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

United States Court of Appeals

for the

Second Circuit

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.

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

JOINT APPENDIX
Volume 1 of 3 (Pages JA001 to JA278)

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CLOSED, APPEAL, ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:11-cv-09336-CM

The New York Times Company et al v. United States Department of Justice
Assigned to: Judge Colleen McMahon
Related Case: 1:12-cv-00794-CM
Cause: 05:552 Freedom of Information Act

Date Filed: 12/20/2011
Date Terminated: 01/24/2013
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

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JA001

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Date Filed	#	clear	Docket Text
12/20/2011	1	2.4 MB	COMPLAINT against United States Department of Justice. (Filing Fee $ 350.00, Receipt Number 4996)Document filed by The New York Times Company, Charlie Savage, Scott Shane.(ama) (Entered: 12/22/2011)
12/20/2011			SUMMONS ISSUED as to United States Department of Justice, U.S. Attorney and U.S. Attorney General. (ama) (Entered: 12/22/2011)
12/20/2011			Magistrate Judge James C. Francis IV is so designated. (ama) (Entered: 12/22/2011)
12/20/2011			Case Designated ECF. (ama) (Entered: 12/22/2011)
12/20/2011	2	171.4 KB	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Charlie Savage, Scott Shane, The New York Times Company.(ama) (Entered: 12/22/2011)
01/10/2012	3	52.5 KB	ORDER SCHEDULING AN INITIAL PRETRIAL CONFERENCE: Initial Conference set for 2/24/2012 at 11:30 AM in Courtroom 14C, 500 Pearl Street, New York, NY 10007 before Judge Colleen McMahon. Additional relief as set forth in this Order. (Signed by Judge Colleen McMahon on 1/10/12) (pl) (Entered: 01/10/2012)
01/13/2012	4	224.0 KB	NOTICE OF APPEARANCE by Sarah Sheive Normand on behalf of United States Department of Justice (Normand, Sarah) (Entered: 01/13/2012)
01/23/2012	5	304.2 KB	ANSWER to 1 Complaint. Document filed by United States Department of Justice.(Normand, Sarah) (Entered: 01/23/2012)
02/24/2012			Minute Entry for proceedings held before Judge Colleen McMahon: Initial Pretrial Conference held on 2/24/2012. Decision: Initial conference held. A briefing schedule was entered. The Government must move before April 13, 2012; responses to its motion are due May 11, 2012, at which time the opponents are free to cross-move; and the Governments reply and, if appropriate, opposition to the cross-motion is due May 25, 2012. Cross-movants should not file a reply unless instructed to do so by the Court. (Submitted By Scott Danner). (mde) (Entered: 02/24/2012)
04/09/2012	6	209.8 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Sarah S Normand dated 4/9/2012 re: Request for a ten day extension of time to file a motion for summary judgment and to file a consolidated brief of up to 40 pages in both cases. ENDORSEMENT: Ok, but dont ask for any more time. If government official can give speeches about this matter without creating security problem, any involved agency can.

			(Signed by Judge Colleen McMahon on 4/9/2012) (cd) (Entered: 04/09/2012)
04/23/2012	7	67.7 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Stuart Delery and Preet Bharara dated 4/23/2012 re: We write respectfully on behalf of the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the "Government") to seek a further extension, until May 21, 2012, of the Government's deadline to file its consolidated motion for summary judgment. ENDORSEMENT: I have read Director Clapper's declaration (which must remain under seal - believe me, I appreciate the irony) and I will grant the extension requested by the government. The time to file its motion is extended to May 21, 2012. (Motions due by 5/21/2012.) (Signed by Judge Colleen McMahon on 4/23/2012) (rjm) (Entered: 04/23/2012)
04/23/2012	8	67.7 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Stuart Delery and Preet Bharara dated 4/23/12 re: Counsel for the defendant requests a further extension, until 5/21/12, of the Government's deadline to file his consolidated motion for summary judgment. ENDORSEMENT: I have read Director Clepper's declaration (which must remain under seal-believe me, I appreciate the irony) and I will grant the extension requested by the government. The time to file its motion is extended to May 21, 2012. (Motions due by 5/21/2012.) (Signed by Judge Colleen McMahon on 4/23/2012) (mro) (Entered: 04/24/2012)
05/21/2012			Minute Entry for proceedings held before Judge Colleen McMahon: Telephone Conference held on 5/21/2012. Decision: Phone conference held. Defendants must move on or before June 20, 2012. Plaintiffs have four weeks thereafter to file responses.(Submitted By Benjamin T. Alden). (mde) (Entered: 05/21/2012)
06/19/2012	9	50.7 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Susan S. Normand dated 6/18/12 re: Counsel for the Government seeks leave to file a consolidated brief of up to fifty pages in both cases in support of the Government's motion for summary judgment. ENDORSEMENT: Ok. (Signed by Judge Colleen McMahon on 6/19/2012) (mro) (Entered: 06/19/2012)
06/20/2012	10	282.8 KB	MOTION for Summary Judgment. Document filed by United States Department of Justice.(Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	11	6.7 MB	DECLARATION of Sarah S. Normand in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	12	152.8 KB	MEMORANDUM OF LAW in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 06/20/2012)

JA003

06/21/2012	13	1.4 MB	DECLARATION of John F. Hackett in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	14	14.5 MB	DECLARATION of John Bennett in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	15	4.4 MB	DECLARATION of John E. Bies in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	16	5.4 MB	DECLARATION of Robert R. Neller in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	17	10.9 MB	DECLARATION of Douglas R. Hibbard in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	18	283.3 KB	NOTICE of Classified Filing re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 06/21/2012)
07/18/2012	19	386.2 KB	CROSS MOTION for Summary Judgment. Document filed by Charlie Savage, Scott Shane, The New York Times Company.(McCraw, David) (Entered: 07/18/2012)
07/18/2012	20	2.3 MB	MEMORANDUM OF LAW in Support re: 19 CROSS MOTION for Summary Judgment.. Document filed by Charlie Savage, Scott Shane, The New York Times Company. (McCraw, David) (Entered: 07/18/2012)
07/18/2012	21	12.3 MB	DECLARATION of NABIHA SYED in Support re: 19 CROSS MOTION for Summary Judgment.. Document filed by Charlie Savage, Scott Shane, The New York Times Company. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit)(McCraw, David) (Entered: 07/18/2012)
07/20/2012	22		ENDORSED LETTER addressed to Judge Colleen McMahon from Sarah S. Normand dated 7/20/2012 re: We write respectfully on behalf of defendants the Department of Justice and its component, the Office of Legal Counsel; the Department of Defense and its component, the United States Special Operations Command; and the Central Intelligence

JA004

		56.8 KB	Agency (collectively, the "Government") in the above-named related cases brought pursuant to the Freedom of Information Act ("FOIA") to request that the Court set a deadline of August 8, 2012, for the filing of the Government's reply and opposition to plaintiffs' respective cross-motions in these cases. ENDORSEMENT: OK., (Responses due by 8/8/2012., Replies due by 8/8/2012.) (Signed by Judge Colleen McMahon on 7/20/2012) (lmb) (Entered: 07/20/2012)
08/08/2012	23	463.8 KB	REPLY MEMORANDUM OF LAW in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/08/2012	24	34.7 KB	DECLARATION of Douglas Hibbard in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/09/2012	25	344.1 KB	DECLARATION of Mark Herrington in Support re: 10 MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	26	463.8 KB	MEMORANDUM OF LAW in Opposition re: 19 CROSS MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	27	344.1 KB	DECLARATION of Mark Herrington in Opposition re: 19 CROSS MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	28	34.7 KB	DECLARATION of Douglas Hibbard in Opposition re: 19 CROSS MOTION for Summary Judgment.. Document filed by United States Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/27/2012	29	3.3 MB	REPLY MEMORANDUM OF LAW in Support re: 19 CROSS MOTION for Summary Judgment.. Document filed by Charlie Savage, Scott Shane, The New York Times Company. (McCraw, David) (Entered: 08/27/2012)
09/21/2012	30	38.1 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from David McCraw dated 9/21/2012 re: Plaintiffs and Defendant respectfully ask for permission to submit on or before October 1, 2012 three-page letters discussing the significance of the new decision for the pending summary judgment motions. ENDORSEMENT: Excellent idea - we have been reading the decision carefully. (Signed by Judge Colleen McMahon on 9/21/2012) (rjm) (Entered: 09/21/2012)
10/02/2012	31	53.0 KB	ENDORSED LETTER addressed to Judge Colleen McMahon, from Sarah S. Normand, dated 10/1/2012, re: on behalf of defendants, request an unopposed extension of time, until October 10, 2012, for the parties to submit simultaneous supplemental letter briefs addressing the Second Circuit's recent decision in Brennan Center v. Department of Justice, No. 11-4599 (2d Cir. Sept. 20, 2012). ENDORSEMENT: OK. (Signed by Judge Colleen McMahon on 10/2/2012) (ja) (Entered: 10/02/2012)

JA005

01/02/2013	32	0.6 MB	ORDER: #102747 terminating 10 Motion for Summary Judgment; terminating 19 Motion for Summary Judgment. The Government's motion for summary judgment is granted except to the extent of permitting the DoD to submit a supplemental and more fulsome justification for why the deliberative process privilege applies to the two Unclassified Memos on its Vaughn Index. Plaintiffs' cross motions for summary judgment are denied except as to the open issue described above. This constitutes the decision and order of the Court. The Clerk of the Court is directed to remove the motions at Docket 11 Civ. 9336 # 10 and 19 and Docket 12 Civ. 794 # 24 and 34 from the Court's list of open motions.(Signed by Judge Colleen McMahon on 1/2/2013) (ago) (Additional attachment(s) added on 1/2/2013: # 1 Order) (mde). Modified on 1/7/2013 (jab). (Entered: 01/02/2013)
01/03/2013	33	0.6 MB	CORRECTED OPINION GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT: #102747 The Government's motion for summary judgment is granted except to the extent of permitting the DoD to submit a supplemental and more detailed justification for why the deliberative process privilege applies to the two Unclassified Memos on its Vaughn Index. Plaintiffs' cross motions for summary judgment are denied except as to the open issue described above. This constitutes the decision and order of the Court. The Clerk of the Court is directed to remove the motions at Docket 11 Civ. 9336 # 10 and 19 and Docket 12 Civ. 794 # 24 and 34 from the Court's list of open motions. (Signed by Judge Colleen McMahon on 1/3/2013) Copies Sent By ECF By Chambers. (cd) Modified on 1/7/2013 (jab). (Entered: 01/03/2013)
01/15/2013	38	6.1 MB	INTERNET CITATION NOTE: Material from decision with Internet citation re: 33 Memorandum & Opinion. (Attachments: # 1 Internet Citation, # 2 Internet Citation, # 3 Internet Citation, # 4 Internet Citation, # 5 Internet Citation, # 6 Internet Citation, # 7 Internet Citation, # 8 Internet Citation, # 9 Internet Citation, # 10 Internet Citation, # 11 Internet Citation, # 12 Internet Citation, # 13 Internet Citation, # 14 Internet Citation, # 15 Internet Citation) (sj) (Entered: 02/13/2013)
01/18/2013	36	12.3 KB	ORDER: The Government has until 6 PM on February 1, 2013 to submit supplemental declarations justifying the applicability of the deliberative process privilege to the two Unclassified Memos on the Department of Defense's Vaughn Index. (Signed by Judge Colleen McMahon on 1/18/2013) Copies Sent By ECF TO ALL COUNSEL (pl) (Entered: 01/30/2013)
01/22/2013	34	25.8 KB	DECISION AND ORDER: Accordingly, the Government's motion for summary judgment with respect to the Unclassified Memos is granted and Plaintiffs' cross motions for summary judgment are denied. The Clerk of the Court is directed to enter judgment for the Government and to close both cases. This constitutes the decision and order of the Court. (Signed by Judge Colleen McMahon on 1/22/2013) (djc) (Entered: 01/22/2013)

JA006

01/22/2013			Transmission to Judgments and Orders Clerk. Transmitted re: 34 Order, to the Judgments and Orders Clerk. (djc) (Entered: 01/22/2013)
01/24/2013	35	182.3 KB	CLERK'S JUDGMENT That for the reasons stated in the Court's Decision and Order dated January 22, 2013, the Governments motion for summary judgment with respect to the Unclassified Memos is granted and Plaintiffs cross motions for summary judgment are denied; accordingly, both of the cases are closed. (Signed by Clerk of Court Ruby Krajick on 1/24/13) (Attachments: # 1 Notice of Right to Appeal) (dt) (Entered: 01/24/2013)
02/01/2013	37	183.4 KB	NOTICE OF APPEAL from 35 Clerk's Judgment, 33 Memorandum & Opinion,,, 34 Order,. Document filed by Charlie Savage, Scott Shane, The New York Times Company. Filing fee $ 455.00, receipt number 0208-8196082. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (McCraw, David) (Entered: 02/01/2013)
02/01/2013			Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 37 Notice of Appeal,. (nd) (Entered: 02/01/2013)
02/01/2013			Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 32 Order on Motion for Summary Judgment,,,,,,, 13 Declaration in Support of Motion filed by United States Department of Justice, 35 Clerk's Judgment, 11 Declaration in Support of Motion, filed by United States Department of Justice, 23 Reply Memorandum of Law in Support of Motion filed by United States Department of Justice, 21 Declaration in Support of Motion, filed by The New York Times Company, Scott Shane, Charlie Savage, 9 Endorsed Letter, 16 Declaration in Support of Motion, filed by United States Department of Justice, 15 Declaration in Support of Motion, filed by United States Department of Justice, 19 CROSS MOTION for Summary Judgment. filed by The New York Times Company, Scott Shane, Charlie Savage, 12 Memorandum of Law in Support of Motion filed by United States Department of Justice, 14 Declaration in Support of Motion, filed by United States Department of Justice, 22 Endorsed Letter, Set Deadlines,,,,,,, 6 Endorsed Letter, 28 Declaration in Opposition to Motion filed by United States Department of Justice, 17 Declaration in Support of Motion, filed by United States Department of Justice, 3 Order for Initial Pretrial Conference, 27 Declaration in Opposition to Motion filed by United States Department of Justice, 24 Declaration in Support of Motion filed by United States Department of Justice, 7 Endorsed Letter, Set Deadlines,,,, 2 Rule 7.1 Corporate Disclosure Statement filed by The New York Times Company, Scott Shane, Charlie Savage, 36 Order, 8 Endorsed Letter, Set Deadlines,,,, 1 Complaint filed by The New York Times Company, Scott Shane, Charlie Savage, 5 Answer to Complaint filed by United States Department of Justice, 29 Reply Memorandum of Law in Support of Motion filed by The New York Times Company, Scott Shane, Charlie Savage, 10 MOTION for Summary Judgment. filed by United States Department of Justice, 26 Memorandum of Law in Opposition to Motion filed by United States Department of Justice, 37

			Notice of Appeal, filed by The New York Times Company, Scott Shane, Charlie Savage, 25 Declaration in Support of Motion filed by United States Department of Justice, 4 Notice of Appearance filed by United States Department of Justice, 18 Notice (Other) filed by United States Department of Justice, 30 Endorsed Letter, 20 Memorandum of Law in Support of Motion filed by The New York Times Company, Scott Shane, Charlie Savage, 33 Memorandum & Opinion,,, 31 Endorsed Letter, 34 Order, were transmitted to the U.S. Court of Appeals. (nd) (Entered: 02/01/2013)

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Description:	Docket Report	**Search Criteria:**	1:11-cv-09336-CM
Billable Pages:	6	**Cost:**	0.60

JA008

CLOSED, APPEAL, ECF, RELATED

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:12-cv-00794-CM

American Civil Liberties Union et al v. U.S. Department of Justice et al
Assigned to: Judge Colleen McMahon
Related Case: 1:11-cv-09336-CM
Cause: 05:552 Freedom of Information Act

Date Filed: 02/01/2012
Date Terminated: 01/24/2013
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

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TERMINATED: 10/04/2012

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TERMINATED: 01/09/2013

Plaintiff

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JA010

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Joshua Nicholas Colangelo-Bryan
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Michael P Weinbeck
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TERMINATED: 10/04/2012

Nathan Freed Wessler
(See above for address)
TERMINATED: 01/09/2013

V.

Defendant

U.S. Department of Justice
including its component the Office of Legal Counsel

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Defendant

U.S. Department of Defense
including its component U.S. Special Operations Command

represented by **Sarah Sheive Normand**
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ATTORNEY TO BE NOTICED

JA011

Defendant

Central Intelligence Agency represented by **Sarah Sheive Normand**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	clear	Docket Text
02/01/2012	1	1.3 MB	COMPLAINT against Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Filing Fee $ 350.00, Receipt Number 465401028481)Document filed by The American Civil Liberties Union Foundation, American Civil Liberties Union.(mro) (Entered: 02/01/2012)
02/01/2012			SUMMONS ISSUED as to Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice, U.S. Attorney and U.S. Attorney General. (mro) (Entered: 02/01/2012)
02/01/2012			CASE REFERRED TO Judge Colleen McMahon as possibly related to 11-cv-9336. (mro) (Entered: 02/01/2012)
02/01/2012			Case Designated ECF. (mro) (Entered: 02/01/2012)
02/02/2012			CASE ACCEPTED AS RELATED. Create association to 1:11-cv-09336-CM. Notice of Assignment to follow. (pgu) (Entered: 02/02/2012)
02/02/2012	2	17.8 KB	NOTICE OF CASE ASSIGNMENT to Judge Colleen McMahon. Judge Unassigned is no longer assigned to the case. (pgu) (Entered: 02/02/2012)
02/02/2012			Magistrate Judge James C. Francis IV is so designated. (pgu) (Entered: 02/02/2012)
02/02/2012	3	53.1 KB	ORDER SCHEDULING AN INITIAL PRETRIAL CONFERENCE: Initial Conference set for 2/24/2012 at 11:30 AM in Courtroom 14C, 500 Pearl Street, New York, NY 10007 before Judge Colleen McMahon. (Signed by Judge Colleen McMahon on 2/2/2012) (mro) (Entered: 02/02/2012)
02/03/2012	4	279.5 KB	NOTICE OF APPEARANCE by Sarah Sheive Normand on behalf of Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice (Normand, Sarah) (Entered: 02/03/2012)
02/08/2012	11	0.5 MB	MOTION for Eric A.O. Ruzicka to Appear Pro Hac Vice. Document filed by The American Civil Liberties Union Foundation.(sjo) (Entered: 02/16/2012)
02/08/2012	12	0.5 MB	MOTION for Colin Wicker to Appear Pro Hac Vice. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(sjo) (Entered: 02/16/2012)

JA012

02/08/2012	13	0.5 MB	MOTION for Michael P. Weinbeck to Appear Pro Hac Vice. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(sjo) (Entered: 02/16/2012)
02/09/2012	5	403.2 KB	SUMMONS RETURNED EXECUTED. U.S. Department of Justice served on 2/3/2012, answer due 2/24/2012. Service was made by Mail. Document filed by The American Civil Liberties Union Foundation; American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	6	402.4 KB	SUMMONS RETURNED EXECUTED. Central Intelligence Agency served on 2/3/2012, answer due 2/24/2012. Service was made by mail. Document filed by The American Civil Liberties Union Foundation; American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	7	395.3 KB	SUMMONS RETURNED EXECUTED. U.S. Department of Defense served on 2/3/2012, answer due 2/24/2012. Service was made by mail. Document filed by The American Civil Liberties Union Foundation; American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	8	395.3 KB	SUMMONS RETURNED EXECUTED. Service was made by mail. Document filed by The American Civil Liberties Union Foundation, American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/09/2012	9	404.2 KB	CERTIFICATE OF SERVICE of Summons Returned Executed served on United States Attorney for the Southern District of New York on 2/3/12. Service was made by Mail. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Colangelo-Bryan, Joshua) (Entered: 02/09/2012)
02/10/2012	10	403.4 KB	SUMMONS RETURNED EXECUTED. Service was made by mail. Document filed by The American Civil Liberties Union Foundation, American Civil Liberties Union. (Colangelo-Bryan, Joshua) (Entered: 02/10/2012)
02/16/2012			CASHIERS OFFICE REMARK on 13 Motion to Appear Pro Hac Vice, 11 Motion to Appear Pro Hac Vice, 12 Motion to Appear Pro Hac Vice in the amount of $600.00, paid on 02/08/2012, Receipt Number 1029168,1029169,1029170. (jd) (Entered: 02/16/2012)
02/17/2012	14	22.8 KB	ORDER FOR ADMISSION PRO HAC VICE granting 13 Motion for Michael P. Weinbeck to Appear Pro Hac Vice. (Signed by Judge Colleen McMahon on 2/17/2012) (tro) (Entered: 02/17/2012)
02/17/2012	15	21.4 KB	ORDER FOR ADMISSION PRO HAC VICE granting 12 Motion for Colin Wicker to Appear Pro Hac Vice. (Signed by Judge Colleen McMahon on 2/17/2012) (tro) (Entered: 02/17/2012)
02/17/2012	16	21.7 KB	ORDER FOR ADMISSION PRO HAC VICE granting 11 Motion for Eric A.O. Ruzicka to Appear Pro Hac Vice. (Signed by Judge Colleen

			McMahon on 2/17/2012) (tro) (Entered: 02/17/2012)
02/24/2012			Minute Entry for proceedings held before Judge Colleen McMahon: Initial Pretrial Conference held on 2/24/2012. Decision: Initial conference held. A briefing schedule was entered. The Government must move before April 13, 2012; responses to its motion are due May 11, 2012, at which time the opponents are free to cross-move; and the Governments reply and, if appropriate, opposition to the cross-motion is due May 25, 2012. Cross-movants should not file a reply unless instructed to do so by the Court. (Submitted By Scott Danner). (mde) (Entered: 02/24/2012)
03/05/2012	17	305.0 KB	ANSWER to 1 Complaint,. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 03/05/2012)
04/04/2012	18	37.8 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A.O. Ruzicka dated 4/3/2012 re: I am writing pursuant to Rule IV.C of this Court's Individual Practices and Procedures to request a page-limit extension to the ACLU's briefing in this matter. The ACLU respectfully requests that the Court permit it to submit a brief not to exceed 40 pages. ENDORSEMENT: OK. (Signed by Judge Colleen McMahon on 4/4/2012) (rjm) (Entered: 04/04/2012)
04/09/2012	19	209.8 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Sarah S Normand dated 4/9/2012 re: Request for a ten day extension of time to file a motion for summary judgment and to file a consolidated brief of up to 40 pages in both cases. ENDORSEMENT: Ok, but dont ask for any more time. If government official can give speeches about this matter without creating security problem, any involved agency can. (Signed by Judge Colleen McMahon on 4/9/2012) (cd) (Entered: 04/09/2012)
04/20/2012	20	37.4 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated 4/19/2012 re: Counsel requests a ten-day extension of Plaintiff ACLU's deadline to file its Response to the Government's Motion for Summary Judgment. ENDORSEMENT: Yes, everything moves back 10 days. (Signed by Judge Colleen McMahon on 4/19/2012) (djc) (Entered: 04/20/2012)
04/23/2012	21	67.7 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Stuart Delery and Preet Bharara dated 4/23/2012 re: We write respectfully on behalf of the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the "Government") to seek a further extension, until May 21, 2012, of the Government's deadline to file its consolidated motion for summary judgment. ENDORSEMENT: I have read Director Clapper's declaration (which must remain under seal - believe me, I appreciate the irony) and I will grant the extension requested by the government. The time to file its motion is extended to May 21, 2012. (Motions due by 5/21/2012.) (Signed by Judge Colleen McMahon on 4/23/2012) (rjm) (Entered: 04/23/2012)

04/23/2012	22	67.7 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Stuart Delery and Preet Bharara dated 4/23/12 re: Counsel for the defendant requests a further extension, until 5/21/12, of the Government's deadline to file his consolidated motion for summary judgment. ENDORSEMENT: I have read Director Clepper's declaration (which must remain under seal-believe me, I appreciate the irony) and I will grant the extension requested by the government. The time to file its motion is extended to May 21, 2012. (Motions due by 5/21/2012.) (Signed by Judge Colleen McMahon on 4/23/2012) (mro) (Entered: 04/24/2012)
05/21/2012			Minute Entry for proceedings held before Judge Colleen McMahon: Telephone Conference held on 5/21/2012. Decision: Phone conference held. Defendants must move on or before June 20, 2012. Plaintiffs have four weeks thereafter to file responses.(Submitted By Benjamin T. Alden). (mde) (Entered: 05/21/2012)
06/19/2012	23	50.7 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Susan S. Normand dated 6/18/12 re: Counsel for the Government seeks leave to file a consolidated brief of up to fifty pages in both cases in support of the Government's motion for summary judgment. ENDORSEMENT: Ok. (Signed by Judge Colleen McMahon on 6/19/2012) (mro) (Entered: 06/19/2012)
06/20/2012	24	282.8 KB	MOTION for Summary Judgment. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice.(Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	25	152.8 KB	MEMORANDUM OF LAW in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	26	6.7 MB	DECLARATION of Sarah S. Normand in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J) (Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	27	1.4 MB	DECLARATION of John F. Hackett in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/20/2012)
06/20/2012	28	14.5 MB	DECLARATION of John Bennett in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	29		DECLARATION of John E. Bies in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency,

		4.4 MB	U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	30	5.4 MB	DECLARATION of Robert R. Neller in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J) (Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	31	10.9 MB	DECLARATION of Douglas R. Hibbard in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Normand, Sarah) (Entered: 06/21/2012)
06/21/2012	32	283.3 KB	NOTICE of Classified Filing re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 06/21/2012)
07/18/2012	33	36.0 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated 7/17/2012 re: I am writing today to request that the page limit for the American Civil Liberties Union and American Civil Liberties Union Foundation's (collectively, the ACLU) memorandum of law in support of their motion for summary judgment and in opposition to the government's motion for summary judgment be increased by ten pages to a total of fifty pages.ENDORSEMENT: Ok. (Signed by Judge Colleen McMahon on 7/18/2012) (ama) (Entered: 07/18/2012)
07/18/2012	34	9.2 KB	MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]*. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Wicker, Colin) (Entered: 07/18/2012)
07/18/2012	35	151.3 KB	MEMORANDUM OF LAW in Support re: 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]. [MEMORANDUM IN SUPPORT OF PLAINTIFFS THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT]*. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Wicker, Colin) (Entered: 07/18/2012)
07/18/2012	36	19.9 MB	DECLARATION of COLIN WICKER in Support re: 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]*.. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Attachments: # 1 Exhibit EXHIBITS 1-5, # 2 Exhibit EXHIBITS 6-10,

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			# 3 Exhibit EXHIBITS 11-17, # 4 Exhibit EXHIBIT 18, # 5 Exhibit EXHIBITS 19 AND 20, EX 20, PART 1 OF 2, # 6 Exhibit EXHIBIT 20, PART 2 OF 2, # 7 Exhibit EXHIBIT 21-24)(Wicker, Colin) (Entered: 07/18/2012)
07/20/2012	37	56.8 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Sarah S. Normand dated 7/20/2012 re: We write respectfully on behalf of defendants the Department of Justice and its component, the Office of Legal Counsel; the Department of Defense and its component, the United States Special Operations Command; and the Central Intelligence Agency (collectively, the "Government") in the above-named related cases brought pursuant to the Freedom of Information Act ("FOIA") to request that the Court set a deadline of August 8, 2012, for the filing of the Government's reply and opposition to plaintiffs' respective cross-motions in these cases. ENDORSEMENT: OK., (Responses due by 8/8/2012., Replies due by 8/8/2012.) (Signed by Judge Colleen McMahon on 7/20/2012) (lmb) (Entered: 07/20/2012)
08/08/2012	38	463.8 KB	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/08/2012	39	344.1 KB	DECLARATION of Mark Herrington in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/08/2012	40	34.7 KB	DECLARATION of Douglas Hibbard in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/08/2012)
08/09/2012	41	463.8 KB	MEMORANDUM OF LAW in Opposition re: 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]*.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	42	344.1 KB	DECLARATION of Mark Herrington in Opposition re: 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]*.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/09/2012	43	34.7 KB	DECLARATION of Douglas Hibbard in Opposition re: 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]*.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 08/09/2012)
08/16/2012	44		**FILING ERROR - DEFICIENT DOCKET ENTRY** - MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF*

		33.1 KB	*MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL*. Document filed by American Civil Liberties Union. (Attachments: # 1 Affidavit of Michael P. Weinbeck in Support of Application to Withdraw as Counsel, # 2 Affidavit of Service, # 3 proposed Order)(Weinbeck, Michael) Modified on 8/16/2012 (db). (Entered: 08/16/2012)
08/16/2012			***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DEFICIENT DOCKET ENTRY ERROR. Note to Attorney Michael P Weinbeck to RE-FILE Document 44 MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL*. ERROR(S): Supporting Documents are filed separately, each receiving their own document #. (db)** (Entered: 08/16/2012)
08/16/2012	45	8.4 KB	MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL*. Document filed by American Civil Liberties Union. (Weinbeck, Michael) (Entered: 08/16/2012)
08/16/2012	46	9.1 KB	AFFIDAVIT of MICHAEL P. WEINBECK in Support re: 45 MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL*.. Document filed by American Civil Liberties Union. (Weinbeck, Michael) (Entered: 08/16/2012)
08/16/2012	47	8.1 KB	AFFIDAVIT OF SERVICE of APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL served on Sarah S. Normand on 08/16/12. Service was accepted by BY ECF FILING SYSTEM. Document filed by American Civil Liberties Union. (Weinbeck, Michael) (Entered: 08/16/2012)
08/22/2012	48	77.6 KB	ENDORSED LETTER addressed to Judge Colleen McMahon from Eric A. O. Ruzicka dated 8/13/2012 re: request leave to file a reply brief of no more than 10 pages by 8/24/2012 also ask that an oral argument be scheduled for this matter. ENDORSEMENT: Ok. (Replies due by 8/24/2012.) (Signed by Judge Colleen McMahon on 8/20/2012) (jar) (Entered: 08/22/2012)
08/24/2012	49	35.7 KB	REPLY MEMORANDUM OF LAW in Support re: 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]. [REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT]*. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 08/24/2012)
08/24/2012	50	7.3 KB	AFFIDAVIT OF SERVICE of Reply Memorandum served on Sarah S. Normand on 08/24/2012. Service was accepted by by ECF filiing system. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 08/24/2012)

