

# 13-0422-cv(L), 13-0445-cv(CON)

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, SCOTT SHANE,  
AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION,

*Plaintiffs-Appellants,*

– v. –

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES  
DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**JOINT APPENDIX**  
**Volume 2 of 3 (Pages JA279 to JA575)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

x

THE NEW YORK TIMES COMPANY, et al.,

Plaintiffs,

v.

11 Civ. 9336 (CM)

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

x

AMERICAN CIVIL LIBERTIES UNION et al.,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE, et al.,

12 Civ. 794 (CM)

Defendants.

**ECF CASE**

x

**DECLARATION OF JOHN E. BIES**

I, John E. Bies, declare as follows:

1. I am a Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”). My responsibilities include the supervision of OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Motion for Summary Judgment in these consolidated proceedings. These statements are based on my personal knowledge, on information provided to me by OLC attorneys and staff working under my direction, and on information provided to me by others

within the Executive Branch of the Government. I have also provided a classified declaration *ex parte* and under seal with additional information for the Court.

### **OLC'S RESPONSIBILITIES**

2. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions. OLC's legal advice and analysis may inform the decision-making of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

3. Although OLC publishes some opinions and makes discretionary releases of others, OLC legal advice is generally kept confidential. One important reason OLC legal advice often needs to stay confidential is that it is part of a larger deliberative process—a process that itself requires confidentiality to be effective. If government agencies and OLC had to conduct deliberations with knowledge that their deliberations were open to public view, such discussions would naturally be chilled or inhibited, and the efficiency of government policy making would suffer as a result.

4. These deliberative confidentiality concerns apply with particular force to OLC advice because of OLC's role in the decision-making process: OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive activities of the Executive Branch on matters that can be quite controversial. So that Executive Branch officials may continue to request, receive, and rely on candid legal advice from OLC on such sensitive matters, it is

essential that OLC legal advice provided in the context of internal deliberations not be inhibited by concerns about public disclosure.

5. The foregoing considerations regarding the need for confidential Executive Branch deliberations are particularly compelling in the context of the provision of legal advice, given the nature of the attorney-client relationship. There is a special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal advice. When the advice is provided in confidence, it is protected from compelled disclosure. As the Supreme Court has observed, “[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is critical to protect this relationship of trust in the governmental context, to ensure such full and frank communication between governmental attorneys and their clients, and thereby promote such broader public interests in the government’s observance of law and the administration of justice. The free and candid flow of information between agency decision-makers and their outside legal advisers depends on the decision-makers’ confidence that such advice will remain confidential. Moreover, disclosure of legal advice may often reveal confidential communications from agency clients made for the purposes of securing advice.

6. When requested to provide counsel on the law, OLC attorneys stand in a special relationship of trust with their agency clients. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust. Thus, the need to protect the relationship of trust between OLC and the

client seeking its legal advice provides an additional reason OLC legal advice often needs to stay confidential.

7. The interests protected by the deliberative process and attorney-client privileges continue to apply fully to confidential OLC legal advice in circumstances where the Executive Branch or one of its departments or agencies elects, in the interest of transparency, to explain publicly the Executive Branch's understanding of the legal basis for current or contemplated Executive Branch conduct. There is a fundamental distinction between an explanation of the rationale and basis for a decision, which would not be privileged, and advice received prior to making a decision, which is privileged. Thus, there is no disclosure of privileged legal advice, and therefore no waiver of attorney-client privilege, when, as part of explaining the rationale for its actions or policies, the Executive Branch explains its understanding of their legal basis without reference to any confidential legal advice that Executive Branch decisionmakers may have received before deciding to take the action or adopt the policy. Likewise, confidential advice does not lose the protection of the deliberative process privilege simply because the Executive Branch explains the basis or rationale for its actions or policies without referring to that advice; rather, confidential deliberative advice loses this protection only through adoption, *i.e.*, if the advice is expressly adopted as part of the explanation of the rationale for the decision. I strongly believe that if merely explaining publicly the legal basis for Executive Branch conduct were understood to remove the protection of the deliberative process and attorney-client privileges from the confidential legal advice provided as part of the Executive Branch's internal deliberations, it would substantially harm the ability of Executive Branch decisionmakers to request, receive, and rely upon full and frank legal advice from government lawyers as part of

the decisionmaking process, and it would also harm the public by discouraging the Executive Branch from explaining its understanding of the legal basis for its actions publicly in the future.

### PLAINTIFFS' FOIA REQUESTS

#### *The New York Times' FOIA Requests*

8. On June 24, 2010, OLC received a request dated June 11, 2010 from New York Times reporter Scott Shane. See Ex. A, attached (the "Shane Request"). The Shane Request sought "copies of all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing . . . of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States government." The Shane Request specifically encompassed "legal advice . . . to the military [or] the Central Intelligence Agency."

9. By letter dated October 27, 2011, OLC Special Counsel Paul Colborn responded to the Shane Request on behalf of OLC. See Ex. B, attached. Insofar as the Shane Request pertains to the Department of Defense, OLC responded that it had searched its files and processed responsive records, and was withholding all such records pursuant to Exemptions One, Three, and Five. OLC further responded that, insofar as the Shane Request pertains to any other agencies of the United States Government, pursuant to FOIA Exemptions One, Three, and Five, OLC neither confirmed nor denied the existence of the documents described in the request.

10. On October 7, 2011, OLC received a request dated the same day from New York Times reporter Charlie Savage, seeking "a copy of all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist." See Ex. C, attached (the "Savage Request"). Mr. Savage asserted in his request that "this matter is of pressing public interest because of the recent death in Yemen of Anwar Al-

Awlaki, a United States citizen who has been accused of being an ‘operational’ terrorist with the group Al Qaeda in the Arabian Peninsula.”

11. By letter dated October 27, 2011, Mr. Colborn responded to the Savage Request on behalf of OLC. *See* Ex. D, attached. Interpreting the request as seeking OLC opinions pertaining to al-Aulaqi, OLC neither confirmed nor denied the existence of such documents, pursuant to FOIA Exemptions One, Three, and Five.

12. On November 4, 2011, the New York Times Company (“the New York Times”) filed an appeal of OLC’s decision with the Department of Justice’s Office of Information Policy (“OIP”) on behalf of Messrs. Shane and Savage.

13. On December 20, 2011, before OIP had ruled on the New York Times’ administrative appeal, the New York Times and its reporters filed this lawsuit.

#### ***The ACLU FOIA Request***

14. On October 24, 2011, OLC received a FOIA request dated October 19, 2011, from Nathan Freed Wessler on behalf of the American Civil Liberties Union Foundation (together with the American Civil Liberties Union, hereinafter the “ACLU”), requesting all records “pertaining to the legal basis in domestic, foreign, and international law upon which U.S. citizens can be subjected to targeted killings” and “the process by which U.S. citizens can be designated for targeted killings, including who is authorized to make such determinations and what evidence is needed to support them,” as well as a variety of records relating to three individuals alleged to have been targeted, Anwar al-Aulaqi, Samir Kahn, and Abdulrahman al-Aulaqi. *See* Ex. E, at 5-6 (ACLU FOIA Request (October 19, 2011)).

15. By letter dated November 14, 2011, Mr. Colborn responded to Mr. Wessler on behalf of OLC, interpreting the request as seeking OLC opinions pertaining to those three

individuals and informing him that, pursuant to FOIA Exemptions One, Three, and Five, OLC “neither confirms nor denies the existence of the documents described in your request” because “the very fact of the existence or nonexistence of such documents is itself classified, protected from disclosure by statute, and privileged.” *See* Ex. F (OLC Response (November 14, 2011)). Mr. Colborn also informed Mr. Wessler that he had the right to appeal OLC’s processing of the request to OIP. On December 6, 2011, the ACLU filed an appeal of OLC’s decision with OIP.

16. On February 29, 2012, before OIP had ruled on the ACLU’s administrative appeal, the ACLU filed this lawsuit.

17. By letter dated April 3, 2012, Eric A. O. Ruzicka, counsel to the ACLU, informed Sarah Normand, an Assistant United States Attorney for the Southern District of New York who represents the government in this matter, that the ACLU “agrees to exclude from the first category of its request all draft legal analyses,” but that the ACLU did not agree “to exclude internal communications, including e-mails.” *See* Ex. G (ACLU Letter (April 3, 2012)).

#### **OLC’S SEARCH**

18. There are a number of locations where OLC’s substantive records are stored. OLC’s unclassified substantive records may be located in the paper files of individual OLC employees or stored electronically in two types of electronic systems: a shared central storage system for the office’s final unclassified work product and the computer accounts of individual employees. The central storage system consists of documents in their original file format (e.g., Microsoft Office, WordPerfect, PDF) collected in folders, which are organized by date, on a shared network drive on the Department of Justice electronic file server. It is OLC’s practice to save all final unclassified work product to this central storage system; accordingly, if OLC has provided any unclassified written advice or has memorialized any unclassified oral advice in

writing, that advice should be accessible through this system. OLC uses a sophisticated search engine, called Isys Search Software (“Isys”), to perform keyword searches of this collection of final work product files. Isys searches the full text of documents (including PDF files) within this collection of final work product, as opposed to searching only document titles or e-mail subject lines.

19. In addition, OLC may have classified substantive records that could be responsive to a FOIA request. Paper files containing classified documents must be stored either in individual safes or in OLC’s Sensitive Compartmented Information Facility (“SCIF”). These paper files include classified records that are not part of any individual custodian’s files but rather are maintained as a part of the Office’s records regarding final classified legal advice that has been provided by OLC. Electronic classified records might also be stored in a secure computer system, in which records might be located in the accounts of individual users, in shared folders, or in the classified email accounts of individual users.

*The Search for Documents Responsive to the New York Times’ FOIA Requests*

20. In October 2011, an OLC attorney initiated a search for records responsive to the Shane and Savage requests, including any final legal advice provided by OLC with respect to the subjects of these requests located either in the Isys database or in secure locations identified by a senior career OLC attorney as locations that possibly could contain potentially responsive records. All such locations identified were searched.

21. Insofar as the Shane request pertains to the Department of Defense (“DoD”), OLC’s search identified one responsive document. This document is also responsive to the Savage request. The document is exempt from disclosure pursuant to FOIA Exemptions One,

Three, and Five, 5 U.S.C. § 552(b)(1), (3), and (5), because it is classified, protected from disclosure by statute, and protected by the deliberative process and attorney-client privileges.

22. With respect to documents responsive to the Shane or Savage requests that relate to the activity of any agencies of the United States Government other than the Department of Defense, OLC has not acknowledged the existence or nonexistence of any additional responsive documents. I understand that John Bennett of the Central Intelligence Agency (“CIA”) will file a declaration with the Court in support of the position that the existence or nonexistence of documents responsive to these requests relating to the activities of the CIA is exempt from disclosure under FOIA.

*The Search for Documents Responsive to the ACLU’s FOIA Request*

23. In October or early November 2011, an OLC attorney initiated a search for records responsive to the ACLU’s request, including any final legal advice provided by OLC with respect to the subjects of these requests located either in the Isys database or in secure locations identified by a senior career OLC attorney as locations that possibly could contain potentially responsive records. All such locations identified were searched.

24. In April 2012, a paralegal employed at OLC used Isys to perform additional keyword searches of OLC’s central storage system of all unclassified, final OLC advice. The keyword terms used in those searches are listed in Exhibit H, attached hereto. In performing these searches, the paralegal ran a separate search with each of the listed terms or phrases, without connectors joining the separate terms or phrases. OLC’s paralegals use Isys on a regular basis and are experienced in running searches such as the ones conducted here.

25. OLC is a very small component of the Department of Justice, employing approximately twenty to twenty-five attorneys at any one time. In consultation with OLC

attorneys likely to be familiar with the assignment of OLC attorneys on national security matters, OLC identified four current and four former attorneys as individual custodians who might potentially have records responsive to the ACLU's request.<sup>1</sup>

26. With each of the four current employees identified as potential custodians of responsive records, an OLC attorney discussed locations where potentially responsive documents might be located, and the paper files of each attorney were searched for potentially responsive documents. Where the current employee indicated specific locations in his or her electronic or e-mail files where potentially responsive materials might be found, those locations were also searched for potentially responsive documents. In addition, an OLC attorney discussed with each of the identified custodians who are current employees if there were secure locations in individual safes or in the SCIF that should be searched for potentially responsive classified records, and any locations so identified were also searched for potentially responsive documents. An OLC paralegal also reviewed any individual paper files left by the four departed custodians for potentially responsive documents.

27. An OLC attorney or paralegal also conducted keyword searches of the e-mails of the four current employees identified as potential custodians. The same keyword searches were also conducted for the departed user e-mail accounts of the four identified employees who were no longer employed at OLC at the time of the searches. The keyword terms used in these searches are listed in Exhibit H, attached hereto. Using the identified search terms with no connectors, the paralegals used the Microsoft Outlook program to search the e-mail files of the identified custodians. These searches included both the custodian's unclassified e-mail account well as any classified e-mail accounts the custodian had.

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<sup>1</sup> A fifth employee identified as potentially having responsive records, an attorney adviser, was on maternity leave at the time of the search. That attorney indicated that any potentially responsive records in her files would almost certainly be duplicates of materials in the possession of the custodians who were searched.

28. The searches identified 62 documents as responsive to the ACLU's request that are not classified or specifically protected from disclosure under FOIA by statute. Two of those documents were referred to OIP for processing. The remaining 60 documents are exempt from disclosure under Exemption Five of FOIA, 5 U.S.C. § 552(b)(5), because they are protected by the deliberative process and attorney-client privileges. The searches also identified additional responsive records marked as classified or protected from disclosure by statute, which are all exempt from disclosure under FOIA Exemptions One, Three, and/or Five, 5 U.S.C. § 552(b)(1), (3), and (5). In addition, I have been advised that certain information relating to the personnel of other agencies reflected in the documents is also protected by FOIA Exemption Six, 5 U.S.C. § 552(b)(6).

#### **DOCUMENTS AT ISSUE**

29. I am personally familiar with the withheld documents that are at issue in this case.

#### ***Withholdings Pursuant to Exemption Five for the New York Times Requests***

30. OLC identified one OLC opinion pertaining to the Department of Defense marked classified as responsive to the Shane and Savage requests. That OLC opinion contains confidential legal advice to the Attorney General, for his use in interagency deliberations, regarding a potential military operation in a foreign country. This document is wholly exempt from disclosure under Exemption Five because it is protected by the deliberative process and attorney-client privileges.

31. This document is protected by the deliberative process privilege because it is confidential, pre-decisional, and deliberative. The document is pre-decisional because it was prepared in advance of Executive Branch decisions regarding a potential military operation in a foreign country, and it is deliberative because it contains confidential legal advice by OLC

attorneys to other Executive Branch officials in connection with potential decisions regarding such an operation. Consequently, this document falls squarely within the protection of the deliberative process privilege. Compelled disclosure of this document would undermine the deliberative processes of the Government and chill the candid and frank communications necessary for effective governmental decision-making.

32. As confidential legal advice provided by OLC to an Executive Branch client, this document is also protected by the attorney-client privilege. The foregoing considerations regarding the need for confidential deliberations are particularly compelling in the context of the provision of legal advice by OLC. The document reflects confidential communications between OLC and Executive Branch clients made for the purpose of providing legal advice. In providing the legal advice contained in the opinion, OLC was serving an advisory role as legal counsel to the Executive Branch. Having been requested to provide counsel on the law, OLC stood in a special relationship of trust with the Attorney General, as well as other participants in the interagency deliberations in connection with which the advice was prepared. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, disclosure of the advice itself would be equally disruptive to that trust.

*Withholdings Pursuant to Exemption Five for the ACLU Request*

33. All of the unclassified documents not protected from disclosure by statute identified as responsive to the ACLU's request are exempt from disclosure under Exemption Five because they are protected by the deliberative process and the attorney-client privileges. These documents are described in greater detail in the index attached as Exhibit I to this declaration.

34. As delineated in that index, Documents 1 and 2 are Department of Justice or Executive Branch interagency e-mails containing legal deliberations concerning potential statements regarding the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances.

35. Documents 3 to 8 are Department of Justice or Executive Branch interagency e-mails containing legal deliberations regarding draft question & answer talking points on the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances.

36. Documents 46 to 48 are internal OLC, Department of Justice, or Executive Branch interagency e-mails containing legal deliberations concerning draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances.

37. Documents 9 to 45 and 49 to 60 are Department of Justice or Executive Branch interagency e-mails containing legal deliberations concerning draft legal analysis and potential public statements regarding the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. All but three of these documents related to precursors of, and culminated in, the Attorney General's March 5, 2012 speech at Northwestern University School of Law, available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

38. In addition to these documents, OLC's search also located responsive documents marked classified or protected from disclosure by statute. The documents marked classified include one OLC opinion related to DoD operations. This material is being withheld in full, and OLC has been advised that it cannot be further identified or described on the public record,

pursuant to Exemptions One and Three, 5 U.S.C. § 552(b)(1), (3). I understand that John Hackett of the Office of the Director of National Intelligence (“ODNI”) will file a declaration with the Court that will provide further information regarding this determination.

39. All of the unclassified OLC documents—and, except as noted in my classified *ex parte* declaration, all of the classified OLC documents—are protected by the deliberative process privilege because they are confidential, pre-decisional, and deliberative. As legal deliberations or legal advice, these documents are (a) pre-decisional, *i.e.*, were prepared in advance of Executive Branch decisionmaking; and (b) deliberative, *i.e.*, reflect advice, the preparation of advice, or other deliberations by OLC attorneys or other Executive Branch officials in connection with that decisionmaking. Consequently, these documents fall squarely within the protection of the deliberative process privilege. Compelled disclosure of these documents would undermine the deliberative processes of the Government and chill the candid and frank communications necessary for effective governmental decision-making.

40. Many of these documents are deliberations regarding and comments on draft legal analysis. There is a strong need for confidentiality with respect to drafts and other preliminary work product. By their very nature, these drafts are pre-decisional and deliberative—part of the exchange of ideas and suggestions that accompanies careful Executive Branch decisionmaking. Drafts are especially sensitive in the deliberative process within OLC, where OLC attorneys make extensive use of drafts to focus, articulate, and refine their legal advice and analysis. Compelled disclosure of such preliminary analysis would seriously inhibit the candor and effectiveness of the advisers engaged in this highly deliberative process, and the quality and integrity of the final result would inevitably suffer.

41. As part of its deliberative process in the preparation of legal advice for client agencies, OLC seeks and receives input from client agencies concerning legal theories and arguments and sometimes will share aspects of draft legal analysis with client agencies for input and comment. When formulating its legal advice, OLC depends upon these submissions and input by officials of the client agencies with knowledge or expertise in relevant subject matters. The confidentiality of this input allows OLC to receive candid and fully reasoned legal arguments from client agencies. Like draft legal analysis, the confidentiality of this input also is integral to the deliberative processes of the Office, and such input is likewise protected by the deliberative process privilege.

42. In addition, all 60 documents listed in Exhibit I—and, except as noted in my classified *ex parte* declaration, all of the classified OLC documents—are protected by the attorney-client privilege. The responsive documents either (a) are confidential legal advice provided to OLC's Executive Branch clients; (b) reflect confidential communications between OLC and Executive Branch clients made for the purpose of providing legal advice; and/or (c) are internal drafts by OLC attorneys that contain confidences OLC received from its Executive Branch clients for the purpose of providing legal advice. As such, these documents fall squarely within the attorney-client privilege. The foregoing considerations regarding the need for confidential deliberations are particularly compelling in the context of the provision of legal advice by OLC.

***Withholdings Pursuant to Exemptions One and Three***

43. In connection with seeking advice from OLC, OLC's Executive Branch clients sometimes provide OLC with classified information or other information specifically protected from disclosure under FOIA by statute. OLC does not have original classification authority, but

when it receives or makes use of classified information provided to it by its clients, OLC is required to mark and treat that information as derivatively classified to the same extent as its clients have identified such information as classified. Accordingly, all classified information in OLC's possession or incorporated into its products has been classified by another agency or component with original classifying authority.

44. I am familiar with the documents marked classified that are at issue in this case. These documents are marked as classified because they were marked as classified when OLC received them or because they contain information OLC received from other components or agencies that was marked as classified. OLC has also been informed that information contained in these documents is protected from disclosure under FOIA by statute.

45. Accordingly, OLC also withheld these documents at issue pursuant to Exemptions One and Three. Exemption One, 5 U.S.C. § 552(b)(1), exempts documents classified in the interest of national defense or foreign policy pursuant to an Executive Order from disclosure under FOIA. Exemption Three, 5 U.S.C. § 552(b)(3), exempts documents "specifically exempted from disclosure by statute" from disclosure under FOIA. *See* Paragraph 38, *supra*.

#### ***Withholdings Pursuant to Exemptions Six***

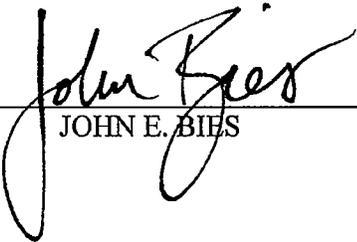
46. I have been advised that some of the identified responsive OLC documents include the names of employees at other departments and agencies whose identity is protected by Exemption Six, which exempts the disclosure of records which would otherwise constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The names of these employees are withheld on this additional basis as well. *See* Declaration of John Hackett, ODNI, at ¶ 32.

\* \* \* \* \*

47. In conclusion, I respectfully submit that, except as noted in my classified *ex parte* declaration, all of the identified responsive documents are covered by the deliberative process privilege and/or the attorney-client privilege, and accordingly fall squarely within Exemption Five. The compelled disclosure of these documents would harm the deliberative processes of the government and would disrupt the attorney-client relationship between OLC and its clients throughout the Executive Branch.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: June 20, 2012

  
\_\_\_\_\_  
JOHN E. BIES

# Exhibit A

15710-104

Rec'd 6/24/1

**The New York Times**

1627 I St. NW, Suite 700  
Washington, DC 20006

June 11, 2010

To: Bette Farris, FOIA officer, Office of Legal Counsel

From: Scott Shane, reporter, The New York Times

Under the Freedom of Information Act, I request copies of all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing, assassination, or killing of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States government. This would include legal advice on these topics to the military, the Central Intelligence Agency or other intelligence agencies. It would include the legal status of killing with missiles fired from drone aircraft or any other means. If the opinions or memoranda are classified, I request the release of any unclassified portions and, if necessary, a mandatory declassification review of the remainder.

As a member of the media seeking this material for urgent news reporting, I request expedited handling of this request. The law directs that expedited treatment should be granted if "the information is urgently needed by an individual primarily engaged in disseminating information to inform the public about actual or alleged Federal Government activities." Certainly coverage by The New York Times of the legal justification for targeted killings qualifies for expedited handling under this standard.

Many thanks for your help. If I can answer any questions or do anything else to speed your response, please call me at 202-862-0305.

Sincerely



Scott Shane  
Reporter, The New York Times  
202-862-0305  
shane@nytimes.com

JA297

# Exhibit B



U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

October 27, 2011

Scott Shane  
The New York Times  
1627 I Street NW, Suite 700  
Washington, D.C. 20006

Dear Mr. Shane:

This responds to your Freedom of Information Act request dated June 11, 2010, in which you seek "all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing, assassination, or killing of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States government. . . . [to] include legal advice on these topics to the military, the Central Intelligence Agency or other intelligence agencies."

Insofar as your request pertains to the Department of Defense, we have searched the files of the Office of Legal Counsel and have completed the processing of records responsive to your request. We are withholding all such records pursuant to FOIA Exemption One, 5 U.S.C. § 552(b)(1), which protects classified information; Exemption Three, *id.*, § 552(b)(3), which protects information specifically exempted from disclosure by statute; and Exemption Five, *id.*, § 552(b)(5), which protects information that is privileged.

Insofar as your request pertains to any other agencies of the United States Government, pursuant to FOIA Exemptions One, Three and Five, 5 U.S.C. § 552(b)(1), (3) and (5), the Office of Legal Counsel neither confirms nor denies the existence of the documents described in your request. We cannot do so because the very fact of the existence or nonexistence of such documents is itself classified, protected from disclosure by statute, and privileged.

I am required by statute and regulation to inform you that you have the right to file an administrative appeal. Any administrative appeal must be received within 60 days of the date of this letter by the Office of Information Policy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink that reads "Paul P. Colborn".

Paul P. Colborn  
Special Counsel

JA299

# Exhibit C

*Rec'd 10/2/12*

To:

Supervisory Paralegal  
Office of Legal Counsel  
Department of Justice  
Room 5515, 950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-2038  
Fax: (202) 514-0563

Cc: Tracy Schmalzer, Department of Justice Communications Director

Dear Department of Justice,

This is a request filed under the Freedom of Information Act.

I am requesting a copy of all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist.

I am a member of the news media and this request is made for the purpose of news gathering and not for commercial use. For that reason, I request a fee waiver. Moreover, this matter is of pressing public interest because of the recent death in Yemen of Anwar Al-Awlaki, a United States citizen who has been accused of being an "operational" terrorist with the group Al Qaeda in the Arabian Peninsula. For that reason, I request expedited processing.

Thank you for your consideration of my request.

Sincerely,



Charlie Savage

c/o The New York Times  
1627 I St N.W.  
Washington, D.C. 20006

[savage@nytimes.com](mailto:savage@nytimes.com)

202-862-0317

JA301

# Exhibit D

**JA302**



U.S. Department of Justice

Office of Legal Counsel

---

Washington, D.C. 20530

October 27, 2011

Charlie Savage  
N.Y. Times  
1627 I Street, N.W.  
Washington, D.C. 20006

Dear Mr. Savage:

This responds to your Freedom of Information Act request dated October 7, 2011, in which you seek, OLC "memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist."

Pursuant to FOIA Exemptions One, Three and Five, 5 U.S.C. § 552(b)(1), (3) and (5), the Office of Legal Counsel neither confirms nor denies the existence of the documents described in your request. We cannot do so because the very fact of the existence or nonexistence of such documents is itself classified, protected from disclosure by statute, and privileged.

I am required by statute and regulation to inform you that you have the right to file an administrative appeal. Any administrative appeal must be received within 60 days of the date of this letter by the Office of Information Policy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink that reads "Paul P. Colborn".

Paul P. Colborn  
Special Counsel

JA303

# Exhibit E

**JA304**

*Rec'd 10/24/11*

**NATIONAL SECURITY  
PROJECT**



October 19, 2011

Information Officer  
Office of Freedom of Information and Security Review  
Directorate for Executive Services and Communications  
FOIA/Privacy Branch  
1155 Defense Pentagon, Room 2C757  
Washington, D.C. 20301-1155

HQ USSOCOM  
ATTN: SOCS-SJS-I/FOIA Requester Service Center  
7701 Tampa Point Blvd  
MacDill AFB, FL 33621-5323

**AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION**  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, D.C. 20530-0001

**OFFICERS AND DIRECTORS**  
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PRESIDENT

Carmen L. Mallon  
Chief of Staff  
Office of Information Policy  
Department of Justice  
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1425 New York Avenue, NW  
Washington, DC 20530-0001

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

Elizabeth Farris, Supervisory Paralegal  
Office of Legal Counsel  
Department of Justice  
Room 5515, 950 Pennsylvania Ave., NW  
Washington, DC 20530-0001

Tracy Schmalzer  
Director, Office of Public Affairs  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**JA305**

Information and Privacy Coordinator  
 FOIA Office  
 Gate 5  
 1000 Colonial Farm Road  
 McLean, VA 22101

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/  
 Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, the President’s Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General’s Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the “ACLU”).<sup>1</sup>

AMERICAN CIVIL LIBERTIES  
 UNION FOUNDATION

This Request seeks records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki<sup>2</sup> (“al-Awlaki”) and two other U.S. citizens by the United States Government. According to news reports, al-Awlaki, a United States citizen, was killed in Yemen on or around September 30, 2011, by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)—commonly referred to as “drones”—operated by the Central Intelligence Agency (CIA) and/or Joint Special Operations Command (JSOC). *See, e.g.,* Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Greg Miller, *Strike on Aulqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. Samir Khan

<sup>1</sup> The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

<sup>2</sup> Al-Awlaki’s name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to al-Awlaki using any spelling or transliteration of his name.

