SECOND DECLARATION OF MATTHEW G. OLSEN

Pursuant to 28 U.S.C. § 1746, I, Matthew G. Olsen, hereby declare:

1. I am the Executive Director of the Guantanamo Review Task Force ("Task Force") and Special Counselor to the Attorney General. I was appointed to these positions by the Attorney General on February 20, 2009. Prior to this appointment, I served as the Deputy Assistant Attorney General for the Office of Intelligence in the Department of Justice's National Security Division and, more recently, as Acting Assistant Attorney General for National Security. The statements made herein are based upon my personal knowledge and information made available to me in my official capacity.

2. The Task Force was created by the Attorney General, pursuant to an executive order of the President requiring a comprehensive interagency review of the status of each individual detained at the Guantanamo Bay Naval Base and the closure of the detention facilities at Guantanamo by January 22, 2010. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) ("Executive Order"). As stated in the Executive Order, the President determined that the "prompt and appropriate disposition of the individuals currently detained at Guantanamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice." Executive Order § 2(b). The sole purpose of the Task Force is to implement the President's order by conducting the interagency review and providing recommendations to designated Executive Branch officials regarding the appropriate disposition of each detainee held at Guantanamo.

3. I previously submitted a declaration on April 16, 2009, in response to orders issued by the Court in a number of the Guantanamo *habeas* cases inquiring whether the Task Force has gathered information about individual detainees and, in some cases, directing the Government to make certain information available to the detainees' counsel if possessed by the Task Force. That declaration provided general information about the status of the Task Force's efforts to assemble information pertaining to the detainees at Guantanamo.

4. The purpose of this second declaration is to: (1) provide further information about the nature of the information that has been made available to the Task Force; (2) describe how the Task Force has structured its operations in order to carry out its mandate from the President; and (3) explain why the Task Force's ability to perform that mandate would be jeopardized were Task Force resources diverted to reviewing and identifying information for purposes of the *habeas* litigation.

Nature of the Detainee-Related Information Made Available to the Task Force

5. As discussed in my prior declaration, since my appointment to serve as Executive Director, one of my goals has been to ensure that the Task Force has access to a collection of information that is as comprehensive as reasonably practicable pertaining to the detainees at Guantanamo.

6. To date, in response to taskings disseminated across the intelligence community, as well as to various non-intelligence agencies believed to have pertinent information, the Task Force has received significant information from the following entities:

- Central Intelligence Agency ("CIA")
- Department of Defense ("DOD")
- Department of Justice ("DOJ")
- Federal Bureau of Investigation ("FBI")
- National Security Agency ("NSA")
- Department of State

- National Counter-Terrorism Center ("NCTC")

7. In my prior declaration, I explained that the Task Force's information gathering effort is ongoing and is expected to remain ongoing for the foreseeable future. We have made substantial progress since my prior declaration toward obtaining a complete response from each of the agencies listed above. While we are continuing to receive information from these agencies on a rolling or as-needed basis, all of these agencies have now completed the bulk of their expected production to the Task Force.

8. As of April 20, 2009, the total amount of data loaded onto the Task Force's stand-alone network ("TF network") was estimated to consist of approximately 1.8 million pages, for a total of approximately 400,000 unique documents. The documents contained in this collection vary widely, but generally speaking the agencies above provided the following:

- CIA:
    - the results of records searches (*i.e.*, searches based on a detainee's name(s), aliases, and other identifying information) run for each individual detainee on CIA intelligence databases; and
    - finished intelligence products (*i.e.*, reports and analyses, as opposed to raw intelligence information) regarding various general topics of interest to the Task Force's work;
- DOD:
    - records of detainee-related administrative proceedings, such as Combatant Status Review Tribunals ("CSRT") and Administrative Review Board ("ARB") proceedings (which I understand were previously provided to DOJ for purposes of the *habeas* litigation), as well as documents pertaining to detainees gathered in preparation for those proceedings by DOD's Office for the Administrative Review of Detained Enemy Combatants ("OARDEC");
    - Detainee Assessment Briefs ("DABs") and summaries of biographic and capture information pertaining to the detainee prepared by the Joint Intelligence Group ("JIG") of Joint Task Force Guantanamo (which I

understand were previously provided to DOJ for purposes of the *habeas* litigation);

