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UNITED STATES DISTRICT COURT
FOR THE 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.

09 Civ. 8071 (BSJ) (FM)

ECF Case

MEMORDANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Clerk of the Court is directed to docket this redacted version of the above captioned Plaintiffs' Memorandum of Law pending resolution by the Court of the sealing issue.

So ordered:
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11/22/11

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PRELIMINARY STATEMENT

Since 2002, the U.S. military has detained thousands of people at its Bagram, Afghanistan detention facility without access to lawyers or courts, in a war without a clearly defined enemy, or, according to the government, geographic boundaries. Since 2009, the Department of Defense ("DOD") has determined that at least 100 Bagram detainees—and likely hundreds more—are "enduring security threats" based on secret criteria that result in prolonged, and potentially indefinite, detention. This case concerns the public's right to know the "enduring security threat" criteria ("EST criteria"), which contain DOD's legal interpretation of its detention authority, but which it refuses to disclose publicly.

President Obama has said, referring to the Guantanamo detention regime, that "[w]e must have clear, defensible, and lawful standards" for "those who cannot be prosecuted yet who pose a clear danger" and will remain in U.S. custody without charge or trial. *See* President Barack Obama, Remarks by the President on National Security, National Archives (May 21, 2009), Declaration of Hina Shamsi ("Shamsi Decl.") Ex. A. That fundamental principle must also govern the security detention regime at Bagram, where the government states that it is applying the same controversial detention authority—the 2001 Authorization for Use of Military Force ("AUMF")—that it invokes for Guantanamo detainees. In the Guantanamo context, the government's interpretation of its detention authority is publicly debated and subject to judicial review. Yet, in this case, DOD invokes its classification authority under Exemption 1 of FOIA, 5 U.S.C. § 552(b)(1), to withhold the EST criteria—which interpret the same AUMF authority—from public scrutiny. DOD claims that the EST criteria are protected from disclosure because they relate to "military plans . . . or operations" and the "foreign relations or foreign activities of the United States." Exec. Order No. 13,526, § 1.4(a), (d), 75 Fed. Reg. 707 (Dec. 29, 2009).

The government fails to meet its burden of showing that EST criteria are properly classifiable under either category, or that their disclosure would harm national security.

According to DOD, the EST criteria constitute a discretionary military threat assessment, without any impact on the lawfulness of detention. But the EST criteria document itself (which DOD inadvertently disclosed to plaintiffs and which this Court has now reviewed), DOD policy statements, and publicly available information all make clear that the EST criteria are mandatory and substantive legal standards that set forth and clarify DOD's long-term detention authority. As such, the EST criteria do not meet even the most capacious reading of military "plans" or "operations," but are instead "secret law," which the Second Circuit has described as "an abomination." *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 548 (2d Cir. 1978). Without disclosure of the EST criteria, the public does not know and cannot debate the scope and extent of DOD's interpretation of its detention authority, or whether that authority complies with the laws of war. DOD also fails to meet its burden to show that the EST criteria relate to "foreign relations or activity" because its affidavit makes only an inadequate and speculative assertion in support of this argument, which is further undercut by publicly available information.

DOD's primary argument against disclosure is based on harm: according to DOD, if Bagram detainees know the EST criteria, they will lie to minimize the seriousness of their conduct in order to avoid meeting the criteria. This argument is illogical and implausible. As plaintiffs explain in detail, the EST criteria have already been revealed in government officials' public statements, officially disclosed documents, statutes, and to Bagram detainees themselves as a result of military questioning. Any enemy who is, as the government says, intent on "obtaining and synthesizing" the EST criteria, can already do so based on publicly available

information. The release of information already available to our enemies cannot plausibly cause harm to national security, and should not be officially withheld from the American public. Additionally, on the government's argument, no law or legal interpretation would ever be disclosed for fear that a potential violator, knowing what conduct is prohibited, would lie under questioning to avoid liability. The existence of FOIA itself, and abundant case law interpreting it, rejects the very premise of the government's untenable argument.

Even if this Court determines that the EST criteria are properly classified and may be withheld by DOD, it should not exercise its inherent authority, as the government asks, to order plaintiffs to return a document that plaintiffs lawfully possess. The Second Circuit has cautioned that courts' inherent authority is limited outside the discovery context, especially when First Amendment rights are implicated, as they are here. To interpret courts' inherent authority as sweepingly as the government urges would raise profound constitutional concerns.

STATEMENT OF FACTS

A. The Detention Regime at Bagram.

Since 2002, the United States has detained thousands of people at the Bagram Air Base prison facility in Afghanistan.[1] The number of detainees has increased dramatically in the last two years, from approximately 645 in 2009 to at least 2,600 now. *See* Redacted List of 645 Detainees Held at Bagram Air Base, Shamsi Decl., Ex. B (645 detainees as of September 2009); Kevin Sieff, *Afghan Prison Transfer Delayed*, Wash. Post, Aug. 12, 2011, Shamsi Decl. Ex. C (approximately 2,600 detainees as of August 2011).

[1] Plaintiffs use "Bagram" to refer both to the Bagram Theatre Internment Facility at which detainees were held until December 2009, and the Detention Facility in Parwan to which they were then transferred.

Detainees at Bagram are subject to the exclusive jurisdiction and control of the executive branch, and do not currently have the right to *habeas corpus* review. *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010).

In late 2009, the U.S. military established a Detainee Review Board ("DRB") process to determine Bagram detainees' detention status, and to make recommendations regarding the disposition of each detainee. Deputy Sec'y of Def., Memorandum re: Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (July 2, 2009) (Decl. of William K. Lietzau, ("Lietzau Decl.") Attachment) ("July 2009 Bagram Policy Guidance"), Shamsi Decl. Ex. D; Robert S. Harward, Vice Admiral, U.S. Navy & Deputy Commander, Detention Operations, Memorandum re: Detainee Review Board Policy Memorandum, Afghanistan ¶ 7 (July 11, 2010) ("July 2010 DRB Policy Memorandum"), Shamsi Decl. Ex. E. Detainees receive a DRB hearing, presided over by three field officers, within 60 days of transfer to Bagram and every six months thereafter. July 2010 DRB Policy Memorandum ¶¶ 7, 9(a), Shamsi Decl. Ex. E.