(“Khan”), also a U.S. citizen, was killed in the same attack. See Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>. Press reports indicate that on or around October 14, 2011, a third U.S. citizen, Abdulrahman al-Awlaki,<sup>3</sup> was killed in a drone strike in southern Yemen. Abdulrahman al-Awlaki, the son of Anwar al-Awlaki, was 16 years old at the time of his death. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

We seek information about the legal basis in domestic, foreign, and international law for authorizing the targeted killing of al-Awlaki. Specifically, we request any memoranda produced by the Department of Justice Office of Legal Counsel (OLC) analyzing the legal basis for killing al-Awlaki and authorizing the use of lethal force against him. We request information regarding the rules and standards used to determine when, where, and under what circumstances al-Awlaki could be killed, as well as what measures were required to avoid civilian casualties. We also request information about whether Samir Khan was specifically targeted for killing and what the legal basis was for killing him.

Beginning immediately after al-Awlaki was killed, the media began reporting the existence of a legal memorandum drafted by the OLC that provided legal justification for killing al-Awlaki (hereinafter “OLC memo”). The memorandum was reportedly completed around June 2010 and signed by David Barron. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulagi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. According to the New York Times, the OLC memo “concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him.” Savage, *supra*. We seek release of this memorandum, as well as any other memoranda describing the legal basis for killing al-Awlaki or any other U.S. citizen.

<sup>3</sup> Abdulrahman al-Awlaki's first name is sometimes spelled “Abdelrahman” or “Abdul-Rahman” and his family name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to Abdulrahman al-Awlaki using any spelling or transliteration of his name.

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Since al-Awlaki was killed, there have been numerous calls for the release of the OLC memo and any other documents explaining the government's asserted legal basis for killing al-Awlaki. *See, e.g.*, Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, <http://wapo.st/n6l3vK> ("A bipartisan chorus of political and legal voices is calling on the Obama administration to release a declassified version of the Justice Department memo that provided the legal analysis sanctioning the killing in Yemen last week of Anwar al-Awlaki, a U.S. citizen."); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare (Oct. 4, 2011, 3:07 PM), <http://bit.ly/r42x0f>; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, Lawfare (Oct. 3, 2011, 7:45 AM), <http://bit.ly/mRUMg0>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4> ("The Justice Department reportedly wrote an advisory memo on the legality of targeting an American citizen with lethal force absent a trial or other due process, but the administration has kept the memo classified. Keeping the legal rationale secret amplifies the voices that argue that Mr. Obama assassinated an American citizen."); Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>. The public has a vital interest in knowing the legal basis on which U.S. citizens may be designated for extrajudicial killing and then targeted with legal force.

Reports indicate that the OLC memo "does not independently analyze the quality of the evidence against [al-Awlaki]." Savage, *supra*. We therefore also seek information about the factual basis for authorizing the killing of al-Awlaki. Such information includes the basis for asserting that al-Awlaki was operationally involved in al Qaeda planning, and that he posed an imminent threat of harm to the United States, United States citizens, or others. We also seek information about the legal and factual bases for targeting Khan and Abdulrahman al-Awlaki.

Press reports have revealed that Executive Branch officials engage in a process of assessing the factual basis for determining whether an individual, including U.S. citizens, should be targeted for killing. *See* Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/qZ0Q4q> ("Hidden behind walls of top-secret classification, senior U.S. government officials meet in what is essentially a star chamber to decide which enemies of the state to target for assassination."). However, the government has not revealed the factual basis for targeting al-Awlaki for killing, and press reports suggest that the evidence against him is subject to significant dispute. *See* Hosenball, *supra*

("[O]fficials acknowledged that some of the intelligence purporting to show Awlaki's hands-on role in plotting attacks was patchy."). The public also lacks information about the killings of Khan and Abdulrahman al-Awlaki, including whether they were intentionally targeted.

Without information about the legal and factual basis for the targeted killing of al-Awlaki and others, the public is unable to make an informed judgment about the policy of authorizing targeted killings of United States citizens. We make the following requests for information in hopes of filling that void.

### I. Requested Records

1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
  - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
  - B. The protections and requirements imposed by the Fifth Amendment Due Process Clause;
  - C. The reasons why international-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
  - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
  - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of al-Awlaki;

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- F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
  - G. Any requirement that the U.S. government first attempt to capture al-Awlaki before killing him.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki, including:
- A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
  - B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
  - C. Facts indicating that there was a legal justification for killing persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
  - D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
  - E. Any other facts relevant to the decision to authorize and execute the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

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## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

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The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>

; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU's "Torture FOIA" webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. The webpage also advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA: *See* Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>4</sup>

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Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's targeted killing of Anwar al-Awlaki, allegedly collateral killing of Samir Khan, and potential killing of other U.S. citizens in Yemen and elsewhere using unmanned aerial vehicles or other means. The records sought will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about targeted killings using drones in Afghanistan, Pakistan, Yemen and elsewhere. More particularly, there has been extensive media coverage of the killing of al-Awlaki and Khan. *See, e.g.*, Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Scott Shane & Thom Shanker, *Yemen*

<sup>4</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

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*Strike Reflects U.S. Shift To Drones as Cheaper War Tool*, N.Y. Times, Oct. 2, 2011, at A1, available at <http://nyti.ms/ogznLt>; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>; Greg Miller, *Strike on Aulqi Demonstrates Collaboration Between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. There has also been widespread reporting of the killing of Abdulrahman al-Awlaki. See, e.g., Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>; Brian Bennett, *U.S. Drone Strikes Kill Al Qaeda Operative in Yemen*, L.A. Times, Oct. 16, 2011, <http://lat.ms/mWffAn>; Hamza Hendawi, *Yemen: U.S. Strike Kills 9 al-Qaeda Militants*, Associated Press, Oct. 15, 2011, <http://abcn.ws/p3HqbA>.

The Obama Administration's refusal to release the OLC memo or other documents describing the legal basis for killing al-Awlaki has also been the subject of intense media coverage. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2007, <http://wapo.st/n6l3vK>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4>; Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/ohOG0w>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. There is also significant interest in the details of the process by which the government authorized the killing of al-Awlaki. See, e.g., Bruce Ackerman, *Obama's Death Panel*, Foreign Policy, Oct. 7, 2011, <http://bit.ly/qZ0Q4q>; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>.

Significant and pressing questions about the basis for the targeted killing of al-Awlaki and other U.S. citizens remain unanswered. Therefore, the subject of this Request will remain a matter of widespread and exceptional media interest. The public has an urgent need for information about the subject of this Request.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, and the Central Intelligence Agency with regard to the targeted killings of Anwar al-Awlaki and other U.S. citizens. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d)(i); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU’s commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that “disclosure, not secrecy, is the dominant objective of the Act,” but that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act”).

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to “representatives of the news media”).

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is

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“primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.<sup>5</sup>

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

Please be advised that because we are requesting expedited processing under the Department of Justice implementing regulations section 16.5(d)(1)(ii) and section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Notwithstanding Ms. Schmalzer’s determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

<sup>5</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in August 2011 the Department of Justice granted a fee waiver to the ACLU with respect to a request for information related to the proxy detention of detainees of U.S. naval vessels. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

We also request that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Nathan Freed Wessler  
National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

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Sincerely,



Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 519-7847  
Fax: (212) 549-2654

# Exhibit F



Office of Legal Counsel

12-13

Washington, D.C. 20530

November 14, 2011

Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004

Dear Mr. Wessler:

This responds to your Freedom of Information Act request dated October 19, 2011, in which you seek, "records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki and two other U.S. citizens by the United States Government," as more specifically set forth in separately numbered paragraphs at pages 5 and 6 of your request.

Pursuant to FOIA Exemptions One, Three and Five, 5 U.S.C. § 552(b)(1), (3) and (5), the Office of Legal Counsel neither confirms nor denies the existence of the documents described in your request. We cannot do so because the very fact of the existence or nonexistence of such documents is itself classified, protected from disclosure by statute, and privileged.

I am required by statute and regulation to inform you that you have the right to file an administrative appeal. Any administrative appeal must be received within 60 days of the date of this letter by the Office of Information Policy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

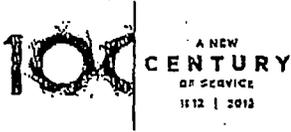
Sincerely,

A handwritten signature in black ink that reads "Paul P. Colborn". The signature is fluid and cursive.

Paul P. Colborn  
Special Counsel

JA318

# Exhibit G



ERIC A. O. RUZICKA  
(612) 340-2959  
FAX (612) 340-8800  
ruzicka.eric@dorsey.com

April 3, 2012

**BY FACSIMILE AND FIRST-CLASS MAIL**

Sarah S. Normand, Esq.  
U.S. Attorney's Office  
Southern District of New York  
86 Chambers Street  
New York, NY 10007

Re: American Civil Liberties Union and The American Civil Liberties Union  
Foundation v. U.S. Department of Justice, U.S. Department of Defense, and  
Central Intelligence Agency  
(12 Civ. 794 (CM))

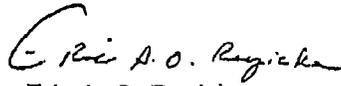
Dear Ms. Normand:

I am writing in response to your phone call of March 30, 2012, in which you requested that the ACLU limit the first prong of its FOIA requests submitted to the Departments of Defense and Justice. You specifically requested that the ACLU exclude from the first category of its request any draft legal analyses, email, or other internal communications.

The ACLU agrees to exclude from the first category of its request all draft legal analyses. However, the ACLU will not agree to exclude internal communications, including emails.

Should you wish to discuss further, please contact me at your convenience.

Sincerely,

  
Eric A. O. Ruzicka

EAOR:dib

# Exhibit H

**Office of Legal Counsel Search Terms**

“target! kill!”

“drones”

“assassinat!”

“extrajudicial killing”

“UAV”

“unmanned”

“awlaki”

“aulaqi”

“khan”

“lethal force”

“lethal operation”

# Exhibit I

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

Doc. No.	Date	Document Description	Exemption Claimed
1	3/29/2010- 3/30/2010	Email chain reflecting internal Department of Justice and interagency legal deliberations regarding drafts of a potential statement concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at the Office of Legal Counsel ("OLC") and attorneys at various agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
2	3/29/2010- 4/29/2010	Email chain reflecting internal Department of Justice and interagency legal deliberations regarding drafts of potential statement concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and at various agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
3	10/10/2010- 10/11/2010	Email chain reflecting internal Department of Justice and interagency legal deliberations regarding draft question & answer talking point concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, the Office of the Attorney General ("OAG"), and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
4	10/10/2010- 10/11/2010	Email chain reflecting internal Department of Justice and interagency legal deliberations regarding draft question & answer talking point concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; the Office of the Deputy Attorney General ("ODAG"); OAG; the Civil Division, Department of Justice ("CIV"); State; Office of Public Affairs, Department of Justice ("OPA"); and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
5	10/10/2010- 10/11/2010	Email chain reflecting internal Department of Justice and interagency legal deliberations regarding draft question & answer talking point concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; OPA; OAG; ODAG; CIV; and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
6	10/11/2010	Email chain reflecting interagency legal deliberations regarding draft question & answer talking point concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, ODAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

Doc. No.	Date	Document Description	Exemption Claimed
7	10/11/2010	Email chain reflecting internal OLC and interagency legal deliberations regarding drafts regarding draft question & answer talking point concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, ODAG, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
8	10/11/2010	Email chain reflecting interagency legal deliberations regarding draft question & answer talking point concerning the legal basis for the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, ODAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
9	5/19/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; CIV; the National Security Division, Department of Justice ("NSD"); Office of the Associate Attorney General; and ODAG.	b(5) (deliberative process and attorney client privileges)
10	5/18/2011- 5/19/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and the National Security Council Staff ("NSS").	b(5) (deliberative process and attorney client privileges)
11	5/20/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; NSS; OAG; Office of Legislative Affairs, Department of Justice; and ODAG.	b(5) (deliberative process and attorney client privileges)
12	10/8/2011	Email chain reflecting internal OLC deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

Doc. No.	Date	Document Description	Exemption Claimed
13	10/20/2011- 10/21/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
14	10/22/2011- 10/23/2011	Email chain reflecting internal OLC and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and an agency with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
15	10/18/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
16	10/22/2011- 10/25/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and an agency with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
17	10/30/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; and OAG.	b(5) (deliberative process and attorney client privileges)
18	10/30/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; and OAG.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
ACLU FOIA FY12-013

<b>Doc. No.</b>	<b>Date</b>	<b>Document Description</b>	<b>Exemption Claimed</b>
19	10/30/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; and OAG.	b(5) (deliberative process and attorney client privileges)
20	10/30/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; OAG; and ODAG.	b(5) (deliberative process and attorney client privileges)
21	10/30/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; OAG; and ODAG.	b(5) (deliberative process and attorney client privileges)
22	10/30/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; NSD; OAG; and ODAG.	b(5) (deliberative process and attorney client privileges)
23	10/30/2011- 10/31/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys and officials at OLC; NSD; OAG; the Federal Bureau of Investigation ("FBI"); and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
24	10/30/2011- 10/31/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys and officials at OLC; NSD; OAG; the Federal Bureau of Investigation ("FBI"); and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

<b>Doc. No.</b>	<b>Date</b>	<b>Document Description</b>	<b>Exemption Claimed</b>
25	10/31/2011-11/1/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
26	10/31/2011-11/1/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
27	10/31/2011-11/1/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
28	10/31/2011-11/1/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
29	10/31/2011-11/1/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
30	10/31/2011-11/1/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

<b>Doc. No.</b>	<b>Date</b>	<b>Document Description</b>	<b>Exemption Claimed</b>
31	10/31/2011-11/1/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
32	10/31/2011-11/1/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
33	10/31/2011-11/2/2011	Email chain reflecting internal OLC and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
34	10/31/2011-11/2/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
35	10/31/2011-11/2/2011	Email chain reflecting internal Department of Justice and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
36	10/31/2011-11/2/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

<b>Doc. No.</b>	<b>Date</b>	<b>Document Description</b>	<b>Exemption Claimed</b>
37	10/31/2011- 11/3/2011	Email chain reflecting internal OLC and interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
38	11/3/2011- 11/4/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and an agency with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
39	11/3/2011- 11/4/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and an agency with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
40	11/4/2011	Email chain reflecting internal OLC deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC.	b(5) (deliberative process and attorney client privileges)
41	11/3/2011- 11/4/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and an agency with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
42	11/2/2011- 11/4/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

<b>Doc. No.</b>	<b>Date</b>	<b>Document Description</b>	<b>Exemption Claimed</b>
43	11/3/2011- 11/4/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC and an agency with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
44	11/6/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, ODAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
45	11/6/2011- 11/7/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, ODAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
46	11/6/2011- 11/7/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, ODAG, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
47	11/6/2011- 11/7/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, ODAG, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
48	11/7/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; ODAG; OAG; and CIV.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

Doc. No.	Date	Document Description	Exemption Claimed
49	11/7/2011	Email chain reflecting internal OLC and Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; CIV; and OAG.	b(5) (deliberative process and attorney client privileges)
50	11/7/2011- 11/8/2011	Email chain reflecting internal OLC and Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; CIV; and OAG.	b(5) (deliberative process and attorney client privileges)
51	11/7/2011- 11/8/2011	Email chain reflecting internal Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; CIV; NSD; OAG; and ODAG.	b(5) (deliberative process and attorney client privileges)
52	11/7/2011- 11/8/2011	Email chain reflecting internal OLC and Department of Justice deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC; CIV; and OAG.	b(5) (deliberative process and attorney client privileges)
53	11/8/2011- 11/9/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
54	11/8/2011- 11/9/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)

**Index of Office of Legal Counsel Documents Withheld**  
 ACLU FOIA FY12-013

<b>Doc. No.</b>	<b>Date</b>	<b>Document Description</b>	<b>Exemption Claimed</b>
55	11/8/2011- 11/9/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
56	11/8/2011- 11/9/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
57	11/8/2011- 11/10/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
58	11/8/2011- 11/10/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
59	11/8/2011- 11/10/2011	Email chain reflecting interagency deliberations regarding discussing draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances. Email chain among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)
60	11/8/2011	E-mail circulating draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances, and discussion regarding interagency deliberations concerning the same. Email among attorneys at OLC, OAG, and other agencies with national security responsibilities.	b(5) (deliberative process and attorney client privileges)



conveyed and executed, and that combatant command concerns are addressed by the Joint Staff. I evaluate and synthesize such concerns and advise and make recommendations to the Chairman of the Joint Chiefs of Staff regarding our worldwide military operations.

2. I make the following statements based upon my years of service and experience in the United States military, personal knowledge, and information made available to me in my official capacity. I have served in the United States Armed Forces for over thirty years at various levels of command and staff. As a commander of U.S. forces, I have deployed to: Okinawa, Japan; Mogadishu, Somalia; Panama; and multiple times to Iraq and Afghanistan in support of Operations Iraqi Freedom and Enduring Freedom. As the Director of Operations, I receive and review daily operational plans and briefings, reports and intelligence analyses from the Combatant Commands, the Joint Staff, and the Intelligence Community. I oversee the National Military Command Center, which is responsible for monitoring worldwide events affecting national security and U.S. interests twenty-four hours a day, seven days a week. I have traveled in an official capacity to a number of countries where U.S. forces are conducting ongoing operations against al Qaeda and associated terrorist groups, engaging with senior military and government officials. As a result of my experiences, I have extensive knowledge of our military forces and their capabilities, current operations, and the conventional and unconventional forces and capabilities of the enemies arrayed against us.

3. I am familiar with the FOIA request, dated October 19, 2011, which plaintiffs sent to the DoD Office of Freedom of Information (OFOI) and Headquarters, United States Special Operations Command (SOCOM) seeking 1) the legal basis upon which U.S. citizens can be subjected to "targeted killings," 2) the process by which U.S. citizens can be designated for "targeted killing," 3) the legal basis upon which the targeted killing of Anwar al-Awlaki was

authorized, 4) the factual basis for the targeted killing of al-Awlaki, 5) the factual basis for the killing of Samir Khan, and 6) the factual basis for the killing of Ahdulrahman al-Awlaki. The request was also sent to the Department of Justice and its component Office of Legal Counsel (OLC), and the Central Intelligence Agency (CIA). Plaintiffs sought expedited processing and a fee waiver. (A true and accurate copy of plaintiffs' October 19, 2011 request is attached hereto as Exhibit A).

4. The purpose of this declaration is to articulate the basis for the Department of Defense's "no number, no list" response to most of the classified documents responsive to plaintiffs' FOIA request to various Department of Defense ("DoD") components, and to support the assertion of the classified information exemption, pursuant to 5 U.S.C. § 552(b)(1), and the deliberative process privilege and attorney/client privilege exemptions, pursuant to 5 U.S.C. § 552b(5), to certain documents processed in response to plaintiffs' FOIA request.

#### **ADMINISTRATIVE BACKGROUND**

5. On October 31, 2011, OFOI denied plaintiffs' October 19, 2011, requests for a fee waiver and expedited processing. (A true and accurate copy of the OFOI response is attached hereto as Exhibit B). Plaintiffs appealed DoD's decision on December 16, 2011. (A true and accurate copy of the plaintiffs' appeal is attached hereto as Exhibit C). OFOI informed plaintiffs on December 27, 2011, that it would be unable to process the appeal within 20 working days. (A true and accurate copy of the OFOI letter is attached hereto as Exhibit D).

6. On November 7, 2011, SOCOM denied plaintiffs' requests for a fee waiver and expedited processing. (A true and accurate copy of the SOCOM response is attached hereto as Exhibit E). Plaintiffs appealed SOCOM's decision on December 16, 2011. (A true and accurate copy of the SOCOM response is attached hereto as Exhibit F). OFOI, the appellate authority for

SOCOM, informed plaintiffs on December 27, 2011, that it would be unable to process the appeal within 20 working days. (A true and accurate copy of the OFOI response is attached hereto as Exhibit G).

7. By letter dated April 3, 2012, plaintiffs agreed to narrow their request to exclude draft legal analyses. (A copy of plaintiffs' April 3, 2012 letter is attached hereto as Exhibit H).

8. DoD did not charge any fees for the search, processing, or production of records responsive to plaintiffs' request.

#### **DOD SEARCH FOR RESPONSIVE RECORDS**

9. After plaintiffs' FOIA request became the subject of litigation, the DoD General Counsel's Office (Office of Litigation Counsel) (DOD OGC) determined which DoD offices were reasonably likely to have documents responsive to the request, based upon discussions with DoD personnel familiar the subject matter of the request. DOD OGC conducted a search of their offices, including the General Counsel's office and the following OGC elements: Legal Counsel, International Affairs, and Intelligence. DOD OGC also tasked the Joint Staff, SOCOM, and Central Command (CENTCOM) to conduct a search of their records for responsive documents.

10. Searches of all of the listed DoD offices included searches for both electronic and paper records and included all levels of classification. The electronic searches included relevant key words, such as "Citizen," "U.S. Citizen," "AG Speech," "al-Awlaki" (using multiple spellings), "Samir Kahn," etc.

#### **SEARCH RESULTS**

11. The final version of a speech by Jeh Johnson, DoD General Counsel, to Yale Law

School on February 22, 2012, is responsive to plaintiffs' request and is released in full.

(Attached as Exhibit I). All remaining responsive documents are fully exempt from disclosure under 5 U.S.C. § 552 (b)(1) and/or (b)(5). No non-exempt information in these remaining documents is reasonably segregable.

#### **UNCLASSIFIED DOCUMENTS RESPONSIVE TO THE REQUEST**

12. 5 U.S.C. § 552(b)(5), permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 allows an agency to exempt information that is normally privileged in the civil discovery context. These privileges include the pre-decisional, deliberative process privilege; the attorney- work product privilege; and the attorney-client privilege.

13. Ten unclassified documents totaling 73 pages were located in various offices within DoD and are listed in the attached Vaughn Index (Exhibit J).

14. Seven of the ten documents are email traffic regarding drafts of Mr. Johnson's speech to Yale Law School and a speech delivered by the Attorney General at Northwestern University School of Law on March 5, 2012. These speeches were prepared using input from senior advisors within DoD and from personnel at other government agencies. These consultations were essential to determining the nature and the scope of the speeches. These internal communications are exempt from disclosure under exemption 5. The emails are predecisional and deliberative, as they contain opinions, advice, and recommendations as part of the consultative process involved in determining statements that would be made regarding declared United States policy. Disclosure of this information could chill full, frank and open discussions on matters of policy between subordinates and superiors. The content of the emails

consist of internal deliberations regarding draft legal analysis, which plaintiffs agreed to exclude in the letter dated April 3, 2012.

15. One of the unclassified documents is a CAPSTONE presentation presented by the General Counsel on February 1, 2012, to officers who recently obtained the rank of O-7 regarding international legal principles. This document is exempt from disclosure under exemption 5 as attorney/client communication, as it contains communications and advice to clients that were intended to be confidential and there is no indication that the intended confidentiality was not maintained.

16. The remaining two unclassified documents are unclassified memoranda from the Legal Counsel to the Chairman of the Joint Chiefs of Staff to the White House's National Security Council Legal Advisor addressing the legal basis for conducting military operations against U.S. citizens in general. Both of these documents are exempt from disclosure under exemption 5. They are predecisional and deliberative, as they contain opinions, advice, and recommendations as part of the consultative process. Disclosure of this information could chill full, frank and open discussions on matters between legal counsel.

#### **CLASSIFIED DOCUMENT RESPONSIVE TO THE REQUEST**

17. In addition to the unclassified documents described above, the searches located the Department of Justice Office of Legal Counsel (OLC) opinion identified by OLC as responsive to requests by both the ACLU and the New York Times. This OLC opinion must be withheld in full because the content of the document contains information about military operations, intelligence sources and methods, foreign government information, foreign relations, and foreign activities. Its disclosure would damage national security, and the classified information is not reasonably segregable. The document is exempt from disclosure under exemptions 1 and 5.

18. FOIA exemption 1, 5 U.S.C. § 552(b)(1), provides that the FOIA disclosure provisions do not apply to matters that are: (A) specifically authorized under criteria established by an Executive Order to be kept from disclosure in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such an Executive Order.

19. Executive Order (E.O.) E.O. 13526 establishes a framework for “classifying” and “safeguarding” national security information, “including information relating to defense against transnational terrorism.” Section 6.1(i) of E.O. 13526 defines “classified national security information” or “classified information” as “information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.” Section 6.1(cc) of E.O. 13526 defines “national security” as the “national defense or foreign relations of the United States.”

20. Section 1.1(a) of E.O. 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. government; (3) the information falls within one or more of the categories of information listed in section 1.4 of E.O. 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security and the original classification authority is able to identify or describe the damage.

21. In Section 1.3(a)(2) of Executive Order (E.O.) 13526, the President authorized agency heads to designate officials that may classify information originally as TOP SECRET. In turn, and pursuant to Section 1.3(c) of E.O. 13526, the Deputy Secretary of Defense, acting

pursuant to a delegation from the Secretary of Defense, has authorized me to exercise TOP SECRET original classification authority.

22. As an original classification authority, consistent with Sections 1.1(a) of E.O. 13526, and as described below, I have determined that some of the information contained within the OLC opinion concerns E.O. 13526 Sections 1.4(a) (military plans, weapons systems, or operations), (b) (foreign government information), (c) (intelligence activities and intelligence sources and methods) and (d) (foreign relations of the U.S.). This information is owned by and under the control of the U.S. government, the unauthorized disclosure of which reasonably could be expected to result in exceptionally grave damage to the national security. I also have determined that the information contained within the OLC opinion has not been classified in order to conceal violations of law, inefficiency, administrative error; prevent embarrassment to a person, organization, or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

23. The OLC opinion is also exempt under the deliberative process privilege of exemption 5. The information is pre-decisional and deliberative, as the documents contain opinions, advice, and recommendations as part of the consultative process important to national security policy-making. Disclosure of this information could chill full, frank, and open discussion on matters that are the subject of these documents.

24. Finally, as the OLC opinion contains advice from counsel, it is also exempt under the attorney-client privilege. These documents contain advice to clients, reflect information communicated by clients in confidence to attorneys, and contain communications that were intended to be confidential and there is no indication that the intended confidentiality was not maintained.

**“NO NUMBERS, NO LIST” RESPONSE  
TO REMAINING CLASSIFIED RESPONSIVE RECORDS**

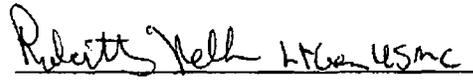
25. In addition to the documents listed in Exhibit J and the OLC opinion described above, there are additional classified documents responsive to plaintiffs’ request.

26. DoD cannot further describe or even enumerate on the public record, the number, type, or dates of responsive records because to do so would reveal classified information about the nature and extent of DoD’s interest in these topics. To provide any additional information, even type of document, author, date, length, recipient, could itself reveal classified facts. For example, revealing the dates of documents could strongly suggest that DoD had information about particular operations, events or individuals, thus potentially revealing the focus of military operational planning, the extent of DoD’s knowledge about AQAP internal structures and activities, intelligence sources and methods, and other classified information. Revealing the nature, depth, or breadth of DoD’s interest in this topic could expose the nature, depth, or breadth of DoD’s operational activities, which would enable this sophisticated adversary to more effectively thwart our efforts and implicate sensitive foreign relations. This information could reasonably be expected to harm national security and must be withheld.

27. The plaintiff has asserted in the complaint that the United States has publically acknowledged underlying facts, which DoD’s response seeks to protect. I am aware of the speeches made by the DoD General Counsel, the United States Attorney General, and other Executive Branch officials regarding legal analysis and procedural considerations applicable to the potential use of lethal force against valid military targets who happen to be United States citizens. However, I am not aware of any Executive Branch official having officially acknowledged the nature, depth, or breadth of DoD’s interest or involvement in the deaths, or lack thereof, of Anwar al-Awlaki, Samir Kahn, or Abdulrahman al-Awlaki.

28. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 20th day of June 2012 in Arlington, VA.

Handwritten signature of Robert R. Neller in black ink, appearing as "Robert R. Neller LtGen USMC".

