



2. I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties. I submit this declaration in support of the Central Intelligence Agency's ("CIA's") Motion for Summary Judgment.

#### Background

3. Congress created the position of the Director of National Intelligence ("DNI") in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as the head of the United States Intelligence Community and as the principal advisor to the President for intelligence matters related to the national security. The DNI also serves as the Intelligence Advisor to the National Security Council ("NSC"), and the Homeland Security Council. 50 U.S.C. § 403(b)(1), (2).

4. The responsibilities and authorities of the DNI are set forth in the National Security Act of 1947, as amended. These responsibilities include ensuring that national intelligence is provided to the President, heads of the departments and agencies of the Executive Branch, the Chairman

of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is charged with establishing objectives for the United States Intelligence Community, as well as determining the requirements and priorities for the collection, analysis, production, and dissemination of national intelligence by elements of the intelligence community. The DNI is also charged with managing and directing the tasking of collection, analysis, production, and dissemination of national intelligence. 50 U.S.C. § 403-1(f)(1)(A)(i) and (ii).

5. In addition, the National Security Act of 1947, as amended, states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of information under applicable law, Executive Orders, or other Presidential directives and for access to and dissemination of intelligence. 50 U.S.C. § 403-(i)(2)(A), (B).

6. Finally, the National Security Act of 1947, as amended, created an Office of the Director of National Intelligence. The function of this Office is to assist the DNI

in carrying out the duties and responsibilities of the Director under the Act and other applicable provisions of law, and to carry out such other duties as may be prescribed by the President or by law.

7. The purpose of this declaration is to explain the disposition of thirteen documents that were referred to the ODNI by the CIA and one document referred to the ODNI by the Department of State in connection with the above-captioned FOIA litigation.

#### ADMINISTRATIVE PROCESSING OF REFERRALS

8. The ODNI received referrals of thirteen documents, totaling 123 pages, from the CIA for review. As described in more detail below, one document (Document 79 on CIA's Vaughn index), totaling four pages, was released in part and twelve documents (Documents 3, 4, 62, 103-104, 107-111, 130, and 243 on CIA's Vaughn index), totaling 119 pages, were withheld in full. I understand that the CIA is preparing a declaration and Vaughn index supporting the withholding of certain information in documents 79, 3, 4, 62, 103-104, 107-111, 130, and 243, pursuant to FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3). I also understand that the Department of State and the Department of Defense are preparing declarations supporting the withholding of certain information in Document 103 pursuant to FOIA Exemption 5. I submit this declaration

to explain why ODNI also invokes FOIA Exemption 5 to withhold information in these thirteen documents.

9. The ODNI received a referral of one document, totaling three pages, from the Department of State. (Document 360 on CIA's Vaughn index.) As described in more detail below, the ODNI determined that one page of this document could be released in full and two pages should be withheld in full. I understand that the CIA is preparing a declaration and Vaughn index supporting the withholding of certain information in this document pursuant to FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3). I submit this declaration to explain why ODNI also invokes Exemption 5 to withhold information in this document.

#### DOCUMENT DESCRIPTIONS

10. Document 79: Document 79 on the CIA's Vaughn index is a four-page document from a member of the United States Congress to the Director of National Intelligence. It seeks a classification review of certain statements regarding the details of the CIA's Terrorist Detention and Interrogation program. The first page is a one-page fax cover sheet. The remaining three pages consist of a one-page letter from a member of Congress and a two-page attachment.

11. The fax cover sheet and the letter are releasable in full and have been provided to plaintiffs. These documents,

when separated from the attachment, are unclassified. The two-page attachment, however, contains classified information. In addition, the two-page attachment contains handwritten notes regarding the statements contained in the attachment.

12. Document 3: Document 3 on the CIA Vaughn index is a seven-page document consisting of a one-page routing sheet, a one-page memorandum for the record dated August 11, 2005, a one-page memorandum dated August 12, 2005 from the Principal Deputy Director for National Intelligence to an assistant to the President and a four-page memorandum dated August 6, 2005 from the Director of National Intelligence to two assistants to the President. The one-page memorandum from the Principal Deputy Director of National Intelligence dated August 12, 2005 pertains to a possible decision to be made by the President. The four-page memorandum dated August 6, 2005 is identical to Document 4, discussed further in paragraph 13.