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10/02/2012	51	53.0 KB	ENDORSED LETTER addressed to Judge Colleen McMahon, from Sarah S. Normand, dated 10/1/2012, re: on behalf of defendants, request an unopposed extension of time, until October 10, 2012, for the parties to submit simultaneous supplemental letter briefs addressing the Second Circuit's recent decision in Brennan Center v. Department of Justice, No. 11-4599 (2d Cir. Sept. 20, 2012). ENDORSEMENT: OK. (Signed by Judge Colleen McMahon on 10/2/2012) (ja) (Entered: 10/02/2012)
10/04/2012	52	23.7 KB	APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL: granting 45 Motion to Withdraw as Attorney. Attorney Michael P Weinbeck terminated.ENDORSEMENT: GRANTED. (Signed by Judge Colleen McMahon on 10/04/2012) (ama) (Entered: 10/04/2012)
10/05/2012	53	269.0 KB	NOTICE OF APPEARANCE by Brett Max Kaufman on behalf of American Civil Liberties Union, The American Civil Liberties Union Foundation (Kaufman, Brett) (Entered: 10/05/2012)
10/10/2012	54	9.8 KB	MOTION for Nathan Freed Wessler to Withdraw as Attorney. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation.(Wessler, Nathan) (Entered: 10/10/2012)
01/02/2013	55	0.6 MB	ORDER terminating 34 Motion for Summary Judgment; terminating 24 Motion for Summary Judgment. The Government's motion for summary judgment is granted except to the extent of permitting the DoD to submit a supplemental and more fulsome justification for why the deliberative process privilege applies to the two Unclassified Memos on its Vaughn Index. Plaintiffs' cross motions for summary judgment are denied except as to the open issue described above. This constitutes the decision and order of the Court. The Clerk of the Court is directed to remove the motions at Docket 11 Civ. 9336 # 10 and 19 and Docket 12 Civ. 794 # 24 and 34 from the Court's list of open motions.(Signed by Judge Colleen McMahon on 1/2/2013) (ago) (Additional attachment(s) added on 1/2/2013: # 1 Order) (mde). (Entered: 01/02/2013)
01/03/2013	56	0.6 MB	CORRECTED OPINION GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT: The Government's motion for summary judgment is granted except to the extent of permitting the DoD to submit a supplemental and more detailed justification for why the deliberative process privilege applies to the two Unclassified Memos on its Vaughn Index. Plaintiffs' cross motions for summary judgment are denied except as to the open issue described above. This constitutes the decision and order of the Court. The Clerk of the Court is directed to remove the motions at Docket 11 Civ. 9336 # 10 and 19 and Docket 12 Civ. 794 # 24 and 34 from the Court's list of open motions. (Signed by Judge Colleen McMahon on 1/3/2013) Copies Sent By ECF By Chambers. (cd) (Entered: 01/03/2013)
01/09/2013	57	30.2	MOTION OF NATHAN FREED WESSLER TO WITHDRAW AS COUNSEL granting 54 Motion to Withdraw as Attorney. Attorney Nathan Freed Wessler terminated. ENDORSEMENT: GRANTED

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		KB	Remove name from Docket. (Signed by Judge Colleen McMahon on 1/09/2013) (ama) Modified on 1/15/2013 (ama). Modified on 1/17/2013 (ama). (Entered: 01/10/2013)
01/17/2013	58	284.0 KB	**FILING ERROR - ELECTRONIC FILING OF NON-ECF DOCUMENT** - DECLARATION of Brigadier General Richard C. Gross in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) Modified on 1/18/2013 (db). (Entered: 01/17/2013)
01/18/2013			***NOTE TO ATTORNEY THAT THE ATTEMPTED FILING OF Document No. 58 HAS BEEN REJECTED. Note to Attorney Sarah Sheive Normand : THE CLERK'S OFFICE DOES NOT ACCEPT LETTERS FOR FILING, either through ECF or otherwise, except where the judge has ordered that a particular letter be docketed. Letters may be sent directly to a judge. (db) (Entered: 01/18/2013)
01/18/2013	59	184.8 KB	DECLARATION of Brigadier General Richard C. Gross in Support re: 24 MOTION for Summary Judgment.. Document filed by Central Intelligence Agency, U.S. Department of Defense, U.S. Department of Justice. (Normand, Sarah) (Entered: 01/18/2013)
01/18/2013	62	12.3 KB	ORDER: The Government has until 6 PM on February 1, 2013 to submit supplemental declarations justifying the applicability of the deliberative process privilege to the two Unclassified Memos on the Department of Defense's Vaughn Index. (Signed by Judge Colleen McMahon on 1/18/2013) Copies Sent By ECF TO ALL COUNSEL (pl) (Entered: 01/30/2013)
01/22/2013	60	25.8 KB	DECISION AND ORDER: Accordingly, the Government's motion for summary judgment with respect to the Unclassified Memos is granted and Plaintiffs' cross motions for summary judgment are denied. The Clerk of the Court is directed to enter judgment for the Government and to close both cases. This constitutes the decision and order of the Court. (Signed by Judge Colleen McMahon on 1/22/2013) (djc) (Entered: 01/22/2013)
01/24/2013	61	182.3 KB	CLERK'S JUDGMENT That for the reasons stated in the Court's Decision and Order dated January 22, 2013, the Governments motion for summary judgment with respect to the Unclassified Memos is granted and Plaintiffs cross motions for summary judgment are denied; accordingly, both of the cases are closed. original Document # 35 filed in 11 Civ. 9336. (Signed by Clerk of Court Ruby Krajick on 1/24/13) (Attachments: # 1 Notice of Right to Appeal)(dt) (Entered: 01/24/2013)
02/01/2013	63	99.4 KB	**FILING ERROR - NO ORDER SELECTED FOR APPEAL** - NOTICE OF APPEAL. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. Filing fee $ 455.00, receipt number 0208-8197154. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Ruzicka, Eric)

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			Modified on 2/1/2013 (nd). (Entered: 02/01/2013)
02/01/2013			*****NOTE TO ATTORNEY REGARDING DEFICIENT APPEAL. Note to Attorney Eric Ruzicka to RE-FILE Document No. 63 Notice of Appeal,. The filing is deficient for the following reason: the Order being appealed was NOT selected. Re-file the document as a Corrected Notice of Appeal event and select the correct Order being appealed. (nd)** (Entered: 02/01/2013)
02/01/2013	64	99.4 KB	CORRECTED NOTICE OF APPEAL re: 63 Notice of Appeal, 61 Clerk's Judgment,. Document filed by American Civil Liberties Union, The American Civil Liberties Union Foundation. (Ruzicka, Eric) (Entered: 02/01/2013)
02/01/2013			Appeal Fee Paid electronically via Pay.gov: for 64 Corrected Notice of Appeal. Filing fee $ 455.00. Pay.gov receipt number r 0208-8197154, paid on 2/1/2013. (nd) (Entered: 02/01/2013)
02/01/2013			Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 64 Corrected Notice of Appeal. (nd) (Entered: 02/01/2013)
02/01/2013			Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 40 Declaration in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 33 Endorsed Letter, Set Deadlines/Hearings,,,, 29 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 13 MOTION for Michael P. Weinbeck to Appear Pro Hac Vice. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 7 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 48 Endorsed Letter, Set Deadlines/Hearings,, 16 Order on Motion to Appear Pro Hac Vice, 22 Endorsed Letter, Set Deadlines,,,, 17 Answer to Complaint filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 62 Order, 31 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 5 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 45 MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL.* filed by American Civil Liberties Union, 60 Order, 51 Endorsed Letter, 18 Endorsed Letter, 43 Declaration in Opposition to Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 14 Order on Motion to Appear Pro Hac Vice, 55 Order on Motion for Summary Judgment,,,,,,, 2 Notice of Case Assignment/Reassignment, 58 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 19 Endorsed Letter, 6 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 25 Memorandum of Law in Support of Motion filed by U.S. Department of Defense, U.S. Department of

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Justice, Central Intelligence Agency, 64 Corrected Notice of Appeal filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 15 Order on Motion to Appear Pro Hac Vice, 35 Memorandum of Law in Support of Motion, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 10 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 34 MOTION for Summary Judgment *[PLAINTIFFS' NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT]*. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 3 Order for Initial Pretrial Conference, 63 Notice of Appeal, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 61 Clerk's Judgment, 28 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 24 MOTION for Summary Judgment. filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 42 Declaration in Opposition to Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 26 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 44 MOTION for Michael P. Weinbeck to Withdraw as Attorney *APPLICATION OF MICHAEL P. WEINBECK TO WITHDRAW AS COUNSEL*. filed by American Civil Liberties Union, 30 Declaration in Support of Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 57 Order on Motion to Withdraw as Attorney, 27 Declaration in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 20 Endorsed Letter, 47 Affidavit of Service Other filed by American Civil Liberties Union, 54 MOTION for Nathan Freed Wessler to Withdraw as Attorney. filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 50 Affidavit of Service Other filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 23 Endorsed Letter, 32 Notice (Other) filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 8 Summons Returned Executed filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 38 Reply Memorandum of Law in Support of Motion filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 49 Reply Memorandum of Law in Support of Motion, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 1 Complaint, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 9 Certificate of Service Other, filed by American Civil Liberties Union, The American Civil Liberties Union Foundation, 4 Notice of Appearance filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 41 Memorandum of Law in Opposition to Motion, filed by U.S. Department of Defense, U.S. Department of Justice, Central Intelligence Agency, 21 Endorsed Letter, Set Deadlines,,,, 46 Affidavit in Support of Motion filed by American Civil Liberties Union, 39 Declaration in Support of Motion filed by U.S. Department of Defense, U.S.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, and SCOTT SHANE,	:	**No. _____**
Plaintiffs,	:	
- against -	:	**COMPLAINT**
UNITED STATES DEPARTMENT OF JUSTICE,	:	
Defendant.	:	**ECF CASE**

Plaintiffs The New York Times Company, Charlie Savage, and Scott Shane (jointly, "NYT"), by their undersigned attorney, allege for their Complaint:

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, *et seq.*, seeking the production of agency records improperly withheld by Defendant United States Department of Justice ("DOJ") in response to requests properly made by Plaintiffs.

2. Questions surrounding the legality of targeted killing – especially the extrajudicial use of lethal force away from any so-called "hot" battlefield where United

States forces are engaged in active combat – have generated extensive public debate since October 2001, when the Bush Administration first contemplated whether covert lethal force could be used against people deemed to be al-Qaeda operatives.

3. Most recently, the death of an American citizen, Anwar al-Awlaki, who was killed in a drone strike in Yemen in September, has kindled widespread interest in – and controversy over – the scope of the circumstances in which it is lawful for government officials to employ targeted killing as a policy tool.

4. Given the questions surrounding the legality of the practice under both U.S. and international law, notable legal scholars, human rights activists, and current and former government officials have called for the government to disclose its legal analysis justifying the use of targeted lethal force, especially as it applies to American citizens.

5. For example, the former legal adviser to the United States Department of State in the Bush administration, John B. Bellinger III, has argued that it is "important to domestic audiences and international audiences for the Administration to explain how the targeting and killing of an American complies with applicable constitutional standards."

6. To date, the government has not offered a thorough and transparent legal analysis of the issue of targeted killing. Instead, several government officials have made statements broadly asserting the legality of such actions in a conclusory fashion.

7. Upon information and belief, there exists at least one legal memorandum detailing the legal analysis justifying the government's use of targeted killing.

8. In a Feb. 11, 2011, article about targeted killing operations by the Central Intelligence Agency, *Newsweek* quoted an anonymous government official as saying such actions were "governed by legal guidance provided by the Department of Justice."

9. On September 30, 2011, the *Washington Post* reported that the government had produced a "secret memorandum authorizing the legal targeting" of Anwar al-Awlaki, an American citizen who had been killed earlier that day in Yemen.

10. On October 8, 2011, *The New York Times* published an article that described some details about the context and contents of the Awlaki memorandum.

11. Both before and after the death of al-Awlaki, NYT duly filed FOIA requests seeking memoranda that detail the legal analysis behind the government's use of targeted lethal force. To date, DOJ has refused to release any such memoranda or any segregable portions, claiming them to be properly classified and privileged and in respect to certain memoranda has declined to say whether they in fact exist.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §§552(a)(4)(B) and 28 U.S.C. §1331.

13. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

14. Because DOJ has failed to determine either of the two pending administrative appeals in the time set by FOIA, NYT is deemed to have exhausted all administrative remedies as to each and is now entitled to appeal directly to the Court to enforce the dictates of FOIA pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

15. Plaintiff The New York Times Company is the publisher of *The New York Times*. The weekday circulation of *The New York Times* is the highest in the nation among metropolitan dailies, at more than 900,000 daily, with 1.35 million on Sunday. The average number of monthly unique visitors to NYTimes.com has exceeded 20 million.

16. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, N.Y.

17. Plaintiff Charlie Savage is a reporter for *The New York Times*.

18. Plaintiff Scott Shane is a reporter for *The New York Times*.

19. Defendant DOJ is an agency of the federal government that has possession and control of the records sought by Plaintiffs' FOIL requests.

20. DOJ is the federal agency responsible for enforcing the law and defending the legal interests of the United States. The Office of Information Policy ("OIP"), a component entity of DOJ, is responsible for ensuring the agency's compliance with FOIA requests. The Office of Legal Counsel ("OLC"), a component entity of DOJ, assists the Attorney General in his function as legal adviser to the President and all executive branch agencies.

21. DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1).

FACTS

The Memoranda Underlying The Times's FOIA Requests

22. A central issue in the debate over targeted killings has been the scope of the government's legal authority to use force against American citizens when officials have deemed them to be terrorists.

23. On February 3, 2010, Director of National Intelligence Dennis C. Blair testified to the House Permanent Select Committee on Intelligence that "we take direct actions against terrorists in the intelligence community. If we think that direct action will involve killing an American citizen, we get specific permission to do that."

24. A number of senators, representatives, and government officials – including both supporters and opponents of the practice – have since urged the Department of Justice to make public its legal justification for the targeted killing of individuals.

25. For example, on October 2, 2011, Jane Harman, a former United States representative and a former ranking member of the House Intelligence Committee, argued that "targeted killing of anyone should give us pause, and there has to be a legal framework around doing that. 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. But I think the Justice Department should release that memo."

26. Similarly, on October 7, 2011, Senator Dianne Feinstein, chairwoman of the Senate Select Committee on Intelligence, called on the administration to "make public its legal analysis on its counterterrorism authorities" because "for transparency and to maintain public support of secret operations, it is important to explain the general framework for counterterrorism actions."

27. Senator Carl Levin, chairman of the Senate Armed Services Committee, has said: "I would urge them to release the memo. I don't see any reason why they shouldn't."

28. Other officials have complained that much of the publicly available information on targeted killing results from off-the-record comments by government officials

reported in the media. As a former United States representative and a former chairman of the House Select Committee on Intelligence, Peter Hoekstra, has noted: "The targeting of Americans – it is a very sensitive issue, but again there's been more information in the public domain than what has been shared with this committee. There is no clarity. Where is the legal framework?"

29. Former attorneys for the OLC have also recommended the release of memoranda detailing the legality of targeted killing.

30. Jack Goldsmith, a former assistant attorney general who headed the OLC, has argued that "a legal analysis of the U.S. ability to target and kill enemy combatants (including U.S. citizens) outside Afghanistan can be disclosed without revealing means or methods of intelligence-gathering or jeopardizing technical covertness. The public legal explanation need not say anything about the means of fire (e.g. drones or something else), or particular countries, or which agencies of the U.S. government are involved, or the intelligence basis for the attacks… A full legal analysis, as opposed to conclusory explanations in government speeches and leaks, would permit a robust debate about targeted killings – especially of U.S. citizens – that is troubling to many people."

31. Only extremely limited legal analysis has been made available by government officials with knowledge of the program.

32. For example, in a speech on March 10, 2010, Harold Koh, legal adviser of the United States Department of State, assured members of the American Society of International Law that "it is the considered view of this administration – and it has certainly been in my experience during my time as legal adviser – that U.S. targeting

practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."

33. On September 16, 2011, John O. Brennan, a senior adviser to President Obama on homeland security and counterterrorism, provided similar reassurance: "We will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say 'all our actions,' that includes covert actions, which we undertake under the authorities provided to us by Congress. President Obama has directed that all our actions – even when conducted out of public view – remain consistent with our laws and values."

34. Upon information and belief, there exists at least one official OLC memorandum that details the legal argument justifying targeted killing.

35. On September 30, 2011, the *Washington Post* described a Department of Justice "secret memorandum authorizing the legal targeting" of al-Awlaki, an American citizen accused of coordinating the Al-Qaeda operations in the Arabian peninsula. The article said that officials refused to disclose the exact legal analysis" such as "how they considered any Fifth Amendment right to due process." It also quoted a "former senior intelligence official" as saying the C.I.A. "would not have killed an American without such a written opinion."

36. On October 8, 2011, *The New York Times* published an article that described the memorandum in greater detail, including the rough timeframe and bureaucratic background in which it had been produced and an outline of some of its legal reasoning.

Mr. Shane's FOIA Request for Memoranda Related to Targeted Killing

37. On June 11, 2010, Mr. Shane had submitted a FOIA request to DOJ OLC seeking a copy of "all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing of people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government."

38. By letter dated October 27, 2011, DOJ OLC denied Mr. Shane's request.

39. The DOJ OLC responded that "insofar as your request pertains to the Department of Defense," all responsive records were being withheld pursuant to FOIA Exemption 1, § 552(b)(1) (relating to national defense or foreign policy information properly classified pursuant to Executive Order No. 13526), FOIA Exemption 3, § 552(b)(3) (relating to information protected from disclosure by statute), and Exemption 5 (§ 552(b)(5) (relating to information that is privileged).

40. The DOJ OLC also stated that, to the extent the request sought documents pertaining to other government agencies, it "neither confirms nor denies the existence of the documents described in your request," pursuant to FOIA Exemption 1, Exemption 3, and Exemption 5.

41. On November 4, 2011, NYT submitted to DOJ OIP its appeal of the denial of Mr. Shane's request.

42. More than twenty days have passed since NYT submitted its November 4, 2011 administrative appeal to DOJ OIP. NYT has received no further response to its appeal.

43. As a result, NYT is deemed to have exhausted its administrative remedies with regard to Mr. Shane's request.

Mr. Savage's FOIA Request for Memoranda Related to Targeted Killing

44. On October 7, 2011, Mr. Savage submitted a FOIA request DOJ OLC 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."

45. By letter dated October 27, 2011, on the same day Mr. Shane was sent his denial letter, DOJ OLC also denied Mr. Savage's request.

46. DOJ OLC stated that it "neither confirms nor denies the existence of the documents described in your request," pursuant to FOIA Exemption 1, § 552(b)(1) (relating to national defense or foreign policy information properly classified pursuant to Executive Order No. 13526), FOIA Exemption 3, § 552(b)(3) (relating to information protected from disclosure by statute), and Exemption 5 (§ 552(b)(5) (relating to information that is privileged).

47. On November 4, 2011, NYT submitted to DOJ OIP its appeal of the denial of NYT's request. DOJ OIP adjudicates such appeals, including those made to DOJ OLC.

48. More than twenty days have passed since NYT submitted its November 4, 2011 administrative appeal to DOJ OIP. NYT has received no further response to its appeal.

49. As a result, NYT is deemed to have exhausted its administrative remedies with regard to Mr. Savage's request.

CAUSE OF ACTION

50. NYT repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

51. DOJ, as an agency subject to FOIA, 5 U.S.C. § 552(f), must release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption under 5 U.S.C. § 552(a)(3).

52. Upon information and belief, DOJ has possession of memoranda setting forth the government's analysis of the legality of targeted lethal force, including its use on American citizens.

53. Defendant has improperly withheld the memoranda under FOIA.

54. Memoranda containing legal analysis relied upon by the government constitute a final determination of policy by the government and therefore are not deliberative materials and not properly subject to Exemption 5.

55. Memoranda containing only legal analysis fail to meet the requirements for properly classified materials under Executive Order No. 13526 or other legal authority, and therefore Exemptions 1 and 3 do not apply.

56. Even if parts of the memoranda are properly classified or otherwise subject to an exemption, DOJ has an obligation to redact non-public portions of the memoranda and release those portions that are public under FOIA.

57. Defendant's failure to provide the memoranda violates FOIA.

REQUEST FOR RELIEF

WHEREFORE, NYT respectfully requests that this Court:

a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;

b. Declare that the memoranda requested by NYT are public under 5 U.S.C. § 552 and must be disclosed or, in the alternative, conduct an in camera review to determine whether any parts of the memoranda are properly public under FOIA;

c. Order the DOJ to provide the memoranda, or such parts as the Court determines are public under FOIA, to NYT within twenty business days of this Court's order;

d. Award NYT its costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and

e. Grant NYT such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 20, 2011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

12 CV 0794

Civil Action No. _____

American Civil Liberties Union and the American Civil Liberties Union Foundation,

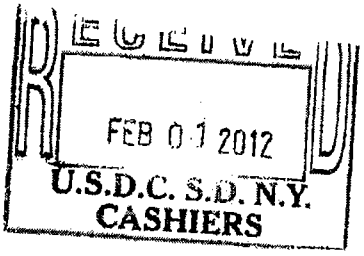
Plaintiffs,

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.

COMPLAINT



COMPLAINT FOR INJUNCTIVE RELIEF

1. This is a lawsuit seeking the release of records related to the U.S. government's "targeted killing" of U.S. citizens overseas.

2. These targeted killings have been the subject of sustained media coverage. Media reports reveal that at least three American citizens have been killed over the last four months by unmanned aerial vehicles—commonly known as "drones"—on the basis of unilateral decisions made by the executive branch.

3. Media reports about the targeted killing program routinely quote anonymous government officials describing details of the program. High-ranking government officials, including the President of the United States and the Secretary of Defense, have discussed publicly the use of drones and the targeted killing of U.S. citizens.

Defense, have discussed publicly the use of drones and the targeted killing of U.S. citizens.

4. For example, in a recent interview, President Barack Obama, referring to the use of drones by the United States to carry out targeted killings, said that "this is a targeted, focused effort at people who are on a list of active terrorists . . . ." Former Central Intelligence Agency Director and current Secretary of Defense Leon Panetta, when asked to describe how the decision was made to order the targeted killing of a U.S. citizen, said that "the President of the United States obviously reviews these cases and reviews the legal justification, and in the end says go or no go."

5. Despite requests from legal scholars, human rights organizations, members of the media, and elected officials, the U.S. government has not disclosed the process by which it adds names to so-called "kill lists;" the standards under which it determines which Americans may be put to death; or the evidentiary bases on which it concludes that those standards were satisfied in any particular case.

6. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking injunctive and other appropriate relief, the immediate processing and release of records sought by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively "ACLU") from Defendants U.S. Department of Justice ("DOJ"), U.S. Department of Defense ("DOD"), and Central Intelligence Agency ("CIA") (collectively "Defendants") through a FOIA request ("Request") made by the ACLU on October 19, 2011.

The Request sought records related to the factual and legal bases for the targeted killing of U.S. citizens.

7. The Request was directed to the DOJ, DOD, and CIA. The Request was also directed at specific components of those agencies, including the DOD's U.S. Special Operations Command ("USSOCOM"), which oversees the Joint Special Operations Command ("JSOC"), and the DOJ's Office of Legal Counsel ("OLC"). The Request sought expedited processing and a fee waiver.

8. Defendants have provided varying responses to the Request, either denying it or delaying a response to it. No agency has released any record in response to the Request. The Defendants have responded inconsistently to the ACLU's request for expedited processing and fee reductions and waivers.

9. The Request relates to a topic of vital importance: the power of the U.S. government to kill U.S. citizens without presentation of evidence and without disclosing legal standards that guide decision makers. Given the momentous nature of the governmental powers that are the subject of the Request, the fullest possible transparency and disclosure is vital.

Jurisdiction and Venue

10. This Court has subject matter jurisdiction and personal jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706.

11. Venue is premised on the place of business of the ACLU and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

12. Plaintiff American Civil Liberties Union is a nationwide, non-profit, nonpartisan organization with more than 500,000 members dedicated to the constitutional principles of liberty and equality. The ACLU is committed to ensuring that the U.S. government acts in compliance with the Constitution and laws, including international legal obligations. The ACLU is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties and human rights. 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.

13. Plaintiff American Civil Liberties Union Foundation is a separate §501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties.

14. Defendant DOJ is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). One subcomponent of DOJ is the OLC, from which the ACLU has also requested records.

15. Defendant DOD is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). One subcomponent of DOD is USSOCOM, from which the ACLU has also requested records.

16. Defendant CIA is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

Factual Background

17. Since at least 2002, the U.S. government has carried out targeted killings overseas using drones and other means. Many of the individuals subjected to targeted killings have been foreign nationals, but media reports have indicated that citizens of the United States have also been killed.

18. Both JSOC and the CIA participate in the targeted killing program.

19. The press began reporting in early 2010 that Anwar al-Awlaki, a U.S. citizen born in New Mexico, had been placed on CIA and JSOC "kill lists" that authorized his targeted killing. In the fall of 2011, the media reported on the existence of a legal memorandum drafted by the OLC ("OLC memo") that provided a legal analysis to support al-Awlaki's killing.

20. On or around September 30, 2011, al-Awlaki was killed in a joint CIA-JSOC drone strike in northern Yemen. American and international news organizations reported that Samir Khan, also a U.S. citizen, was killed in the same attack.

21. On or around October 14, 2011, Abdulrahman al-Awlaki, a U.S. citizen born in Colorado, was killed in a JSOC drone attack in southeastern Yemen. Abdulrahman was sixteen years old.

22. Statements by President Barack Obama confirmed the death of Anwar al-Awlaki and indicated that al-Awlaki was the intended target of the September 30 attack. The President described the killing of al-Awlaki as a "success" that is a "tribute to our intelligence community." On October 25, 2011, the President, describing the attack on al-Awlaki, said "we were able to remove him from the field."

23. Although U.S. government officials, including the President and the Secretary of Defense, have made statements on the record confirming the existence of the targeted killing program, the government has not disclosed the process by which it adds names to so-called "kill lists;" the standards under which it determines which Americans may be put to death; or the evidentiary bases on which it concluded that those standards were satisfied in any particular case.

24. The government has refused to release its legal or evidentiary bases for the September 30 and October 14 strikes. It has not explained whether Samir Khan and Abdulrahman al-Awlaki were killed "collaterally" or were targeted themselves. It has not said what measures, if any, it took to minimize the possibility that individuals not targeted would be killed incidentally.

25. Since the existence of the OLC memo was disclosed in the media, there has been intense and sustained public interest in its contents. Members of Congress and former attorneys in the OLC—including Jack Goldsmith, a former assistant

attorney general who headed the OLC—have urged that the OLC memo or the legal reasoning it contains be released to the public.

26. The former legal adviser to the U.S. Department of State in the Bush Administration, John B. Bellinger III, said that it is "important to domestic audiences and international audiences for the administration to explain how the targeting and killing of an American complies with applicable constitutional standards."

27. Peter Hoekstra, former U.S. representative and former chair of the House Select Committee on Intelligence, has said that "the targeting of Americans—it is a very sensitive issue, but again there's been more information in the public domain than what has been shared with this committee. There is no clarity. Where is the legal framework?"

28. Senator Carl Levin, chair of the Senate Armed Services Committee has said, "I would urge them to release the memo. I don't see any reason why they shouldn't."

29. Senator Dianne Feinstein, chair of the Senate Select Committee on Intelligence, called on the administration to "make public its analysis on counterterrorism authorities" because "for transparency and to maintain public support of secret operations, it is important to explain the general framework for counterterrorism actions."

The ACLU's FOIA Request

30. On October 19, 2011, the ACLU submitted a FOIA request for records related to the "legal authority and factual basis for the targeted killing" of al-Awlaki, Abdulrahman, and Khan. The Request was submitted to the designated FOIA offices of the DOJ, DOD, CIA, USSOCOM, and OLC.

31. The Request seeks expedited processing on the basis of a "compelling need" for these records because the information 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); *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 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).

32. The Request seeks a waiver of search, review, and duplication fees on the basis 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). The Request seeks the waiver also on the basis that the ACLU constitutes a "representative of the news media" and that the records are not sought for commercial use. *See* 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).

The Government's Response to the FOIA Request

33. On October 27, 2011, the DOJ Office of Information Policy granted the ACLU's request for expedited processing. The DOJ also determined that the Request fell within "unusual circumstances" and informed the ACLU that it would not be able to respond to the Request within the statutory deadline. The DOJ deferred determination of whether the ACLU qualified for a fee waiver.