- files maintained on various detainees by the Office of Military Commissions ("OMC"), including files of the Criminal Investigative Task Force ("CITF") (established to investigate cases for prosecution in the military commission system); and

- finished intelligence products prepared by, and select material gathered by, the Defense Intelligence Agency on the Guantanamo detainee population as a whole or particular subgroups of the population;

- FBI:

  - the results of name traces on various detainees on FBI law-enforcement databases that were previously run for DOJ in connection with the Guantanamo *habeas* litigation;

  - the results of FBI name traces on detainees that were previously run in connection with military commission investigations or CSRT and ARB proceedings; and

  - records of FBI interviews of detainees (known as "302s" and "letterhead memoranda") provided to the DOJ *habeas* team, OMC, and OARDEC;

- DOJ:

  - the contents of the DOJ *habeas* team's consolidated database of files from the Joint Intelligence Group ("JIG") of Joint Task Force Guantanamo and the Office for Administrative Review of Detained Enemy Combatants ("OARDEC"); and

  - litigation-related documents pertaining to various *habeas* cases;

- NSA: the results of name traces on each detainee run on relevant NSA databases of disseminated NSA intelligence reports;

- NCTC: finished intelligence products on various topics of interest to the Task Force and other materials described in the NCTC declaration submitted herewith; and

- Department of State: information concerning potential destination countries for detainees approved for transfer or release.

9. Most of the documents reviewed by the Task Force reside on the TF network. The TF network, however, does not define the complete universe of documents available to the Task Force. As noted in my prior declaration, Task Force members also have access to certain external networks through which they can obtain additional information as needed. In particular, Task Force members have access to the Joint Detainee Information Management System (JDIMS), a dedicated database of Guantanamo-detainee information maintained by the Department of Defense, and the database of detainee information previously maintained for OMC. Also, Task Force members have access to more general intelligence databases based on members' respective agency affiliations. For example, CIA analysts on the Task Force are able to access certain intelligence databases generally available to them in their capacity as CIA analysts; and the same is true for members on the Task Force from the FBI, NCTC, and the Defense Intelligence Agency. Task Force members use these external agency databases to conduct targeted searches for specific items of information that, for a variety of reasons, may not be available on the TF network itself.

Structure of the Task Force's Operations

10. To date, the Task Force has assembled a staff of approximately 56 persons (excluding administrative staff). They are currently grouped into two types of teams for purposes of conducting the reviews of individual detainees: (1) transfer/release teams, responsible for determining whether detainees should be recommended for transfer or release; and (2) prosecution teams, responsible for determining whether the government should seek to prosecute detainees, including whether it is feasible to prosecute detainees in Article III courts. These teams prepare written recommendations in consultation with the Executive Director of the Task Force, who submits the recommendations to a Review Panel

composed of senior-level officials. The Review Panel members are authorized to decide the disposition of Guantanamo detainees.

11. Transfer/Release Teams. The Task Force's transfer/release teams are composed of persons drawn from a broad variety of agency backgrounds. They include intelligence analysts, FBI agents, military personnel, representatives from the Departments of Defense, State, and Homeland Security, and attorneys from the Department of Justice.

12. Transfer/release teams generally evaluate detainees in groups, with detainees typically grouped by country of origin, in light of various country-specific considerations that can be relevant to their disposition. The teams strive within the time available to cull and review the information available to the Task Force on each detainee in the group. The focus of the team's evaluation is on the degree of threat the detainee poses to the national security of the United States, as well as potential destination countries where it may be possible to transfer or release the detainee in the event that such disposition is deemed appropriate. Transfer/release teams are instructed to base their evaluation on the totality of available information regarding each detainee – including the credibility and reliability of the information – and to carefully scrutinize the basis for conclusions set forth in prior threat assessments, intelligence reporting, and other information related to the detainee.

