only after five months had elapsed since they had sent their FOIA request to DoD, which request DoD had refused to expedite, and in response to which DoD had identified only a single responsive document, which it withheld in full. *See* Compl. ¶¶ 2, 37-42. It was not until after Plaintiffs brought this action in this Court that DoD agreed to release the withheld document (a list of the detainees at Bagram) in part, *see ACLU v. DoD*, 752 F. Supp. 2d at 363, and — pursuant to a series of court-ordered stipulations — to search for and produce thousands of records responsive to Plaintiffs' request. DoD agreed to conduct these searches and produce these documents only once the parties had negotiated sensible limits on the scope of the documents sought by Plaintiffs and agreed on time limits for the searches and productions to be completed, and submitted their agreed-upon parameters to the Court for its review and approval. [*See* Docket Nos. 24, 44, 50.] DoD produced the Document to Plaintiffs as part of its attempt to comply with the Production Order, the second of these three orders. Indeed, Plaintiffs would have no doubt sought relief from this Court had DoD failed to meet its obligations to produce the agreed-upon set of documents

pursuant to the Court's orders. Thus, any argument that Plaintiffs received the Document other than "under compulsion of a court order" is meritless.

As for the limitation that Plaintiffs perceive exists on this Court's inherent authority, they are correct that the authority in question is bounded, but misidentify its limits. As this Court has summarized the Second Circuit case law, a federal court's inherent authority does not extend over the "'use of information innocently obtained from third parties *without use of judicial process*.'" *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997) (quoting *Schlaifer Nance & Co. v. Estate of Warhol*, 742 F. Supp. 165, 166 (S.D.N.Y. 1990) (emphasis added and emphasis omitted)). Plaintiffs' argument incorrectly implies that the second component of this formulation ("without use of judicial process") refers generally to all documents obtained outside of discovery. In doing so, Plaintiffs conflate the discovery process — surely the most common way in which a court facilitates the exchange of information between parties — and "judicial process" generally. But no one can seriously dispute that a court may order a party to produce certain information to its opponent without a pending discovery request, or that courts have inherent authority to police certain exchanges of information outside of traditional discovery, such as information produced pursuant to administrative subpoenas (including the national-security letters discussed above). *See generally United States v. Bailey* (*In re Subpoena Duces Tecum*), 228 F.3d 341, 348 (4th Cir. 2000) ("A[n] [administrative] subpoena . . . commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands." (citing *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967))).

Plaintiffs' argument to the contrary is based in part on the Second Circuit's statement in *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983), that "'prior

restraint on [a party's] First Amendment right to disseminate documents obtained outside the discovery process was beyond the court's power.'" Opp. at 30 (quoting *Bridge*, 710 F. 2d at 946). But as the court of appeals in *Bridge* clarified, its statement was concerned with a document that the offending party had obtained "independently of *any judicial processes*" whatsoever. *Bridge*, 710 F.2d at 946 (emphasis added). Similarly, *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963), cited by the *Bridge* court and by Plaintiffs, *see* Opp. at 30, also considered the constitutionality of court orders restricting the use of "information which have come into [a party's] possession otherwise than through *the court's processes*." *Int'l Prods.*, 325 F.2d at 409 (emphasis added). Thus, these cases do not, as Plaintiffs argue, stand for the proposition that the Court may restrict the dissemination of documents only if obtained through discovery.

Plaintiffs acknowledge, albeit in a footnote, that courts — including this one — have indeed concluded that they may order the return of documents obtained outside of discovery without running afoul of constitutional considerations. *See* Opp. at 31 n.15. But Plaintiffs argue, without justification, that misconduct by a party (*e.g.*, "stolen documents," to use Plaintiffs' term) is required in order for a court to invoke its authority over documents obtained outside the discovery process. *See id.* (collecting cases). Misconduct is, true enough, one basis upon which a court may assert its authority over documents obtained outside of the judicial process altogether. As explained above, a federal court's inherent authority does not extend over "use of information *innocently* obtained from third parties without use of judicial process." *Fayemi*, 174 F.R.D. at 324 (internal quotation marks omitted). A court thus has inherent authority to regulate parties' use of documents they obtained through "use of [the] judicial process" *or* over those that they obtained through other than "innocent[]" means. *Id.*

Thus, this Court has ordered a party that received inadvertently produced privileged emails in an arbitration proceeding parallel to the litigation to destroy those documents. *See Fuller v. Interview, Inc.*, No. 07 Civ. 5728 (RJS)(DF), 2009 WL 3241542, at *1 (S.D.N.Y. Sept. 30, 2009). And a federal court in California ordered the Government to return privileged documents that a federal agency had obtained through its own processes while litigation was pending. *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). And, of course, in the *Al-Haramain* case discussed extensively by the parties in previous briefing, a court ordered that a party had to surrender to the court 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 on other grounds*, 507 F.3d 1190 (9th Cir. 2007).

In the FOIA context, there are only a few cases that even address the possibility of a requester returning documents released to it by a government agency. *See* Mot. at 16 (collecting cases). This has more to do with the mechanics of FOIA releases than with any limitations on a court's inherent authority. Plaintiffs correctly note that once documents are released pursuant to FOIA, they are intended for the public at large, and thus generally cannot be restricted in their post-release distribution. *See* Opp. at 28-29. Here, however, we are dealing with an intermediate situation: a document that was inadvertently provided (pursuant to a court order) to a FOIA requester who, upon receiving it and before disseminating it to the public, contacted the releasing agency to inquire whether the release had been inadvertent.[3] The Document is in somewhat of a

[3] Other than the production containing the Document, Plaintiffs have published on their website all of the documents released by the various agency defendants throughout this litigation almost immediately after their respective releases. *See* Am. Civil Liberties Union, *Bagram FOIA*, *available at* http://www.aclu.org/national-security/bagram-foia.

