

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al., :

Plaintiffs, :

v. :

DEPARTMENT OF DEFENSE, et al., :

Defendants. :

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AMERICAN CIVIL LIBERTIES UNION, et al., :

Plaintiffs, :

v. :

DEPARTMENT OF JUSTICE, AND ITS
COMPONENT OFFICE OF LEGAL COUNSEL, :

Defendants. :

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ELECTRONICALLY FILED

04 Civ. 4151 (AKH)

**DECLARATION OF
DAVID J. BARRON**

05 Civ. 9620 (AKH)

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 (“DOJ” or 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 the government requested 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.

2. This Third Declaration supplements, and hereby incorporates, the Declaration of David J. Barron, dated September 21, 2009 (“First Declaration”) and the Declaration of David J. Barron, dated November 13, 2009 (“Second Declaration”).

PART I

Introduction

3. As part of its review and reprocessing of the documents in connection with the remand of this case, OLC searched its files for the documents identified on the original *Vaughn* index filed on May 15, 2006. 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, as explained in detail in my First Declaration. *See* First Declaration, ¶ 11. Through these searches, 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.

4. As a result of this supplemental search of the relevant safe drawers, OLC identified an additional 224 documents that initially appeared to be responsive to plaintiffs’ FOIA request. OLC referred 168 of these documents to CIA and 56 to other Executive Branch entities for consultation, processing, or a determination that they had already been processed in

this case.¹ In a letter provided to the Court on September 28, 2009, the Assistant United States Attorneys litigating this matter represented that OLC and the government agencies to which the 56 documents were referred would use their best efforts to process these documents by October 30, 2009, and submit any appropriate *Vaughn* declaration for withheld information by November 20, 2009. On October 30, 2009, the government released ten of these 56 documents in full or in part to plaintiffs. Despite the government's best efforts, 14 of the 56 documents were not fully processed by October 30, 2009. The government completed processing of these remaining 14 documents on November 6, 2009, and the government released two additional documents in part to plaintiffs on that date.

5. During processing, OLC sent 18 of the 56 documents to the NSC for consultation. NSC determined that one of the 18 documents is currently the subject of ongoing proceedings in this litigation and a second document was previously processed in this litigation. The government released a third document in full on October 30, 2009. The remaining 15 documents are described in our *Vaughn* index. The government released three of these 15 documents in part on October 30, 2009, and one in part on November 6, 2009.

6. OLC referred another 11 of the 56 documents to the State Department for consultation, processing, or a determination that the documents had already been processed.² The State Department determined that two of these 11 documents were previously processed as

¹ The Second Declaration addresses the 168 documents referred to CIA and those documents are not further discussed here.

² The Declaration of Margaret P. Grafeld, filed by the State Department on November 20, 2009, states that DOJ referred 25 documents to the State Department. That number includes documents initially sent to the NSC and forwarded to the State Department at NSC's request.

part of this litigation. Two other documents were comprised of pages that were previously processed and pages that were determined non-responsive to the request. These four documents are not described in our *Vaughn* index. The remaining seven of the 11 documents are described in our *Vaughn* index. The government released one of these seven documents in part on October 30, 2009.

7. OLC referred three more of the 56 documents to the Federal Bureau of Investigation (“FBI”) for consultation, processing, or a determination that the documents had already been processed. One of these documents was released in part on October 30, 2009.³ Because OLC and other DOJ components—apart from the FBI—waived all applicable exemptions to this document, it is not described in our *Vaughn* index. Several pages of a second document were later determined to be Department of Defense (“DOD”) material and referred to DoD for processing; we understand from DOD attorneys that all of those pages had been previously released or otherwise processed in connection with this litigation. The remainder of the document was released in part on November 6, 2009. It is included in our *Vaughn* index, along with the third document.⁴

8. OLC referred the final 24 of these 56 documents to DOD for consultation, processing, or a determination that the documents had already been processed. We understand from DOD attorneys that three of these 56 documents were previously processed and released in full or in part, six documents were previously processed but not released, one document was a

³ This document was provided to plaintiffs as three separately dated documents.