In making their detention determination, DRBs consider evidence gathered and presented by U.S. government personnel, including: assessments by a Behavioral Science Consultation Team of the detainee's likelihood of recidivism and amenability to rehabilitation; U.S. military criminal investigations, which can include chemical tests for explosives residue and other investigative and forensic testing; and reports from Bagram facility personnel on the detainee's behavior and any disciplinary problems. *See* DRB File, Detainee ISN 3806, Shamsi Decl. Ex. F. DRBs also hear testimony from witnesses, which can include the detainee's direct captors and other U.S. personnel, the detainee's relatives and community leaders, and—if he chooses to testify—the detainee.

After the DRB hearing, each member of the panel must fill out a worksheet indicating whether the detainee meets threshold criteria for detention, which are based on the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *See* DRB File, Detainee 4193 at 1572, Shamsi Decl. Ex. G (sample DRB worksheet). If at least two of the three DRB panel members find that this standard is met, they must also assess whether the detainee meets the "Enduring Security Threat" criteria, which limits the disposition possibilities, as discussed below.

B. The Enduring Security Threat Criteria.

The DRB procedures instruct DRB panel members to recommend—and the Bagram Commander to decide—whether detainees meet the standard for an "Enduring Security Threat" (EST). July 2010 DRB Policy Memorandum ¶ 12(o), Shamsi Decl. Ex. E. Designation as an EST "identif[ies] the highest threat detainees for purposes of transfer and release determinations." *Id.* Non-EST detainees may be released by order of the Bagram Commander. An EST detainee may only be released or transferred for prosecution or repatriation, if at all, after another DRB finds he is no longer an EST and recommends release or another disposition, the Convening Authority approves that recommendation, and the Commander or Deputy Commander of the U.S. Central Command, headquartered in Florida, gives approval after providing notice to Pentagon officials. *Id.* ¶¶ 12–13.

DOD has not released the exact number of Bagram detainees designated as ESTs, but records obtained by the ACLU through its FOIA request show that between September 2009 and June 2010, at least 100 detainees out of the 906 who received DRB hearings during that period were labeled ESTs. Shamsi Decl. ¶ 4. Given that the population at Bagram has swelled to approximately 2,600, and that ESTs appear rarely to be released from custody, it is likely that the

EST population at Bagram numbers in the hundreds. At least 6 Bagram detainees captured outside of Afghanistan and transferred to Bagram have been determined to be ESTs. Shamsi Decl. ¶ 5.

C. Plaintiffs' FOIA Request and DOD's Disclosure of the EST Criteria.

On April 23, 2009, plaintiffs submitted a Freedom of Information Act ("FOIA") request ("Request") to DOD, among other agencies, seeking records "pertaining to the detention and treatment of prisoners" held at Bagram. Request Under Freedom of Information Act from ACLU to Dep't of Def., Cent. Intelligence Agency, Dep't of State & Dep't of Justice (Apr. 23, 2009), Shamsi Decl. Ex. H. Request #8 sought records concerning DOD's "process for determining and reviewing Bagram prisoners' status, the process for determining whether their detention is appropriate, and the process for determining who should be released." *Id.* Plaintiffs filed suit to enforce the request in September 2009. *See* Compl., ECF No. 1.

In various documents produced to plaintiffs through May 13, 2011, DOD redacted the EST criteria at issue in this motion. As DOD's production was coming to an end, plaintiffs' counsel told the government that the ACLU intended to litigate the propriety of DOD's withholding of the EST criteria.[2] DOD's final production, on May 13, 2011, included detailed DRB dossiers omitted by DOD in error from prior productions. Among these documents were the EST criteria: two identical, unredacted copies of a worksheet used by DRB members, which sets out the standards used to determine EST status ("EST criteria"). The "SECRET/NOFORN" classification notations at the top and bottom of each page were crossed out.

[2] Plaintiffs summarize here the dispute giving rise to this motion. Additional factual details, which plaintiffs incorporate by reference, are reflected in previous filings before this Court. *See* Pls.' Rule 72(a) Objections to the Order of Magistrate Judge Maas Prohibiting Pls. from Relying on the Contents of a Disputed Doc. in Sealed Args. to the Ct., Aug. 8, 2011, ECF. No. 64; Reply in Supp. of Pls.' Rule 72(a) Objections to the Order of Magistrate Judge Maas Prohibiting Pls. from Relying on the Contents of a Disputed Doc. in Sealed Args. to the Ct., Aug. 25, 2011, ECF. No. 67.

When plaintiffs' counsel realized that DOD had disclosed the previously withheld EST criteria, they promptly notified the government. Having seen the criteria, plaintiffs' counsel also informed the government that plaintiffs did not believe that there was any basis for withholding the EST criteria, and urged DOD to declassify the document expeditiously. *See* Email exchange between Hina Shamsi, Director, ACLU National Security Project, and Jean-David Barnea, Assistant United States Attorney (May 24–25, 2011), Shamsi Decl. Ex. I. DOD took the position that the documents remained classified and had been inadvertently disclosed. The government asked plaintiffs' counsel to return the EST criteria, and to refrain from speaking about or otherwise communicating the information contained in them. *See id.* Plaintiffs' counsel responded, by letter dated June 3, 2011, to reiterate their position that the EST criteria were not properly classified. *See* Letter from Hina Shamsi, Director, ACLU National Security Project, to Jean-David Barnea, Assistant United States Attorney (June 3, 2011), Shamsi Decl. Ex. J. Negotiations between the parties ultimately failed, as DOD refused to declassify the EST criteria. Throughout discussions and negotiations with the government, plaintiffs' counsel have agreed to safeguard the EST criteria pending the outcome of negotiations and litigation. Joint Letter to the Ct. 2, July 8, 2011, ECF No. 54.