Lieutenant General ROBERT R. NELLER, USMC  
Director of Operations, J-3, Joint Staff

# EXHIBIT A

JA344

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NATIONAL SECURITY  
PROJECT



12-F-0113

October 19, 2011

Information Officer  
Office of Freedom of Information and Security Review  
Directorate for Executive Services and Communications  
FOIA/Privacy Branch  
1155 Defense Pentagon, Room 2C757  
Washington, D.C. 20301-1155

HQ USSOCOM  
ATTN: SOCS-SJS-I/FOIA Requester Service Center  
7701 Tampa Point Blvd  
MacDill AFB, FL 33621-5323

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T/212.549.2500  
WWW.ACLU.ORG

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, D.C. 20530-0001

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Information and Privacy Coordinator  
 FOIA Office  
 Gate 5  
 1000 Colonial Farm Road  
 McLean, VA 22101

Re: **REQUEST UNDER FREEDOM OF INFORMATION ACT/  
 Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General's Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").<sup>1</sup>

AMERICAN CIVIL LIBERTIES  
 UNION FOUNDATION

This Request seeks records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki<sup>2</sup> ("al-Awlaki") and two other U.S. citizens by the United States Government. According to news reports, al-Awlaki, a United States citizen, was killed in Yemen on or around September 30, 2011, by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)—commonly referred to as "drones"—operated by the Central Intelligence Agency (CIA) and/or Joint Special Operations Command (JSOC). See, e.g., Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Greg Miller, *Strike on Aulqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0la0>. Samir Khan

<sup>1</sup> The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

<sup>2</sup> Al-Awlaki's name is sometimes spelled "al-Aulaqi." This Request seeks records referring to al-Awlaki using any spelling or transliteration of his name.

("Khan"), also a U.S. citizen, was killed in the same attack. See Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pp0Nke>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>. Press reports indicate that on or around October 14, 2011, a third U.S. citizen, Abdulrahman al-Awlaki,<sup>3</sup> was killed in a drone strike in southern Yemen. Abdulrahman al-Awlaki, the son of Anwar al-Awlaki, was 16 years old at the time of his death. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>.

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We seek information about the legal basis in domestic, foreign, and international law for authorizing the targeted killing of al-Awlaki. Specifically, we request any memoranda produced by the Department of Justice Office of Legal Counsel (OLC) analyzing the legal basis for killing al-Awlaki and authorizing the use of lethal force against him. We request information regarding the rules and standards used to determine when, where, and under what circumstances al-Awlaki could be killed, as well as what measures were required to avoid civilian casualties. We also request information about whether Samir Khan was specifically targeted for killing and what the legal basis was for killing him.

Beginning immediately after al-Awlaki was killed, the media began reporting the existence of a legal memorandum drafted by the OLC that provided legal justification for killing al-Awlaki (hereinafter "OLC memo"). The memorandum was reportedly completed around June 2010 and signed by David Barron. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. According to the New York Times, the OLC memo "concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him." Savage, *supra*. We seek release of this memorandum, as well as any other memoranda describing the legal basis for killing al-Awlaki or any other U.S. citizen.

<sup>3</sup> Abdulrahman al-Awlaki's first name is sometimes spelled "Abdelrahman" or "Abdul-Rahman" and his family name is sometimes spelled "al-Aulaqi." This Request seeks records referring to Abdulrahman al-Awlaki using any spelling or transliteration of his name.

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Since al-Awlaki was killed, there have been numerous calls for the release of the OLC memo and any other documents explaining the government's asserted legal basis for killing al-Awlaki. See, e.g., Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, <http://wapo.st/n6l3vK> ("A bipartisan chorus of political and legal voices is calling on the Obama administration to release a declassified version of the Justice Department memo that provided the legal analysis sanctioning the killing in Yemen last week of Anwar al-Awlaki, a U.S. citizen."); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare (Oct. 4, 2011, 3:07 PM), <http://bit.ly/r42x0f>; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, Lawfare (Oct. 3, 2011, 7:45 AM), <http://bit.ly/mRUMg0>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4> ("The Justice Department reportedly wrote an advisory memo on the legality of targeting an American citizen with lethal force absent a trial or other due process, but the administration has kept the memo classified. Keeping the legal rationale secret amplifies the voices that argue that Mr. Obama assassinated an American citizen."); Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>. The public has a vital interest in knowing the legal basis on which U.S. citizens may be designated for extrajudicial killing and then targeted with legal force.

Reports indicate that the OLC memo "does not independently analyze the quality of the evidence against [al-Awlaki]." Savage, *supra*. We therefore also seek information about the factual basis for authorizing the killing of al-Awlaki. Such information includes the basis for asserting that al-Awlaki was operationally involved in al Qaeda planning, and that he posed an imminent threat of harm to the United States, United States citizens, or others. We also seek information about the legal and factual bases for targeting Khan and Abdulrahman al-Awlaki.

Press reports have revealed that Executive Branch officials engage in a process of assessing the factual basis for determining whether an individual, including U.S. citizens, should be targeted for killing. See Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/qZ0Q4q> ("Hidden behind walls of top-secret classification, senior U.S. government officials meet in what is essentially a star chamber to decide which enemies of the state to target for assassination."). However, the government has not revealed the factual basis for targeting al-Awlaki for killing, and press reports suggest that the evidence against him is subject to significant dispute. See Hosenball, *supra*

("[O]fficials acknowledged that some of the intelligence purporting to show Awlaki's hands-on role in plotting attacks was patchy."). The public also lacks information about the killings of Khan and Abdulrahman al-Awlaki, including whether they were intentionally targeted.

Without information about the legal and factual basis for the targeted killing of al-Awlaki and others, the public is unable to make an informed judgment about the policy of authorizing targeted killings of United States citizens. We make the following requests for information in hopes of filling that void.

### I. Requested Records

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1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
  - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
  - B. The protections and requirements imposed by the Fifth Amendment Due Process Clause;
  - C. The reasons why international-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
  - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
  - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of al-Awlaki;

- F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
  - G. Any requirement that the U.S. government first attempt to capture al-Awlaki before killing him.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki, including:
- A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
  - B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
  - C. Facts indicating that there was a legal justification for killing persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
  - D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
  - E. Any other facts relevant to the decision to authorize and execute the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

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## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

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The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>

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; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU's "Torture FOIA" webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. The webpage also advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. See Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>4</sup>

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's targeted killing of Anwar al-Awlaki, allegedly collateral killing of Samir Khan, and potential killing of other U.S. citizens in Yemen and elsewhere using unmanned aerial vehicles or other means. The records sought will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about targeted killings using drones in Afghanistan, Pakistan, Yemen and elsewhere. More particularly, there has been extensive media coverage of the killing of al-Awlaki and Khan. See, e.g., Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Scott Shane & Thom Shanker, *Yemen*

<sup>4</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

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*Strike Reflects U.S. Shift To Drones as Cheaper War Tool*, N.Y. Times, Oct. 2, 2011, at A1, available at <http://nyti.ms/ogznLt>; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>; Greg Miller, *Strike on Aulqi Demonstrates Collaboration Between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0la0>. There has also been widespread reporting of the killing of Abdulrahman al-Awlaki. See, e.g., Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>; Brian Bennett, *U.S. Drone Strikes Kill Al Qaeda Operative in Yemen*, L.A. Times, Oct. 16, 2011, <http://lat.ms/mWffAn>; Hamza Hendawi, *Yemen: U.S. Strike Kills 9 al-Qaeda Militants*, Associated Press, Oct. 15, 2011, <http://abcn.ws/p3HqbA>.

The Obama Administration's refusal to release the OLC memo or other documents describing the legal basis for killing al-Awlaki has also been the subject of intense media coverage. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2007, <http://wapo.st/n6l3vK>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4>; Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. There is also significant interest in the details of the process by which the government authorized the killing of al-Awlaki. See, e.g., Bruce Ackerman, *Obama's Death Panel*, Foreign Policy, Oct. 7, 2011, <http://bit.ly/qZ0Q4q>; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>.

Significant and pressing questions about the basis for the targeted killing of al-Awlaki and other U.S. citizens remain unanswered. Therefore, the subject of this Request will remain a matter of widespread and exceptional media interest. The public has an urgent need for information about the subject of this Request.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, and the Central Intelligence Agency with regard to the targeted killings of Anwar al-Awlaki and other U.S. citizens. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d)(i); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is a "representative of the news media" for the same reasons it is

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“primarily engaged in the dissemination of information.” See *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); see *supra*, section II.<sup>5</sup>

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. See 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

Please be advised that because we are requesting expedited processing under the Department of Justice implementing regulations section 16.5(d)(1)(ii) and section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Notwithstanding Ms. Schmaler’s determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

<sup>5</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in August 2011 the Department of Justice granted a fee waiver to the ACLU with respect to a request for information related to the proxy detention of detainees of U.S. naval vessels. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

We also request that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Nathan Freed Wessler  
National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

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Sincerely,



Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 519-7847  
Fax: (212) 549-2654

# EXHIBIT B

**JA357**



**DEPARTMENT OF DEFENSE  
OFFICE OF FREEDOM OF INFORMATION  
1155 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1155**

**OCT 31 2011**

Ref: 12-F-0113

Mr. Nathan Freed Wessler  
American Civil Liberties Union  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Dear Mr. Wessler:

This is an interim response to your October 19, 2011, twelve page Freedom of Information Act (FOIA) request submitted on behalf of the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU"). Your request seeks, "...records pertaining to the legal authority and factual basis for the targeted killing of Anwar al Walkai ("al-Awlaki") and two other U.S. citizens by the United States Government." We note that you have also submitted this request to HQ USSOCOM and the Department of Justice. We received your request on October 26, 2011, and assigned it FOIA case number 12-F-0113.

You have also requested: (a) "Representative of the news media" fee status, 5 U.S.C. § 552(a)(4)(A)(ii), 32 C.F.R. § 286.28(e)(7); (b) a waiver or limitation of search, review and duplication fees, 5 U.S.C. § 552(a)(4)(A)(iii), 32 C.F.R. § 286.28(d); and (c) expedited processing on the basis of "compelling need" and urgent need, 5 U.S.C. § 552(a)(6)(E), 32 C.F.R. § 286.4(d)(3)(ii).

Concerning your request for representative of the news media status, in your request you explain that the ACLU is a membership organization that educates the public about civil liberties implications of pending and proposed legislation, lobbies legislators and mobilizes its members to lobby their legislators. That the ACLU provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. Additionally, you state that although the, "ACLU is perhaps most well known for its litigation activities, it is far more than a large public-interest law firm. The ACLU's principal mission is not to litigate important civil-rights and civil-liberties cases, but to preserve and defend the guarantees of the Bill of Rights and civil-rights laws, using litigation as just one of many tactics...Every aspect of the ACLU's work in furtherance of this mission—including litigation—can fairly be described as information dissemination."

According to your website, "the ACLU is our nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country." Although the ACLU may have the means to disseminate information to the public, your website does not support that the ACLU's function is publishing or broadcasting news to the public.

**JA358**

After carefully considering your letter in the context of the governing Departmental regulation found at 32 C.F.R. § 286 and reviewing information available concerning the American Civil Liberties Union and the ACLU Foundation on your website, I do not find that the ACLU would qualify as a representative of the news media.

Accordingly, I have determined that you should be placed in the "other" category for fee purposes. The "other" fee category affords you two hours of search time and 100 pages of duplication free of charge. Subsequent processing will be assessed at the established Department of Defense (DoD) fee rates of: clerical search time--\$20 per hour; professional search time--\$44 per hour; executive search time--\$75 per hour; and document reproduction at \$0.15 per page

Your request that fees associated with the processing of the request should be limited to reasonable standard charges for document duplication, 32 C.F.R. § 286.28(e)(7), on the grounds that the ACLU qualifies as a representative of the news media, is denied. Due to the scope of your request, I anticipate that a complete search for responsive records would exceed the two free hours that you are entitled to as an "other" category requester. I ask that you make a fee commitment to support a complete search. If you do not commit to pay fees, the search will be limited to two hours and will only be conducted within the Office of the Secretary of Defense and the Joint Staff. Please respond in writing, stating the amount of fees you are willing to pay to process this request beyond two hours.

You have requested expedited processing on the basis of "compelling need" and urgent need by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal government activity. You argue that the records requested will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct". However, as to qualifying as "breaking news," the information relates to continuing news stories, as you have illustrated on pages eight and nine of your request. In addition, I do not find that the information would lose its value if not processed on an expedited basis. Therefore, your request for expedited processing is denied.

We will be unable to respond to your request within the FOIA's statutory time period as there are unusual circumstances which impact our ability to quickly process your request. Those circumstances are: the need to search for and collect records from several organizations which are geographically separated from this Office and the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. For these reasons, your request has been placed in our complex processing queue. We will additionally not be able to respond to your request with an additional 10 days. Therefore, if you would like to receive an earlier response, you may wish to narrow the scope of your request. As a matter of information, our current administrative workload is approximately 1,700 open requests.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, ATTN: Mr. James Hogan, 1155 Defense Pentagon, Washington, DC 20301-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 12-F-0113, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

  
for 

Paul J. Jacobsmeyer  
Chief

JA360

# EXHIBIT C

**JA361**

NATIONAL SECURITY PROJECT



12-A-0113-A1

December 16, 2011

Via UPS

Defense Freedom of Information Policy Office  
ATTN: Mr. James Hogan  
Director of Administration and Management  
Office of the Secretary of Defense  
1155 Defense Pentagon  
Washington, DC 20301-1155

Re: Freedom of Information Act Appeal  
Case Number 12-F-0113

AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10038-2400  
17712.547.2500  
WWW.ACLU.ORG

Dear Mr. Hogan,

OFFICERS AND DIRECTORS  
SUSAN N. HERVAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU") write to appeal the Department of Defense's denials of (1) the ACLU's request for expedited processing of Freedom of Information Act ("FOIA") Request number 12-F-0113 ("Request") and (2) the ACLU's request for a fee limitation based on its status as a representative of the news media. The ACLU also appeals from the Department of Defense's deferral of any decision on the ACLU's request for a public-interest fee waiver.

The ACLU's Request seeks records relating to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki ("al-Awlaki") and two other U.S. citizens by the United States Government. Specifically, the Request seeks six categories of information, including records pertaining to the legal basis in domestic, foreign, and international law upon which U.S. citizens can be subjected to targeted killing and upon which al-Awlaki was actually targeted, the process by which U.S. citizens can be designated for targeted killing, and factual basis for the killings of al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. See Ex. A (FOIA Request dated October 19, 2011). Chief Paul J. Jacobsmeyer's letter denying the ACLU's Request for expedited processing and a fee limitation and deferring any decision on the ACLU's request for a public-interest fee waiver is dated October 31, 2011. See Ex. B (Mr. Jacobsmeyer's letter dated October 31, 2011).

**I. The ACLU is entitled to expedited processing.**

Expedited processing is warranted where the information requested is urgently needed by an organization primarily engaged in disseminating

information in order to inform the public about actual or alleged federal-government activity. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 286.4(d)(3)(ii).

For the reasons set out in the original Request, expedited processing is warranted here. See Ex. A at 7–9. Mr. Jacobsmeyer, however, denied expedited processing on the grounds that the requested records were not urgently needed and did not qualify as “breaking news” because the subject of the Request relates to “continuing news stories,” and because “the information would [not] lose its value if not processed on an expedited basis.” Ex. B at 2. Mr. Jacobsmeyer’s determination was incorrect; the request clearly meets the statutory and regulatory requirements for expedited processing.

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*A. The requested records are urgently needed to inform the public about federal-government activity.*

The records requested are urgently needed to inform the national debate about U.S. policy with respect to targeted killings of U.S. citizens. As the ACLU’s Request demonstrates, the information requested relates to a breaking news story that dramatically focused the public’s attention on the legality, extent, and implications of the United States Government’s policy and practice of authorizing and carrying out targeted killings of U.S. citizens and others and its failure to avoid killing U.S. citizens while targeting other individuals. See Ex. A at 2–4, 8–9.

As the numerous news articles cited in the Request suggest, this is an issue about which the public seeks knowledge. Indeed, since the ACLU submitted this Request, there has been sustained interest in the U.S. policy of authorizing targeted killings of U.S. citizens generally, and in the killings of the three U.S. citizens discussed in the Request specifically. See, e.g., Adam Entous, Evan Perez & Siobhan Gorman, *Drone Program Attacked by Human-Rights Groups*, Wall. St. J., Dec. 9, 2011, <http://on.wsj.com/vDmkqg>; Roger Cohen, Op-Ed., *Doctrine of Silence*, N.Y. Times, Nov. 28, 2011, <http://nyti.ms/uqi9le>; Leonard C. Goodman, *Assassinating the Rule of Law*, In These Times, Nov. 25, 2011, <http://bit.ly/sVlfoJ>; Paul D. Miller, Op-Ed., *When Will the U.S. Drone War End?*, Wash. Post, Nov. 17, 2011, <http://wapo.st/tnTGJ0>; Andrew Rosenthal, *Release the Memo!*, N.Y. Times, Nov. 11, 2011, <http://nyti.ms/swDmDB>; Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, Wall St. J., Nov. 4, 2011, <http://on.wsj.com/uh1AEL>; Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of his Father?*, Time, Oct. 27, 2011, <http://ti.me/vj2Eor>; Alan Gathright, *Denver-Born Teen Killed In U.S. Drone Attack*, TheDenverChannel.com, Oct. 27, 2011, <http://bit.ly/v4or1K>; Daniel

Swift, *Drone Knowns and Unknowns*, Harper's Mag., Oct. 27, 2011, <http://bit.ly/rBQjCp>; Tim Lister, *Death of U.S. Teenager in Drone Strike Stokes Debate*, CNN.com, Oct. 25, 2011, <http://bit.ly/rDnXsA>; Catherine Herridge, *Obama Administration Pressed for Accountability After Americans Killed in Anti-Terror Airstrikes*, FoxNews.com, Oct. 25, 2011, <http://fxn.ws/rIFWd8>; Editorial, *When is it Okay to Kill Americans Abroad?*, Wash. Post, Oct. 21, 2011, <http://wapo.st/rCWmkY>; Ken Dilanian, *Grieving Awlaki Family Protests Yemen Drone Strikes*, L.A. Times, Oct. 19, 2011, <http://lat.ms/vZQ0nU>.

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The urgent and important nature of the requested documents has recently been highlighted in statements made by U.S. officials, including President Obama. See, e.g., David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, Wash. Post, Oct. 26, 2011, <http://wapo.st/u2GTMf> (“[Al-Awlaki] was probably the most important al Qaeda threat that was out there after Bin Laden was taken out, and it was important that working with the enemies [sic: Yemenis], we were able to remove him from the field.”); Matt Apuzzo, *Obama Lawyers: Citizens Targeted If at War with US*, Associated Press, Dec. 1, 2011, <http://yhoo.it/tgYqPX>; Question Taken at Press Briefing, *Reported Death of Abdulrahman al-Awlaki*, U.S. Dep't of State (Oct. 25, 2011), <http://1.usa.gov/tD9jQN>. The targeted killing of al-Awlaki and other U.S. citizens has also been a topic of discussion during Republican presidential campaign debates, with candidates staking out positions about the legality of the government's actions. See CBS News/NJ Debate Transcript, Part 1, CBSNews.com (Nov. 13, 2011), <http://bit.ly/tPzdli>; CBS News/NJ Debate Transcript, Part 2, CBSNews.com (Nov. 13, 2011), <http://bit.ly/rHiRcq>.

A rapidly growing body of legal scholarship is also being produced regarding the legality of the targeted killing of al-Awlaki, but that scholarship is hobbled by a lack of information about the government's legal and factual justifications for carrying out the killing. See, e.g., Robert J. Deiahunty & Christopher J. Motz, *Killing Al-Awlaki: The Domestic Legal Issues*, 1 Idaho J. L. & Pub. Pol'y (forthcoming 2012) (manuscript at 3-4), <http://ssrn.com/abstract=1963976> (“Our analysis is unavoidably somewhat tentative. This is not only because the crucial facts surrounding the U.S. government's decision to target and kill al-Awlaki, and the circumstances surrounding his death, are not fully available from open sources, but to an unknown extent remain classified. No less important is the fact that the Obama Administration has thus far declined to reveal even a redacted version of a 50-page legal memorandum reportedly prepared in 2010 by the Justice Department's Office of Legal Counsel (OLC) respecting the legality of targeting and killing al-Awlaki.”); David Husband, *The Targeted Killing of*

*Al-Awlaki*, Harv. Nat'l Security J., Nov. 26, 2011, <http://bit.ly/sG8lh2>; Anthony M. Shults, Note, *The "Surveil or Kill" Dilemma: Separation of Powers and the FISA Amendments Act's Warrant Requirement for Surveillance of U.S. Citizens Abroad*, 86 N.Y.U. L. Rev. 1590 (2011); Philip Dore, Comment, *Greenlighting American Citizens: Proceed With Caution*, 72 La. L. Rev. 255 (2011); Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. Conflict & Security L. 385 (2011); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in 13 Y.B. of Int'l Humanitarian L. (M.N. Schmitt et al. eds., 2010), available at <http://ssrn.com/abstract=1754223>.

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In light of the ongoing national debate about whether and how the U.S. government may authorize and carry out targeted killings against U.S. citizens, Mr. Jacobsmeyer's statement that the Request does not "qualify[] as 'breaking news'" is surprising and incorrect. The fundamental question about how this country will deal with terrorism suspects and when it may kill its own citizens and others is critical to the public's understanding of the targeted killing program and U.S. counterterrorism practices. Information sought in the Request is essential to a full understanding of these matters. And, more to the point, details are of paramount importance *now* as U.S. officials decide when and where they are empowered to order targeted killings and whether U.S. citizens are entitled to greater procedural protections. Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki are the most recent U.S. citizens killed pursuant to the government's targeted killing program, but there is no reason to believe they will be the last. The public urgently needs access to the information sought in the Request in order to inform the ongoing debate about the wisdom and legality of the targeted killing program. *See, e.g., Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004) (finding expedited processing warranted where requested records would provide useful information for "ongoing national debate" about the Patriot Act); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (expedition of FOIA request related to voting rights warranted where "importance of this issue is paramount" and where "expedition of the[] documents could advance the current debate over the Voting Rights Act"); *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (granting preliminary injunction for expedited processing where "obtaining in a timely fashion information [was] vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program"); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1182, 1186 (N.D. Cal. 2008) (granting preliminary injunction for expedited processing of FOIA request where the requested information was "essential to inform the public debate over the

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possible FISA amendments” and where “the requested information [would] be rendered useless in the effort to educate the American public about the issues pertinent to the legislation if such information is produced after Congress amends the law”); *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, No. C 07-5278 SI, 2007 WL 4208311, at \*7 (N.D. Cal. Nov. 27, 2007) (finding “irreparable harm can exist in FOIA cases . . . because ongoing public and congressional debates about issues of vital national importance ‘cannot be restarted or wound back’” (quoting *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643 MMC, 2006 WL 3462659, at \*4 (N.D. Cal. Nov. 29, 2006))); *Gerstein*, 2006 WL 3462658, at \*7 (finding that delaying a response to a FOIA request in which a national policy debate is occurring would compromise a significant recognized interest “in enhancing public debate on potential legislative action”); *id.* at \*6 (finding expedited processing mandatory where request concerned a “matter of . . . current exigency to the American public” and the “subject of an ongoing national debate”); *see also Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“stale information is of little value”).

Finally, Mr. Jacobsmeyer’s conclusion that the Request does not concern a breaking news story because “the information relates to continuing news stories” defies common sense and caselaw on the subject. Ex. B at 2. Widespread media interest on these topics only *underscores* the importance of this issue to the public and *supports* the ACLU’s entitlement to expedited processing under the “urgency to inform” standard. *See, e.g., Am. Civil Liberties Union of N. Cal. v. Dep’t of Def.*, No. C 06-01698 WHA, 2006 WL 1469418, at \*6–7 (N.D. Cal. May 25, 2006) (stating that “[i]f anything, extensive media interest usually is a fact *supporting* not *negating* urgency in the processing of a FOIA request,” and holding that “intense [media] scrutiny” about DoD’s TALON database “validated” the argument that there was an “‘urgency to inform’ the public about the program”); *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d at 29 (citing to news articles demonstrating “widespread public concern” about the government’s surveillance activities under the Patriot Act in concluding expedited processing of FOIA request warranted); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (noting how numerous “news reports and magazine articles” on the topic of the FOIA request were in finding that expedited processing was warranted).

The Request makes clear that the records requested are of critical importance to an ongoing national debate. There is no question that release of the records requested would be in the public interest because they would contribute significantly to the public understanding of “actual or alleged” activities of the government. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Notably, the

Department of Justice has separately granted expedited processing for this Request, recognizing that the information requested is matter of urgent national importance. *See* Ex. C.

*B. The ACLU is primarily engaged in the dissemination of information.*

As Requesters have already demonstrated, the ACLU is primarily engaged in the dissemination of information. *See* Ex. A at 7–8. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU’s work and one of its primary activities.

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Indeed, courts have already found that the ACLU, and other organizations with missions and information-dissemination activities similar to the ACLU’s, are “primarily engaged in disseminating information.” *See, e.g., Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d at 29 n.5 (finding that ACLU, as a non-profit, public-interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” is “primarily engaged in disseminating information” (internal citation omitted)); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference—whose mission is “to serve as the site of record for relevant and up-to-the minute civil rights news and information” and to “disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws”—to be “primarily engaged in the dissemination of information”). Courts have found that the ACLU and other similar organizations are “primarily engaged in disseminating information” even though they engage in other activities—such as lobbying and litigation—in addition to their publication and information-dissemination activities.

**II. ACLU is entitled to a fee limitation based on its status as a representative of the news media.**

A waiver of search and review fees is warranted here because the ACLU is a “representative of the news media” and the records requested are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7); *see* Ex. A at 10–11. Mr. Jacobsmeyer concluded that the ACLU does not qualify as a “representative of the news media” because “[a]lthough the ACLU may have the means to disseminate information to the public,” its website “does not support that the ACLU’s function is publishing or

broadcasting news to the public.” Ex. B at 1. Mr. Jacobsmeyer’s conclusion is incorrect and misinterprets the standard by which an organization qualifies as a “representative of the news media.”

The D.C. Circuit has ruled that any “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience” qualifies as a “representative of the news media” under FOIA’s fee-waiver provisions. *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *see also* 5 U.S.C. § 552(a)(4)(A)(ii) (defining “a representative of the news media” in identical terms). As Senator Leahy said during debate about FOIA’s fee-waiver provisions: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected . . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’” 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986). The ACLU plainly meets this standard.

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As the Request amply explains, the ACLU disseminates information through many channels, including its website, case-dedicated webpages, blogs, press releases, books, reports, newsletters, news briefings, “know your rights” publications, fact sheets, educational brochures, pamphlets, television series, and public speaking engagements. *See* Ex. A at 7–11. The Request further explains that the ACLU’s material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students, faculty, policy makers, reporters, and members of the general public for no cost or for a nominal fee. *See id.* at 7. It specifically indicates that the ACLU’s website features information obtained through FOIA, including links to released documents, analyses of that information, and charts that collect, summarize, and present information. *See id.* at 7–8.

The release of documents pursuant to past ACLU requests for records relating to the treatment of terrorism suspects has generated a significant reaction from the press, and has added substantively to the ongoing debate over U.S. government policy. To date, the ACLU has received over 150,000 pages of documents in response to such record requests, attracting prolonged and widespread attention from the public and the media.

Thus, contrary to Mr. Jacobsmeyer’s determination, the ACLU’s website more than adequately shows that it engages in publication and dissemination of news, information, and editorial content. The information that the ACLU disseminates is not limited to case developments; indeed, it distributes educational material about a particular civil-liberties issue, recent

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news about the particular issue, analyses of congressional or executive-branch action on the particular issue, and more in-depth analytic and educational multimedia features on the issue. No court has ever held that an organization that otherwise engages in the kinds of publishing, editorial, and public-education activities that qualify it as a “representative of the news media” must also show that these are the organization’s sole or even primary functions. Rather, the organization must simply be actively engaged in “gather[ing] information of potential interest to a segment of the public, us[ing] its editorial skills to turn the raw materials into a distinct work, and distribut[ing] that work to an audience.” *Nat’l Sec. Archive*, 880 F.2d at 1387; *id.* at 1386 (finding the National Security Archive to be a news-media representative even though it engaged in many other activities that did not “establish an entitlement to preferred status”); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 12 (D.D.C. 2003) (stating that “the key [is] not the organization’s ‘description,’” but rather “whether its activities qualify as those of a representative of the news media” (quoting *Nat’l Sec. Archive*, 880 F.2d at 1385)). In short, there is no requirement that a particular percentage of an organization’s efforts be dedicated to information dissemination or that dissemination of information be the organization’s *only* activity.