13. Document 4: Document 4 on the CIA's Vaughn index is a four-page memorandum from the Director of National Intelligence to two assistants to the President, dated August 6, 2005, and contains the assessments, recommendations, and analyses of the intelligence community regarding certain intelligence operations on an issue related to a possible decision to be made by the President.

14. Documents 79, 3, and 4 bear the classification TOP SECRET, and Documents 3 and 4 also bear markings for sensitive compartmented information.

15. Documents 62, 103-104, 107-111, 130, and 243: These ten documents, and their attachments, were created or collected by the NSC and its Principals and Deputies Committees for the purpose of considering United States policy regarding detainees and making recommendations to the President. The documents were authored by the Executive Secretary of the NSC Principals or Deputies Committees, and either discuss the agenda for upcoming NSC Principals or Deputies Committee meetings, or summarize those meetings.

16. The NSC is the principal forum for considering national security policy issues requiring Presidential determination. The President presides over meetings of the NSC. The NSC includes the Vice President, the Secretary of State, the Secretary of Defense, and the Secretary of Energy, as prescribed by statute. The membership of the NSC also includes the Secretary of the Treasury, the Attorney General, the Secretary of Homeland Security, the Representative of the United States of America to the United Nations, the Assistant to the President for National Security Affairs ("National Security Advisor"), the Counsel to the President, and the Chief of Staff to the President. The Chairman of the Joint

Chiefs of Staff and the Director of National Intelligence serve as Adviser's to the NSC.

17. The NSC formulates its recommendations for potential presidential decisions through two primary committees: the Principals Committee and the Deputies Committee. The NSC Principals Committee serves as the senior interagency forum for consideration of policy issues affecting the national security, and is chaired by the National Security Advisor. Regular members of the Principals Committee include the Vice President, the Secretary of State, the Secretary of Defense, and the Secretary of the Treasury, the Attorney General, the Secretary of Energy, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the Representative of the United States of America to the United Nations, the Chief of Staff to the President, the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff. Other senior members of the Administration may also be included in Principals Meetings.

18. The NSC Deputies Committee serves as the senior sub-cabinet interagency forum for consideration of policy issues affecting the national security, and is chaired by the Assistant to the President and Deputy National Security Advisor. The members of the Deputies Committee are: the Deputy Secretary of State, Deputy Secretary of the Treasury,



Deputy Secretary of Defense, Deputy Attorney General, the Deputy Secretary of Energy, the Deputy Secretary of Homeland Security, the Deputy Director of the Office of Management and Budget, the Deputy to the United States Representative to the United Nations, the Deputy Director of National Intelligence, the Vice Chairman of the Joint Chiefs of Staff, and the Assistant to the Vice President for National Security Affairs. Other senior members of the Administration may also be included in Deputies Committee meetings.

EXEMPTIONS CLAIMED

A. FOIA Exemption 5 - Deliberative Process and Presidential Communications Privilege

19. *Deliberative Process Privilege - Exemption 5* protects inter-agency or intra-agency records covered by certain privileges, including the deliberative process privilege. This exemption is intended to protect the candid views and advice of U.S. Government officials in their pre-decisional deliberations respecting policy formulation and administrative direction.

20. Disclosure of material containing such deliberations, or of material on which such deliberations are based, would prejudice the free flow of internal recommendations and other necessary exchanges. It would

severely hamper the ability of responsible officials to formulate and carry out executive branch programs. The handwritten notes contained on the two-page attachment to Document 79, as well as portions of Documents 3, 4, 62, 103-104, 107-111, 130, 243 and 360 have been withheld pursuant to the deliberative process privilege.