13. Transfer/release team leaders work with their teams to prepare a package of written recommendations for the detainees in the group, to be submitted to the Review Panel by the Executive Director. Given the compressed schedule in which we must make these transfer/release evaluations, we do not prepare a formal administrative record encompassing all the information reviewed by the teams in making their recommendations. However, the

written recommendations prepared for the Review Panel do include citations to the sources of information referenced in those documents.

14. Based on our experience to date, it takes approximately three to four weeks for a transfer/release team to assemble a package of approximately 6-10 recommendations for submission to the Review Panel. These packages are prepared and submitted to the Review Panel on a staggered, rolling basis. As the Attorney General explained during his recent trip to Europe, as of April 29, 2009, approximately 30 detainees had been approved for transfer as a result of the Task Force's review. Other recommendations are scheduled to be made to the Review Panel in the coming weeks. Of course, the length of time required for the Review Panel's consideration varies depending on the complexities and circumstances of the case, as it also does for the Task Force's review. Also, once a favorable decision is issued by the Review Panel, it takes additional time to implement and often depends on the outcome of diplomatic efforts.

15. Prosecution teams. The Task Force's prosecution teams are staffed predominantly by federal prosecutors, but also include military prosecutors, investigative agents, and intelligence analysts. The prosecution teams review detainees who have not been or are unlikely to be approved for transfer or release, in order to determine whether the government should seek to prosecute the detainee and whether prosecution in an Article III court is feasible.

16. Given the distinct focus of the prosecution teams, they operate on a separate track from the transfer/release teams. Their current review priorities encompass those detainees who have already been charged in the military commission system at Guantanamo, as well as a larger group of detainees for whom the possibility of charges were still under consideration

by military commission prosecutors at the time the Executive Order was issued. As the work of the Task Force proceeds, prosecution teams also will review other detainees identified as unsuitable for transfer or release.

17. The recommendations of the prosecution teams are, like those of the transfer/review teams, being prepared on a rolling basis. Evaluating the potential for prosecuting these detainees involves novel and complex legal and evidentiary questions and, as a result, the prosecution teams generally take longer than the transfer/review teams to complete their recommendations.

The Task Force Review Process Should Remain Separate from the *Habeas* Litigation

18. As Executive Director of the Task Force I respectfully submit that the Task Force does not have the resources or capabilities to identify and collect discoverable and exculpatory information for litigation purposes. Further, subjecting Task Force information to discovery may divert the Task Force to litigation-related tasks and undermine our ability to carry out the mandate assigned to us by the Attorney General and the President. I also understand that a number of agencies that have produced information to the Task Force are submitting declarations to the Court, contemporaneous with this declaration, explaining how the exposure of their information to discovery in the Guantanamo *habeas* litigation would impose severe burdens on them given the sensitivity of the information and the difficulty of clearing its release, in any form, for litigation purposes.

19. **The Task Force's mandate.** As explained above, the sole mandate of the Task Force is to implement the President's order to close the Guantanamo detention facilities, by conducting an interagency review to determine the most appropriate disposition for each Guantanamo detainee. In contrast to the Guantanamo *habeas* litigation, the Task Force's

mandate is not limited to making a legal determination as to whether there is lawful authority to continue holding each detainee. Rather, pursuant to the Executive Order, our mandate is to recommend appropriate dispositions for each detainee based on broad, discretionary considerations of national security and foreign policy, as well as the interests of justice.

