UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMNESTY INTERNATIONAL USA, CENTER FOR CONSTITUTIONAL RIGHTS, INC. and WASHINGTON SQUARE LEGAL SERVICES, INC., Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE, AND THEIR COMPONENTS, Defendants.	**ECF CASE** 07 CV 5435 (LAP)

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs Amnesty International USA, the Center for Constitutional Rights, Inc., and Washington Square Legal Services, Inc., (collectively, "Plaintiffs") respectfully submit this memorandum of law in further support of their cross-motion for partial summary judgment in this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

ARGUMENT

I. THE CIA HAS NOT JUSTIFIED ITS WITHHOLDINGS PURSUANT TO EXEMPTIONS 1 AND 3.

A. The National Security Context Does Not Relieve the CIA of Its FOIA Obligations.

Contrary to what the Central Intelligence Agency ("CIA") suggests regarding national security cases, substantial deference to agency declarations or affidavits is not automatic. CIA Reply & Cross-Opposition ("CIA Cross-Opp.") at 2-3. Agency declarations must "be specific in the first place and cannot support summary judgment if they are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Scott v. CIA*, 916 F. Supp. 42, 47 (D.D.C. 1996) (citing *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987)) (internal quotation marks omitted). Government declarations can be accorded substantial deference only if they are sufficiently detailed. *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 14 (D.D.C. 1998) ("[A]ffidavits are *only* entitled to this extra weight" if they "describe the documents withheld and the justification for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed.") (emphasis added). Because the CIA has failed to provide the requisite specificity in describing the withheld records, its declarations are not entitled to substantial deference.

The CIA cites to *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978), to suggest that courts "must first accord substantial weight to an agency's affidavit," in an apparent effort to bypass the specificity requirement. CIA Cross-Opp. at 2. But *Ray* makes clear that substantial

deference only follows submission of a detailed *Vaughn* index. *Ray*, 587 F.2d at 1195. In fact, in *Ray*, the Court identified numerous insufficiency issues with the CIA's submissions and ordered a supplemental affidavit, a more specific index of descriptions, and discovery.[1] Similar judicial scrutiny occurred in other national security cases cited by the government.[2]

For a *Vaughn* submission to be sufficient, it must "provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant, and correlate those claims with the particular part of a withheld document to which they apply." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) (internal quotation marks and alterations omitted). The correlation of asserted harms to specific documents or to narrow categories of documents is critical to the purpose of a *Vaughn* index—"to enable the court and the opposing party to address the merits of the claimed exemptions." *See Judicial Watch*, 449 F.3d at 149; *King*, 830 F.2d at 220-21 (rejecting a government declaration that lacked "sufficient specificity to enable meaningful review [of whether] disclosure would likely impact national security"). Enhanced judicial deference to agency affidavits describing documents' classified status is only warranted after the CIA satisfies its evidentiary burden, which it has failed to do.

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[1] Problems included, for instance, a "glaring defect" in a declaration that "lump[ed] the exemptions together and fail[ed] to identify whether different exemptions are claimed as to different parts of each document"; an affidavit that failed to "address specifically whether the disclosure of substantive information may be possible without the disclosure of source, and if not why not"; and an "[o]verall . . . problem of segregability" due to the "CIA's proffer of multiple exemptions for each withheld document," among others. *Ray*, 587 F.2d at 1196.

[2] *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 380 (D.C. Cir. 2007) (remanding to the district court for further proceedings requiring the CIA to either disclose any officially acknowledged records or establish both that their contents are exempt from disclosure and that such exemption has not also been waived by congressional testimony); *ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (finding that CIA's fourth and fifth declarations finally support *Glomar* response with respect to two specific items, but rejecting *Glomar* response for a third item and requiring agency either to produce the record or provide additional justification for any withholding).

B. The CIA Has Not Met Its Threshold Burden To Provide an Adequate Vaughn Index and Declarations.

The CIA claims that it has provided "more than sufficient detail to justify the CIA's Exemption[] 1 and 3 withholdings," repeatedly referring to its "80-page declaration" that it asserts describes "specific types of exempt information." CIA Cross-Opp. at 3. For the reasons set forth below, the CIA has failed to sufficiently justify its Exemption 1 and 3 withholdings.[3]

1. The CIA's Generalized Approach Is Unsupported By Authority Cited.

As Plaintiffs previously set forth, the CIA's *Vaughn* descriptions provide only repetitive and generalized references with respect to both the subject matter of the record and the potential harm that would occur from disclosure.[4] Pls.' Opp. & Cross-Opp. Sum. J. ("Pls.' Cross-Mot.")

[3] The CIA invokes Exemptions 1 and 3 for all but four documents in the representative sample set. The CIA does not invoke Exemption 1 for Documents 31, 42, 59, 88, 125, 127, 152, 158, 174, 175, 240, 247, 249 and 250; it does not invoke Exemption 3 for Documents 174, 247, 249 and 250. Accordingly, national security exemptions are claimed for every record except Documents 247 and 249. While Plaintiffs challenge the adequacy of the *Vaughn* index and lack sufficient information to test the CIA's merits arguments, Plaintiffs do not challenge the withholding of covers, cryptonyms, pseudonyms or dissemination control markings to the extent that Exhibit J clearly indicates which records contain this information (and to the extent that the information has not been officially acknowledged). Plaintiffs cannot, however, determine the propriety of these withholdings from the government's existing submissions. Compare, for example, the *Vaughn* index and Exhibit J entries for Document 59. The *Vaughn* index indicates partial Exemption 3 withholdings under the CIA Act, but not the NSA, for "CIA official titles, internal organizational data, names, employee numbers, employee telephone numbers, functions, filing information/instructions, and titles or other organizational identifiers of CIA organizational components," but the Exhibit J entry notes that withheld information relates to "human sources," "cryptonyms," "dissemination control markings" and "terrorist detention and interrogation program." Upon examination of the partially released Document 59, however, it appears that only the names of CIA personnel and routing information is redacted and, despite Exhibit J's assertion of dissemination control markings being withheld, the *Vaughn* entry indicates that the document does not bear a classification marking. These inconsistencies render it impossible for Plaintiffs to determine the propriety of withholding, particularly when the CIA has withheld documents in their entirety, as it has done in most cases.

[4] Contrary to its claims, the CIA fails to provide even the limited information it claims is available for every document. CIA Cross-Opp. at 4. A review of the *Vaughn* index demonstrates that required details are missing for numerous documents in the sample set. *See, e.g.*, Pls.' Cross-Mot. at 9 & n.26; *see also* Pls.' Cross-Mot. Ex. 2 (Chart of Repetitive and

at 8-9, 11-13. Although the government urges the Court to view its repetitive language as permissibly treating "common documents commonly," rather than as insufficient generalities, *see* CIA Cross-Opp. at 5, its position is unsupported by the authority cited.

In *Judicial Watch*, for instance, the Court permitted the Federal Drug Administration ("FDA") to describe records related to the approval of a specific drug, mifepristone, using "commonalities" to justify its withholdings under FOIA Exemptions 4, 5, and 6. The court found that in light of the specific facts of the case—which involved a limited subject matter and an extensive number of disclosed documents—the common treatment was permissible. Even in *Judicial Watch*, however, the court required the FDA to produce additional information to explain the technical nature of the descriptions to facilitate the court and plaintiffs' understanding of the records. 449 F.3d at 150. The common treatment endorsed in *Judicial Watch* is not appropriate here, where the CIA has collected diverse types of documents with diverse bases for the actual Exemption 1 and 3 withholdings in a manner that precludes the Court and Plaintiffs from evaluating the agency's claims.

The CIA's reliance on *Morley v. CIA*, 508 F.2d 1108, 1113 (D.C. Cir. 2007), in support of its highly generalized approach is also misplaced. Purporting to adopt an approach sanctioned by *Morley*, the CIA relies exclusively on Exhibit J to the First DiMaio Declaration to correlate the vaguely described intelligence information with specific records, *see* First DiMaio Decl. ¶¶ 64, 74, 100, 110 & 126, claiming that the declaration explains the harm that would result from disclosure of broad "categories" of information in each document. CIA Cross-Opp at 4.

Missing Information Examples in *Vaughn* Index). The CIA simply ignores Plaintiffs' detailed submissions concerning the additional information required for specific documents. *See* Pls.' Cross Mot. at 9, 11-13.

This case is unlike *Morley*, however, which involved a FOIA request related to a single named CIA agent's position as a case officer for a particular anti-Castro organization during the time of President Kennedy's assassination. *Morley*, 508 F.3d at 1113. By contrast, the present motion involves three separate FOIA requests that concern a program that the CIA admits has spanned several years, affected a range of individuals in various locations, and involved multiple government actors, and in respect of which there has been only selective disclosure of information. Far more descriptive information is required. The CIA's *Vaughn* submissions are so vague that, unlike in *Morley* or *Judicial Watch*, the context of this case fails to assist Plaintiffs and the Court in understanding the basis of the withholdings for specific documents. The CIA's highly generalized approach is unsupported by *Morley* or *Judicial Watch*.

2. The CIA's General Descriptions of the Documents' Subject Matter and the Potential Harms Lack the Required Specificity.

The CIA's generalities also indicate shortcomings in its justifications for withholdings under Exemptions 1 and 3. To sustain an Exemption 1 withholding, the CIA bears the burden of establishing that the information has been properly classified and that the subject matter of the particular withholding reasonably would be expected to cause the specific harm to national security described in the *Vaughn* submissions. For Exemption 3, the CIA must show that the subject matter of the withheld information properly falls within one of the withholding statutes at issue, the National Security Act of 1947, ch. 343, 61 Stat. 495-510 (1947) ("NSA") or the Central Intelligence Agency Act of 1949 (codified at 50 U.S.C. § 403g ("CIA Act")). The CIA's generalized and abstract descriptions in its *Vaughn* index and declarations fail to carry its burden.

For instance, the CIA's *Vaughn* submissions do not describe with any specificity the subject matter of particular documents or the harms that would flow from disclosure. The majority of the First DiMaio Declaration is generic background information. It describes in

general terms the procedural requirements for invoking Exemption 1, *see* First DiMaio Decl. ¶¶ 41-53, and offers a general background discussion of "intelligence sources," including a basic explanation of "human source[s]" and "foreign liaison and foreign government information," *see id*. ¶¶ 61-63, 65-73. The declaration also proffers a similarly generalized background discussion of "intelligence methods" and potential harms from disclosure, *see id*. ¶¶ 76-81; inadequate descriptions and generic examples of "Foreign Intelligence Relationships," *see id*. ¶¶ 98-99; and an overview of "Intelligence Activities" that describes "General Intelligence Activities" and generic harms from disclosure, *see id*. at ¶¶ 105-109. Finally, in these generic sections of the DiMaio Declaration, the CIA only asserts that one of the illustrative examples of intelligence sources or methods describes actual information in the documents at issue. *See id*. ¶ 60 (expressing concern about exposing former detainees to retribution).

Further, these sections of the First DiMaio Declaration are replete with illustrations of information and potential harms that are not even logically related to the subject of these FOIA requests. For example, in describing "human sources," the CIA conjures a scenario in which a U.S. citizen business executive assists the CIA by sharing information learned during business abroad. *See id*. ¶ 58. The CIA makes no claim that this type of intelligence source is involved in any document in the *Vaughn* index, nor does this seem a likely scenario for the human sources allegedly at issue in the withholdings. Compare this speculation with the government's later example of a "human source," albeit an involuntary one: "The information requested in this case includes records referring to persons who were in United States' custody at some point and records related to their interrogations." *Id.* ¶ 60 (emphasis added). Even here, however, the government's claim of harm—a risk of retribution to former detainees—is applicable only if the detainees' names have not already been disclosed (or if the detainees do not want their names

disclosed). *See* Declaration of Margaret L. Satterthwaite ("Satterthwaite Decl.") ¶¶ 11, 13, 15. Consequently, withholding this information may only be appropriate in some, if any, contexts.

Similarly, the only relevant contested "intelligence method" that the government expressly alleges is contained in the responsive records is "foreign intelligence relationships." First DiMaio Decl. ¶ 83. Yet, the First DiMaio Declaration's unspecified overview of foreign intelligence relationships provides no assistance to the Court or Plaintiffs in understanding the actual bases for particular withholdings. In trying to describe the harm that would flow from disclosure of "general intelligence activities," the government warns that its admission of intelligence information about a "particular individual" would alert the individual's organization that the CIA had detected its activities, resulting in a plethora of harms. *Id.* ¶¶ 107-109. Yet, the CIA does not provide adequate information for the Court and Plaintiffs to test this claim against evidence in the record establishing that CIA and senior White House officials have admitted to detaining sixteen named individuals and detailing the various plots purportedly thwarted through the interrogation of these men.[5] Thus, the description of general intelligence activities and the accompanying description of potential harm are insufficient to justify any withholdings.

The First DiMaio Declaration briefly—and inadequately—addresses the actual subject matter of Plaintiffs' FOIA requests by presenting an overview of the government's rendition, secret detention, and coercive interrogation program. *See id.* ¶¶ 111-127. Even here, however, the declaration proclaims without specific detail that the "program includes a number of the intelligence sources and methods I have previously described," but avers that "details of the program remain classified." *Id.* ¶ 111. Beyond the actual assertion in ¶ 60, the Court and

[5] *See* Satterthwaite Decl. Exs. A, B. Relatedly, it is well-established that the CIA is engaged in clandestine activity against al Qaeda and other related politically violent organizations—the Department of State even maintains a list of organizations designated by the government as "Foreign Terrorist Organizations." *See* http://www.state.gov.s.ct.rls.fs.37191.htm.

Plaintiffs are left to speculate about which of the "previously described" human or foreign government information sources or foreign intelligence relationships methods are contained in the records.

The First DiMaio Declaration also eventually identifies, but only generally, what it describes as the "additional" intelligence sources and methods information actually contained within the 246 records withheld under Exemptions 1 & 3: "conditions of confinement and interrogation methods used by the CIA, locations of CIA intelligence activities overseas, and assistance provided by certain foreign governments in furtherance of these activities." *Id.* ¶ 112. Again, however, the CIA aggregates these generalized categories of purported harms under the heading "Terrorist Detention and Interrogation" program in Exhibit J. Plaintiffs and the Court cannot determine whether a specific withholding relates to conditions of confinement or negotiations with a foreign government to locate a CIA facility, nor can Plaintiffs or the Court determine whether the information is properly identified to be an "intelligence source or method."

The CIA's general description of the coercive interrogation techniques also fails to explain how this subject is raised in specific documents. Neither the *Vaughn* index nor the DiMaio Declarations indicate whether withheld records include legal memoranda generally authorizing the use of coercive interrogation methods; correspondence seeking authorization to use a specific interrogation method against a specific detainee and the approval of each such use; or records related to the CIA Inspector General's investigation of the CIA's program, including the legality of interrogation techniques. *See* Satterthwaite Decl. ¶¶ 27, 29, 53, 55.a., 59. As developed further below, these details are essential to allow Plaintiffs to mount meaningful merits challenges and the Court to review the merits of specific withholdings.