Indeed, many of the organizations that courts have found to be “representatives of the news media”—and whose mission, function, and publication activities are similar in kind to the ACLU’s—engage in a wide variety of litigation and congressional advocacy. For example, the D.C. courts have found that the Electronic Privacy Information Center (“EPIC”) is a “representative of the news media” for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information and public-education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5. EPIC, like the ACLU, is an advocacy organization that employs multiple strategies, including litigation, public education, and legislative and political advocacy to accomplish its policy goals. *See EPIC Annual Report 2007–2008*, 2008 *Elec. Privacy Info. Ctr.* at 1, available at [http://epic.org/epic/annual\\_reports/2007.pdf](http://epic.org/epic/annual_reports/2007.pdf) (describing itself as a public-interest-research center that engages in activities such as “policy research, public education, conferences, litigation, publications, and advocacy”). EPIC, like the ACLU, frequently serves as counsel and writes amicus briefs in federal litigation. *Id.* at 13–15. EPIC, like the ACLU, devotes substantial resources to advocating before Congress and the executive branch. *Id.* at 9–11, 16–18. In 2006 and 2007, EPIC’s staff testified or submitted comments to Congress on at least seven occasions and filed comments with federal agencies on at least 11 occasions. *Id.*

Similarly, the D.C. Circuit has found that the National Security Archive is a "representative of the news media" for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information and public-education activities. *See Nat'l Sec. Archive*, 880 F.2d at 1386-87; *see also Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding that Judicial Watch, self-described as a "public interest law firm," is a news-media requester); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public-education functions).

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As the Request exhaustively demonstrates, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. *See Ex. A at 7-11.*

### III. The ACLU is entitled to a fee-waiver determination.

FOIA requires agencies to waive or reduce the fees associated with a request "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 32 C.F.R. § 286.28(d). The ACLU requested a waiver of search, review, and duplication fees based on the considerable public interest in the subject of the Request, the ongoing and widespread media attention to the matter, the fact that the Request would significantly contribute to the public's understanding of the operations and activities of the government, and the fact that the Request was not "primarily in the commercial interest" of the ACLU. *Ex. A at 10-11.* Rather than address the ACLU's request, Mr. Jacobsmeyer stated that he "determined that [the ACLU] should be placed in the 'other' category for fee purposes." *Ex. B at 2.* He stated that the "search will be limited to two hours and will only be conducted within the Office of the Secretary of Defense and the Joint Staff" unless the ACLU committed to financing a longer search. *Id.*

The ACLU objects to the Department's practice of attempting to secure fee commitments prior to determining whether to grant a request for a fee waiver. The Request makes clear that the records requested are of critical importance to an ongoing national debate, and, as Mr. Jacobsmeyer's letter conceded, the information requested "relates to continuing news stories." *Id.* There is no question that release of the records requested would be in the public interest because they would likely contribute significantly to the public

understanding of the operations or activities of the government. *See* 5 U.S.C. § 552(a)(4)(A)(iii).

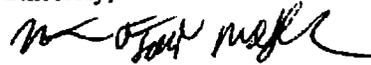
Therefore, Mr. Jacobsmeyer erred in his failure to determine the ACLU's request for a public interest fee waiver prior to placing the ACLU's Request in the "other" fee category. The ACLU's request for a fee waiver should be granted because the Request plainly and incontrovertibly seeks records of immense importance to an ongoing national debate about federal government policies and practices.

#### IV. Conclusion

For the foregoing reasons, the ACLU is entitled to expedited processing of the Request and a fee limitation associated with being a "representative of the news media." The ACLU is also entitled to a response to its request for a public interest fee waiver.

Thank you for your consideration.

Sincerely,



Nathan Freed Wessler  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 519-7847  
Fax: (212) 549-2654

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# EXHIBIT D

**JA372**



**DEPARTMENT OF DEFENSE**  
**DEFENSE FREEDOM OF INFORMATION POLICY OFFICE**  
1155 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1155

DEC 27 2011

Ref: 12-A-0118-A1

Mr. Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street  
18<sup>th</sup> Floor  
New York, NY 10004

Dear Mr. Wessler:

This is in response to your December 16, 2011, Freedom of Information Act (FOIA) appeal. We received your appeal in our office December 21, 2011.

Due to an extremely heavy FOIA workload, we are unable to complete your appeal within the statutory time requirement. In fairness to the general public, we make every effort to treat all requesters equally. Accordingly, responses are made on a first-in, first-out, easy-hard basis, and controlled in response queues. When the appellate review of your case is complete, you will be notified by the appellate authority, the Deputy Director of Administration and Management, Office of the Secretary of Defense, of the final decision. You may direct any questions concerning this appeal to Ms. Alisa Turner at (571) 372-0445, or [alisa.turner@whs.mil](mailto:alisa.turner@whs.mil).

Sincerely,

  
for James P. Hogan  
Chief

JA373

# EXHIBIT E

**JA374**

12-AC-0017-A1



**UNITED STATES SPECIAL OPERATIONS COMMAND**  
7701 TAMPA POINT BOULEVARD  
MACDILL AIR FORCE BASE, FLORIDA 33621-5323

NOV - 7 2011

Command Freedom of Information/Privacy Act Division

Mr. Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Dear Mr. Wessler:

This is an interim response to your October 19, 2011, twelve-page Freedom of Information Act (FOIA) request submitted on behalf of the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU"). Your request seeks, "...records pertaining to the legal authority and factual basis for the targeted killing of Anwar al Walkai ("al-Awlaki") and two other U.S. citizens by the United States Government. We note that you have also submitted this request to the Department of Defense FOIA/Privacy Branch and the Department of Justice. We received your request on November 2, 2011, and assigned it U.S. Special Operations Command (USSOCOM) Control Number 2012-023. Please refer to this number should you have any questions concerning your request.

You have also requested: (a) "Representative of the news media" fee status, 5 U.S.C. § 552(a)(4)(A)(ii), 32 C.F.R. § 286.28(e)(7); (b) a waiver or limitation of search, review and duplication fees, 5 U.S.C. § 552(a)(4)(A)(iii), 32 C.F.R. § 286.28(d); and (c) expedited processing on the basis of "compelling need" and urgent need, 5 U.S.C. § 552(a)(6)(E), 32 C.F.R. § 286.4(d)(3)(ii).

Concerning your request for representative of the news media status, in your request you explain that the ACLU is a membership organization that educates the public about civil liberties implications of pending and proposed legislation, lobbies legislators and mobilizes its members to lobby their legislators. That the ACLU provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. Additionally, you state that although the, "ACLU is perhaps most well known for its litigation activities, it is far more than a large public-interest law firm. The ACLU's principal mission is not to litigate important civil-rights laws, using litigation as just one of the many tactics... Every aspect of the ACLU's work in furtherance of this mission—including litigation—can fairly be described as information dissemination."

According to your website "the ACLU is our nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country." Although the ACLU may have the means to disseminate information to the public, your website

JA375

SOCS-SJS-I

SUBJECT: Freedom of Information Act Request – Nathan Freed Wessler, American Civil Liberties Union (USOCOM FOIA Control Number 2012-023)

does not support that the ACLU's function is publishing or broadcasting news to the public. After carefully considering your letter in the context of the governing Departmental regulation found at 32 C.F.R. § 286 and reviewing information available concerning the American Civil Liberties Union and the ACLU Foundation on your website, we do not find that the ACLU would qualify as a representative of the news media.

Accordingly, it has been determined that you should be placed in the "all other" category for fee purposes. The "all other" fee category affords you two hours of search time and 100 pages of duplication free of charge. Subsequent processing will be assessed at the established USSOCOM fee rates of: clerical search time--\$20 per hour; professional search time--\$44 per hour; executive search time--\$75 per hour; and document reproduction at \$0.15 per page.

Your request that fees associated with the processing the request should be limited to reasonable standard charges for document duplication, 32 C.F.R. § 286.28(e)(7), on the grounds that the ACLU qualifies as a representative of the news media, is denied. Due to the scope of your request, it is anticipated that a complete search for responsive records would exceed the two free hours that you are entitled to as an "all other" category requester. We ask that you make a fee commitment to support a complete search. If you do not commit to pay fees, the search will be limited to two hours and will only be conducted within the USSOCOM Headquarters. Please respond in writing, stating the amount of fees you are willing to pay to process this request beyond two hours.

You have requested expedited processing on the basis of "compelling need" and urgent need by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. You argue that the records requested will help determine the government's asserted legal basis for the targeted killing of Al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct". However, as to qualifying as "breaking news," the information relates to continuing news stories, as you have illustrated on pages eight and nine of your request. In addition, We do not find that the information would lose its value if not processed on an expedited basis. Therefore, your request for expedited processing is denied.

We will be unable to respond to your request within the FOIA's statutory time period as there are unusual circumstances which impact our ability to quickly process your request. Those circumstances are: the need to search for and collect records from several organizations which are geographically separated from this Office and the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. For these reasons, your request has been placed in our complex processing queue. We will additionally not be able to respond to your request with an additional 10 days. Therefore, if you would like to receive an earlier response, you may wish to narrow the scope of your request.

# EXHIBIT F

**JA377**

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NATIONAL SECURITY  
PROJECT



12-AC-0017-A1

December 16, 2011

Via UPS

James Hogan, Chief  
Policy, Appeals and Litigation Branch  
Office of Freedom of Information  
1155 Defense Pentagon  
Washington, DC 20301-1155

Re: Freedom of Information Act Appeal  
Control Number 2012-023

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL  
NEW YORK, NY 10004 2400  
212.549.2300  
WWW.ACLU.ORG

Dear Mr. Hogan,

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (together, "ACLU") write to appeal the United States Special Operations Command's ("USSOCOM") denials of (1) the ACLU's request for expedited processing of the Freedom of Information Act ("FOIA") Request assigned Control Number 2012-023 ("Request") and (2) the ACLU's request for a fee limitation based on its status as a representative of the news media. The ACLU also appeals from USSOCOM's deferral of any decision on the ACLU's request for a public-interest fee waiver.

The ACLU's Request seeks records relating to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki ("al-Awlaki") and two other U.S. citizens by the United States Government. Specifically, the Request seeks six categories of information, including records pertaining to the legal basis in domestic, foreign, and international law upon which U.S. citizens can be subjected to targeted killing and upon which al-Awlaki was actually targeted, the process by which U.S. citizens can be designated for targeted killing, and factual basis for the killings of al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. See Ex. A (FOIA Request dated October 19, 2011). Freedom of Information/Privacy Act Division Chief Phyllis D. Holden's letter denying the ACLU's Request for expedited processing and a fee limitation and deferring any decision on the ACLU's request for a public-interest fee waiver is dated November 7, 2011. See Ex. B (Ms. Holden's letter dated Nov. 7, 2011).

**I. The ACLU is entitled to expedited processing.**

Expedited processing is warranted where the information requested is urgently needed by an organization primarily engaged in disseminating

information in order to inform the public about actual or alleged federal-government activity. See 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 286.4(d)(3)(ii).

For the reasons set out in the original Request, expedited processing is warranted here. See Ex. A at 7–9. Ms. Holden, however, denied expedited processing on the grounds that the requested records were not urgently needed and did not qualify as “breaking news” because the subject of the Request relates to “continuing news stories,” and because “the information would [not] lose its value if not processed on an expedited basis.” Ex. B at 2. Ms. Holden’s determination was incorrect; the request clearly meets the statutory and regulatory requirements for expedited processing.

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*A. The requested records are urgently needed to inform the public about federal-government activity.*

The records requested are urgently needed to inform the national debate about U.S. policy with respect to targeted killings of U.S. citizens. As the ACLU’s Request demonstrates, the information requested relates to a breaking news story that dramatically focused the public’s attention on the legality, extent, and implications of the United States Government’s policy and practice of authorizing and carrying out targeted killings of U.S. citizens and others and its failure to avoid killing U.S. citizens while targeting other individuals. See Ex. A at 2–4, 8–9.

As the numerous news articles cited in the Request suggest, this is an issue about which the public seeks knowledge. Indeed, since the ACLU submitted this Request, there has been sustained interest in the U.S. policy of authorizing targeted killings of U.S. citizens generally, and in the killings of the three U.S. citizens discussed in the Request specifically. See, e.g., Adam Entous, Evan Perez & Siobhan Gorman, *Drone Program Attacked by Human-Rights Groups*, Wall St. J., Dec. 9, 2011, <http://on.wsj.com/vDmkqz>; Roger Cohen, Op-Ed., *Doctrine of Silence*, N.Y. Times, Nov. 28, 2011, <http://nyti.ms/uqi9Ie>; Leonard C. Goodman, *Assassinating the Rule of Law*, In These Times, Nov. 25, 2011, <http://bit.ly/sVlfOJ>; Paul D. Miller, Op-Ed., *When Will the U.S. Drone War End?*, Wash. Post, Nov. 17, 2011, <http://wapo.st/tnTGJ0>; Andrew Rosenthal, *Release the Memo!*, N.Y. Times, Nov. 11, 2011, <http://nyti.ms/swDmDB>; Adam Entous, Siobhan Gorman & Julian E. Barnes, *U.S. Tightens Drone Rules*, Wall St. J., Nov. 4, 2011, <http://on.wsj.com/uh1AEL>; Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of his Father?*, Time, Oct. 27, 2011, <http://ti.me/vj2Eor>; Alan Gathright, *Denver-Born Teen Killed In U.S. Drone Attack*, TheDenverChannel.com, Oct. 27, 2011, <http://bit.ly/v4or1K>; Daniel

Swift, *Drone Knowns and Unknowns*, Harper's Mag., Oct. 27, 2011, <http://bit.ly/rBQjCp>; Tim Lister, *Death of U.S. Teenager in Drone Strike Stokes Debate*, CNN.com, Oct. 25, 2011, <http://bit.ly/rDnXsA>; Catherine Herridge, *Obama Administration Pressed for Accountability After Americans Killed in Anti-Terror Airstrikes*, FoxNews.com, Oct. 25, 2011, <http://fxn.ws/rIFWd8>; Editorial, *When is it Okay to Kill Americans Abroad?*, Wash. Post, Oct. 21, 2011, <http://wapo.st/rCWmkY>; Ken Dilanian, *Grieving Awlaki Family Protests Yemen Drone Strikes*, L.A. Times, Oct. 19, 2011, <http://lat.ms/vZQ0nU>.

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The urgent and important nature of the requested documents has recently been highlighted in statements made by U.S. officials, including President Obama. See, e.g., David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, Wash. Post, Oct. 26, 2011, <http://wapo.st/u2GTMf> ("[Al-Awlaki] was probably the most important al Qaeda threat that was out there after Bin Laden was taken out, and it was important that working with the enemies [sic: Yemenis], we were able to remove him from the field."); Matt Apuzzo, *Obama Lawyers: Citizens Targeted If at War with US*, Associated Press, Dec. 1, 2011, <http://yhoo.it/tgYqPX>; Question Taken at Press Briefing, *Reported Death of Abdulrahman al-Awlaki*, U.S. Dep't of State (Oct. 25, 2011), <http://1.usa.gov/tD9jQN>. The targeted killing of al-Awlaki and other U.S. citizens has also been a topic of discussion during Republican presidential campaign debates, with candidates staking out positions about the legality of the government's actions. See CBS News/NJ Debate Transcript, Part 1, CBSNews.com (Nov. 13, 2011), <http://bit.ly/tPzdli>; CBS News/NJ Debate Transcript, Part 2, CBSNews.com (Nov. 13, 2011), <http://bit.ly/rHiRcq>.

A rapidly growing body of legal scholarship is also being produced regarding the legality of the targeted killing of al-Awlaki, but that scholarship is hobbled by a lack of information about the government's legal and factual justifications for carrying out the killing. See, e.g., Robert J. Delahunty & Christopher J. Motz, *Killing Al-Awlaki: The Domestic Legal Issues*, 1 Idaho J. L. & Pub. Pol'y (forthcoming 2012) (manuscript at 3-4), <http://ssrn.com/abstract=1963976> ("Our analysis is unavoidably somewhat tentative. This is not only because the crucial facts surrounding the U.S. government's decision to target and kill al-Awlaki, and the circumstances surrounding his death, are not fully available from open sources, but to an unknown extent remain classified. No less important is the fact that the Obama Administration has thus far declined to reveal even a redacted version of a 50-page legal memorandum reportedly prepared in 2010 by the Justice Department's Office of Legal Counsel (OLC) respecting the legality of targeting and killing al-Awlaki."); David Husband, *The Targeted Killing of*

*Al-Awlaki*, Harv. Nat'l Security J., Nov. 26, 2011, <http://bit.ly/sG8lh2>;  
Anthony M. Shults, Note, *The "Surveil or Kill" Dilemma: Separation of Powers and the FISA Amendments Act's Warrant Requirement for Surveillance of U.S. Citizens Abroad*, 86 N.Y.U. L. Rev. 1590 (2011); Philip Dore, Comment, *Greenlighting American Citizens: Proceed With Caution*, 72 La. L. Rev. 255 (2011); Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. Conflict & Security L. 385 (2011); Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in 13 Y.B. of Int'l Humanitarian L. (M.N. Schmitt et al. eds., 2010), available at <http://ssrn.com/abstract=1754223>.

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In light of the ongoing national debate about whether and how the U.S. government may authorize and carry out targeted killings against U.S. citizens, Ms. Holden's statement that the Request does not "qualify[] as 'breaking news'" is surprising and incorrect. The fundamental question about how this country will deal with terrorism suspects and when it may kill its own citizens and others is critical to the public's understanding of the targeted killing program and U.S. counterterrorism practices. Information sought in the Request is essential to a full understanding of these matters. And, more to the point, details are of paramount importance *now* as U.S. officials decide when and where they are empowered to order targeted killings and whether U.S. citizens are entitled to greater procedural protections. Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki are the most recent U.S. citizens killed pursuant to the government's targeted killing program, but there is no reason to believe they will be the last. The public urgently needs access to the information sought in the Request in order to inform the ongoing debate about the wisdom and legality of the targeted killing program. *See, e.g., Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 (D.D.C. 2004) (finding expedited processing warranted where requested records would provide useful information for "ongoing national debate" about the Patriot Act); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (expedition of FOIA request related to voting rights warranted where "importance of this issue is paramount" and where "expedition of the[] documents could advance the current debate over the Voting Rights Act"); *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006) (granting preliminary injunction for expedited processing where "obtaining in a timely fashion information [was] vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program"); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1182, 1186 (N.D. Cal. 2008) (granting preliminary injunction for expedited processing of FOIA request where the requested information was "essential to inform the public debate over the

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possible FISA amendments” and where “the requested information [would] be rendered useless in the effort to educate the American public about the issues pertinent to the legislation if such information is produced after Congress amends the law”); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, No. C 07-5278 SI, 2007 WL 4208311, at \*7 (N.D. Cal. Nov. 27, 2007) (finding “irreparable harm can exist in FOIA cases . . . because ongoing public and congressional debates about issues of vital national importance ‘cannot be restarted or wound back’” (quoting *Gerstein v. Cent. Intelligence Agency*, No. C-06-4643 MMC, 2006 WL 3462659, at \*4 (N.D. Cal. Nov. 29, 2006))); *Gerstein*, 2006 WL 3462658, at \*7 (finding that delaying a response to a FOIA request in which a national policy debate is occurring would compromise a significant recognized interest “in enhancing public debate on potential legislative action”); *id.* at \*6 (finding expedited processing mandatory where request concerned a “matter of . . . current exigency to the American public” and the “subject of an ongoing national debate”); *see also Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (“stale information is of little value”).

Finally, Ms. Holden’s conclusion that the Request does not concern a breaking news story because “the information relates to continuing news stories” defies common sense and caselaw on the subject. Ex. B at 2. Widespread media interest on these topics only *underscores* the importance of this issue to the public and *supports* the ACLU’s entitlement to expedited processing under the “urgency to inform” standard. *See, e.g., Am. Civil Liberties Union of N. Cal. v. Dep’t of Def.*, No. C 06-01698 WHA, 2006 WL 1469418, at \*6–7 (N.D. Cal. May 25, 2006) (stating that “[i]f anything, extensive media interest usually is a fact *supporting* not *negating* urgency in the processing of a FOIA request,” and holding that “intense [media] scrutiny” about DoD’s TALON database “validated” the argument that there was an “‘urgency to inform’ the public about the program”); *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d at 29 (citing to news articles demonstrating “widespread public concern” about the government’s surveillance activities under the Patriot Act in concluding expedited processing of FOIA request warranted); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (noting how numerous “news reports and magazine articles” on the topic of the FOIA request were in finding that expedited processing was warranted).

The Request makes clear that the records requested are of critical importance to an ongoing national debate. There is no question that release of the records requested would be in the public interest because they would contribute significantly to the public understanding of “actual or alleged” activities of the government. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Notably, the

Department of Justice has separately granted expedited processing for this Request, recognizing that the information requested is matter of urgent national importance. *See* Ex. C.

*B. The ACLU is primarily engaged in the dissemination of information.*

As Requesters have already demonstrated, the ACLU is primarily engaged in the dissemination of information. *See* Ex. A at 7–8. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public (in both its raw and analyzed form) is a critical and substantial component of the ACLU's work and one of its primary activities.

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Indeed, courts have already found that the ACLU, and other organizations with missions and information-dissemination activities similar to the ACLU's, are "primarily engaged in disseminating information." *See, e.g., Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d at 29 n.5 (finding that ACLU, as a non-profit, public-interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" is "primarily engaged in disseminating information" (internal citation omitted)); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference—whose mission is "to serve as the site of record for relevant and up-to-the minute civil rights news and information" and to "disseminate[] information regarding civil rights and voting rights to educate the public [and] promote effective civil rights laws"—to be "primarily engaged in the dissemination of information"). Courts have found that the ACLU and other similar organizations are "primarily engaged in disseminating information" even though they engage in other activities—such as lobbying and litigation—in addition to their publication and information-dissemination activities.

**II. ACLU is entitled to a fee limitation based on its status as a representative of the news media.**

A waiver of search and review fees is warranted here because the ACLU is a "representative of the news media" and the records requested are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.28(e)(7); *see* Ex. A at 10–11. Ms. Holden concluded that the ACLU does not qualify as a "representative of the news media" because "[a]lthough the ACLU may have the means to disseminate information to the public," its website "does not support that the ACLU's function is publishing or

broadcasting news to the public.” Ex. B at 1–2. Ms. Holden’s conclusion is incorrect and misinterprets the standard by which an organization qualifies as a “representative of the news media.”

The D.C. Circuit has ruled that any “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience” qualifies as a “representative of the news media” under FOIA’s fee-waiver provisions. *Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *see also* 5 U.S.C. § 552(a)(4)(A)(ii) (defining “a representative of the news media” in identical terms). As Senator Leahy said during debate about FOIA’s fee-waiver provisions: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected . . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’” 132 Cong. Rec. S14292 (daily ed. Sept. 30, 1986). The ACLU plainly meets this standard.

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As the Request amply explains, the ACLU disseminates information through many channels, including its website, case-dedicated webpages, blogs, press releases, books, reports, newsletters, news briefings, “know your rights” publications, fact sheets, educational brochures, pamphlets, television series, and public speaking engagements. *See* Ex. A at 7–11. The Request further explains that the ACLU’s material is available to everyone, including tax-exempt organizations, not-for-profit groups, law students, faculty, policy makers, reporters, and members of the general public for no cost or for a nominal fee. *See id.* at 7. It specifically indicates that the ACLU’s website features information obtained through FOIA, including links to released documents, analyses of that information, and charts that collect, summarize, and present information. *See id.* at 7–8.

The release of documents pursuant to past ACLU requests for records relating to the treatment of terrorism suspects has generated a significant reaction from the press, and has added substantively to the ongoing debate over U.S. government policy. To date, the ACLU has received over 150,000 pages of documents in response to such record requests, attracting prolonged and widespread attention from the public and the media.

Thus, contrary to Ms. Holden’s determination, the ACLU’s website more than adequately shows that it engages in publication and dissemination of news, information, and editorial content. The information that the ACLU disseminates is not limited to case developments; indeed, it distributes educational material about a particular civil-liberties issue, recent news about

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the particular issue, analyses of congressional or executive-branch action on the particular issue, and more in-depth analytic and educational multimedia features on the issue. No court has ever held that an organization that otherwise engages in the kinds of publishing, editorial, and public-education activities that qualify it as a “representative of the news media” must also show that these are the organization’s sole or even primary functions. Rather, the organization must simply be actively engaged in “gather[ing] information of potential interest to a segment of the public, us[ing] its editorial skills to turn the raw materials into a distinct work, and distribut[ing] that work to an audience.” *Nat’l Sec. Archive*, 880 F.2d at 1387; *id.* at 1386 (finding the National Security Archive to be a news-media representative even though it engaged in many other activities that did not “establish an entitlement to preferred status”); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 12 (D.D.C. 2003) (stating that “the key [is] not the organization’s ‘description,’” but rather “whether its activities qualify as those of a representative of the news media” (quoting *Nat’l Sec. Archive*, 880 F.2d at 1385)). In short, there is no requirement that a particular percentage of an organization’s efforts be dedicated to information dissemination or that dissemination of information be the organization’s *only* activity.

Indeed, many of the organizations that courts have found to be “representatives of the news media”—and whose mission, function, and publication activities are similar in kind to the ACLU’s—engage in a wide variety of litigation and congressional advocacy. For example, the D.C. courts have found that the Electronic Privacy Information Center (“EPIC”) is a “representative of the news media” for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information and public-education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d 5. EPIC, like the ACLU, is an advocacy organization that employs multiple strategies, including litigation, public education, and legislative and political advocacy to accomplish its policy goals. *See EPIC Annual Report 2007–2008*, 2008 *Elec. Privacy Info. Ctr.* at 1, available at [http://epic.org/epic/annual\\_reports/2007.pdf](http://epic.org/epic/annual_reports/2007.pdf) (describing itself as a public-interest-research center that engages in activities such as “policy research, public education, conferences, litigation, publications, and advocacy”). EPIC, like the ACLU, frequently serves as counsel and writes amicus briefs in federal litigation. *Id.* at 13–15. EPIC, like the ACLU, devotes substantial resources to advocating before Congress and the executive branch. *Id.* at 9–11, 16–18. In 2006 and 2007, EPIC’s staff testified or submitted comments to Congress on at least seven occasions and filed comments with federal agencies on at least 11 occasions. *Id.*

Similarly, the D.C. Circuit has found that the National Security Archive is a "representative of the news media" for the purposes of FOIA even though it engages in litigation and lobbying activities beyond its more traditional dissemination of information and public-education activities. *See Nat'l Sec. Archive*, 880 F.2d at 1386-87; *see also Judicial Watch, Inc. v. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding that Judicial Watch, self-described as a "public interest law firm," is a news-media requester); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding Leadership Conference to be primarily engaged in disseminating information even though it engages in substantial amounts of legislative advocacy beyond its publication and public-education functions).

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As the Request exhaustively demonstrates, the ACLU actively gathers news and information, analyzes it, creates distinct works, publishes that information, and disseminates it widely to the public. *See Ex. A at 7-11.*

### III. The ACLU is entitled to a fee-waiver determination.

FOIA requires agencies to waive or reduce the fees associated with a request "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 32 C.F.R. § 286.28(d). The ACLU requested a waiver of search, review, and duplication fees based on the considerable public interest in the subject of the Request, the ongoing and widespread media attention to the matter, the fact that the Request would significantly contribute to the public's understanding of the operations and activities of the government, and the fact that the Request was not "primarily in the commercial interest" of the ACLU. *Ex. A at 10-11.* Rather than address the ACLU's request, Ms. Holden stated that she "determined that [the ACLU] should be placed in the 'all other' category for fee purposes." *Ex. B at 2.* She stated that the "search will be limited to two hours and will only be conducted within the USSOCOM Headquarters" unless the ACLU committed to financing a longer search. *Id.*

The ACLU objects to USSOCOM's practice of attempting to secure fee commitments prior to determining whether to grant a request for a fee waiver. The Request makes clear that the records requested are of critical importance to an ongoing national debate, and, as Ms. Holden's letter conceded, the information requested "relates to continuing news stories." *Id.* There is no question that release of the records requested would be in the public interest because they would likely contribute significantly to the public

understanding of the operations or activities of the government. See 5 U.S.C. § 552(a)(4)(A)(iii).

Therefore, Ms. Holden erred in her failure to determine the ACLU's request for a public interest fee waiver prior to placing the ACLU's Request in the "other" fee category. The ACLU's request for a fee waiver should be granted because the Request plainly and incontrovertibly seeks records of immense importance to an ongoing national debate about federal government policies and practices.

