

are 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 commanded the Expeditionary Strike Group 5 and served as the Commander of U.S. Naval Forces Southern Command and U.S. 4th Fleet. As the Vice 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 assist with the supervision of 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 Qa'ida 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 killing," 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-Aulaqi was

authorized, 4) the factual basis for the “targeted killing” of al-Aulaqi, 5) the factual basis for the killing of Samir Khan, and 6) the factual basis for the killing of Ahdulrahman al-Aulaqi. The request was also sent to the Department of Justice and its component Office of Legal Counsel (OLC), and the Central Intelligence Agency (CIA).

4. The purpose of this declaration is to address the Department of Defense’s withholding of documents located in the DoD search for records. That search was described in earlier declarations in this litigation by Lieutenant General Robert R. Neller, USMC, dated June 20, 2012, and Mark Herrington, dated August 8, 2012. That search located 80 responsive documents. All of the responsive documents are classified and exempt from disclosure pursuant to 5 U.S.C. § 552(b)(1). Certain of the responsive documents are also protected by the deliberative process privilege, the attorney/client privilege and/or the presidential communications privilege, and thus exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5).

APPLICABLE EXEMPTIONS

5. 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.

6. 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.”

7. 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.

8. In Section 1.3(a)(2) of 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.

9. FOIA Exemption 5, 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 deliberative process, attorney-client and presidential communications privileges.

DOCUMENTS WITHHELD BY DOD

Copies of the Disclosed OLC Memoranda

10. Documents 5 and 7 are copies of the two OLC memoranda that have been partially released in this litigation. See OLC Index nos. 5, 4. These documents have already been litigated and the propriety of the redactions in the released versions has been upheld by the Second Circuit and this Court. Documents 8, 14, and 19-21 are additional copies of those memoranda, which also contain highlights or written notes by DoD attorneys. Those notes are exempt from disclosure under Exemption 5 as deliberative process privileged. These notes were made in preparation for briefing senior DoD leadership regarding legal analysis to inform possible military operations, and disclosure would have a chilling effect on operational planning discussions and impede military decision-making. Document 1 is a classified cover memo from the DoD General Counsel to the Secretary of Defense with the two OLC memoranda attached. The cover memo is an attorney/client privileged communication and is properly withheld under Exemption 5. This communication was from an attorney to his client intended to be privileged and has not previously been disclosed. The cover memo also contains classified information regarding intelligence and possible military operations and has also been withheld pursuant to Exemption 1. Document 15 is a draft version of the cover memo; in addition to the bases for withholding document 1, this draft document is predecisional and deliberative and its disclosure would have a chilling effect on operational planning discussions and impede military decision-making.

Discussions Regarding the Disclosed OLC Memoranda

11. Documents 2-4, 18, and 22 are email communications and notes within DoD and between DoD and other Government agencies regarding the two disclosed OLC memoranda.

These communications concern draft legal analysis and factual questions posed during the preparation of those memoranda. These communications are both attorney/client and deliberative process privileged. Even though portions of the final legal advice in these memoranda have been deemed waived by the Second Circuit and released, the communications and deliberations undertaken to reach those opinions remain privileged. These communications were intended to be privileged and have not previously been disclosed. Further, they are predecisional and deliberative and their disclosure would have a chilling effect on operational planning discussions and impede military decision-making. These documents also contain currently and properly classified material regarding intelligence sources and methods and military plans, weapons, or systems, which material is also withheld under Exemption 1.

Drafts, Communications, and Notes Regarding the Classified DOJ White Paper

12. Documents 10 and 17 are draft versions of the classified DOJ white paper that has previously been redacted and released in this matter. See OLC Index no. 9. Documents 11-13 are communications and notes regarding the drafts of the classified DOJ white paper. These documents contain currently and properly classified information and are withheld pursuant to Exemption 1. Additionally, they are predecisional and deliberative in nature and contain attorney/client communications and are also withheld under Exemption 5. These communications were intended to be privileged and have not previously been disclosed. Further, they are predecisional and deliberative, and their disclosure would have a chilling effect on intra and interagency deliberations.