Further, the CIA identifies only two general potential harms in an attempt to justify its withholdings related to these categories of activities, namely that disclosure of interrogation methods and conditions of confinement will undermine the CIA's ability to effectively question detainees because individuals can train in counter-interrogation techniques, First DiMaio Decl. ¶ 121, and that disclosure of a foreign government's assistance—including the hosting of CIA secret detention facilities—will result in the loss of cooperation from the foreign government, *id*. ¶¶ 123-125. Given that the CIA has disclosed its use of waterboarding, Satterthwaite Decl. ¶¶ 23, 24, and its use of particular territory for rendition flights, Satterthwaite Decl. ¶ 28, the CIA must provide further information to demonstrate the specific harm that disclosure would actually cause, and must do so in a manner that facilitates Plaintiffs' challenges and the Court's review.

Finally, Exhibit J does not explain which type of information from these broad categories is included in a particular document. The First DiMaio Declaration makes no reference to a particular document withheld pursuant to Exemptions 1 or 3. For each document, the CIA does not indicate whether Exemptions 1 and/or 3 each apply to the entire document or only portions thereof. Similarly, where a statute is invoked as an Exemption 3 withholding statute, the CIA does not explain whether the statute justifies the withholding of a portion or the entirety of the document, or to what extent it overlaps with a separate statute invoked.[6] In other words, the CIA asks the Court to presume what FOIA requires it to establish: that each particular withholding pursuant to Exemption 1 is properly classified and actually includes information that, if disclosed, would cause the asserted specific harm to national security, and that each particular

[6] The CIA suggests without basis that Plaintiffs conceded that the CIA Act applies to all documents withheld under Exemption 3. CIA Cross-Opp. at 6-7. As set forth more fully below, *see supra* I.D.2, Plaintiffs challenge the adequacy of the *Vaughn* submissions purporting to justify the agency's Exemption 3 withholdings as well as the merits of these withholdings to the extent possible in light of the CIA's inadequate evidentiary showing.

withholding pursuant to Exemption 3 actually contains information that is properly within the specified withholding statute. By doing so, the CIA attempts to circumvent its threshold burden.

Document 79, a partially released record, illustrates the inadequacy of the CIA's approach. The *Vaughn* index describes Document 79, for example, as a "SCI/Top Secret" letter from a Member of Congress to the Office of the Director of National Intelligence ("DNI") partially withheld pursuant to Exemption 1 because it would "reveal intelligence sources and methods, as well as foreign activities of the United States government" and Exemption 3 because the information falls within the NSA. Exhibit J identifies "terrorist detention and interrogation program" as the relevant intelligence activity. The redacted Document 79 provides further clarity that it is a letter from a Senator requesting that DNI confirm that attached statements are unclassified official acknowledgments. The whole attachment, however, is redacted. The sum of the information the CIA provides for even this partially released document gives no indication of the subject matter of the redactions and leaves the Court and Plaintiffs entirely unable to test the CIA's justification for withholding information that the then-Vice Chair of the Senate Select Committee on Intelligence, viewed as officially acknowledged and unclassified. Document 89 suffers from nearly identical deficiencies.

For other records, the information is missing or inconsistent. The *Vaughn* entry for Document 175 indicates it is an unclassified memo from the CIA Senior Deputy General Counsel to the CIA Inspector General partially withheld under Exemption 3 pursuant to both the NSA and CIA Act. Exhibit J does not have an entry for Document 175, providing the Court and Plaintiffs with no explanation of how the withheld information purportedly relates to intelligence sources and methods properly withheld under the NSA or the CIA Act. Further, the actual partially released Document 175 bears markings indicating that it also was withheld pursuant to

Exemption 1, even though the *Vaughn* entry or Exhibit J do not assert this. The entries for the documents withheld in their entirety are even more indecipherable for the Court and Plaintiffs.

In sum, for individual documents, the CIA has failed to provide the specificity necessary for adversarial testing and judicial review. The relevant query is not whether responsive records contain some classified information, but whether some portions of a particular document are subject to segregation and disclosure as officially acknowledged information, and whether for specific documents or portions of a document, the CIA has improperly concealed information. The CIA index and declarations offer generalized statements about potential harms to national security that would be raised by the disclosure of "types" of information that may or may not be included in a sampled document, or general assertions about the applicability of the NSA or the CIA Act to withholdings. This is plainly not enough; the CIA has failed to meet its burden.

Although purporting to rely upon its public submissions, the CIA recognizes that additional details may be required and has taken the extraordinary measure of submitting a classified declaration for the Court's *ex parte, in camera* review. On September 24, 2008, Plaintiffs, by letter brief, moved for relief from the government's classified declaration, arguing that the government had not established as complete a record as possible to justify review of such a declaration and requesting that the amount of information shielded from the adversarial process be limited. Letter from M. Hensler to Hon. Loretta A. Preska, dated September 24, 2008. The Court denied Plaintiffs' motion. October 2, 2008 Order. Although Plaintiffs maintain that the government's submission of a classified declaration is premature and improper, Plaintiffs' essential argument is that additional information justifying the CIA's withholdings is required. Plaintiffs respectfully request that, to the extent that the Court considers the *in camera* declaration, it provide a detailed explanation referring to the classified material (with appropriate

portions of the opinion to be redacted), in order to permit robust appellate review. *See Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 589 (D.C. Cir. 1987) (remanding for further explanation after *in camera* review of declaration, since there was "simply not enough in the way of a 'decision' here to enable the panel to exercise [its] review function.").

C. The CIA Has Withheld Segregable Officially Acknowledged Information.

In addition to identifying publicly known information about the CIA's program, Plaintiffs have set forth in detail official acknowledgments by the CIA and senior White House officials that should be identified in the withheld documents, segregated, and disclosed. Pls.' Cross-Mot. at 28-29. The CIA concedes that the CIA or senior White House officials have officially acknowledged information about the program which is the subject of Plaintiffs' requests.[7] CIA Cross-Opp. at 22 n.10; Second DiMaio Decl. ¶ 22. The CIA also concedes that it is under a legal obligation to disclose officially acknowledged information pursuant to 5 U.S.C. § 552(b). CIA Cross-Opp. at 56.

The CIA, however, claims that Plaintiffs have not submitted evidence that it has improperly withheld officially acknowledged information. CIA Cross-Opp. at 23. To the contrary, Plaintiffs have submitted concrete evidence of records pertinent to the same CIA program at issue here that the agency has been compelled partially to disclose as official acknowledgments in other FOIA litigation. Satterthwaite Decl. ¶ 24. The CIA claims to have processed nearly 10,000 records; yet, amongst the 592 pages disclosed to Plaintiffs in April

[7] For example, while the CIA disputes that the government has officially acknowledged the CIA's detention of nineteen individuals, it confirms that the "United States" has officially acknowledged the detention of sixteen individuals in the program at issue here. CIA Cross-Opp. at 22. At a minimum, references in the responsive records related to the detention of all of these sixteen individuals must be segregated and disclosed. A list of the most pertinent undisputed officially acknowledged information is set forth in Attachment 1 to the Declaration of Gitanjali S. Gutierrez.

2008, little reference to these or other conceded official acknowledgments can be discerned, rendering it unclear what role the official acknowledgments played in the CIA's assessment of segregable and releasable information.

Finally, the insufficiently detailed *Vaughn* index renders it impossible for Plaintiffs to ascertain the nature of the 246 documents for which Exemption 1 or 3 is invoked, thereby limiting Plaintiffs' ability to offer more specific challenges to the CIA's failure to segregate and disclose officially acknowledged information. Plaintiffs have satisfied their burden by showing: undisputed official acknowledgments; the disclosure of some of this information in other FOIA litigation; and the lack of disclosed records in this case containing all of the undisputed officially acknowledged information.[8] The CIA has not, on the other hand, carried its burden to demonstrate that it has reviewed the withheld documents for officially acknowledged information that should be segregated and disclosed.

The CIA claims that any unclassified and unprivileged information is inextricably intertwined with withheld materials and cannot be reasonably segregated. CIA Cross-Opp. at 57; First DiMaio Decl. ¶ 172. Yet, the CIA's herculean efforts in this litigation to avoid public disclosure of its rendition, secret detention, and coercive interrogation program heighten the informational value of every portion of every segregable record for the public and Plaintiffs. In other FOIA cases, the segregation and release of a single phrase or sentence in a document might be properly understood as not being reasonable or meaningful. In a case like this, however, where there are extremely high levels of public interest in every government acknowledgment, the segregation and release of information that has been acknowledged—even if it is only a

[8] The CIA highlights its disclosure of some official acknowledgments related to congressional requests for information, CIA Cross-Opp. at 23. Yet, the CIA must disclose all reasonably segregable officially acknowledged information.

sentence or phrase in each document—is both reasonable and meaningful. The 592 pages of disclosed information contain previously-released public records such as a 93-page copy of the Fourth Geneva Convention and lengthy public records. Clearly absent are documents similar to the record released in the *ACLU v. DOD* litigation. *See* Satterthwaite Decl. ¶ 24 (referencing the CIA's officially acknowledged waterboarding of three named detainees and documents which include other officially acknowledged information). The CIA must segregate and release this information in the processed records. This segregability assessment is mandated by FOIA itself. 5 U.S.C. § 552(b); *see Schiller v. NLRB*, 964 F.2d 1205, 1209-10 (D.D. Cir. 1992); *Mead Data Ctr., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

D. The CIA Does Not Support Its Exemption 3 Withholdings under the NSA or CIA Act.

The CIA erroneously dismisses Plaintiffs' challenges to the CIA's broad Exemption 3 withholdings, relying on the NSA or the CIA Act. The CIA asserts that the NSA withholding provision is unchanged despite the recent restructuring of the nation's intelligence infrastructure through the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872 ("IRTPA"), amending the NSA. Further, the CIA asserts without support that it can withhold broad categories of information under the far narrower withholding provision of the CIA Act even if IRTPA sufficiently modified the NSA to limit the CIA's withholdings under that statute. Neither argument has merit.

1. The CIA Ignores the Significance of the Post-9/11 Amendments to the NSA Which Do Not Support the Agency's Exemption 3 Withholdings.

The CIA disregards both textual changes and the major substantive shift evidenced by the legislative history of IRTPA and the CIA Act. *See* CIA Cross-Opp. at 6-12. As a result, the CIA fails to satisfy the NSA's procedural or substantive requirements for invoking Exemption 3.

First, Plaintiffs challenge the adequacy of the DNI's submission in this case. In its opposition, the CIA belatedly produced a "memorandum" from the DNI based on his review of a "draft declaration" from the CIA and a partial sample of the withheld records. Second DiMaio Decl. Ex. B (Memorandum from J.M. McConnell, Director of National Intelligence to General Michael V. Hayden, Director of the Central Intelligence Agency, Apr. 11, 2008); CIA Cross-Opp. at 9.[9] The CIA no longer has independent authority to assert a withholding of "intelligence sources and methods." IRTPA § 1011(a) (striking NSA §§ 102-104 and inserting amended NSA § 102A(i), 50 U.S.C. § 403-1(i) (2004)). This preliminary assessment does not fulfill the current procedural requirements for an Exemption 3 withholding under the NSA, to provide a declaration from the Office of the DNI ("ODNI") supporting the Exemption 3 withholdings.

Second, where the CIA is asserting that the NSA supports the withholding of information, IRTPA requires a more searching judicial review into whether the CIA is properly withholding "intelligence sources and methods" than the Supreme Court required in *CIA v. Sims,* 471 U.S. 159 (1985). IRTPA implicitly repeals the statutory interpretation of "intelligence sources and methods" of the *Sims* Court, undermining the precedential value of *Sims* and its progeny. As an initial matter, the CIA rightly describes Plaintiffs' arguments on this point as "novel." Def. Cross-Opp. at 10. They are novel because the recently enacted IRTPA forced an overhaul of the country's intelligence framework in response to intelligence failures revealed by the events on September 11, 2001.[10] This is an issue of first impression.[11]

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[9] The DNI's memorandum makes clear that his office did not review the entire *Vaughn* index and only approved the CIA's assertion in a draft of the First DiMaio Declaration. The Court and Plaintiffs cannot ascertain the information actually provided to the DNI.

[10] *See, e.g.*, S. Rep. No. 108-139, at 4 (2004) (Conf. Rep.) (statement of Senator Susan Collins, Chairperson of Conference Committee) ("This legislation addresses the alarming flaws in our national intelligence structure that were so horribly and painfully exposed on that black

The statutory language and legislative history show that IRTPA compels a narrower reading of "intelligence sources and methods" and allows for more independent judicial oversight than had previously been recognized in *Sims* and its progeny.[12] IRTPA explicitly stripped the DCI of its prior authority to withhold "intelligence sources and methods." IRTPA § 1011(a). Contrary to the government's claim, IRTPA's shift of authority to "protect intelligence sources and methods from unauthorized disclosure," from the Director of the CIA to the DNI included a substantive change in the scope of the DNI's authority. As demonstrated further below, with the enactment of IRTPA, Congress has "repealed by implication" the definition of "intelligence sources and methods" established by *Sims* and its progeny.[13]

September morning more than 3 years ago. It does what nearly a half century of studies and legislation calling for intelligence reform failed to do.").

[11] The three cases cited by the CIA for the proposition that the IRTPA leaves unchanged the CIA's "broad powers to protect intelligence sources and methods from disclosure in FOIA cases," Def. Cross-Opp. at 12, are inapposite. *Terkel v. AT&T Corp.* 441 F. Supp. 2d 899, 206 (N.D. Ill. 2006), is not a FOIA case but, rather, an action against a private party seeking declaratory and injunctive relief related to an alleged violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2702(a)(3). Further, with the government's intervention in that case, it submitted a publicly filed affidavit from the DNI, an affidavit that has not been provided here. *People for the American Way Foundation v. National Security Agency*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006), was decided on the grounds of the National Security Agency Act ("NSA Act") without even considering the IRTPA and the NSA, the statute at issue here. The footnote cited by the CIA merely expresses *dicta*. Finally, in *Lahr v. National Transportation Safety Board*, 453 F. Supp. 2d 1153, 1190-91 (C.D. Cal. 2006), the court *sua sponte* held that the NSA supported the withholdings even though the government had relied on the CIA Act: the impact of IRTPA was not litigated. *Id.* at 1190. Moreover, the court did not accept the CIA assertions but rather reviewed the withheld document *in camera.* In none of these cases did the court explicitly decide the impact of IRTPA on an invocation of Exemption 3 based upon the NSA.