#### IV. Conclusion

For the foregoing reasons, the ACLU is entitled to expedited processing of the Request and a fee limitation associated with being a "representative of the news media." The ACLU is also entitled to a response to its request for a public interest fee waiver.

Thank you for your consideration.

Sincerely,



Nathan Freed Wessler  
American Civil Liberties Union  
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12-AC-0017-A1



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

OCT 27 2011

Mr. Nathan Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Re: AG/12-00070 (F)  
DAG/12-00071 (F)  
ASG/12-00072 (F)  
CLM:DRH:NCJ

Dear Mr. Wessler:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated October 19, 2011, which was received in this Office on October 20, 2011, in which you requested records created after September 11, 2001 concerning the process, legal and factual basis for the targeted killing of United States citizens, including Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

You requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv) (2011). Pursuant to Department of Justice regulations, we directed your request to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. *See id.* at § 16.5(d)(2). The Director has determined that your request for expedited processing should be granted. Accordingly, your request has been assigned to a FOIA Specialist in this Office and records searches are being initiated in the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

The records you seek require searches in other Offices, and so your request falls within "unusual circumstances." *See* 5 U.S.C. 552 § (a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. We have not yet completed our search for records within the scope of your request. The time needed to process your request will necessarily depend on the complexity of our records search and on the volume of any records located. In an effort to speed up our records searches, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

JA388

-2-

If you have any questions or wish to discuss the processing of your request, you may contact Natasha Jahangiri, the analyst processing this request, by telephone at the above number or you may write to her at Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Lastly, you may contact our FOIA Public Liaison at the above telephone number to have any concerns you may have addressed.

Sincerely,



Carmen L. Mallon  
Chief of Staff

JA389

# EXHIBIT G

**JA390**

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**DEPARTMENT OF DEFENSE**  
**DEFENSE FREEDOM OF INFORMATION POLICY OFFICE**  
**1155 DEFENSE PENTAGON**  
**WASHINGTON, DC 20301-1155**

**DEC 27 2011**

Ref: 12-AC-0017-A1

Mr. Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street  
18<sup>th</sup> Floor  
New York, NY 10004

Dear Mr. Wessler:

This is in response to your December 16, 2011, Freedom of Information Act (FOIA) appeal. We received your appeal in our office December 21, 2011.

Due to an extremely heavy FOIA workload, we are unable to complete your appeal within the statutory time requirement. In fairness to the general public, we make every effort to treat all requesters equally. Accordingly, responses are made on a first-in, first-out, easy-hard basis, and controlled in response queues. When the appellate review of your case is complete, you will be notified by the appellate authority, the Deputy Director of Administration and Management, Office of the Secretary of Defense, of the final decision. You may direct any questions concerning this appeal to Ms. Alisa Turner at (571) 372-0445, or [alisa.turner@whs.mil](mailto:alisa.turner@whs.mil).

Sincerely,

*A. Turner*  
for James P. Hogan  
Chief

**JA391**

# EXHIBIT H

**JA392**

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ERIC A. O. RUZICKA  
(612) 340-2959  
FAX (612) 340-8800  
ruzicka.eric@dorsey.com

April 3, 2012

**BY FACSIMILE AND FIRST-CLASS MAIL**

Sarah S. Normand, Esq.  
U.S. Attorney's Office  
Southern District of New York  
86 Chambers Street  
New York, NY 10007

Re: American Civil Liberties Union and The American Civil Liberties Union  
Foundation v. U.S. Department of Justice, U.S. Department of Defense, and  
Central Intelligence Agency  
(12 Civ. 794 (CM))

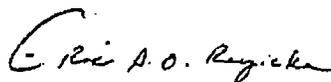
Dear Ms. Normand:

I am writing in response to your phone call of March 30, 2012, in which you requested that the ACLU limit the first prong of its FOIA requests submitted to the Departments of Defense and Justice. You specifically requested that the ACLU exclude from the first category of its request any draft legal analyses, email, or other internal communications.

The ACLU agrees to exclude from the first category of its request all draft legal analyses. However, the ACLU will not agree to exclude internal communications, including emails.

Should you wish to discuss further, please contact me at your convenience.

Sincerely,

  
Eric A. O. Ruzicka

EAOR:dib

# EXHIBIT I

**JA394**

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FINAL – EMBARGOED UNTIL 4:30pm on 2/22

**Dean's Lecture at Yale Law School**  
**"National security law, lawyers and lawyering**  
**in the Obama Administration"**

**By Jeh Charles Johnson**  
**General Counsel of the Department of Defense**

**February 22, 2012**

Thank you for this invitation, and thank you, in particular, Professor Hathaway for your work in the national security legal field. Since we first met last fall I have appreciated your scholarship and our growing friendship. I was pleased to welcome you to the Pentagon in December to introduce you to a number of my civilian and military colleagues there. I would like to count on you as someone with whom I can consult from time to time on the very difficult legal issues we wrestle with in national security.

I am a student of history and, as you will hear throughout my remarks tonight, I like to try to put things in the broader perspective.

I have been General Counsel of the Department of Defense now for exactly 3 years and 12 days, having been appointed to that position by President Obama on February 10, 2009. I have been on an incredible journey with Barack Obama for longer than that, over five years, going back to November 2006, when he recruited me to the presidential campaign he was about to launch. I remember thinking then, "this is a long-shot, but it will be exciting, historic, and how many times in my life will someone personally ask me to help him become President." For the young people here, no matter your political affiliation, I can tell you that involvement in a presidential campaign was exciting -- not for the chance to personally interact with the candidate or help develop his positions on issues; the best experiences were canvassing door to door with my kids in northwest Des Moines and northeast Philadelphia; personally observing the Iowa caucus take place in a high school cafeteria; and passing out leaflets at the train station in my hometown of Montclair, New Jersey.

Involvement in the Obama campaign in 2007-08 was one of the highlights of my personal life.

Involvement in the Obama Administration has been the highlight of my professional life. Day to day, the job I occupy is all at once interesting, challenging, and frustrating. But, when I take a step back and look at the larger picture, I realize that I have witnessed many transformative events in national security over the last three years:

We have focused our efforts on Al Qaeda, and put that group on a path to defeat. We found bin Laden. Scores of other senior members of Al Qaeda have been killed or captured. We have taken the fight to Al Qaeda: where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Though the fight against Al Qaeda is not over, and multiple arms of our government remain vigilant in the effort to hunt down those who want to do harm to Americans, counterterrorism experts state publicly that Al Qaeda senior leadership is today severely crippled and degraded.

Thanks to the extraordinary sacrifices of our men and women in uniform, we have responsibly ended the combat mission in Iraq.

We are making significant progress in Afghanistan, and have begun a transition to Afghan-led responsibility for security there.

We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.

We worked with the Congress to bring about a number of reforms to military commission, reflected in the Military Commissions Act of 2009 and the new Manual for Military Commissions. By law, use of statements obtained by cruel, inhuman and degrading treatment – what was once the most controversial aspect of military commissions – is now prohibited.

We are working to make that system a more transparent one, by reforming the rules for press access to military commissions proceedings, establishing close circuit TV, and a new public website for the commissions system.

We have ended Don't Ask, Don't Tell, which I discussed last time I was here.

Finally, we have, in these times of fiscal austerity, embarked upon a plan to transform the military to a more agile, flexible, rapidly deployable and technologically advanced force, that involves reducing the size of the active duty Army and Marine Corps, and the defense budget by \$487 billion over 10 years.

Perhaps the best part of my job is I work in the national security field with, truly, some of the best and brightest lawyers in the country. In this illustrious and credentialed group, I often ask myself "how did I get here?"

Many in this group are graduates of this law school: My special assistant and Navy reservist Brodi Kemp, who is here with me today (class of '04); Caroline Krass at OLC (class of '93); Dan Koffsky at OLC (class of '78); Marty Lederman, formerly of OLC (class of '88); Greg Craig, the former White House Counsel (class of '72); Bob Litt, General Counsel of ODNI (class of '76); Retired Marine Colonel Bill Lietzau (class of '89); Beth Brinkman at DOJ (class of '85); Sarah Cleveland, formerly at State Legal (class of '92); David Pozen at State Legal (class of '08); Steve Pomper (class of '93) and my Deputy Bob Easton (class of '90). I also benefit from working with a number of Yale law students as part of my office's internship and externship programs.

Last but not least -- your former Dean. Like many in this room, I count myself a student of Harold Koh's. Within the Administration, Harold often reminds us of many of the things Barack Obama campaigned on in 2007-08. As I wrote these remarks, I asked myself to settle on the one theme from the 2008 campaign that best represents what Harold has carried forward in his position as lawyer for the State Department. The answer was easy: "The United States must lead by the power of our example and not by the example of our power."

There have been press reports that, occasionally, Harold and I, and other lawyers within the Obama Administration, disagree from time to time on national security legal issues. I confess this is true, but it is also true that we actually agree on issues most of the time.

The public should be reassured, not alarmed, to learn there is occasional disagreement and debate among lawyers within the Executive Branch of government.

From 2001 to 2004, while I was in private practice in New York City, I also chaired the Judiciary Committee of the New York City Bar Association, which rates all the nominees and candidates for federal, state and local judicial office in New York City. In June 2002, our bar committee was in the awkward position of rejecting the very first candidate the new Mayor's judicial screening committee had put forth to the Mayor for the Family Court in New York City. On very short notice, I was summoned to City Hall for a meeting with Mayor Michael Bloomberg and the chair of his judicial screening committee, who was called on to defend his committee's recommendation of the judge. The Mayor wanted to know why our committees had come out differently. The meeting was extremely awkward, but I'll never forget what Mayor Bloomberg said to us: "if you guys always agree, somebody's not doing their job."

Knowing that we must subject our national security legal positions to other very smart lawyers who will scrutinize and challenge them has made us all work a lot harder to develop and refine those positions. On top of that, our clients are sophisticated consumers of legal advice. The President, the Vice President, the National Security Adviser, the Vice President's national security adviser, the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security -- are themselves all lawyers. They are not engaged in the practice of law, but in the presentation to them of our legal advice, any weakness in the logic chain will be seized upon and questioned immediately, usually with a statement that begins with the ominous preface: "I know I'm not supposed to play lawyer here, but . . ."

By contrast, "group think" among lawyers is dangerous, because it makes us lazy and complacent in our thinking, and can lead to bad results. Likewise, shutting your eyes and ears to the legal dissent and concerns of others can also lead to disastrous consequences.

Before I was confirmed by the Senate for this job Senator Carl Levin, the chairman of the Armed Services Committee, made sure that I

read the Committee's November 2008 report on the treatment and interrogation of detainees at Guantanamo.

The report chronicles the failure of my predecessor in the Bush Administration to listen to the objections of the JAG leadership about enhanced interrogation techniques, the result of which was that the legal opinion of one Lieutenant Colonel, without more, carried the day as the legal endorsement for stress positions, removal of clothing, and use of phobias to interrogate detainees at Guantanamo Bay,<sup>1</sup>

Just before becoming President, Barack Obama told his transition team that the rule of law should be one of the cornerstones of national security in his Administration. In retrospect, I believe that President Obama made a conscious decision three years ago to bring in to his Administration a group of strong lawyers who would reflect differing points of view. And, though it has made us all work a lot harder, I believe that over the last three years the President has benefited from healthy and robust debate among the lawyers on his national security team, which has resulted in carefully delineated, pragmatic, credible and sustainable judgments on some very difficult legal issues in the counterterrorism realm – judgments that, for the most part, are being accepted within the mainstream legal community and the courts.

Tonight I want to summarize for you, in this one speech, some of the basic legal principles that form the basis for the U.S. military's counterterrorism efforts against Al Qaeda and its associated forces. These are principles with which the top national security lawyers in our Administration broadly agree. My comments are general in nature about the U.S. military's legal authority, and I do not comment on any operation in particular.

First: in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality,

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<sup>1</sup> See *Inquiry into the Treatment of Detainees in U.S. Custody*, Report of the Committee on Armed Services, United States Senate (110<sup>th</sup> Congress, 2d Session, Nov. 20, 2008).

historic precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment.

Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge. As I told the Heritage Foundation last October, over-reaching with military power can result in national security setbacks, not gains. Particularly when we attempt to extend the reach of the military on to U.S. soil, the courts resist, consistent with our core values and our American heritage – reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus unless expressly authorized by Congress or the Constitution.

Second: in the conflict against al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by the Congress one week after 9/11.<sup>2</sup> "The AUMF," as it is often called, is Congress' authorization to the President to:

"use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Ten years later, the AUMF remains on the books, and it is still a viable authorization today.

In the detention context, we in the Obama Administration have interpreted this authority to include:

"those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are

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<sup>2</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001).

engaged in hostilities against the United States or its coalition partners.”<sup>3</sup>

This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantanamo detainees,<sup>4</sup> and in 2011 Congress joined the Executive and Judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year’s National Defense Authorization Act, 10 years after enactment of the original AUMF.<sup>5</sup> (A point worth noting here: contrary to some reports, neither Section 1021 nor any other detainee-related provision in this year’s Defense Authorization Act creates or expands upon the authority for the military to detain a U.S. citizen.)

But, the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the Executive labels a “terrorist.” Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces.

Nor is the concept of an “associated force” an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context,<sup>6</sup> and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more decentralized, and relies more on associates to carry out its terrorist aims.

An “associated force,” as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an “associated force” is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw

<sup>3</sup> See Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, at 1 (D.D.C. March 13, 2009).

<sup>4</sup> See e.g., *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>5</sup> Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 (December 31, 2011).

<sup>6</sup> See, e.g., *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010); *Hamily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the "hot" battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11<sup>th</sup> attacks – al Qaeda and the Taliban -- without a geographic limitation.

The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe we are in any "Global War on Terror," or that we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.

Fourth: I want to spend a moment on what some people refer to as "targeted killing." Here I will largely repeat Harold's much-quoted address to the American Society of International Law in March 2010. In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice. What is new is that, with advances in technology, we are able to target military objectives with much more precision, to the point where we can identify, target and strike a single military objective from great distances.

Should the legal assessment of targeting a single identifiable military objective be any different in 2012 than it was in 1943, when the U.S. Navy targeted and shot down over the Pacific the aircraft flying Admiral Yamamoto, the commander of the Japanese navy during World War Two, with the specific intent of killing him? Should we take a dimmer view of the legality of lethal force directed against individual

members of the enemy, because modern technology makes our weapons more precise? As Harold stated two years ago, the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the law of war on the use of technologically advanced weapons systems in armed conflict, so long as they are employed in conformity with the law of war. Advanced technology can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

On occasion, I read or hear a commentator loosely refer to lethal force against a valid military objective with the pejorative term "assassination." Like any American shaped by national events in 1963 and 1968, the term is to me one of the most repugnant in our vocabulary, and it should be rejected in this context. Under well-settled legal principles, lethal force against a valid *military* objective, in an armed conflict, is consistent with the law of war and does not, by definition, constitute an "assassination."

Fifth: as I stated at the public meeting of the ABA Standing Committee on Law and National Security, belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives. Reiterating principles from *Ex Parte Quirin* in 1942,<sup>7</sup> the Supreme Court in 2004, in *Hamdi v. Rumsfeld*,<sup>8</sup> stated that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'"

Sixth: contrary to the view of some, targeting decisions are not appropriate for submission to a court. In my view, they are core functions of the Executive Branch, and often require real-time decisions based on an evolving intelligence picture that only the Executive Branch may timely possess. I agree with Judge Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.<sup>9</sup>

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<sup>7</sup> 317 U.S. 1 (1942).

<sup>8</sup> 542 U.S. 507 (2004).

<sup>9</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

As I stated earlier in this address, within the Executive Branch the views and opinions of the lawyers on the President's national security team are debated and heavily scrutinized, and a legal review of the application of lethal force is the weightiest judgment a lawyer can make. (And, when these judgments start to become easy, it is time for me to return to private law practice.)

Finally: as a student of history I believe that those who govern today must ask ourselves how we will be judged 10, 20 or 50 years from now. Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow.

I'm going to tell one more story. There's a movie out now called "Red Tails," that remind us all about the exploits and courage of the famed Tuskegee Airmen of World War Two. In March 1945 about 100 Tuskegee Airmen were sent to train at Freeman Field in Indiana. At the time Army Regulation 210-10 prohibited segregated officers' clubs in the Army. Determined to continue a system of segregation despite this rule, the base commander devised two different officers' clubs: one for all the Tuskegee airmen "instructors" (all of whom happened to be white), and another for the Tuskegee airmen "trainees" (all of whom happened to be black). Over the course of two days in April 1945, 61 Tuskegee airmen were arrested for challenging the segregated clubs, in what is now known in the history books as the "Freeman Field Mutiny." Several days later, all the Tuskegee Airmen on the base were rounded up, read the base regulation, and told to sign a certification that they had read it and understood it. Every one of them refused to sign. Next, with the legal help of a JAG from First Air Force, every Tuskegee airman on base was interviewed one by one in the base legal office and given three choices: (1) sign the certification, (2) write and sign your own certification, or (3) be arrested for disobeying a direct order.<sup>10</sup> Almost all of them, again, refused to sign.

As a result, my uncle 2dLt Robert B. Johnson and over 100 other Tuskegee airmen became detainees of the U.S. military, arrested and

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<sup>10</sup> See "The Freeman Field Mutiny: A Study in Leadership," A Research Paper Presented to the Research Department Air Command and Staff College by Major John D. Murphy (March 1997).

charged with a violation of Article 64 of the Articles of War, disobeying a direct order in a time of war, a capital offense. Eventually, once the public learned of the episode, the Tuskegee airmen were released, but Lt Johnson was denied the opportunity to serve in combat and given a letter of reprimand from the U.S. Army. But, he never regretted his actions.

My legal colleagues and I who serve in government today will not surrender to the national security pressures of the moment. History shows that, under the banner of "national security," much damage can be done – to human beings, to our laws, to our credibility, and to our values. As I have said before, we must adopt legal positions that comport with common sense, and fit well within the mainstream of legal thinking in the area, consistent with who we are as Americans.

I have talked today about legally sustainable and credible ways to wage war, not to win peace. All of us recognize this should not be the normal way of things, and that the world is a better place when the United States does indeed lead by the power of an example, and not by the example of its power.

In addition to my uncle, one of my personal heroes is my former law partner Ted Sorensen, who died a little over a year ago. Ted was John F. Kennedy's speechwriter, one of his closest advisors, and himself one of the most eloquent communicators of our time.

In May 2004 Ted Sorensen gave one of the best speeches I've ever heard. It was right after the Abu Ghraib scandal broke. He said this, which I will never forget:

"Last week a family friend of an accused American guard in Iraq recited the atrocities inflicted by our enemies on Americans and asked: Must we be held to a different standard? My answer is YES. Not only because others expect it. We must hold ourselves to a different standard. Not only because God demands it, but because it serves our security. Our greatest strength has long been not merely our military might but our moral authority. Our surest protection against assault from abroad has been not all our guards,

gates and guns or even our two oceans, but our essential goodness as a people.”

My goal here tonight was to inform and to educate. My other reason for being here is to appeal directly to the students, to ask that you think about public service in your career. Law students become trained in the law for many different reasons, with many different traits and interests. Some are naturally suited for transactions, to help structure deals. Others want to be in the courtroom, and love advocacy. There are so many facets of the law -- and people who want to pursue them -- that help make our profession great.

Over the years, one of my big disappointments is to see a law student or young lawyer who went to law school motivated by a desire for public service, but who gave up the pursuit because of student loans, lack of a readily available opportunity, or the lure of a large law firm and a large starting salary.

To those law students who are interested in public service, I hope you do not lose that interest as your career progresses. We need talented lawyers serving in government at all levels, you will find every day interesting and rewarding, and, in the end, you and others will assess the sum total of your legal career, not by what you got, but by what you gave.

Thank you for listening.

# EXHIBIT J

**JA407**

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American Civil Liberties Union et al. v. U.S. Department of Justice et al.

Civil Action No. 12-00794 (CM)

U.S. District Court

Southern District of New York

**DoD Vaughn Index**

<b>Index of Records Withheld by DOD</b>				
<b>Document Number</b>	<b>Date(s)</b>	<b>Description</b>	<b>Exemption(s)</b>	<b>Pages</b>
1	02/27/12	Email from the DoD Deputy General Counsel for International Affairs to the DoD General Counsel and other OGC attorneys suggesting changes to the Attorney General's Speech at Northwestern University School of Law on March 5, 2012. Last in a chain of emails.	Exemption 5, deliberative process privilege	4
2	02/27/12	Email from a Joint Staff attorney to the DoD General Counsel and other OGC attorneys suggesting changes to the Attorney General's Speech at Northwestern University School of Law on March 5, 2012. Last in a chain of emails.	Exemption 5, deliberative process privilege	4
3	02/11/12	Email from the DoD General Counsel to other OGC attorneys and other U.S. Government personnel discussing changes to a draft of the DoD GC's speech at Yale Law School on Feb 22, 2012. Last in a chain of emails.	Exemption 5, deliberative process privilege	1
4	02/21/12	Email between DOD OGC attorneys discussing a draft of the DoD GC's speech at Yale Law School on Feb 22, 2012. Last in a chain of emails.	Exemption 5, deliberative process privilege	3
5	02/27/12	Email from a Joint Staff attorney to other attorneys within his office with attachment of suggested changes to the Attorney General's Speech at Northwestern University	Exemptions 5, deliberative process privilege	5

		School of Law on March 5, 2012. Last in a chain of emails.		
6	03/01/12	Email from a Joint Staff attorney to the DoD General Counsel and other OGC attorneys suggesting changes to the Attorney General's Speech at Northwestern University School of Law on March 5, 2012. Last in a chain of emails.	Exemption 5, deliberative process privilege	3
7	03/01/2012	Email from a Joint Staff attorney to other attorneys within his office suggesting changes to the Attorney General's Speech at Northwestern University School of Law on March 5, 2012. Last in a chain of emails.	Exemption 5, deliberative process privilege	3
8	01/2/2012	CAPSTONE Slide Presentation	Exemption 5, Attorney/Client	43
9	06/23/2011	Memorandum from Legal Counsel to Chairman of the Joint Chiefs of Staff to the National Security Legal Advisor with legal analysis regarding the effect of U.S. citizenship on targeting enemy belligerents.	Exemption 5, deliberative process privilege	2
10	Undated	Memorandum from Legal Counsel to Chairman of the Joint Chiefs of Staff to the National Security Legal Advisor with legal analysis regarding the effect of U.S. citizenship on targeting enemy belligerents. This memo was subsequent to and references document number 6.	Exemption 5, deliberative process privilege	4

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, )  
et al. )  
Plaintiffs, )  
v. ) Civil No. 12-00794 (CM)  
DEPARTMENT OF JUSTICE, )  
et al. )  
Defendants. )  
\_\_\_\_\_ )

DECLARATION OF DOUGLAS R. HIBBARD

I, Douglas R. Hibbard, declare the following to be true and correct:

1) I am the Deputy Chief of the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

JA410

2) I make the statements herein on the basis of personal knowledge, as well as on the basis of information acquired by me in the course of performing my official duties.

Plaintiff's Initial FOIA Request

3) By letter dated October 19, 2011, Nathan Wessler, on behalf of the American Civil Liberties Union Foundation and the American Civil Liberties Union, submitted a FOIA request addressed to, inter alia, the Department of Justice, Office of Information Policy, seeking six categories of records, the first and second pertaining to the legal basis and process for use of lethal force against U.S. citizens and categories three through six seeking records concerning the use of lethal force against three named individuals: Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. (A copy of plaintiff's October 19, 2011 letter is attached hereto as Exhibit A.)

4) OIP received plaintiffs' FOIA request on October 20, 2011, and initiated processing on behalf of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), and Associate Attorney General (OASG).

5) Plaintiffs requested expedited processing of the request based on the Department of Justice standard permitting expedition for requests involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv) (2011). Plaintiffs directed a copy of their request for expedited processing to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. § 16.5(d)(2). On October 26, 2011, the Director of Public Affairs advised OIP that she had determined that plaintiffs' request for expedited processing under this standard should be granted.

6) By letter dated October 27, 2011, OIP acknowledged receipt of plaintiffs' FOIA request on behalf of OAG, ODAG, and OASG. Additionally, OIP advised plaintiffs that their request for expedited processing pursuant to 28 C.F.R. § 16.5(d)(1)(iv) had been granted. (A copy of OIP's October 27, 2011 letter is attached hereto as Exhibit B.)

7) In response to plaintiffs' FOIA request, on November 3, 2011, OIP initiated searches in OAG, ODAG, and OASG for responsive records subject to the FOIA. OIP was processing the request at the time this suit was filed.

8) OIP located one responsive document, totaling two pages, which is being released, and is attached hereto as Exhibit C. These are final talking points prepared for the use of the Attorney General and others in addressing hypothetical questions about Anwar al-Aulaqi's death. OIP located three additional responsive unclassified records, totaling five pages, which are being withheld in full pursuant to Exemptions 3, 5, and 6 of the FOIA, with certain portions determined to be not responsive to plaintiffs' request. Separately, the Office of Legal Counsel (OLC) referred one unclassified document, totaling three pages, to OIP. This material is being withheld in full pursuant to the deliberative process privilege of Exemption 5 of the FOIA, with certain portions determined to be not responsive to plaintiffs' request. Lastly, OIP's searches also identified classified material responsive to plaintiffs' request. OIP has been advised that this material should be withheld in full and cannot be further identified or described on the public record, pursuant to FOIA Exemptions 1 and 3. Further information can be found in the declaration of John F. Hackett.

#### Explanation of Records Searches

9) OIP conducted searches in OAG, ODAG, and OASG for any records responsive to

plaintiffs' FOIA request. As described in detail below, these searches consisted of a comprehensive review of the paper and electronic files of both current and departed employees in those Offices, as well as a search of the Departmental Executive Secretariat, which is the official records repository for those offices. OIP searched all files likely to contain responsive documents. With respect to searches conducted in individual Offices, OIP's standard practice is to initiate such searches by sending a memorandum to each Office notifying the Office of the receipt of the request and the need to conduct a search. The general practice for all of these Offices is, upon receipt of a search memorandum, to notify each individual staff member in that Office of the receipt of OIP's memorandum requesting that a search be conducted, and each staff member's files, both paper and electronic, are then searched as necessary for records responsive to the request. In some instances, the Offices will request that staff members from OIP assist in the search. A search of an official's computer files usually includes a search of the e-mail systems of that official, and can include a hard drive search if the official indicates that one is called for.

#### Search of the Office of the Attorney General

- 10) By memorandum dated November 3, 2011, a search was initiated in OAG.
- 11) By memorandum dated December 6, 2011, OAG identified five officials (which included one former OAG official still with the Department) who might have responsive records. Specifically, OAG advised that all five officials (including one former OAG official) may have responsive e-mails, one of them may also have responsive unclassified paper files, and one of them may also have responsive unclassified computer files and classified paper files.
- 12) OIP conducted a search of the unclassified e-mails of the four current OAG officials,

as well as the departed official. For the departed official, a search was conducted of this official's Enterprise Vault (EV Vault). The EV Vault maintains e-mails of current and former employees in the senior leadership offices of the Department. For all five e-mail searches, OIP used the following terms to conduct the searches: "targeted killings," "kill lists," "lethal operation," "lethal force," "al-Aulaqi" and "target," "al-Awlaki" and "target," "al-Alwaki" and "target," "Samir Khan" and "target," and "Abdulrahman" and "target." For the principal OAG records custodian OIP reviewed each potentially responsive record. For the remaining four custodians OIP reviewed a sample of potentially responsive material and determined that none was responsive to the request.

13) One OAG official indicated that he may have responsive unclassified paper files. OIP searched and reviewed those files subject to the FOIA for responsiveness to plaintiffs' FOIA request.

14) One OAG official indicated that she may have responsive unclassified computer files. OIP searched those files using the terms: "targeted killings," "kill lists," "lethal operation," and "lethal force." All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

15) That same OAG official indicated that she may have responsive classified paper files. That official conducted a search of her classified records for material responsive to the request. OIP cannot further identify or describe on the public record if responsive material was located.

16) Subsequently, OAG advised that the former OAG official still with the Department, who was the principal OAG records custodian on this matter, may have responsive classified e-

mails and classified paper files. That official conducted a search of his classified e-mails and a search was conducted of his classified records for material responsive to the request. OIP cannot further identify or describe on the public record if responsive material was located.

Search of the Office of the Deputy Attorney General

17) By memorandum dated November 3, 2011, a search was initiated in ODAG.

