

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 Forces
Command, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

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DECLARATION OF ROBERT R. NELLER

I, Robert R. Neller, Lieutenant General, United States Marine Corps, pursuant to 28
U.S.C. § 1746 make the following declaration.

1. I am the Director of Operations for the Joint Staff at the Pentagon and have served in
this capacity since January 11, 2011. In my capacity as the Director of Operations I am
responsible for all Department of Defense (DoD) operational matters outside of the continental
United States. As such, I coordinate and communicate frequently with the staffs of the Unified
Combatant Commands, to include U.S. Africa Command, U.S. Central Command, U.S.
European Command, U.S. Pacific Command, U.S. Southern Command, U.S. Strategic
Command, U.S. Transportation Command and U.S. Special Operations Command, as well as
with the Intelligence Community, to ensure on behalf of the Chairman of the Joint Chief of Staff
that the President of the United States' and Secretary of Defense's direction and guidance are

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

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

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

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

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

ADMINISTRATIVE BACKGROUND

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

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

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

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

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

DOD SEARCH FOR RESPONSIVE RECORDS

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

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

SEARCH RESULTS

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

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

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

UNCLASSIFIED DOCUMENTS RESPONSIVE TO THE REQUEST

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

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

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

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

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

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

CLASSIFIED DOCUMENT RESPONSIVE TO THE REQUEST

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

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

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

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

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

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

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

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

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

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

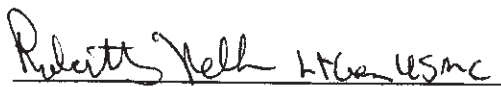
25. In addition to the documents listed in Exhibit J and the OLC opinion described above, there are additional classified documents responsive to plaintiffs’ request.

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

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

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

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

Handwritten signature of Robert R. Neller in cursive, with "LTGen USMC" written in the middle of the signature.

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