The parties subsequently litigated the ability of plaintiffs to rely on and refer to the EST criteria document in this motion. This Court issued an order from the bench on October 12, 2011, permitting plaintiffs to rely on the EST criteria, but restricting plaintiffs' ability to cite or make direct comparisons to the contents of the document. *See* Tr. of Oral Arg. 33–34, Shamsi Decl. Ex. K.

ARGUMENT

I. FOIA AND FIRST AMENDMENT STANDARDS OF REVIEW

The purpose of FOIA is "broad disclosure" of government records, *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), and FOIA "adopts as its most basic premise a policy strongly favoring public disclosure." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999). FOIA's exemptions are therefore "narrowly construed" and all doubts "are to be resolved in favor of disclosure." *Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008), *vacated on other grounds and remanded*, 130 S. Ct. 777 (2009). DOD bears the "burden . . . to justify the withholding of any requested documents." *Associated Press v. Dep't of Def.*, 554 F.3d 274, 283 (2d Cir. 2009). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

Courts review exemption claims *de novo*. 5 U.S.C. § 552(a)(4)(B). FOIA Exemption 1, which DOD invokes in this matter, permits an agency to withhold information that is properly classified under the executive order that governs classification. 5 U.S.C. § 552(b)(1). Information may be classified under Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), only where, among other things, it falls within one of the categories of classifiable information set out in Section 1.4 of the Order, *and* the classification authority determines "disclosure of the information reasonably could be expected to result in damage to the national security" and is "able to identify or describe the damage," *id.* § 1.1.[3]

[3] DOD invoked category § 1.4(d) with respect to the EST criteria for the first time in support of its motion for summary judgment. Lietzau Decl. ¶ 8. In all prior instances, DOD either invoked Exemption 1 without further specification, *see, e.g.*, DRB File, Detainee ISN 1432 at 7-12, Shamsi Decl. Ex. L, or, in its most recent production (which included the EST criteria), it invoked categories § 1.4(a) and § 1.4(c) (constituting "intelligence activities . . . sources or methods"). *See e.g.*, DRB File, Detainee ISN 20256 at 10, Shamsi Decl. Ex. M. DOD is no longer invoking category § 1.4(c), and the Court need not have any concern that disclosure of the EST criteria would result in the disclosure of intelligence sources or methods.

DOD's affidavit in support of its Exemption 1 invocation may be afforded "substantial weight," but summary judgment in favor of the government is not warranted unless "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 . . . contrary evidence in the record." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68, 73 (2d Cir. 2009). Even in the face of national security-related exemption claims, the Court must not "relinquish[] [its] independent responsibility" to assess the propriety of the agency's justifications. *Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).

In this case, even more searching review of the government's Exemption 1 claim is required because of the First Amendment issues raised by the government's request that this Court order plaintiffs to return the EST criteria. *See* Gov't Br. 13–20. Plaintiffs have lawful possession of the EST criteria, and the Court's determination of the propriety of the underlying classification could impact plaintiffs' free speech rights by prohibiting them from disseminating lawfully acquired information. *See McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) ("Because the present case implicates First Amendment rights, however, we feel compelled to go beyond the FOIA standard of review . . . .");[4] *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 882–83 (2d Cir. 2008). The question now before this Court is not simply whether the government's affidavit justifying classification is "logical or plausible," as required under FOIA, *Am. Civil Liberties Union v. Dep't of Def.*, 752 F. Supp. 2d 361, 364 (S.D.N.Y. 2010), but rather whether the Court can determine if DOD "in fact had *good reason* to classify, and therefore censor, the materials at issue," *Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (quoting *McGehee*, 718

[4] *McGehee* concerned the CIA's power to censor an article by a former agent who had signed a secrecy agreement in which he consented not to divulge classified information without prior permission of the agency. 718 F.2d at 1139, 1141. Plaintiffs are not government employees and are not constrained by any secrecy agreement. Therefore, the standard of review should actually be *stricter* than that set out in *McGehee*.

F.2d at 1148) (emphasis added). Under this standard, "a reason will not qualify as 'good' if it surmounts only a standard of frivolousness." *John Doe Inc.*, 549 F.3d at 875. Instead, "[t]he upholding of nondisclosure" requires that "some reasonable likelihood [of an enumerated harm] must be shown."[5] *Id.* Furthermore, unlike in a typical FOIA case, the Court may not afford the agency a "presumption of regularity" in evaluating its reasons for classification. *McGehee*, 718 F.2d at 1148–49.

II. THE GOVERNMENT HAS NOT MET ITS BURDEN TO JUSTIFY WITHHOLDING OF THE EST CRITERIA UNDER EXEMPTION 1

A. The EST Criteria May Not be Withheld As "Military Plans or Operations" Because They Constitute Secret Law.

The Second Circuit, together with other Courts of Appeals, has clearly stated that the government may not withhold under FOIA information that "sets forth or clarifies an agency's substantive or procedural law," which, if withheld, would constitute "secret law." *Caplan*, 587 F.2d at 548 (internal citation omitted); *see also Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 872 (D.C. Cir. 2010); *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 252 (D.C. Cir. 1993); *Hawkes v. IRS*, 507 F.2d 481, 484–85 (6th Cir. 1974); *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980); *Audubon Soc'y v. U.S. Forest Serv.*, 104 F.3d 1201, 1204 (10th Cir. 1997).