Documents Explained in Other Declarations

13. Document 9 is a copy of Document 1 on the OLC index and document 16 is a copy of document 14 on the CIA index. The propriety of the withholding of these documents is

already fully addressed in other submissions before this Court, and other declarants have fully addressed the applicable exemptions.

Documents Containing Factual Information Regarding Anwar al-Aulaqi

14. The documents withheld by DOD also include factual information regarding Aulaqi. This information is similar to the intelligence information and operational details in the OLC-DOD Memorandum that the Second Circuit held remain properly classified and exempt from disclosure, and that this Court determined could be properly withheld from the February 2010 Aulaqi memorandum. Compromising such sensitive intelligence sources and methods would harm national security by permitting adversaries to thwart U.S. intelligence collection and counterterrorism measures. There is no reasonably segregable, non-exempt material contained within any of these documents. They are therefore properly withheld under Exemption 1.

15. Additionally, to the extent these factual documents were provided to attorneys in connection with a request for legal advice, they are further exempt as confidential attorney/client communications and are properly withheld under Exemption 5.

Other Documents Withheld by DoD

16. I cannot discuss, in an unclassified forum, the bases for withholding the remaining responsive DoD documents. Those documents are described in my second classified, *ex parte* declaration, and in the classified index of responsive records that is annexed to my classified declaration. The classified index includes details, such as dates and specific descriptions of documents, which remain classified.

17. Annexed hereto is an unclassified index that omits these classified details. Beyond the listings in the annexed unclassified index and the descriptions of the documents contained in this unclassified declaration, DoD cannot further describe the types or dates of

responsive records because to do so would reveal the classified information described above, and in my classified, *ex parte* declaration.

Partial Glomar

18. Plaintiffs' request includes records pertaining to the "factual basis for the killing" of Samir Khan and Abdulrahman al-Aulaqi. In a letter to the Senate Judiciary Committee dated May 22, 2013, the Attorney General disclosed that Samir Khan and Abdulrahman al-Aulaqi were killed in the course of U.S. counterterrorism operations, but stated that "these individuals were not specifically targeted by the United States." In a later speech at the National Defense University, President Obama emphasized the "necessary secrecy" of these operations. Notwithstanding the limited official acknowledgment that these two individuals were killed in the course of U.S. counterterrorism operations, the specifics of those operations remain classified.

19. Accordingly, DoD can neither confirm nor deny having responsive records pertaining to these individuals without revealing classified information, and asserts Exemption 1 as to whether or not it has records responsive to those portions of Plaintiffs' request. The existence or nonexistence of such records could indicate whether DoD had an intelligence interest in the two individuals and/or whether DoD had an operational role in specific counterterrorism operations, and if so, could demonstrate the nature, depth, and breadth of those interests or activities. Additionally, confirming or denying the existence of responsive records could reveal whether CIA did or did not have authority to participate in particular counterterrorism operations or gather intelligence on particular individuals. Revealing the sensitive specifics of U.S. counterterrorism activities, including whether DOD had information regarding specific individuals or an operational role in specific operations, could provide

valuable insight to terrorist organizations and allow them alter their activities in order to frustrate U.S. efforts to combat terrorism.

20. All of the documents and information withheld by DoD are currently and properly classified. The information is owned by and under the control of the U.S. government. I have determined that the information 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.

21. I am familiar with the Second Circuit's opinion in this litigation, and the waiver that was found by that Court does not apply to these documents, beyond those portions of the two OLC memoranda previously released. There is no additional reasonably segregable non-exempt information among the documents withheld by DoD.

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

Executed this 14 day of November 2014 in Arlington, VA.



Rear Admiral Sinclair M. Harris, USN
Vice Director of Operations, J-3, Joint Staff