18) By memorandum dated January 18, 2012, ODAG identified five officials who might have records responsive to the request. Specifically, ODAG advised that all five officials may have responsive e-mails, two of them may also have responsive unclassified paper files, two of them may also have responsive unclassified computer files, and four of them may also have classified paper files. ODAG also provided potentially responsive paper material from one official to OIP for further review.

19) OIP conducted a search of the unclassified e-mails of the five current ODAG officials. OIP used the following terms to conduct the searches: "targeted killings," "kill lists," "lethal operation," "lethal force," "al-Aulaqi" and "target," "al-Awlaki" and "target," "al-Alwaki" and "target," "Samir Khan" and "target," and "Abdulrahman" and "target." For the principal ODAG records custodian OIP reviewed each potentially responsive record. For the remaining four custodians OIP reviewed a sample of potentially responsive material and determined that none was responsive to the request.

20) Based on knowledge gained after OIP had completed its search for records maintained by those officials identified by ODAG in its memorandum of January 18, 2012, OIP also conducted a search of the unclassified e-mails of one former ODAG official who was the principal ODAG records custodian on this matter. All material subject to the FOIA located in

this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

21) OIP conducted a review of two current ODAG officials' unclassified paper files for responsiveness to plaintiff's FOIA request. All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

24) Two ODAG officials indicated that they may have responsive unclassified computer files. OIP conducted a search of these two ODAG officials' computer files. The terms used to complete this search were: "targeted killings," "kill lists," "lethal operation," and "lethal force." All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request.

25) Four ODAG officials indicated that they may have responsive classified paper files. Those four officials conducted a search of their own classified records. OIP cannot further identify or describe on the public record if responsive material was located.

26) Subsequently, ODAG advised that certain ODAG officials may have responsive classified e-mails. The principal ODAG records custodian on this matter conducted a search of her classified e-mail and those of her predecessor. OIP cannot further identify or describe on the public record if responsive material was located.

Search of the Office of the Associate Attorney General

27) By memorandum dated November 3, 2011, a search was initiated in the OASG.

28) By memorandum dated December 21, 2011, OASG provided potentially responsive unclassified material from one OASG official to OIP for further review. All material subject to the FOIA located in this search was reviewed by OIP for responsiveness to plaintiffs' FOIA request. OASG identified no additional officials who required a search for responsive material.

None of the material provided by OASG was determined to be responsive to the request, and no supplemental searches were conducted.

Search of the Departmental Executive Secretariat

29) On March 23, 2012, OIP initiated a search in the electronic database of the Departmental Executive Secretariat for records responsive to plaintiffs' FOIA request. As noted above, the Departmental Executive Secretariat is the official records repository for OAG, ODAG and OASG. The Departmental Executive Secretariat uses a central database to control and track certain incoming and outgoing correspondence for the Department's senior management offices. This Intranet Quorum (IQ) database maintains records from January 1, 2001, through the present. Records received by the designated senior management offices are entered into IQ by trained Executive Secretariat analysts. The data elements entered into the system include such items as the date of the document, the date of receipt, the sender, the recipient, as well as a detailed description of the subject of the record. In addition, entries are made that, among other things, reflect what action is to be taken on the records, which component has responsibility for that action, and when that action should be completed. Key word searches of the electronic database may then be conducted by utilizing a single search parameter or combinations of search parameters. Search parameters may include the subject, organization, date, name, or other key words. The terms used to complete this search included: "targeted killings," "kill lists," "lethal operation," "lethal force," "al-Aulaqi" and "target," "al-Awlaki" and "target," "al-Alwaki" and "target," "Samir Kahn" and "target," and "Abdulrahman" and "target." All material subject to the FOIA located in this search was reviewed by OIP and was determined to be not responsive to plaintiffs' request.

Search of Records Indices of Departed OAG, ODAG, and OASG Employees' Files

30) On March 23, 2012, OIP initiated a search of the records indices of officials from the administrations of former Attorneys General Ashcroft, Gonzales, and Mukasey for OAG, ODAG, and OASG. These indices supplement the electronic database of the Departmental Executive Secretariat and list file folder titles, arranged according to subject, for the records of former OAG, ODAG, and OASG staff. Any subject file titles of the former officials that appeared to contain potentially responsive records would then need to be retrieved and reviewed from retired records storage facilities. The terms used to complete this search included: "targeted killings," "kill lists," "lethal operation," and "lethal force." No responsive records were located in this search.

#### Referral from the Office of Legal Counsel

31) On April 18, 2012, the Office of Legal Counsel referred two responsive documents to OIP that are subject to the FOIA. One of these documents was duplicative of material previously located by OIP and identified in OIP's Vaughn Index as document one. The responsive portions of the second document, totaling three pages, have been withheld in full and the document is listed in the attached Vaughn Index as document four.

#### Plaintiffs' Narrowed Request

32) By letter dated April 3, 2012, plaintiffs agreed to narrow their request to exclude draft legal analyses. (A copy of plaintiffs' April 3, 2012 letter is attached hereto as Exhibit D.)

#### Unclassified Documents Responsive to Plaintiffs' FOIA Request

33) The cut-off date for documents responsive to plaintiffs' request was November 3, 2011, the day the search for records commenced. Upon completion of its searches for records responsive to plaintiffs' request, combined with OLC's referral, and in light of plaintiffs' narrowing, OIP determined that five unclassified documents, totaling ten pages, were subject to

the FOIA and responsive to plaintiffs' request. OIP has released to plaintiffs one of these documents, totaling two pages. The remaining four documents, totaling eight pages, are being withholding in full pursuant to the deliberative process and presidential communication privileges of Exemption 5 of the FOIA. The identities of certain government personnel within these records is also protected pursuant to Exemptions 3 and 6.

34) The speech of Attorney General Eric Holder at Northwestern University School of Law on March 5, 2012 was delivered after the searches had been initiated, and the speech is therefore not included in the responsive material. A true and correct copy of those prepared remarks is nonetheless attached here as Exhibit E.

#### Explanation of Withheld Unclassified Material

35) Attached to this declaration as Exhibit F is a Vaughn Index containing a detailed description of the four unclassified documents, totaling eight pages, that are being withheld pursuant to Exemptions 3, 5, and 6. The Vaughn Index contains a description of the responsive documents at issue, including the date, provides the number of pages for each document, and identifies the exemption and, when applicable, privilege protecting each document from disclosure under Exemption 5 of the FOIA. (OIP's Vaughn Index is attached hereto as Exhibit F.)

#### FOIA Exemption 5

36) Exemption 5 of the FOIA protects certain inter- and intra-agency communications protected by the deliberative process and presidential communication privileges. The responsive documents withheld from plaintiffs were created and exchanged entirely within the Executive Branch. As detailed in the attached Vaughn Index, documents one, two, and four were

exchanged only within the Department of Justice. Document three was exchanged between the Department of State and various federal agencies, including the intelligence community.

#### Deliberative Process Privilege

37) The four unclassified documents withheld from plaintiffs are inter- or intra-agency communications exchanged, or drafts and briefing material created within, the Executive Branch. The information withheld falls into two overall but inter-related categories: (1) draft talking points and briefing material prepared for the Attorney General and (2) e-mail discussions about draft documents.

38) A significant part of the deliberative decisionmaking process is the creation of draft talking points and briefing material designed as preparatory material to aid in briefing senior officials in preparing for high-level meetings and to answer inquiries that may arise from outside sources. Documents one (talking points), two (briefing material), and four (e-mails concerning document one) of the attached Vaughn Index consist of such material.

39) In drafting such talking points and briefing material, the authors attempt to identify important issues and background and provide key talking points in concise, summary format for ease of understanding and presentation. In doing so, the authors distill pertinent information from underlying events as they attempt to anticipate questions and concerns that senior Executive Branch leadership, including the Attorney General, may encounter about the issues at hand, to ensure that they are prepared to respond appropriately. Throughout this process, the authors necessarily review the universe of facts and possible issues arising on the topic, and then select those facts and issues that they deem most appropriate for briefing senior officials. In doing so, they provide their own advice based on these background points.

40) Here, document one consists of draft talking points prepared for the Attorney General, by his staff, to assist him in preparing for an upcoming meeting with the President. The talking points, which are themselves identified as a draft document, contain legal analysis regarding the use of lethal force that the Attorney General's senior staff believed was important to convey to the President. The process by which a draft document evolves into a final document is itself a deliberative process. This is demonstrated in document four, which consists of an e-mail exchange between officials in ODAG and OLC deliberating on the content of the advice provided to the Attorney General within document one.

41) Similarly, document two consists of briefing material prepared to assist the Attorney General in responding to possible questions at an upcoming Congressional hearing. The Executive Branch's most senior officials rely heavily on the creation of such talking points and briefing material so that they can be fully informed on the substance and the many nuances of issues. The employees preparing such materials must feel free to create the most thorough and candid documents possible so that the Executive Branch leadership are well-informed as they ultimately decide how to represent the federal government as a whole. With regard to document two, OIP conducted appropriate research and was able to confirm that material in question was not addressed during the Attorney General's hearing. OIP carefully reviewed these documents and determined that there was no reasonably segregable, non-exempt information that could be disclosed.

42) Another significant part of the decisionmaking process within the Executive Branch involves the exchange of e-mail messages in which various stakeholders strategize, opine, advise, and otherwise discuss working matters under their purview. Executive Branch employees

routinely e-mail each other, sharing interpretations, opinions and language, giving and responding to suggestions, and providing input. E-mail operates as a way for individual Executive Branch employees to communicate with each other about current matters and to key in a wide range of stakeholders without having to leave their offices. These "discussions," which get memorialized by e-mail, are part of the exchange of ideas and suggestions that accompanies all decisionmaking and often reflect staff members' preliminary assessments about issues on which they have not yet decided, or on which they may be asked to make recommendations. Indeed, such e-mail discussions most resemble conversations between staff members, which are part of the give and take of agency deliberations.

43) Documents three and four of the attached Vaughn Index consist of such communications. In document three, an official from the Department of State is providing comments, recommendations, and suggested language changes on a draft document discussing a proposed public statement. These communications were intended to assist the Attorney General in determining the nature, scope and content of a major address on national security policy, and they ultimately resulted in the Attorney General's speech at Northwestern. As part of developing that speech, subordinate advisors to the Attorney General provided draft documents containing proposed language for discussion. These draft documents were circulated for consideration and comment both within the relevant offices of the Department and to agency stakeholders within the Executive Branch with an interest in the subject matter. Relevant DOJ and agency officials in turn provided comments on the draft documents, which resulted in further deliberations. These deliberations took place through e-mail communications, in which suggestions and recommendations were offered, discussed and responded to, before the Attorney General

finalized and delivered his address on March 5, 2012. These deliberations are essential to the decisionmaking process.

44) Likewise, document four discusses draft language contained within document one, which itself is a draft of talking points. The author is providing his insight into the language contained within the talking points, which were still in draft form at this time. This exchange of recommendations and suggestions is an inherent part of the deliberative process involved in drafting a document. Disclosure of such material would severely hamper the efficient day-to-day working of the Executive Branch, as individuals would no longer feel free to candidly present their views on pending matters.

45) If communications such as these are routinely released to the public, Executive Branch employees will be much more circumspect in their discussions with each other and in providing information and viewpoints to senior officials in a timely manner. This lack of candor would seriously impair the Executive Branch's ability to foster the forthright, internal discussions necessary for efficient and proper decisionmaking. Agency decisionmaking is at its best when employees are able to focus on the substance of their views and not on whether their views may at some point be made publicly available. OIP carefully reviewed this document and determined that there was no reasonably segregable, non-exempt information that could be disclosed.

46) Similarly, the material marked classified that is being protected pursuant to the deliberative process privilege consists of deliberative e-mails and briefing materials. For the reasons detailed above concerning the withheld unclassified material, this material is also predecisional and deliberative in nature in that it consists of the same type of preliminary, deliberative discussions, only conducted at a classified level.

Presidential Communications Privilege

47) In addition to being protected by the deliberative process privilege, document one of the attached Vaughn Index is also protected by the presidential communications privilege. As mentioned above, document one consists of draft talking points prepared for a meeting between the President and member of his cabinet. That meeting occurred the following day. It therefore reflects communications that one can fairly infer were provided to the President. The underlying purposes of the presidential communications privilege are similar to those of the deliberative process privilege, but they take on a distinct significance at the level of presidential decisionmaking because presidential decisionmaking must be informed by candid advice of the highest caliber. Accordingly, this document is also protected by the presidential communications privilege.

FOIA Exemption 6

48) The application of Exemption 6 to this material is limited to the identities of certain personnel of other federal agencies. The justification for OIP's decision to withhold this information is contained in the declaration of John F. Hackett.

I declare under penalty of perjury that the foregoing is true and correct.



Douglas R. Hibbard

Executed this 20 day of June 2012.

# EXHIBIT A

NATIONAL SECURITY  
ACT

Case 1:12-cv-00072

Document 31-1

Filed 06/21/12

Page 2 of 13

ASG 2012-00072



FOIA  
DRH Reviewer  
NCJ

October 19, 2011

Information Officer  
Office of Freedom of Information and Security Review  
Directorate for Executive Services and Communications  
FOIA/Privacy Branch  
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OCT 20 2011

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Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/  
 Expedited Processing Requested

To Whom it May Concern:

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, the President’s Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General’s Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the “ACLU”).<sup>1</sup>

AMERICAN CIVIL LIBERTIES  
 UNION FOUNDATION

This Request seeks records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki<sup>2</sup> (“al-Awlaki”) and two other U.S. citizens by the United States Government. According to news reports, al-Awlaki, a United States citizen, was killed in Yemen on or around September 30, 2011, by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)—commonly referred to as “drones”—operated by the Central Intelligence Agency (CIA) and/or Joint Special Operations Command (JSOC). *See, e.g.*, Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Greg Miller, *Strike on Aulaqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. Samir Khan

<sup>1</sup> The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

<sup>2</sup> Al-Awlaki’s name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to al-Awlaki using any spelling or transliteration of his name.

(“Khan”), also a U.S. citizen, was killed in the same attack. See Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>. Press reports indicate that on or around October 14, 2011, a third U.S. citizen, Abdulrahman al-Awlaki,<sup>3</sup> was killed in a drone strike in southern Yemen. Abdulrahman al-Awlaki, the son of Anwar al-Awlaki, was 16 years old at the time of his death. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

We seek information about the legal basis in domestic, foreign, and international law for authorizing the targeted killing of al-Awlaki. Specifically, we request any memoranda produced by the Department of Justice Office of Legal Counsel (OLC) analyzing the legal basis for killing al-Awlaki and authorizing the use of lethal force against him. We request information regarding the rules and standards used to determine when, where, and under what circumstances al-Awlaki could be killed, as well as what measures were required to avoid civilian casualties. We also request information about whether Samir Khan was specifically targeted for killing and what the legal basis was for killing him.

Beginning immediately after al-Awlaki was killed, the media began reporting the existence of a legal memorandum drafted by the OLC that provided legal justification for killing al-Awlaki (hereinafter “OLC memo”). The memorandum was reportedly completed around June 2010 and signed by David Barron. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. According to the New York Times, the OLC memo “concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him.” Savage, *supra*. We seek release of this memorandum, as well as any other memoranda describing the legal basis for killing al-Awlaki or any other U.S. citizen.

<sup>3</sup> Abdulrahman al-Awlaki’s first name is sometimes spelled “Abdelrahman” or “Abdul-Rahman” and his family name is sometimes spelled “al-Aulaqi.” This Request seeks records referring to Abdulrahman al-Awlaki using any spelling or transliteration of his name.

Since al-Awlaki was killed, there have been numerous calls for the release of the OLC memo and any other documents explaining the government's asserted legal basis for killing al-Awlaki. See, e.g., Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, <http://wapo.st/n6l3vK> ("A bipartisan chorus of political and legal voices is calling on the Obama administration to release a declassified version of the Justice Department memo that provided the legal analysis sanctioning the killing in Yemen last week of Anwar al-Awlaki, a U.S. citizen."); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare (Oct. 4, 2011, 3:07 PM), <http://bit.ly/r42x0f>; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, Lawfare (Oct. 3, 2011, 7:45 AM), <http://bit.ly/mRUMg0>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4> ("The Justice Department reportedly wrote an advisory memo on the legality of targeting an American citizen with lethal force absent a trial or other due process, but the administration has kept the memo classified. Keeping the legal rationale secret amplifies the voices that argue that Mr. Obama assassinated an American citizen."); Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>. The public has a vital interest in knowing the legal basis on which U.S. citizens may be designated for extrajudicial killing and then targeted with legal force.

AMERICAN CIVIL LIBERTIES  
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Reports indicate that the OLC memo "does not independently analyze the quality of the evidence against [al-Awlaki]." Savage, *supra*. We therefore also seek information about the factual basis for authorizing the killing of al-Awlaki. Such information includes the basis for asserting that al-Awlaki was operationally involved in al Qaeda planning, and that he posed an imminent threat of harm to the United States, United States citizens, or others. We also seek information about the legal and factual bases for targeting Khan and Abdulrahman al-Awlaki.

Press reports have revealed that Executive Branch officials engage in a process of assessing the factual basis for determining whether an individual, including U.S. citizens, should be targeted for killing. See Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/qZ0Q4q> ("Hidden behind walls of top-secret classification, senior U.S. government officials meet in what is essentially a star chamber to decide which enemies of the state to target for assassination."). However, the government has not revealed the factual basis for targeting al-Awlaki for killing, and press reports suggest that the evidence against him is subject to significant dispute. See Hosenball, *supra*

(“[O]fficials acknowledged that some of the intelligence purporting to show Awlaki’s hands-on role in plotting attacks was patchy.”). The public also lacks information about the killings of Khan and Abdulrahman al-Awlaki, including whether they were intentionally targeted.

Without information about the legal and factual basis for the targeted killing of al-Awlaki and others, the public is unable to make an informed judgment about the policy of authorizing targeted killings of United States citizens. We make the following requests for information in hopes of filling that void.

### **I. Requested Records**

1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles (“UAVs” or “drones”) or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
  - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
  - B. The protections and requirements imposed by the Fifth Amendment Due Process Clause;
  - C. The reasons why international-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
  - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
  - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of al-Awlaki;

- F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
  - G. Any requirement that the U.S. government first attempt to capture al-Awlaki before killing him.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki, including:
- A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
  - B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
  - C. Facts indicating that there was a legal justification for killing persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
  - D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
  - E. Any other facts relevant to the decision to authorize and execute the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

## II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a “breaking news story of general public interest.” 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a “matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence”).

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The ACLU is “primarily engaged in disseminating information” within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. *See ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information” (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, [www.aclu.org](http://www.aclu.org). The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia); <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; [www.aclu.org/patriotfoia](http://www.aclu.org/patriotfoia); [www.aclu.org/spyfiles](http://www.aclu.org/spyfiles); <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>

; [www.aclu.org/exclusion](http://www.aclu.org/exclusion). For example, the ACLU's "Torture FOIA" webpage, [www.aclu.org/torturefoia](http://www.aclu.org/torturefoia), contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. The webpage also advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. See Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.<sup>4</sup>

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Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's targeted killing of Anwar al-Awlaki, allegedly collateral killing of Samir Khan, and potential killing of other U.S. citizens in Yemen and elsewhere using unmanned aerial vehicles or other means. The records sought will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about targeted killings using drones in Afghanistan, Pakistan, Yemen and elsewhere. More particularly, there has been extensive media coverage of the killing of al-Awlaki and Khan. See, e.g., Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Scott Shane & Thom Shanker, *Yemen*

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<sup>4</sup> In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

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*Strike Reflects U.S. Shift To Drones as Cheaper War Tool*, N.Y. Times, Oct. 2, 2011, at A1, available at <http://nyti.ms/ogznLt>; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>; Greg Miller, *Strike on Aulaqi Demonstrates Collaboration Between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. There has also been widespread reporting of the killing of Abdulrahman al-Awlaki. See, e.g., Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>; Brian Bennett, *U.S. Drone Strikes Kill Al Qaeda Operative in Yemen*, L.A. Times, Oct. 16, 2011, <http://lat.ms/mWffAN>; Hamza Hendawi, *Yemen: U.S. Strike Kills 9 al-Qaeda Militants*, Associated Press, Oct. 15, 2011, <http://abcn.ws/p3Hqba>.

The Obama Administration's refusal to release the OLC memo or other documents describing the legal basis for killing al-Awlaki has also been the subject of intense media coverage. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2007, <http://wapo.st/n6l3vK>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4>; Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. There is also significant interest in the details of the process by which the government authorized the killing of al-Awlaki. See, e.g., Bruce Ackerman, *Obama's Death Panel*, Foreign Policy, Oct. 7, 2011, <http://bit.ly/qZ0Q4q>; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>.

Significant and pressing questions about the basis for the targeted killing of al-Awlaki and other U.S. citizens remain unanswered. Therefore, the subject of this Request will remain a matter of widespread and exceptional media interest. The public has an urgent need for information about the subject of this Request.

### III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, and the Central Intelligence Agency with regard to the targeted killings of Anwar al-Awlaki and other U.S. citizens. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d)(i); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU’s commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that “disclosure, not secrecy, is the dominant objective of the Act,” but that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act”).

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to “representatives of the news media”).

The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is a “representative of the news media” for the same reasons it is

“primarily engaged in the dissemination of information.” *See Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of FOIA); *see supra*, section II.<sup>5</sup>

\* \* \*

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

Please be advised that because we are requesting expedited processing under the Department of Justice implementing regulations section 16.5(d)(1)(ii) and section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ’s Office of Public Affairs. Notwithstanding Ms. Schmalzer’s determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

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<sup>5</sup> On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in August 2011 the Department of Justice granted a fee waiver to the ACLU with respect to a request for information related to the proxy detention of detainees of U.S. naval vessels. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

We also request that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. § 552(a)(7)(B).

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Nathan Freed Wessler  
National Security Project  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Sincerely,



Nathan Freed Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
Tel: (212) 519-7847  
Fax: (212) 549-2654

DELIVERED

OCT 20 2011

Office of Information Policy

# EXHIBIT B

**JA438**



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

OCT 27 2011

Mr. Nathan Wessler  
American Civil Liberties Union Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Re: AG/12-00070 (F)  
DAG/12-00071 (F)  
ASG/12-00072 (F)  
CLM:DRH:NCJ

Dear Mr. Wessler:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated October 19, 2011, which was received in this Office on October 20, 2011, in which you requested records created after September 11, 2001 concerning the process, legal and factual basis for the targeted killing of United States citizens, including Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

You requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv) (2011). Pursuant to Department of Justice regulations, we directed your request to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. at § 16.5(d)(2). The Director has determined that your request for expedited processing should be granted. Accordingly, your request has been assigned to a FOIA Specialist in this Office and records searches are being initiated in the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

The records you seek require searches in other Offices, and so your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. We have not yet completed our search for records within the scope of your request. The time needed to process your request will necessarily depend on the complexity of our records search and on the volume of any records located. In an effort to speed up our records searches, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

JA439

-2-

If you have any questions or wish to discuss the processing of your request, you may contact Natasha Jahangiri, the analyst processing this request, by telephone at the above number or you may write to her at Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Lastly, you may contact our FOIA Public Liaison at the above telephone number to have any concerns you may have addressed.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Mallon', with a stylized flourish at the end.

Carmen L. Mallon  
Chief of Staff

JA440

# EXHIBIT C

**Q: Was it lawful to target al-Awlaki?**

- I cannot provide details about our cooperation with the Yemeni government on counterterrorism operations, but I can tell you a little about al-Awlaki.
- Anwar al-Awlaki was an operational leader of al Qaeda in the Arabian Peninsula – al Qaeda’s most active operational affiliate and a group that poses a serious threat to the United States, our partners, and to the people of Yemen.
- He took the lead in planning and directing efforts to murder innocent Americans and was directly tied to several attempted terrorist attacks on the United States.
- This is not new information – my Administration has been consistently saying this for some time. A public designation published in the Federal Register and an accompanying press release issued by the Department of Treasury in July 2010, described the operational role of al-Awlaki. A month later in litigation, a public filing by then-Secretary of Defense Gates declared that al-Awlaki was a “key operational AQAP leader” who assisted, for example, in preparations for the attempted bombing of Northwest Airlines Flight 253 by AQAP as it was landing in Detroit on December 25, 2009.

**Q: But he was a U.S. citizen -- doesn't he have any constitutional rights?**

- I cannot provide details about our cooperation with the Yemeni government on counterterrorism operations.
- As a general matter, however, it would be entirely lawful for the United States to target the high-level leaders of enemy forces who are plotting to kill Americans both under the authority provided by Congress for the use of military force in the armed conflict with al-Qaeda, the Taliban, and associated forces as well as under established international law that recognizes our right of self-defense.
- The legal analysis would be slightly different with respect to U.S. citizens, as we would have to take into account any constitutional protections that might apply to a U.S. citizen who is leading enemy forces in their efforts to kill innocent Americans.

- Any time we use force, I want to assure you that we do so with extraordinary care and in full accordance with U.S. law and the international law of armed conflict.

# EXHIBIT D

JA444



ERIC A. O. RUZICKA  
(612) 340-2959  
FAX (612) 340-8800  
ruzicka.eric@dorsey.com

April 3, 2012

**BY FACSIMILE AND FIRST-CLASS MAIL**

Sarah S. Normand, Esq.  
U.S. Attorney's Office  
Southern District of New York  
86 Chambers Street  
New York, NY 10007

Re: American Civil Liberties Union and The American Civil Liberties Union  
Foundation v. U.S. Department of Justice, U.S. Department of Defense, and  
Central Intelligence Agency  
(12 Civ. 794 (CM))

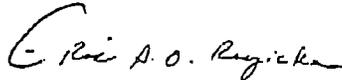
Dear Ms. Normand:

I am writing in response to your phone call of March 30, 2012, in which you requested that the ACLU limit the first prong of its FOIA requests submitted to the Departments of Defense and Justice. You specifically requested that the ACLU exclude from the first category of its request any draft legal analyses, email, or other internal communications.

The ACLU agrees to exclude from the first category of its request all draft legal analyses. However, the ACLU will not agree to exclude internal communications, including emails.

Should you wish to discuss further, please contact me at your convenience.

Sincerely,

  
Eric A. O. Ruzicka

EAOR: erb

# EXHIBIT E

Home » Briefing Room » Justice News

**JUSTICE NEWS**

**Attorney General Eric Holder Speaks at Northwestern University School of Law**

Chicago ~ Monday, March 5, 2012

*As prepared for delivery*

Thank you, Dean [Daniel] Rodriguez, for your kind words, and for the outstanding leadership that you provide – not only for this academic campus, but also for our nation's legal community. It is a privilege to be with you today – and to be among the distinguished faculty members, staff, alumni, and students who make Northwestern such an extraordinary place.

For more than 150 years, this law school has served as a training ground for future leaders; as a forum for critical, thoughtful debate; and as a meeting place to consider issues of national concern and global consequence. This afternoon, I am honored to be part of this tradition. And I'm grateful for the opportunity to join with you in discussing a defining issue of our time – and a most critical responsibility that we share: how we will stay true to America's founding – and enduring – promises of security, justice and liberty.

Since this country's earliest days, the American people have risen to this challenge – and all that it demands. But, as we have seen – and as President John F. Kennedy may have described best – "In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger."

Half a century has passed since those words were spoken, but our nation today confronts grave national security threats that demand our constant attention and steadfast commitment. It is clear that, once again, we have reached an "hour of danger."

We are a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated.

Like President Obama – and my fellow members of his national security team – I begin each day with a briefing on the latest and most urgent threats made against us in the preceding 24 hours. And, like scores of attorneys and agents at the Justice Department, I go to sleep each night thinking of how best to keep our people safe.

I know that – more than a decade after the September 11<sup>th</sup> attacks; and despite our recent national security successes, including the operation that brought to justice Osama bin Laden last year – there are people currently plotting to murder Americans, who reside in distant countries as well as within our own borders. Disrupting and preventing these plots – and using every available and appropriate tool to keep the American people safe – has been, and will remain, this Administration's top priority.

But just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution – and must always be consistent with statutes, court precedent, the rule of law and our founding ideals. Not only is this the right thing to do – history has shown that it is also the most effective approach we can take in combating those who seek to do us harm.

This is not just my view. My judgment is shared by senior national security officials across the government. As the President reminded us in 2009, at the National Archives where our founding documents are housed, "[w]e uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset." Our history proves this. We do not have to choose between security and liberty – and we will not.