The EST criteria are paradigmatically secret law and should never have been withheld as classified because they contain the government's legal interpretation of its authority to detain Bagram prisoners for prolonged periods, and potentially indefinitely. The government, however,

[5] *John Doe, Inc.* concerned the constitutionality of gag orders imposed on the recipients of National Security Letters. As the opinion notes, "[t]he panel [was] not in agreement as to whether, in this context, we should examine [the statute] under a standard of traditional strict scrutiny or under a standard that, in view of the context, is not quite as 'exacting' a form of strict scrutiny." 549 F.3d at 878. The court concluded that the standard of review would have "no bearing on [its] disposition" of the case." *Id.* In light of the serious First Amendment concerns at issue in this case, strict scrutiny should apply to the government's classification determination.

implausibly asserts that the EST criteria are merely a discretionary military assessment with no "implications related to the lawfulness of detention." Gov't Br. 5. But that assertion is contradicted by the EST criteria themselves and by DOD's own public documents and statements, all of which make clear that the EST criteria function as mandatory and substantive legal rules that military officials use to interpret and apply DOD's detention authority. Disclosure of the EST criteria is therefore vital to the public's understanding of the scope of detention authority that the government asserts over Bagram detainees, which is a subject of significant controversy and debate, but which is not subject to any judicial oversight.

DOD asserts the authority to detain individuals at Bagram under the Authorization for Use of Military Force of 2001 ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). Lietzau Decl. ¶ 9. It applies to detainees at Bagram the same AUMF interpretation that it and the Department of Justice use to justify detention at Guantanamo.[6] *See* July 2009 Bagram Policy Guidance at 31, Shamsi Decl. Ex. D (reproducing AUMF interpretation derived from Guantanamo cases); DRB File, Detainee ISN 4193 at 1572, Shamsi Decl. Ex. G (same). But both the AUMF and the government's interpretation of it contain terms that are either ill-defined or undefined, and leave unanswered critically important legal questions about how the government interprets its detention authority, and whether that authority is consistent with the

[6] In the context of Guantanamo habeas cases, the government claims the following detention authority:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 3, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

laws of war. *Cf.* Lietzau Decl. ¶ 9 (acknowledging that law of war principles "inform[]" detention under the AUMF). These legal questions include:

- Whether the government interprets its law-of-war detention authority to extend beyond the Afghan battlefield to individuals captured in other parts of the world in which, and with which, the United States is not at war. *See Al Maqaleh v. Gates*, 604. F. Supp. 2d 205, 209 (D.D.C. 2009) (habeas petition filed on behalf of four Bagram prisoners captured outside of Afghanistan and rendered without judicial process to Bagram).
- How the government interprets the AUMF terms "belligerent act," "substantially supported," and "directly supported," each of which govern the kind of conduct that may subject a Bagram prisoner to prolonged detention.
- How the government interprets the AUMF terms "part of" and "associated forces," which govern the kind of affiliation that may subject a Bagram prisoner to prolonged detention.
- How the government determines whether the threat presented by a detainee may be mitigated and the detainee released. *See Al Maqaleh*, 604 F. Supp. 2d at 209 (some Bagram detainees have been imprisoned for more than eight years).

In the Guantanamo context, every one of these legal questions (and others) is subject to judicial review, public scrutiny, and public debate. In the Bagram context, each of these legal questions is answered by the EST criteria, which represent DOD's "interpretation of substantive or procedural law," *Caplan*, 587 F.2d at 548, but which the government improperly seeks to keep secret. Given that the government purports to be applying the same standards at Bagram as at Guantanamo, there is no legitimate basis for it to withhold its interpretation of those standards.

The EST criteria are not war plans, records of military operations, or military intelligence assessments—the kinds of information to which courts have held the "military plans or

operations" exemption applies—and may not be withheld on that basis. *See, e.g.*, *Taylor v. Dep't of the Army*, 684 F.2d 99, 108 (D.C. Cir. 1982) (information on the operational readiness of different Army units properly classified); *Whalen v. U.S. Marine Corps*, 407 F. Supp. 2d 54, 56–58 (D.D.C. 2005) (upholding Exemption 1 redactions to study of the Bay of Pigs operation, including of "actual war plans that remain in effect"); *Pub. Educ. Ctr., Inc. v. Dep't of Def.*, 905 F. Supp. 19, 20 (D.D.C. 1995) (videotapes made in the course of U.S. Army military operation in Somalia properly classified); *cf. Azmy v. Dep't of Def.*, 562 F. Supp. 2d 590, 601–02 (S.D.N.Y. 2008) (DOD was not improperly withholding secret law when it withheld "information that does not itself lay out any rules or regulations that guide agency action, but, instead, provides particular intelligence and law enforcement assessments and some of the reasoning behind such assessments").

In seeking to suppress the EST criteria, DOD argues that the "enduring security threat" determination is a discretionary assessment, and not a category "created by law or one with implications related to the lawfulness of detention." Lietzau Decl. ¶ 9; *see also* Gov't Br. 5. This argument is not just contradicted by the EST criteria document itself, but also by DOD's own public documents and statements. DOD policy documents confirm that military personnel "*shall* consider whether detainees meet the criteria for classification as an Enduring Security Threat." July 2009 Bagram Policy Guidance at 40, Shamsi Decl. Ex. D (emphasis added); *see also* DRB File, Detainee ISN 4193 at 1572, Shamsi Decl. Ex. G (disclosing that EST document contains "criteria and definitions"). Non-EST detainees may still be detained, but the Bagram Commander has discretion to authorize their release. By contrast, for EST detainees, "there are limitations on the approval authority of a transfer or release decision." July 2009 Bagram Policy Guidance at 40, Shamsi Decl. Ex. D. Detainees determined to be ESTs may only be released, if

at all, after three additional layers of review, including approval by the senior-most officials of the U.S. Central Command in Florida, after consultation with Pentagon officials. July 2010 DRB Policy Memorandum ¶¶ 12–13, Shamsi Decl. Ex. E.