34. No further response or correspondence has been received from the DOJ. No records responsive to the Request have been released by the DOJ.

35. On October 31, 2011, the DOD denied the ACLU's request for expedited processing, determined that the Request fell within "unusual circumstances," and extended the time limit to respond to the Request. The DOD also denied the ACLU's request for a limitation of fees based on its status as a representative of the news media and failed to address the request for a public-interest fee waiver.

36. By letter dated December 16, 2011, the ACLU timely filed an administrative appeal of the DOD's determinations. The ACLU urged the appellate authority to expedite processing and grant the requested fee waivers.

37. On December 27, 2011, the DOD indicated that it was unable to process the administrative appeal within the statutory timeframe. No further response or correspondence has been received from the DOD. No records responsive to the Request have been released by the DOD.

38. By letter dated November 17, 2011, the CIA stated that the Request "is denied pursuant to FOIA exemptions (b)(1) and (b)(3)." The CIA stated that the "fact of the existence or nonexistence of requested records is currently and properly classified" and protected from disclosure.

39. By letter dated December 6, 2011, the ACLU timely filed an administrative appeal of the CIA's determination. The ACLU urged the appellate authority to reconsider its denial of the Request on the basis that the denial was overbroad and impermissible under FOIA.

40. By letter dated January 18, 2012, the CIA indicated that it would be unable to respond to the administrative appeal within the statutory timeframe. No records responsive to the Request have been released by the CIA.

41. On November 7, 2011, USSOCOM denied the ACLU's request for expedited processing, determined that the Request fell within "unusual circumstances," and extended the time limit to respond to the Request. The DOD also denied the ACLU's request for a limitation of fees based on its status as a representative of the news media and failed to address the request for a public-interest fee waiver.

42. By letter dated December 16, 2011, the ACLU timely filed an administrative appeal of USSOCOM's determinations. The ACLU urged the appellate authority to expedite processing and grant the requested fee waivers.

43. By letter dated December 27, 2011, the DOD appellate authority responsible for processing FOIA appeals for DOD component agencies, including USSOCOM,

indicated that it would be unable to process the administrative appeal within the statutory timeframe. No records responsive to the Request have been released by USSOCOM.

44. By letter dated November 14, 2011, the OLC denied the Request pursuant to FOIA exemptions (b)(1), (b)(3), and (b)(5). The OLC stated that it "neither confirms nor denies the existence of the documents described in your request."

45. By letter dated December 6, 2011, the ACLU timely filed an administrative appeal of the OLC's determination. The ACLU urged the appellate authority to reconsider its denial of the Request on the basis that the denial was overbroad and impermissible under FOIA.

46. No further response or correspondence has been received from the OLC. No records responsive to the Request have been released by the OLC.

Causes of Action

47. Defendants' failure to make a reasonable effort to search for records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3), and Defendants' corresponding regulations.

48. Defendants' failure to promptly make available the records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and Defendants' corresponding regulations.

49. The failure of the DOD to grant the ACLU's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E) and the DOD's corresponding regulations.

50. The DOD's failure to grant the ACLU's request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(ii)(II) and the DOD's corresponding regulations.

51. The failure of the DOD to grant the ACLU's request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and the DOD's corresponding regulations.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Order Defendants immediately to produce all records responsive to the Request;

B. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;

C. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and

D. Grant such other relief as the Court may deem just and proper.

Dated: February 1, 2012

DORSEY & WHITNEY LLP

By: _____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Defendant United States Department of Justice ("DOJ"), by its attorneys, answers the complaint upon information and belief as follows:

1. Denies the allegations in paragraph 1, except admits that plaintiffs have brought this

action under the Freedom of Information Act, 5 U.S.C. § 552.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2, except admits that the legality of targeted killing has been a topic of public discussion.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3, except admits that the legality of targeted killing has been a topic of public discussion.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4, except admits that the legality of targeted killing has been a topic of public discussion.

5. Denies knowledge or information sufficient to form a belief as to the accuracy of the quotation from John B. Bellinger III in paragraph 5.

6. Denies the allegations in the first sentence of paragraph 6, except admits that the United States Government has not publicly issued a legal analysis regarding targeted killing. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 6, except admits that the legality of targeted killing has been a topic of public discussion.

7. States that DOJ can neither confirm nor deny the allegations in paragraph 7, except to admit that there exists a classified legal memorandum addressing the subject of targeted killing that pertains to the Department of Defense.

8. States that paragraph 8 purports to characterize a February 11, 2011, *Newsweek* article, to which the Court is respectfully referred for a complete and accurate statement of its contents.

9. States that paragraph 9 purports to characterize a September 30, 2011, *Washington Post* article, to which the Court is respectfully referred for a complete and accurate statement of its contents.

10. States that paragraph 10 purports to characterize an October 8, 2011, *New York Times* article, to which the Court is respectfully referred for a complete and accurate statement of its contents.

11. Denies the allegations in paragraph 11, except admits with respect to the allegations in the first sentence of paragraph 11 that New York Times reporters Scott Shane and Charlie Savage submitted FOIA requests to DOJ, to which the Court is respectfully referred for a complete and accurate statement of their contents; and admits with respect to the allegations in the second sentence of paragraph 11 that DOJ sent Mr. Shane and Mr. Savage responses to their respective requests, to which the Court is respectfully referred for a complete and accurate statement of their contents.

12. States that the allegations in paragraph 12 constitute a legal conclusion to which no response is required.

13. States that the allegations in paragraph 13 constitute a legal conclusion to which no response is required.

14. States that the allegations in paragraph 14 constitute a legal conclusion to which no response is required.

15. Admits the allegations in the first sentence of paragraph 15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the remainder of paragraph 15.

16. Admits the allegations in paragraph 16.

17. Admits the allegations in paragraph 17.

18. Admits the allegations in paragraph 18.

19. With respect to the allegations in paragraph 19, admits that DOJ is an agency of the federal government and states that the allegations in the remainder of paragraph 19 constitute a legal conclusion to which no response is required .

20. Admits the allegations in the first sentence of paragraph 20. Denies the allegations in the second sentence of paragraph 20, except admits that the Office of Information Policy ("OIP") is a component of the Department of Justice, and respectfully refers the Court to the Department of Justice's website for a complete and accurate statement of OIP's mission. Admits the allegations in the third sentence of paragraph 20.

21. Admits the allegations in paragraph 21.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22, except admits that the legality of targeted killing has been a topic of public discussion.

23. States that paragraph 23 purports to quote from February 3, 2010, testimony to the House Permanent Select Committee on Intelligence, to which the Court is respectfully referred for a complete and accurate statement of its contents.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24, except admits that the legality of targeted killing has been a topic of public discussion.

25. Denies knowledge or information sufficient to form a belief as to the accuracy of the

quotation from Jane Harman in paragraph 25.

26. Denies knowledge or information sufficient to form a belief as to the accuracy of the quotation from Senator Dianne Feinstein in paragraph 26.

27. Denies knowledge or information sufficient to form a belief as to the accuracy of the quotation from Senator Carl Levin in paragraph 27.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 28, except admits that the legality of targeted killing has been a topic of public discussion. Denies knowledge or information sufficient to form a belief as to the accuracy of the quotation from Peter Hoekstra in the second sentence of paragraph 28.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29.

30. Denies knowledge or information sufficient to form a belief as to the accuracy of the quotation from Jack Goldsmith in paragraph 30.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 because the terms used in this paragraph are vague and ambiguous.

32. Denies the allegations in paragraph 32, except admits that State Department Legal Adviser Harold Koh gave a speech to the American Society of International Law on March 25, 2010, to which the Court is respectfully referred for a complete and accurate statement of its contents.

33. States that paragraph 33 purports to characterize comments by John O. Brennan in a speech delivered at Harvard Law School on September 16, 2011, to which the Court is

respectfully referred for a complete and accurate statement of its contents.

34. States that DOJ can neither confirm nor deny the allegations in paragraph 34, except to admit that there exists a classified legal memorandum addressing the subject of targeted killing that pertains to the Department of Defense.

35. States that paragraph 35 purports to characterize a September 30, 2011, *Washington Post* article, to which the Court is respectfully referred for a complete and accurate statement of its contents.

36. States that paragraph 36 purports to characterize an October 8, 2011, *New York Times* article, to which the Court is respectfully referred for a complete and accurate statement of its contents.

37. With respect to the allegations in paragraph 37, admits that Mr. Shane submitted a FOIA request on June 11, 2010, to which the Court is respectfully referred for a complete and accurate statement of its contents.

38. Admits the allegations in paragraph 38.

39. States that paragraph 39 characterizes OLC's October 27, 2011 response letter, to which the Court is respectfully referred for a complete and accurate statement of its contents.

40. States that paragraph 40 characterizes OLC's October 27, 2011 response letter, to which the Court is respectfully referred for a complete and accurate statement of its contents.

41. Admits the allegations in paragraph 41.

42. Admits the allegations in the first sentence of paragraph 42. Denies the allegations in the second sentence of paragraph 42 and avers that OIP acknowledged receipt of plaintiffs' appeal by letter dated November 16, 2011.

43. States that the allegations in paragraph 43 constitute a legal conclusion to which no response is required.

44. With respect to the allegations in paragraph 44, admits that on October 7, 2011, Mr. Savage submitted a FOIA request to OLC, to which the Court is respectfully referred for a complete and accurate statement of its contents.

45. Admits the allegations in paragraph 45.

46. States that paragraph 46 characterizes OLC's response to Mr. Savage's FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

47. Admits the allegations in the first sentence of paragraph 47. Denies the allegations in the second sentence of paragraph 47, except admits that OIP has the responsibility of adjudicating administrative appeals from the actions of OLC.

48. Admits the allegations in the first sentence of paragraph 48. Denies the allegations in the second sentence of paragraph 48 and avers that OIP acknowledged receipt of plaintiffs' appeal by letter dated November 16, 2011.

49. States that the allegations in paragraph 49 constitute a legal conclusion to which no response is required.

50. DOJ repeats, answers, and incorporates its responses to the allegations in the foregoing paragraphs as though fully set forth herein.

51. States that the allegations in paragraph 51 constitute a legal conclusion to which no response is required.

52. States that DOJ can neither confirm nor deny the allegations in paragraph 52, except

to admit that DOJ has possession of a classified legal memorandum addressing the subject of targeted killing that pertains to the Department of Defense.

53. Denies the allegations in paragraph 53.

54. Denies the allegations in paragraph 54.

55. Denies the allegations in paragraph 55.

56. Denies the allegations in paragraph 56.

57. Denies the allegations in paragraph 57.

The remainder of the complaint contains a request for relief, to which no response is required. To the extent a response is required, defendant denies the allegations contained in the remainder of the complaint and states that plaintiffs are not entitled to the requested relief or any other relief from defendant.

Defendant denies all allegations in plaintiffs' complaint not expressly admitted or denied.

FIRST DEFENSE

Plaintiffs fail to state a claim upon which relief can be granted.

WHEREFORE, defendant is entitled to judgment dismissing plaintiffs' complaint with prejudice and granting such further relief as the Court deems just, including costs and disbursements.

Dated: January 23, 2012

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Assistant Attorney General

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.

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12 Civ. 794 (CM)

ANSWER

ECF CASE

Defendants the United States Department of Justice ("DOJ"), including its component the Office of Legal Counsel ("OLC"), the United States Department of Defense ("DOD"), including its component the United States Special Operations Command ("USSOCOM"), and the Central Intelligence Agency, by their attorneys, answer the complaint upon information and belief as follows:

1. State that the allegations in paragraph 1 constitute a characterization of this action to which no response is required.

2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2, except admit that lethal operations have been a topic of public discussion.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 3, except admit that, in general, lethal operations have been a topic of public discussion. Deny the allegations in the second sentence of paragraph 3, except admit that the President and Secretary of Defense have made public statements concerning lethal operations, and respectfully refer the Court to those statements for a complete and accurate statement of their contents.

4. Deny the allegations in paragraph 4, except admit that the President and Secretary of Defense have made public statements concerning lethal operations, and respectfully refer the Court to those statements for a complete and accurate statement of their contents.

5. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 because the terms used in this paragraph – including "kill lists" and

"standards under which . . . Americans may be put to death" – are vague, ambiguous and argumentative.

6. State that the allegations in paragraph 6 constitute a characterization of this action and plaintiffs' FOIA request to which no response is required. The Court is respectfully referred to plaintiffs' complaint and FOIA request for a complete and accurate statement of their contents.

7. State that the allegations in paragraph 7 constitute a characterization of plaintiffs' FOIA request to which no response is required. The Court is respectfully referred to plaintiffs' FOIA request for a complete and accurate statement of its contents.

8. Deny the allegations in paragraph 8, except admit that the U.S. Government has not disclosed any records in response to the FOIA request and aver that each defendant has responded to the FOIA request, and respectfully refer the Court to defendants' respective responses for a complete and accurate statement of their contents.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 because the terms used in this paragraph are vague, ambiguous, and argumentative, except admit that lethal operations have been a topic of public discussion.

10. State that the allegations in paragraph 10 constitute a legal conclusion to which no response is required.

11. State that the allegations in paragraph 11 constitute a legal conclusion to which no response is required.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12.

13. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13.

14. Admit the allegations in paragraph 14.

15. Admit the allegations in paragraph 15.

16. Admit the allegations in paragraph 16.

17. Admit that DOD has carried out lethal operations, including against foreign nationals, using drones and other means. With respect to any other agency of the U.S. Government, neither admit nor deny the allegations in paragraph 17, pursuant to 5 U.S.C. § 552(b)(1), (3). Deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding media reports in the second sentence of paragraph 17, except admit that lethal operations have been a topic of public discussion.

18. State that the term "the targeted killing program" in paragraph 18 is vague, ambiguous and argumentative. To the extent an answer is required, neither admit nor deny the allegations in paragraph 18, pursuant to 5 U.S.C. § 552(b)(1), (3).

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 19, except admit that lethal operations have been a topic of public discussion. The allegations in the second sentence of paragraph 19 purport to characterize a media report or reports concerning an alleged OLC memorandum, and the Court is respectfully referred to those media reports for a complete and accurate statement of their contents.

20. Neither admit nor deny the allegations in the first sentence of paragraph 20, pursuant

to 5 U.S.C. § 552(b)(1), (3), except admit that al-Awlaki was killed on or about September 30, 2011. The allegations in the second sentence of paragraph 20 purport to characterize media reports, to which the Court is respectfully referred for a complete and accurate statement of their contents.

21. Neither admit nor deny the allegations in paragraph 21, pursuant to 5 U.S.C. § 552(b)(1), (3).

22. Deny the allegations in paragraph 22, except admit that al-Awlaki was killed and the President made a public statement concerning al-Awlaki's death, and respectfully refer the Court to the President's statement for a complete and accurate statement of its contents.

23. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23 because the terms used in this paragraph – including "the targeted killing program," "kill lists" and "standards under which . . . Americans may be put to death" – are vague, ambiguous and argumentative, except admit that the President and Secretary of Defense have made public statements concerning lethal operations, and respectfully refer the Court to those statements for a complete and accurate statement of their contents.

24. The allegations in paragraph 24 appear to refer back to allegations in paragraphs 20 and 21 that are neither admitted nor denied. Accordingly, neither admit nor deny the allegations in paragraph 24, pursuant to 5 U.S.C. § 552(b)(1), (3).

25. Deny the allegations in the first sentence of paragraph 25, except admit that lethal operations have been a topic of public discussion. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 25.

26. Deny knowledge or information sufficient to form a belief as to the accuracy of the quotation from John B. Bellinger III in paragraph 26.

27. Deny knowledge or information sufficient to form a belief as to the accuracy of the quotation from Peter Hoekstra in paragraph 27.

28. Deny knowledge or information sufficient to form a belief as to the accuracy of the quotation from Senator Carl Levin in paragraph 28.

29. Deny knowledge or information sufficient to form a belief as to the accuracy of the quotation from Senator Dianne Feinstein in paragraph 29.

30. With respect to the allegations in paragraph 30, admit that on October 19, 2011, plaintiffs submitted a FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

31. State that the allegations in paragraph 31 constitute a characterization of plaintiffs' FOIA request to which no response is required. The Court is respectfully referred to plaintiffs' FOIA request for a complete and accurate statement of its contents.

32. State that the allegations in paragraph 32 constitute a characterization of plaintiffs' FOIA request to which no response is required. The Court is respectfully referred to plaintiffs' FOIA request for a complete and accurate statement of its contents.

33. State that the allegations in paragraph 33 characterize the Office of Information Policy's ("OIP's") October 27, 2011, response to plaintiffs' FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

34. Admit the allegations in paragraph 34 with respect to the DOJ's Office of

Information Policy.

35. State that the allegations in paragraph 35 characterize DOD's October 31, 2011, response to plaintiffs' FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

36. Admit allegations in the first sentence of paragraph 36. State that the remainder of paragraph 36 characterizes plaintiffs' December 16, 2011, administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents.

37. State that the allegations in the first sentence of paragraph 37 characterize DOD's December 27, 2011, response to plaintiffs' administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents. Admit the allegations in the second and third sentences of paragraph 37.

38. State that the allegations in paragraph 38 characterize CIA's November 17, 2011, response to plaintiffs' FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

39. Admit the allegations in the first sentence of paragraph 39. State that the remaining allegations in paragraph 39 characterize plaintiffs' December 6, 2011, administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents.

40. State that the allegations in the first sentence of paragraph 40 characterize CIA's January 18, 2012, response to plaintiffs' administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents. Admit the allegations in the second sentence of paragraph 40.

41. State that the allegations in paragraph 41 characterize USSOCOM's November 7, 2011, response to plaintiffs' FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

42. Admit the allegations in the first sentence of paragraph 42. State that the remaining allegations in paragraph 42 characterize plaintiffs' December 16, 2011, administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents.

43. State that the allegations in the first sentence of paragraph 43 characterize DOD's December 27, 2011, response to plaintiffs' administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents. Admit the allegations in the second sentence of paragraph 43.

44. State that the allegations in paragraph 44 characterize OLC's response to plaintiffs' FOIA request, to which the Court is respectfully referred for a complete and accurate statement of its contents.

45. Admit the allegations in the first sentence of paragraph 45. State that the allegations in the second sentence of paragraph 45 characterize plaintiffs' December 6, 2011, administrative appeal, to which the Court is respectfully referred for a complete and accurate statement of its contents.

46. Admit the allegations in paragraph 46.

47. Deny the allegations in paragraph 47.

48. Deny the allegations in paragraph 48.

49. Deny the allegations in paragraph 49.

50. Deny the allegations in paragraph 50.

51. Deny the allegations in paragraph 51.

The remainder of the complaint contains a request for relief, to which no response is required. To the extent a response is required, defendants deny the allegations contained in the remainder of the complaint and state that plaintiffs are not entitled to the requested relief or any other relief from defendants.

Defendants deny all allegations in plaintiffs' complaint not expressly admitted or denied.

FIRST DEFENSE

Plaintiffs fail to state a claim upon which relief can be granted.

WHEREFORE, defendants are entitled to judgment dismissing plaintiffs' complaint with prejudice and granting such further relief as the Court deems just, including costs and disbursements.

Dated: March 5, 2012

TONY WEST
Assistant Attorney General

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, and SCOTT SHANE, Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	**NOTICE OF MOTION** 11 Civ. 9336 (CM)
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.	12 Civ. 794 (CM)

PLEASE TAKE NOTICE THAT, upon the Declarations of John Bennett, John E. Bies, John F. Hackett, Douglas R. Hibbard, Robert R. Neller and Sarah S. Normand, as well as classified declarations filed for the Court's *ex parte* and *in camera* review, and the accompanying memorandum of law, defendants the Department of Justice and its component, the Office of Legal Counsel; the Department of Defense and its component, the United States Special Operations Command; and the Central Intelligence Agency, by their attorneys, Preet Bharara, United States Attorney for the Southern District of New York, and Stuart F. Delery,

Acting Assistant Attorney General, will move this Court before the Honorable Colleen McMahon, United States District Judge, at the United States Courthouse, 500 Pearl Street, New York, New York 10007, for an order granting summary judgment in favor of defendants in the above-named cases.

Dated: New York, New York
June 20, 2012

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Acting Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, and SCOTT SHANE, Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	11 Civ. 9336 (CM)
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.	12 Civ. 794 (CM)

DECLARATION OF SARAH S. NORMAND

SARAH S. NORMAND, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am an Assistant United States Attorney in the office of Preet Bharara, United States Attorney for the Southern District of New York, attorney for defendants the Department of Justice and its component, the Office of Legal Counsel; the Department of Defense and its component, the United States Special Operations Command; and the Central Intelligence Agency in the above-named cases. I have been assigned to defend this matter, and I

am fully familiar with the facts pertaining to it.

2. I submit this declaration in support of defendants' consolidated motion for summary judgment in these cases.

3. Annexed hereto as Exhibit A is a true and correct copy of the complaint filed by Scott Shane, Charlie Savage and the *New York Times* (collectively, the "*New York Times*") on December 20, 2011.

4. Annexed hereto as Exhibit B is a true and correct copy of the complaint filed by the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the "ACLU") on February 1, 2012.

5. On February 2, 2012, this Court accepted the *New York Times* and ACLU cases as related. During the initial pretrial conference held on February 24, 2012, this Court directed that the cases be briefed in coordinated fashion.

6. Annexed hereto as Exhibit C is a true and correct copy of a letter dated April 3, 2012, from Eric A. O. Ruzicka, counsel for ACLU, to the undersigned.

7. Annexed hereto as Exhibit D is a true and correct copy of the text of remarks presented by Attorney General Eric Holder at Northwestern University School of Law on March 5, 2012, as retrieved on March 13, 2012, from the U.S. Department of Justice website (http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html).

8. Annexed hereto as Exhibit E is a true and correct copy of the transcript of remarks presented by Assistant to the President for Homeland Security and Counterterrorism John O. Brennan at the Woodrow Wilson International Center for Scholars on April 30, 2012, as retrieved on May 13, 2012, from the Wilson Center website (http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy).

9. Annexed hereto as Exhibit F is a true and correct copy of the text of remarks presented by Department of State Legal Adviser Harold Hongju Koh at the American Society of International Law on March 25, 2010, as retrieved on June 20, 2012, from the U.S. Department of State website (http://www.state.gov/s/l/releases/remarks/139119.htm).

10. Annexed hereto as Exhibit G is a true and correct copy of the remarks presented by Assistant to the President for Homeland Security and Counterterrorism John O. Brennan at Harvard Law School on September 16, 2011, as retrieved on June 20, 2012, from the White House website (http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an).

11. Annexed hereto as Exhibit H is a true and correct copy of the remarks presented by President Obama on September 30, 2011, as retrieved on March 13, 2012, from the White House website (http://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony).

12. Annexed hereto as Exhibit I is a true and correct copy of a transcript of President Obama's interview on *The Tonight Show* on October 25, 2011, as provided by NBC and retrieved from the National Journal website on June 20, 2012 (http://www.nationaljournal.com/whitehouse/transcript-of-president-obama-s-interview-on-the-tonight-show-with-jay-leno-20111026).

13. Annexed hereto as Exhibit J is a true and correct copy of an article entitled "Secret 'Kill List' Proves a Test of Obama's Principles and Will," which was published in the *New York Times* on May 29, 2012, as retrieved on June 19, 2012, from the *New York Times*

website

(http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html).

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

Dated: New York, New York
June 20, 2012

/s/ Sarah S. Normand
SARAH S. NORMAND
Assistant United States Attorney

EXHIBIT A

Exhibit A is omitted as duplicative.

It can be found at JA024.

EXHIBIT B

Exhibit B is omitted as duplicative.

It can be found at JA036.

EXHIBIT C

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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:dlb

EXHIBIT D

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 thattacks; 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 thchose 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.

JA083

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.

JA084

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.

EXHIBIT E

International Security Studies

Events

The Efficacy and Ethics of U.S. Counterterrorism Strategy

April 30, 2012 // 12:00pm — 1:15pm

- **Event Speakers**

Transcript of Remarks by John O. Brennan

Assistant to the President for Homeland Security and Counterterrorism

"The Ethics and Efficacy of the President's Counterterrorism Strategy"

Jane Harman:
Good afternoon, everyone. Welcome to the Wilson Center, and a special welcome to our chairman of the board Joe Gildenhorn and his wife Alma, who are very active on the Wilson -- who is very active on the Wilson council. This afternoon's conversation is, as I see it, a great tribute to the kind of work we do here. We care intensely about having our most important policymakers here, and in getting objective accounts of what the United States government and other governments around the world are doing. On September 10th, 2001, I had lunch with L. Paul

Bremer. Jerry Bremer, as he is known, had chaired the congressionally chartered Commission on Terrorism on which I served.

It was one of three task forces to predict a major terror attack on U.S. soil. At that lunch, we lamented that no one was taking our report seriously. The next day, the world changed. In my capacity as a senior Democrat on the House intelligence committee, I was headed to the U.S. Capitol at 9:00 a.m. on 9/11 when an urgent call from my staff turned me around. To remind, most think that the Capitol, in which the intelligence committee offices were then located was the intended target of the fourth hijacked plane. Congress shut down. A terrible move, I thought, and 250 or so members mingled on the Capitol lawn, obvious targets if that plane had arrived. I frantically tried to reach my youngest child, then at a D.C. high school, but the cell towers were down.

I don't know where John Brennan was that day, but I do know that the arch of our lives came together after that when he served as deputy executive director of the CIA, when I became the ranking member on the House intelligence committee, when he became the first director of the Terrorist Threat Integration Center, an organization that was set up by then-President Bush 43, when I was the principle author of legislation which became the Intelligence Reform and Terrorism Prevention Act, a statute which we organized our intelligence community for the first time since 1947, and renamed TTIC, the organization that John had headed, the National Counter Terrorism Center, when he served as the first director of the NCTC, when I chaired the intelligence subcommittee of the homeland security committee, when he moved into the White House as deputy national security advisor for homeland security and counterterrorism, and assistant to the president, and when I succeeded Lee Hamilton here at the Wilson Center last year.

Finally, when he became President Obama's point person on counterterrorism strategy, and when the Wilson Center commenced a series of programs which as still ongoing, the first of which we held on 9/12/2011 to ask what the next 10 years should look like, and whether this country needs a clearer legal framework around domestic intelligence.

Clearly, the success story of the past decade is last May's takedown of Osama bin Laden. At the center of that effort were the senior security leadership of our country. I noticed Denis McDonough in the audience, right here in the front row, and certainly it included President Obama and John Brennan. They made the tough calls.

But I also know, and we all know, how selfless and extraordinary were the actions of unnamed intelligence officials and Navy SEALs. The operation depended on their remarkable skills and personal courage. They performed the mission. The Wilson Center is honored to welcome John Brennan here today on the eve of this first

anniversary of the bin Laden raid. President Obama will headline events tomorrow, but today we get an advance peek from the insider's insider, one of President Obama's most influential aides with a broad portfolio to manage counterterrorism strategy in far-flung places like Pakistan, Yemen, and Somalia. Activities in this space, as I mentioned, at the Wilson Center are ongoing, as are terror threats against our country.

I often say we won't defeat those threats by military might alone, we must win the argument. No doubt our speaker today agrees that security and liberty are not a zero sum game. We either get more of both, or less. As Ben Franklin said, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." So, as we welcome John Brennan, I also want to congratulate him and President Obama for nominating the full complement of members to the Privacy and Civil Liberties Board, another part of the 2004 intelligence reform law, and a key part of assuring that America's counterterrorism efforts also protect our constitution and our values. At the end of today's event, we would appreciate it if everyone would please remain seated, while Mr. Brennan departs the building. Thank you for coming, please welcome John Brennan.

[applause]

John Brennan:
Thank you so much Jane for the very kind introduction, and that very nice and memorable walk down memory lane as our paths did cross so many times over the years, but thank you also for your leadership of the Wilson Center. It is a privilege for me to be here today, and to speak at this group. And you have spent many years in public service, and it continues here at the Wilson Center today, and there are few individuals in this country who can match the range of Jane's expertise from the armed services to intelligence to homeland security, and anyone who has appeared before her committee knew firsthand just how extensive and deep that expertise was. So Jane, I'll just say that I'm finally glad to be sharing the stage with you instead of testifying before you. It's a privilege to be next to you. So to you and everyone here at the Woodrow Wilson Center, thank you for your invaluable contributions, your research, your scholarship, which help further our national security every day.
I very much appreciate the opportunity to discuss President Obama's counterterrorism strategy, in particular its ethics and its efficacy.

It is fitting that we have this discussion here today at the Woodrow Wilson Center. It was here in August of 2007 that then-Senator Obama described how he would bring the war in Iraq to a responsible end and refocus our efforts on "the war that has to be won," the war against al-Qaeda, particularly in the tribal regions of Afghanistan and Pakistan.

He said that we would carry on this fight while upholding the laws and our values, and that we would work with allies and partners whenever possible. But he also made it clear that he would not hesitate to use military force against terrorists who pose a direct threat to America. And he said that if he had actionable intelligence about high-value terrorist targets, including in Pakistan, he would act to protect the American people.

So it is especially fitting that we have this discussion here today. One year ago today, President Obama was then facing the scenario that he discussed here at the Woodrow Wilson Center five years ago, and he did not hesitate to act. Soon thereafter, our special operations forces were moving toward the compound in Pakistan where we believed Osama bin Laden might be hiding. By the end of the next day, President Obama could confirm that justice had finally been delivered to the terrorist responsible for the attacks of September 11th, 2001, and for so many other deaths around the world.