20. Importantly, the Task Force must carry out this mandate under significant time constraints. The Executive Order directs the closure of detention facilities at Guantanamo "as soon as practicable, and no later than 1 year from the date of this order" – *i.e.*, by January 22, 2010. *Id.* § 3. Further, it provides that "[i]f any individuals covered by this order remain in detention at Guantanamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States." *Id.*

21. At present, there are approximately 240 individuals who remain in detention at Guantanamo. An essential part of the Task Force's charge is to review the facts critically and independently for each detainee; we cannot simply rely on prior Executive determinations made concerning the detainee. Therefore, Task Force review teams must conduct a painstaking effort to assemble and sift through the intelligence reporting on each detainee and to scrutinize the available information about the detainee and the basis for his detention. These factual examinations are complex and time-consuming and must each be completed in a matter of weeks, on a rolling basis, in order for decisions to be reached on all of the detainees within the time frame established by the President**.**

22. **The Task Force teams are not in a position to conduct litigation-related discovery.** Transfer/review team members strive to review all material relating to a detainee in the Task Force's possession; however, due to time constraints they are not always able to review every available document. Further, the Task Force's transfer/release teams consist mostly of non-lawyers. While the teams take exculpatory information into consideration in making their evaluations, they are in no position to evaluate what information is discoverable or exculpatory for purposes of the *habeas* litigation. Most team members are not trained in the rules of civil discovery, they generally lack familiarity with the procedural history of individual *habeas* cases, and they cannot be expected to keep track of the varying discovery orders and definitions of exculpatory evidence issued in each one. By the same token, team members generally lack knowledge of what exculpatory materials have already been produced to detainee counsel in each case.

23. Requiring transfer/review team members to conduct comprehensive searches for information subject to discovery for litigation purposes would likely generate constant questions and confusion regarding the nature and extent of this obligation and overwhelm our resources – all to the detriment of the review teams' ability to complete their evaluations on time. Before they could begin an evaluation of a detainee for the Task Force's purposes, team members would have to familiarize themselves with the details of the detainee's *habeas* case, including the course of the litigation to date, the scope of any outstanding orders for discovery, and the nature of the materials already produced to detainee counsel through discovery. Each document reviewed by the review teams would have to be evaluated not only through the prism of national security and foreign policy concerns as required of the Task Force under the Executive Order, but also through the legal prism of *habeas* discovery.

Documents that might not be deemed sufficiently pertinent to be reviewed for the Task Force's purposes – because, for example, they are cumulative, or deal with ancillary issues – would nevertheless have to be scrutinized and perhaps set aside for further review for purposes of the *habeas* case. Frequent, if not daily, consultation with *habeas* litigators in the Department of Justice would be needed to answer any questions that arise and to ascertain whether particular documents fall within the scope of the government's discovery and disclosure obligations and have not been previously produced to detainee's *habeas* counsel. Given that the process would have to be repeated hundreds of times as the review teams complete their reviews of nearly 200 remaining detainees, the result would be a recurring, systemic imposition on the ability of the transfer/release teams to accomplish the mission assigned to the Task Force by the Attorney General within the time frame established by the President.

24. Similarly, the prosecution teams on the Task Force are ill-equipped to identify exculpatory and other discoverable information for litigation purposes As an initial matter, the prosecution teams are not charged with reviewing all of the Guantanamo detainees, but instead are reviewing only the subset of detainees disapproved (or likely to be disapproved) for transfer or release. Thus, the prosecution teams are by no means reviewing information on all of the detainees who have pending *habeas* cases.

25. Moreover, even as to those detainees who are being reviewed by the prosecution teams, the prosecution teams generally do not conduct a comprehensive review of all the raw evidence in the Government's possession concerning the detainees. Instead, their review tends to focus on key pieces of evidence identified in case files compiled by criminal investigators, in order to determine how that evidence could be used to build a viable

prosecution. While, like the transfer/release teams, the prosecution teams take into account exculpatory information in making their recommendations, they are in no position to conduct a full-scale search for all information that may be deemed exculpatory or discoverable for purposes of the *habeas* litigation. They lack the time and resources for conducting such a search, and in any event their review is taking place at a more nascent stage of the criminal process. The prosecution teams are merely recommending which detainees the government should seek to prosecute and whether prosecution is feasible in Article III courts. The Task Force prosecution teams are not initiating prosecutions, which can only be done by the Department of Justice (for a prosecution in an Article III court) or an appropriate military authority (for a prosecution brought in a military commission or other military forum). In the event that such prosecutions are ultimately authorized, it would be the responsibility of the prosecuting attorneys to do a complete search for exculpatory information pursuant to the rules applicable in the chosen prosecution forum.