Most importantly, the highest-ranking Bagram detention official, Vice Admiral Robert Harward, has publicly confirmed that an EST determination could prolong detention indefinitely because EST detainees may continue to be held by the United States *even after* all other detention operations are handed over to the Afghan government: "'I anticipate having a subset of unilateral U.S. detention operations [at Bagram], including Pakistanis we can't repatriate *and enduring security threats*.'" *See* Julian E. Barnes, *U.S. Seeks Role in Afghan Jail*, Wall St. J., Sept. 22, 2010, Shamsi Decl. Ex. N (emphasis added). In short, detainees determined to be an "enduring security threat" are presumptively subject to prolonged U.S. military detention while non-EST detainees may be released or transferred. On their face and by their function, therefore, the EST criteria are substantive legal interpretations and rules that govern and constrain DOD's actions and thus are precisely the type of information that FOIA is *not* intended to protect. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (FOIA evinces "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law") (internal citations and quotation marks omitted).

FOIA cases prohibiting secret law arise primarily in the regulatory and law enforcement context, in which courts adjudicate the government's withholding of documents under FOIA Exemptions 2, 5, and 7(E).[7] Although in this instance the government has invoked Exemption 1,

[7] Exemption 2 exempts from disclosure agency records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Until this year, four Circuits had held that Exemption 2 could be used to withhold parts of law enforcement manuals if disclosure risked the circumvention of laws or agency regulations. *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1263 (2011). In *Milner*, the Supreme Court rejected, as a matter of statutory construction, this judicially-created "High 2" exemption.

Exemption 5 applies to " interagency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), and includes a deliberative process

case law makes clear that courts' rejection of secret law is predicated on the fact that FOIA is "aimed at ending secret law and insuring that this country has 'an informed, intelligent electorate.'" *Allen v. CIA*, 636 F.2d 1287, 1299 (D.C. Cir. 1980) (citing H.R. Rep. No. 89-1497 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2419). Thus, as the Supreme Court recently reiterated, FOIA is "a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. *It defines a structural necessity in a real democracy.*" *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (citations omitted) (emphasis added). Because the EST criteria constitute the government's interpretation of its authority to imprison Bagram detainees, potentially indefinitely, the public, to which the government is democratically accountable, has a right to know that interpretation.

Thus, in the Exemption 5 context, courts hold that legal standards cannot be kept secret if they have in practice been adopted or used by an agency—as the EST criteria have indisputably been adopted and used by DOD. *See, e.g.*, *Orion Research, Inc. v. Envtl. Prot. Agency*, 615 F.2d 551, 554 (1st Cir. 1980) (Exemption 5 does not apply to "final memoranda that 'represent policies, statements or interpretations of law that the agency has actually adopted.'" (quoting *Schwartz v. IRS*, 511 F.2d 1303, 1305 (D.C. Cir. 1975)); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) ("[A]n agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'"); *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971) (same).

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privilege. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997); *Wolfe v. U.S. Dep't of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc).

Section 7(E) permits withholding of material that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law . . . ." 5 U.S.C. § 552(b)(7)(E).

Cases concerning FOIA exemptions for law enforcement materials in the Exemption 2 and 7(E) contexts are especially instructive here, where the government argues that disclosure would cause individuals to engage in evasion and manipulation. Gov't Br. 9. Courts reject attempts to withhold secret law based on the limitless and untenable premise of this argument. It is, of course, a truism that the better informed a person is about the law and its application, the better able he may be to avoid liability—but the government is only permitted to withhold law enforcement material if "the *sole effect* of disclosure would be to enable law violators to escape detection." *Hawkes*, 507 F.2d at 483 (emphasis added); *Lone Star Indus., Inc. v. FTC*, No. 82-3150, 1984 WL 21979, at *2 n.1 (D.D.C. Mar. 26, 1984) (assuming, *arguendo*, that secret law may not be withheld under Exemption 7(A)). The government's arguments in this case do not meet this high threshold.

In an often-cited concurrence, Judge Bazelon explained that the rationale behind disclosure of prosecutorial discretion guidelines is to "assure that the exercise of prosecutorial discretion is even-handed, rational, and consonant with statutory intent, which are touchstones for the proper exercise of such discretion. Since prosecutors' discretion may be all but unreviewable in individual cases, it is all the more important that the public and the courts be informed of the general criteria which prosecutors apply in selecting which cases to prosecute and what charges to bring." *Jordan v. Dep't of Justice*, 591 F.2d 753, 781–82 (D.C. Cir. 1978) (en banc) (Bazelon, J., concurring) (internal citation omitted); *see also Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1068, 1075 (D.C. Cir. 1981) (citing Judge Bazelon's concurrence with approval). The same rationale applies in this case—the public has a strong interest in disclosure of the EST criteria to ensure that DOD is exercising its currently

unreviewable detention authority in a manner that is "even-handed, rational, and consonant with statutory intent."

For this Court to uphold the government's invocation of the "military plans or operations" exemption in this case would mean ceding to the government the authority to hold individuals for prolonged periods—potentially indefinitely—on the basis of secret criteria that are immune from judicial scrutiny or public oversight or criticism. In our society, it is not only those who interpret and enforce the laws who should know what they mean. The EST criteria are secret law, and may not be withheld.

B. The Government Has Not Met Its Burden To Justify Withholding of the EST Criteria As Being Related To "Foreign Relations or Foreign Activities."

DOD's affidavit fails to show how the EST criteria could relate to "the foreign relations or foreign activities of the United States," beyond a bare, speculative, and inadequate assertion that the criteria—which DOD admits "are not currently a topic" in discussions with other countries—could complicate those discussions. Lietzau Decl. ¶ 17. DOD does not provide any "logical or plausible" justification for this claim, and the Court should afford it no weight. DOD's claim is, in any case, "controverted by . . . contrary evidence in the record." *Am. Civil Liberties Union v. Dep't of Def.*, 752 F. Supp. 2d at 364 (quoting *Wilner*, 592 F.3d at 73).