The death of bin Laden was our most strategic blow yet against al-Qaeda. Credit for that success belongs to the courageous forces who carried out that mission, at extraordinary risk to their lives; to the many intelligence professionals who pieced together the clues that led to bin Laden's hideout; and to President Obama, who gave the order to go in.

Now one year later, it's appropriate to assess where we stand in this fight. We've always been clear that the end of bin Laden would neither mark the end of al-Qaida, nor our resolve to destroy it. So along with allies and partners, we have been unrelenting. And when we assess that al-Qaida of 2012, I think it is fair to say that, as a result of our efforts, the United States is more secure and the American people are safer. Here's why.

In Pakistan, al-Qaida's leadership ranks have continued to suffer heavy losses. This includes Ilyas Kashmiri, one of al-Qaida's top operational planners, killed a month after bin Laden. It includes Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri, al-Qaida's deputy leader. It includes Younis al-Mauritani, a planner of attacks against the United States and Europe, until he was captured by Pakistani forces.

With its most skilled and experienced commanders being lost so quickly, al-Qaida has had trouble replacing them. This is one of the many conclusions we have been able to draw from documents seized at bin Laden's compound, some of which will be published online, for the first time, this week by West Point's Combating Terrorism Center. For example, bin Laden worried about, and I quote, "The rise of lower leaders who are not as experienced and this would lead to the repeat of mistakes."

Al-Qaida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer

places to train and groom the next generation of operatives. They're struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qaida is losing badly. And bin Laden knew it at the time of his death. In documents we seized, he confessed to "disaster after disaster." He even urged his leaders to flee the tribal regions, and go to places, "away from aircraft photography and bombardment."

For all these reasons, it is harder than ever for al-Qaida core in Pakistan to plan and execute large-scale, potentially catastrophic attacks against our homeland. Today, it is increasingly clear that compared to 9/11, the core al-Qaida leadership is a shadow of its former self. Al-Qaida has been left with just a handful of capable leaders and operatives, and with continued pressure is on the path to its destruction. And for the first time since this fight began, we can look ahead and envision a world in which the al-Qaida core is simply no longer relevant.

Nevertheless, the dangerous threat from al-Qaida has not disappeared. As the al-Qaida core falters, it continues to look to affiliates and adherents to carry on its murderous cause. Yet these affiliates continue to lose key commanders and capabilities as well. In Somalia, it is indeed worrying to witness al-Qaida's merger with al-Shabaab, whose ranks include foreign fighters, some with U.S. passports. At the same time, al-Shabaab continues to focus primarily on launching regional attacks, and ultimately, this is a merger between two organizations in decline.

In Yemen, al-Qaida in the Arabian Peninsula, or AQAP, continues to feel the effects of the death last year of Anwar al-Awlaki, its leader of external operations who was responsible for planning and directing terrorist attacks against the United States. Nevertheless, AQAP continues to be al-Qaida's most active affiliate, and it continues to seek the opportunity to strike our homeland. We therefore continue to support the government of Yemen in its efforts against AQAP, which is being forced to fight for the territory it needs to plan attacks beyond Yemen. In north and west Africa, another al-Qaida affiliate, al-Qaida in the Islamic Maghreb, or AQIM, continues its efforts to destabilize regional governments and engages in kidnapping of Western citizens for ransom activities designed to fund its terrorist agenda. And in Nigeria, we are monitoring closely the emergence of Boko Haram, a group that appears to be aligning itself with al-Qaida's violent agenda and is increasingly looking to attack Western interests in Nigeria, in addition to Nigerian government targets.

More broadly, al-Qaida's killing of innocents, mostly Muslim men, women and children, has badly tarnished its image and appeal in the eyes of Muslims around the world.

John Brennan:

Thank you. More broadly, al-Qaida's killing of innocents, mostly men women and children, has badly tarnished its appeal and image in the eyes of Muslims around the world. Even bin Laden and his lieutenants knew this. His propagandist, Adam Gadahn, admitted that they were now seen "as a group that does not hesitate to take people's money by falsehood, detonating mosques, and spilling the blood of scores of people." Bin Laden agreed that "a large portion" of Muslims around the world "have lost their trust" in al-Qaida.

So damaged is al-Qaida's image that bin Laden even considered changing its name. And one of the reasons? As bin Laden said himself, U.S. officials "have largely stopped using the phrase 'the war on terror' in the context of not wanting to provoke Muslims." Simply calling them al-Qaida, bin Laden said, "reduces the feeling of Muslims that we belong to them."

To which I would add, that is because al-Qaida does not belong to Muslims. Al-Qaida is the antithesis of the peace, tolerance, and humanity that is the hallmark of Islam.

Despite the great progress we've made against al-Qaida, it would be a mistake to believe this threat has passed. Al-Qaida and its associated forces still have the intent to attack the United States. And we have seen lone individuals, including American citizens, often inspired by al-Qaida's murderous ideology, kill innocent Americans and seek to do us harm.

Still, the damage that has been inflicted on the leadership core in Pakistan, combined with how al-Qaida has alienated itself from so much of the world, allows us to look forward. Indeed, if the decade before 9/11 was the time of al-Qaida's rise, and the decade after 9/11 was the time of its decline, then I believe this decade will be the one that sees its demise. This progress is no accident.

It is a direct result of intense efforts made over more than a decade, across two administrations, across the U.S. government and in concert with allies and partners. This includes the comprehensive counterterrorism strategy being directed by President Obama, a strategy guided by the President's highest responsibility, to protect the safety and the security of the American people. In this fight, we are harnessing every element of American power: intelligence, military, diplomatic, development, economic, financial, law enforcement, homeland security, and the power of our values, including our commitment to the rule of law. That's why, for instance, in his first days in office, President Obama banned the use of enhanced interrogation techniques, which are not needed to keep our country safe. Staying true to our values as a nation also includes upholding the transparency upon which our democracy depends.

A few months after taking office, the president travelled to the National Archives where he discussed how national security requires a delicate balance between

secrecy and transparency. He pledged to share as much information as possible with the American people "so that they can make informed judgments and hold us accountable." He has consistently encouraged those of us on his national security team to be as open and candid as possible as well.

Earlier this year, Attorney General Holder discussed how our counterterrorism efforts are rooted in, and are strengthened by, adherence to the law, including the legal authorities that allow us to pursue members of al-Qaida, including U.S. citizens, and to do so using technologically advanced weapons.

In addition, Jeh Johnson, the general counsel at the Department of Defense, has addressed the legal basis for our military efforts against al-Qaida. Stephen Preston, the general counsel at the CIA, has discussed how the agency operates under U.S. law.

These speeches build on a lecture two years ago by Harold Koh, the State Department legal adviser, who noted that "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."

Given these efforts, I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification. Still, there continues to be considerable public and legal debate surrounding these technologies and how they are sometimes used in the fight against al-Qaida.

Now, I want to be very clear. In the course of the war in Afghanistan and the fight against al-Qaida, I think the American people expect us to use advanced technologies, for example, to prevent attacks on U.S. forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform. What has clearly captured the attention of many, however, is a different practice, beyond hot battlefields like Afghanistan, identifying specific members of al-Qaida and then targeting them with lethal force, often using aircraft remotely operated by pilots who can be hundreds, if not thousands, of miles away. And this is what I want to focus on today.

Jack Goldsmith, a former assistant attorney general in the administration of George W. Bush and now a professor at Harvard Law School, captured the situation well. He wrote:

"The government needs a way to credibly convey to the public that its decisions about who is being targeted, especially when the target is a U.S. citizen, are sound. First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions. The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of

its legal ones. All of this information can be disclosed in some form without endangering critical intelligence."

Well, President Obama agrees. And that is why I am here today.

I stand here as someone who has been involved with our nation's security for more than 30 years. I have a profound appreciation for the truly remarkable capabilities of our counterterrorism professionals, and our relationships with other nations, and we must never compromise them. I will not discuss the sensitive details of any specific operation today. I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost. At the same time, we reject the notion that any discussion of these matters is to step onto a slippery slope that inevitably endangers our national security. Too often, that fear can become an excuse for saying nothing at all, which creates a void that is then filled with myths and falsehoods. That, in turn, can erode our credibility with the American people and with foreign partners, and it can undermine the public's understanding and support for our efforts. In contrast, President Obama believes that done carefully, deliberately and responsibly we can be more transparent and still ensure our nation's security.

So let me say it as simply as I can. Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Broadly speaking, the debate over strikes targeted at individual members of al-Qaida has centered on their legality, their ethics, the wisdom of using them, and the standards by which they are approved. With the remainder of my time today, I would like to address each of these in turn.

First, these targeted strikes are legal. Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length. To briefly recap, as a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack. The Authorization for Use of Military Force, the AUMF, passed by Congress after the September 11th attacks authorized the president "to use all necessary and appropriate forces" against those nations, organizations, and individuals responsible for 9/11. There is nothing in the AUMF that restricts the use of military force against al-Qaida to Afghanistan.

As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this

purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Second, targeted strikes are ethical. Without question, the ability to target a specific individual, from hundreds or thousands of miles away, raises profound questions. Here, I think it's useful to consider such strikes against the basic principles of the law of war that govern the use of force.

Targeted strikes conform to the principle of necessity, the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.

Targeted strikes conform to the principles of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.

Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.

For the same reason, targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering. For all these reasons, I suggest to you that these targeted strikes against al-Qaida terrorists are indeed ethical and just.

Of course, even if a tool is legal and ethical, that doesn't necessarily make it appropriate or advisable in a given circumstance. This brings me to my next point.

Targeted strikes are wise. Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there just may be only minutes to act.

They can be a wise choice because they dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether. Yet they are also a wise choice

because they dramatically reduce the danger to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond their intended target.

In addition, compared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.

There's another reason that targeted strikes can be a wise choice, the strategic consequences that inevitably come with the use of force. As we've seen, deploying large armies abroad won't always be our best offense.

Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into al-Qaida's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment, and inspire the next generation of terrorists. In comparison, there is the precision of targeted strikes.

I acknowledge that we, as a government, along with our foreign partners, can and must do a better job of addressing the mistaken belief among some foreign publics that we engage in these strikes casually, as if we are simply unwilling to expose U.S forces to the dangers faced every day by people in those regions. For, as I'll describe today, there is absolutely nothing casual about the extraordinary care we take in making the decision to pursue an al-Qaida terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life.

Still, there is no more consequential a decision than deciding whether to use lethal force against another human being, even a terrorist dedicated to killing American citizens. So in order to ensure that our counterterrorism operations involving the use of lethal force are legal, ethical, and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.

This reflects his approach to broader questions regarding the use of force. In his speech in Oslo accepting the Nobel Peace Prize, the president said that "all nations, strong and weak alike, must adhere to standards that govern the use of force." And he added:

"Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength."

The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology, and any more nations are seeking it, and more will succeed in acquiring it. President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of those nations may -- and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.

If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do ourselves. President Obama has therefore demanded that we hold ourselves to the highest possible standards, that, at every step, we be as thorough and as deliberate as possible.

This leads me to the final point I want to discuss today, the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan. What I hope to do is to give you a general sense, in broad terms, of the high bar we require ourselves to meet when making these profound decisions today. That includes not only whether a specific member of al-Qaida can legally be pursued with lethal force, but also whether he should be.

Over time, we've worked to refine, clarify, and strengthen this process and our standards, and we continue to do so. If our counterterrorism professionals assess, for example, that a suspected member of al-Qaida poses such a threat to the United States to warrant lethal action, they may raise that individual's name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for a decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of al-Qaida is authorized under both international and U.S. law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qaida, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.

Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands. Even if it were

possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism resources.

As a result, we have to be strategic. Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.

For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action. We do not engage in legal action -- in lethal action in order to eliminate every single member of al-Qaida in the world. Most times, and as we have done for more than a decade, we rely on cooperation with other countries that are also interested in removing these terrorists with their own capabilities and within their own laws. Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat, to stop plots, prevent future attacks, and to save American lives.

And what do we mean when we say significant threat? I am not referring to some hypothetical threat, the mere possibility that a member of al-Qaida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qaida or one of its associated forces. Or perhaps the individual is himself an operative, in the midst of actually training for or planning to carry out attacks against U.S. persons and interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plans and his plots before they come to fruition.

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qaida members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever and wherever feasible.

For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way. In fact, the members of al-Qaida that we or other nations have captured have been one of our greatest sources of information about al -Qaida, its plans, and its intentions. And once in U.S. custody, we often can prosecute them in our federal courts or reformed military commissions, both of which are used for gathering intelligence and preventing future terrorist attacks.

You see our preference for capture in the case of Ahmed Warsame, a member of al-Shabaab who had significant ties to al-Qaida in the Arabian Peninsula. Last year,

when we learned that he would be traveling from Yemen to Somalia, U.S. forces captured him in route and we subsequently charged him in federal court.

The reality, however, is that since 2001 such unilateral captures by U.S. forces outside of hot battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.

Moreover, after being subjected to more than a decade of relentless pressure, al-Qaida's ranks have dwindled and scattered. These terrorists are skilled at seeking remote, inhospitable terrain, places where the United States and our partners simply do not have the ability to arrest or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Oftentimes, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might be the only remaining option to address the threat, prevent an attack, and save lives.

Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.

Those are some of the questions we consider; the high standards we strive to meet. And in the end, we make a decision, we decide whether a particular member of al-Qaida warrants being pursued in this manner. Given the stakes involved and the consequences of our decision, we consider all the information available to us, carefully and responsibly.

We review the most up-to-date intelligence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands, we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the intelligence community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

We listen to departments and agencies across our national security team. We don't just hear out differing views, we ask for them and encourage them. We discuss. We debate. We disagree. We consider the advantages and disadvantages of taking action. We also carefully consider the costs of inaction and whether a decision not to carry out a strike could allow a terrorist attack to proceed and potentially kill scores of innocents.

Nor do we limit ourselves narrowly to counterterrorism considerations. We consider the broader strategic implications of any action, including what effect, if any, an action might have on our relationships with other countries. And we don't simply make a decision and never revisit it again. Quite the opposite. Over time, we refresh the intelligence and continue to consider whether lethal force is still warranted.

In some cases, such as senior al-Qaida leaders who are directing and planning attacks against the United States, the individual clearly meets our standards for taking action. In other cases, individuals have not met our standards. Indeed, there have been numerous occasions where, after careful review, we have, working on a consensus basis, concluded that lethal force was not justified in a given case.

As President Obama's counterterrorism advisor, I feel that it is important for the American people to know that these efforts are overseen with extraordinary care and thoughtfulness. The president expects us to address all of the tough questions I have discussed today. Is capture really not feasible? Is this individual a significant threat to U.S. interests? Is this really the best option? Have we thought through the consequences, especially any unintended ones? Is this really going to help protect our country from further attacks? Is this going to save lives?

Our commitment to upholding the ethics and efficacy of this counterterrorism tool continues even after we decide to pursue a specific terrorist in this way. For example, we only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing. This is a very high bar. Of course, how we identify an individual naturally involves intelligence sources and methods, which I will not discuss. Suffice it to say, our intelligence community has multiple ways to determine, with a high degree of confidence, that the individual being targeted is indeed the al-Qaida terrorist we are seeking.

In addition, we only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances. The unprecedented advances we have made in technology provide us greater proximity to target for a longer period of time, and as a result allow us to better understand what is happening in real time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.

I can tell you today that there have indeed been occasions when we decided against conducting a strike in order to avoid the injury or death of innocent civilians. This reflects our commitment to doing everything in our power to avoid civilian casualties, even if it means having to come back another day to take out that terrorist, as we have done previously. And I would note that these standards, for identifying a target and avoiding the loss of innocent -- the loss of lives of innocent civilians, exceed

what is required as a matter of international law on a typical battlefield. That's another example of the high standards to which we hold ourselves.

Our commitment to ensuring accuracy and effectiveness continues even after a strike. In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths. There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception.

As the president and others have acknowledged, there have indeed been instances when, despite the extraordinary precautions we take, civilians have been accidently killed or worse -- have been accidentally injured, or worse, killed in these strikes. It is exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war. And when it happens we take it very, very seriously. We go back and we review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

Ensuring the ethics and efficacy of these strikes also includes regularly informing appropriate members of Congress and the committees who have oversight of our counterterrorism programs. Indeed, our counterterrorism programs, including the use of lethal force, have grown more effective over time because of congressional oversight and our ongoing dialogue with members and staff.

This is the seriousness, the extraordinary care, that President Obama and those of us on his national security team bring to this weightiest of questions: Whether to pursue lethal force against a terrorist who is plotting to attack our country.

When that person is a U.S. citizen, we ask ourselves additional questions. Attorney General Holder has already described the legal authorities that clearly allow us to use lethal force against an American citizen who is a senior operational leader of al-Qaida. He has discussed the thorough and careful review, including all relevant constitutional considerations, that is to be undertaken by the U.S. government when determining whether the individual poses an imminent threat of violent attack against the United States.

To recap, the standards and processes I've described today, which we have refined and strengthened over time, reflect our commitment to: ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to U.S. interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that

innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaida terrorist is a U.S. citizen.

Going forward, we'll continue to strengthen and refine these standards and processes. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities. As the president said in Oslo, in the conduct of war, America must be the standard bearer.

This includes our continuing commitment to greater transparency. With that in mind, I have made a sincere effort today to address some of the main questions that citizens and scholars have raised regarding the use of targeted lethal force against al -Qaida. I suspect there are those, perhaps some in this audience, who feel we have not been transparent enough. I suspect there are those, both inside and outside our government, who feel I have been perhaps too open. If both groups feel a little bit unsatisfied, then I probably struck the right balance today.

Again, there are some lines we simply will not and cannot cross because, at times, our national security demands secrecy. But we are a democracy. The people are sovereign. And our counterterrorism tools do not exist in a vacuum. They are stronger and more sustainable when the American people understand and support them. They are weaker and less sustainable when the American people do not. As a result of my remarks today, I hope the American people have a better understanding of this critical tool, why we use it, what we do, how carefully we use it, and why it is absolutely essential to protecting our country and our citizens.

I would just like to close on a personal note. I know that for many people in our government and across the country the issue of targeted strikes raised profound moral questions. It forces us to confront deeply held personal beliefs and our values as a nation. If anyone in government who works in this area tells you they haven't struggled with this, then they haven't spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain in counterterrorism.

But I am certain about one thing. We are at war. We are at war against a terrorist organization called al-Qaida that has brutally murdered thousands of Americans, men, women and children, as well as thousands of other innocent people around the world. In recent years, with the help of targeted strikes, we have turned al-Qaida into a shadow of what it once was. They are on the road to destruction.

Until that finally happens, however, there are still terrorists in hard-to-reach places who are actively planning attacks against us. If given the chance, they will gladly strike again and kill more of our citizens. And the president has a Constitutional and solemn obligation to do everything in his power to protect the safety and security of the American people.

Yes, war is hell. It is awful. It involves human beings killing other human beings, sometimes innocent civilians. That is why we despise war. That is why we want this war against al-Qaida to be over as soon as possible, and not a moment longer. And over time, as al-Qaida fades into history and as our partners grow stronger, I'd hope that the United States would have to rely less on lethal force to keep our country safe.

Until that happens, as President Obama said here five years ago, if another nation cannot or will not take action, we will. And it is an unfortunate fact that to save many innocent lives we are sometimes obliged to take lives, the lives of terrorists who seek to murder our fellow citizens.

On behalf of President Obama and his administration, I am here to say to the American people that we will continue to work to safeguard this nations -- this nation and its citizens responsibly, adhering to the laws of this land and staying true to the values that define us as Americans, and thank you very much.

Jane Harman:
Thank you, Mr. Brennan. As it is almost 1:00, I hope you can stay a few extra minutes to take questions, and I would just like to make a comment, ask you one question, and then turn over to our -- turn it over to our audience for questions. Please no statements. Ask questions. First your call for greater transparency is certainly appreciated by me. I think that the clearer we can make our policies, and the better we can explain them, and the more debate we can have in the public square about them, the more: one, they will be understood; and two, they will persuade the would-be suicide bomber about to strap on a vest that there is a better answer. We do have to win the argument in the end with the next generation, not just take out those who can't be rehabilitated in this generation, and I see you nodding, so I know you agree and I'm not going to ask you a question about that. I also want to say how honored we are that you would make this important speech at the Wilson Center. There is new material here, for those who may have missed it. The fact that the U.S. conducts targeted strikes using drones has always been something that I, as a public official, danced around because I knew it had not been officially acknowledged by our government. I was one of those members of Congress briefed on this program, I have seen the feed that shows how we do these things, I'm not going to comment on specific operations or areas of the world, but I do think it is important that our government has acknowledged this, and set out, as carefully as possible, the reasons why we do it, and I want to commend you personally as well as Eric Holder, Jeh Johnson, and Harold Koh for carefully laying out the legal framework, and also add that at the Wilson Center, we will continue to debate these issues, and see what value we can add free from spin on a non-partisan basis to helping to articulate even more clearly the reasons why, as you said, war is hell, and why, as you said, there is no decision more consequential than deciding to use legal force, so thank you very much for making those remarks here.

My question is this: One thing I don't think you mentioned in that enormously important address was the rise of Islamist parties, which have been elected in Tunisia, Egypt, and probably will be elected, and exist in Turkey and other countries. Do you think that having Islamist inside the tent, in a political sphere, also helps diminish the threat of outside groups like al-Qaida?

John Brennan:
Well, hopefully political pluralism is breaking out in the Middle East, and we're going to find in many countries the ability of various constituencies to find expression through political parties. And certainly, we are very strong advocates of using the political system, the laws, to be able to express the views of individual groups within different countries, and so rather than finding expression through violent extremism, these groups have the opportunity now, and since they've never had before in countries like Tunisia, and in Egypt, Yemen, other places, where they can in fact participate meaningfully in the political system. This is going to take some time for these systems to be able to mature sufficiently so that there can be a very robust and democratic system there, but certainly those individuals who are parties -- who are associated with parties that have a religious basis to them, they can find now the opportunity now to be able to participate in that political system.

Jane Harman:
My second and final question, and I see all of you with your hands about to be raised, and again, please just state a question as I'm about to do. You just mentioned Yemen, that has been part of your broader portfolio, I know you made many trips there, and you were a key architect of the deal to get Saleh to agree to -- the 40 year autocrat ruler -- to agree to accept immunity, leave the country, and then to be replaced by an elected leader, in this case, his vice president in a restructured government. Do you think a Yemen-type solution could work in Syria? Do you think there's any possibility of getting the Bashar family out of Syria and structuring a new government there, and perhaps in having the -- Russia lead the effort to do that, because of its close ties to Syria, and the fact that it is still unfortunately arming and supporting the Syrian regime?

John Brennan:
Well, each of these countries in the Middle East are facing different types of circumstances, and they have unique histories. Yemen was fortunate that they do -- did have a degree of political pluralism there, Ali Abdullah Saleh in fact allowed certain political institutions to develop, and we were very fortunate to have a peaceful transition from the previous regime to the government of President Hadi now. Certainly, there needs to be some way found for progress in Syria. It's outrageous what's happening in that country, the continued death of Syrian citizens at the hands of a brutal authoritarian government. This is something that needs to stop, and the international community has come together on it, so I'd like to be able to see something that would be able to transition peacefully, but the sooner it can be done, obviously, the more lives we've saved.

Jane Harman:
Thank you very much. Please identify yourselves, and ask a question only. The woman straight ahead of me, yes. Just wait for the mic.

Tara McKelvy:

Hi, my name is Tara McKelvy, I'm a scholar here, and I'm a correspondent for Newsweek and The Daily Beast, and you talked a little bit about the struggle that you have in this process of the targeted strikes, and General Cartwright talked to me about the question of surrender, that's not really an option when you use a Predator drone, for instance. I'm wondering if you can talk about which kinds of issues that you found most troubling when you think about these strikes.

John Brennan:
Well, as I said, one of the considerations that we go through is the feasibility of capture. We would prefer to get these individuals so that they can be captured. Working with local governments, what we like to be able to do is provide them the intelligence that they can get the individuals, so it doesn't have to be U.S. forces that are going on the ground in certain areas. But if it's not feasible, either because it's too risky from the standpoint of forces or the government doesn't have the will or the ability to do it, then we make a determination whether or not the significance of the threat that the person poses requires us to take action, so that we're able to mitigate the threat that they pose. I mean, these are individuals that could be involved in a very active plot, and if it is allowed to continue, you know, it could result in attacks either in Yemen against the U.S. embassy, or here in the homeland that could kill, you know, dozens if not hundreds of people. So what we always want to do, though, is look at whether or not there is an option to get this person and bring them to justice somehow for intelligence collection purposes, as well as to try them for their crimes.

Jane Harman:
Thank you, man in the green shirt right here.

Robert Baum:
Robert Baum from the Wilson Center and the University of Missouri. Thank you for your comments. I did want to ask about one area where we seem to be less successful, the events in Mali and Nigeria seem to suggest that we've been less successful in containing al-Qaida, and I was wondering if you could talk a little bit about your efforts in West Africa and also urge you to emphasize the importance of economic development as a way of -- the strategic development of economic development in combating the terrorism. Thank you.

John Brennan:
You raised two important points. One is what are we doing in terms of confronting the terrorist threat that emanates in places like Mali and Nigeria, and other areas,

and then what we need to do further upstream as far as the type of development assistance, and assistance to these countries, so they can build the institutions that are going to be able to address the needs of the people. Nigeria's a particularly dangerous situation right now with Boko Haram that has the links with al-Qaida, but also has links with al-Shabaab, as well AQIM. It has this radical offshoot, Ansaru, that really is focused on U.S. or Western interests, and so there is a domestic challenge that Boko Haram poses to Nigeria, and as we well know, there's the north-south struggle within Nigeria, and tensions between the Christian-Muslim communities. So we are trying to work with the Nigerian government as well as other governments are, as well, to try to give them the capabilities they need to confront the terrorist threat, but then also the issue is the building up those political institutions within Nigeria so that they can deal with this, not just from a law enforcement or internal security perspective, but also to address those needs that are fueling some of these fires of violent extremism.

Mali, you know, because of the recent coup, we've been trying to work across the Sahel with Mali, and Niger, and Mauritania, and other countries to address the growing phenomenon and threat of al-Qaida Islamic Maghreb that is a unique organization because it has a criminal aspect to it. You know, it kidnaps these individuals for large ransoms. We're outraged whenever, you know, countries or organizations pay these huge sums to al-Qaida, whether it be in the Sahel or in Yemen because it just is able to feed their activities, but Mali right now, with the coup, and then you have the Tuareg rebellion up in the north, and then that area that basically is such a large expansive territory, that also, you know, requires both a balancing of addressing the near-term threats that are posed by al-Qaida, but also trying to give the government in Mali, in Bamako, the ability to build up those institutions, address the development needs, they have the different sort of ethnic and tribal rivalries that are there, so it's a complicated area. I've worked very closely with the -- talking with my French and British colleagues as well as with others in the region, about how there might be some way to address some of these broader African issues that manifest themselves, unfortunately, in the kidnappings, and the piracy, and the criminal activities, and terrorist attacks, so there's an operational cadence in Africa now that is concerning in a number of parts of the continent.

Jane Harman:
Back there, middle, yeah.

John Brennan:
I can take another 10 minutes [inaudible].

Leanne Erdberg:

Hi there, Leanne Erdberg [spelled phonetically] from the State Department. How can we ensure that executive interagency actors, when they are undertaking counterterrorism actions, are held to appropriate standards, and processes as we

ask them to act as prosecutors, judges, and juries, and how we can ensure that intelligence is held to the same standards and processes that evidence is?

John Brennan:
Okay, well as I tried to say in my remarks, we're not carrying out these actions to retaliate for past transgressions. We are not a court, we're not trying to determine guilt or innocence, and then carry out a strike in retaliation. What we're trying to do is prevent the loss of lives through terrorist attacks, so it's not as though we're, you know, sort of judge and jury on, again, their involvement in past activities. We see a threat developing, we follow it very carefully, we identify the individuals who are responsible for allowing that plot and that plan to go forward, and then we make a determination about whether or not we have the solid intelligence base, and that's why I tried to say in my remarks, we have standards. You know, the intelligence is brought forward, we evaluate that, there's interagency meetings that a number of us are involved in on a ongoing basis, scrutinizing that intelligence, determining whether or not we have a degree of confidence that that person is indeed involved in carrying out this plan to kill Americans. If it reaches that level, then what we do is we look at it according to the other standards that I talked about in terms of infeasibility of capture, determination that we are able to have the intelligence that will give us, you know, a high degree of confidence that, you know, we can track an individual and find them, and be confident that we're taking action against an individual who really is involved in carrying out an attack. You know, if we -- if we didn't have to take these actions, and we still had -- and we had confidence that there wasn't going to be a terrorist attack, I think everybody would be very, very pleased. We only decide to take that action if there is no other option available, if there is not the option of capture, if the local government will not take action, if we cannot do something that will prevent that attack from taking place, and the only available option is taking that individual off of the battlefield, and we're going to do it in a way that gives us the confidence that we are not going to, in fact, inflict collateral damage. So again, it really is a very rigorous system of standards and processes that we go through.

Jane Harman:
Thank you. In the far back. Yes, you.

Jon Harper:

Sir, I was wondering if you could tell us --

Jane Harman:
Identify yourself, please.

Jon Harper:

Oh, sorry, Jon Harper with the Asahi Shimbun. It's a Japanese paper. I was wondering if you could tell me how many times or what percentage of the time have

proposals to target a specific individual been denied, and also if you could address the issue of signature strikes, which I guess aren't necessarily targeted against specific individuals, but people who are engaging in suspicious activities. Could you comment on what the criteria is for targeting them? Thank you.