FOIA limbo: While the Document is no longer under the exclusive control of DoD, DoD's release of the Document to them was inadvertent (as Plaintiffs themselves recognized) and at odds with DoD's understanding that public release of the Document will harm national security. Perhaps another FOIA requester might have suppressed its questions about DoD's intention to release the Document and made the Document public immediately, before DoD would have realized its mistake. But Plaintiffs, having decided to do the responsible thing and consulted with DoD about the Document (in light of the potential national-security ramification of a release of the Document), cannot now seek a tacit judicial imprimatur for their desire to keep the Document, by arguing that the Court lacks the authority to order them to return the Document.[4]

Finally, Plaintiffs argue that the First Amendment "generally protects information lawfully obtained on matters of public concern," and thus claim that this militates against this Court exercising its inherent authority to order them to return the Document. Opp. at 30-31

[4] We also note the irony in Plaintiffs' position regarding the paucity of cases in which parties challenged court orders requiring them to return classified information that was inadvertently produced to them. *See, e.g.*, Opp. at 29. As noted in the parties' prior briefing, in other cases, when non-government parties were apprised of the fact that they were in possession of classified information that they were not supposed to have received, they immediately returned the documents to the Government, often suffering concrete prejudice to their litigating position as a result. *See Al-Haramain*, 451 F. Supp. 2d at 1229 & n.6 (charity designated as terrorist group and its directors were ordered to return a classified document that a government agency had accidentally provided to them, and immediately complied, some before the court actually issued its order, though this initially resulted in the dismissal of their claims); *In re Terrorist Attacks on September 11, 2011*, No. 03 MDL 1570 (GBD) (FM) (discussed in the parties' submissions relating to the limitations on Plaintiffs' ability to discuss the Document in their briefing, *see* DoD 72(a) Opp. at 15-16) (private plaintiffs obtained documents from an unknown source, but returned them immediately upon Government confirmation that they were classified, as a result of which they were denied the right to conduct jurisdictional discovery in aid of potentially adding a defendant). Because of the plaintiffs' voluntary actions in these cases of inadvertent disclosures, there is a paucity of cases in which the Government has had to ask a court to order the return of classified documents. Here, by contrast, the Court must address this issue because Plaintiffs have refused to return the Document to DoD voluntarily.

(collecting Supreme Court cases). While Plaintiffs' premise is true as a general matter, it ignores a parallel line of cases that is applicable here. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court held that courts could, consistent with the First Amendment, prohibit parties from publishing information they obtained through court-sanctioned discovery, but could not forbid them from publishing similar information "as long as the information is gained through means independent of the court's processes." *Id.* at 33-34.

As in the cases discussed above concerning courts' inherent authority, Plaintiffs' argument thus relies on narrowing all types of judicial process to mean only the discovery process. For the reasons explained above, however, and as anticipated by the *Seattle Times* Court itself, the relevant distinction is whether or not the information in question was "gained through means independent of the court's processes." *See also Bridge C.A.T. Scan Assocs.*, 710 F.2d at 946 (First Amendment prohibits courts from exercising control over documents a party obtains "independently of any judicial processes"); *Int'l Products*, 325 F.2d at 409 (same); *cf. ONBANCorp, Inc. v. Holtzman*, No. 96-CV-1700 (RSP/DNH), 1997 WL 381779, at *5 (N.D.N.Y. June 27, 1997) (First Amendment did not prevent court from issuing protective order governing materials that a party obtained through discovery in a parallel state-court action, though it ultimately declined to do so for reasons of judicial comity, because those materials had been obtained through "judicial process," though not the court's own process).

II. THE COURT SHOULD MAINTAIN PERMANENTLY UNDER SEAL THE RELEVANT PORTIONS OF PLAINTIFFS' OPPOSITION AND RELATED FILINGS BY BOTH PARTIES

DoD hereby requests that designated portions of Plaintiffs' opposition brief remain under seal permanently: all of Section II.C except the first and last paragraphs in that section, and all of Section II.D except the first, second, penultimate, and last paragraphs in that section. Although

parties' briefs in litigation are presumptively filed publicly, such documents may be maintained under seal when "justified . . . with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006). As explained in a classified portion of the accompanying declaration, public release of the relevant sections of Plaintiffs' opposition brief could potentially disclose classified information, and thus would harm national security. *See* Reply Lietzau Decl. ¶¶ 29-32.

CONCLUSION

For the foregoing reasons and for the reasons expressed in DoD's opening brief, the Court should grant DoD's motion for partial summary judgment and deny Plaintiffs' cross-motion for partial summary judgment, order Plaintiffs to return the properly classified Document to DoD, and order that the relevant parts of Plaintiffs' opposition brief (as well as other briefing on similar issues) be kept under seal indefinitely.

Dated: New York, New York
December 5, 2011

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the Department of Defense

By: s/Jean-David Barnea
JEAN-DAVID BARNEA
Assistant United States Attorney
86 Chambers Street, 3rd floor
New York, NY 10007
Tel.: (212) 637-2679
Fax: (212) 637-2717
Email: Jean-David.Barnea@usdoj.gov