

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| AMERICAN CIVIL LIBERTIES UNION, et al., | : | |
| | : | |
| Plaintiffs, | : | <u>ELECTRONICALLY FILED</u> |
| | : | |
| v. | : | 04 Civ. 4151 (AKH) |
| | : | |
| DEPARTMENT OF DEFENSE, et al., | : | <u>DECLARATION OF</u> |
| | : | <u>DAVID J. BARRON</u> |
| Defendants. | : | |
| ----- | X | |
| AMERICAN CIVIL LIBERTIES UNION, et al., | : | |
| | : | |
| Plaintiffs, | : | |
| | : | |
| v. | : | 05 Civ. 9620 (AKH) |
| | : | |
| DEPARTMENT OF JUSTICE, AND ITS | : | |
| COMPONENT OFFICE OF LEGAL COUNSEL, | : | |
| | : | |
| Defendants. | : | |
| ----- | X | |

I, David J. Barron, declare the following:

1. I am the Acting Assistant Attorney General for the Office of Legal Counsel (“OLC” or “the Office”) of the United States Department of Justice (the “Department”), a position I have held since January 20, 2009. In this position, I supervise all OLC operations, including OLC’s response to requests under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this *Vaughn* declaration in connection with the remand of this case to the district court, which was requested by the government in order to permit the reprocessing of the documents at issue in this case. The statements made herein are based on my personal knowledge and on information provided to me by OLC attorneys.

PART I

Introduction

2. In January 2009, the President discontinued the interrogation practices that are addressed in many of the documents at issue in this case. He issued Executive Order 13491 of January 22, 2009, which generally prohibits the use by the United States Government, in any armed conflict, of any interrogation technique or approach, or treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.

3. On April 16, 2009, the Department released to the public four documents that it had been withholding in this case and that address interrogation practices that the President has ordered discontinued. The President made a statement accompanying that release in which he explained that “after consulting with the Attorney General, the Director of National Intelligence, and others,” he “believe[d] that exceptional circumstances surround these memos and require their release.” *See* Daily Comp. Pres. Docs., 2009 DCPD No. 00263, p. 1 (Apr. 16, 2009).

4. At the time of the April 16 release, plaintiffs’ appeal of the district court’s order denying plaintiffs’ summary judgment motion was pending before the U.S. Court of Appeals for the Second Circuit. The government sought a remand of the case to the district court in order to permit a review and reprocessing of certain withheld documents in light Executive Order 13491 and the April 16 release. The Court of Appeals remanded the case. On remand, the district court ordered the government to provide by August 31, 2009 a *Vaughn* declaration setting forth the justification for the continued withholding of the 181 documents listed on the original *Vaughn* index. The parties agreed to a three-week extension of that deadline, and the court granted an extension until September 21, 2009.

5. In order to conduct its review and reprocessing of the documents in connection with the remand of this case, OLC had to search its files for the documents identified on the original *Vaughn* index. I was informed that a copy set of the indexed documents was not made when the documents were compiled in 2005 due to their extreme sensitivity at the time, and the original documents were not maintained over time as a discrete set within the OLC files after the initial 2005 search for responsive documents. Instead, the documents were stored in safe drawers in OLC's Sensitive Compartmented Information Facility ("SCIF"), intermingled with other documents on related topics in the working files of the Office. Moreover, some of the original documents have been in the temporary custody of other government offices on several occasions since the initial search in 2005. The task of recompiling the set was further complicated by the fact that the document descriptions on the original *Vaughn* index were very general in nature.

6. Between June and September 2009, OLC, with the assistance of attorneys from the Office of the United States Attorney for the Southern District of New York and the Central Intelligence Agency ("CIA"), conducted extensive search efforts to locate the documents listed on the original *Vaughn* index. These search efforts are described in detail in Part II of this declaration, below. Through these searches, OLC located and identified 171 documents that correspond to entries on the original *Vaughn* index.¹ OLC based these identifications on the totality of circumstances, including the document descriptions on the original *Vaughn* index, the location in the files in which the documents were found, and the absence of other documents that might meet the particular document description on the *Vaughn* index, as well as other factors.