The government suggests that release of the EST criteria would complicate "discussions with the governments of other countries who are *considering* accepting custody of detainees." Gov't Br. 10 (emphasis added). Such speculation is not supported by the Lietzau Declaration, the only evidence offered by DOD, which states only that "EST criteria and determinations are not currently a topic in our sensitive bilateral discussions," Lietzau Decl. ¶ 17, and fails to say even in the most general terms how disclosure of the EST criteria could complicate those discussions. There is simply nothing in the record supporting the government's contention that

disclosing the EST criteria could complicate transfer or diplomatic efforts. Because it is not supported by "affidavits [that] describe the justifications for nondisclosure," the government's foreign relations argument cannot be a basis for finding that Exemption 1 has been properly invoked to withhold the EST criteria. *Am. Civil Liberties Union*, 752 F. Supp. 2d at 364 (quoting *Wilner*, 592 F.3d at 73).

The government's assertion that disclosing the EST criteria would "complicate" discussions with foreign governments about individual detainees is also "controverted by contrary evidence in the record," *id.*, which shows that the EST criteria are already in the public domain. *See infra*, Parts II.C and D. In addition, in response to plaintiffs' FOIA request, the government has produced documents about hundreds of individual named detainees that disclose whether each detainee was assessed to be an EST. *See* Shamsi Decl. ¶ 4. These individual EST determinations are not classified, and the ACLU has published them online. It is also no secret to foreign governments—or anyone else—what it means for an individual to be detained as an EST. Since at least May 2010, when DOD released to the ACLU official policy documents, it has been public that the EST determination identifies detainees assessed to be the highest threats, and that EST status is relevant to transfer determinations. *See* July 2009 Bagram Policy Guidance at 8, Shamsi Decl. Ex. D. The government's own brief emphasizes the same information. Gov't Br. 5 (quoting Lietzau Decl. ¶ 9). In short, over the last two years, the government has disclosed individual EST determinations, and has also publicly explained that transfer determinations hinge on the EST criteria. The notion that this information is known to the world, but not discussed with foreign governments that are considering accepting a detainee, is fanciful at best. At the very least, this Court should not accept the government's proposition on faith.

Finally, contrary to the government's argument that disclosure of the EST criteria would cause harm to U.S. foreign relations, there are good reasons to believe that disclosure would in fact benefit the United States' diplomatic activities. The detention standards employed by the United States are highly controversial. There is significant public concern about whether U.S. detention standards are consistent with the United States' law-of-war obligations, and the secrecy surrounding the EST criteria only calls into question whether the United States is abiding by its commitment to the rule of law. Disclosure of the EST criteria would promote transparency and permit public scrutiny and debate concerning the United States' interpretation of its detention authority in Afghanistan. Even if there is disagreement with that interpretation, transparency would enhance the United States' traditional standing as a leader on rule of law issues, not undermine it.

For these reasons, the Court cannot accept the government's assertion of harm to foreign relations as a proper basis for withholding the EST criteria under Exemption 1.

C. The Government Has Not Met Its Burden of Showing That Disclosure of the EST Criteria Would Cause Harm To National Security.

Even if the Court were to find that the EST criteria fall within a category of classifiable information, to prevail under Exemption 1, the government must also sufficiently demonstrate that disclosure of the withheld information "reasonably could be expected to result in damage to the national security." Exec. Order No. 13,526, § 1.1(a)(4), 75 Fed. Reg. 707 (Dec. 29, 2009). The government's claim of harm boils down to the argument that our enemies are able to "obtain and synthesize" publicly available information, Lietzau Decl. ¶ 11, and if they were to learn the EST criteria, they would "engage in conduct and manipulation" during interrogation to avoid detention. Gov't Br. 9–11. This claim fails because it is illogical and controverted by publicly available information. *Wilner*, 592 F.3d at 73. The claim is also undermined by the fact that

there is widespread public knowledge of the EST criteria. *Wash. Post v. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) ("It is a matter of common sense that the presence of information in the public domain makes the disclosure of that information less likely to 'cause damage to the national security.'"). The government fails to meet its burden.

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The Court should reject the government's invocation of Exemption 1. The government's explanation of the harm that would befall the nation should the EST criteria be released is illogical and controverted by the evidence laid out above. All of the harms asserted by the government are equally likely to have occurred in response to information already available to detainees. Release of the document will not now cause any greater harm. If the Court does accept the government's harm argument, however, it should require the government to specify the portions of the EST criteria that would result in harm, in order to conduct a segregability analysis. *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d 65, 73–74 (D.D.C. 2008) (government failed to provide an adequate segregability analysis in its declaration to the court because "[a] blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability" (citation omitted)).

D. The Government Has Officially Disclosed the EST Criteria.

Even if the Court were to find that the EST criteria are properly classified, the Government has waived its ability to withhold them because of its official disclosures. Under FOIA, an agency's otherwise-valid withholding claim is defeated if the information it seeks to withhold has been previously acknowledged or disclosed. *See Wilson*, 586 F.3d at 186; *Am. Civil Liberties Union v. Dep't of Def.*, 628 F.3d 612, 620 (D.C. Cir. 2011). In order to qualify as an official disclosure, the information at issue must "(1) '[be] as specific as the information previously released,' (2) 'match[] the information previously disclosed,' and (3) [be] 'made public through an official and documented disclosure.'" *Wilson*, 586 F.3d at 186 (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)); *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). Moreover, if even a portion of the information has been disclosed, the government must release that portion. 5 U.S.C. § 552(b) (requiring disclosure of segregable portions of records); *Krikorian v. Dep't of State*, 984 F.2d 461, 467 (D.C. Cir. 1993) (finding error in district court's failure to "make specific findings of segregability").