[12] In a dramatic departure from prior appellate and district court cases, the Court in *Sims* broadly defined an "intelligence source" as that or those which "provide[], or [are] engaged to provide, information the Agency needs to fulfill its statutory obligations" to collect foreign intelligence. *Sims*, 471 U.S. at 177.

[13] Congress has explicitly not acquiesced to the *Sims* interpretation of the term "intelligence sources and methods." Indeed, Congress explicitly refused to endorse the *Sims* reading of "intelligence sources and methods" at an earlier date, stating that a "closer, more systematic review" was required. H.R. Rep. No. 102-963, at 23 (1992) (Conf. Rep.), as reprinted in 1992 U.S.C.C.A.N. 2605, 2614 (Intelligence Authorization Act for Fiscal Year 1993 report).

The Supreme Court has recognized "repeal by implication of a legal disposition implied by a statutory text" is both "frequent[]" and "necessar[y]"in order to "reconcil[e] many laws enacted over time." *United States v. Fausto*, 484 U.S. 439, 453 (1988) (holding that a more recently enacted statute "repealed . . . the judicial interpretation of the Back Pay Act"); *see also Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 786 n.17 (2000) ("it is well established that a court can, *and should*, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted") (emphasis added).[14]

Deference to *Sims* can no longer compel the interpretation of "intelligence sources and methods"; that phrase must now be interpreted in light of IRTPA and the restructured intelligence paradigm it creates. The prior interpretation of "intelligence sources and methods" in *Sims* is now inconsistent with Congress's recognition of the CIA's obligation to segregate intelligence sources from other information and to disseminate more intelligence information at lower classification levels within the intelligence community.[15]

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[14] The case for IRTPA's amendment of the prior judicial interpretation of "intelligence sources and methods" is even stronger than was the case for judicial reinterpretation in *Fausto*. In *Fausto*, the language in the old statute formed part of a comprehensive statutory scheme and had to be reconciled. In contrast, here, Congress repealed the prior provision of the NSA and introduced a new provision, albeit one with similar language.

[15] Numerous provisions within IRTPA highlight its mandate to achieve broader intelligence dissemination in part through the creation of information that is both unclassified and does not contain intelligence "source" information—the information protected from disclosure by the NSA. Whereas the pre-IRTPA NSA charged the CIA only with the "appropriate dissemination" of intelligence within the government, NSA § 103(d)(3) (2003), IRTPA charges the DNI with "maximiz[ing] the dissemination of intelligence," IRTPA § 1011(a) (codified at 50 U.S.C. 403-1(i)(2)(2005)), including through establishing "guidelines" related to the "classification of information" and the "access to and dissemination of intelligence." IRTPA § 1011(a) (codified at 50 U.S.C. 403-1(i)(2)(A)-(B)). In this context, IRTPA requires the "preparation of intelligence products in such a way that source information is removed to allow for dissemination at the lowest level of classification possible or in unclassified form to the extent practicable." IRTPA § 1011(a) (codified at 50 U.S.C. 403-1(i)(2)(C)).[15] Compliance with this provision requires the CIA to create a category of intelligence products with intelligence sources segregated from other unclassified information. Thus, this intelligence information, segregated

Further, the legislative history of IRTPA urges a reinterpretation of "intelligence sources and methods." As an initial matter, the legislative history is relevant to an interpretation of IRTPA. Courts routinely look to the legislative history to interpret statutes. *Boumediene v. Bush*, __ U.S. __, 128 S. Ct. 2229, 2242-44 (2008) ("[t]he Court of Appeals was correct to take note of the legislative history [such as floor statements] when construing the statute"); *In re Nortel Networks Corp. Secs. Litig*., 539 F.3d 129, 132 n.6 (2d Cir. 2008); *A. Michael's Piano v. Fed. Trade Comm'n*, 18 F.3d 138, 144 (2d Cir. 1994) ("construing withholding statutes [by] looking to the plain language of the statute and its legislative history, in order to determine legislative purpose"); *United States v. Taleb-Jedi*, 06 Cr. 652 (BMC), 2008 U.S. Dist. LEXIS 57665, at *43, *56 (E.D.N.Y. July 23, 2008) (examining IRTPA's legislative history in order to construe the meaning of another provision of the Act). Indeed, the *Sims* Court itself relied heavily on legislative history in its prior interpretation of "intelligence sources and methods," *Sims*, 471 U.S. at 168-69, 170-72, and prior to IRTPA, Congress had neither explicitly accepted

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from "source" information, is not exempt from FOIA disclosure pursuant to the NSA's protection of "intelligence sources." Other provisions regarding intelligence dissemination further emphasize IRTPA's mandate to promote disclosure. IRTPA emphasizes intra-government information-sharing, and further, includes a provision facilitating disclosure of intelligence information to the private sector. IRTPA § 1011(a) (codified at 50 U.S.C. 403-1(g)(1)(2005)); IRTPA § 1016(a), 1016(f)(2)(B)(vi) ("Information Sharing" provision requiring the President to create an "Information Sharing Environment" that "allows users to share information . . . , as appropriate, *with the private sector*" (emphasis added)). Further, IRTPA enhanced declassification procedures. IRTPA § 1102(f) (extending and improving the authorities of the Public Interest Declassification Act of 2000, 50 U.S.C. 435 note); Pub. Interest Declassification Act of 2000, Pub. L. 105-567, 703(b)(2)-(3), 114 Stat. 2856 (2000) (Public Interest Declassification Board established "to promote the fullest possible public access to a thorough, accurate, and reliable documentary record of significant United States national security decisions and . . . activities . . ." by recommending the "identification, collection, and review for declassification of information of extraordinary public interest that does not undermine the national security of the United States).

nor rejected the *Sims* approach to the term. *See supra*, note14.[16] The authorities relied upon by Plaintiffs address the congressional intent underlying IRTPA.

Finally, the legislative history affirms IRTPA as marking a transition from a Cold War era of excessive secrecy to a post-9/11 era of broader information-sharing, a shift the CIA erroneously rejects. CIA Cross-Opp. at 11 n.5. *See, e.g.*, 150 Cong. Rec. S11939-01, 12001 (daily ed. Dec. 8, 2004) (statement of Sen. Bob Graham, former Chairman of the Senate Intelligence Committee and conferee on IRTPA) ("Our intelligence community has developed an unhealthy obsession with secrecy . . . [which] poses a serious and continuing threat to our national security"); 9/11 Comm. Rep. at 399 ("The national security institutions of the U.S. government are still the institutions constructed to win the Cold War. The United States constructs a very different world today.").[17] This changing paradigm is reflected in IRTPA's statutory language and legislative history, and it compels a narrower definition of the information which can be withheld by the NSA than the more permissive definition established in *Sims*.

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[16] Ironically, the CIA relies on legislative history to assert that "no other statements or reports [other than the Conference Report and Joint Explanatory Statement] reflect the intent of the drafters" of IRTPA, Def. Cross-Reply at 10 n.4 (*citing* 150 Cong. Rec. E2209-01 (Dec. 7, 2004) (statement of Rep. Hoekstra)). Yet, the Joint Explanatory Statement itself makes clear that IRTPA was expressly passed to implement the recommendations of the 9/11 Commission Report, National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (2004) ("9/11 Commission Report"), in addition to the findings of other studies and hearings, such as the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence, S. Rep. No. 107-351 & H.R. Rep. No. 107-792 (2002) ("Joint Intell. Comm. Report"). Joint Explanatory Statement of the Committee of the Conference, Intelligence Reform and Terrorism Prevention Act of 2004, 242. ("This legislation in part implements the recommendations of the National Commission on Terrorist Attacks Upon the United States (the '9/11 Commission') but also responds to other studies and related commissions which focused on intelligence reform for protecting the United States against acts of terrorism.").

[17] The 9/11 Commission Report and the Joint Intelligence Committee Report acknowledged the deleterious national security effects of the prior culture of overclassification and secrecy. Joint Intell. Comm. Report at xi, xv, xvii, 118; 124; 9/11 Comm. Report at 103.

Because the CIA ignores the IRTPA's importance, it wrongly presumes that past caselaw retains the same precedential value. The text of the controlling statute and a consideration of its legislative history, however, counsel the Court to require a DNI declaration not provided here and a definition of "intelligence sources and methods" consistent with IRTPA.[18]

2. The CIA Has Asserted a Dramatically Overbroad Reading of the CIA Act Not Supported by Caselaw or the CIA's Vaughn Index and Declarations.

The CIA erroneously asserts that Plaintiffs have conceded that the CIA Act, 50 U.S.C. § 403g, would support its Exemption 3 withholdings regardless of the viability of the NSA's withholding authority for the same information. CIA Cross-Opp. at 6-7. That assertion not only ignores Plaintiffs' various challenges to the CIA Act withholdings, but it also reveals to the Court the dramatic overbreadth of the CIA's reading of 50 U.S.C. § 403g.

First, Plaintiffs raised a threshold challenge that the inadequacy of the *Vaughn* and the declarations prevents a meaningful challenge to the CIA's invocation of 50 U.S.C. § 403g. Pls. Cross-Mot. at 10-13. The significance of Plaintiffs' concerns about litigating blindly with an inadequate description of the withheld information is heightened where, as here, the CIA asserts an interpretation of 50 U.S.C. § 403g far beyond the realm of plausibility and precedence. This narrow provision permits the non-disclosure of the CIA's "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g. *Baker v. CIA*, 580 F.2d 664, 670 (D.C. Cir. 1978) ("[S]ection 403g creates a very narrow and explicit exception to the requirements of the FOIA. Only specific information on the CIA's personnel and internal structure that is listed in the statute will obtain protection from

[18] *See, e.g.*, *Sims*, 471 U.S. at 193-94 (Marshall, J., concurring) ("'intelligence source' refers only to sources who provide information either on an express or implied promise of confidentiality, and the exemption protects such information and material that would lead to disclosure of such information").

disclosure."); *Halperin v. CIA*, 629 F.2d 144, 151, n.45 (D.C. Cir. 1980) (recognizing a "narrow interpretation of section 403g"); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (recognizing "the limited purpose" of 50 U.S.C. § 403g to permit the CIA to protect information regarding the Agency's "internal structure" from unauthorized disclosure); *Navasky v. CIA*, 499 F. Supp. 269, 275 n.3 (S.D.N.Y. 1980) (denying the viability of a claim to withhold "authors and publishers of books clandestinely sponsored by the CIA" on the basis of 50 U.S.C. § 403g because of the narrowness of the nondisclosure provision). Because of the vague and conclusory nature of the CIA's *Vaughn* submissions regarding Exemption 3 withholdings, *see supra* I.B, it is impossible for Plaintiffs and the Court to distinguish for which portions of withheld documents the CIA is invoking which statute or statutes. It certainly does not follow that both statutes are invoked to cover the entirety of 246 out of 250 of the records in the sample set without further information, even less that the records could be *properly* withheld on those grounds.[19] Indeed, contrary to the CIA's assertions that the CIA's NSA withholdings are co-extensive with the CIA's CIA Act withholdings, CIA Cross-Opp. at 6-7 (citing First DiMaio Decl. ¶¶ 55-121, 135), the *Vaughn* index entries for certain documents only invoke the NSA *without invoking the CIA Act*, *see* Docs. 6, 7, 16, 17, 20, 22, 23, 25, 29, 30, 103, 104, 107-11, 114, 115; or only invoke the CIA Act *without invoking the NSA*. *See* Docs. 31, 42, 59, 88, 125, 127, 240. This is entirely inconsistent with the CIA's assertion that "[c]oextensively, information that could lead to the

[19] In virtually all of the documents for which Exemption 3 is invoked relying on the NSA and the CIA Act, the language in the *Vaughn* index is substantially the same: "The document is [] exempt from disclosure by exemption (b)(3) pursuant to Section 102A(i)(1) of the National Security Act of 1947. Information about CIA official titles, internal organizational data, names, employee numbers, employee telephone numbers, functions, and titles or other organizational identifiers of CIA components is also withheld under (b)(3) pursuant to Section 6 of the Central Intelligence Act of 1949." *See, e.g.*, Docs. 1-5, 8-15, 18-19, 21, 24, 26-28, 32-41, 43-58, 60-87, 89-102, 105-06, 112, 113, 116-24, 126, 128-51, 152, 153-73, 175-239, 241-46, 248, 300. This language suggests that the CIA is asserting that the CIA Act exempts a *subset* of the information already exempt due to the invocation of the NSA.

revelation of an intelligence activity, source, or method falls precisely within the scope of 50 U.S.C.A. §§ 403-1(i), 403g." First DiMaio Decl. ¶ 127.

Second, Plaintiffs challenged the CIA's reliance on the CIA Act to withhold information related to activities outside the agency's mandate. Pls.' Cross-Mot. at 30-34; *see infra* I.E. Third Plaintiffs' invocation of IRTPA's amendment of the judicial interpretation of the NSA § 102A(i) is directly relevant here. *See supra* I.D.1. NSA § 102A(i) is the statement of purpose incorporated in 50 U.S.C. § 403g ("in order further to implement section 102A(i) of the National Security Act . . . the Agency shall be exempted from . . . the provisions of any other law which require the publication or disclosure" of specified categories of information).

E. Plaintiffs' Evidence Is Undisputed That the CIA Both Classified Information Outside Its Mandate and Classified Information To Conceal Impropriety or Delay Disclosure.

The CIA claims that, when reviewing its Exemption 1 and 3 withholdings, this Court need not consider whether the agency acted outside its mandate. CIA Cross-Opp. at 12-13. The CIA misconstrues Plaintiffs' arguments, does not contest Plaintiffs' record evidence, and disregards both the appropriate standard for evaluating this question on summary judgment and the the critical function of judicial review within FOIA's statutory framework.

"It is well settled in Freedom of Information Act cases as in any others that summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979) (internal citations omitted). In addition, summary judgment is appropriate for a FOIA plaintiff when the requested material, "even on the agency's version of the facts, falls outside the proffered exemption." *Petroleum Inf. Corp. v. U.S. DOI*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). Moreover, the CIA is obligated to segregate all information that does not legitimately implicate national security concerns or intelligence

sources and methods. Plaintiffs are entitled to summary judgment or, alternatively, to discovery and further proceedings to resolve any factual, disputes because Plaintiffs' evidentiary submissions defeat the CIA's claim that the records fall within Exemptions 1 and 3. At a minimum, Plaintiffs' evidentiary submissions have created a genuine issue of material fact concerning whether the CIA has withheld information related to activities outside the CIA's mandate or has classified this information for a prohibited purpose.[20]

1. The CIA's Admissions Demonstrate the Illegality of the Government's Program.

Here, Plaintiffs seek, in addition to an adequate *Vaughn* submission for Documents 1-250, the prompt segregation and disclosure of two categories of information that cannot be withheld under Exemptions 1 and 3: (1) records concerning the CIA's own determination that its conduct violated its mandate and (2) records concerning conduct that was proscribed by law at the time the conduct occurred. Pls. Cross-Mot. at 30-31. As Plaintiffs have laid out, from its inception to its current implementation, the CIA's program has violated and continues to violate various international and domestic laws. Pls.' Cross-Mot. at 30-34.