¹ The *Vaughn* numbers of the ten remaining entries are: 6, 20, 47, 77, 142, 155, 172, 175, 177, and 181.

However, many of the identified documents are not certain matches, either due to the lack of specificity of the document descriptions on the original *Vaughn* index or because the determination of a match assumes that an error was made in the original *Vaughn* index.²

7. OLC has reprocessed the 171 documents that have been located under the revised FOIA guidelines issued by the Attorney General on March 19, 2009. Those guidelines were issued in response to a Presidential Memorandum of January 21, 2009, which directed agencies to administer FOIA with a presumption of openness. The Attorney General's memorandum instructed agencies to consider information for discretionary release, and to consider partial disclosures of information where a full disclosure is not possible.

8. Informed by this guidance, the President's statement of April 16, 2009 (see paragraph 3, above), and the legitimate and substantial public interest in the advice provided by OLC regarding the government's interrogation and detention practices, OLC decided not to assert 5 U.S.C. § 552(b)(5) ("Exemption Five") with respect to 101 of the documents in full and two documents in part that were listed on the original *Vaughn* index and that had previously been withheld.³ Of these 103 documents as to which OLC decided not to assert Exemption Five in full or in part, 43 were documents in which no other agency asserted an exemption under FOIA over the document in its entirety. On August 24, 2009, plaintiffs were provided these 43

² Discrepancies between the entries on the original *Vaughn* index and the corresponding document generally have been noted on the updated *Vaughn* index.

³ OLC waived or partially waived its previous reliance on Exemption Five with respect to 102 documents (in full or in part), and concluded that it would not assert Exemption Five with respect to the document identified as *Vaughn* number 160, because that document does not reflect any OLC equities.

documents, some of which contained redactions.⁴ On that date, OLC also made available to the public certain of those documents—those representing OLC’s final legal advice—by posting them on the “OLC FOIA Reading Room” website at <http://www.usdoj.gov/olc/olc-foia1.htm>.

9. OLC continues to assert Exemption Five with respect to 68 of the 171 located documents in full and two of the documents in part.⁵ Part III of my declaration below identifies these documents by *Vaughn* number and provides detailed explanations and justifications for the withholding of these documents.

PART II

Search for Documents on the *Vaughn* Index

10. This Part of the declaration describes in greater detail my understanding of the original search that was conducted for the documents responsive to plaintiffs’ FOIA request, as well as more recent search efforts for the documents listed on the original *Vaughn* index in connection with the reprocessing of documents. Having assumed my current position in January of this year, I have no personal knowledge of the search that OLC conducted in 2005 in response to plaintiffs’ FOIA request or the subsequent processing and handling of documents responsive to that request during the prior Administration. In order to prepare this declaration in a good-faith effort to provide information to the Court, I assigned several OLC attorneys to collect the

⁴ The release included 42 documents that were identified by number on the OLC *Vaughn* index and one document that was erroneously identified as a document not previously identified on OLC’s *Vaughn* index. That document is a June 18, 2004 memorandum from Jack Goldsmith to John Helgeson. OLC has now confirmed that this document is *Vaughn* number 37.

⁵ The documents identified as *Vaughn* numbers 89 and 174 were released in part on August 24, 2009. OLC continues to assert Exemption Five with respect to certain redacted portions of these documents.

information documented here. They have made significant efforts, including conducting a thorough review of OLC files and speaking with a former OLC attorney still within the Department of Justice and other persons in the government familiar with the OLC documents at issue in this case. I am providing the information in this section of the declaration on the basis of the information they have provided me. If the Court has any questions about the information provided in this declaration, OLC is prepared to supplement this declaration. Thus, the information presented in the remainder of this Part is provided based on information and belief.