John Brennan:

Well, I'm not going to go into sort of how many times, what proportion of instances there have been sort of either approvals or declinations of these recommendations that come forward, but I can just tell you that there have been a -- numerous times where individuals that were put forward for consideration for this type of action was declined. You make reference to signature strikes that are frequently reported in the press. I was speaking here specifically about targeted strikes against individuals who are involved. Everything we do, though, that is carried out against al-Qaida is carried out consistent with the rule of law, the authorization on the use of military force, and domestic law. And we do it with a similar rigor, and there are various ways that we can make sure that we are taking the actions that we need to prevent a terrorist attack. That's the whole purpose of whatever action we use, the tool we use, it's to prevent attack, and to save lives. And so I spoke today, for the first time openly, about, again, what's commonly referred to in the press as drones, remotely piloted aircraft, that can give you that type of laser-like precision that can excise that terrorist or that threat in a manner that, again, with the medical metaphor, that will not damage the surrounding tissue, and so what we're really trying to do -- al-Qaida's a cancer throughout the world, it has metastasized in so many different places, and when that metastasized tumor becomes lethal and malignant, that's when we're going to take the action that we need to.

Jane Harman:
Last question will be the woman in the back at the edge.

Homai Emdah:

Sorry. What about in a country like Pakistan --

Jane Harman:
Could you identify yourself please.

Homai Emdah:
Homai Emdah [spelled phonetically], Express News. Mr. Brennan, what about in a country like Pakistan where drone strikes are frequently carried out, and the Pakistani government has, over the last few months, repeatedly protested to the U.S. government about an end to drone strikes, which is also the subject of discussion between Ambassador Grossman when he was in Islamabad. You mentioned that countries can be incapable or unwilling to carry out -- to arrest militants, so how do you deal with a country like Pakistan which doesn't accept drone strikes officially?

John Brennan:
We have an ongoing dialogue with many countries throughout the world on counterterrorism programs, and some of those countries we are involved in very detailed discussions about the appropriate tools to bring to bear. In the case of Pakistan, as you pointed out, Ambassador Grossman was there just very recently. There are ongoing discussions with the government of Pakistan about how best to address the terrorist threat that emanates from that area, and I will point out, that, you know, so many Pakistanis have been killed by that malignant tumor that is within the sovereign borders of Pakistan. It's -- and many, many brave Pakistanis have given their lives against these terrorist and militant organizations. And so, as the parliament recently said in its resolution, that Pakistan needs to rid itself of this -- these foreign militants and these foreign terrorists that have taken root inside of Pakistan. So we are committed to working very closely on an ongoing basis with the Pakistani government which includes, you know, the various components, intelligence, security, and various civilian departments and agencies in order to help them address the terrorist threat, but also so that they can help us make sure that Pakistan and that area near Afghanistan is never, ever again used as a launching pad for attacks here in the United States.

Jane Harman:
Thank you. Let me just conclude by saying that former CIA director Mike Hayden used to use the analogy of a football field, the lines on the football field, and he talked about our intelligence operatives and others as the players on the field, and he said, "We need them to get chalk on their cleats." Go up right up to the line in carrying out what are approved policies of the United States, and if you think about it that way, it is really important to have policies that are transparent, so that those who are carrying out the mission and those in the United States, and those around the world who are trying to understand the mission, know where the lines are. If we don't know where the lines are, some people will be risk-averse, other will commit excesses, and we've certainly seen a few of those, Abu Ghraib comes to mind, over recent years which are black eyes on our country. And so I just want to applaud the fact that John Brennan has come over here from the White House, spent over an hour with us laying out in great detail what the rules are for something that has been revealed today, which is the use of drones in certain operations, targeted operations. The debate will continue, no question, people in this audience and listening in have different points of view, we certainly know that one young woman did during his remarks, but that's why the Wilson Center's here. To offer a platform free of spin and partisan rhetoric to debate these issues thoroughly, and you honored us by coming here today, Mr. Brennan, thank you very much.

John Brennan:
Thank you very much Jane, thank you.

[applause]

[end of transcription]

Event Speakers List:

- **John O. Brennan //**
  Assistant to the President for Homeland Security and Counterterrorism

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EXHIBIT F

U.S. DEPARTMENT OF STATE
DIPLOMACY IN ACTION

The Obama Administration and International Law

Speech
Harold Hongju Koh
Legal Adviser, U.S. Department of State
Annual Meeting of the American Society of International Law
Washington, DC
March 25, 2010

Thank you, Dean Areen, for that very generous introduction, and very special thanks to my good friends President Lucy Reed and Executive Director Betsy Andersen for the extraordinary work you do with the American Society of International Law. It has been such a great joy in my new position to be able to collaborate with the Society on so many issues.

It is such a pleasure to be back here at the ASIL. I am embarrassed to confess that I have been a member of ASIL for more than 30 years, since my first year of law school, and coming to the annual meeting has always been a highlight of my year. As a young lawyer just out of law school I would come to the American Society meeting and stand in the hotel lobby gaping at all the famous international lawyers walking by: for international lawyers, that is as close as we get to watching the Hollywood stars stroll the red carpet at the Oscars! And last year at this time, when this meeting was held, I was still in the middle of my confirmation process. So under the arcane rules of that process, I was allowed to come here to be seen, but not heard. So it is a pleasure finally to be able to address all of you and to give you my perspective on the Obama Administration's approach to international law.

Let me start by bringing you special greetings from someone you already know.

As you saw, my client, Secretary Clinton very much wanted to be here in person, but as you see in the headlines, this week she has been called away to Mexico, to meeting visiting Pakistani dignitaries, to testify on Capitol Hill, and many other duties. As you can tell, she is very proud of the strong historical relationship between the American Society and the State Department, and she is determined to keep it strong. As the Secretary mentioned, I and another long time member of the Society, your former President Anne Marie Slaughter of the Policy Planning Staff join her every morning at her 8:45 am senior staff meeting, so the spirit of the American Society is very much in the room (and the smell of the Society as well, as I am usually there at that hour clutching my ASIL coffee mug!)

Since this is my first chance to address you as Legal Adviser, I thought I would speak to three issues. First, the nature of my job as Legal Adviser. Second, to discuss the strategic vision of international law that we in the Obama Administration

are attempting to implement. Third and finally, to discuss particular issues that we have grappled with in our first year in a number of high-profile areas: the International Criminal Court, the Human Rights Council, and what I call The Law of 9/11: detentions, use of force, and prosecutions.

I. The Role of the Legal Adviser

First, my job. I have now been the Legal Adviser of the State Department for about nine months. This is a position I first heard of about 40 years ago, and it has struck me throughout my career as the most fascinating legal job in the U.S. Government. Now that I've actually been in the job for awhile, I have become even more convinced that that is true, for four reasons.

First, I have absolutely extraordinary colleagues at the Legal Adviser's Office, which we call "L," which is surely the greatest international law firm in the world. Its numbers include many current lawyers and alumni who are sitting here in the audience, and it is a training ground for America's international lawyers [To prove that point, could I have a show of hands of how many of you in the audience have worked in L sometime during your careers?] Our 175 lawyers are spread over 24 offices, including four extraordinary career deputies and a Counselor of International Law, nearly all of whom are members of this Society and many of whom you will find speaking on the various panels throughout this Annual Meeting program.

Second, I have extraordinary clients and you just saw one, Secretary Hillary Clinton, who is a remarkably able lawyer. Of course, another client of mine, the President, is also an outstanding lawyer, as are both Deputy Secretaries, the Department's Counselor, the Deputy Chief of Staff, and a host of Under Secretaries and Assistant Secretaries.

Third, each day we tackle extraordinarily fascinating legal questions. When I was a professor, I would spend a lot of time trying to think up exam questions. For those of you who are professors, this job literally presents you with a new exam question every single day. For example, I had never really thought about the question: "can you attach a panda?" Or the question, can Mu'ammar al-Qadhafi erect a tent in Englewood, New Jersey, notwithstanding a contrary local ordinance? To be honest, I had never really thought about those questions. But rest assured, in the future, many Yale law students will.

Fourth and finally, my position allows me to play extraordinary and varied roles. Some government lawyers have the privilege for example, of giving regular advice to a particularly prominent client or pleading particular cases before a particular court. But the Legal Adviser must shift back and forth constantly between four rich and varied roles: which I call counselor, conscience, defender of U.S. interests, and spokesperson for international law.

As **Counselor,** I mean obviously, that the Legal Adviser must play all the traditional functions of an agency general counsel, but with a twist. Like every in-house counsel's office, we do buildings and acquisitions, but those buildings may well be in Afghanistan or Beijing. We review government contracts, but they may require contracting activities in Iraq or Pakistan. We review employment decisions, but with respect to employees with diplomatic and consular immunities or special visa problems.

But in addition to being counselors, we also serve as a **conscience** for the U.S. Government with regard to international law. The Legal Adviser, along with many others in policy as well as legal positions, offers opinions on both the wisdom and morality of proposed international actions. For it is the unique role of the Legal Adviser's Office to coordinate and render authoritative legal advice for the State Department on international legal issues, or as Dick Bilder once put it, to "speak law

to power." In this role, the Legal Adviser must serve not only as a source of black letter advice to his clients, but more fundamentally, as a source of good judgment. That means that one of the most important roles of the Legal Adviser is to advise the Secretary when a policy option being proposed is "lawful but awful." As Herman Pfleger, one former Legal Adviser, put it: "You should never say no to your client when the law and your conscience say yes; but you should never, ever say yes when your law and conscience say no." And because my job is simply to provide the President and the Secretary of State with the very best legal advice that I can give them, I have felt little conflict with my past roles as a law professor, dean and human rights lawyer, because as my old professor, former legal adviser Abram Chayes, once put it: "There's nothing wrong with a lawyer holding the United States to its own best standards and principles."

A third role the Legal Adviser plays is **defender** of the United States interests in the many international fora in which the U.S. appears-- the International Court of Justice, where I had the honor recently of appearing for the United States in the *Kosovo* case; the UN Compensation Commission; the Iran-US Claims Tribunal; NAFTA tribunals (where I was privileged to argue recently before a Chapter XI tribunal in the *Grand River* case) – and we also appear regularly in US domestic litigation, usually as of counsel to the Department of Justice in a case such as the Supreme Court's current case of *Samantar v. Yousuf*, on which this Society held a panel this morning.

A fourth and final role for the Legal Adviser, and the reason I'm here tonight, is to act as a **spokesperson** for the US Government about why international law matters. Many people don't understand why obeying our international commitments is both right and smart, and that is a message that this Administration, and I as Legal Adviser, are committed to spreading.

II. The Strategic Vision

That brings me to my second topic: what strategic vision of international law are we trying to implement? How does obeying international law advance U.S foreign policy interests and strengthen America's position of global leadership? Or to put it another way, with respect to international law, is this Administration really committed to what our President has famously called "change we can believe in"? Some, including a number of the panelists who have addressed this conference, have argued that there is really more continuity than change from the last administration to this one.

To them I would answer that, of course, in foreign policy, from administration to administration, there will always be more continuity than change; you simply cannot turn the ship of state 360 degrees from administration to administration every four to eight years, nor should you. But, I would argue—and these are the core of my remarks today-- to say that is to understate the most important difference between this administration and the last: and that is with respect to its **approach and attitude toward international law.** The difference in that approach to international law I would argue is captured in **an Emerging "Obama-Clinton Doctrine,"** which is based on four commitments: to: 1. *Principled Engagement;* 2. Diplomacy as a Critical Element of *Smart Power;* 3. *Strategic Multilateralism; and* 4. the notion that *Living Our Values* Makes us Stronger and Safer, by Following *Rules of Domestic and International Law; and Following Universal Standards, Not Double Standards.*

As articulated by the President and Secretary Clinton, I believe the Obama/Clinton doctrine reflects these four core commitments. First, a **Commitment to Principled Engagement**: A powerful belief in the interdependence of the global community is a major theme for our President, whose father came from a Kenyan family and who as a child spent several years in Indonesia.

Second, a commitment to what Secretary Clinton calls "**smart power**"—a blend of principle and pragmatism" that makes "intelligent use of all means at our disposal," including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy.

Third, a commitment to what some have called **Strategic Multilateralism**: the notion acknowledged by President Obama at Cairo, that the challenges of the twenty-first century "can't be met by any one leader or any one nation" and must therefore be addressed by open dialogue and partnership by the United States with peoples and nations across traditional regional divides, "based on mutual interest and mutual respect" as well as acknowledgment of "the rights and responsibilities of [all] nations."

And fourth and finally, a commitment to **living our values by respecting the rule of law**, As I said, both the President and Secretary Clinton are outstanding lawyers, and they understand that by imposing constraints on government action, law legitimates and gives credibility to governmental action. As the President emphasized forcefully in his National Archives speech and elsewhere, the American political system was founded on a vision of common humanity, universal rights and rule of law. Fidelity to [these] values" makes us stronger and safer. This also means **following universal standards, not double standards**. In his Nobel lecture at Oslo, President Obama affirmed that "[a]dhering to standards, international standards, strengthens those who do, and isolates those who don't." And in her December speech on a 21st Century human rights agenda, and again two weeks ago in introducing our annual human rights reports, Secretary Clinton reiterated that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves."

Now in implementing this ambitious vision—this Obama-Clinton doctrine based on principled international engagement, smart power, strategic multilateralism, and the view that global leadership flows to those who live their values and obey the law and global standards—I am reminded of two stories.

The first, told by a former teammate is about the late Mickey Mantle of the American baseball team, the New York Yankees, who, having been told that he would not play the next day, went out and got terrifically drunk (as he was wont to do). The next day, he arrived at the ballpark, somewhat impaired, but in the late innings was unexpectedly called upon to pinch-hit. After staggering out to the field, he swung wildly at the first two pitches and missed by a mile. But on the third pitch, he hit a tremendous home run. And when he returned to the dugout, he squinted out at the wildly cheering crowd and confided to his teammates, "[t]hose people don't know how hard that really was."[1]

In much the same way, I learned that the making of U.S. foreign policy is infinitely harder than it looks from the ivory tower. Why? Because, as lawyers, we are accustomed to the relatively orderly world of law and litigation, which is based on a knowable and identifiable structure and sequence of events. The workload comes with courtroom deadlines, page limits and scheduled arguments. But if conducting litigation is like climbing a ladder, making foreign policy is much more like driving the roundabout near the Coliseum in Rome.

In this maze of bureaucratic politics, you are only one lawyer, and there is only so much that any one person can do. Collective government decision-making creates enormous coordination problems. We in the Legal Adviser's Office are not the only lawyers in government: On any given issue, my office needs to reach consensus decisions with all of the other interested State Department bureaus, but our Department as a whole then needs to coordinate its positions not just with other government law offices, which include: our lawyer clients (POTUS/SecState/DepSecState); White House Lawyers (WHCounsel/NSC Legal Counsel/USTR General Counsel); DOD Lawyers (OGC, Jt Staff, CoComs, Services, JAGs); DOJ Lawyers (OLC, OSG, Litigating Divisions-Civ., Crim, OIL, NSD); IC Lawyers (DNI, CIA); DHS Lawyers, not to mention lawyers in the Senate and House.

To make matters even more complex, we participate in a complicated web of legal processes within processes: the policy process, the clearance process, the interagency process, the legislative process; and once a U.S. position is developed, an *inter*governmental lawyering process. So unlike academics, who are accustomed to being individualists, in government you are necessarily part of a team. One obvious corollary to this is that as one government lawyer, your views and the views of your client are not the only views that matter. As Walter Dellinger observed when he worked at OLC:

"[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority… When lawyers who are now [in my office] begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions."**[2]**

Now to say that is not to say that one administration cannot or should not reverse a previous administration's legal positions. But what it does mean, as I noted at my confirmation hearings, is that government lawyers should begin with a presumption of *stare decisis*--that an existing interpretation of the Executive Branch should stand-- unless after careful review, a considered reexamination of the text, structure, legislative or negotiating history, purpose and practice under the treaty or statute firmly convinces us that a change to the prior interpretation is warranted.

So that is what I mean when I say it's harder than it looks. And as those listening who have served in government know, it is a lot harder to get from a good idea to the implementation of that idea than those outside the government can imagine.

That brings me to my second, shorter story: about two Irishmen walking down the road near Galway. One of them asks the other, "So how do you get to Dublin?" And the other answers, "I wouldn't start from here."

In the same way, given the choice, no one would have started with what we inherited: the worst recession since the Depression, with conflicts in Iraq, Afghanistan, against al-Qaeda. Add to this mix a difficult and divided political environment, which makes it very difficult to get 60 Senate votes for cloture, much less the 67 you would need for treaty ratification, and such thorny carryover issues as resuming international engagement, closing Guantanamo, not to mention tackling an array of new challenges brought to us by the 21st century: climate change, attendant shifts in the polar environment; cyber crime, aggression and terrorism, food security, and global health just to name a few. Just to round things out, throw in a 7.0 earthquake in Haiti, another earthquake in Chile, four feet of snow in Washington, and you might well say to yourselves, to coin a phrase, "I wouldn't start from here."

But that having been said, how have we played the hand we have been dealt? What legal challenges do we face? There are really five fields of law that have occupied most of my time: what I call the law of international justice and dispute resolution, the law of 9/11, the law of international agreements, the law of the State Department, and the law of globalization. Tonight I want to focus on the first two of these areas: the law of international justice and dispute resolution and the law of 9/11. For they best illustrate how we have tried to implement the four themes I have outlined: principled engagement, multilateralism, smart power, and living our values.

III. Current Legal Challenges

A. International Justice and Dispute Resolution

By international justice and dispute resolution, I refer to the U.S.'s renewed relationship to international tribunals and other international bodies. Let me address two of them: the International Criminal Court and the U.N. Human Rights Council. As President Obama recognized, "a new era of engagement has begun and renewed respect for international law and institutions is critical if we are to resume American leadership in a new global century."

1. The International Criminal Court

With respect to the U.S. relationship to the ICC, let me report on my recent participation in the Resumed 8th Session of ICC Assembly of States Parties in New York, from which I have just returned. Last November, Ambassador-at-Large for War Crimes Stephen Rapp and I led an interagency delegation that resumed engagement with the Court by attending a meeting of the ICC Assembly of States Parties (ASP). This was the first time that the United States had attended such a meeting, and this week's New York meeting continued that November session. As you know, the United States is not party to the Rome Statute, but we have attended these meetings as an observer. Our goal in November was to listen and learn, and by listening to gain a better understanding of the issues being considered by the ASP and of the workings of the International Criminal Court.

Significantly, although during the last decade the U.S. was largely absent from the ICC, our historic commitment to the cause of international justice has remained strong. As you all know, we have not been silent in the face of war crimes and crimes against humanity. As one of the vigorous supporters of the work of the ad hoc tribunals regarding the former Yugoslavia, Rwanda, Cambodia, Sierra Leone, and Lebanon, the United States has worked for decades, and we will continue to work, with other States to ensure accountability on behalf of victims of such crimes. But as some of those ad hoc war crimes tribunals enter their final years, the eyes of the world are increasingly turned toward the ICC. At the end of May, the United States will attend the ASP's Review Conference in Kampala, Uganda. There are two key items on the agenda: stock-taking and aggression.

In the current situation where the Court has open investigations and prosecutions in relation to four situations, but has not yet concluded any trials, the stock-taking exercise is designed to address ways to strengthen the Court, and includes issues such as state cooperation; complementarity; effect on victims; peace and justice; and universality of membership. Even as a non-State party, the United States believes that it can be a valuable partner and ally in the cause of advancing international justice. The Obama Administration has been actively looking at ways that the U.S. can, consistent with U.S. law, assist the ICC in fulfilling its historic charge of providing justice to those who have endured crimes of epic savagery and scope. And as Ambassador Rapp announced in New York, we would like to meet with the Prosecutor at the ICC to examine whether there are specific ways that the United States might be able to support the particular prosecutions that already underway in the Democratic Republic of Congo, Sudan, Central African Republic, and Uganda.

But as for the second agenda item, the definition of the crime of aggression, the United States has a number of serious concerns and questions. The crime of aggression, which is a *jus ad bellum* crime based on acts committed by the state, fundamentally differs from the other three crimes under the Court's jurisdiction—genocide, war crimes, and crimes against humanity—which are *jus in bello* crimes directed against particular individuals. In particular, we are concerned that adopting a definition of aggression at this point in the court's history could divert the ICC from its core mission, and potentially politicize and weaken this young institution. Among the States Parties we found strongly held, yet divergent, views on many fundamental and unresolved questions.

First, there are questions raised by the terms of the definition itself, including the degree to which it may depart from customary international law of both the "crime of aggression" and the state "act of aggression." This encompasses

questions like what does it mean when the current draft definition requires that an act of aggression must be a "manifest" – as opposed to an "egregious" violation of the U.N. Charter?

A second question of who decides. The United States believes that investigation or prosecution of the crime of aggression should not take place absent a determination by the U.N. Security Council that aggression has occurred. The U.N. Charter confers on the Security Council the responsibility for determining when aggression has taken place. We are concerned by the confusion that might arise if more than one institution were legally empowered to make such a determination in the same case, especially since these bodies, under the current proposal, would be applying different definitions of aggression.

Third, there are questions about how such a crime would potentially affect the Court at this point in its development. For example, how would the still-maturing Court be affected if its prosecutor were mandated to investigate and prosecute this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political--both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged? To what extent would the availability of such a charge place burdens on the prosecutor in every case, both those in which he chooses to charge aggression and those in which he does not? If you think of the Court as a wobbly bicycle that is finally starting to move forward, is this frankly more weight than the bicycle can bear?

Fourth, would adopting the crime of aggression at this time advance or hinder the key goals of the stock-taking exercise: promoting complementarity, cooperation, and universality? With respect to complementarity, how would this principle apply to a crime of aggression? Do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will moving to adopt this highly politicized crime at a time when there is genuine disagreement on such issues enhance the prospects for universal adherence to the Rome Statute?

All of these questions go to our ultimate concern: has a genuine consensus yet emerged to finalize a definition of the crime of aggression? What outcome in Kampala will truly strengthen the Court at this critical moment in its history? What we heard at the Resumed Session in New York is that no clear consensus has yet emerged on many of these questions. Because this is such a momentous decision for this institution, which would bring about such an organic change in the Court's work, that we believe that we should leave no stone unturned in search of genuine consensus. And we look forward to discussing these important issues with as many States Parties and Non States Parties as possible between now and what we hope will be a successful Review Conference in Kampala.

2. Human Rights Council

In addition to reengaging with the ICC, the United States has also reengaged the U.N. Human Rights Council in Geneva. Along with my long time friend and colleague, Assistant Secretary of State for Democracy, Human Rights and Labor Michael Posner, who has my old job, and Assistant Secretary of State for International Organizations Esther Brimmer, I had the privilege of leading the first U.S. delegation to return to the Human Rights Council this past September.

You know the history: In March 2006, the U.N. General Assembly voted overwhelmingly to replace the flawed Human Rights Commission with this new body: the Human Rights Council. The last Administration participated actively in the negotiations in New York to reform the Commission, but ultimately voted against adoption of the UNGA resolution that created the HRC, and decided not to run for a seat.

The UNGA resolution that created the HRC made a number of important changes from the commission process: it created the Universal Periodic Review process, a mandatory process of self-examination and peer review that requires each U.N. member state to defend its own record before the HRC every four years. The Obama Administration would like our report to serve as a model for the world. Accordingly, we are preparing our first UPR report, which will be presented this November, with outreach sessions in an unprecedented interagency listening tour being conducted in about ten locations around the United States to hear about human rights concerns from civil society, community leaders, and tribal governments. Second, the HRC and its various subsidiary bodies and mechanisms meet far more frequently throughout the year than did the Commission, a pace that exhausts delegations. Third, the election criteria were revised. So while HRC membership still includes a number of authoritarian regimes that do not respect human rights, the election requirement of a majority of UNGA votes in often competitive elections has led to certain countries being defeated for membership and others declining to run for a seat. The rule that only one-third of membership (16 members) can convene a special session, has led to a disproportionate number of special sessions dedicated to criticism of Israel, which already is the only country with a permanent agenda item dedicated to examination of its human rights practices: an unbalanced focus that we have clearly and consistently criticized.

When the Obama Administration took office, we faced two choices with respect to the Human Rights Council: we could continue to stay away, and watch the flaws continue and possibly get worse, or we could engage and fight for better outcomes on human rights issues, even if they would not be easy to achieve. With the HRC, as with the ICC and other fora, we have chosen principled engagement and strategic multilateralism. While the institution is far from perfect, it is important and deserves the long-term commitment of the United States, and the United States must deploy its stature and moral authority to improve the U.N. human rights system where possible. This is a long-term effort, but one that we are committed to seeing through to success consistent with the basic goals of the Obama-Clinton doctrine: principled engagement and universality of human rights law. Our inaugural session as an HRC member in September saw some important successes, most notably the adoption by consensus of a freedom of expression resolution, which we co-sponsored with Egypt, that brought warring regional groups together and preserved the resolution as a vehicle to express firm support for freedom of speech and expression. This resolution was a way of implementing some of the themes in President Obama's historic speech in Cairo, bridging geographic and cultural divides and dealing with global issues of discrimination and intolerance. We also joined country resolutions highlighting human rights situations in Burma, Somalia, Cambodia, and Honduras, and were able to take positions joined by other countries on several resolutions on which the United States previously would have been isolated, including ones on toxic waste and the financial crisis. The challenges in developing a body that fairly and even-handedly addresses human rights issues are significant, but we will continue to work toward that end.

At the March HRC session, which ends tomorrow, we have continued to pursue principled engagement by taking on a variety of initiatives at the HRC that seek to weaken protections on freedom of expression, in particular, the push of some Council Members to ban speech that "defames" religions, such as the Danish cartoons. At this session, we made supported a country resolution on Guinea and made significant progress in opposing the Organization of the Islamic Conference's highly problematic "defamation of religions" resolution, even while continuing to deal with underlying concerns about religious intolerance.

B. The Law of 9/11

Let me focus the balance of my remarks on that aspect of my job that I call "The Law of 9/11." In this area, as in the other areas of our work, we believe, in the President's words, that "living our values doesn't make us weaker, it makes us safer and it makes us stronger."

We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is a "conflict that America did not seek, one in which we are joined by forty-three other countries…in an effort to defend ourselves and all nations from further attacks." In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).

Everyone here at this meeting is committed to international law. But as President Obama reminded us, "the world must remember that it was not simply international institutions -- not just treaties and declarations -- that brought stability to a post-World War II world. …[T]he instruments of war do have a role to play in preserving the peace."

With this background, let me address a question on many of your minds: how has this Administration determined to conduct these armed conflicts and to defend our national security, consistent with its abiding commitment to international law? ***Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.*** As the President reaffirmed in his Nobel Prize Lecture, "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct … [E]ven as we confront a vicious adversary that abides by no rules … the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength." We in the Obama Administration have worked hard since we entered office to ensure that we conduct all aspects of these armed conflicts – in particular, detention operations, targeting, and prosecution of terrorist suspects – in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.

Let me say a word about each: detention, targeting, and prosecution.

1. Detention

With respect to detention, as you know, the last Administration's detention practices were widely criticized around the world, and as a private citizen, I was among the vocal critics of those practices. This Administration and I personally have spent much of the last year seeking to revise those practices to ensure their full compliance with domestic and international law, first, by unequivocally guaranteeing *humane treatment* for all individuals in U.S. custody as a result of armed conflict and second, by *ensuring that all detained individuals are being held pursuant to lawful authorities*.

a. Treatment

To ensure humane treatment, on his second full day in office, the President unequivocally banned the use of torture as an instrument of U.S. policy, a commitment that he has repeatedly reaffirmed in the months since. He directed that executive officials could no longer rely upon the Justice Department OLC opinions that had permitted practices that I consider to be torture and cruel treatment -- many of which he later disclosed publicly -- and he instructed that henceforth, all interrogations of detainees must be conducted in accordance with Common Article 3 of the Geneva Conventions and with the revised Army Field Manual. An interagency review of U.S. interrogation practices later advised – and the President agreed – that no techniques beyond those in the Army Field Manual (and traditional noncoercive FBI techniques) are necessary to conduct effective interrogations. That Interrogation and Transfer Task Force also issued a set of recommendations to help ensure that the United States will not transfer individuals to face torture. The President also revoked Executive Order 13440, which had interpreted particular provisions of Common Article 3, and restored the meaning of those provisions to the way they have traditionally been understood in international law. The President ordered CIA "black sites" closed and directed the Secretary of Defense to conduct an immediate review – with two follow-up visits by a blue ribbon task force of former government officials – to ensure that the conditions of detention at Guantanamo fully

comply with Common Article 3 of the Geneva Conventions. Last December, I visited Guantanamo, a place I had visited several times over the last two decades, and I believe that the conditions I observed are humane and meet Geneva Conventions standards.

As you all know, also on his second full day in office, the President ordered Guantanamo closed, and his commitment to doing so has not wavered, even as closing Guantanamo has proven to be an arduous and painstaking process. Since the beginning of the Administration, through the work of my colleague Ambassador Dan Fried, we have transferred approximately 57 detainees to 22 different countries, of whom 33 were resettled in countries that are not the detainees' countries of origin. Our efforts continue on a daily basis. Just this week, five more detainees were transferred out of Guantanamo for resettlement. We are very grateful to those countries who have contributed to our efforts to close Guantanamo by resettling detainees; that list continues to grow as more and more countries see the positive changes we are making and wish to offer their support.