Plaintiffs' documentary evidence concerning the program's illegality remains uncontroverted on the record. The government has acknowledged that the decision of the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), on June 29, 2006, required it to reverse its previous position that Common Article 3 did not apply to "War on Terror" detainees and required new measures to authorize the CIA's continued operation of its program. *See*

[20] To the extent that discovery or *in camera* review of documents is necessary to aid courts in determining whether documents were classified in order to conceal violations of law, these mechanisms should be utilized. *See Ray*, 587 F.2d at 1215 (describing judicial procedures for resolving factual disputes upon remand, including use of discovery); *Agee v. CIA*, 524 F. Supp. 1290, 1293 (D.D.C. 1981) (conducting *in camera* review of documents to determine whether properly classified); *Patterson v. FBI*, 705 F. Supp. 1033, 1040 (D.N.J. 1989) (same).

Second DiMaio Decl. ¶ 22 (listing sources of admissions); *see also* Satterthwaite Decl. ¶¶ 49-51. The CIA has not challenged Plaintiffs' assertions that the CIA is bound by the express prohibitions on the use of torture during interrogations, the practice of extraordinary rendition, and the use of secret detention, including proxy detention practices. Pls.' Cross-Mot. at 32-33. Plaintiffs have proffered ample evidence that the CIA engaged in these prohibited acts, including evidence of an investigation by the Department of Justice's Office of Professional Responsibility ("OPR") into the Office of Legal Counsel ("OLC") attorneys' legal approval of coercive interrogation techniques like waterboarding, and official government documents establishing that the CIA engaged in the prohibited practice of waterboarding. *See* Satterthwaite Decl. at ¶¶ 24, 49-70. The CIA has also acknowledged that the current program of detention, rendition, and interrogation is different from its previous form, including that the CIA no longer waterboards detainees. *See* Second DiMaio Decl. ¶ 22; *see also* Satterthwaite Decl. Ex. E, ¶ 52.c. The CIA has not disputed evidence submitted by Plaintiffs that proponents of the CIA's program were concerned about its illegality and took actions commensurate with that belief, including, according to former CIA Inspector General Frederick P. Hitz, destroying CIA tapes of detainee interrogations to prevent legal scrutiny, in part. *See* Satterthwaite Decl. ¶¶ 45.a.-b., 52, 54-55.

Although the CIA "maintains" that the government's interrogation and detention activities are lawful, CIA Cross-Opp. at 12; Memorandum of Law in Support of CIA's Motion for Summary Judgment ("CIA Opening Br.") at 14-15, the only supportive evidence it offers does not contradict Plaintiffs' submissions. The First DiMaio Declaration simply states that "the President has authorized the CIA to set up terrorist detention facilities outside the United States" to gather intelligence, First DiMaio Decl. ¶ 111, and that the CIA's activities, thus, fall within its statutory mandate, citing to 50 U.S.C. § 403-3(d) (1994), and Executive Order 12333, 3 C.R.F.

200 (1982). CIA Opening Br. at 15. Assuming that the President did issue such an authorization, the CIA has not challenged Plaintiffs' evidence that this authorization led to activities in violation of Common Article 3 and other binding law. Moreover, the CIA does not even "maintain[]" that its *rendition* practices were lawful, as distinguished from its interrogation and detention activities. *See* CIA Cross-Opp. at 12.

Plaintiffs have, thus, submitted uncontroverted evidence that the program was illegal at the time it occurred and that CIA officials took self-preservational actions with knowledge of its illegality. The FOIA exemptions were not intended to enable concealment of such unlawful activity. *See infra* I.E.2., I.E.3. On the contrary, "FOIA was enacted in order to 'promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) (alteration in original) (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999)); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The need for public disclosure pursuant to FOIA is heightened under precisely these circumstances when the Executive seeks improperly to hide illegal activities.

2. The CIA Has Impermissibly Invoked Exemption 1 To Conceal Improper, Unlawful or Embarrassing Conduct or To Delay Disclosure.

To satisfy the substantive requirements of Exemption 1, it is "undeniably the Government's burden" to establish that withheld material falls within an applicable Executive Order and has been properly classified in accordance with that Order—plaintiffs can defeat summary judgment by adducing sufficient evidence to create a disputed issue of material fact as to the propriety of classification. *McDonnell v. United States*, 4 F.3d 1227, 1245 (3d Cir. 1993); *see also Wilkinson v. FBI*, 633 F. Supp. 336, 341 (C.D. Cal. 1986) (summary judgment unwarranted where propriety of classification called into question by interim declassification of

sample documents; agency ordered to reexamine all remaining documents for appropriate disclosure to plaintiffs).[21] Section 1.7(a) of Executive Order 12958, as amended by Executive Order 13292, prohibits classification, *inter alia*, to "conceal violations of law, inefficiency, or administrative error;" to "prevent embarrassment . . . ;" or to "prevent or delay the release of information that does not require protection in the interest of national security." 68 Fed. Reg. 15315, 15318 (March 28, 2003). The CIA inexplicably contends that it has presented "unrebutted" evidence of the harm that would occur if responsive records were disclosed and that Plaintiffs have offered "no evidence" of the CIA's motive in classifying information concerning the government's programs. CIA Cross-Opp. at 16. To the contrary, plaintiffs have submitted ample evidence to create a "triable issue[] of fact" as to the propriety of the CIA's classification. *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991).[22]

As discussed in Section I.E.1, Plaintiffs have adduced uncontroverted evidence that the program was illegal at the time it occurred and that CIA officials took self-preservational actions with knowledge of its illegality. Undoubtedly, overclassification—*i.e.*, classifying documents, or portions thereof, in order to conceal illegal or embarrassing material—was one among these self-preservational acts. During recent hearings in connection with the Overclassification Reduction

[21] The courts have a key role in enforcing the "safeguards" that ensure proper classification under E.O. 12958. *See ACLU v. DOD*, No. 06-3140, 2008 WL 4287823, at *9, *10, *13 (2d Cir. Sept. 22, 2008) (discussing judicial scrutiny as developed through the legislative history); *Ray*, 587 F.2d at 1222 (Wright, C.J., concurring) ("*De novo* review by the courts is essential to assure that government agencies comply with Congress' commitment to compel disclosure of information that is being withheld only to cover up embarrassing mistakes or irregularities.").

[22] The Government cites, CIA Cross-Opp. at 14-17, a number of cases in which plaintiffs failed to create a triable issue of fact that materials were classified for a prohibited purpose when plaintiffs adduced merely speculative, conjectural or vague evidence. *See, e.g.*, *Lesar v. DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980); *Joya-Martinez v. FBI*, No. 91-1433 SSH, 1994 WL 118206, at *2 (D.D.C. Mar. 31, 1994). However, these authorities also compel the conclusion that the courts must examine the evidence on a case-by-case basis. Here, the record evidence is sufficient to create a triable issue of fact.

Act, H.R. 6575, which the House passed on September 9, 2008,[23] certain Members of Congress articulated the concern that agencies such as the CIA are overclassifying information related to counter-terrorism programs for these very reasons. Specifically, Rep. Henry A. Waxman testified in March 2005 that he had discovered recent examples of the "executive branch . . . using . . . novel designations to withhold information that's potentially embarrassing, not to advance national security" in connection with information about counter-terrorism activities. Satterthwaite Decl. Ex. UU. Moreover, Chairman Rep. Christopher Shays, in connection with a 2004 hearing leading up to the Overclassification Reduction Act, observed that the "dangerous, if natural, tendency to hide embarrassing or inconvenient facts, which can mask vulnerabilities and only keeps critical information from the American people." Satterthwaite Decl. Ex. SS. These concerns of overclassification to conceal illegal or embarrassing conduct are not new; indeed, they are written into the history of FOIA.[24]

Taken together, this record evidence—viewed in the context of FOIA's legislative history and historical and current congressional concerns—creates, at a minimum, a triable issue of fact to counter the CIA's assertion that it had no improper motive in classifying the information.

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[23] The Overclassification Reduction Act has as its purpose, "increas[ing] Governmentwide information sharing and the availability of information to the public by applying standards and practices to reduce improper classification." H.R. 6575, 110th Cong., § 2 (2d Session, 2008). It is currently pending before the Senate.

[24] FOIA was intended in part to address the problem of agency classification to conceal illegal or embarrassing conduct or to delay the release of information that does not involve national security protections. In overriding President Ford's veto of the 1974 amendments to FOIA, Senator Baker described overclassification as one of the key bases for *de novo* review: "[R]ecent experience indicates that the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating. . . ." *Ray*, 587 F.2d at 1209 (Wright, C.J., concurring) (quoting Staffs of Senate Comm. on the Judiciary and House Comm. on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents at 460-61 (Comm. Print 1975)).

First DiMaio Decl. ¶ 51. When facts call into question the propriety of an agency's classifications, summary judgment is improper. *Wilkinson*, 633 F. Supp. at 341.

3. The CIA Cannot Invoke the NSA and CIA Act To Conceal Unlawful Conduct Pursuant to Exemption 3.

With respect to Exemption 3, examining the CIA's withholdings under the NSA and the CIA Act—in light of the evidentiary record in this case—establishes that the CIA's asserted justification for its withholdings must fail. First, as an initial matter, the NSA is not properly invoked in this case, and the vast majority of withheld information does not fall properly within the CIA Act's exemptions. *See infra* II.D.

But assuming *arguendo* that the NSA's statutory exemption applies, the CIA cannot credibly maintain that the NSA or CIA Act permits the President to authorize the CIA to act *ultra vires*.[25] As set forth above, the CIA's rendition, secret detention and coercive interrogation program violates, *inter alia*, prohibitions against enforced disappearances, renditions and the use of torture. In responding to Plaintiffs' FOIA request, "every effort should be made to segregate

[25] The government's reliance upon *Wilner v. NSA*, No. 07 Civ. 3883 (DLC), 2008 WL 2567765 (S.D.N.Y. June 25, 2008), and *People for the American Way Foundation v. NSA*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006), is misplaced. CIA Cross-Opp. at 13. These cases address Exemption 3 withholdings based upon the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, *codified* at 50 U.S.C. § 40, rather than the scope of the statutory exemption set forth in § 403-1(i)(1)-(2)(A) of the NSA. In any event, *Wilner v. NSA*, No. 07 Civ. 3883 (SLC), 2008 WL 2567765 (S.D.N.Y. June 25, 2008), is a district court case currently on appeal before the Court of Appeals for the Second Circuit. Pls. Notice of Appeal, *Wilner v. NSA*, No. 07 Civ. 3882 (SLC), filed on Sept. 24, 2008. In *People for the American Way v. NSA*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006), the district court stated that whether the program at issue "is *ultimately* determined to be unlawful, its *potential illegality* cannot be used in this case" to avoid reliance upon Section 6 of the NSA Act. Neither of the cases is persuasive here. *Navasky v. CIA*, 499 F. Supp. 269 (S.D.N.Y. 1980), a case decided prior to *Sims*, is the only case cited by the government that actually involves NSA and Exemption 3 withholdings by the CIA. In *Navasky*, the court "found" that a claim of *ultra vires* activities was irrelevant to an Exemption 3 withholding, but the court's actual holding was that the responsive records at issue were related to activity that did not logically constitute intelligence sources or methods. Accordingly, the documents fell outside the protections of the NSA, and the withholdings were not justified under Exemption 3. *Navasky*'s *dicta* should not be adopted by this Court.

for ultimate disclosure aspects of the record that would not implicate legitimate intelligence operations." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 830 n.49 (D.C. Cir. 1979) (emphasis added). The CIA has failed to establish how disclosure of its unlawful conduct would implicate legitimate intelligence operations. Indeed, the CIA cannot show this.

Contrary to the CIA's contentions, courts have not approved the invocation of FOIA Exemption 3 and the NSA to conceal patently illegal activities. *See Founding Church of Scientology*, 610 F.2d at 830 n.49; *Hayden v. NSA / Cent. Sec. Serv.*, 608 F.2d 1381, 1389 (D.C. Cir. 1979); *Terkel v. AT &T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006); *ACLU v. DOD*, 389 F. Supp. 2d at 564-65. Exemption 3 only shields documents "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). "[W]here [an agency] function or activity is authorized by statute and *not otherwise unlawful*, [agency] materials integrally related to that function or activity fall within . . . Exemption 3." *Hayden*, 608 F.2d at 1389 (emphasis added). However, an agency "would have no protectable interest in suppressing information [under Exemption 3] simply because its release might uncloak an illegal operation. . . ." *Founding Church of Scientology*, 610 F. 2d at 830 n.49.

As courts have observed, allowing the government to invoke statutory FOIA exemptions that hide illegalities would give the government license "to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities" to intelligence agencies or claiming that the information implicated information about intelligence activities. *Terkel*, 441 F. Supp. 2d at 905. Indeed, the government's admissions and other evidence in the record strongly suggest that the CIA and senior White House officials explicitly sought to shift interrogations from agencies such as the Federal Bureau of Investigation ("FBI") and

Department of Defense ("DOD") precisely to exploit the secrecy surrounding the CIA.[26] At a minimum, Plaintiffs have created a substantial material factual dispute concerning whether or not information about the government's program rendition, secret detention and coercive interrogation program properly falls within the NSA and the CIA Act.

Moreover, as set forth above, I.D, the recent amendments to the NSA reinforce congressional intent to narrow the scope of information properly withheld under Exemption 3. If any prior doubt existed as to the propriety of withholding information about unlawful activity pursuant to Exemption 3 and the NSA, the recent amendments clarified the reach of the NSA.

* * *

For these reasons and the reasons Plaintiffs set forth in their prior brief, the CIA has failed to provide an adequate *Vaughn* index justifying its Exemption 1 and 3 withholdings. The CIA has further improperly withheld information related to conduct outside the agency's mandate and to conceal improper activities, as well as failed to disclose undisputed officially acknowledged information.

II. THE CIA HAS NOT JUSTIFIED ITS EXEMPTION 5 WITHHOLDINGS.

The government asserts that Plaintiffs fail to raise "substantive" challenges to particular Exemption 5 withholdings and criticize Plaintiffs' brief for their focus on inadequacies in the *Vaughn* index and declaration descriptions. CIA Cross-Opp. at 24, 27, 28. But the reason for this focus is simple: the government has failed to meet its threshold burden to provide sufficient information to permit substantive testing of its withholdings.

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[26] *See, e.g.*, Satterthwaite Decl. ¶ 6.a – f. (describing sources discussing origins of CIA program and "turf battles" between CIA and FBI); *id.* ¶ 39 (criticism from Senate Select Committee on Intelligence of Administration's decision to withhold existence of CIA program from full committee oversight for five years); *id.* ¶ 42.b (DOJ OIG's criticism that CIA denied DOJ investigation access to CIA detainees and describing CIA's "lack of cooperation" that "hampered" DOJ investigation into detainee abuse).