Documents officially released by DOD in response to the ACLU's FOIA request disclose individual factors used to determine a detainee's threat level. Most broadly, the government's Bagram DRB procedures reveal that continuing internment of a detainee is justified if "necessary to mitigate the threat the detainee poses." July 2009 Bagram Policy Guidance at 31, Shamsi Decl. Ex. D. More specifically, the DRB procedures state that "[a]n 'Enduring Security Threat' is an individual who, assessed by capability and commitment, [redacted]." *Id.* at 40.

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DRB procedures further disclose and clarify that another factor relevant to EST designation is the success of "rehabilitation and reconciliation programs while detained by OEF forces," and "whether the detainee's family and local community have demonstrated a commitment to the peaceful reintegration of the detainee." July 2010 DRB Policy Memorandum at 10, Shamsi Decl. Ex. E.

Taken together, the official statements and documents described above do more than merely "discuss[] the general subject matter of [the] document[]." *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993). These are "official and documented disclosure[s]," *Wilson*, 586 F.3d at 186, including by DOD itself. Because there is a "match between the information requested and the content of the prior disclosure[s]," the government has waived its withholding claim and the EST criteria must be released. *Wolf*, 473 F.3d at 378. In the alternative, should the Court determine that only some of the EST criteria have been disclosed, it should order release of those criteria. *See Krikorian*, 984 F.2d at 467.

III. AN ORDER REQUIRING PLAINTIFFS TO RETURN THE EST CRITERIA WOULD RAISE SIGNIFICANT FIRST AMENDMENT CONCERNS

The government argues that this Court has inherent authority to order the return of the EST criteria. That proposition is far from clear, however, because the most relevant decisions of the Second Circuit discussing the scope of inherent authority are carefully limited to the

discovery context. The government has cited no cases authorizing the exercise of the Court's inherent authority in circumstances like this—when the government itself disclosed the EST criteria, albeit inadvertently, pursuant to a FOIA request rather than civil or criminal discovery. Indeed, the government has conceded that discovery cases do not control here. *See* Tr. of Oral Arg. 16, Shamsi Decl. Ex. K. And FOIA itself does not authorize such a procedure. The Court's inherent authority to exercise control over information that plaintiffs lawfully obtained is limited by the Constitution, and although the government's motion ignores the profoundly important First Amendment concerns raised by its request, this Court should not, because, as the Supreme Court instructs, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used,'" *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665–66 (2011) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

The government cites no cases in which courts have exercised their inherent authority in FOIA contexts akin to the one now before the Court.[12] Instead, the government relies on cases

[12] Defendants' FOIA cases are unpersuasive. *Hersh & Hersh v. U.S. Department of Health & Human Services*, No. C 06-4234 PJH, 2008 WL 901539, at *9 (N.D. Cal. Mar. 31, 2008), an unpublished Northern District of California case, articulates no legal basis for a court order that documents disclosed in response to a FOIA request be returned. The government's summary judgment brief in that case cited no law in support of its request for return of the inadvertently produced documents. *See* Joint Motion for Summary Judgment By Defendants Department of Health and Human Services and Intervenor Guidant Corporation at 23, *Hersh & Hersh*, 2008 WL 901539 (No. C 06-4234 PJH), ECF No. 96, Shamsi Decl. Ex. AC. And the FOIA plaintiff argued only that the government's production of the documents was not actually inadvertent, without raising the First Amendment issues that are now before this Court. *See* Memorandum of Points & Authorities in Support of Plaintiff's Opposition to Joint Motion for Summary Judgment By Defendants Department of Health and Human Services and Intervenor Guidant Corporation at 19-21, *Hersh & Hersh*, 2008 WL 901539 (No. C 06-4234 PJH), ECF No. 107, Shamsi Decl. Ex. AD. Similarly, *Piper v. Department of Justice*, 294 F. Supp. 2d 16, 27 n.5 (D.D.C. 2003), provides no discussion of a court's authority to order the return of a document produced in response to a FOIA request, nor did the court in that case even enter any order requiring the return of an inadvertently disclosed photograph. Finally, the order to return information in *Public Citizen Health Research Group v. Food & Drug Administration*, 953 F. Supp. 400 (D.D.C. 1996), was issued on the basis of factors that are clearly distinguishable from the order the government seeks here. First, in *Public Citizen*, the court relied on the fact that "the party that disclosed the information" was not the one "seeking to prevent its dissemination." *Id.* at 404. Second, the court reasoned that the restraint imposed—which was to last only a number of months—was "very limited in duration" and therefore was "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id.* at 405 & n.4 (citing *Seattle Times*). The order the government seeks here is not time-limited, but permanent. Even with these limiting factors, *Public Citizen* drew

concerning courts' well-established authority to enter and enforce protective orders in the context of coercive discovery, and on cases concerning a party's misconduct. The situation before this Court is different, however, because it involves the disclosure of a document outside of court-ordered discovery, and because there is no allegation of bad faith or misconduct on the part of the ACLU.[13]

The government turned over the EST criteria pursuant to the requirements imposed by FOIA—which has no clawback provision—rather than under compulsion of a court order. The government acknowledges that the Court did not order DOD to "afford Plaintiffs access to documents that DoD would maintain were exempt from disclosure under FOIA." Gov't Br. 19. There is no basis to transform the government's disclosure under FOIA into a production pursuant to the Court's coercive process. Litigation concerning the agency's timeliness in responding to plaintiffs' FOIA request does not bring the government's disclosure of the EST criteria within the ambit of discovery, and the relevant authorities disfavor courts' exercise of any control over information disclosed in the context of FOIA. *See Nat'l Archives & Records Admin.*, 541 U.S. at 174 ("[O]nce there is disclosure [under FOIA], the information belongs to the general public. There is no mechanism under FOIA for a protective order . . . proscribing its

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significant criticism in a subsequent decision, *In re Columbia University Patent Litigation*, 330 F. Supp. 2d 18, 19 n.1 (D. Mass. 2004), in which the court "expressed serious doubts as to whether it would ordinarily be permissible or appropriate to restrict distribution of information obtained independently of discovery . . . in view of the heavy presumption against prior restraints on speech."