11. CIA attorneys were initially given access to the OLC Sensitive Compartmented Information Facility (“SCIF”) in 2005 to search for documents responsive to the FOIA request at issue in this litigation. CIA attorneys conducted this search because no OLC attorneys assigned at that time to the processing of FOIA requests had the clearances needed to access and review the documents. CIA attorneys made the original responsiveness determinations and created an unclassified draft index of the documents setting forth very general descriptions of the documents, along with the date, classification level, and number of pages of each document. That preliminary index was filed on May 15, 2006 as an attachment to a declaration by Steven G. Bradbury, then the Acting Assistant Attorney General for OLC. The review done by the CIA attorneys in 2005 took place in the OLC SCIF, and at that time the documents did not leave OLC’s custody.

12. At the time of the original search in 2005, neither the CIA nor OLC made a copy of the documents listed on the index due to concerns about making additional copy sets of these highly sensitive classified documents. Moreover, the indexed documents were not maintained as a discrete, segregated set within the OLC SCIF, but were instead returned to the working files of

the Office in safe drawers that also contained other documents not responsive to this litigation.

13. Most of the documents reviewed and indexed by the CIA attorneys were also responsive to document requests OLC received in connection with government investigations that have been conducted over the last several years, some of which are still being conducted. In connection with those investigations, representatives of other government entities have reviewed documents in the OLC SCIF or have been given temporary custody of sets of documents that have included certain responsive documents in this matter.

14. In particular, the documents were reviewed on numerous occasions in the OLC SCIF by attorneys from the Office of Professional Responsibility of the Department of Justice (“OPR”), which has been conducting an investigation of the legal advice given in connection with CIA interrogation and detention practices. A collection of documents from the OLC SCIF, which included responsive documents in this matter, was transported some time during early 2007 to the OPR SCIF for further review by OPR in connection with that office’s ongoing investigation.

15. In 2007, the documents were recalled from OPR by OLC so that they could be sent to the CIA for processing and for purposes of updating the unclassified *Vaughn* index submitted in this matter. The CIA maintained custody of the documents at CIA headquarters for one or two months in order to update the *Vaughn* index.

16. The *Vaughn* index created by the CIA during that time was filed as Exhibit A to the declaration of Marilyn Dorn (a CIA representative) dated June 7, 2007. That index is an unclassified index of 181 documents that are described in a very general manner. Approximately 70 of the 181 documents, for instance, are listed as “undated”; some documents are identified

only as “1-page undated handwritten notes,” and numerous document descriptions are identical to one another. For instance, documents 112 through 116 are each identified only as an undated, 1-page “draft memo providing legal advice” classified at the TS level. A classified version of the *Vaughn* index was not created, and no copy set of the documents was made due to concerns at the time about the sensitivity of the documents.

17. The documents were returned from the CIA to the OLC SCIF in July 2007. The documents returned from the CIA included two three-ring binders that had been assembled previously by OLC, as well as the remaining documents that the CIA attorneys had organized into numbered redweld folders while the documents were in the custody of the CIA.

18. Shortly after the return of the documents from the CIA, a set of documents that included (but was not limited to) the redweld folders and two binders returned from the CIA was transferred to the custody of OPR for purposes of that office’s investigation and review of legal advice related to the CIA interrogation and detention program. Although certain of these documents were recalled to OLC from OPR on several occasions in order to respond to other FOIA requests and inquiries taking place within the government, the documents generally remained in the possession of OPR until March 2009.

19. On at least one occasion in late 2007 or early 2008, when the documents were recalled by OLC from OPR for purposes of another matter, an OLC attorney made significant efforts to recompile the 181 documents listed on the original *Vaughn* index based on the descriptions of the documents on that index. The attorney made tentative identifications of approximately 150 of the 181 documents and marked the original documents with pencil numbers corresponding to the *Vaughn* index in the lower left-hand corner of each of those 150

documents.

20. In March 2009, an OLC attorney under my supervision asked OPR to return the documents to OLC's custody so that the documents could be searched for purposes of another FOIA matter, and OPR returned the documents promptly to the OLC SCIF, including the set of redweld folders and two binders.