A. Deliberative Process Privilege.

The government invokes the deliberative process privilege on 167 separate occasions and claims that the *Vaughn* index and supporting declarations "provide[] sufficiently particularized information to satisfy its burden of establishing that the documents are both predecisional and deliberative." CIA Cross-Opp. at 25. Although the government's declarations appear voluminous, they actually contain very little particularized, document-specific information in support of the exemptions claimed.[27] Even when the *Vaughn* index is paired with the generalized declarations, the government fails to meet its burden to sufficiently describe the records to permit the Court to engage in *de novo* review of its withholdings.[28] The government's effort to further substantiate its claims through an *ex parte, in camera* declaration deprives Plaintiffs of any opportunity to further test the government's claims.

1. The Declarations and Index Are Insufficient To Establish the Deliberative Process Privilege.

The CIA asserts that, when considered together, the descriptions in the declarations and the *Vaughn* index satisfy its burden under FOIA. CIA Cross-Opp. at 24. The government, for instance, states that its "indices and declarations identify ten documents as 'letters written by CIA attorneys to their legal advisors at [the OLC] soliciting legal advice, analysis and opinions regarding use of an alternative set of interrogation procedures with respect to detainees,'"

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[27] The government declarations provide no record-specific information to support the deliberative process privilege in 80 of the 167 records for which the exemption is claimed (*i.e.*, Doc. Nos. 5, 18, 22-23, 34, 36-42, 45-50, 56, 61, 63, 73, 77, 83, 92, 96, 101, 102, 105, 106, 112-117, 120, 123, 128-129, 132, 137, 139, 142, 148, 154-163, 176-179, 182-186, 191, 194, 198, 200, 202, 204, 214, 223, 225-226, 228-229, 232-233, 235-239, 241, 244, and 248).

[28] The CIA states that, "given the classified nature of the documents at issue," it is "unsurprising" that additional detail could not be provided. CIA Cross-Opp. at 25. Even in national security cases, the government must still "identify the deliberative process involved and the role played by *each* document in the course of that process" before it can prevail on summary judgment. *Greenberg*, 10 F. Supp. 2d at 16) (emphasis added).

suggesting that it has provided sufficient information to justify its withholding. CIA Cross-Opp. at 26 (citing First DiMaio Decl. at ¶ 138) (referring to Doc. Nos. 67, 69, 71, 72, 76, 80, 81, 84, 93, and 99). But the First DiMaio Declaration's 173 paragraphs add little further factual information concerning these specific documents and the claimed withholding. *See, e.g.*, First DiMaio Decl. ¶¶ 144-148 (discussing the deliberative process privilege without providing any specific facts with regard to particular documents).[29] The *Vaughn* index for these ten documents says even less—listing only a bare document description, generalized sender and recipient information, date, page number, classification, and the same or similar conclusory justification.[30]

Similarly, the government states that its submission "describes with particularity thirteen draft opinions and eight final opinions" prepared by the OLC. CIA Cross-Opp. at 26 (referring to Doc. Nos. 1, 6, 7, 8, 9, 10, 11, 12, 13, 16, 19, 25, 30, 65, 68, 70, 75, 78, 83, 86, 87) (emphasis added). But the sum total of the "particularity" in the declarations boils down to the following: that the documents were prepared by the OLC "in the course of providing legal advice to the CIA regarding the detention and interrogation of certain high value al Qaeda terrorists", CIA Opp. at 26 (quoting Colborn Decl. ¶ 4); that the records "reflect the Office's confidential legal advice to the CIA regarding the detention and interrogation of certain high value al Qaeda terrorists", *id.* at 26 (quoting First DiMaio Decl. ¶ 138); that the "signed documents are pre-

[29] The information submitted by the CIA in support of its Exemption 1 and/or 3 claims does not bear on whether a document is appropriately withheld under Exemption 5, which focuses on a document's role in a specific policy-making context. *See Nat'l Council of La Raza*, 411 F.3d at 356.

[30] For instance, the *Vaughn* index describes Doc. 71, a "Request for Legal Advice," as "a one-page letter from the CIA Office of General Counsel to DOJ OLC and an 18-page memorandum providing facts to DOJ OLC for the purpose of obtaining legal advice. The document is dated December 30, 2004 and bears the classification TOP SECRET/SCI." *See* Doc. 71. It further states in conclusory terms that "because the OLC legal opinion was requested and prepared in the course of internal governmental deliberations, and for the purpose of providing advice to decision makers with respect to a particular policy issue, the document is also properly withheld in full pursuant to the deliberative process privilege." *See* Doc. 71.

decisional because, like the unsigned drafts, they were prepared to assist the CIA in arriving at decisions regarding the treatment and detention of high value al Qaeda terrorists", *id*. at 27 (quoting Colborn Decl. ¶ 13); and that the records "were all solicited, received or generated as part of the process by which policy is formulated", *id*. at 27 (quoting First DiMaio Decl. ¶ 145).[31] These descriptions offer little insight into the contents of the documents or their uses in particular deliberative processes; the *Vaughn* index is similarly unhelpful.[32]

Far from "clearly establish[ing]" that the exemption applies, these and other similar descriptions provide insufficient detail to test the withholdings. CIA Cross-Opp. at 27.[33] Neither the conclusory language in the *Vaughn* index, nor the descriptions in the declarations—even at their most descriptive (e.g., "regarding the detention and interrogation of certain high value al Qaeda terrorists," *id*. at 26 (quoting Colborn Decl. ¶ 4))—provide any meaningful identification of "the deliberative process involved and the role played by each document in the course of that

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[31] The CIA also cites to wholly non-specific statements concerning the general role of the OLC with regard to Executive Branch operations. CIA Cross-Opp. at 26 (citing Colborn Decl. ¶ 2).

[32] According to briefing in *American Civil Liberties Union v. DOD*, No. 04 Civ. 4151 (AKH), (S.D.N.Y.), the *Vaughn* index entries for Documents 6, 7, and 16 correspond to one of two May 10, 2005 OLC memoranda and two copies of the May 30, 2005 memorandum described in a October 4, 2007 New York Times article as being authored by Steven G. Bradbury, now Principal Deputy Assistant Attorney General for the OLC. *ACLU v. DOD*, No. 04-cv-4151 (AKH) (S.D.N.Y), Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, dated Nov. 5, 2007, at n.4; Declaration of Paul P. Colborn, dated Nov. 5, 2007, ¶ 14; Third Declaration of Paul P. Colborn, dated Sept. 12, 2008, ¶ 3. Notwithstanding the public availability of information about these memoranda, including their author and subject matter, since October 4, 2007, none of this detail is included in the government's *Vaughn* index.

[33] The government's reliance on *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. N.Y. 1999), and *Tigue v. Department of Justice*, 312 F.3d 70 (2d Cir. 2002), is misplaced. CIA Cross-Opp. at 27. In *Grand Central Partnership*, the district court was *unable* to determine whether the exemption applied on the basis of declarations and a *Vaughn* index, even where the record showed that the email at issue was between government employees discussing a specific government investigation with regard to specific improprieties. 166 F.3d at 482-83 (citing the district court). In *Tigue*, the record at issue was cited twice in a public government report, leaving little doubt as to how the document fit within a particular deliberative process. *See* 312 F.3d at 75, 80. The government provides far less here.

process." *Greenberg*, 10 F. Supp. 2d at 16; *Elec. Privacy Info. Ctr. v. DOJ*, 511 F. Supp. 2d 56, 70 (D.D.C. 2007) (where an agency merely asserts that "memoranda are 'predecisional,' the court has no way to assess that claim apart from its naked assertion."); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) ("conclusory assertions of privilege will not suffice to carry" the agency's burden); *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (expressing "concern" where "there might be 'no definable decision-making process' to which the documents contributed.").[34]

The absence of specific information makes it impossible to determine whether the documents are "merely peripheral to actual policy formation"—in which case they would not be entitled to deliberative process protection—or whether they instead "bear on the formulation or exercise of policy-oriented judgment," in which case such protection might be warranted. *Grand Cent. P'ship., Inc.*, 166 F.3d at 482 (internal quotation marks and citation omitted); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994) (stating that relevant factors in determining whether privilege applies are "the identity and position of the author and any recipients of the document, along with the place of those persons within the decisional hierarchy"). Similarly, the descriptions are so vague that they prevent Plaintiffs and the Court from determining whether the "documents may have been adopted after-the-fact as expressing the government's position on the issues they address," which would not afford them the protection of the privilege. *Elec. Privacy Info. Ctr.*, 511 F. Supp. 2d at 70. Although courts should be "sensitive to the government's need

[34] The government relies on *Greenberg*, 10 F. Supp. 2d at 16 n.18, to suggest that the level of detail in its *Vaughn* index and declarations is sufficient. CIA Cross-Opp. at 25 n.13. This reliance is inapposite. In *Greenberg*, the court granted summary judgment on Exemption 5 claims only where the overall description adequately described both the particular decision-making process and the role of the withheld document in that process. *Greenberg*, 10 F. Supp. 2d at 16. Where the Court in *Greenberg* was unable to determine this, it denied summary judgment. *Id.* at 16-17. *Greenberg* undermines rather than supports the government's position.

to protect classified information and its deliberative processes, essentially declaring 'because we say so' is an inadequate method for invoking Exemption 5." *Id.* at 71.[35]

2. The CIA's Arguments Concerning Adoption Are Unavailing.

A predecisional document is exempted from the deliberate process privilege if it is adopted, formally or informally, as an agency's position. *Coastal States Gas Corp.*, 617 F.2d at 866. The CIA provides insufficient detail to test whether the adoption exemption applies, and its arguments to the contrary are unavailing. CIA Cross-Opp. at 31-32. The First DiMaio Declaration merely states that "to the extent that some of the [Exemption 5] documents on the attached *Vaughn* index contain specific policy recommendations these documents do not indicate whether the recommendation or the underlying reasoning in support of such recommendation was ever adopted by the appropriate decision-maker."[36] *See* First DiMaio Decl. at 147 (emphasis added). But the test is not whether the document itself "indicates" that the policy has been adopted—the adoption or incorporation exemption to the deliberative process privilege exists, in large measure, to discourage just this sort of formalistic approach. *See Coastal States Gas Corp*, 617 F.2d at 867 ("[A]n agency will not be permitted to develop a body of 'secret law,' used by it

[35] Further, the CIA's claim that pre-decisional legal advice, including OLC memoranda, can fit within the deliberative process rationale is irrelevant. *See* CIA Cross-Opp. at 27. Plaintiffs do not dispute this point. Rather, Plaintiffs argue that the *Vaughn* submissions provided are insufficient to establish whether Exemption 5 appropriately applies to withholdings in this case.

[36] The government has offered a "clarif[ication]" regarding Doc. 3, a four page memorandum from the Office of the DNI to two assistants to the President. *See* Second DiMaio Decl. ¶ 19; Doc. 3. The government states that, according to a cover memorandum, the "recommendations in the attached four-page memorandum (identical to Document 4) were adopted by policymakers." In an apparent effort to shield full disclosure, the DiMaio Declaration further states that the cover memorandum "does not indicate that the policymakers adopted the memorandum in full or any of the reasoning of the four-page memorandum." *Id.* Similarly, Plaintiffs should be provided with information sufficient to test this assertion, and, at a minimum, the specific policy recommendations adopted should be disclosed.

in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'")

With regard to OLC memoranda in particular, the CIA asserts that "OLC memoranda have not been adopted by the CIA in any *final* decision memoranda as *final* CIA policy, nor do the OLC memoranda state *final* CIA policy." CIA Cross-Opp. at 32 (citing the Second DiMaio Decl. ¶ 18) (emphasis added). But whether these memoranda were adopted as "final" is the wrong test as well. *Coastal States Gas Corp.*, 617 F.2d at 869 (the government's "contention that these documents are not 'final opinions,'. . . misses the point" where evidence showed that such opinions were routinely used for guidance and referred to as precedent.). The test is whether, based on all relevant facts and circumstances, adoption has occurred. *See Nat'l Council of La Raza*, 411 F.3d at 356; *Coastal States Gas Corp.*, 617 F.2d at 866. The *Vaughn* index and declarations are insufficiently detailed to permit this test to be applied.

Furthermore, it is well publicized that certain OLC memoranda relating to the secret detention and coercive interrogation programs may have been secretly adopted as policy and it is known that they are among the documents withheld, and insufficiently described, by the government in this case. According to the CIA, the Department of Justice not only reviewed, but also approved, interrogation procedures. Satterthwaite Decl. ¶¶ 53.d. Discussing secret OLC memoranda dated May 2005, the *New York Times* reported in October 2007 that the Bush administration "adopted [] new measures without public debate or Congressional vote, choosing to rely instead on the confidential legal advice of a handful of appointees." Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, at A1; *see* Satterthwaite Decl. ¶ 29.a. Information provided by the government in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH), slip op. (S.D.N.Y. Aug. 28,

2008), indicates that Documents 6, 7, and 16 correspond to one of two May 10, 2005 OLC memoranda and two copies of the May 30, 2005 memorandum referenced in the October 4, 2007 *New York Times* article and that these memoranda all concern "the interrogation of detainees in CIA custody."[37] Considerable information is publicly known regarding precisely how these May 2005 OLC memoranda purport to authorize interrogation, including, for instance, that one memorandum contains an "explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures"; and that one memorandum is an opinion that CIA interrogation methods would not violate the prohibition on "cruel, inhuman or degrading treatment" written in response to a congressional amendment that would expressly outlaw such treatment, among other facts. It is also publicly known that the memoranda were authored by Steven G. Bradbury, now Principal Deputy Assistant Attorney General for the OLC. Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007; *see* Satterthwaite Decl. ¶ 29.a. Yet none of this public detail is contained in the *Vaughn* index or declarations

[37] On August 28, 2008, the government in *ACLU v. DOD*, No. 04 Civ. 4151 (AKH) (S.D.N.Y.) Aug. 28, 2008), was ordered, by October 3, 2008, to produce or justify withholding the three May 2005 OLC memoranda that were the subject of the *New York Times* article. *See* Order Granting Preliminary Injunction in Part and Denying in Part, dated August 28, 2008. On September 12, the government filed a motion seeking partial reconsideration of the Court's August 28, 2008 order to the extent that it requires OLC to prepare Vaughn justifications for withholding these three OLC memoranda on the basis that Documents 6, 7, and 16 correspond to one of the two May 10, 2005 OLC memoranda and two copies of the May 30, 2005 memorandum. *See ACLU v. DOD*, No. 04-cv-4151 (AKH) (S.D.N.Y) Defendants' Memorandum of Law in Support of Motion for Partial Reconsideration of the Court's August 28, 2008 Order, dated Sept. 12, 2008. In the event it is determined that these records and/or their withholdings are not appropriately within the scope of the *ACLU v. DOD* litigation, Plaintiffs do not waive any right to challenge their withholding. *See* Stipulation and Order Between Plaintiffs and the Central Intelligence Agency Regarding Procedures for Adjudicating Summary Judgment Motions, filed June 9, 2008, at ¶ 1.

concerning these documents. This example belies the CIA's contention that it cannot disclose further information without compromising national security interests.