21. The handwritten notes on the attachment to Document 79 reflect the thoughts, assessments, and analysis of the person reviewing the attachment. The twelve remaining documents referred by the CIA (Documents 3,4, 62, 103-104, 107-111, 130, and 243) were prepared, solicited or received as part of the process by which detainee policy was formulated, and contain information reflecting the deliberations of ODNI and other executive branch officials, including deliberations at NSC Principals and Deputies Committee meetings. Disclosure of this information, which is pre-decisional, portions of which are marked "draft," and which contains selected factual material intertwined with opinion and analysis, would reveal the internal deliberations of senior government officials, and thereby inhibit candid internal discussion and the expression of recommendations and judgments regarding issues facing these officials and preferred courses of action. There are no reasonably segregable facts that may be disclosed in this deliberative material.

22. The letter referred by the State Department is from an ODNI official to a Department of Justice official in the Office of Legal Counsel. The ODNI official is providing comments on a draft OLC letter related to the detention of detainees by the CIA. In this letter, the ODNI official is providing his thoughts and analysis and recommending that certain changes be made to a draft OLC letter.

23. Because the officials involved in these pre-decisional deliberations would have reasonably expected that their candid discussions and recommendations regarding sensitive national security issues would remain confidential, release of these records would discourage open and frank discussions among executive branch officials in the future, thereby threatening the confidence needed to ensure the candor of future deliberations. The withheld information is, accordingly, exempt from release under FOIA Exemption 5.

24. *Presidential Communications Privilege* - Exemption 5 also protects from disclosure information covered by the presidential communications privilege. The presidential communications privilege protects confidential communications that relate to potential presidential decision-making and that involve the President, his senior advisors, or staff working for senior presidential advisors. The privilege protects communications in connection with the performance of the

President's responsibilities of his office and made in the process of shaping policies and making decisions.

25. In addition to communications directly involving the President, the privilege protects communications involving presidential advisors, including communications which these advisors solicited and received from others as well as those they authored themselves. Protecting the frank and candid deliberations of ideas and expression of views is essential in order to ensure that such advisors are able to thoroughly examine issues, formulate opinions, and provide appropriate advice to the President. This privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-decisional documents.

26. In this case, the privilege protects twelve documents: Documents 3, 4, 62, 103-104, 107-111, 130, and 243. These documents contain information reflecting communications solicited and received by senior presidential advisors including the Director of National Intelligence, the Principal Deputy Director of National Intelligence, and others, in the course of discussing issues related to formulating recommendations and advice for presidential decision-making.

27. Documents 3 and 4 are memoranda authored by the Principal Deputy Director of National Intelligence and the Director of National Intelligence, respectively, to the

National Security Advisor, on an issue related to a possible decision to be made by the President. Accordingly, they are withheld in their entirety pursuant to the presidential communications privilege.

28. Documents 62, 103-104, 107-111, 130, and 243 reflect or memorialize communications between senior presidential advisers and senior United States government officials at NSC Principals and Deputies Committee meetings where presidential advisers solicited and received information and/or recommendations in the course of gathering information for decisions, or potential decisions, to be made by the President, including decisions on detainee policy. Among the public decisions made by former President George W. Bush regarding detainee policies generally are his signing of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, and his speech on September 6, 2006, announcing the transfer of detainees from CIA custody to Guantanamo Bay. Accordingly, these documents are withheld in their entirety pursuant to the presidential communications privilege.

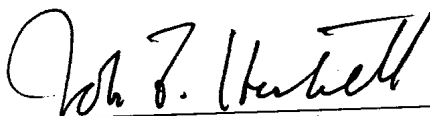
29. The presidential advisers involved in these deliberations would have reasonably expected that their discussions and recommendations regarding sensitive national security issues would remain confidential. Disclosure of these communications and deliberations would necessarily inhibit

presidential advisers from engaging in the full and candid exploration of issues and options that is essential in order to effectively prepare advice and recommendations for the President. Thus, all twelve documents are properly withheld pursuant to the presidential communications privilege.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 22nd day of September 2009.

  
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John F. Hackett