⁴ Upon review, we determined that the third document concerned internal DOJ decisionmaking and should not have been referred.

publicly available document, seven were not responsive pursuant to the agreement concerning the revised scope of DOD searches and processing in this case, three are exempt pursuant to the order of September 29, 2005 in this case, and two contain pages that are already public as well as pages that are not responsive pursuant to the agreement concerning the revised scope of DOD searches and processing in this case. The government also released one of the 24 documents in full on October 30, 2009. Therefore, these 23 documents are not described in our *Vaughn* index. The remaining document is described in our *Vaughn* index.

9. Additionally, over the course of the search described in the First Declaration, CIA and OLC attorneys determined that seven of the documents identified on the original *Vaughn* index were documents that concern the Department of Defense (“DOD”), rather than the CIA, and therefore were inadvertently included on the original OLC *Vaughn* index.⁵ These documents were referred to DOD for processing. *See* First Declaration, n.6. We understand from DOD attorneys that two of these documents were previously processed but not released, two documents had been separately made public, and one is exempt pursuant to the order of September 29, 2005 in this case. Moreover, we have determined that one document is not responsive. Therefore, these six of the seven documents are not described in our *Vaughn* index. The one remaining document is described in our *Vaughn* index.

10. Finally, OLC referred an additional document to DOD for processing once it was determined to be a version of a document previously processed in this litigation. This document was released in full on October 30, 2009 and is therefore not included in the *Vaughn* index.

⁵ The numbers of these documents from the original *Vaughn* index are: 7, 10, 13, 14, 23, 25, and 146.

11. This declaration provides an explanation of the exemptions asserted by OLC, other components of DOJ, and the National Security Council (“NSC”) over the documents described above that are included in our *Vaughn* index.

12. OLC, other DOJ components, and the NSC assert Exemption Five, 5 U.S.C. § 552(b)(5), in full or in part with respect to certain of the documents described in the *Vaughn* index. Part II of this declaration identifies the documents subject to Exemption Five, in full or in part, by *Vaughn* number and provides explanations and justifications for the withholding of these documents. In addition, DOJ asserts Exemption Two, 5 U.S.C. § 552(b)(2), with respect to certain of the documents. Part III of the declaration identifies these documents by *Vaughn* number and provides an explanation and justification for the withholding of these documents. Finally, DOJ asserts Exemption Six, 5 U.S.C. § 552(b)(6), with respect to certain of the documents, including some for which Exemption Five is asserted in full or in part. Part IV of the declaration identifies these documents by *Vaughn* number and provides an explanation and justification for the withholding of these documents.

PART II

Withholdings Pursuant to Exemption Five

13. 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 privilege.

14. OLC has determined that the following documents, identified by their numbers in the *Vaughn* index, warrant withholding in full under Exemption Five: 1, 20, 21, 22, 23, and 26. OLC is also partially withholding the following documents pursuant to Exemption Five: 2, 4, 6, 8, 11, 12, 13, 14, and 15. The following documents, identified by their numbers in the *Vaughn* index, are documents that other DOJ components are withholding in full pursuant to Exemption Five: 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, and 24. The documents that other DOJ components are withholding in part are: 2 and 19. Finally, the National Security Council has also determined that the following documents warrant withholding in part under Exemption Five: 6, 7, 8, 10, 13, and 16.

Deliberative Process Privilege

15. The documents or redacted portions of documents listed in paragraph 14 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, informal attorney work product such as attorney notes or comments generated or used in the preparation of legal advice, and communications reflecting deliberations in connection with the formulation of OLC legal advice. The categories into which each of the withheld documents falls are identified below.