21. Over a period of several weeks during June and July 2009, an attorney under my supervision examined each document in the set returned to OLC from OPR, as well as other collections of potentially relevant material from the same time period. That attorney attempted to confirm the earlier tentative *Vaughn* index assignments made by the previous OLC attorney and to identify any additional documents that matched the entries on the index. On July 19, 2009, two attorneys from the CIA met with the OLC attorney in the OLC SCIF in order to further attempt to identify documents on the *Vaughn* index. During that meeting, all three attorneys examined each original document in the set returned from OPR, including the collection of redweld folders and two binders. Based on this review, the attorneys collectively decided, for purposes of accuracy, to make a few changes to the earlier identifications, and also assigned *Vaughn* numbers to approximately 15 more documents, bringing the total number of documents identified to 165 of the 181 total documents on the original *Vaughn* index.

22. Between July 20 and July 31, 2009, for purposes of another FOIA request, three OLC attorneys under my supervision searched documents in the OLC SCIF that are stored in the two safes cleared to store documents classified at the relevant level. In conducting that search, the attorneys also looked for the 16 documents on the original *Vaughn* index that had not yet been identified. This search did not result in the identification of any additional documents on

the *Vaughn* index.

23. On July 20, 2009, an attorney under my supervision sent an attorney in OPR a list of the 16 documents that had not been located and asked the OPR attorney to search the OPR SCIF to determine whether OPR had inadvertently retained any of those documents. On July 27, 2009, the OPR attorney responded that OPR did not have any of the listed documents.

24. In July 2009, an attorney under my supervision also asked a CIA attorney to search the files in CIA's Office of General Counsel for copies of any of the remaining 16 documents on the *Vaughn* index. In August 2009, a CIA attorney informed OLC that a search by the CIA did not yield any of those documents.

25. On August 12, 2009, Heather McShain and Sean Lane, two Assistant United States Attorneys for the Southern District of New York who represent the government in this matter, met in the OLC SCIF with an OLC attorney under my supervision, as well as a CIA attorney, to perform another search for the 16 remaining documents on the original *Vaughn* index. The search continued on August 17, 2009. Although the search focused on the set of redweld folders and binders and the drawers of the safes in which these items have been stored, the attorneys also searched all of the other drawers in the two safes cleared to store documents at the relevant classification level, with the exception of two drawers and a set of documents in the back of a third drawer that were deemed unlikely to contain relevant documents due to the date or classification level of the documents in that set.

26. In the course of their efforts on August 12 and August 17, 2009, the attorneys involved in the search identified six documents as potentially matching the descriptions of the remaining 16 documents on the *Vaughn* index, bringing the total number of documents located to

171.⁶

27. Between August 18 and August 20, 2009, an attorney under my supervision searched the remainder of the drawers of the two safes cleared to store documents at the relevant classification level (*i.e.*, the two drawers and portion of a third drawer that were not searched on August 12 or 17). The attorney also searched documents held in an additional safe that contains documents at classification levels that are not relevant to the subject matter of this litigation.

28. In the course of these various search efforts between June and August, 2009, attorneys conducting the searches found additional documents that were not identified on the original *Vaughn* index but which appeared to be responsive to the plaintiffs' FOIA request. OLC concluded that a supplemental search should be conducted in order to identify all responsive documents in the relevant safe drawers of the OLC SCIF. Accordingly, after plaintiffs agreed to a three-week extension of the court's original deadline, the government obtained from the court an extension of time in order to allow for this additional search.

29. During the weeks of August 31, 2009 and September 7, 2009, three OLC attorneys under my supervision conducted an additional search of the two safes in the OLC SCIF that are cleared to store documents classified at the relevant level of classification. Those attorneys were asked to look for documents responsive to plaintiffs' original FOIA request, regardless of whether the documents were included on the original *Vaughn* index. Each document in every drawer of the two relevant safes was viewed by at least one OLC attorney for

⁶ Of the 171 documents, seven documents are documents that concern the Department of Defense ("DOD"), rather than the CIA, and that therefore were inadvertently included on the original OLC *Vaughn* index. The *Vaughn* numbers of these documents are: 7, 10, 13, 14, 23, 25, and 146. These documents have been referred to DOD for processing.

an initial responsiveness determination. For any responsiveness determination that was not readily apparent, at least two OLC attorneys viewed or discussed the relevant document. The attorneys made copies of every document that appeared to be responsive but was not listed on the original *Vaughn* index.