During the past year, we completed an exhaustive, rigorous, and collaborative interagency review of the status of the roughly 240 individuals detained at Guantanamo Bay when President Obama took office. The President's Executive Order placed responsibility for review of each Guantanamo detainee with six entities –the Departments of Justice, State, Defense, and Homeland Security, the Office of the Director of National Intelligence (ODNI), and the Joint Chiefs of Staff – to collect and consolidate from across the government all information concerning the detainees and to ensure that diplomatic, military, intelligence, homeland security, and law enforcement viewpoints would all be fully considered in the review process. This interagency task force, on which several State Department attorneys participated, painstakingly considered each and every Guantanamo detainee's case to assess whether the detainee could be transferred or repatriated consistently with national security, the interests of justice, and our policy not to transfer individuals to countries where they would likely face torture or persecution. The six entities ultimately reached unanimous agreement on the proper disposition of all detainees subject to review. As the President has made clear, this is not a one-time review; there will be "a thorough process of periodic review, so that *any* prolonged detention is carefully evaluated and justified." Similarly, the Department of Defense has created new review procedures for individuals held at the detention facility in Parwan at Bagram airfield, Afghanistan, with increased representation for detainees, greater opportunities to present evidence, and more transparent proceedings. Outside organizations have begun to monitor these proceedings, and even some of the toughest critics have acknowledged the positive changes that have been made.

b. Legal Authority to Detain

Some have asked what legal basis we have for continuing to detain those held on Guantanamo and at Bagram. But as a matter of both international and domestic law, the legal framework is well-established. As a matter of international law, our detention operations rest on three legal foundations. First, we continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States. Second, in Afghanistan, we work as partners with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of "all necessary measures" by the NATO countries constituting the International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan. As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in *Hamdi v. Rumsfeld*.

The federal courts have confirmed our legal authority to detain in the Guantanamo habeas cases, but the Administration is not asserting an unlimited detention authority. For example, with regard to individuals detained at Guantanamo, we explained in a March 13, 2009 habeas filing before the DC federal court --and repeatedly in habeas cases since -- that we

are resting our detention authority on a domestic statute – the 2001 Authorization for Use of Military Force (AUMF) – as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source.

In explaining this approach, let me note two important differences from the legal approach of the last Administration. First, as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.

Second, unlike the last administration, as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF *as informed by the laws of war.* Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is "necessary and appropriate" under the AUMF requires some "translation," or analogizing principles from the laws of war governing traditional *international* conflicts.

Some commentators have criticized our decision to detain certain individuals based on their membership in a non-state armed group. But as those of you who follow the Guantanamo habeas litigation know, we have defended this position based on the AUMF, as informed by the text, structure, and history of the Geneva Conventions and other sources of the laws of war. Moreover, while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that individuals who are part of an organized armed group like al-Qaeda can be subject to law of war detention for the duration of the current conflict. In sum, we have based our authority to detain not on conclusory labels, like "enemy combatant," but on whether the factual record in the particular case meets the legal standard. This includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces. Often these factors operate in combination. While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

A final point: the Obama Administration has made clear both its goal not only of closing Guantanamo, but also of moving to shift detention responsibilities to the local governments in Iraq and Afghanistan. Last July, I visited the detention facilities in Afghanistan at Bagram, as well as Afghan detention facilities near Kabul, and I discussed the conditions at those facilities with both Afghan and U.S. military officials and representatives of the International Committee of the Red Cross. I was impressed by the efforts that the Department of Defense is making both to improve our ongoing operations and to prepare the Afghans for the day when we turn over responsibility for detention operations. This Fall, DOD created a joint task force led by a three-star admiral, Robert Harward, to bring new energy and focus to these efforts, and you can see evidence of his work in the rigorous implementation of our new detainee review procedures at Bagram, the increased transparency of these proceedings, and closer coordination with our Afghan partners in our detention operations.

In sum, with respect to both treatment and detainability, we believe that our detention practices comport with both domestic and international law.

B. Use of Force

In the same way, in all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say *is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.*

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high -level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict-- such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate *domestic law,* in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute "assassination."

In sum, let me repeat: as in the area of detention operations, this Administration is committed to ensuring that the targeting practices that I have described are lawful.

C. Prosecutions:

The same goes, third and finally, for our policy of prosecutions. As the President made clear in his May 2009 National Archives speech, we have a national security interest in trying terrorists, either before Article III courts or military commissions, and in keeping the number of individuals detained under the laws of war low.

Obviously, the choice between Article III courts and military commissions must be made on a case-by-case basis, depending on the facts of each particular case. Many acts of terrorism committed in the context of an armed conflict can constitute both war crimes and violations of our Federal criminal law, and they can be prosecuted in either federal courts or military commissions. As the last Administration found, those who have violated American criminal laws can be successfully tried in federal courts, for example, Richard Reid, Zacarias Moussaoui, and a number of others.

With respect to the criminal justice system, to reiterate what Attorney General Holder recently explained, Article III prosecutions have proven to be remarkably effective in incapacitating terrorists. In 2009, there were more defendants charged with terrorism violations in federal court than in any year since 9/11. In February 2010, for example, Najibullah Zazi pleaded guilty in the Eastern District of New York to a three-count information charging him with conspiracy to use weapons of mass destruction, specifically explosives, against persons or property in the United States, conspiracy to commit murder in a foreign country, and provision of material support to al-Qaeda. We have also effectively used the criminal justice system to pursue those who have sought to commit terrorist acts overseas. On March 18, 2010, for example, David Headley pleaded guilty to a dozen terrorism charges in U.S. federal court in Chicago, admitting that he participated in planning the November 2008 terrorist attacks in Mumbai, India, as well as later planning to attack a Danish newspaper.

As the President noted in his National Archives speech, lawfully constituted military commissions are also appropriate venues for trying persons for violations of the laws of war. In 2009, with significant input from this Administration, the Military Commissions Act was amended, with important changes to address the defects in the previous Military Commissions Act of 2006, including the addition of a provision that renders inadmissible any statements taken as a result of cruel, inhuman or degrading treatment. The 2009 legislative reforms also require the government to disclose more potentially exculpatory information, restrict hearsay evidence, and generally require that statements of the accused be admitted only if they were provided voluntarily (with a carefully defined exception for battlefield statements).

IV. CONCLUSION

In closing, in the last year, this Administration has pursued principled engagement with the ICC and the Human Rights Council, and has reaffirmed its commitment to international law with respect to all three aspects of the armed conflicts in which we find ourselves: detention, targeting and prosecution. While these are not all we want to achieve, neither are they small accomplishments. As the President said in his Nobel Lecture, "I have reaffirmed America's commitment to abide by the Geneva Conventions. We lose ourselves when we compromise the very ideals that we fight to defend. And we honor ideals by upholding them not when it's easy, but when it is hard." As President Obama went on to say, even in this day and age war is sometimes justified, but "this truth", he said, "must coexist with another – that no matter how justified, war promises human tragedy. The soldier's courage and sacrifice is full of glory … But war itself is never glorious, and we must never trumpet it as such. So part of our challenge is reconciling these two seemingly irreconcilable truths – that war is sometimes necessary, and war at some level is an expression of human folly."

Although it is not always easy, I see my job as an international lawyer in this Administration as reconciling these truths around a thoroughgoing commitment to the rule of law. That is the commitment I made to the President and the Secretary when I took this job with an oath to uphold the Constitution and laws of the United States. That is a commitment that I make to myself every day that I am a government lawyer. And that is a commitment that I make to each of you, as a lawyer deeply committed—as we all are—to the goals and aspirations of this American Society of International Law.

Thank you.

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[1] Jim Bouton, Ball Four: My Life and Hard Times Throwing the Knuckleball in the Big Leagues 30 (1970).
[2] Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107 (1995).

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EXHIBIT G

The White House

Office of the Press Secretary

For Immediate Release September 16, 2011

Remarks of John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws"

Remarks of John O. Brennan
Assistant to the Presidentfor Homeland Security and Counterterrorism
Program on Law and Security
Harvard Law School
Cambridge, Massachusetts
Friday, September 16, 2011

"Strengthening our Security by Adhering to our Values and Laws"

Good evening. Thank you, Dan, for your very kind introduction and for your service to our nation, in both the judicial and executive branches. At the White House, Dan helped us navigate some of the most complex legal issues related to our efforts to keep the American people safe. I know that President Obama is grateful for his service. And I am grateful for having had the opportunity to sit through his many law tutorials during national security meetings in the White House Situation Room. I dare say that those tutorials were a tad less expensive than what some of you currently are paying for his pearls of wisdom.

It's a pleasure to be here at Harvard Law School, and I want to acknowledge Dean Minow and members of the staff and faculty who are here tonight.

I especially want to thank Professor Gabriella Blum and Benjamin Wittes of the Brookings Institution for being the driving force behind your new Program on Law and Security. The preservation of our national security and the laws that define us as the United States of America demand that we understand the intersection of the two—indeed, how they reinforce one another. So I commend you for your efforts, we look forward to your contributions, and I very much appreciate the opportunity to be here for your inaugural event.

It's wonderful to see a number of friends and colleagues who I've had the privilege to work with over many years—public servants who have devoted their lives to protecting our nation. And let me say what a thrill it is to see so many students here this evening. I just hope your choice to listen to me on a Friday night is not an indictment of your social lives.

Now, I am not a lawyer, despite Dan's best efforts. I am the President's senior advisor on counterterrorism and homeland security. And in this capacity—and during more than thirty years working in intelligence and on behalf of our nation's security—I've developed a profound appreciation for the role that our values, especially the rule of law, play in keeping our country safe. It's an appreciation of course, understood by President Obama, who, as you may know, once spent a little time here. That's what I want to talk about this evening—how we have strengthened, and continue to strengthen, our national security by adhering to our values and our laws.

Obviously, the death of Usama Bin Laden marked a strategic milestone in our effort to defeat al-Qa'ida. Unfortunately, Bin Laden's death, and the death and capture of many other al-Qa'ida leaders and operatives, does not mark the end of that terrorist organization or its efforts to attack the United States and other countries. Indeed, al-Qa'ida, its affiliates and its adherents remain the preeminent security threat to our nation.

The core of al-Qa'ida—its leadership based in Pakistan—though severely crippled, still retains the intent and capability to attack the United States and our allies. Al-Qa'ida's affiliates—in places like Pakistan, Yemen, and countries throughout Africa—carry out its murderous agenda. And al-Qa'ida adherents – individuals, sometimes with little or no contact with the group itself – have succumbed to its hateful ideology and work to facilitate or conduct attacks here in the United States, as we saw in the tragedy at Fort Hood.

Guiding principles

In the face of this ongoing and evolving threat, the Obama Administration has worked to establish a counterterrorism framework that has been effective in enhancing the security of our nation. This framework is guided by several core principles.

First, our highest priority is – and always will be – the safety and security of the American people. As President Obama has said, we have no greater responsibility as a government.

Second, we will use every lawful tool and authority at our disposal. No single agency or department has sole responsibility for this fight because no single department or agency possesses all the capabilities needed for this fight.

Third, we are pragmatic, not rigid or ideological – making decisions not based on preconceived notions about which action seems "stronger," but based on what will actually enhance the security of this country and the safety of the American people. We address each threat and each circumstance in a way that best serves our national security interests, which includes building partnerships with countries around the world.

Fourth—and the principle that guides all our actions, foreign and domestic—we will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say "all our actions," that includes covert actions, which we undertake under the authorities provided to us by Congress. President Obama has directed that all our actions—even when conducted out of public view—remain consistent with our laws and values.

For when we uphold the rule of law, governments around the globe are more likely to provide us with intelligence we need to disrupt ongoing plots, they're more likely to join us in taking swift and decisive action against terrorists, and they're more likely to turn over suspected terrorists who are plotting to attack us, along with the evidence needed to prosecute them.

When we uphold the rule of law, our counterterrorism tools are more likely to withstand the scrutiny of our courts, our allies, and the American people. And when we uphold the rule of law it provides a powerful alternative to the

twisted worldview offered by al-Qa'ida. Where terrorists offer injustice, disorder and destruction, the United States and its allies stand for freedom, fairness, equality, hope, and opportunity.

In short, we must not cut corners by setting aside our values and flouting our laws, treating them like luxuries we cannot afford. Indeed, President Obama has made it clear—we must reject the false choice between our values and our security. We are constantly working to optimize both. Over the past two and a half years, we have put in place an approach—both here at home and abroad—that will enable this Administration and its successors, in cooperation with key partners overseas, to deal with the threat from al-Qa'ida, its affiliates, and its adherents in a forceful, effective and lasting way.

In keeping with our guiding principles, the President's approach has been pragmatic—neither a wholesale overhaul nor a wholesale retention of past practices. Where the methods and tactics of the previous administration have proven effective and enhanced our security, we have maintained them. Where they did not, we have taken concrete steps to get us back on course.

Unfortunately, much of the debate around our counterterrorism policies has tended to obscure the extraordinary progress of the past few years. So with the time I have left, I want to touch on a few specific topics that illustrate how our adherence to the rule of law advances our national security.

Nature and geographic scope of the conflict

First, our definition of the conflict. As the President has said many times, we are at war with al-Qa'ida. In an indisputable act of aggression, al-Qa'ida attacked our nation and killed nearly 3,000 innocent people. And as we were reminded just last weekend, al-Qa'ida seeks to attack us again. Our ongoing armed conflict with al-Qa'ida stems from our right—recognized under international law—to self defense.

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that —in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

That does not mean 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 constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the "hot" battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an "imminent" threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define "imminence."

We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, al-Qa'ida does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an "imminent" attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.

The convergence of our legal views with those of our international partners matters. The effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies—who, in ways public and private, take great risks to aid us in this fight. But their participation must be consistent with their laws, including their interpretation of international law. Again, we will never abdicate the security of the United States to a foreign country or refrain from taking action when appropriate. But we cannot ignore the reality that cooperative counterterrorism activities are a key to our national defense. The more our views and our allies' views on these questions converge, without constraining our flexibility, the safer we will be as a country.

Privacy and transparency at home

We've also worked to uphold our values and the rule of law in a second area—our policies and practices here at home. As I said, we will use all lawful tools at our disposal, and that includes authorities under the renewed PATRIOT Act. We firmly believe that our intelligence gathering tools must enable us to collect the information we need to protect the American people. At the same time, these tools must be subject to appropriate oversight and rigorous checks and balances that protect the privacy of innocent individuals.

As such, we have ensured that investigative techniques in the United States are conducted in a manner that is consistent with our laws and subject to the supervision of our courts. We have also taken administrative steps to institute additional checks and balances, above and beyond what is required by law, in order to better safeguard the privacy rights of innocent Americans.

Our democratic values also include—and our national security demands—open and transparent government. Some information obviously needs to be protected. And since his first days in office, President Obama has worked to strike the proper balance between the security the American people deserve and the openness our democratic society expects.

In one of his first acts, the President issued a new Executive Order on classified information that, among other things, reestablished the principle that all classified information will ultimately be declassified. The President also issued a Freedom of Information Act Directive mandating that agencies adopt a presumption of disclosure when processing requests for information.

The President signed into law the first intelligence authorization act in over five years to ensure better oversight of intelligence activities. Among other things, the legislation revised the process for reporting sensitive intelligence activities to Congress and created an Inspector General for the Intelligence Community.

For the first time, President Obama released the combined budget of the intelligence community, and reconstituted the Intelligence Oversight Board, an important check on the government's intelligence activities. The President declassified and released legal memos that authorized the use, in early times, of enhanced interrogation

techniques. Understanding that the reasons to keep those memos secret had evaporated, the President felt it was important for the American people to understand how those methods came to be authorized and used.

The President, through the Attorney General, instituted a new process to consider invocation of the so-called "state secrets privilege," where the government can protect information in civil lawsuits. This process ensures that this privilege is never used simply to hide embarrassing or unlawful government activities. But, it also recognizes that its use is absolutely necessary in certain cases for the protection of national security. I know there has been some criticism of the Administration on this. But by applying a stricter internal review process, including a requirement of personal approval by the Attorney General, we are working to ensure that this extraordinary power is asserted only when there is a strong justification to do so.

Detention and interrogation

We've worked to uphold our values and the rule of law in a third area—the question of how to deal with terrorist suspects, including the significant challenge of how to handle suspected terrorists who were already in our custody when this Administration took office. There are few places where the intersection of our counterterrorism efforts, our laws, and our values come together as starkly as it does at the prison at Guantánamo. By the time President Obama took office, Guantánamo was viewed internationally as a symbol of a counterterrorism approach that flouted our laws and strayed from our values, undercutting the perceived legitimacy—and therefore the effectiveness—of our efforts.

Aside from the false promises of enhanced security, the purported legality of depriving detainees of their rights was soundly and repeatedly rejected by our courts. It came as no surprise, then, that before 2009 few counterterrorism proposals generated as much bipartisan support as those to close Guantánamo. It was widely recognized that the costs associated with Guantánamo ran high, and the promised benefits never materialized.

That was why—as Dan knows so well—on one of his first days in office, President Obama issued the executive order to close the prison at Guantánamo. Yet, almost immediately, political support for closure waned. Over the last two years Congress has placed unprecedented restrictions on the discretion of our experienced counterterrorism professionals to prosecute and transfer individuals held at the prison. These restrictions prevent these professionals—who have carefully studied all of the available information in a particular situation—from exercising their best judgment as to what the most appropriate disposition is for each individual held there.

The Obama Administration has made its views on this clear. The prison at Guantánamo Bay undermines our national security, and our nation will be more secure the day when that prison is finally and responsibly closed. For all of the reasons mentioned above, we will not send more individuals to the prison at Guantánamo. And we continue to urge Congress to repeal these restrictions and allow our experienced counterterrorism professionals to have the flexibility they need to make individualized, informed decisions about where to bring terrorists to justice and when and where to transfer those whom it is no longer in our interest to detain.

This Administration also undertook an unprecedented review of our detention and interrogation practices and their evolution since 2001, and we have confronted squarely the question of how we will deal with those we arrest or capture in the future, including those we take custody of overseas. Nevertheless, some have suggested that we do not have a detention policy; that we prefer to kill suspected terrorists, rather than capture them. This is absurd, and I want to take this opportunity to set the record straight.

As a former career intelligence professional, I have a profound appreciation for the value of intelligence. Intelligence disrupts terrorist plots and thwarts attacks. Intelligence saves lives. And one of our greatest sources of

intelligence about al-Qa'ida, its plans, and its intentions has been the members of its network who have been taken into custody by the United States and our partners overseas.

So I want to be very clear—whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people. This is how our soldiers and counterterrorism professionals have been trained. It is reflected in our rules of engagement. And it is the clear and unambiguous policy of this Administration.

Now, there has been a great deal of debate about the best way to interrogate individuals in our custody. It's been suggested that getting terrorists to talk can be accomplished simply by withholding *Miranda* warnings or subjecting prisoners to so-called "enhanced interrogation techniques." It's also been suggested that prosecuting terrorists in our federal courts somehow impedes the collection of intelligence. A long record of experience, however, proves otherwise.

Consistent with our laws and our values, the President unequivocally banned torture and other abusive interrogation techniques, rejecting the claim that these are effective means of interrogation. Instead, we have focused on what works. The President approved the creation of a High-Value Detainee Interrogation Group, or HIG, to bring together resources from across the government – experienced interrogators, subject matter experts, intelligence analysts, and linguists – to conduct or assist in the interrogation of those terrorists with the greatest intelligence value – both at home and overseas. Through the HIG, we have brought together the capabilities that are essential to effective interrogation, and ensured they can be mobilized quickly and in a coordinated fashion.

Claims that *Miranda* warnings undermine intelligence collection ignore decades of experience to the contrary. Yes, some terrorism suspects have refused to provide information in the criminal justice system, but so have many individuals held in military custody, from Afghanistan to Guantánamo, where Miranda warnings were not given. What is undeniable is that many individuals in the criminal justice system have provided a great deal of information and intelligence—even after being given their *Miranda* warnings. The real danger is *failing* to give a Miranda warning in those circumstances where it's appropriate, which could well determine whether a terrorist is convicted and spends the rest of his life behind bars, or is set free.

Moreover, the Supreme Court has recognized a limited exception to *Miranda*, allowing statements to be admitted if the unwarned interrogation was "reasonably prompted by a concern for public safety." Applying this public safety exception to the more complex and diverse threat of international terrorism can be complicated, so our law enforcement officers require clarity.

Therefore, at the end of 2010, the FBI clarified its guidance to agents on use of the public safety exception to *Miranda*, explaining how it should apply to terrorism cases. The FBI has acknowledged that this exception was utilized last year, including during the questioning of Faisal Shahzad, accused of attempting to detonate a car bomb in Times Square. Just this week in a major terrorism case, a federal judge ruled that statements obtained under the public safety exception *before* the defendant was read his *Miranda* rights are, in fact, admissible at trial.

Some have argued that the United States should simply hold suspected terrorists in law of war detention indefinitely. It is worth remembering, however, that, for a variety of reasons, reliance upon military detention for individuals apprehended outside of Afghanistan and Iraq actually began to decline precipitously years *before* the Obama Administration came into office.

In the years following the 9/11 attacks, our knowledge of the al-Qa'ida network increased and our tools with which to bring them to justice in federal courts or reformed military commissions were strengthened, thus reducing the need for long-term law of war detention. In fact, from 2006 to the end of 2008, when the previous administration

apprehended terrorists overseas and outside of Iraq and Afghanistan, it brought more of those individuals to the United States to be prosecuted in our federal courts than it placed in long-term military detention at Guantánamo.

Article III courts & reformed military commissions

When we succeed in capturing suspected terrorists who pose a threat to the American people, our other critical national security objective is to maintain a viable authority to keep those individuals behind bars. The strong preference of this Administration is to accomplish that through prosecution, either in an Article III court or a reformed military commission. Our decisions on which system to use in a given case must be guided by the factual and legal complexities of each case, and relative strengths and weaknesses of each system. Otherwise, terrorists could be set free, intelligence lost, and lives put at risk.

That said, it is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it.

This is not a radical idea, nor is the idea of prosecuting terrorists captured overseas in our Article III courts. Indeed, terrorists captured beyond our borders have been successfully prosecuted in our federal courts on many occasions. Our federal courts are time-tested, have unquestioned legitimacy, and, at least for the foreseeable future, are capable of producing a more predictable and sustainable result than military commissions. The previous administration, successfully prosecuted hundreds of suspected terrorists in our federal courts, gathering valuable intelligence from several of them that helped our counterterrorism professionals protect the American people. In fact, every single suspected terrorist taken into custody on American soil—before and after the September 11th attacks—has first been taken into custody by law enforcement.

In the past two years alone, we have successfully interrogated several terrorism suspects who were taken into law enforcement custody and prosecuted, including Faisal Shahzad, Najibullah Zazi, David Headley, and many others. In fact, faced with the firm but fair hand of the American justice system, some of the most hardened terrorists have agreed to cooperate with the FBI, providing valuable information about al-Qa'ida's network, safe houses, recruitment methods, and even their plots and plans. That is the outcome that all Americans should not only want, but demand from their government.

Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system. There is bipartisan agreement that U.S. citizens should not be tried by military commission. Since 2001, two U.S. citizens were held in military custody, and after years of controversy and extensive litigation, one was released; the other was prosecuted in federal court. Even as the number of U.S. citizens arrested for terrorist-related activity has increased, our civilian courts have proven they are more than up to the job.

In short, our Article III courts are not only our single most effective tool for prosecuting, convicting, and sentencing suspected terrorists—they are a proven tool for gathering intelligence and preventing attacks. For these reasons, credible experts from across the political spectrum continue to demand that our Article III courts remain an unrestrained tool in our counterterrorism toolbox. And where our counterterrorism professionals believe prosecution in our federal courts would best protect the full range of U.S. security interests and the safety of the American people, we will not hesitate to use them. The alternative—a wholesale refusal to utilize our federal courts—would undermine our values and our security.

At the same time, reformed military commissions also have their place in our counterterrorism arsenal. Because of bipartisan efforts to ensure that military commissions provide all of the core protections that are necessary to ensure

a fair trial, we have restored the credibility of that system and brought it into line with our principles and our values. Where our counterterrorism professionals believe trying a suspected terrorist in our reformed military commissions would best protect the full range of U.S. security interests and the safety of the American people, we will not hesitate to utilize them to try such individuals. In other words, rather than a rigid reliance on just one or the other, we will use both our federal courts and reformed military commissions as options for incapacitating terrorists.

As a result of recent reforms, there are indeed many similarities between the two systems, and at times, these reformed military commissions offer certain advantages. But important differences remain—differences that can determine whether a prosecution is more likely to succeed or fail.

For example, after Ahmed Warsame—a member of al-Shabaab with close ties to al-Qa'ida in the Arabian Peninsula—was captured this year by U.S. military personnel, the President's national security team unanimously agreed that the best option for prosecuting him was our federal courts, where, among other advantages, we could avoid significant risks associated with, and pursue additional charges not available in, a military commission. And, if convicted of certain charges, he faces a mandatory life sentence.

In choosing between our federal courts and military commissions in any given case, this Administration will remain focused on one thing—the most effective way to keep that terrorist behind bars. The only way to do that is to let our experienced counterterrorism professionals determine, based on the facts and circumstances of each case, which system will best serve our national security interests.

In the end, the Obama Administration's approach to detention, interrogation and trial is simple. We have established a practical, flexible, results-driven approach that maximizes our intelligence collection and preserves our ability to prosecute dangerous individuals. Anything less—particularly a rigid, inflexible approach—would be disastrous. It would tie the hands of our counterterrorism professionals by eliminating tools and authorities that have been absolutely essential to their success.

Capacity building abroad

This brings me a final area where upholding the rule of law strengthens our security—our work with other nations. As we have seen from Afghanistan in the 1990s to Yemen, Somalia and the tribal areas of Pakistan today, al-Qa'ida and its affiliates often thrive where there is disorder or where central governments lack the ability to effectively govern their own territory.

In contrast, helping such countries build a robust legal framework, coupled with effective institutions to enforce them and the transparency and fairness to sustain them, can serve as one of our most effective weapons against groups like al-Qa'ida by eliminating the very chaos that organization needs to survive. That is why a key element of this Administration's counterterrorism strategy is to help governments build their capacity, including a robust and balanced legal framework, to provide for their own security.

Though tailored to the unique circumstances of each country, we are working with countries in key locations to help them enact robust counterterrorism laws and establish the institutions and mechanisms to effectively enforce them. The establishment of a functioning criminal justice system and institutions has played a key role in the security gains that have been achieved in Iraq. We are working to achieve similar results in places like Afghanistan, Iraq, Yemen, Pakistan, and elsewhere.

These efforts are not a blank check. As a condition of our funding, training, and cooperation, we require that our partners comply with certain legal and humanitarian standards. At times, we have curtailed or suspended security

assistance when these standards are not met. We encourage these countries to build a more just, more transparent system that can gain the respect and support of their own people.

As we are seeing across the Middle East and North Africa today, courageous people will continue to demand one of the most basic universal rights—the right to live in a society that respects the rule of law. Any security gains will be short-lived if these countries fail to provide just that. So where we see countries falling short of these basic standards, we will continue to support efforts of people to build institutions that both protect the rights of their own people and enhance our collective security.

Flexibility—critical to our success

In conclusion, I want to say again that the paramount responsibility of President Obama, and of those of us who serve with him, is to protect the American people. To save lives. Each of the tools I have discussed today, and the flexibility to apply them to the unique and complicated circumstances we face, are critical to our success.

This President's counterterrorism framework provides a sustainable foundation upon which this Administration and its successors, in close cooperation with our allies and partners overseas, can effectively deal with the threat posed by al-Qa'ida and its affiliates and adherents. It is, as I have said, a practical, flexible, result-driven approach to counterterrorism that is consistent with our laws, and in line with the very values upon which this nation was founded. And the results we have been able to achieve under this approach are undeniable. We divert from this path at own peril.

Yet, despite the successes that this approach has brought, some—including some legislative proposals in Congress—are demanding that we pursue a radically different strategy. Under that approach, we would never be able to turn the page on Guantánamo. Our counterterrorism professionals would be compelled to hold all captured terrorists in military custody, casting aside our most effective and time-tested tool for bringing suspected terrorists to justice—our federal courts. *Miranda* warnings would be prohibited, even though they are at times essential to our ability to convict a terrorist and ensure that individual remains behind bars. In sum, this approach would impose unprecedented restrictions on the ability of experienced professionals to combat terrorism, injecting legal and operational uncertainty into what is already enormously complicated work.

I am deeply concerned that the alternative approach to counterterrorism being advocated in some quarters would represent a drastic departure from our values and the body of laws and principles that have always made this country a force for positive change in the world. Such a departure would not only risk rejection by our courts and the American public, it would undermine the international cooperation that has been critical to the national security gains we have made.

Doing so would not make us safer, and would do far more harm than good. Simply put, it is not an approach we should pursue. Not when we have al-Qa'ida on the ropes. Our counterterrorism professionals—regardless of the administration in power—need the flexibility to make well-informed decisions about where to prosecute terrorist suspects.

To achieve and maintain the appropriate balance, Congress and the Executive Branch must continue to work together. There have been and will continue to be many opportunities to do so in a way that strengthens our ability to defeat al-Qa'ida and its adherents. As we do so, we must not tie the hands of our counterterrorism professionals by eliminating tools that are critical to their ability to keep our country safe.

As a people, as a nation, we cannot—and we must not—succumb to the temptation to set aside our laws and our values when we face threats to our security, including and especially from groups as depraved as al-Qa'ida. We're better than that. We're better than them. We're Americans.