- a. Drafts of, or draft inserts for, OLC memoranda or other documents providing legal advice: 1, 22, and 26.
- b. 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: 2, 4, 6, 8, 11, 12, 13, 14, 15, 21, and 23.
- c. Communications reflecting pre-decisional discussion of legal issues pertinent to the preparation of OLC advice and comments on draft OLC opinions: 20, 21, 22, and 23.

16. 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.

17. 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.

18. 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.

19. In addition, the documents over which other DOJ components have asserted Exemption Five are also predecisional and deliberative. These documents consist of input from other departments and agencies concerning legal theories and arguments considered in connection with the preparation of Department legal advice. They are therefore protected by the

deliberative process privilege.

20. Finally, the documents over which the NSC has asserted Exemption Five are also predecisional and deliberative. These documents consist of communications among departments and agencies concerning legal and policy issues made prior to and for the purpose of informing a final decision. They are therefore protected by the deliberative process privilege.

21. Compelled disclosure of the documents listed in paragraph 14 would cause serious harm to the deliberative processes of DOJ and the Executive Branch. It is essential to DOJ's mission and the deliberative processes of the Executive Branch that the development of DOJ's considered legal advice and the NSC's decisionmaking process 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 DOJ and the NSC assert Exemption Five is necessary to ensure that Executive Branch officials will examine legal and policy arguments and theories candidly, effectively, and in writing, and to ensure that Executive Branch officials will seek legal advice from DOJ on sensitive matters.

Presidential Communications Privilege

22. Portions of documents 6, 7, 8, 10, 13, and 16 contain pre-decisional deliberative communications among presidential advisers relating to a possible presidential decision. NSC asserts Exemption Five in part with respect to these documents, which are protected by the deliberative process and presidential communications privileges.

23. 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.

PART III

Withholdings Pursuant to Exemption Two

24. Four documents, identified by their numbers in the *Vaughn* index, are not protected by the deliberative process privilege but contain information that warrants withholding pursuant to FOIA Exemption Two, 5 U.S.C. § 552(b)(2). These documents are: 3, 5, and 9. These documents reveal the telephone and fax numbers of government employees. The telephone numbers concern internal government practices because they are a tool used by government employees during the performance of their official duties. Disclosure of the business telephone and fax numbers could subject these individuals to harassing telephone calls and fax transmissions, which could disrupt official business.

PART III

Withholdings Pursuant to Exemption Six

25. Of the documents protected by deliberative process privilege described above, thirteen documents, identified by their numbers in the *Vaughn* index, also contain information that warrants withholding pursuant to FOIA Exemption Six, 5 U.S.C. § 552(b)(6). These documents are: 2, 4, 6, 7, 8, 10, 11, 13, 14, 15, 17, 19, and 24. One document (18), over which

DOJ does not assert deliberative process privilege, also contains information that warrants withholding pursuant to FOIA Exemption Six. These documents reveal the identities of federal government employees. The disclosure of those names would subject the individuals to a significant invasion of personal privacy, and any legitimate public interest in the release of this information is insufficient to outweigh the intrusion on personal privacy. Therefore, the disclosure would be a clearly unwarranted invasion of personal privacy.

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

Dated: Washington, D.C.
November 20, 2009



DAVID J. BARRON

American Civil Liberties Union, et al. v. Department of Defense
 04 Civ. 4151
American Civil Liberties Union, et al. v. Department of Justice
 05 Civ. 9620