30. As a result of those additional search efforts over the past three weeks, OLC has identified additional documents that appear to be responsive to plaintiffs' FOIA request. Of these documents, OLC referred 168 to the CIA for processing and 56 to other Executive Branch entities for processing where those other Executive Branch entities originally generated, or otherwise have equities in, those documents. Of the referred documents, there may well be duplicates of documents already processed. To the extent the referred documents include new documents that have not yet been reviewed or processed, OLC anticipates that the government will file a supplemental *Vaughn* index (or indices, depending on the outcome of the processing) in this matter upon the completion of processing.

31. The additional search efforts during the weeks of August 31, 2009 and September 7, 2009 did not result in the identification of additional documents listed on the original *Vaughn* index, and the number of located documents from that index remains 171. Even within that set of 171 documents, however, many of the identified documents are uncertain matches, either because the identification is premised on an assumption that an error was made on the original *Vaughn* index with respect to the date, length, or classification level of the document, or because the original document description was not sufficiently specific (e.g., "1-page undated handwritten notes") to permit clear confirmation of a match.

PART III

Withholdings Pursuant to Exemption Five

32. Exemption Five of FOIA exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This provision exempts from disclosure those documents or information normally privileged in the civil discovery context, including documents or information protected by the deliberative process and presidential communications privileges.

33. Based on OLC’s review and reprocessing of the documents listed on the *Vaughn* index, as indicated in paragraph 8 above, OLC decided not to assert Exemption Five with respect to 101 documents in full, and two documents in part, that had previously been withheld. On August 24, 2009, the Office made a discretionary release of 43 documents as to which it had waived Exemption Five and as to which the CIA also no longer claimed any FOIA exemptions. The documents released by OLC on that date constitute letters, memoranda, and opinions of the Office conveying final legal advice and analysis or other documents reflecting final advice of the Office.

34. OLC has determined that other documents corresponding to entries on the original *Vaughn* index continue to warrant withholding or partial withholding under Exemption Five. These documents, identified by their numbers on the original *Vaughn* index, are: 16, 18, 31, 32, 33, 35, 39, 40, 41, 46, 63, 66, 68, 71, 81, 82, 86, 100, 102, 103, 104, 105, 106, 108, 109, 111, 117, 118, 119, 121, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 135, 139, 140, 141, 143, 144, 145, 147, 148, 149, 150, 152, 153, 154, 156, 157, 158, 161, 162, 165, 167, 168, 169, 171,

173, 176, 178, and 180. OLC is also continuing partially to withhold documents 89 and 174 pursuant to Exemption Five.

Deliberative Process Privilege

35. In contrast with the documents as to which OLC has decided not to assert Exemption Five, the documents or redacted portions of documents listed in paragraph 34 above do not constitute final legal advice of the Office. Instead, these documents are: (a) pre-decisional, *i.e.*, generated prior to a decision; and (b) deliberative, *i.e.*, reflecting discussions, proposals, and the “give and take” exchanges that characterize the government’s deliberative process. These documents fall squarely within the deliberative process privilege. They include draft legal memoranda or opinions; documents memorializing or reflecting pre-decisional deliberations of the office; informal attorney work product such as attorney notes or comments generated or used in the preparation of legal advice; communications between OLC and client agencies reflecting deliberations in connection with the formulation of OLC legal advice; and communications between presidential advisers reflecting pre-decisional deliberations. The documents that fall into each of these five categories are identified below.

