



April 24, 2012

Hon. Catherine O'Hagan Wolfe  
Clerk of Court  
United States Court of Appeals  
for the Second Circuit  
500 Pearl Street, Room 370  
New York, NY 10007

Re: *Am. Civil Liberties Union v. Dep't of Justice*, Nos. 10-4290(L),  
10-4289(CON), 10-4647(XAP), 10-4668(XAP)

AMERICAN CIVIL LIBERTIES  
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OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

Dear Ms. Wolfe,

Appellees write pursuant to Federal Rule of Appellate Procedure 28(j) in response to the recently declassified transcript of the *ex parte* session conducted on March 9, 2012.

The transcript suggests—and it has prompted some in the media to conclude<sup>1</sup>—that the redacted “source of authority” at issue in the government’s appeal is a memorandum signed by President Bush on September 17, 2001 authorizing the CIA to set up detention facilities abroad.

If true, it may be relevant to this Court’s consideration that the CIA officially acknowledged the existence of that memorandum in this very litigation.

In response to appellees’ Freedom of Information Act request, the CIA identified as responsive “a 14-page memorandum dated 17 September 2001 from President Bush to the Director of the CIA pertaining to the CIA’s authorization to detain terrorists” and “to set up detention facilities outside the United States.” Eighth Declaration of Marilyn A. Dorn ¶ 66, *ACLU v. Dep’t of Def.*, No. 1:04-CV-4151 (S.D.N.Y. June 8, 2007), ECF No. 226, available at <http://bit.ly/IM23gR>. The CIA described the memorandum as follows:

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<sup>1</sup> See Marcy Wheeler, *The CIA Continues to Cover Up Bush’s Authorization of Torture*, emptywheel (Apr. 18, 2012), <http://www.emptywheel.net/2012/04/18/the-cia-continues-to-cover-up-bushs-authorization-of-torture/>; Marcy Wheeler, *The Memorandum of Notification the CIA Pretends Has Never Been Acknowledged*, emptywheel (Apr. 19, 2012), <http://www.emptywheel.net/2012/04/19/the-memorandum-of-notification-the-cia-pretends-has-never-been-acknowledged/>; Marcy Wheeler, *The CIA’s NSC’s President’s Torture Program*, emptywheel (Apr. 20, 2012), <http://www.emptywheel.net/2012/04/20/the-cias-nscs-presidents-torture-program/>; Marcy Wheeler, *Judge Hellerstein: Yes, the Redacted Torture Authorization Pertains to the September 17, 2001 Torture Authorization* (Apr. 20, 2012), <http://www.emptywheel.net/2012/04/20/judge-hellerstein-yes-the-redacted-torture-authorization-pertains-to-the-september-17-2001-torture-authorization/>.

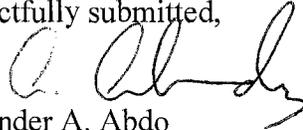
67. This 14-page document consists of a 12-page notification memorandum and an attached two-page cover memorandum. The 12-page notification memorandum is a memorandum from the President to the members of the NSC regarding a clandestine intelligence activity. The two-page cover memorandum is a transmittal memorandum from the Executive Secretary of the NSC to the Director of the CIA.

68. The 12-page memorandum pertains to the CIA's authorization to detain terrorists. The memorandum discusses the approval of the clandestine intelligence activity and related analysis and description. The memorandum also discusses other matters not relevant to Plaintiffs' general or specific FOIA requests.

*Id.* ¶¶ 67–68.

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Respectfully submitted,



Alexander A. Abdo  
Counsel for Appellees–Cross-Appellants

cc: All counsel of record