Vaughn Index to Accompany Barron Declaration

Document Number	Date	From	To	Description	Pages	Classification	Exemption/ Privilege
1	Undated	DOJ	DOJ	One page draft document concerning advice to DOD on interrogations	1	Top Secret	b(5)
2	9/21/2001	State	DOD, DOJ, NSC	Seven page document with handwritten attorney notes, concerning meeting agenda, meeting attendees, and tasking, plus a fax cover sheet	8	Secret	b(5), b(6)
3	10/4/2001	State	NSC, DOD	One page fax concerning the Geneva Conventions	1	Unclassified	b(2)
4	10/10/2001	State	DOJ	Eleven page draft with handwritten attorney notes concerning al-Qaeda, plus a fax cover sheet	12	Secret	b(5), b(6)
5	10/11/2001	State	NSC	One page document on detention with fax cover sheet	2	Unclassified	b(2)
6	10/11/2001	NSC	DOJ, State, DOD	Eight page draft paper with handwritten notes concerning al-Qaeda, plus a fax cover sheet	9	Secret	b(5), b(6)
7	10/12/2001	NSC	DOJ, State, DOD	Eight page draft paper with handwritten notes concerning al-Qaeda, plus a fax cover sheet	9	Secret	b(5), b(6)

8	10/12/2001	State	DOD, DOJ, NSC, WHCO	One page cover memo and nine page draft paper with handwritten notes, concerning al-Qaeda, plus a fax cover sheet	11	Secret	b(5), b(6)
9	10/12/2001	State	NSC	One page document concerning detention plus fax cover sheet	2	Unclassified	b(2)
10	10/18/2001	NSC	DOJ, State, DOD	Eight page paper concerning al-Qaeda and fax cover sheet	9	Secret	b(5), b(6)
11	11/8/2001	State	DOJ	Nine page memo and three page memo, both with handwritten attorney notes, concerning detention, and a routing cover sheet	13	Secret	b(5), b(6)
12	Undated	UNK	UNK	Four page draft document concerning detention plus a one page draft document with handwritten notes concerning indictment of a contractor	5	Confidential	b(5)
13	7/26/2004	NSC	State, DOD, DOJ, CIA	Four page document with handwritten notes concerning a meeting with a four page attachment, plus a fax cover sheet and a routing cover sheet	10	Secret	b(1), b(5), b(6)
14	11/3/2004	NSC	DOJ	Four page draft document concerning detention plus a one page draft document with handwritten notes concerning indictment of a contractor, plus a fax cover sheet	6	Confidential	b(5), b(6)
15	12/14/2004	NSC	CIA, DOJ	Five page memo plus a fax cover sheet	6	Confidential	b(5), b(6)

16	12/15/2004	NSC	State, DOD, DOJ, CIA	Two page memo concerning meeting with a one page attachment, a two page attachment, a three page attachment, and a five page attachment, plus a fax cover sheet, a classification cover sheet, and a routing cover sheet	15	Secret	b(1), b(5)
17	11/7/2001	State	DOJ, NSC	Nine page document concerning detention plus a fax cover sheet	10	Secret	b(5), b(6)
18	12/12/2002	State	CIA, DOJ	Four page cable concerning detention plus a fax cover sheet	5	Confidential	b(6)
19	11/19/2002	DOJ	DOJ	Six page cable concerning detention plus a routing cover sheet	7	Confidential	b(5), b(6)
20	4/16/2004	State	DOJ	One page document concerning an OLC draft memo	1	Unclassified	b(5)
21	7/14/2004	State	DOD, DOJ	Seven page draft letter with handwritten marginalia concerning an OLC draft memo, plus a fax cover sheet	8	Secret	b(5)
22	7/16/2004	DOJ	State	Five page letter concerning an OLC draft memo	5	Secret	b(5)
23	Undated	State	DOJ	Four page memo concerning an OLC draft memo with handwritten attorney notes	4	Secret	b(5)
24	2/4/2004	DOJ	DOJ	Two page email concerning interviews of detainees	2	Unclassified	b(5), b(6)
25	5/6/2004	FBI	DOJ	Ninety-one pages of documents concerning interrogation plus a routing cover sheet	92	Secret	b(2)
26	5/10/2004	DOJ	DOD	One page draft memo concerning interrogation	1	Top Secret	b(5)

Legend:

CIA—Central Intelligence Agency
DOD—Department of Defense
DOJ—Department of Justice
NSC—National Security Council
State—Department of State
UNK—Unknown
WHCO—White House Counsel's Office