Thank you all very much.

EXHIBIT H

The White House

Office of the Press Secretary

For Immediate Release September 30, 2011

Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony

Fort Myer, Virginia

11:41 A.M. EDT

THE PRESIDENT: Thank you very much. (Applause.) Secretary Panetta, thank you for your introduction and for your extraordinary leadership. Members of Congress, Vice President Biden, members of the Joint Chiefs, service secretaries, distinguished guests, and men and women of the finest military in the world.

Most of all, Admiral Mullen, Deborah, Michael, and I also want to also acknowledge your son Jack, who's deployed today. All of you have performed extraordinary service to our country.

Before I begin, I want to say a few words about some important news. Earlier this morning, Anwar al-Awlaki -- a leader of al Qaeda in the Arabian Peninsula -- was killed in Yemen. (Applause.) The death of Awlaki is a major blow to al Qaeda's most active operational affiliate. Awlaki was the leader of external operations for al Qaeda in the Arabian Peninsula. In that role, he took the lead in planning and directing efforts to murder innocent Americans. He directed the failed attempt to blow up an airplane on Christmas Day in 2009. He directed the failed attempt to blow up U.S. cargo planes in 2010. And he repeatedly called on individuals in the United States and around the globe to kill innocent men, women and children to advance a murderous agenda.

The death of al-Awlaki marks another significant milestone in the broader effort to defeat al Qaeda and its affiliates. Furthermore, this success is a tribute to our intelligence community, and to the efforts of Yemen and its security forces, who have worked closely with the United States over the course of several years.

Awlaki and his organization have been directly responsible for the deaths of many Yemeni citizens. His hateful ideology -- and targeting of innocent civilians -- has been rejected by the vast majority of Muslims, and people of all faiths. And he has met his demise because the government and the people of Yemen have joined the international community in a common effort against Al Qaeda.

Al Qaeda in the Arabian Peninsula remains a dangerous -- though weakened -- terrorist organization. And going forward, we will remain vigilant against any threats to the United States, or our allies and partners. But make no mistake: This is further proof that al Qaeda and its affiliates will find no safe haven anywhere in the world.

Working with Yemen and our other allies and partners, we will be determined, we will be deliberate, we will be

relentless, we will be resolute in our commitment to destroy terrorist networks that aim to kill Americans, and to build a world in which people everywhere can live in greater peace, prosperity and security.

Now, advancing that security has been the life's work of the man that we honor today. But as Mike will admit to you, he got off to a somewhat shaky start. He was a young ensign, just 23 years old, commanding a small tanker, when he collided with a buoy. (Laughter.) As Mike later explained, in his understated way, when you're on a ship, "colliding with anything is not a good thing." (Laughter.)

I tell this story because Mike has told it himself, to men and women across our military. He has always understood that the true measure of our success is not whether we stumble; it's whether we pick ourselves up and dust ourselves off and get on with the job. It's whether -- no matter the storms or shoals that come our way -- we chart our course, we keep our eye fixed on the horizon, and take care of those around us -- because we all we rise and fall together.

That's the story of Mike Mullen. It's the story of America. And it's the spirit that we celebrate today.

Indeed, if there's a thread that runs through his illustrious career, it's Mike's sense of stewardship -- the understanding that, as leaders, our time at the helm is but a moment in the life of our nation; the humility, which says the institutions and people entrusted to our care look to us, yet they do not belong to us; and the sense of responsibility we have to pass them safer and stronger to those who follow.

Mike, as you look back as your four consequential years as chairman and your four decades in uniform, be assured our military is stronger and our nation is more secure because of the service that you have rendered. (Applause.)

Today, we have renewed American leadership in the world. We've strengthened our alliances, including NATO. We're leading again in Asia. And we forged a new treaty with Russia to reduce our nuclear arsenals. And every American can be grateful to Admiral Mullen -- as am I -- for his critical role in each of these achievements, which will enhance our national security for decades to come.

Today, we see the remarkable achievements of our 9/11 generation of service members. They've given Iraqis a chance to determine their own future. They've pushed the Taliban out of their Afghan strongholds and finally put al Qaeda on the path to defeat. Meanwhile, our forces have responded to sudden crises with compassion, as in Haiti, and with precision, as in Libya. And it will be long remembered that our troops met these tests on Admiral Mullen's watch and under his leadership.

Today, we're moving forward from a position of strength. Fewer of our sons and daughters are in harm's way, and more will come home. Our soldiers can look forward to shorter deployments, more time with their families, and more time training for future missions. Put simply, despite the stresses and strains of a hard decade of war, the military that Admiral Mullen passes to General Dempsey today is the best that it has ever been.

And today, thanks to Mike's principled leadership, our military draws its strength from more members of our American family. Soon, women will report for duty on our submarines. And patriotic service members who are gay and lesbian no longer have to lie about who they are to serve the country that they love. History will record that the tipping point toward this progress came when the 17th Chairman of the Joint Chiefs of Staff went before Congress, and told the nation that it was the right thing to do.

Mike, your legacy will endure in a military that is stronger, but also in a nation that is more just. (Applause.)

Finally, I would add that in every discussion I've ever had with Mike, in every recommendation he's ever made, one thing has always been foremost in his mind -- the lives and well-being of our men and women in uniform. I've seen it

in quiet moments with our wounded warriors and our veterans. I saw it that day in the Situation Room, as we held our breath for the safe return of our forces who delivered justice to Osama bin Laden. I saw it at Dover, as we honored our fallen heroes on their final journey home.

Mike, you have fulfilled the pledge you made at the beginning -- to represent our troops with "unwavering dedication." And so has Deborah, who we thank for her four decades of extraordinary service, her extraordinary support to our military families, her kindness, her gentleness, her grace under pressure. She is an extraordinary woman, Mike. And we're both lucky to have married up. (Applause.)

Now the mantle of leadership passes to General Marty Dempsey, one of our nation's most respected and combat-tested generals. Marty, after a lifetime of service, I thank you, Deanie, Chris, Megan and Caitlin for answering the call to serve once more.

In this sense, today begins to complete the transition to our new leadership team. In Secretary Panetta, we have one of our nation's finest public servants. In the new Deputy Secretary, Ash Carter, we will have an experienced leader to carry on the work of Bill Lynn, who we thank for his outstanding service. And the new Vice Chairman, Admiral Sandy Winnefeld, will round out a team where -- for the first time -- both the Chairman and Vice Chairman will have the experience of leading combat operations in the years since 9/11.

Leon, Marty, Ash, Sandy, men and women of this department, both uniformed and civilian -- we still have much to do: From bringing the rest of our troops home from Iraq this year, to transitioning to Afghan lead for their own security, from defeating al Qaeda, to our most solemn of obligations -- taking care of our forces and their families, when they go to war and when they come home.

None of this will be easy, especially as our nation makes hard fiscal choices. But as Commander-in-Chief, let me say it as clearly as I can. As we go forward we will be guided by the mission we ask of our troops and the capabilities they need to succeed. We will maintain our military superiority. We will never waver in defense of our country, our citizens or our national security interests. And the United States of America --and our Armed Forces -- will remain the greatest force for freedom and security that the world has ever known.

This is who we are, as Americans. And this is who we must always be -- as we salute Mike Mullen as an exemplar of this spirit, we salute him for a life of patriotic service; as we continue his legacy to keep the country that we love safe; and as we renew the sources of American strength, here at home and around the world.

Mike, thank you, from a grateful nation. (Applause.)

END
11:52 A.M. EDT

EXHIBIT I

NationalJournalSubscriber

WHITE HOUSE

Transcript of President Obama's Interview on the Tonight Show With Jay Leno

by **National Journal staff**
October 26, 2011 | 12:35 a.m.

Below is a transcript of President Obama's interview on Tuesday's Tonight Show With Jay Leno *as provided by NBC.*

THE TONIGHT SHOW WITH JAY LENO

JAY LENO: It's an honor and a privilege to welcome my first guest back to the show. Welcome the 44th President of the United States, President Barack Obama.

(Applause.)

Welcome back.

THE PRESIDENT: Thank you. Thank you. It is good to be back.

JAY LENO: It's good to have you back, sir. Of course, the big news this week, Gaddafi is dead. Rebel forces -- killed by rebel forces. Your reaction? Your take on this?

THE PRESIDENT: Well, this is somebody who, for 40 years, has terrorized his country and supported terrorism. And he had an

opportunity during the Arab spring to finally let loose of his grip on power and to peacefully transition into democracy. We gave him ample opportunity, and he wouldn't do it. And, obviously, you never like to see anybody come to the kind of end that he did, but I think it obviously sends a strong message around the world to dictators that --

JAY LENO: Yeah.

THE PRESIDENT: -- people long to be free, and they need to respect the human rights and the universal aspirations of people.

JAY LENO: Now, the mob mentality -- and it was a rebel mob, I guess. It wasn't a government --

THE PRESIDENT: Right.

JAY LENO: -- they televised the death. Your thoughts on that?

THE PRESIDENT: You know, obviously, that's not something that I
think we should relish. And there was a reason after Bin Laden was killed, for example, we didn't release the photograph. You know, I think that there's a certain decorum with which you treat the dead even if it's somebody who has done terrible things.

JAY LENO: Now, you took some heat for the whole leading-from-behind tactic here with Libya. Explain that.

THE PRESIDENT: Well, the truth was, we -- this was a phrase that
the media picked up on.

JAY LENO: Okay.

THE PRESIDENT: But it's not one that I ever used.

JAY LENO: No.

THE PRESIDENT: We lead from the front. We introduced the resolution in the United Nations that allowed us to protect civilians in Libya when Gaddafi was threatening to slaughter them. It was our extraordinary men and women in uniform, our pilots who took out their air defense systems, set up a no-fly zone. It was our folks in NATO who were helping to coordinate the NATO operation there. And the difference here is we were able to organize the international community. We were able to get the U.N. mandate for the operation. We were able to get Arab countries involved. And so there was never this sense that somehow we were unilaterally making a decision to take out somebody. Rather, it was the world community. And that's part of the reason why this whole thing only cost us a billion dollars --

JAY LENO: Right.

THE PRESIDENT: -- as opposed to a trillion dollars. Not a single U.S. troop was on the ground. Not a single U.S. troop was killed or injured, and that, I think, is a recipe for success in the future.

(Applause.)

JAY LENO: Let me ask you about that because, with Osama Bin Laden, I remember the night before you were at the correspondence dinner and the whole deal.

THE PRESIDENT: Right.

JAY LENO: How hard was it to make that decision to send in those
Navy SEALs? because that could have been --

THE PRESIDENT: It could have been a disaster, but the reason I

was able to do it was -- when you meet these SEALs and you talk to them, they are the best of the best. They are professional. They are precise. They practice. They train. They understand what exactly they intend to do. They are prepared for the worst in almost every circumstance. So even though it was 50/50 that Bin Laden would be there, I was a hundred percent confident in the men, and I could not have made that decision were it not for the fact that our men and women in uniform are the best there is. They are unbelievable.

(Applause.)

JAY LENO: Now, you just announced the troops coming out of --

THE PRESIDENT: Right.

JAY LENO: -- Iraq. We have, like -- 4,000, I think, were killed.

THE PRESIDENT: Yeah, 4-.

JAY LENO: Billions of dollars spent, nine years. What was accomplished? What did we accomplish there?

THE PRESIDENT: Look, Saddam Hussein is gone, and that's a good
thing.

JAY LENO: Right.

THE PRESIDENT: The Iraqis now have the opportunity to create their own democracy, their own country, determine their own destiny. And I'm cautiously optimistic that they realize that the way they should resolve conflict is not through killing each other but, rather, through dialogue and discussion and debate. And so that would not have been possible had it not been for the extraordinary sacrifices not just of our Armed Forces, but also

their families. You know, when you think about the rotations that over a million of our troops went through --

JAY LENO: Right.

THE PRESIDENT: -- and reservists and National Guardsmen and -women and the strain that that placed on those families during this long period, it's remarkable. So I think Americans can rightly be proud that we have given Iraqis an opportunity to determine their own destiny, but I also think that policymakers and future Presidents need to understand what it is that we are getting ourselves into when we make some of these decisions. And there might have been other ways for us to accomplish those same goals. But the main thing right now is to celebrate the extraordinary work that our men and women did. Having them home
for the holidays for good is going to be a big deal.

(Applause.)

JAY LENO: Let me ask you now, many members of -- many members of
the GOP opposed withdrawing from Iraq.

THE PRESIDENT: It's shocking that they opposed something I proposed.

(Laughter and applause.)

JAY LENO: But, I mean, wasn't it originally -- didn't they want to get out of Iraq?

THE PRESIDENT: Well, look, I don't know exactly how they are thinking about it. You know, as you said, we've been in there four years, over 4,000 young men and women killed, tens of thousands injured, some of them for life, spent close to a trillion dollars on this operation. I think the vast majority of

the American people feel as if it is time to bring this war to a close --

JAY LENO: Yeah.

THE PRESIDENT: -- particularly because we still have --

(Applause.)

You know, we still have work to do in Afghanistan. We are transitioning to Afghan lead there. Our guys are still -- and gals are still making sacrifices there. We would not have been able to do as good of a job in decimating al Qaeda's leadership over the last two years if we had still been focused solely on Iraq. And one of the arguments I made way back in 2007 was, if we were able to bring the war in Iraq to a close, then that would allow us to go after the folks who perpetrated 9/11, and obviously, we've been very successful in doing that. We are not done yet.

JAY LENO: Yeah.

THE PRESIDENT: But al Qaeda is weaker than anytime in recent memory. We have taken out their top leadership position. That's been a big accomplishment.

(Applause.)

JAY LENO: Can I ask you about taking out their top leadership, al-Awlaki, this guy, American-born terrorist? How important was he to al Qaeda?

THE PRESIDENT: Do you what happened was we put so much pressure
on al Qaeda in the Afghan/Pakistan region --

JAY LENO: Right.

THE PRESIDENT: -- that their affiliates were actually becoming more of a threat to the United States. So Awlaki was their head

of external operations. This is the guy that inspired and helped to facilitate the Christmas Day bomber. This is a guy who was actively planning a whole range of operations here in the homeland and was focused on the homeland. And so this 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, we were able to remove him from the field.

(Applause.)

JAY LENO: I'll tell you, we are going to take a break. When we come back, I want to ask you about Hilary Clinton and her role with the President right after this.

(Commercial break.)

JAY LENO: Welcome back, talking to the President of the United States. So tell me about Hilary Clinton and the job she's doing.

THE PRESIDENT: She has been, I think, as good of a Secretary of State as we've seen in this country. She's been outstanding.

(Applause.)

JAY LENO: Very good.

THE PRESIDENT: I'm really proud of her.

JAY LENO: I mean, something I think is really great is the fact that you guys are both rivals. And I did a lot of jokes about you guys going after each other, but you come together for the sake of the country. And I thought that was pretty interesting.

Tell me about how that works.

THE PRESIDENT: You know, it really wasn't that difficult. The truth is Hilary and I agree on the vast majority of issues. We did during the campaign. In fact, one of the problems with all of those debates was you started running out of stuff to say because --

JAY LENO: Yeah.

THE PRESIDENT: -- we had a similar world view. She was, I think, understandably tired after the campaign and hesitant about whether or not this would be a good fit, and I told her that I had complete confidence in her, that the country needed her. She stepped up to the plate. She works as hard as anybody I've ever seen. She is tenacious, and we are really very proud of her. The entire national security team that we've had has been outstanding, and it's not just rivals within the Democratic party. My Secretary of Defense, Bob Gates, is a Republican.

JAY LENO: Right.

THE PRESIDENT: He was a carryover from the Bush Administration.
He made an outstanding contribution. So I think one of the things that we have done is been able to restore a sense that whatever our politics, when it comes to our national security, when it comes to the national defense, everybody has to be on the same page. And so the question now is, as we end the war in Iraq, it is time for us to rebuild this country, and can we get that same kind of cooperation when it comes to fixing what's wrong here?

(Applause.)

JAY LENO: Now, let me ask you something. And this is a fun story. This is stuff I love, this rumor that Joe Biden and

Hilary might swap, and she might run for Vice President and he might -- is there any --

THE PRESIDENT: You know, Joe Biden is not only a great Vice President, but he has been a great advisor and a great friend to me. So I think that they are doing great where they are, and both of them are racking up a lot of miles.

JAY LENO: Yeah.

THE PRESIDENT: Joe tends to go more to Pittsburgh.

JAY LENO: Right.

THE PRESIDENT: Hilary is going to Karachi.

JAY LENO: Right.

THE PRESIDENT: But they've both got important work to do. They
are doing great.

JAY LENO: Yeah. But you don't want to say "big f'ing deal" in Karachi. That could have some problems. Now, I want to -- now, the approval rating -- the bad news is your approval rating is 41 percent.

THE PRESIDENT: Right.

JAY LENO: The good news is you are still three times better than Congress. They are at 13 percent. So explain. I mean -- so if you are grading on a curve -- if you are grading on a curve, you are killing. You are just killing.

THE PRESIDENT: You know, look, we have gone through the worst
financial crisis, the worst economic crisis since the

Great Depression. People are hurting out there, and they've been hurting out there for a while. And people were having a tough time even before the crisis. You know, incomes, wages, we are all flat. Costs of everything from college to health care to gas to food, all of it was going up, and so people were feeling a lot of pressure even before this crisis. And so I --

every day I wake up saying to myself, "Look, you can't expect folks to feel satisfied right now." I'm very proud of the work that we've done over the last two or three years, but they are exactly right. We've got more work to do, and that's why, right now, for example, our biggest challenge is to make sure that we are putting people back to work. We stabilize the economy, but there are not enough people working. And so we put forward this jobs bill that has proposals that traditionally have been supported by Democrats and Republicans. I mean, we've got -- we are putting construction workers back to work rebuilding our roads and our bridges. I suspect folks here this L.A. would say that there are some roads that could be fixed. You know, that's just my guess.

(Applause.)

JAY LENO: See, here's the problem. And the thing that angers me and I think a lot of Americans is I didn't like what they did to President Bush. I don't like when they do it to you. When Mitch McConnell says, "Our goal is to make this guy a one-time president." I mean, why -- does that anger you? How is that a goal? That doesn't help the --

THE PRESIDENT: Look, I think the things that folks across the country are most fed up with, whether you are a Democrat, Republican, Independent, is putting party ahead of country or putting the next election ahead of the next generation.

(Applause.)

And so what we need -- there are some real differences between the party in terms of where we want to take the country. I believe we've got to invest in education and research and infrastructure in order for us to succeed in the long-term, and I think that there's nothing wrong with us closing the deficit and making our investments by making sure that folks like you and me who have been incredibly blessed by this country are doing a little more of a fair share. They have a different philosophy. We can argue about that, but on things that, traditionally, we have agreed to like infrastructure, like tax cuts for small businesses to give them incentives to hire veterans, on things that traditionally haven't been partisan, we should be able to get together. The election is 13 months away. We've got a lot of time, and the last thing we need to be doing is saying to the American people that there's nothing we can do until the next election. We've got to do some work right, putting people back to work.

(Applause.)

JAY LENO: Well, you are by passing congress now and giving these
executive orders.

THE PRESIDENT: Yeah.

JAY LENO: Explain that. Explain that.

THE PRESIDENT: Well, look, if Congress is gridlocked, if the Republicans in Congress refuse to act, then there is going to be a limit to some of the things we'd like to do, but there's still some actions that we can take without waiting for Congress. So yesterday, for example, we announced working with some of the federal housing agencies. Let's make it easier for people to refinance. A lot of these folks, because their homes are underwater now, their mortgages are higher than what their homes

are worth, a lot of them are having trouble getting refinanced by their banks. And so they are locked in at high rates when rates should be a lot lower for them. We've said, "Let's figure out a way to waive some of the fees, waive some of the provisions that are preventing them from being able to refinance." And that could mean an extra couple thousand bucks in people's pockets right now. They then have that money to buy a computer for their kid for school or what have you, and that will get the economy going again. So we are going to look for opportunities to do things without Congress. We can't afford to keep waiting for them if they are not going to do anything. On the other hand, my hope is that, at some point, they start listening to the American people, and we can work with Congress as well.

(Applause.)

JAY LENO: Well, you are talking about listening to the American people. As President, you look out your window. Do you see this occupy Wall Street movement? What do you make of it from your --

THE PRESIDENT: Look, people are frustrated, and that frustration
has expressed itself in a lot of different ways. It expressed itself in the Tea Party. It's expressing itself in occupy Wall Street. I do think that what this -- what this signals is that people in leadership, whether it's corporate leadership, leaders in the banks, leaders in Washington, everybody needs to understand that the American people feel like nobody is looking out for them right now. And, traditionally, what held this country together was this notion that if you work hard, if you are playing by the rules, if you are responsible, if you are looking out for your family, you are showing up to work every day and doing a good job, you've got a chance to get ahead. You've got a chance to succeed. And, right now, it feels to people like the deck is stacked against them, and the folks in power don't seem to be paying attention to that.

So if everybody is tuned in to that message and we are working every single day to figure out how do we give people a fair shake and how do we make sure that everybody is doing their fair share, then people won't be occupying the streets because they will have a job and they will feel like they are able to get ahead. But, right now, they are frustrated. And part of my job over the next year is to make sure that if they are not seeing it out of Congress at a minimum, they are seeing it out of their President, somebody who is going to be fighting for them.

JAY LENO: We'll take a break. When we come back, we'll talk more with the President, ask him some personal issues. We'll get to an issue, of course, that's very big here in Hollywood, this issue on the Kardashians. We'll find out more about that. Okay. Right back with President Obama right after this.

(Commercial break.)

JAY LENO: Welcome back to our President, President Obama. We're
going to talk about some lighter stuff, about dealing with the pressure of being President. Now, I know you quit smoking.

THE PRESIDENT: I did. I did, definitively.

JAY LENO: It's out.

THE PRESIDENT: It's out.

JAY LENO: All right. Remember you are under oath.

THE PRESIDENT: I am.

JAY LENO: So tell me how you cope with the daily pressures. How
does --

THE PRESIDENT: Big on exercise.

JAY LENO: Yeah.

THE PRESIDENT: Work out in the morning with Michelle. We've got
a little gym in the White House. She's in better shape than me, though. So --

JAY LENO: And she's very competitive.

THE PRESIDENT: She is.

JAY LENO: Yeah.

THE PRESIDENT: And so it's embarrassing sometimes.

JAY LENO: Yeah.

THE PRESIDENT: Yeah. She'll get up there a half an hour earlier than me. She will have already run 10 miles or something.

JAY LENO: You know --

THE PRESIDENT: And I'm, you know --

JAY LENO: Speaking of that --

THE PRESIDENT: -- staggering up to the gym.

JAY LENO: As President, everything is public. And I turned on the news last night, and I see my President at a very famous restaurant here in Los Angeles called "Roscoes Chicken and Waffles." Now, I think you ordered the Country Boy Special. What is that?

THE PRESIDENT: Wings and waffles.

JAY LENO: Wings.

THE PRESIDENT: With hot sauce.

JAY LENO: So the fried chicken wings, waffles with syrup, and wings with hot sauce. Now, is Michelle -- I mean, she's sitting back, watching the news. Here you are scarfing down the waffles.

THE PRESIDENT: Originally, it was just a way to be out there and say hi to everybody, but --

JAY LENO: Yeah.

THE PRESIDENT: -- once we got in the car, it smelled pretty good.

JAY LENO: Yeah.

THE PRESIDENT: So, I mean, I'm eating the wings. You've got the
hot sauce on there.

JAY LENO: Yeah.

THE PRESIDENT: The fancy presidential limousine --

JAY LENO: Yeah.

THE PRESIDENT: -- smelling like chicken.

JAY LENO: Yeah.

(Applause.)

THE PRESIDENT: And we were actually going to a fund-raiser --

JAY LENO: Yeah.

THE PRESIDENT: -- with Will Smith and Jada.

JAY LENO: Yeah.

THE PRESIDENT: And I didn't realize it was so close. So, suddenly, we pull up, and my sleeves were rolled up, and I got a spot on my tie. And my fingers are -- I'm looking for one of those Wet Ones, you know, to see if I have chicken on my teeth. Anyway, it was not elegant --

JAY LENO: No.

THE PRESIDENT: -- but outstanding chicken.

JAY LENO: Outstanding chicken.

THE PRESIDENT: Outstanding chicken and --

JAY LENO: Now --

THE PRESIDENT: Now, here's the secret, though. Here's the secret. Michelle, she's done a great job with this healthy eating --

JAY LENO: Right.

THE PRESIDENT: - and let's move and get exercise. But Michelle,
as quiet as this is kept, she loves french fries. She loves pizza. She loves chicken. Her point is just in moderation.

JAY LENO: Right.

THE PRESIDENT: So she does not get upset as long as, you know,

it's not every day.

JAY LENO: Right, right. Okay.

THE PRESIDENT: And that's the theory. She doesn't mind the girls having a -- having a smack, although Halloween is coming up.

JAY LENO: Yeah.

THE PRESIDENT: And she's been giving, for the last few years, kids fruit and raisins in a bag.

JAY LENO: Ooh.

THE PRESIDENT: And I said, "The White House is going to get egged" --

JAY LENO: Right.

THE PRESIDENT: -- "if this keeps up. We are going to" --

JAY LENO: Yeah. You've got to go -- yeah.

THE PRESIDENT: "You need to throw some candy in there."

JAY LENO: Yeah, moderation. Come on. Exactly. Exactly.

THE PRESIDENT: A couple Reese's Pieces or something.

JAY LENO: Yeah.

THE PRESIDENT: Yeah.

JAY LENO: Okay. You turned 50 recently.

THE PRESIDENT: I did.

JAY LENO: Okay. Biggest gripe?

THE PRESIDENT: My hair is getting a little gray.

JAY LENO: Yeah, it is getting a little gray, a touch in there, I see.

THE PRESIDENT: But, you know, overall, I feel great. You know, Michelle thinks I look old, but that's okay. She still thinks -- she still thinks I'm cute. That's what she tells me.

JAY LENO: How are the girls doing, Malia and Sasha?

THE PRESIDENT: The girls are doing wonderfully. You know, they
are growing -- they just grow up so fast. They are thriving. They -- it's amazing how steady, well-mannered, kind they are. You know, they are just good people.

JAY LENO: Yeah.

THE PRESIDENT: And part of this, I think, is a testimony to Michelle, also having my mother-in-law in the house --

JAY LENO: Oh, yeah.

THE PRESIDENT: -- because she doesn't take any mess. So --

JAY LENO: Do they have cell phones?

THE PRESIDENT: We have -- Malia got a cell phone, but their not
allowed to use it during the week just like they are not allowed to watch TV during the week.

JAY LENO: Really? Boo. Boo. Really? Wow.

THE PRESIDENT: During the weekends, they get their TV time, but --

JAY LENO: Oh. Speaking of TV time --

THE PRESIDENT: Yes.

JAY LENO: -- now, you recently said that you didn't like the girls watching the Kardashians.

THE PRESIDENT: That's --

JAY LENO: Have you seen the show?

THE PRESIDENT: No, I have not seen the show.

JAY LENO: Ah-hah. So you are making a judgment without ever seeing the show.

THE PRESIDENT: I am probably a little biased against reality TV partly because, you know, there's this program on C-SPAN called "Congress" --

JAY LENO: Right.

THE PRESIDENT: -- that is -- that I -- that I -- that --

(Laughter and applause.)

No, I have not seen the show. And do you recommend it, Jay? Do you think that --

JAY LENO: I just think it's a wonderful show. I don't know if it's something -- I don't know. Has Michelle seen it? Have the girls ever seen it?

THE PRESIDENT: I think the girls have seen it, yeah.

JAY LENO: Now, have you been watching the GOP debates?

THE PRESIDENT: I'm going to wait until everybody is voted off the island before --

(Applause.)

Once they narrow it down to one or two, I'll start paying attention.

JAY LENO: Well, I know you are a huge basketball fan. This lockout, this is really depressing.

THE PRESIDENT: It's heartbreaking.

JAY LENO: What needs to be done here? Who is wrong?

(Laughter.)

THE PRESIDENT: Well, look, if you look at the NFL, they were able to settle theirs.

JAY LENO: Yeah.

THE PRESIDENT: And I think they understood. Players were making
millions of dollars. Owners, some of us are worth billions of dollars. We should be able to figure out how to split a nine-billion-dollar pot so that our fans, who are allowing us to make all of this money, can actually have a good season. And I think the owners and the basketball players need to think the same way.

(Applause.)

JAY LENO: Do you think the whole season is going to go? I mean, it's two weeks, and it's another -- it's a month.

THE PRESIDENT: I'm concerned about it. I think they need to just remind themselves that the reason they are so successful --

JAY LENO: Yeah.

THE PRESIDENT: -- is because a whole bunch of folks out there love basketball. And, you know, basketball has actually done well, but these kinds of lockouts a lot of times take a long time to recover from them.

JAY LENO: Exactly. Now, who have you got in the World Series?

THE PRESIDENT: You know, my White Sox are not in there. So I just want to see a good game.

JAY LENO: I'm with you.

THE PRESIDENT: I do not take sides unless it's my side.

JAY LENO: Wow. Wow.

(Laughter.)

THE PRESIDENT: Do not take sides unless it's your side.

JAY LENO: Well, Mr. President, it has been an honor and a privilege to have you here.

THE PRESIDENT: Always a pleasure.

JAY LENO: Say hello to Michelle and the family. Thank you so much.

THE PRESIDENT: Thank you.

JAY LENO: We'll be right back with music from Yo-Yo Ma.

(Applause.)