Moreover, if the government had provided sufficient detail (such as was already within the public sphere), Plaintiffs would have been able to more adequately review withholdings against the public record and cite instances where memoranda listed on the *Vaughn* were referenced by the CIA or "actually adopted" by the CIA. For example, the *New York Times* article emphasizes that the OLC memoranda may have in fact served as a basis for CIA policy—notwithstanding the assertion in the Second DiMaio Declaration that OLC memoranda do not state "final" policy. *See* Second DiMaio Decl. ¶ 18.

3. The CIA's Argument Concerning Drafts Is Overstated

The government's opposition suggests that drafts are "by their very nature" protected by the deliberative process privilege and are almost always exempt from disclosure. CIA Cross-Opp. at 28 n.14, 29 (citing cases). To the contrary, "simply designating a document as a 'draft' does not automatically make it privileged under the deliberative process privilege.[38] *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004); *Lee v. FDIC*, 923 F. Supp. 451, 458 (S.D.N.Y. 1996) (same). The government is not relieved of its obligations under FOIA simply because what is withheld is a draft; rather, it must still provide sufficient information to test whether the exemption is properly applied. *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007) (concluding that "[b]ased upon the information provided by Defendants, the Court cannot determine that the drafts 'formed an essential link in a specified consultative process. . . .'") (citations omitted).

4. The CIA's Segregability Analysis Is Insufficient

[38] None of the cases cited by the government establish otherwise.

Contrary to the CIA's suggestion, Plaintiffs do not "labor under the misapprehension that factual information can never fall within the ambit of the deliberative process privilege." CIA Cross-Opp. at 29. But the government appears to suggest that the converse is true; namely, that factual material always falls within the privilege. This is plainly not the case. *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 568 (S.D.N.Y. 1989). Even in *Mapother v. DOJ*, 3 F.3d 1533 (D.C. Cir. 1993), relied upon by the CIA, the Court found a factual chronology to be "'reasonably segregable' from the other parts of the Report [and] subject to disclosure unless shown to be protected by some other exemption." *Id.* at 1540. Although the CIA cites *Mapother* for its suggestion that factual material may be withheld "if it would expose an agency's policy deliberations to unwanted scrutiny," *id.* at 1538, the government still needs to demonstrate the nexus between the facts and the deliberative process; certain facts can be "simply too attenuated" from the deliberative process to be protected by the privilege. *Id.* at 1540.

The *Vaughn* index and declarations are so vague and conclusory that they simply do not permit Plaintiffs or the Court to test whether any non-exempt material is being improperly withheld. The *Vaughn* index for each of the 167 documents states, in summary and identical form, that "[t]here is no meaningful, reasonably segregable portion of the document that can be released." Referring to all 167 withholdings, the First DiMaio Declaration generalizes that the "particular facts contained in [the withheld documents] were identified, extracted, and highlighted out of other potentially relevant facts and background materials by the authors, in the exercise of their judgment" and, as such, would tend to reveal the author's and agency's deliberative process. CIA Cross-Opp. at 31 (citing First DiMaio Decl. ¶146). The Grafeld Declaration summarily states that Documents 103 and 82 "contain factual material intertwined with opinion" and the Hackett Declaration summarily states that Documents 3, 4, 103-104, 107-

111, 130 and 243 "contain selected factual material intertwined with opinion and analysis" incapable of reasonable segregation. Grafeld Decl. ¶ 9; Hackett Decl. ¶ 20.

These descriptions cannot be sufficient. *See Elec. Privacy Info.*, 511 F. Supp. 2d at 70 (finding that "because the language used by OLC is both vague and expansive, the court is not in a position to determine segregability at all . . ."); *Mead Data Ctr.*, 566 F.2d at 261 ("[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts."). Plaintiffs are entitled to summary judgment and an order requiring the reprocessing of records and release of reasonably segregable factual material.

B. Attorney-Client Privilege.

The CIA's invocation of the attorney-client privilege to withhold 60 records is similarly unavailing.[39] Although the government has offered sweeping statements concerning the confidentiality of withheld materials, the declarations and *Vaughn* index provide an insufficient basis for evaluating the confidentiality claims as to specific documents. *See* CIA Cross-Opp. at 16 (citing the First DiMaio Decl. at ¶ 143 and Colborn Decl. at ¶ 16 with regard to the OLC documents withheld under the attorney client privilege, and the First DiMaio Decl. at ¶¶ 41-75, 130-35 for more general statements concerning confidential treatment of records). The CIA must show that the documents were circulated "no further than among those members 'of the

[39] The "attorney-client privilege applies only when information is the product of an attorney-client relationship and is maintained as confidential between attorney and client." *Brinton v. Dep't of State*, 636 F.2d 600, 603 (D.C. Cir. 1980). However, a "[c]ourt cannot assume confidentiality." *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 04 Civ. 1724, 2006 U.S. Dist. LEXIS 14389, at *44 (D.D.C. Mar. 20, 2006) (stating that like a privilege log a *Vaughn* index should satisfy certain requirements including a listing of "persons to whom the original or any copies of the documents were shown or provided.").

organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.'" *Coastal States Gas Corp.*, 617 F.2d at 863 (citing *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242 (D.D.C. 1977)) (emphasis added). Certain citations that the government marshals in support of confidentiality merely concern general classification processes. *See* First DiMaio Decl. at ¶¶ 41-75, 130-35. Such generalized statements concerning confidentiality are insufficient to permit Plaintiffs or the Court to evaluate whether confidentiality has been maintained or certain exceptions exist.[40] *See, e.g., Nat'l Council of La Raza*, 411 F.3d at 360 ("[T]he attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy.").

In addition, the *Vaughn* descriptions for three of the records fail to mention the involvement of any attorneys, offering only conclusory assertions that "portions" of the documents "contain legal advice and analysis." *See* Docs. 20, 28, 103. Document 20, for example, is a "[j]oint memorandum between CIA and Department of Defense," which "outlines procedures to be used going forward in a specific context." No attorney involvement is apparent from the *Vaughn* description, which states only that "[p]ortions of the document also contain legal advice and analysis and are therefore withheld pursuant to attorney-client privilege." Such descriptions are insufficient to establish that the exemption applies either in whole or in part.

Finally, the CIA's arguments regarding the segregation of facts not protected by the attorney-client privilege and the disclosure of "neutral objective analysis" are misplaced. CIA

[40] The CIA asserts that Plaintiffs did not "raise any challenges" to the invocation of attorney-client privilege with regard to Docs. 20, 103, 82, 103 and 192 because these documents were not specifically discussed in the section of Plaintiffs' brief that addressed attorney-client privilege. CIA Cross-Opp. at 33 n.17. In its earlier brief, Plaintiffs challenged *all* document descriptions, including those for Docs. 20, 103, 82, 103 and 192, as insufficient for summary judgment. *See, e.g.*, Pls.' Cross-Mot. at 2-3, 8-9. The use of examples throughout the brief in no way limits Plaintiffs' challenge.

Cross-Opp. at 35. With regard to each document withheld on this basis, the government recites, in boilerplate fashion, that the purported legal advice is "based upon facts provided by the CIA." Not only is this bare recitation insufficient to permit Plaintiffs or the Court to test it, but the assertion itself allows that certain exceptions may apply. In some circumstances, for instance, third-party facts communicated by an agency to its counsel may not be considered sufficiently confidential to warrant protection. *See, e.g., Coastal States Gas Corp.*, 617 F.2d at 863.[41] Similarly, if legal advice is based solely on third-party facts, the attorney-client privilege may not apply. *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997).[42] Because the government's representations are silent on the source of the CIA's facts, it is impossible to determine whether these exceptions apply.

In sum, the CIA has not met its burden to invoke the attorney-client privilege.

C. Work-Product Privilege.

Contrary to the CIA's assertion, its submissions are insufficiently detailed to support the work-product privilege, which the government claims as a basis for withholding 48 records.[43]

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[41] The CIA's point distinguishing *Brinton*, 636 F.2d at 603 is misplaced. CIA Cross-Opp. at 35 n.18. Plaintiffs cited *Brinton* to illustrate that not all facts communicated within the attorney-client relationship are necessarily privileged; the government's summary description of withheld facts makes it impossible to discern whether any exceptions apply.

[42] The government cites to *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007) for the proposition that legal analysis of policy by an attorney for a government official can constitute legal advice. CIA Cross-Opp. at 35. However, in *Erie*, the court undertook a particularized analysis to determine whether the privilege applied, finding that the "advice--particularly when viewed in the context of which it was solicited and rendered--does not constitute 'general policy or political advice' unprotected by the privilege." *In re County of Erie*, 473 F.3d, at 423 (citation omitted). The CIA's submissions lacks the level of detail necessary to undertake such an analysis.

[43] The attorney work-product privilege is "limited in scope" and "exempts those documents prepared in contemplation of litigation," not "every written document generated by an attorney." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 268 (D.D.C. 2004) (citation omitted). The burden is on the withholding agency "to make the correlation between each withheld document and the 'litigation for which the document was created.'" *Maine v. U.S. DOI*, 298 F.3d 60, 70 (1st Cir. 2002) (citation omitted).

Each *Vaughn* index entry related to documents withheld on this basis states only that the "legal opinion was prepared by attorneys in contemplation of potential litigation and/or administrative proceedings, and . . . is therefore withheld pursuant to the attorney work product privilege," or similar language. *See, e.g.*, Doc. 7. The declarations are equally vague.[44] The First DiMaio Declaration ¶ 139, cited by the CIA, is as generalized as the boilerplate statements in the *Vaughn* index: the "CIA's purpose in requesting advice from OLC was the very likely prospect of criminal, civil, or administrative litigation against the CIA and CIA personnel." Although the CIA further states that "at the time *some* of these documents were prepared, criminal, civil and administrative proceedings regarding the detention and interrogation activities were already proceeding in a number of forums," it fails to link any of the withheld documents to particular proceedings.[45] First DiMaio Decl. ¶ 141 (emphasis added). Finally, DiMaio baldly states that all records withheld as work product were "prepared in contemplation of specific litigation," but fails to identify "specific litigation." First DiMaio Decl. ¶ 142.[46] This is insufficient.

The government's effort to distinguish *Church of Scientology International v. U.S. Department of Justice*, 30 F.3d 224 (1st Cir. 1994) is unavailing. In *Church of Scientology*, the Court rejected non-specific work product justifications where the *Vaughn* index stated only that

[44] For example, the DiMaio Declaration ¶ 138, specifically cited by the government, does not even mention litigation, much less state that legal advice sought or generated was prepared in contemplation of litigation. DiMaio Decl. ¶ 138 (letters written by CIA attorneys to OLC counterparts were "soliciting legal advice, analysis and opinions regarding the use of an alternative set of interrogation procedures with respect to detainees.").

[45] DiMaio states as an example that "the CIA OIG conducted a criminal investigation of CIA personnel who questioned Iraqi detainee Mandel al-Jamadi" but does not identify particular documents created in anticipation or in contemplation of this investigation. DiMaio Decl. ¶ 141.

[46] With regard to Docs. 33, 35, 43, 53, and 66, DiMaio states that these documents "were prepared in recognition of existing litigation concerning the Program," but virtually no additional information is provided concerning the litigation or the documents. DiMaio Decl. ¶ 140. Document 33, for instance, is described simply as "From/To CIA/OGC attorney to officers and attorneys" and is "a one page email, and two-page attached draft memorandum, and a one-page distribution slip."

the document was "created in contemplation of litigation" and the declaration only added "generalized comments about all of the documents for which the work-product privilege was asserted." *Church of Scientology*, 30 F.3d at 237. The approach rejected in *Church of Scientology* is precisely the approach the CIA takes here.[47]

The CIA also misconstrues Plaintiffs' argument concerning the crime-fraud exception. CIA Cross-Opp. at 38. Plaintiffs do not demand a waiver of any privileges in order to determine whether exceptions to the privilege apply. Rather, Plaintiffs merely require adequate specificity to permit Plaintiffs to determine whether any withheld materials potentially implicate the crime-fraud exception. Further, contrary to the CIA's assertions, Plaintiffs have provided ample "unprivileged factual evidence establishing 'probable cause'" to support an invocation of the crime-fraud exception. CIA Cross-Opp. at 38 (citing *In re John Doe, Inc.*, 13 F.3d 633, 637 (2d Cir. 1994)). In addition to submissions detailing investigations into the legality of the CIA's interrogation program, Plaintiffs have submitted material outlining the Department of Justice's Office of Professional Responsibility investigation into the *legal approval* of coercive interrogation techniques such as waterboarding. *See e.g.*, Satterthwaite Decl. at ¶¶ 59-60. The CIA's assertion to the contrary is unfounded.

[47] Other cases cited by the CIA do not support its work-product claims because each provides far more concrete bases for asserting work-product protection than the CIA's general statement here that litigation was "virtually inevitable." CIA Cross-Opp. at 36 (citing First DiMaio Decl. ¶ 139). For example, in *Upjohn Co. v. United States*, 449 U.S. 383, 386-387 (1981), the formal investigation at issue concerned "possibly illegal payments" and the investigation results were then reported to the Internal Revenue Service. In *A.I.A. Holdings v. Lehman Bros., Inc.*, No. 97 Civ. 4978, 2002 WL 31556382, at *6 (S.D.N.Y. Nov. 15, 2002), the presence of in-house "litigation" counsel at a meeting coupled with losses of a "staggering dimension" were the bases for applying the privilege. Finally, *In re Grand Jury Proceedings*, No. M-11-189, 2001 WL 1167497, at *16 (S.D.N.Y. Oct. 3, 2001) actually supports Plaintiffs' position because work-product protection was found to apply to certain documents created following receipt of a government subpoena but was inapplicable where "obscure references to unspecified threats of [] litigation" failed to demonstrate that a "concrete anticipation of litigation" existed.

D. Presidential Communications Privilege

The CIA's arguments concerning the presidential communications privilege, which the government invokes in relation to 19 records, fail for a number of reasons.

First, with regard to eight documents for which the CIA invoked the exemption, the CIA is unable to point to any Second Circuit authority to expressly counter Plaintiffs' contention that the CIA lacks standing to assert the presidential privilege and instead relies on non-binding district court authority from other jurisdictions, including an unpublished opinion. *See* CIA Cross-Opp. at 39 (regarding Docs. 14, 17, 24, 29, 62, 98, 100, and 152). In the only authority from this jurisdiction, the issue of standing was not even discussed. *See N.Y. Times v. DOD*, 499 F. Supp. 2d 501, 516 (S.D.N.Y. 2007).