Today, I want to tell you about the collaboration across the government that defines and distinguishes this Administration's national security efforts. I also want to discuss some of the legal principles that guide – and strengthen – this work, as well as the special role of the Department of Justice in protecting the American people and upholding the Constitution.

Before 9/11, today's level of interagency cooperation was not commonplace. In many ways, government lacked the infrastructure – as well as the imperative – to share national security information quickly and effectively. Domestic law enforcement and foreign intelligence operated in largely independent spheres. But those who attacked us on September 11<sup>th</sup> chose both military and civilian targets. They crossed borders and jurisdictional lines. And it immediately became clear that no single agency could address these threats, because no single agency has all of the necessary tools.

To counter this enemy aggressively and intelligently, the government had to draw on all of its resources – and radically update its operations. As a result, today, government agencies are better postured to work together to address a range of emerging national security threats. Now, the lawyers, agents and analysts at the Department of Justice work closely with our colleagues across the national security community to detect and disrupt terrorist plots, to prosecute suspected terrorists, and to identify and implement the legal tools necessary to keep the American people safe. Unfortunately, the fact and extent of this cooperation are often overlooked in the public debate – but it's something that this Administration, and the previous one, can be proud of.

As part of this coordinated effort, the Justice Department plays a key role in conducting oversight to ensure that the intelligence community's activities remain in compliance with the law, and, together with the Foreign Intelligence Surveillance Court, in authorizing surveillance to investigate suspected terrorists. We must – and will continue to – use the intelligence-gathering capabilities that Congress has provided to collect information that can save and protect American lives. At the same time, these tools must be subject to appropriate checks and balances – including oversight by Congress and the courts, as well as within the Executive Branch – to protect the privacy and civil rights of innocent individuals. This Administration is committed to making sure that our surveillance programs appropriately reflect all of these interests.

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the

United States.

The law requires special procedures, reviewed and approved by the Foreign Intelligence Surveillance Court, to make sure that these restrictions are followed, and to protect the privacy of any U.S. persons whose nonpublic information may be incidentally acquired through this program. The Department of Justice and the Office of the Director of National Intelligence conduct extensive oversight reviews of section 702 activities at least once every sixty days, and we report to Congress on implementation and compliance twice a year. This law therefore establishes a comprehensive regime of oversight by all three branches of government. Reauthorizing this authority before it expires at the end of this year is the top legislative priority of the Intelligence Community.

But surveillance is only the first of many complex issues we must navigate. Once a suspected terrorist is captured, a decision must be made as to how to proceed with that individual in order to identify the disposition that best serves the interests of the American people and the security of this nation.

Much has been made of the distinction between our federal civilian courts and revised military commissions. The reality is that both incorporate fundamental due process and other protections that are essential to the effective administration of justice – and we should not deprive ourselves of any tool in our fight against al Qaeda.

Our criminal justice system is renowned not only for its fair process; it is respected for its results. We are not the first Administration to rely on federal courts to prosecute terrorists, nor will we be the last. Although far too many choose to ignore this fact, the previous Administration consistently relied on criminal prosecutions in federal court to bring terrorists to justice. John Walker Lindh, attempted shoe bomber Richard Reid, and 9/11 conspirator Zacarias Moussaoui were among the hundreds of defendants convicted of terrorism-related offenses – without political controversy – during the last administration.

Over the past three years, we've built a remarkable record of success in terror prosecutions. For example, in October, we secured a conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of an airplane traveling from Amsterdam to Detroit on Christmas Day 2009. He was sentenced last month to life in prison without the possibility of parole. While in custody, he provided significant intelligence during debriefing sessions with the FBI. He described in detail how he became inspired to carry out an act of jihad, and how he traveled to Yemen and made contact with Anwar al-Aulaqi, a U.S. citizen and a leader of al Qaeda in the Arabian Peninsula. Abdulmutallab also detailed the training he received, as well as Aulaqi's specific instructions to wait until the airplane was over the United States before detonating his bomb.

In addition to Abdulmutallab, Faizal Shahzad, the attempted Times Square bomber, Ahmed Ghailani, a conspirator in the 1998 U.S. embassy bombings in Kenya and Tanzania, and three individuals who plotted an attack against John F. Kennedy Airport in 2007, have also recently begun serving life sentences. And convictions have been obtained in the cases of several homegrown extremists, as well. For example, last year, United States citizen and North Carolina resident Daniel Boyd pleaded guilty to conspiracy to provide material support to terrorists and conspiracy to murder, kidnap, maim, and injure persons abroad; and U.S. citizen and Illinois resident Michael Finton pleaded guilty to attempted use of a weapon of mass destruction in connection with his efforts to detonate a truck bomb outside of a federal courthouse.

I could go on. Which is why the calls that I've heard to ban the use of civilian courts in prosecutions of terrorism-related activity are so baffling, and ultimately are so dangerous. These calls ignore reality. And if heeded, they would significantly weaken – in fact, they would cripple – our ability to incapacitate and punish those who attempt to do us harm.

Simply put, since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in Article III courts and are now serving long sentences in federal prison. Not one has ever escaped custody. No judicial district has suffered any kind of retaliatory attack. These are facts, not opinions. There are not two sides to this story. Those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion – they are simply wrong.

But federal courts are not our only option. Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. This Administration's approach has been to ensure that the military commissions system is as effective as possible, in part by strengthening the procedural protections on which the commissions are based. With the President's leadership, and the bipartisan backing of Congress, the Military Commissions Act of 2009 was enacted into law. And, since then, meaningful improvements have been implemented.

It's important to note that the reformed commissions draw from the same fundamental protections of a fair trial that underlie our civilian courts. They provide a presumption of innocence and require proof of guilt beyond a reasonable doubt. They afford the accused the right to counsel – as well as the right to present evidence and cross-examine witnesses. They prohibit the use of statements obtained through torture or cruel, inhuman, or degrading treatment. And they secure the right to appeal to Article III judges – all the way to the United States Supreme Court. In addition, like our federal civilian courts, reformed commissions allow for the protection of sensitive sources and methods of intelligence gathering, and for the safety and security of participants.

A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations in a war zone. For example, statements may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings – for instance, that the statement is reliable and that it was made voluntarily.

I have faith in the framework and promise of our military commissions, which is why I've sent several cases to the reformed commissions for prosecution. There is, quite simply, no inherent contradiction between using military commissions in appropriate cases while still prosecuting other terrorists in civilian courts. Without question, there are differences between these systems that must be – and will continue to be – weighed carefully. Such decisions about how to prosecute suspected terrorists are core Executive Branch functions. In each case, prosecutors and counterterrorism professionals across the government conduct an intensive review of case-specific facts designed to determine which avenue of prosecution to pursue.

Several practical considerations affect the choice of forum.

First of all, the commissions only have jurisdiction to prosecute individuals who are a part of al Qaeda, have engaged in hostilities against the United States or its coalition partners, or who have purposefully and materially supported such hostilities. This means that there may be members of certain terrorist groups who fall outside the jurisdiction of military commissions because, for example, they lack ties to al Qaeda and their conduct does not otherwise make them subject to prosecution in this forum. Additionally, by statute, military commissions cannot be used to try U.S. citizens.

Second, our civilian courts cover a much broader set of offenses than the military commissions, which can only prosecute specified offenses, including violations of the

laws of war and other offenses traditionally triable by military commission. This means federal prosecutors have a wider range of tools that can be used to incapacitate suspected terrorists. Those charges, and the sentences they carry upon successful conviction, can provide important incentives to reach plea agreements and convince defendants to cooperate with federal authorities.

Third, there is the issue of international cooperation. A number of countries have indicated that they will not cooperate with the United States in certain counterterrorism efforts — for instance, in providing evidence or extraditing suspects — if we intend to use that cooperation in pursuit of a military commission prosecution. Although the use of military commissions in the United States can be traced back to the early days of our nation, in their present form they are less familiar to the international community than our time-tested criminal justice system and Article III courts. However, it is my hope that, with time and experience, the reformed commissions will attain similar respect in the eyes of the world.

Where cases are selected for prosecution in military commissions, Justice Department investigators and prosecutors work closely to support our Department of Defense colleagues. Today, the alleged mastermind of the bombing of the U.S.S. Cole is being prosecuted before a military commission. I am proud to say that trial attorneys from the Department of Justice are working with military prosecutors on that case, as well as others.

And we will continue to reject the false idea that we must choose between federal courts and military commissions, instead of using them both. If we were to fail to use all necessary and available tools at our disposal, we would undoubtedly fail in our fundamental duty to protect the Nation and its people. That is simply not an outcome we can accept.

This Administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the President issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December, mandated that a narrow category of al Qaeda terrorist suspects be placed in temporary military custody.

Last Tuesday, the President exercised his authority under the statute to issue procedures to make sure that military custody will not disrupt ongoing law enforcement and intelligence operations — and that an individual will be transferred from civilian to military custody only after a thorough evaluation of his or her case, based on the considered judgment of the President's senior national security team. As authorized by the statute, the President waived the requirements for several categories of individuals where he found that the waivers were in our national security interest. These procedures implement not only the language of the statute but also the expressed intent of the lead sponsors of this legislation. And they address the concerns the President expressed when he signed this bill into law at the end of last year.

Now, I realize I have gone into considerable detail about tools we use to identify suspected terrorists and to bring captured terrorists to justice. It is preferable to capture suspected terrorists where feasible — among other reasons, so that we can gather valuable intelligence from them — but we must also recognize that there are instances where our government has the clear authority — and, I would argue, the responsibility — to defend the United States through the appropriate and lawful use of lethal force.

This principle has long been established under both U.S. and international law. In response to the attacks perpetrated — and the continuing threat posed — by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks — fortunately, unsuccessful — against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved — or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

Furthermore, it is entirely lawful — under both United States law and applicable law of war principles — to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto — the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway — and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

Some have called such operations “assassinations.” They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes.

Now, it is an unfortunate but undeniable fact that some of the threats we face come from a small number of United States citizens who have decided to commit violent attacks against their own country from abroad. Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during this current conflict, it's clear that United States citizenship alone does not make such individuals immune from being targeted. But it does mean that the government must take into account all relevant constitutional considerations with respect to United States citizens — even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.

The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the Due Process Clause — including in a case involving a U.S. citizen captured in the conflict against al Qaeda — the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.

Here, the interests on both sides of the scale are extraordinarily weighty. An individual's interest in making sure that the government does not target him erroneously could not be more significant. Yet it is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks.

Any decision to use lethal force against a United States citizen – even one intent on murdering Americans and who has become an operational leader of al-Qaeda in a foreign land – is among the gravest that government leaders can face. The American people can be – and deserve to be – assured that actions taken in their defense are consistent with their values and their laws. So, although I cannot discuss or confirm any particular program or operation, I believe it is important to explain these legal principles publicly.

Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

The evaluation of whether an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice – and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

Of course, any such use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force. The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets – such as combatants, civilians directly participating in hostilities, and military objectives – may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether.

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. The Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.

That is not to say that the Executive Branch has – or should ever have – the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

Now, these circumstances are sufficient under the Constitution for the United States to use lethal force against a U.S. citizen abroad – but it is important to note that the legal requirements I have described may not apply in every situation – such as operations that take place on traditional battlefields.

The unfortunate reality is that our nation will likely continue to face terrorist threats that – at times – originate with our own citizens. When such individuals take up arms against this country – and join al Qaeda in plotting attacks designed to kill their fellow Americans – there may be only one realistic and appropriate response. We must take steps to stop them – in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out – and we will not.

This is an indicator of our times – not a departure from our laws and our values. For this Administration – and for this nation – our values are clear. We must always look to them for answers when we face difficult questions, like the ones I have discussed today. As the President reminded us at the National Archives, "our Constitution has endured through secession and civil rights, through World War and Cold War, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way."

Our most sacred principles and values – of security, justice and liberty for all citizens – must continue to unite us, to guide us forward, and to help us build a future that honors our founding documents and advances our ongoing – uniquely American – pursuit of a safer, more just, and more perfect union. In the continuing effort to keep our people secure, this Administration will remain true to those values that inspired our nation's founding and, over the course of two centuries, have made America an example of strength and a beacon of justice for all the world. This is our pledge.

Thank you for inviting me to discuss these important issues with you today.

**JA450**



# EXHIBIT F

American Civil Liberties Union et al. v. U.S. Department of Justice et al.

Civil Action No. 12-00794 (CM)

U.S. District Court

Southern District of New York

Vaughn Index

Description of the eight pages of records withheld by OIP.

<b>Index of Records Withheld by OIP</b>				
<b>Document Number</b>	<b>Date(s)</b>	<b>Description</b>	<b>Exemption(s)</b>	<b>Pages</b>
1	01/18/10	Draft talking points prepared for the Attorney General in preparation for a briefing of President. Provided as an attachment to a non-responsive e-mail from the National Security Division, Department of Justice, to various Department of Justice officials where in it is described as a draft document.	Exemption 5, deliberative process and presidential communications privileges	1
2	04/19/11	Briefing material prepared for anticipated upcoming testimony by the Attorney General. Provided as an attachment to a non-responsive e-mail from the Office of Legislative Affairs, Department of Justice, to various Department of Justice officials.	Exemption 5, deliberative process privilege	2

JA453

3	11/02/11	<p>Two e-mails from the Department of State to officials within various national security agencies and the Office of the Attorney General and the Office of Legal Counsel, Department of Justice, providing recommendations and comments regarding the language of a draft document that would culminate in the Attorney General's speech at Northwestern University Law School. Additional portions of this material have been excised as not responsive to the request.</p>	<p>Exemptions 3, 5, deliberative process privilege, and 6</p>	2
4	02/09/10	<p>Two e-mails from the Office of the Deputy Attorney General to the Office of Legal Counsel concerning language contained within document 1. Additional portions of this material have been excised as not responsive to the request.</p>	<p>Exemption 5, deliberative process privilege</p>	3

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
THE NEW YORK TIMES COMPANY,  
CHARLIE SAVAGE, and SCOTT SHANE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
JUSTICE,

Defendant.

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

Plaintiffs,

v.

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

Defendants.

**NOTICE OF CLASSIFIED FILING**

11 Civ. 9336 (CM)

12 Civ. 794 (CM)

Defendants in the above-captioned matters hereby provide notice that they have filed classified documents for the Court's *in camera, ex parte* review. These submissions are classified pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), and cannot be disclosed without proper authorization. Therefore, the submissions have been filed with the United States Department of Justice Litigation Security Group for secure storage and secure transmission to the Court (upon request). The Court may contact the Litigation Security Group directly at 145 N Street, NE, Suite 2W.115, Washington, DC 20530, (202) 514-9016, Attention: Michael Macisso, or contact the undersigned counsel to assist in securing delivery of these submissions for review at the Court's convenience.

**JA455**

Dated: June 20, 2012

Respectfully submitted,

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Acting Assistant Attorney General

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

<hr/>		X
THE NEW YORK TIMES COMPANY,	:	
CHARLIE SAVAGE, and SCOTT SHANE	:	
	:	11 Civ. 9336 (CM)
Plaintiffs,	:	
	:	
- against -	:	
	:	
UNITED STATES DEPARTMENT OF	:	
JUSTICE,	:	
	:	
Defendant.	:	ECF CASE
<hr/>		X

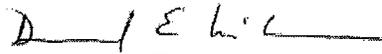
**PLAINTIFFS' CROSS-MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law; the Declaration of Nabiha Syed, dated July 18, 2012; and all prior papers and proceedings in this action and the related action, Plaintiffs shall move this Court at a date to be determined by the Court for an order (i) granting their cross-motion for partial summary judgment; (ii) declaring that a certain memorandum in the possession of the Defendant concerning targeted killings (the "OLC DOD Memorandum") is public under 5 U.S.C. § 552 and ordering Defendant to provide the memorandum to Plaintiffs within 20 business

days of the Court's order, or, alternatively, declaring that an *in camera* review shall be undertaken to determine which portions of the memorandum may be segregated for release; (iii) directing Defendant to provide a Vaughn index as to any additional documents that were subject to Defendant's Glomar response and permitting further challenge to any withholding that may be brought by NYT in this Court; (iv) awarding Plaintiffs the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by 5 U.S.C. § 552(a)(4)(E); and (v) granting such other and further relief as the Court deems just and proper.

Dated: New York, NY  
July 18, 2012

Respectfully submitted,



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#53561

**JA458**

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

-----X

1:12-cv-00794-CM

American Civil Liberties Union and The  
American Civil Liberties Union  
Foundation

Plaintiffs,

**PLAINTIFFS' NOTICE OF MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

-v-

U.S. Department of Justice, including its  
component the Office of Legal Counsel,  
U.S. Department of Defense, including its  
component U.S. Special Operations  
Command, and Central Intelligence  
Agency

Defendants.

-----X

PLEASE TAKE NOTICE THAT, upon the accompanying memorandum of law, the Declaration of Colin Wicker, and all exhibits thereto, and all prior pleadings and proceedings heretofore had herein, Plaintiffs American Civil Liberties Union and The American Civil Liberties Union Foundation (collectively, "the ACLU") will move this Court, before the Honorable Colleen McMahon, at Courtroom 14C of the United States Courthouse, 500 Pearl Street, New York, New York 10007, on a date to be determined by the Court, for an Order granting the ACLU partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. The ACLU respectfully requests the Court to:

1. Order the Defendants to produce to the ACLU a copy of the Office of Legal Counsel's memorandum to the Department of Defense described in the Declaration of John E. Bies ¶¶ 30 and 38;

2. Order the Defendants to produce to the ACLU a copy of the Department of Defense memoranda listed as documents 9 and 10 in the *Vaughn* index submitted as Exhibit J to the Declaration of Robert R. Neller;
3. Order the Defendants to produce to the ACLU a copy of any responsive memoranda from the Office of Legal Counsel to the Central Intelligence Agency, or to submit a full and complete *Vaughn* index of them; and
4. Order the Defendants to produce all remaining responsive documents pursuant to the ACLU's FOIA requests, or submit a full and complete *Vaughn* index for the documents, except for those responsive to the requests specifically waived in the ACLU's memorandum in support of this motion for partial summary judgment.

Dated: July 18, 2012

DORSEY & WHITNEY LLP

By: /s/Joshua Colangelo-Bryan  
Joshua Colangelo-Bryan

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**JA461**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

	X	
THE NEW YORK TIMES COMPANY,	:	
CHARLIE SAVAGE, and SCOTT SHANE	:	
	:	11 Civ. 9336 (CM)
Plaintiffs,	:	
	:	
- against -	:	
	:	
UNITED STATES DEPARTMENT OF	:	
JUSTICE,	:	
	:	
Defendant.	:	ECF CASE
	X	

**DECLARATION OF NABIHA SYED**

NABIHA SYED, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am the First Amendment Fellow at The New York Times Company, the publisher of *The New York Times*, and an attorney for the Plaintiffs here ("NYT"). As such, I am fully familiar with the facts.

2. Annexed hereto as Exhibit A is a true and correct copy of a transcript from the CNN show "State of the Union with Candy Crowley," broadcast on October 2, 2011, which contains comments made by Jane Harman, a former United States representative and a former ranking member of the House Intelligence Committee.

3. Annexed hereto as Exhibit B is a true and correct copy of "Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki", the *Washington Post* (October 7, 2011), by Peter Finn, which reports comments made by Senator Dianne Feinstein, chairwoman of the Senate Select Committee on Intelligence.

4. Attached hereto as Exhibit C is a true and correct copy of a letter dated October 27, 2011 from the Department of Justice ("DOJ") Office of Legal Counsel ("OLC") to Scott Shane of *The New York Times*, denying his June 11, 2010 request (the "Shane Request") under the Freedom of Information Act ("FOIA").

5. Attached hereto as Exhibit D is a true and correct copy of a letter dated October 27, 2011 from DOJ OLC to Charlie Savage of *The New York Times*, denying his October 7, 2011 FOIA request (the "Savage Request").

6. On November 4, 2011, NYT submitted to the DOJ Office of Information Policy ("OIP") its appeal of the denial of the Shane Request. A true and correct copy of this appeal letter is attached hereto as Exhibit E.

7. On November 4, 2011, NYT also submitted to DOJ OIP its appeal of the denial of the Savage Request. A true and correct copy of this appeal letter is attached hereto as Exhibit F.

8. OIP did not respond to either of these appeals within twenty days.

9. A number of articles in *The New York Times*, the *Washington Post*, and elsewhere have reported on OLC legal memoranda about the targeted killing program.

10. These articles include:

- Peter Finn, "Secret U.S. Memo Sanctioned Killing of Aulahi," *Washington Post* (September 30, 2011), a true and correct copy of which is attached hereto as Exhibit G;
- Charlie Savage, "Secret U.S. Memo Made Legal Case to Kill a Citizen," *The New York Times* (October 8, 2011), a true and correct copy of which is attached hereto as Exhibit H;

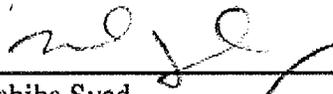
- o Daniel Klaidman, "Obama Team to Break Silence on al-Awlaki Killing," *Newsweek* (January 23, 2012), a true and correct copy of which is attached hereto as Exhibit I; and
- o Charlie Savage, "A Not-Quite Confirmation of a Memo Approving Killing," *The New York Times* (March 8, 2012), a true and correct copy of which is attached hereto as Exhibit J.

11. Attached hereto as Exhibit K is a true and correct copy of a transcript from the Senate Appropriations Committee, Hearing on Fiscal Year 2013 Budget for the Justice Department, dated March 8, 2012, which contains comments from Patrick Leahy, a United States Senator and chairman of the Senate Judiciary Committee.

12. Attached hereto as Exhibit L is a true and correct copy of a transcript from the House Committee on the Judiciary, Hearing on Justice Department Oversight, dated June 7, 2012, which contains comments from Jerrold Nadler, a United States Congressman and member of the House Judiciary Committee.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, NY  
July 18, 2012

  
\_\_\_\_\_  
Nabiha Syed

# EXHIBIT A

JA465

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## STATE OF THE UNION WITH CANDY CROWLEY

Interview with Dick and Liz Cheney; Interview With Michael Hayden, Jane Harman; Interview with Haley Barbour

Aired October 2, 2011 - 09:00 ET

THIS IS A RUSH TRANSCRIPT. THIS COPY MAY NOT BE IN ITS FINAL FORM AND MAY BE UPDATED.

CANDY CROWLEY, HOST: In the words of Defense Secretary Leon Panetta, this has been a bad year for terrorists.

Today, the struggle against al Qaeda with former Vice President Dick Cheney and Liz Cheney, former State Department official, and with former CIA director Michael Hayden and the former ranking member of the House Intelligence committee, Jane Harman.

Then restlessness with the Republican presidential field. Insights from Mississippi Governor Haley Barbour.

I'm Candy Crowley. And this is State of the Union.

Five months after U.S. Navy SEALs raided a house in Pakistan and killed Osama bin Laden, the CIA launched an armed drone into Yemen killing the intended target, famed terrorist recruiter and propagandist Anwar al Awlaki, an American.

Here to talk about the terrorist's bad years is former Vice President Dick Cheney and his daughter, Liz Cheney, chair of a national security advocacy group, Keep America Safe. Together they wrote "In My Time, A Personal and Political Memoir."

Thank you both for joining us. I want to start with the drone strike that took out the top propagandist, at least for al Qaeda in the Arabian Peninsula, perhaps took out the bombmaker for the same group Ibrahim Hassan al-Asiri and also took out Samir Khan. What's your reaction to that?

DICK CHENEY, FORMER U.S. VICE PRESIDENT: Well, I think it was a very good strike. I think it was justified. I think it is very effective use of our drone technology. Thing I'm waiting for is for the administration to go back and correct something they said two years ago when they criticized us for "overreacting" to the events of 9/11. They, in effect, said that we had walked away from our ideals, or taken policy contrary to our ideals when we had enhanced interrogation techniques.

Now they clearly had moved in the direction of taking robust action when they feel it is justified. I say in this case I think it was, but I think they need to go back and reconsider what the president said when he was in Cairo.

CROWLEY: I want your reaction as well, because of your group that you work with, but let me just clarify what you are talking about. This was an American -- actually two Americans were killed, two American terrorists that were associated with al Qaeda in the Arabian Peninsula that were killed without due process, clearly, without a court. So what you're saying is if they can do that, they owe us an apology for going after our -- what seem people called torture, what you called enhanced interrogation techniques. Is that what you're saying?

D. CHENEY: Exactly. He said in his Cairo speech for example that he had quote, "banned torture." Well, we were never torturing anybody in the first place, said we walked away from our basic fundamental ideals. Now that simply wasn't the case. That is to say what he said then was inaccurate especially in light of what they're now doing with respect to policy.

But I do think this was a good strike. I think the president ought to have that kind of authority to order that kind of strike, even when it involves an American citizen when there is clear evidence that he's part of al Qaeda, planning, cooperating and supporting attacks against the United States.

CROWLEY: Because this was what we knew him as was a propagandist. So basically what he said and what he did primarily over the internet, and we know he was connected, or at least largely inspirational to some of the attacks -- Fort Hood, which was a deadly attack, Times Square bomber, the so-called underwear bomber, so you have no problem with the U.S. going overseas and killing an American in a foreign country. That doesn't bother you.

D. CHENEY: I think you've got to go through the process internally, making certain it's reviewed by the appropriate people in the Justice Department, that they take a good, careful look at it. But I think they did all of that in this case. And I think the president has all the authority he needs to order this kind of strike.

It is different between a law enforcement action and a war. And we are at war. We believe we are in war. We believe the war started when they killed 3,000 Americans on 9/11. And I think what we've seen is the administration, the Obama administration, has clearly reached the point where they've agreed they need to be tough and aggressive in defending the nation and using some of the same techniques that the Bush administration did. And they need, as I say, go back and reconsider some of the criticisms they offered about our policies over the past years.

CROWLEY: Liz, do you have any in your group, which is dedicated to keeping up the fight against terror and keeping America safe, does this sort of thing, the drone attacks -- and they've taken out some very high-profile terrorists with drones and with undercover operations. Has this president made us safer in your estimate?

LIZ CHENEY, FORMER STATE DEPARTMENT OFFICIAL: I think that, you know, each time the United States is successful at taking out somebody like al Awlaki, it is a very positive thing. I think it is a sign that the war continues, a sign that we've still got folks out there who are attempting to attack us. I think it is critically important. What concerns me is that the damage that this president has done, some of the damage that my father was speaking about just now, the extent to which when the president of the United States goes on to foreign soil, talks about the United States abandoning our values, says that we tortured people, when he's in Cairo, you know, the home of Mohamed Atta, the home of Amman al Zawahiri. When he does that, he does real damage to our standing in the world and that's the kind of standing that we need to exercise a leadership role which is more important now, frankly, than it's been in many, many years when you look at what's happening across the Arab world, for example.



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America's got to be strong, we've got to have credibility, we have to show leadership. This president seems unwilling, frankly, to do all of those things.

CROWLEY: This smarts. You still are smarting from that -- from that criticism. In fact I've seen a lot of people that have described President Obama's approach to terrorism is pretty much along the lines of the Bush administration absent the enhanced interrogation techniques. Would you go along with that?

I mean could you now -- I want to read you something that you said. Now this was after the underwear bomber was read his Miranda Rights and you felt that they were treating him as a criminal as opposed to a war criminal, as opposed to being a prisoner of war.

And you said, we are at war. And when President Obama pretends that we aren't it makes us less safe. Why doesn't he want to admit we're at war? It doesn't fit with the view of the world he brought with him to the Oval Office.

Sitting that aside, does it matter what he calls it if in fact he has been so -- he has killed -- the U.S., obviously with our intelligence services and our military, have killed dozens of top al Qaeda leaders quite successful. So can you -- can you now say that he has helped in this war on terror, that he is in fact pulling the United States on the more winning side of the war on terror? Because he certainly has killed more than were killed in the Bush administration.

D. CHENEY: Right. But we developed the technique and the technology for it.

The problem you have is that sort of the tone that's set at the top. And on the one hand he wanted -- I assume for political reasons -- not to call it a war. Not to call it a war on terror.

CROWLEY: Yes, but does that matter? Because he's conducting a war, isn't he?