[13] The government's citations to cases concerning documents ordered returned in the context of discovery are not relevant. Unlike in this FOIA context, it is undisputed that courts have authority to enforce their own protective orders when properly issued in the course of discovery. *See In re Zyprexa Inj.*, 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); *United States v. Visa U.S.A., Inc.*, No. 98 Civ. 7076, 2000 WL 1682753 (S.D.N.Y. Nov. 9, 2000). Nor do cases concerning information disclosed in criminal discovery provide an apt comparison. *United States v. Rezaq*, 899 F. Supp. 697, 707 (D.D.C. 1995), for example, allowed the modification of a protective order to require the return of nonmaterial classified documents on the grounds that "the proposed modification establishes procedures that would further enhance the management and control of classified documents made available during discovery, and [the] defendant does not object to the modification." Order, *United States v. Holy Land Foundation*, No. 04 Cr. 240 (N.D. Tex. Jan. 30, 2006), ECF No. 267, and *United States v. Moussaoui*, No. CR. 01-455-A, 2002 WL 32001771 (E.D. Va. Sept. 26, 2002), provide no further reasoning that would justify an order restraining plaintiff's speech concerning the EST criteria.

general dissemination."); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) ("The courts lack authority to limit the dissemination of documents once they are released under FOIA . . . ."); *see also In re Columbia Univ. Patent Litig.*, 330 F. Supp. 2d at 19 n.1 (finding that a restraint on the use of information disclosed in response to a FOIA request under litigation was constitutionally suspect in view of *Seattle Times*, 467 U.S. 20, which "distinguish[ed] between information obtained only through discovery and information obtained independently").

The government relies on *Al-Haramain Islamic Foundation, 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), but that case presents facts and doctrine very different from those at issue here. In *Al-Haramain*, plaintiffs' counsel did not raise any First Amendment concerns and returned the classified document at issue voluntarily, before the involvement of the court. 451 F. Supp. 2d at 1229. The individual named plaintiffs also did not challenge the government's request, and voluntarily returned their copies of the document before issuance of the district court's order. *Id.* at 1229 n.6. Finally, unlike in *Al-Haramain*, the government has not asserted the state secrets privilege in this FOIA case, nor could it.

Plaintiffs believe that the best guidance for this Court in this situation is from the Second Circuit's decisions in *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983), and *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963), which instruct that courts should be cautious in exercising control over information obtained outside of discovery and must balance First Amendment considerations with any exercise of the court's inherent powers. The Second Circuit has repeatedly held that a court's inherent power is limited and "generally extends only to a court's management of its own affairs: to impose decorum, to

maintain order, to control admission to the bar, to discipline attorneys, to punish for contempt, and to vacate its own judgments if tainted by fraud." *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 267 (2d Cir. 2007) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–44 (1991)); *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 380 (1994) (rejecting court's inherent authority where "the power asked for . . . is quite remote from what courts require in order to perform their functions").

In addressing the scope of courts' inherent equitable powers, the Second Circuit has also explained that imposition of a "prior restraint on [a party's] First Amendment right to disseminate documents obtained outside the discovery process [is] beyond the court's power." *Bridge*, 710 F.2d at 946 (citing *Koons*, 325 F.2d at 403). In *Bridge*, the Second Circuit rejected a district court's exercise of control over the use and dissemination of information that the defendant claimed was a protected trade secret where there was "no evidence that [the plaintiff] had come by the information by other than legitimate means." *Id.* at 946. The court held that there was no lawful basis for a court to impose restraints on the use of information lawfully acquired outside of the discovery context.

Bridge and *Koons* teach that any exercise of inherent authority should be balanced against the First Amendment interests at stake. Even if this Court concludes that it has inherent authority under these circumstances to issue a protective order, the question of whether to exercise that authority should take into account the important First Amendment interests that the government has chosen to ignore. Specifically, in a series of cases from *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), to *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), to *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court has repeatedly stressed that the First Amendment

generally protects information lawfully obtained on matters of public concern.[14] The government does not dispute, because it cannot, that plaintiffs obtained the EST criteria lawfully.[15] And there can be no doubt that the EST criteria, which set forth DOD's legal interpretation of who it may subject to indefinite executive detention, involve matters of substantial public concern for all the reasons set forth in Part II. This Court should heed these vital considerations.

CONCLUSION

For the foregoing reasons, the Court should deny the government's motion for partial summary judgment, and grant plaintiffs' cross-motion for partial summary judgment.

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[14] *Florida Star* is particularly relevant because that case, like this one, involved material inadvertently disclosed by the government.

[15] The government musters a number of cases concerning stolen documents, but these cases are inapposite because it is uncontroverted that plaintiffs obtained the EST criteria lawfully. Moreover, the government's citation to *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319 (S.D.N.Y. 1997), demonstrates that Second Circuit precedent carefully balances courts' inherent equitable authority to control the dissemination of information with the requirements of the First Amendment. The court in *Fayemi* noted that *Bridge* "suggests that there may be no basis whatever for a court to exercise control over information obtained outside the discovery process." *Id.* at 324. The government's citations of *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 568 (S.D.N.Y. 2008), and *United States v. Comco Management Corp.*, No. SACV 08-0668-JVS, 2009 WL 4609595, at *4–5 (C.D. Cal. Dec. 1, 2009), are inapposite; neither provides any support for the type of order sought here, where plaintiffs are not alleged to have acted improperly.

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