- a. Drafts of, or draft inserts for, OLC memoranda or other documents providing legal advice: 16, 18, 33, 39, 40, 41, 82, 86, 102, 103, 104, 143, 144, 145, 149, 153, 173, 178, and 180.
- b. Documents memorializing or summarizing internal, pre-decisional deliberations of the office: 31, 32, 33, and 89 (partial withholding).
- c. Informal attorney work product generated during the preparation of OLC advice, such as handwritten notes on separate pieces of paper or in the margins of draft

memoranda or other documents providing legal advice: 16, 18, 32, 40, 63, 66, 68, 71, 81, 82, 102, 103, 104, 111, 117, 118, 119, 121, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 135, 139, 140, 141, 143, 144, 147, 148, 150, 152, 153, 154, 156, 157, 158, 162, 165, 167, 168, 169, 171, 173, 176, and 180.

- d. Communications between OLC and client agencies reflecting pre-decisional discussion of legal issues pertinent to the preparation of OLC advice and comments on draft OLC opinions: 35, 40, 46, 100, 105, 106, 108, 109, and 161.
- e. Communications between presidential advisers reflecting pre-decisional deliberations: 174 (partial withholding).

36. Creating and distributing draft documents is an integral part of OLC's deliberative and decision-making processes. Through the writing process, OLC attorneys articulate, focus, and refine their advice and analysis. Drafts do not represent the final position or ultimate views of OLC. To the contrary, drafts are, by their very nature, pre-decisional and deliberative. They are part of the exchange of ideas and suggestions that accompanies sound decisionmaking, and they reflect the preliminary assessments and suggestions of OLC attorneys. OLC attorneys exchanged the draft documents identified above with each other and with other Executive Branch attorneys for input, comments, edits, and suggestions. Inevitably, initial drafts of documents differ substantially from the final versions, as attorneys adjust their analysis in response to input from their colleagues and other Executive Branch attorneys.

37. The confidentiality of attorney notes and similar informal work product used in the preparation and formulation of legal advice is also integral to OLC's deliberative processes. These documents contain attorneys' informal views and preliminary thoughts and reactions, and

they are integral to the development of OLC's final legal advice. Similarly, attorneys' markings and marginalia on documents are important aspects of OLC's deliberative processes. Like many attorneys, OLC lawyers regularly mark, underline, highlight, bracket, and place comments on the documents they write, review and edit. These markings reflect attorneys' impressions and evaluations, and the markings highlight sections of documents for future reference.

38. As part of its deliberative process in the preparation of legal advice for client agencies, OLC seeks and receives input from client agencies concerning legal theories and arguments and sometimes will share draft opinions with client agencies. OLC depends upon these submissions and input by officials of the client agencies who have knowledge or expertise in the relevant subject matter in order to resolve the legal questions presented for its review. The confidentiality of these submissions allows OLC to receive candid and fully reasoned and considered legal arguments from client agencies. Like draft opinions and informal attorney work product, the confidentiality of these submissions is also integral to the deliberative processes of the Office, and they are likewise protected by the deliberative process privilege.

39. Compelled disclosure of the documents listed in paragraph 34 would cause serious harm to the deliberative processes of OLC and the Executive Branch. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about compelled public disclosure of pre-decisional matters. Protecting from compelled disclosure the confidentiality of the documents with respect to which OLC continues to assert Exemption Five is necessary to ensure that Executive Branch attorneys will examine legal arguments and theories candidly, effectively, and in writing, and to ensure that Executive Branch officials will seek legal advice from OLC on

sensitive matters.

Presidential Communications Privilege

40. Document 174 was released on August 24, 2009 with certain redactions, including the redaction of a sentence (on page 2 and repeated on page 3 of the document) that summarizes a pre-decisional deliberative communication between presidential advisers relating to a possible presidential decision. OLC continues to assert Exemption Five with respect to that redacted sentence, which is protected by the deliberative process and presidential communications privileges.

41. The presidential communications privilege protects confidential communications that relate to possible presidential decisionmaking and that involve the President or his senior advisers. It is not limited to exchanges directly involving the President; it protects communications between presidential advisers made in the course of formulating advice or recommendations for the President. The privilege protects such communications in order to ensure that the President's advisers may fully explore options and provide appropriate advice to the President without concerns about compelled disclosure.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Washington, D.C.
September 21, 2009



DAVID J. BARRON