The government also contends that to match individual documents to particular presidential decisions would "require the disclosure of privileged information." CIA Cross-Opp. at 40. However, numerous cases, including cases cited by the government for the proposition that the "law does not require such an unworkable matching," provide information concerning the presidential decisions at issue without any apparent waiver.[48] Plaintiffs do not seek the disclosure of privileged materials, but are entitled to sufficient detail to test whether materials are being properly withheld. *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997); *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 449 (U.S. 1977).

The CIA's submissions lack the requisite detail to determine whether the privilege applies. For example, the First DiMaio Declaration states, in conclusory fashion, that eight

[48] In each case, the level of specificity regarding the decisionmaking process far surpassed that provided here. *See Citizens for Responsibility & Ethics v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 48 (D.D.C. 2007); *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1110-11 (D.C. Cir. 2004) (withheld materials, *e.g.*, included "memoranda from the Deputy's staff to the Pardon Attorney inquiring about specific pardon applications and requesting that certain pardon recommendations be modified or resubmitted to the Deputy.").

documents "contain information reflecting communications solicited and received by senior presidential advisors as well as communications authored by senior presidential advisors in the course of discussing issues related to formulating recommendations and advice for Presidential decision-making." First DiMaio Decl. at ¶ 152. DiMaio further notes three specific decisions the President has made with regard to detainee policies; however, significantly, there is no representation that any of the withheld documents relate to *these decisions*.[49] First DiMaio Decl. at ¶ 153. The same problem exists for records withheld by the ODNI. *See* Docs. 3, 4, 103-104, 107-111, 130 and 139. For instance, these documents are generally described as "prepared, solicited or received as part of the process by which detainee policy was formulated." Hackett Decl. at ¶ 20.[50] Because the CIA has failed to identify, in other than generalized terms, how the withheld CIA documents relate to particular presidential decisions or decision-making processes, it is impossible to determine whether the privilege has been properly invoked.

The government also misconstrues Plaintiffs' objection concerning whether certain documents that merely describe "policy decisions made by the President" or his advisors properly fall within the privilege. CIA Cross-Opp. at 41 (citing Pls.' Cross-Mot. at 37, which refers to certain documents described in DiMaio Decl. at ¶ 155). Although the government tries to portray Plaintiffs' objection as one concerning whether "post-decisional" materials are protected, it is not. Plaintiffs' concern is whether documents that were never seen by the President or his advisors in the course of policymaking are being inappropriately withheld under this exemption. For example, Documents 17 and 29 were prepared exclusively by CIA personnel. Although they describe certain presidential policy decisions, the government does not

[49] The *Vaughn* index for the respective documents sheds no light on the particular decisionmaking process to which the documents relate.

[50] The Hackett Declaration includes the same language as the First DiMaio Declaration ¶ 153 without any effort to link these public decisions to withheld documents. Hackett Decl. at ¶ 26.

contend that they have been provided to the President or his advisors in connection with any decision. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d at 1116 ("'[C]ommunications authored or solicited and received' by immediate White House advisers in the Office of the President and their staff could qualify under the privilege, communications of staff outside the White House in executive branch agencies that were not solicited and received by such White House advisers could not.") (citations omitted).[51]

E. OIG Witness Statements under Exemptions 5 and 7(D).

The CIA's arguments are insufficient to establish that the 24 cited documents can be withheld pursuant to exemptions 5 and/or 7(D). Whether these exemptions apply turns, in part, on whether the statements at issue were made with the requisite expectation of confidentiality.

The CIA relies on *Am. Fed'n of Gov't Employees v. Dep't of Army*, 441 F. Supp. 1308 (D.D.C. 1977) in attempting to establish that the CIA's rules regarding OIG investigations alone are sufficient to establish the requisite expectation of confidentiality needed for the exemption to apply. CIA Cross-Opp. at 42 (citing to DiMaio Decl. ¶ 170). In *AFGE*, the Court found that a sufficient expectation of confidentiality existed even though witnesses "were not given absolute assurances of confidentiality" and were "*told* that public disclosure of direct testimony might be required" under certain circumstances. *Am. Fed'n of Gov't Employees*, 441 F. Supp. at 1314 (emphasis added). But the AFGE witnesses were specifically counseled regarding confidentiality. Unlike in *AFGE*, neither the DiMaio Declaration nor the *Vaughn* index represent

[51] The CIA's reliance on *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, No. 00-0173, 2008 U.S. Dist. LEXIS 57442 (D.D.C. July 22, 2008), which provides a narrow exception to the "solicited and received rule," is misplaced because in that case "the redacted communications [were] 'revelatory' of presidential decision making because they *memorialize[d] actual communications with the President or his staff*." *Id.* at *9 (emphasis added). Here, there is no allegation that the records memorialize "actual communications with the President or his staff."

that any express assurances of confidentiality were made to the witnesses here.[52] Moreover, *AFGE* is over 30 years old and precedes *Department of Justice v. Landano*, 508 U.S. 165 (1993), which is the standard that should apply here. *See, e.g.*, *Halpern v. FBI*, 181 F.3d 279, 298 (2d Cir. 1999). In *Landano*, the Court adopted a "particularized approach" to determining whether a privacy expectation existed, "examining factors such as the nature of the crime and the source's relation to it" before concluding whether a confidentiality expectation existed. 508 U.S. at 179-80. The CIA's approach—citing to generalized regulations alone—runs counter to the *Landano* rule and is insufficient to establish the exemption claimed. Moreover, contrary to the government's suggestion that "express assurances are not required," CIA Cross-Opp. at 44, this is so only where there are "circumstances from which such an assurance could be reasonably inferred," which are not present here. *See Halpern*, 181 F.3d at 298. Finally, the government's reliance on *Henke v. U.S. Department of Commerce*, 83 F.3d 1445 (D.C. Cir. 1996) is misplaced because the "form" used to collect information in that case specifically recited that the collected information "will not be disclosed to persons outside the Government." *Id.* at 1448. The court found this to be an express promise of confidentiality. *Id.* at 1449. The government's references here to general regulations concerning confidentiality is insufficient to establish the expectation of confidentiality needed to sustain the withholding. More detail is needed from the government before it can withhold these documents under the exemption.

III. THE CIA HAS IMPROPERLY WITHHELD INFORMATION UNDER EXEMPTION 7(A).

[52] *See*, *e.g.*, Doc. 131 ("OIG regulations state that as a matter of policy OIG does not disclose the identities of persons who speak to OIG or the substance of their statements, unless such disclosure is determined to be necessary for the full reporting of a matter or the fulfillment of other OIG or Agency responsibilities. Therefore, this statement can be made under circumstances where confidentiality could reasonably be inferred.").

In attempting to justify its sweeping categorical assertion of Exemption 7(A) to withhold all OIG documents pertinent to investigations open as of December 1, 2007,[53] the CIA states, *ipse dixit*: "the records in question all relate to 'pending law enforcement proceedings.' The records were therefore compiled for law enforcement purposes."[54] CIA Cross-Opp. at 45 (citation omitted). The DiMaio Declarations provide little more to support the CIA's assertions that the withheld information was "compiled for law enforcement purposes," or that the relevant statutorily recognized harms would result from disclosure.

The CIA's assertion fails to account for the possibility that the withheld records were originally compiled for internal investigatory purposes, and therefore not exempt. *See Kimberlin v. DOJ*, 139 F.3d 944, 947 (D.C. Cir. 1998) (citing *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984) ("Material compiled in the course of such internal agency monitoring does not come within Exemption 7(C) even though it 'might reveal evidence that later could give rise to a law enforcement investigation.'").[55]

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[53] Providing no explanation whatsoever for its invocation of Exemption 7(A) for Document 18, the government has inadequately justified its withholding. The chart attached to the First DiMaio Declaration lists Document 18 as withheld under Exemption 7(A), but the *Vaughn* index and the Declarations do not refer to 7(A) for Document 18.

[54] In support of this conclusory assertion, the government mischaracterizes Second Circuit case law. *See* CIA Cross-Opp. at 45 n.24. Contrary to the government's assertions, neither *Halpern v. FBI*, 181 F.3d 279 (2d Cir. 1999), nor *Ferguson v. FBI*, 957 F.2d 1059 (2d Cir. 1992), reject the D.C. Circuit's urging in *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982), that the agency "identify a particular individual or a particular incident as the object of its investigation" and specify "the connection between that individual or incident and a possible security risk or violation of federal law," in order to establish as a threshold matter that the withheld information pertains to law enforcement activities. Indeed, neither case mentions *Pratt*. Plaintiffs rely on *Pratt* only to urge this Court to find the CIA's submissions inadequate to prove the information withheld under Exemption 7 was compiled for law enforcement purposes. *See also Williams v. FBI*, 730 F.2d 882, 885 (1984) (casting doubt on *Pratt*'s suggestion that courts assess the merits of the government's asserted law enforcement investigation).

[55] Claiming to clarify any confusion in the wake of the First DiMaio Declaration, the Second DiMaio Declaration sidesteps the distinction, asserting cursorily "that each of the open OIG investigations was focused upon specific allegations of potentially unlawful activity." Second

Even assuming the CIA could adequately show that the records or information were "compiled for law enforcement purposes," the CIA may only withhold information to the extent that it demonstrates that processing and disclosure "could reasonably be expected to interfere with enforcement proceedings" or cause one of the enumerated harms, 5 U.S.C. § 552(b)(7), which it still has not done. In view of FOIA's statutory framework, the CIA has failed to satisfy its burden to show that it has insufficient resources to process the documents. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-16 (D.C. Cir. 1976).

Nor has the CIA made an adequate showing that disclosure of withheld information would interfere with enforcement hearings or cause a statutorily enumerated harm. The Second DiMaio Declaration ¶ 14 states, without explanation, that disclosure "could interfere with the confidentiality of the investigation." Concrete and specific information is required for such an assertion to have merit and none is found here. *Bevis v. Dep't of State*, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986) (requiring an agency to define its categories functionally, conduct a document-by-document review in order to assign documents to the proper category, and explain how the release of documents in each category would interfere with enforcement proceedings in order to assert a categorical exemption); *ACLU v. FBI*, 429 F. Supp. 2d 179, 191 (D.D.C. 2006).[56] Here the CIA has failed to provide the requisite explanation as to how the release of each category of documents would interfere with enforcement proceedings. CIA Cross-Opp. at 35 (citing First DiMaio Decl. ¶ 164). Rather, the CIA has provided conclusory statements about the potential

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DiMaio Decl. ¶ 12. This explanation critically fails to address whether the records were in fact *compiled* for law enforcement purposes.

[56] The CIA's citation to *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), is inapposite to support the categorical exemption that the CIA asserts. In *NLRB*, the concrete interference on which the Supreme Court relied was the reality of witness intimidation in the context of NLRB unfair labor practices proceedings—a concern articulated in the legislative history for Exemption 7, which shaped the ultimate form the Exemption took. *NLRB*, 437 U.S. at 225-26, 239.

harm caused by the release of information generally. First DiMaio Decl. ¶¶ 161-64; Second DiMaio Decl. ¶¶ 12-14. This is an inadequate showing of harm.

IV. THE CIA HAS IMPROPERLY WITHELD PERSONAL IDENTIFYING INFORMATION UNDER EXEMPTIONS 6 AND 7(C)

The CIA invokes Exemptions 6 and 7(C) for twenty-eight documents (Docs. 126, 131, 133-36, 138-40, 143-46, 149-51, 164-71, 173, 227, 230, 249) and Exemption 6, but not 7(C), to withhold information in six documents (Docs. 159, 174, 187, 192, 195, 250).[57] Contrary to the CIA's assertions, CIA Cross-Opp. at 48-50 & n.27-28, the information at stake is not limited to one detainee name and OIG witness names, but also pertains to "CIA employees" apart from witnesses and includes "identifying information" beyond names.[58] First DiMaio Decl. ¶ 158.

A. The CIA Has Failed To Demonstrate That Information Withheld Pursuant to Exemption 7(C) Was Compiled "for Law Enforcement Purposes."

The CIA has failed to meet its threshold burden to demonstrate that the information withheld on Exemption 7(C) grounds is contained in "law enforcement records" that were "compiled for law enforcement purposes."[59] 5 U.S.C. § 552(b)(7). First, the descriptions contained in the *Vaughn* index and declarations still fail to link the investigations to particular criminal acts or civil infractions. *See Perlman v. Dep't of Justice*, 312 F.3d 100, 105 (2d Cir. 2002), *vacated and remanded*, 541 U.S. 970 (2004), *aff'd*, 380 F.3d 110 (2d Cir. 2004). Second,

[57] The CIA incorrectly asserts that in all records where the government withholds information pursuant to Exemption 6, the information is also withheld under Exemption 7(C). CIA Cross-Opp. at p. 48 n.27. This is plainly untrue. *See* First DiMaio Decl. Document Chart. *Compare Vaughn* entries for Docs. 126, 131, 133-36, 138-40, 143-46, 149-51, 164-71, 173, 227, 230, 249 (invoking both exemptions) *with Vaughn* entries for Docs. 159, 174, 187, 192, 195, 250 (invoking Exemption 6 but not 7(C)).

[58] The Department of Defense has also improperly withheld information as to "duty stations and bargaining unit data." Donley Decl. ¶ 8.

[59] Plaintiffs do not contest that document 249 passes the threshold test for Exemption 7(C). *See* Pls.' Cross-Mot. at 23 n.65. Courts employ distinct two-step tests for determining whether the CIA has properly invoked Exemptions 6 and 7(C). Plaintiffs do not challenge that the documents at issue pass that threshold inquiry for Exemption 6. 5 U.S.C. § 552(b)(6).

as explained above, the CIA has not adequately demonstrated that the records were *compiled* for law enforcement purposes. *See Stern*, 737 F.2d at 89.

B. The CIA Cannot Support Exemptions 6 and 7(C) Withholdings because the Public Interest in Disclosure of Certain Personal Identifying Information Outweighs Any Privacy Interests.