EXHIBIT J

The New York Times

May 29, 2012

Secret 'Kill List' Proves a Test of Obama's Principles and Will

By JO BECKER and SCOTT SHANE

WASHINGTON — This was the enemy, served up in the latest chart from the intelligence agencies: 15 Qaeda suspects in Yemen with Western ties. The mug shots and brief biographies resembled a high school yearbook layout. Several were Americans. Two were teenagers, including a girl who looked even younger than her 17 years.

President Obama, overseeing the regular Tuesday counterterrorism meeting of two dozen security officials in the White House Situation Room, took a moment to study the faces. It was Jan. 19, 2010, the end of a first year in office punctuated by terrorist plots and culminating in a brush with catastrophe over Detroit on Christmas Day, a reminder that a successful attack could derail his presidency. Yet he faced adversaries without uniforms, often indistinguishable from the civilians around them.

"How old are these people?" he asked, according to two officials present. "If they are starting to use children," he said of Al Qaeda, "we are moving into a whole different phase."

It was not a theoretical question: Mr. Obama has placed himself at the helm of a top secret "nominations" process to designate terrorists for kill or capture, of which the capture part has become largely theoretical. He had vowed to align the fight against Al Qaeda with American values; the chart, introducing people whose deaths he might soon be asked to order, underscored just what a moral and legal conundrum this could be.

Mr. Obama is the liberal law professor who campaigned against the Iraq war and torture, and then insisted on approving every new name on an expanding "kill list," poring over terrorist suspects' biographies on what one official calls the macabre "baseball cards" of an unconventional war. When a rare opportunity for a drone strike at a top terrorist arises — but his family is with him — it is the president who has reserved to himself the final moral calculation.

"He is determined that he will make these decisions about how far and wide these operations will go," said Thomas E. Donilon, his national security adviser. "His view is that he's

responsible for the position of the United States in the world." He added, "He's determined to keep the tether pretty short."

Nothing else in Mr. Obama's first term has baffled liberal supporters and confounded conservative critics alike as his aggressive counterterrorism record. His actions have often remained inscrutable, obscured by awkward secrecy rules, polarized political commentary and the president's own deep reserve.

In interviews with The New York Times, three dozen of his current and former advisers described Mr. Obama's evolution since taking on the role, without precedent in presidential history, of personally overseeing the shadow war with Al Qaeda.

They describe a paradoxical leader who shunned the legislative deal-making required to close the detention facility at Guantánamo Bay in Cuba, but approves lethal action without hand-wringing. While he was adamant about narrowing the fight and improving relations with the Muslim world, he has followed the metastasizing enemy into new and dangerous lands. When he applies his lawyering skills to counterterrorism, it is usually to enable, not constrain, his ferocious campaign against Al Qaeda — even when it comes to killing an American cleric in Yemen, a decision that Mr. Obama told colleagues was "an easy one."

His first term has seen private warnings from top officials about a "Whac-A-Mole" approach to counterterrorism; the invention of a new category of aerial attack following complaints of careless targeting; and presidential acquiescence in a formula for counting civilian deaths that some officials think is skewed to produce low numbers.

The administration's failure to forge a clear detention policy has created the impression among some members of Congress of a take-no-prisoners policy. And Mr. Obama's ambassador to Pakistan, Cameron P. Munter, has complained to colleagues that the C.I.A.'s strikes drive American policy there, saying "he didn't realize his main job was to kill people," a colleague said.

Beside the president at every step is his counterterrorism adviser, John O. Brennan, who is variously compared by colleagues to a dogged police detective, tracking terrorists from his cavelike office in the White House basement, or a priest whose blessing has become indispensable to Mr. Obama, echoing the president's attempt to apply the "just war" theories of Christian philosophers to a brutal modern conflict.

But the strikes that have eviscerated Al Qaeda — just since April, there have been 14 in Yemen, and 6 in Pakistan — have also tested both men's commitment to the principles they have repeatedly said are necessary to defeat the enemy in the long term. Drones have

replaced Guantánamo as the recruiting tool of choice for militants; in his 2010 guilty plea, Faisal Shahzad, who had tried to set off a car bomb in Times Square, justified targeting civilians by telling the judge, "When the drones hit, they don't see children."

Dennis C. Blair, director of national intelligence until he was fired in May 2010, said that discussions inside the White House of long-term strategy against Al Qaeda were sidelined by the intense focus on strikes. "The steady refrain in the White House was, 'This is the only game in town' — reminded me of body counts in Vietnam," said Mr. Blair, a retired admiral who began his Navy service during that war.

Mr. Blair's criticism, dismissed by White House officials as personal pique, nonetheless resonates inside the government.

William M. Daley, Mr. Obama's chief of staff in 2011, said the president and his advisers understood that they could not keep adding new names to a kill list, from ever lower on the Qaeda totem pole. What remains unanswered is how much killing will be enough.

"One guy gets knocked off, and the guy's driver, who's No. 21, becomes 20?" Mr. Daley said, describing the internal discussion. "At what point are you just filling the bucket with numbers?"

'Maintain My Options'

A phalanx of retired generals and admirals stood behind Mr. Obama on the second day of his presidency, providing martial cover as he signed several executive orders to make good on campaign pledges. Brutal interrogation techniques were banned, he declared. And the prison at Guantánamo Bay would be closed.

What the new president did not say was that the orders contained a few subtle loopholes. They reflected a still unfamiliar Barack Obama, a realist who, unlike some of his fervent supporters, was never carried away by his own rhetoric. Instead, he was already putting his lawyerly mind to carving out the maximum amount of maneuvering room to fight terrorism as he saw fit.

It was a pattern that would be seen repeatedly, from his response to Republican complaints that he wanted to read terrorists their rights, to his acceptance of the C.I.A.'s method for counting civilian casualties in drone strikes.

The day before the executive orders were issued, the C.I.A.'s top lawyer, John A. Rizzo, had called the White House in a panic. The order prohibited the agency from operating detention

facilities, closing once and for all the secret overseas "black sites" where interrogators had brutalized terrorist suspects.

"The way this is written, you are going to take us out of the rendition business," Mr. Rizzo told Gregory B. Craig, Mr. Obama's White House counsel, referring to the much-criticized practice of grabbing a terrorist suspect abroad and delivering him to another country for interrogation or trial. The problem, Mr. Rizzo explained, was that the C.I.A. sometimes held such suspects for a day or two while awaiting a flight. The order appeared to outlaw that.

Mr. Craig assured him that the new president had no intention of ending rendition — only its abuse, which could lead to American complicity in torture abroad. So a new definition of "detention facility" was inserted, excluding places used to hold people "on a short-term, transitory basis." Problem solved — and no messy public explanation damped Mr. Obama's celebration.

"Pragmatism over ideology," his campaign national security team had advised in a memo in March 2008. It was counsel that only reinforced the president's instincts.

Even before he was sworn in, Mr. Obama's advisers had warned him against taking a categorical position on what would be done with Guantánamo detainees. The deft insertion of some wiggle words in the president's order showed that the advice was followed.

Some detainees would be transferred to prisons in other countries, or released, it said. Some would be prosecuted — if "feasible" — in criminal courts. Military commissions, which Mr. Obama had criticized, were not mentioned — and thus not ruled out.

As for those who could not be transferred or tried but were judged too dangerous for release? Their "disposition" would be handled by "lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice."

A few sharp-eyed observers inside and outside the government understood what the public did not. Without showing his hand, Mr. Obama had preserved three major policies — rendition, military commissions and indefinite detention — that have been targets of human rights groups since the 2001 terrorist attacks.

But a year later, with Congress trying to force him to try all terrorism suspects using revamped military commissions, he deployed his legal skills differently — to preserve trials in civilian courts.

It was shortly after Dec. 25, 2009, following a close call in which a Qaeda-trained operative named Umar Farouk Abdulmutallab had boarded a Detroit-bound airliner with a bomb sewn into his underwear.

Mr. Obama was taking a drubbing from Republicans over the government's decision to read the suspect his rights, a prerequisite for bringing criminal charges against him in civilian court.

The president "seems to think that if he gives terrorists the rights of Americans, lets them lawyer up and reads them their Miranda rights, we won't be at war," former Vice President Dick Cheney charged.

Sensing vulnerability on both a practical and political level, the president summoned his attorney general, Eric H. Holder Jr., to the White House.

F.B.I. agents had questioned Mr. Abdulmutallab for 50 minutes and gained valuable intelligence before giving him the warning. They had relied on a 1984 case called New York v. Quarles, in which the Supreme Court ruled that statements made by a suspect in response to urgent public safety questions — the case involved the location of a gun — could be introduced into evidence even if the suspect had not been advised of the right to remain silent.

Mr. Obama, who Mr. Holder said misses the legal profession, got into a colloquy with the attorney general. How far, he asked, could Quarles be stretched? Mr. Holder felt that in terrorism cases, the court would allow indefinite questioning on a fairly broad range of subjects.

Satisfied with the edgy new interpretation, Mr. Obama gave his blessing, Mr. Holder recalled.

"Barack Obama believes in options: 'Maintain my options,' " said Jeh C. Johnson, a campaign adviser and now general counsel of the Defense Department.

'They Must All Be Militants'

That same mind-set would be brought to bear as the president intensified what would become a withering campaign to use unmanned aircraft to kill Qaeda terrorists.

Just days after taking office, the president got word that the first strike under his administration had killed a number of innocent Pakistanis. "The president was very sharp on

the thing, and said, 'I want to know how this happened,' " a top White House adviser recounted.

In response to his concern, the C.I.A. downsized its munitions for more pinpoint strikes. In addition, the president tightened standards, aides say: If the agency did not have a "near certainty" that a strike would result in zero civilian deaths, Mr. Obama wanted to decide personally whether to go ahead.

The president's directive reinforced the need for caution, counterterrorism officials said, but did not significantly change the program. In part, that is because "the protection of innocent life was always a critical consideration," said Michael V. Hayden, the last C.I.A. director under President George W. Bush.

It is also because Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.

Counterterrorism officials insist this approach is one of simple logic: people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good. "Al Qaeda is an insular, paranoid organization — innocent neighbors don't hitchhike rides in the back of trucks headed for the border with guns and bombs," said one official, who requested anonymity to speak about what is still a classified program.

This counting method may partly explain the official claims of extraordinarily low collateral deaths. In a speech last year Mr. Brennan, Mr. Obama's trusted adviser, said that not a single noncombatant had been killed in a year of strikes. And in a recent interview, a senior administration official said that the number of civilians killed in drone strikes in Pakistan under Mr. Obama was in the "single digits" — and that independent counts of scores or hundreds of civilian deaths unwittingly draw on false propaganda claims by militants.

But in interviews, three former senior intelligence officials expressed disbelief that the number could be so low. The C.I.A. accounting has so troubled some administration officials outside the agency that they have brought their concerns to the White House. One called it "guilt by association" that has led to "deceptive" estimates of civilian casualties.

"It bothers me when they say there were seven guys, so they must all be militants," the official said. "They count the corpses and they're not really sure who they are."

'A No-Brainer'

About four months into his presidency, as Republicans accused him of reckless naïveté on terrorism, Mr. Obama quickly pulled together a speech defending his policies. Standing before the Constitution at the National Archives in Washington, he mentioned Guantánamo 28 times, repeating his campaign pledge to close the prison.

But it was too late, and his defensive tone suggested that Mr. Obama knew it. Though President George W. Bush and Senator John McCain, the 2008 Republican candidate, had supported closing the Guantánamo prison, Republicans in Congress had reversed course and discovered they could use the issue to portray Mr. Obama as soft on terrorism.

Walking out of the Archives, the president turned to his national security adviser at the time, Gen. James L. Jones, and admitted that he had never devised a plan to persuade Congress to shut down the prison.

"We're never going to make that mistake again," Mr. Obama told the retired Marine general.

General Jones said the president and his aides had assumed that closing the prison was "a no-brainer — the United States will look good around the world." The trouble was, he added, "nobody asked, 'O.K., let's assume it's a good idea, how are you going to do this?' "

It was not only Mr. Obama's distaste for legislative backslapping and arm-twisting, but also part of a deeper pattern, said an administration official who has watched him closely: the president seemed to have "a sense that if he sketches a vision, it will happen — without his really having thought through the mechanism by which it will happen."

In fact, both Secretary of State Hillary Rodham Clinton and the attorney general, Mr. Holder, had warned that the plan to close the Guantánamo prison was in peril, and they volunteered to fight for it on Capitol Hill, according to officials. But with Mr. Obama's backing, his chief of staff, Rahm Emanuel, blocked them, saying health care reform had to go first.

When the administration floated a plan to transfer from Guantánamo to Northern Virginia two Uighurs, members of a largely Muslim ethnic minority from China who are considered no threat to the United States, Virginia Republicans led by Representative Frank R. Wolf denounced the idea. The administration backed down.

That show of weakness doomed the effort to close Guantánamo, the same administration official said. "Lyndon Johnson would have steamrolled the guy," he said. "That's not what happened. It's like a boxing match where a cut opens over a guy's eye."

The Use of Force

It is the strangest of bureaucratic rituals: Every week or so, more than 100 members of the government's sprawling national security apparatus gather, by secure video teleconference, to pore over terrorist suspects' biographies and recommend to the president who should be the next to die.

This secret "nominations" process is an invention of the Obama administration, a grim debating society that vets the PowerPoint slides bearing the names, aliases and life stories of suspected members of Al Qaeda's branch in Yemen or its allies in Somalia's Shabab militia.

The video conferences are run by the Pentagon, which oversees strikes in those countries, and participants do not hesitate to call out a challenge, pressing for the evidence behind accusations of ties to Al Qaeda.

"What's a Qaeda facilitator?" asked one participant, illustrating the spirit of the exchanges. "If I open a gate and you drive through it, am I a facilitator?" Given the contentious discussions, it can take five or six sessions for a name to be approved, and names go off the list if a suspect no longer appears to pose an imminent threat, the official said. A parallel, more cloistered selection process at the C.I.A. focuses largely on Pakistan, where that agency conducts strikes.

The nominations go to the White House, where by his own insistence and guided by Mr. Brennan, Mr. Obama must approve any name. He signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan — about a third of the total.

Aides say Mr. Obama has several reasons for becoming so immersed in lethal counterterrorism operations. A student of writings on war by Augustine and Thomas Aquinas, he believes that he should take moral responsibility for such actions. And he knows that bad strikes can tarnish America's image and derail diplomacy.

"He realizes this isn't science, this is judgments made off of, most of the time, human intelligence," said Mr. Daley, the former chief of staff. "The president accepts as a fact that a certain amount of screw-ups are going to happen, and to him, that calls for a more judicious process."

But the control he exercises also appears to reflect Mr. Obama's striking self-confidence: he believes, according to several people who have worked closely with him, that his own judgment should be brought to bear on strikes.

Asked what surprised him most about Mr. Obama, Mr. Donilon, the national security adviser, answered immediately: "He's a president who is quite comfortable with the use of force on behalf of the United States."

In fact, in a 2007 campaign speech in which he vowed to pull the United States out of Iraq and refocus on Al Qaeda, Mr. Obama had trumpeted his plan to go after terrorist bases in Pakistan — even if Pakistani leaders objected. His rivals at the time, including Mitt Romney, Joseph R. Biden Jr. and Mrs. Clinton, had all pounced on what they considered a greenhorn's campaign bluster. (Mr. Romney said Mr. Obama had become "Dr. Strangelove.")

In office, however, Mr. Obama has done exactly what he had promised, coming quickly to rely on the judgment of Mr. Brennan.

Mr. Brennan, a son of Irish immigrants, is a grizzled 25-year veteran of the C.I.A. whose work as a top agency official during the brutal interrogations of the Bush administration made him a target of fierce criticism from the left. He had been forced, under fire, to withdraw his name from consideration to lead the C.I.A. under Mr. Obama, becoming counterterrorism chief instead.

Some critics of the drone strategy still vilify Mr. Brennan, suggesting that he is the C.I.A.'s agent in the White House, steering Mr. Obama to a targeted killing strategy. But in office, Mr. Brennan has surprised many former detractors by speaking forcefully for closing Guantánamo and respecting civil liberties.

Harold H. Koh, for instance, as dean of Yale Law School was a leading liberal critic of the Bush administration's counterterrorism policies. But since becoming the State Department's top lawyer, Mr. Koh said, he has found in Mr. Brennan a principled ally.

"If John Brennan is the last guy in the room with the president, I'm comfortable, because Brennan is a person of genuine moral rectitude," Mr. Koh said. "It's as though you had a priest with extremely strong moral values who was suddenly charged with leading a war."

The president values Mr. Brennan's experience in assessing intelligence, from his own agency or others, and for the sobriety with which he approaches lethal operations, other aides say.

"The purpose of these actions is to mitigate threats to U.S. persons' lives," Mr. Brennan said in an interview. "It is the option of last recourse. So the president, and I think all of us here, don't like the fact that people have to die. And so he wants to make sure that we go through a

rigorous checklist: The infeasibility of capture, the certainty of the intelligence base, the imminence of the threat, all of these things."

Yet the administration's very success at killing terrorism suspects has been shadowed by a suspicion: that Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive. While scores of suspects have been killed under Mr. Obama, only one has been taken into American custody, and the president has balked at adding new prisoners to Guantánamo.

"Their policy is to take out high-value targets, versus capturing high-value targets," said Senator Saxby Chambliss of Georgia, the top Republican on the intelligence committee. "They are not going to advertise that, but that's what they are doing."

Mr. Obama's aides deny such a policy, arguing that capture is often impossible in the rugged tribal areas of Pakistan and Yemen and that many terrorist suspects are in foreign prisons because of American tips. Still, senior officials at the Justice Department and the Pentagon acknowledge that they worry about the public perception.

"We have to be vigilant to avoid a no-quarter, or take-no-prisoners policy," said Mr. Johnson, the Pentagon's chief lawyer.

Trade-Offs

The care that Mr. Obama and his counterterrorism chief take in choosing targets, and their reliance on a precision weapon, the drone, reflect his pledge at the outset of his presidency to reject what he called the Bush administration's "false choice between our safety and our ideals."

But he has found that war is a messy business, and his actions show that pursuing an enemy unbound by rules has required moral, legal and practical trade-offs that his speeches did not envision.

One early test involved Baitullah Mehsud, the leader of the Pakistani Taliban. The case was problematic on two fronts, according to interviews with both administration and Pakistani sources.

The C.I.A. worried that Mr. Mehsud, whose group then mainly targeted the Pakistan government, did not meet the Obama administration's criteria for targeted killing: he was not an imminent threat to the United States. But Pakistani officials wanted him dead, and the American drone program rested on their tacit approval. The issue was resolved after the

president and his advisers found that he represented a threat, if not to the homeland, to American personnel in Pakistan.

Then, in August 2009, the C.I.A. director, Leon E. Panetta, told Mr. Brennan that the agency had Mr. Mehsud in its sights. But taking out the Pakistani Taliban leader, Mr. Panetta warned, did not meet Mr. Obama's standard of "near certainty" of no innocents being killed. In fact, a strike would certainly result in such deaths: he was with his wife at his in-laws' home.

"Many times," General Jones said, in similar circumstances, "at the 11th hour we waved off a mission simply because the target had people around them and we were able to loiter on station until they didn't."

But not this time. Mr. Obama, through Mr. Brennan, told the C.I.A. to take the shot, and Mr. Mehsud was killed, along with his wife and, by some reports, other family members as well, said a senior intelligence official.

The attempted bombing of an airliner a few months later, on Dec. 25, stiffened the president's resolve, aides say. It was the culmination of a series of plots, including the killing of 13 people at Fort Hood, Tex. by an Army psychiatrist who had embraced radical Islam.

Mr. Obama is a good poker player, but he has a tell when he is angry. His questions become rapid-fire, said his attorney general, Mr. Holder. "He'll inject the phrase, 'I just want to make sure you understand that.' " And it was clear to everyone, Mr. Holder said, that he was simmering about how a 23-year-old bomber had penetrated billions of dollars worth of American security measures.

When a few officials tentatively offered a defense, noting that the attack had failed because the terrorists were forced to rely on a novice bomber and an untested formula because of stepped-up airport security, Mr. Obama cut them short.

"Well, he could have gotten it right and we'd all be sitting here with an airplane that blew up and killed over a hundred people," he said, according to a participant. He asked them to use the close call to imagine in detail the consequences if the bomb had detonated. In characteristic fashion, he went around the room, asking each official to explain what had gone wrong and what needed to be done about it.

"After that, as president, it seemed like he felt in his gut the threat to the United States," said Michael E. Leiter, then director of the National Counterterrorism Center. "Even John

Brennan, someone who was already a hardened veteran of counterterrorism, tightened the straps on his rucksack after that."

David Axelrod, the president's closest political adviser, began showing up at the "Terror Tuesday" meetings, his unspeaking presence a visible reminder of what everyone understood: a successful attack would overwhelm the president's other aspirations and achievements.

In the most dramatic possible way, the Fort Hood shootings in November and the attempted Christmas Day bombing had shown the new danger from Yemen. Mr. Obama, who had rejected the Bush-era concept of a global war on terrorism and had promised to narrow the American focus to Al Qaeda's core, suddenly found himself directing strikes in another complicated Muslim country.

The very first strike under his watch in Yemen, on Dec. 17, 2009, offered a stark example of the difficulties of operating in what General Jones described as an "embryonic theater that we weren't really familiar with."

It killed not only its intended target, but also two neighboring families, and left behind a trail of cluster bombs that subsequently killed more innocents. It was hardly the kind of precise operation that Mr. Obama favored. Videos of children's bodies and angry tribesmen holding up American missile parts flooded You Tube, fueling a ferocious backlash that Yemeni officials said bolstered Al Qaeda.

The sloppy strike shook Mr. Obama and Mr. Brennan, officials said, and once again they tried to impose some discipline.

In Pakistan, Mr. Obama had approved not only "personality" strikes aimed at named, high-value terrorists, but "signature" strikes that targeted training camps and suspicious compounds in areas controlled by militants.

But some State Department officials have complained to the White House that the criteria used by the C.I.A. for identifying a terrorist "signature" were too lax. The joke was that when the C.I.A. sees "three guys doing jumping jacks," the agency thinks it is a terrorist training camp, said one senior official. Men loading a truck with fertilizer could be bombmakers — but they might also be farmers, skeptics argued.

Now, in the wake of the bad first strike in Yemen, Mr. Obama overruled military and intelligence commanders who were pushing to use signature strikes there as well.

"We are not going to war with Yemen," he admonished in one meeting, according to participants.

His guidance was formalized in a memo by General Jones, who called it a "governor, if you will, on the throttle," intended to remind everyone that "one should not assume that it's just O.K. to do these things because we spot a bad guy somewhere in the world."

Mr. Obama had drawn a line. But within two years, he stepped across it. Signature strikes in Pakistan were killing a large number of terrorist suspects, even when C.I.A. analysts were not certain beforehand of their presence. And in Yemen, roiled by the Arab Spring unrest, the Qaeda affiliate was seizing territory.

Today, the Defense Department can target suspects in Yemen whose names they do not know. Officials say the criteria are tighter than those for signature strikes, requiring evidence of a threat to the United States, and they have even given them a new name — TADS, for Terrorist Attack Disruption Strikes. But the details are a closely guarded secret — part of a pattern for a president who came into office promising transparency.

The Ultimate Test

On that front, perhaps no case would test Mr. Obama's principles as starkly as that of Anwar al-Awlaki, an American-born cleric and Qaeda propagandist hiding in Yemen, who had recently risen to prominence and had taunted the president by name in some of his online screeds.

The president "was very interested in obviously trying to understand how a guy like Awlaki developed," said General Jones. The cleric's fiery sermons had helped inspire a dozen plots, including the shootings at Fort Hood. Then he had gone "operational," plotting with Mr. Abdulmutallab and coaching him to ignite his explosives only after the airliner was over the United States.

That record, and Mr. Awlaki's calls for more attacks, presented Mr. Obama with an urgent question: Could he order the targeted killing of an American citizen, in a country with which the United States was not at war, in secret and without the benefit of a trial?

The Justice Department's Office of Legal Counsel prepared a lengthy memo justifying that extraordinary step, asserting that while the Fifth Amendment's guarantee of due process applied, it could be satisfied by internal deliberations in the executive branch.

Mr. Obama gave his approval, and Mr. Awlaki was killed in September 2011, along with a fellow propagandist, Samir Khan, an American citizen who was not on the target list but was traveling with him.

If the president had qualms about this momentous step, aides said he did not share them. Mr. Obama focused instead on the weight of the evidence showing that the cleric had joined the enemy and was plotting more terrorist attacks.

"This is an easy one," Mr. Daley recalled him saying, though the president warned that in future cases, the evidence might well not be so clear.

In the wake of Mr. Awlaki's death, some administration officials, including the attorney general, argued that the Justice Department's legal memo should be made public. In 2009, after all, Mr. Obama had released Bush administration legal opinions on interrogation over the vociferous objections of six former C.I.A. directors.

This time, contemplating his own secrets, he chose to keep the Awlaki opinion secret.

"Once it's your pop stand, you look at things a little differently," said Mr. Rizzo, the C.I.A.'s former general counsel.

Mr. Hayden, the former C.I.A. director and now an adviser to Mr. Obama's Republican challenger, Mr. Romney, commended the president's aggressive counterterrorism record, which he said had a "Nixon to China" quality. But, he said, "secrecy has its costs" and Mr. Obama should open the strike strategy up to public scrutiny.

"This program rests on the personal legitimacy of the president, and that's not sustainable," Mr. Hayden said. "I have lived the life of someone taking action on the basis of secret O.L.C. memos, and it ain't a good life. Democracies do not make war on the basis of legal memos locked in a D.O.J. safe."

Tactics Over Strategy

In his June 2009 speech in Cairo, aimed at resetting relations with the Muslim world, Mr. Obama had spoken eloquently of his childhood years in Indonesia, hearing the call to prayer "at the break of dawn and the fall of dusk."

"The United States is not — and never will be — at war with Islam," he declared.

But in the months that followed, some officials felt the urgency of counterterrorism strikes was crowding out consideration of a broader strategy against radicalization. Though Mrs.

Clinton strongly supported the strikes, she complained to colleagues about the drones-only approach at Situation Room meetings, in which discussion would focus exclusively on the pros, cons and timing of particular strikes.

At their weekly lunch, Mrs. Clinton told the president she thought there should be more attention paid to the root causes of radicalization, and Mr. Obama agreed. But it was September 2011 before he issued an executive order setting up a sophisticated, interagency war room at the State Department to counter the jihadi narrative on an hour-by-hour basis, posting messages and video online and providing talking points to embassies.

Mr. Obama was heartened, aides say, by a letter discovered in the raid on Osama bin Laden's compound in Pakistan. It complained that the American president had undermined Al Qaeda's support by repeatedly declaring that the United States was at war not with Islam, but with the terrorist network. "We must be doing a good job," Mr. Obama told his secretary of state.

Moreover, Mr. Obama's record has not drawn anything like the sweeping criticism from allies that his predecessor faced. John B. Bellinger III, a top national security lawyer under the Bush administration, said that was because Mr. Obama's liberal reputation and "softer packaging" have protected him. "After the global outrage over Guantánamo, it's remarkable that the rest of the world has looked the other way while the Obama administration has conducted hundreds of drone strikes in several different countries, including killing at least some civilians," said Mr. Bellinger, who supports the strikes.

By withdrawing from Iraq and preparing to withdraw from Afghanistan, Mr. Obama has refocused the fight on Al Qaeda and hugely reduced the death toll both of American soldiers and Muslim civilians. But in moments of reflection, Mr. Obama may have reason to wonder about unfinished business and unintended consequences.

His focus on strikes has made it impossible to forge, for now, the new relationship with the Muslim world that he had envisioned. Both Pakistan and Yemen are arguably less stable and more hostile to the United States than when Mr. Obama became president.

Justly or not, drones have become a provocative symbol of American power, running roughshod over national sovereignty and killing innocents. With China and Russia watching, the United States has set an international precedent for sending drones over borders to kill enemies.

Mr. Blair, the former director of national intelligence, said the strike campaign was dangerously seductive. "It is the politically advantageous thing to do — low cost, no U.S.

casualties, gives the appearance of toughness," he said. "It plays well domestically, and it is unpopular only in other countries. Any damage it does to the national interest only shows up over the long term."

But Mr. Blair's dissent puts him in a small minority of security experts. Mr. Obama's record has eroded the political perception that Democrats are weak on national security. No one would have imagined four years ago that his counterterrorism policies would come under far more fierce attack from the American Civil Liberties Union than from Mr. Romney.

Aides say that Mr. Obama's choices, though, are not surprising. The president's reliance on strikes, said Mr. Leiter, the former head of the National Counterterrorism Center, "is far from a lurid fascination with covert action and special forces. It's much more practical. He's the president. He faces a post-Abdulmutallab situation, where he's being told people might attack the United States tomorrow."

"You can pass a lot of laws," Mr. Leiter said, "Those laws are not going to get Bin Laden dead."

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, et al., Plaintiffs, v. DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 11-9336
AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs, v. DEPARTMENT OF JUSTICE, et al., Defendants.	Civil Action No. 12-0794

DECLARATION OF JOHN F. HACKETT,
CHIEF OF THE INFORMATION AND DATA MANAGEMENT GROUP,
THE OFFICE OF THE CHIEF INFORMATION OFFICER,
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,

Pursuant to 28 U.S.C. § 1746, I, John F. Hackett, declare the following to be true and correct:

1. I am the Chief of the Information and Data Management Group for the Office of the Director of National Intelligence