D. CHENEY: Well, he is conducting a war, but it matters a lot I think in terms of the rationalization you use, the kinds of weapons systems you choose to use. If it is a law enforcement action, there are going to be inhibitions in terms of how you operate. It can affect the people up and down the line. For example, they talked for a while about prosecuting the people in the CIA who carried out our policies on our watch. Now they backed off that, that's a good thing. That's the right direction to move in. But I think in terms of the kind of signals that are sent by the commander in chief with respect to the kind of efforts that are going to be used and what we expect our people to be able to do, he needs to be clear what he's doing and he clearly is fighting a war. It is important that he do that. I agree with the attacks. That's the right thing to do. But don't get wrapped up in your underwear then trying to go back and validate, if you will, some of the foolish things they said during course of their campaign.

CROWLEY: I guess what I'm asking is, isn't the proof in the pudding? Hasn't this administration waged a successful war against terror?

D. CHENEY: Yes. But, they need to call it what it is. When he goes to Cairo, and in effect says we walked away from our ideals, we forgot our core principles and core values on our watch, that's a big mistake. That sends a signal out there to the world where U.S. stature does matter, where our position in the world and our ability to influence events and make progress for example on Mideast peace turns very much on how people look at us.

If you've got the president of the United States out there saying we overreacted to 9/11 on our watch, that's not good.

CROWLEY: You'd like an apology, it sounds like.

D. CHENEY: Well, I would. I think that would be not for me, but I think for the Bush administration, and that he misspoke when he gave that speech in Cairo two years ago.

CROWLEY: You feel he wronged the Bush--

D. CHENEY: I think he did tremendous damage. I think he slandered the nation and I think he owes an apology to the American people. Those are the policies that kept us safe. They are the policies, frankly, that contributed the enhanced interrogation techniques, we know now Leon Panetta has said some of the intelligence we gained through that program helped us identify the location of bin Laden. So I think the president owes everybody an apology, frankly.

CROWLEY: Liz Cheney, Dick Cheney. Stick with me. We will come back with more with Dick and Liz Cheney. We're going ask for instance their odds-on favorite on the Republican candidate that will go head-to-head with President Obama in 2012.

CROWLEY: We are back with former Vice President Dick Cheney and his daughter and co-author, Liz Cheney.

Before we move on to U.S. politics, when I was preparing for this, I talked to a lot of friends outside the business, saying, you know, what do you want to hear? Like what most still bothers you or what would you like to hear? And here's one of them: It was from an August 2002 VFW speech where you said: "simply stated, there is no doubt that Saddam Hussein now has weapons of mass destruction, there's no doubt he is amassing them to use against our friends, against our allies, and against us."

And the question from my friend was, what made you so positive at this time?

D. CHENEY: Intelligence reports that we were getting. The first intelligence report we got after we got elected was on weapons of mass destruction in Iraq. And it went all the way back to '98 in the Clinton administration. And there had been steady reporting from '98 on. Congress had passed a law authorizing \$100 million to try to overthrow the government in Iraq. And we had 27 months of reporting after we got elected until we actually went into Iraq, all of which said he has got weapons of mass destruction.

Now it turned out what he -- he didn't have stockpiles. He did have the technology. He had the people with the know-how. He had the raw materials. He had the plans to go back into production once...

(CROSSTALK)

CROWLEY: But he didn't -- he hadn't amassed them. And I guess, you know, people say, that's why we went in and we were told they were there and then they weren't there. And did you regret making statements like that?

D. CHENEY: It wasn't anything we made up. The president and I didn't sit in the Oval Office on a Saturday morning and say, let's say he has got WMD. We were given repeatedly reports that said that he in fact had produced weapons of mass destruction.

CROWLEY: Shouldn't you have fired somebody for those reports?

D. CHENEY: Well, and we knew he had done it before.

CROWLEY: Right. D. CHENEY: But it was also true the Germans had the same intelligence, the Brits had the same intelligence. This wasn't just a U.S. problem. And in fact he did have -- talk to Charles Duelfer or David Kay, the guys who ran the Iraq Survey Group after the war, they said that they were more concerned about what they found than when they were worried about stockpiles because he clearly had retained the capacity to get back into the business.

CROWLEY: The other question that was asked, sort of along similar lines but it is about that August report: It was a daily report to the president that said "al Qaeda determined to launch attack against the U.S.," and a month later it happened.

Did you ever have a moment after 9/11 where you thought, did we miss something? Shouldn't we have known this? Why didn't we know this? Did anybody go back and try to figure out why the dots weren't connected or why more attention wasn't paid to that report? Did you ever regret not looking more carefully at stuff ahead of time?

D. CHENEY: We never had actionable intelligence. You could go back and look at that. And it just wasn't there. There were problems though. There had been a wall erected between sort of the domestic intelligence side of the business and the foreign side.

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You talk to Mike Hayden, General Hayden is going to be here shortly. He said, for example, that if we had had the terrorist surveillance program set up which we set up right after 9/11, he was the prime architect of that we might have been able to pick up on the two hijackers who were living in San Diego at that point and that might have triggered suspicions and led us to be able to intercept the operation.

So -- but that program didn't exist prior to 9/11.

CROWLEY: Abrupt change of pace here. President Obama last night spoke for the Human Rights Campaign, which is a pro-gay and lesbian organization for gay and lesbian rights, and he had this to say.

(BEGIN VIDEO CLIP)

BARACK OBAMA, PRESIDENT OF THE UNITED STATES: There are those who don't want to just stand in our way but want to turn the clock back, who want to return to the days when gay people couldn't serve their country openly, who reject the progress that we've made, who, as we speak, are looking to enshrine discrimination into state laws and constitutions, efforts that we've got to work hard to oppose because that's not what America should be about.

(END VIDEO CLIP)

CROWLEY: Also criticized the Republican field for allowing a gay soldier to be booed during -- when he openly said he was gay and he had a question for the Republican candidates. And some in the audience booed him and no one on stage said anything. Is the president on the right side of history on these issues dealing with gay and lesbian rights? D. CHENEY: Well, I think the decision that has been made with respect to allowing gays to serve openly in the military is a good one. I mean, it is the right thing to do. I'm a little bit leery of the notion that somehow we ought to go hammer the Republican candidates because they didn't respond to booing in the audience.

When you're in political campaign and debates, you know, people boo a lot of things. And I'm not sure that it was all focused specifically on that particular issue.

CROWLEY: But do you feel, Liz, that the Republicans need to move ahead with this particular issue because they are seen as anti-gay rights, anti-lesbian rights, and bisexual community, transgender community? Do you think this president is on the right path when it comes to equal rights?

L. CHENEY: You know, I think that it was the right decision to repeal "Don't Ask/Don't Tell." I don't know where President Obama is on this issue and I suspect that there were a lot of people who were watching his speech in that room last night wondering whether they could believe what he was saying, frankly. His position on these issues hasn't been that different from where many of the Republican candidates are. He hasn't come out and advocated gay marriage, for example. I think this was sort of one more example where he's trying to have it both ways.

When he speaks to that audience he tries to sound like he's, you know, some sort of a fighter and advocate for equality, but when he's trying to appeal to people who may not have that as their primary issue, he has got another position. I thought it was pretty vintage Obama, frankly.

CROWLEY: Where do you all stand on the 2012 group at this point? There is Rick Perry out there, Romney out there. Let's start with you.

L. CHENEY: You know, I haven't endorsed anyone yet. I do think -- you know, as I watched the last debate I felt good about the fact that our candidates clearly understand, for example, how important the private sector is going to be in getting us out of this economic mess we're in, something that this White House doesn't understand.

I think there's real hope on the horizon here. You know, there are a number of people we could nominate on our side, frankly, who would be much better -- probably all of them who would be much better than President Obama has been on the economy, for example. But I'm not backing anybody in particular at this point.

CROWLEY: Can you support anybody currently in the Republican field?

D. CHENEY: I will support the Republican nominee. I haven't endorsed anybody yet.

CROWLEY: Will you? D. CHENEY: I don't know.

CROWLEY: Have you been asked?

D. CHENEY: I've been -- well, I've had some conversations, private conversations.

CROWLEY: Well, you can tell us.

(LAUGHTER)

D. CHENEY: I've been busy writing and promoting my book, Caridy, and watching with interest. I think the debates have been pretty good actually. And I think we've got a good crop of candidates there. We don't know that everybody who is going to get in is in yet. So I'm...

CROWLEY: Would you like to see Chris Christie run?

D. CHENEY: I'm not urging anybody to jump into that arena. I've been there myself and they're big boys, they can decide whether or not they want to run.

CROWLEY: Quick wrap-up question for both of you. We thought perhaps we'd see Liz Cheney running for office in this election cycle, either for U.S. senate from Virginia or a congressional seat. You still have thoughts that maybe one day you might run?

L. CHENEY: We'll see what happens. Right now I'm focused on hosting the sixth grade potluck dinner at my house and chaperoning field trips, but it is something that I have a lot of respect for people who do. And I may take a look at it down the road.

CROWLEY: But not this time around.

L. CHENEY: No, I'm not planning to run in 2012.

CROWLEY: And actually...

D. CHENEY: If she does run, I'll support her.

CROWLEY: You'll support her? That's good to know.

Two wrap-up questions for you. One is that President Bush wrote in his book that he worried that his refusal to pardon "Scooter" Libby, your former chief of staff which you pushed very hard for a pardon for him, he -- I mean he had been found guilty of four felony counts dealing with the Valerie Wilson case. President Bush worried that it would ruin your friendship. Did it?

D. CHENEY: Let's say it was a difficult moment. It put a real strain on the relationship. We worked together for eight years. He made me vice president of the United States, I'll always be very grateful for that. This is one issue where we had a fundamental difference. He got to make the decision and he did. I just basically disagreed with him.

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CROWLEY: Did it ruin your friendship?

D. CHENEY: I can't say that. I wouldn't take it that far, by any means.

But Mr. Libby I think was innocent, didn't deserve to be indicted. I think -- it is a long story. I'd urge people to read that chapter in the book. But it really -- I think it was a miscarriage of justice.

CROWLEY: Heart transplant?

D. CHENEY: Don't know. I've got to decide, I'm on a heart pump now. I've got a piece of equipment inside me that supplements my heart. It works very well. I'm 14 months into the program and it's been functioning perfectly.

CROWLEY: It's good to see you, former Vice President Dick Cheney.

Liz Cheney, thank you as well.

L. CHENEY: Thanks, Candy. CROWLEY: And if you want to see the lighter side of the Cheneys, you can watch my "Getting to Know" interview with them and many other newsmakers on our web site, [cnn.com/sotu](http://cnn.com/sotu).

Up next, two intelligence experts on what Anwar al Awlaki's death means for al Qaeda.

(COMMERCIAL BREAK)

CROWLEY: Joining me here in Washington, retired General Michael Hayden, former director of the CIA, now a principal for the Chertoff Group, and Jane Harman, former ranking member of the House intelligence committee, who is now president and CEO of the Wilson Center.

Familiar faces. Thank you both for coming back to talk about what looks like a pretty big week in the war against terror. Not only did Anwar al Awlaki who was just an internet recruiter for a number of plots that took place in the U.S. over the past couple of years, but also Samir Khan, another American. And we'll get to that in a minute. Who was a propagandist. And it may be that bombmaker, Ibrahim Hassan al-Asiri was also taken out.

Then we find out one of the chief commanders in the Haqqani Network has been captured by NATO Afghan forces.

So let's start with al Awlaki. Is this a psychological blow to al Qaeda in the Arabian Peninsula, or is it an operational blow?

FORMER REP. JANE HARMAN (D), CALIFORNIA: I think it is both. I think AQAP, al Qaeda in the Arabian Peninsula, had emerged as the more potent al Qaeda faction in terms of mounting attacks against us, even though al Awlaki was not the titular head of AQAP in terms of his external reach into the United States, the fact that he harbored two of the 9/11 terrorists and knew others, and that he helped with plots like the Hasan plot to kill 13 at a recruiting station in Texas and the Shatzad plot in New York and -- and that recruited, or at least was involved with Abdulmutallib, the underwear bomber and he was involved with the parcel bomb plot, all of those things make him operationally capable and highly sophisticated. And add to that Samir Khan who produced the magazine that was radicalizing the number of disaffected youth in the United States to become home-grown terrorists, and add to that if it's true the bombmaker, who is a Saudi national, al Asiri, who was enormously capable. This is a trifecta that I think has enormous reach in terms of reducing -- degrading the capability of al Qaeda to attack us.

CROWLEY: It is huge, but let's talk about the manner in which they died which is a drone attack, because the president has almost quadrupled the number of drone attacks, especially into Pakistan, that the Bush administration launched and been quite successful. They have wiped out -- not just with drone attacks but in other ways, a lot of top terrorists.

Do you worry that these drone attacks, because they take out innocent people -- they didn't to as far as we know in this last attack, but they often take out innocent people, they miss their targets and they upset the local population. Pakistan comes to mind. Does that worry you?

GEN. MICHAEL HAYDEN (RET.), FORMER CIA DIRECTOR: Well first of all, I would challenge a bit the premise of the question about collateral damage and killing innocents. That's much overblown without getting into any operational details. We obviously can't confirm or deny.

CROWLEY: Doesn't happen?

HAYDEN: No. No. Never say never, but I do think there are some audiences out there who greatly exaggerate what we call collateral damage.

This has proven to be a wonderful weapon in this war. Two successive presidents have used it. It has probably been the single most impactful thing we have done to cripple al Qaeda. We've crippled al Qaeda main to a point now that most people think they're almost not capable of attacking the American homeland and now we've shifted over here to Yemen.

And if I could just add to a thought to what the congresswoman said, think about al Awlaki in terms of the near and far enemy. He was the part of al Qaeda in the Arabian Peninsula that motivated them and enabled them to go after the far enemy, that's us. And so in that sense his death makes America much more safe.

HAYDEN: Frankly, though, Candy, it has less of a direct impact on the fate or health of al Qaeda in the Arabian peninsula. In fact with his being gone, they may be even more focused against the "near enemy," and that's Yemen and Saudi Arabia.

CROWLEY: So that sort of brings me to my next question, which is that we're now hearing this sort of al Qaeda is nearing an end. We've, you know, taken out a lot of their top leadership. How close are we to defeating al Qaeda and how will we know when that happens?

HARMAN: Well, there's not going to be a white flag anywhere, just as there really isn't one or even five battlefields. I don't call this -- and I think it was a misnomer -- I disagree with Vice President Cheney when he said it earlier. I've never called this a "war on terror." Terror is a tactic.

But this is a challenge from those who have extreme views, not all of whom are Muslim, that we have to defeat. We can defeat part of it kinetically. Drone strikes are a kinetic tool in our arsenal. But we really have to win the argument. And our counter-narrative needs to be much stronger and much better in order to win this argument in the 21 or 25 countries in which al Qaeda is.

Let me just say one thing about drone strikes, I think -- I support them as a tool, but we have to be very careful how we use them. We do use them carefully, as in my prior life on the House Intelligence Committee, I was briefed on rules of engagement. And, again, we don't officially acknowledge this program but let's just say the program is used very carefully.

We could abuse this program. We don't abuse it, but we've got to have a counter-narrative, we've got to live our values, we've got to do other things, diplomacy and development in these countries in order to persuade the next generation not to strap on suicide belts.

CROWLEY: General Hayden, let me -- I'll get you in on this, but I've got to take a quick break. And after the break, more with our panel, including analysis of the delicate relationship between Pakistan and the U.S.

(COMMERCIAL BREAK)

CROWLEY: We are back with retired General Michael Hayden and former Congresswoman Jane Harman.

General, to you. Vice President Cheney essentially said in his interview earlier, listen, I am all for these drone attacks, I am really glad they got these people, but for an administration to kill two Americans in Yemen without benefit of a trial or any kind of due process, to

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criticize us for the enhanced interrogation techniques is completely hypocritical.

I want to get first your reaction to the killing by the United States government of two Americans and whether you think the vice president has a point.

HAYDEN: Well, what I would say is what happened in Yemen two days ago is a natural and lawful outgrowth of a premise we've accepted as a nation. We are a nation at war. We are at war with al Qaeda and its affiliates.

Two successive presidents, the Congress and the American courts have all recognized the legitimacy of that. And if you accept that premise, and not everyone in America does, and not everyone...

(CROSSTALK)

CROWLEY: We are not at war with Yemen.

HAYDEN: No, no. But we didn't attack Yemen. We attacked an enemy who was in Yemen beyond the reach of Yemeni sovereignty or American law enforcement. And that premise, we are nation at war, and as a belligerent, have a right to kill or capture enemy combatants, trumps the fact that one or another of those combatants might have U.S. personhood wrapped around them.

So I'm quite comfortable with it.

CROWLEY: Does the vice president have a point though that -- and he agrees with President Obama on the drones. He agrees that this strike should have happened, but does he not have a point that the Bush administration was criticized as having un-American values for enhanced interrogation techniques, and this administration kills Americans without due process, and that he finds an equivalency there?

HARMAN: Well, I dispute a lot of what he said as well. First of all, the targeted killing of anyone should give us pause, and there has to be a legal framework around doing that. I believe in this case...

(CROSSTALK)

CROWLEY: ... legal framework.

HARMAN: Well, the reports -- fresh reports say, there is a lengthy memo that the Office of Legal Counsel and the Department of Justice has prepared making the case. I believe there is a good case. Imminent threat, beyond our ability to arrest him, the authorization to use military force against al Qaeda, he was complicit with al Qaeda. There's no question about that. And a couple of other grounds.

But I think the Justice Department should release that memo. I remember my time as ranking member on the Intelligence Committee, begging the Bush administration to release the memoranda, which we finally did see, the John Yoo memos, initially, which I -- most people felt initially were faulty -- on faulty legal grounds, but nonetheless we finally saw those memos.

So I think Vice President Cheney has a rather thin skin for a guy who has been in the partisan wars as long as he has. And I think some of the criticism of Bush secrecy is valid. I don't think the Obama administration should be repeating it.

I do applaud the fact that they have continued an aggressive counter-terrorism strategy. I'm for that. But I think the debate about the legal grounds for that strategy should be more in the open and we should have a legal framework around our interrogation and detention policies far more than we do right now.

CROWLEY: Let me turn you, in our last couple of minutes, to Pakistan. We saw Admiral Mullen, who was still the chairman of the Joint Chiefs of Staff at that time, he is no longer, having retired this week, who said that the intelligence arm of the Pakistani government is a veritable arm of the Haqqani network, which most recently has been lobbing missiles at the U.S. embassy in Kabul.

How long does this stay tenable that we are partners with a country in the fight against terrorism and they have an intelligence mechanism that is working with a veritable arm of the very people who are attacking us? It is just backwards, isn't it?

HAYDEN: Oh, it is. And I've got no good solution but I also wouldn't quibble with the words that the chairman used. I've seen examples of that during my time in government and it clearly apparently has continued since I've left government.

So I would not challenge that premise.

CROWLEY: And, quickly, should we just at least stop giving them billions of dollars a year? HARMAN: Well, it is a very complicated relationship. Pakistan has 100 nukes. It's a huge Muslim democracy, right in the bull's eye of problems that we have. I want to applaud Admiral Mullen for another thing, which is his courageous comments about ending Don't Ask/Don't Tell. I think of all the military voices, his was singular and I think that policy ended much faster because he was the guy who pointed out the hypocrisy of that policy.

CROWLEY: But in the end what you are saying is we have to stay friends with Pakistan, because they've got nukes and they've got all those terrorists at least in the mountainous range.

HAYDEN: Let me -- let me put this in two phases perhaps. Over the long term, of course we have to stay friends with Pakistan. Pakistan is not an enemy of the United States. And we have strategic reasons to remain friends.

But achieving our objectives in south Asia through Pakistan may not be factually possible in the near term. So we might want to concentrate on the depth of the longer term relationship and recognize that there are some things they will not do. And we have to make conclusions based on that.

CROWLEY: General Hayden, Congresswoman Harman, I have to stop you there. I'm so sorry, but please come back, there's always fun stuff to discuss.

Up next, top stories.

And then Mississippi Governor Haley Barbour on the 2012 field.

But first Fareed Zakaria on his program coming up at the top of the hour.

FAREED ZAKARIA, HOST FAREED ZAKARIA GPS: We have a really important show today on GPS. We look at what to do about America's more vex foreign policy issue, relations with Pakistan. I sat down with Admiral Mike Mullen in his last days in office as chairman of the Joint Chiefs of Staff. He stands by his comment that the deadly Haqqani group in the Af-Pak region is a veritable arm of the Pakistani military.

We also have the other side of the story. I'll speak with Pakistan's new foreign minister Hina Rabbani Khar coming up later on GPS.

(COMMERCIAL BREAK)

CROWLEY: Time for a check of today's top stories.

President Obama told a gathering of gay and lesbian activists that he's committed to equality. In his speech to the Human Rights Campaign last night, the president criticized his Republican rivals for their reaction to the booing of a question by a gay soldier.

(BEGIN VIDEO CLIP) OBAMA: We don't believe in the kind of smallness that says it's OK for a stage full of political leaders, one of whom could end up being the president of the United States, being silent when an American soldier is booed. We don't believe in that.

(END VIDEO CLIP)

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CROWLEY: The booing occurred during a Republican presidential debate last month in Orlando. The candidate to whom the soldier's question was directed, Rick Santorum, said he didn't hear the boos and would have condemned them if he had.

The Yemeni government airplane mistakenly bombed its own troops killing 29 soldiers. The incident occurred last night in a province in southern Yemen where government forces have been battling Islamic militants. The soldiers were using a school as a launching pad to strike at militants when they were bombed.

Israeli prime minister Benjamin Netanyahu's government said today it supports the Middle East quartet's call for the resumption of direct talks with the Palestinians within the next month. Israel called on the Palestinian Authority to do the same. Top Palestinian officials dismiss the Israeli move saying there can be no further negotiations until Israel halts all settlement construction.

And those are today's top stories.

The bad economy continues to be bad news for the president. Republicans note, when the president goes out to sell his jobs program, it is to states he won in 2008 and where he falters now. In Ohio, only 43 percent of voters say the president should be re-elected and President Obama is running virtually even there with Romney. And virtually even with Perry.

Still, polls can cut both ways. Asked who is more likely to create new jobs, Americans say Democrats. And while Republicans are against new taxes, the public by a large margin supports new taxes on those making over \$250,000 a year.

It also supports higher taxes on corporations.

Dissecting the polls and the politicians next with Mississippi Governor Haley Barbour.

(COMMERCIAL BREAK)

CROWLEY: Joining me from Jackson, Mississippi, Republican Governor Haley Barbour, who's not just a governor but a pretty darn good political analyst. So put that hat on for us today as we take a look at the Republican field.

Do you buy into the theory that all of the hubbub surrounding, oh, let's get Chris Christie into the race is a reflection of Republican dissatisfaction with the current field?

GOV. HALEY BARBOUR (R), MISSISSIPPI: Well, I really don't. I think it's a token of the -- the regard that people have for Chris Christie. He's a great governor. If he were to get into the race, he'd have an immediate following. I have no idea as to whether or not he's going to get into the race. But, no, I think this is more an effect of people liking Christie.

CROWLEY: Have you spoken to him at all about this?

BARBOUR: Not in weeks. And I don't have any information, Candy, that you don't have. There's certainly a huge amount of speculation, but I have no -- I have no idea what he's going to do.

CROWLEY: You know, when you do poll Republicans, we do tend to turn up a lot of dissatisfaction, which is not unusual before a party actually selects somebody. But we saw Rick Perry come in, and it was -- you know, almost immediately became the front-runner in the polls. And then along came the debate over immigration and his feeling that in-state tuition breaks should be given to the children of undocumented workers.

Do you think that that has affected him to the extent that it has really lessened his chances to become the Republican nominee in a party that is very much against that sort of thing?

BARBOUR: You know, the news media wants the primaries to be decided this week. There's too many people in the news media who think whatever happened in the last 24 hours tells us what's going to happen the next 24 weeks.

The fact of the matter is 90 percent of what matters for winning the nomination is still in front of us. And, you know, when I grew up in politics, we used to say today's headlines are tomorrow's fish wrappers. Well, they don't sell enough newspapers anymore for people to understand what that means. But, you know, people should not get up on the news of the day or the news of the hour is necessarily going to have some big impact down the road. And a nomination contest is a ways from now.

CROWLEY: I agree with you...

BARBOUR: You know, Candy, I would remind you, in September four years ago, Rudy Giuliani led in our polls, and Fred Thompson was second. So...

CROWLEY: It is...

BARBOUR: ... we have to be careful...

CROWLEY: ... completely -- the calendar is certainly a cautionary note. I give you that. But you and I know that sometimes candidates get in, and you can spot a fatal flaw from a mile away, saying this is never going to work this year, wrong person, wrong time.

And so I guess what I'm asking you is whether you think that Rick Perry's, certainly among conservatives in his party, that he has a fatal flaw in his position on in-state tuition for the children of undocumented workers?

BARBOUR: Well, I really don't. I am reminded about looking for fatal flaws. You could name three fatal flaws that Jimmy Carter had in 1975 or that Bill Clinton had in 1991.

The fact of the matter is the Democrats were dying to run against Ronald Reagan in 1980 because they saw all these fatal flaws. The public -- Republicans or Democrats in the general election -- the public's going to look at our candidates in the totality. They're going to look at their judgment, at their record, and they're going to compare it to Barack Obama.

At the end of the day, the election next year will be a referendum on the presidency of Barack Obama, on his record, his policies, and the results they have achieved or not achieved. I don't think any of our candidates have a, quote, "fatal flaw." But certainly none of them is perfect.

CROWLEY: Let me -- let me, sort of, pick up on that. And as you know, the Obama re-election campaign will very much want to make this an election not a referendum on him or on his policies but on a choice between a Republican candidate and the president, and they're banking that the president will win on that, looking at the current field.

Why? Because they believe that the American public will see the Republican that comes out of this field as too conservative for their taste.

And along those lines, I want to ask you, when you saw the candidates asked the question, if you were offered a 10-1 deal, that is that there would be \$10 of spending cut for every \$1 in tax increases, and no candidate would accept that deal, does that suggest to you that there is no room for compromise in the Republican Party?

And would you have raised your hand on that question?

BARBOUR: Well, first of all, Candy, one thing you and I both agree on is President Obama can't run on his record, that he's got to try to make this election about the Republican, and they will try to do anything they can do to disqualify him or her or make them unacceptable. You're right about that. Obama's people know they can't run on their record.

On that question, you know, I have a little different view. I was a political director for Ronald Reagan. We had to compromise on

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everything. We had a Democratic House of Representatives every minute that Ronald Reagan was president. But we did the Reagan economic plan; had to compromise, didn't get everything we wanted. We did 1986 tax reform...

(CROSSTALK)

CROWLEY: Does it worry you that you've got a Republican field that doesn't look like they want to compromise on anything?

I mean, \$10 in spending decreases as opposed to \$1 in tax increases is a pretty darn good deal. And none of them, you know, went for it.

BARBOUR: Well, Candy, I don't feel bad about having a Republican field that knows better than to negotiate against yourself with the news media.

Now I suspect, if you got down into a room where you were actually negotiating how that you're going to try to get this country's economy out of the terrible shape it's in right now and get some Americans back to work because unemployment is so high, in the reality of that, yeah, I think there would be a lot more compromise than you see when the news media says, well, stake out your position so the Democrats can, or your opponents can throw rocks at it.

You know, I am somebody that -- I had a Democratic legislature for seven years. And so I never got everything I wanted, and I don't think these guys think they'll get everything they wanted. But you shouldn't bid against yourself for the -- for the benefit of the news media.

CROWLEY: I spoke with Senator Lindsey Graham not too long ago on this program. And one of the things he said was he believes that the presidency -- speaking of Republicans -- the presidency, he said, is "ours to lose."

Do you agree with that assessment?

BARBOUR: Well, I actually think that the incumbent is always the favorite. President Obama has some terrible weaknesses you were just talking about, 43 percent re-elected in Ohio, a state that he must win in order to get re-elected. The economy is terrible, and the American people understand that the -- the weak economy and the failure to create jobs is because of Obama's policies. It's not in spite of his policies.

They know that his calling for huge tax increases on employers makes it harder for people to get hired. When you don't know what you're going to have to pay or what your obligations going to be for your employees' health insurance, how do you hire more people?

So I don't agree that we are the favorite. I think the president's the favorite, but he can't run on his record. If this is a referendum on Obama's policies, results...

CROWLEY: Sorry...

BARBOUR: ... he'll lose.

CROWLEY: Sorry to cut you off here, but, Governor, thank you so much for your time. We appreciate it.

BARBOUR: Thank you.

CROWLEY: Thank you all for watching "State of the Union." I'm Candy Crowley in Washington.

Weather forecast

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