Given the great public interest in the nature of the rendition, secret detention and coercive interrogation program, *see* Satterthwaite Decl. ¶¶ 57, 69-70, and the CIA's failure to articulate a clear privacy need, the CIA has not met its burden to withhold information under Exemptions 6 and 7(C).[60] The Exemption 6 and 7(C) inquiries require the agency to demonstrate that disclosure would constitute a "clearly unwarranted" or "unwarranted" invasion of privacy, respectively. *Fed. Labor Relations Auth. v. Dep't of VA*, 958 F.2d 503, 509 (2d Cir 1992). An invasion of privacy will only be either "clearly unwarranted" or "unwarranted" where the public interest in disclosure is outweighed by the individual's privacy interest. *Id.*

In support of its Exemptions 6 and 7(C) withholdings, the CIA fails to provide this Court enough detail to assess the weight of the privacy claim at issue, including the rank of employee whose information is withheld. The CIA states that these documents contain "information that applies to a particular, identifiable individual" and "contain[] personal information regarding the

[60] Courts routinely require information to be released where the public's interest in disclosure outweighs the privacy interests at stake. *See Stern*, 737 F.2d at 86 (holding that the public's interest in disclosure of the identity of a high-level FBI employee outweighs that employee's privacy interest under both Exemption 6 and Exemption 7(C)); *Perlman*, 312 F.3d at 103 (holding records detailing improper conduct of immigration officials were not exempt from production even though they contained personal information because any privacy interest was overcome by the substantial public interest in disclosure); *Leadership Conf. on Civil Rights v. Gonzales*, 421 F. Supp. 2d 104, 108-09 (D.D.C. 2006); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 371-72, 381 (1976).

interview."[61] *See, e.g.*, Doc. 135. This is plainly insufficient to support withholding pursuant to either Exemption 6 or 7(C). All but one of the documents at issue[62] deal only with government employees' privacy interests.[63] Yet the CIA wrongly conflates the privacy interests of government and third-party witnesses. Government employees have a "somewhat diminished" privacy interest as compared to third-party witnesses.[64] *Perlman*, 312 F.3d at 107.

In determining whether the public's interest in disclosure outweighs a government employee's privacy interest, the Second Circuit has held that the "level of responsibility held by a federal employee, is an appropriate consideration when analyzing disclosure." *Id.* The CIA ignores the multifactoral analysis advanced by the Second Circuit[65] which includes considerations of: "(1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature," *id*.; as well as whether "the identities of the decision-makers have already been disclosed." *Wood v. FBI*,

[61] In support of its withholdings in Documents 195, 249, and 250, the DOD has submitted declarations that are similarly inadequate, making boilerplate, generalized assertions about DOD employees' privacy interests.

[62] In Document 249, the CIA improperly relies on Exemption 7(C) to withhold the names of a detainee and of government employees involved in the investigation of the detainee's abuse.

[63] To the extent that specific information is available, the CIA seems to assert this interest on behalf of government employees who served as interviewers and interviewees in investigation(s).

[64] Contrary to the CIA's assertion, there is no general rule that witness names should be withheld. *See* CIA Cross-Opp. 8 n.27. Indeed, courts have recognized that "[b]ecause the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored." *See Stern v. FBI*, 737 F.2d 84, 91-92 (D.C. Cir. 1984).

[65] The DOD has provided a modicum of additional information concerning two, or possibly three, withheld names in Document 249, which refers to "senior CENTCOM" attorneys in Tampa, Florida and Iraq.

432 F.3d 78, 88 (2d Cir. 2005); s*ee also Tomscha v. General Services Admin.*, 158 Fed. Appx. 329, 331 (2d Cir. 2005) (citing the 5 *Perlman* factors); *Cowdery, Ecker & Murphy, LLC v. DOI*, 511 F. Supp. 2d 215, 218 (D. Conn. 2007) (same); *Stern*, 737 F.2d at 89; *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1234 (10th Cir. 2007). The CIA has failed to provide Plaintiffs or the Court with adequate information to assess the privacy interests at stake.

On the other side of the scale, the public interest in disclosure of negligent or improper governmental conduct, including deficiencies in internal investigations, is particularly significant. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 173 (2004). As this Court noted, Plaintiffs "stand in the shoes of the public they seek to inform." Aug. 29 Op. at 46-47; *see also Perlman*, 312 F.3d at 107 (citing *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989), *vacated and remanded*, 541 U.S. 970 (2004), *aff'd*, 380 F.3d 110 (2d Cir. 2004). In relation to the rendition, secret detention, and coercive interrogation program—where government abuse has been documented and public scrutiny is high, *see* Satterthwaite Decl. ¶¶ 49-70—the balancing test tilts markedly towards the public interest in disclosure.

The public interest in the withheld information about the detainee in Document 249 is especially high because the document alleges abuse of that detainee.[66] *See* McGuire Decl. ¶ 11. *See ACLU v. DOD*, No. 06-3140, 2008 WL 4287823, at *21 (2nd Cir. Sept. 22, 2008) (noting that where governmental misconduct is at stake in connection to release of detainee photographs,

[66] The government has failed to adequately establish the detainee's privacy interest or to demonstrate that the release of identifying information would amount to an unwarranted invasion of personal privacy. Moreover, former CIA detainees have provided information about the identities of individuals with whom they were held, reportedly because their fellow prisoners sought to make known their identifying information. *See, e.g.*, Satterthwaite Decl. ¶ 15.

"the public interest in disclosure . . . is strong").[67] The strong public interest in this case, in the face of amorphous privacy interests held by unidentified individuals, favors disclosure.

V. THE CIA HAS IMPROPERLY WITHHELD INFORMATION UNDER EXEMPTION 2.

Contrary to the CIA's implied assertion that it is Plaintiffs' burden to offer an explanation as to how the documents withheld under Exemption 2 would advance the public interest, CIA Cross-Opp. at 53, it is the agency's burden to establish that the information withheld is too trivial to warrant disclosure. *Morley v. CIA*, 508 F. 3d 1108, 1125 (D.C. Cir. 2007). In *Morley v. CIA*, the D.C. Circuit held that the CIA's statement that "[t]here is no public interest in the disclosure of such internal procedures and clerical information," was insufficient to carry the agency's burden under Exemption 2. The CIA forwards an almost identical justification here. As in *Morley*, the CIA has withheld information on the basis that "[t]here is no public interest in the release of this internal, clerical information." First DiMaio Decl. ¶¶ 128-129. The CIA's *Vaughn* index for the documents withheld under this exemption provides insufficient information tending to demonstrate that the information withheld is trivial or of no public interest.[68] Accordingly, the CIA has failed to meet its burden in invoking Exemption 2.

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[67] In *ACLU v. DOD*, No. 06-3140, 2008 WL 4287823, at *21 (2nd Cir. Sept. 22, 2008), the Second Circuit found only a "*de minimis* privacy interest at stake" and thus did not conduct a balancing test. This case is distinguishable, but nevertheless noteworthy. In consideration of the applicability of the Geneva Conventions to the release of photos, the court noted that it was relevant that the plaintiffs' purpose in dissemination was "not itself to humiliate the detainees." *Id.* at *23, *24, *25.

[68] Despite the CIA's assertion otherwise, names of government officials have been withheld pursuant to Exemption 2. In its reply brief, the CIA states that it "did not rely on Exemption 2 to withhold names of government officials." CIA Cross-Opp. at 52-53. But the McGuire Declaration states that "Here [with regard to document no. 249], Exemption 2 is applied to protect the identification of special agents and their identification numbers. . . ." McGuire Decl. at ¶ 7. The inconsistency in the CIA's presentation accentuates the need for the CIA to provide an adequate *Vaughn* index that permits Plaintiffs the opportunity to test the CIA's claims and to determine whether the information withheld would advance the public interest.

VI. THE CIA HAS FAILED TO PRODUCE AN ADEQUATE DRAFT VAUGHN INDEX FOR THE ADDITIONAL OIG RECORDS IN COMPLIANCE WITH THE APRIL 21, 2008 STIPULATION AND ORDER.

Pursuant to the April 21, 2008 Stipulation and Order between the Plaintiffs and the Central Intelligence Agency Regarding Procedures for Summary Judgment Motions ("April 21, 2008 Stipulation and Order"), on May 30, 2008, the CIA was required to produce a draft *Vaughn* index for 50 sample records from OIG investigations closed between June 7, 2007 and December 1, 2007 (the "Additional OIG Representative Sample Set"), *id.* at ¶ 13, after which the parties would meet and confer to determine "which, if any, issues related to the records . . . will be the subject of litigation." *Id.* at ¶ 14. On receipt of the draft *Vaughn* index, Plaintiffs informed the CIA that its inadequacy prevented Plaintiffs from identifying issues that would be the subject of litigation. In light of the CIA's refusal to provide a revised draft *Vaughn*, Plaintiffs challenged the adequacy of the draft *Vaughn* index for the entire Additional OIG Representative Set, including the one document (Document 300), in respect of which the government explicitly invoked a new basis for a withholding under Exemption 5. The CIA declined to remedy the draft *Vaughn* and has sought to circumvent Plaintiffs' challenge to the overall adequacy of the draft *Vaughn* by seeking to put only Document 300 at issue in this litigation. *See* CIA Cross-Opp. at 52-53. Plaintiffs cannot—nor are they required to—articulate challenges on the merits of the withholdings of the Additional OIG Records, including but not limited to Document 300, until the CIA produces an adequate draft *Vaughn* index for all entries, and expressly reserve their challenges to particular documents pending resolution of this issue. Accordingly, Plaintiffs respectfully request that to the extent that the Court grants Plaintiffs' summary judgment motion challenging the adequacy of the CIA's *Vaughn* index for Documents 1-250, that in so ordering, the Court direct the CIA to apply the Court's ruling on the adequacy of the *Vaughn* for Documents 1-250—as well as any related orders to produce a more detailed *Vaughn*—to the

draft *Vaughn* for Documents 251-300 and, if appropriate, permit Plaintiffs to challenge the merits of the agency's withholding at a later date.

VII. THE CIA HAS NOT CONDUCTED AN ADEQUATE SEARCH.

Contrary to the CIA's assertions, CIA Cross-Opp. at 53-56, the CIA has not reasonably designed or explained the searches it conducted. The CIA has added no new information in its opposition filing to meet its burden to demonstrate that its search was adequate. *See Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

Plaintiffs can demonstrate that the CIA would have been likely to uncover undisclosed responsive information if an adequate search were conducted. The CIA cursorily states that the Plaintiffs' request was not directed to the Directorate of Support ("DS"), though that component would appear to have responsive records pertaining to overseas detention facilities and rendition logistics. DiMaio Decl. ¶ 22.[69]

Further, the paltry information that the CIA has provided about the search processes lacks any meaningful detail that would allow the Plaintiffs or the Court to review whether an adequate search has been conducted and nothing in the CIA's recent filing changes that. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890, 892 (D.C. Cir. 1995) (holding that the agency had not provided sufficient information "to allow [the court] review of the adequacy of [their] search"). The agency cannot rest on affidavits to demonstrate an adequate search unless they are "reasonably detailed, nonconclusory affidavits." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Morley v. CIA*, 508 F.3d 1108, 1121-22 (D.C. Cir. 2007).[70] Instead of the requisite

[69] The affidavit does not state that DS was unlikely to contain responsive records; it simply states that the DIR Area was seen as likely to contain responsive records. This is plainly insufficient.

[70] *Morley* held that the CIA did not adequately describe its search with a description that bears a striking resemblance to that put forth by the CIA in the instant case. In *Morley*, "[t]he Declaration incorporates a general explanation of how the agency responds to all FOIA requests,

level of detail regarding search methods or terms required by *Weisberg v. DOJ*, 627 F.2d 365, 371 (D.C. Cir. 1980), the CIA noted that "each component devises its own strategy based on its own record systems." First DiMaio Decl. ¶ 35 n.7. This conclusory statement only begs further unanswered questions. *See Morley*, 508 F.3d at 1121-22.

The agency failed to specify which components were searched within the one area actually searched. In the OIG, the component in which the majority of the retrieved records was located, the CIA provided negligible information about the search processes—for instance, providing no information about whether the initial search was conducted electronically or by hand; no detail about the search terms used, if any; and no clarity about how the OIG would find responsive records not in the most likely case files. First DiMaio Decl. ¶ 35. For "other" unnamed DIR Area components, the CIA only provided two sample search terms utilized, "ghost detainee" and "rendition", and expressly described this list as not exhaustive. DiMaio Decl. ¶ 35 n.7. These search terms would be unlikely to uncover many of the responsive records.[71] There is no evidence that the CIA conducted any searches using the term "unregistered" or "other governmental agency" prisoners or detainees, even though those terms were listed in Plaintiffs' requests, or for "high value" detainees, acknowledged to be a label used to describe those held in CIA prisons.[72] Nor is there evidence that the CIA searched using the names and aliases of the

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and after describing how a single FOIA request must be divvied up between multiple component units within the CIA, Dorn states that 'each component must then devise its own search strategy, which includes identifying which of its records systems to search as well as what search tools, indices, and terms to deploy.'" *Morley*, 508 F.3d at 1121-22.

[71] A search relying on these terms would not even uncover the President's speech acknowledging the existence of the program of secret CIA detention and interrogation. *See* Satterthwaite Decl. Ex. A (White House Office of the Press Secretary, *News Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sept. 6, 2006).

[72] *See, e.g.*, the following Department of Defense documents, all *available at* http://www.aclu.org/torturefoia/released/030905/: Statement of MNF-I, C2, IMIR CW2, Annex to Fay/Jones/Kern Report (June 16, 2004) (explaining that ghost detainees were "usually sourced

sixteen prisoners that the United States has confirmed the CIA secretly detained or those whose identities are not publicly confirmed but would otherwise be known to the CIA.[73]

The searches conducted were designed to be incomplete and are inadequately described. This Court should order the CIA to provide affidavits with sufficient detail and conduct a reasonable search for all responsive documents.

CONCLUSION

For the foregoing reasons, as well as those stated in Plaintiffs' opposition and cross-motion for summary judgment, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for summary judgment and order the agency to (a) provide a *Vaughn* index for Documents 1-250 and supporting declarations consisting of unclassified descriptions with adequate detail and specificity to enable *de novo* judicial review and adversarial testing; (b) to apply this ruling to its preparation of a draft *Vaughn* index for Documents 251-300 pursuant to ¶ 13 of the April 21, 2008 Stipulation and Order; (c) reprocess responsive documents; (d) conduct a reasonable segregability analysis; (e) release segregated information that was improperly withheld; and (f) conduct a reasonable search, including of the Directorate of Support, and provide an adequate description of the search(es) conducted.

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from TF-121 or Other Governmental Agencies"); Sworn Statement of SGT, 372nd MP Co, Annex to Fay/Jones/Kern Report (May 7, 2004) (stating that "ghost detainees were detainees who were brought to our facility by Other Government Agencies (OGA)."). The Office of the Director of National Intelligence uses the term "high value" to describe detainees in the CIA's program. *See* Satterthwaite Decl. Ex. B (Announcement, Office of the Director of National Intelligence, *Summary of the High Value Terrorist Detainee Program*, Sept. 6, 2006).

[73] *See, e.g.*, Amnesty International, Cageprisoners, the Center for Constitutional Rights, New York University School of Law Center for Human Rights and Global Justice, Human Rights Watch, and Reprieve, *Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror"* (June 2007), *available at* http://chrgj.org/docs/OffRecord/OFF_THE_RECORD_FINAL.pdf.

Respectfully Submitted,

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