



U.S. Department of Justice

United States Attorney
Southern District of New York

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June 12, 2015

BY ECF

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *The New York Times Co. v. United States Dep't of Justice*,
14-4432(Lead), 14-4764(Con) (2d Cir.)

Dear Ms. Wolfe:

We write respectfully in response to the ACLU's June 10, 2015 letter enclosing redacted versions of two classified declarations that were initially filed in civil litigation brought by the father of Anwar al-Aulaqi, and recently produced by the Department of Defense and Central Intelligence Agency, respectively, in the ongoing district court proceedings in this case. These declarations do not support the ACLU's claim that the government must release factual material contained in the Office of Legal Counsel ("OLC") memoranda at issue in this appeal.

The factual information about Aulaqi that is released in the redacted declarations, *see* Gates Declaration ¶¶ 9, 14, 27, and Panetta Declaration ¶ 4, is not new. Substantially the same information was released in May 2013, was part of the record before the Court in the prior appeal, and was cited in the Court's opinion. *See* President's Remarks at National Defense University & Letter from Attorney General Holder to Senator Leahy, *cited at* SPA 106-07. The ACLU argued then, as it does now, that this Court should order release of any such factual material in the July 2010 OLC-DOD Memorandum. *See* Tr. Oct. 1, 2013, at 42-43 (citing, *inter alia*, Attorney General's letter). This Court nevertheless redacted the entire fact section of the OLC-DOD Memorandum. SPA 130; *see also* Gov't Br. at 43-45, 52-53. Notably, the substantial redactions in the Gates and Panetta declarations underscore that significant factual information concerning Aulaqi, his activities and associates remains classified.

In addition to being properly classified and exempt from disclosure under FOIA Exemptions 1 and 3, the factual material included in the OLC memoranda is also protected by Exemption 5 because disclosure of OLC's reliance on particular facts would reveal privileged facts communicated by OLC's clients for the purpose of obtaining legal advice, as well as OLC's selection of facts relevant to its predecisional legal advice. Gov't Br. at 44. This privilege has not been waived, as this Court repeatedly emphasized that "[t]he Government's waiver applies

only to the portions of the OLC-DOD Memorandum that explain legal reasoning.” SPA 124; *see also* SPA 113; Gov’t Br. at 32.

Respectfully,

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cc: Counsel for Plaintiffs-Appellants (via ECF)