26. A further reason why it would be inappropriate for the Task Force to conduct litigation-related searches is that the Task Force cannot be expected to conform the timing of its reviews to the various discovery schedules set in individual *habeas* cases. The Task Force must have the ability to structure its own review in the manner that best enables us to complete our review in a timely and orderly fashion. For example, the Task Force to date has focused on reviewing detainees in country-specific groups in part because there may be fact patterns or foreign policy issues common to each group, making it more efficient for all of the detainees in the group to be reviewed together.

27. Further, it is important for the Task Force to coordinate its review with ongoing diplomatic efforts by the Department of State. For every detainee determined to be eligible

for transfer or release, the Department of State must identify an appropriate destination country that is willing to accept the detainee. The Executive Order directs that the "Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate" to implement such arrangements. Executive Order § 5. These diplomatic efforts must be conducted in a coordinated rather than piecemeal or *ad hoc* fashion. Accordingly, the Department of State needs to be able to pursue a carefully coordinated diplomatic strategy in order to maximize the number of potential destination countries available for detainees approved for transfer or release. For this reason, the Task Force is coordinating its review with diplomatic priorities identified by the Department of State, and our schedule must be flexible to meet the demands of these diplomatic and other priorities. For example, a diplomatic urgency could suddenly arise, causing us to reshuffle our entire schedule and place cases that were at the back of the line to the front in the interest of the overall mission.. I am therefore concerned about any habeas-related obligations that would require the Task Force to reorient its review according to *litigation* timetables generated by discovery or other deadlines in the detainee *habeas* cases as opposed to the *diplomatic* timetables that are currently driving our review process.

28. **The Task Force's Written Evaluations and Recommendations.** I understand that there may be certain practical benefits to an approach that limits discovery of the information that the Task Force has assembled in each case to the documents that are cited in the Task Force's recommendation for that particular detainee. It is important to understand, however, that such an approach also has inherent limitations, as explained further below.

29. Most significantly, for the same reasons that the Task Force is not in a position to conduct civil discovery searches in the course of its review, the Task Force's

recommendations are not written with the purpose of identifying the catalog of information that may be deemed exculpatory or otherwise discoverable for purposes of the *habeas* litigation. Rather, as described above, our recommendations are focused primarily on the distinct policy question of whether a detainee can be transferred or released consistent with the national security and foreign policy interests of the United States (for the transfer/release teams) and on the mixed legal and factual question of whether a detainee should be prosecuted and whether it would be feasible to prosecute the detainee in an Article III court (for the prosecution teams).

30. While the facts that we deem material in evaluating these questions may overlap with the facts deemed material in the *habeas* cases, the degree of overlap may vary. For instance, a transfer/release team may determine that a detainee is appropriate for transfer based on an assessment of the detainee's potential threat, and therefore it may not be necessary for a review team to explore in full the facts underlying the legal basis for detention. Even where the review teams are focused on the same factual questions at issue in the *habeas* cases, our recommendations typically do not take pains to cite each piece of information that a petitioner might deem exculpatory or otherwise discoverable in litigation. Rather, our recommendations are intended to be summaries for senior-level officials, not line-by-line accounts of all the information at issue. Moreover, as explained above, the recommendations are written under time constraints and by staff members who are not in a position to evaluate what information is discoverable or exculpatory for purposes of a particular *habeas* case.

31. Accordingly, if a judgment is made to produce documents cited in the Task Force's recommendations for purposes of the habeas litigation, the Court and the litigants

should appreciate that it is not a substitute for exhaustive searches of information available to the Task Force, and that the Task Force's review schedule and priorities must remain coordinated with diplomatic strategies essential to closing Guantanamo.

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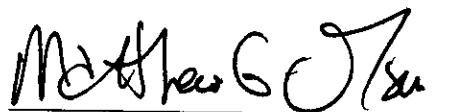
32. In sum, the Task Force is focused exclusively on completing the review required by the President in the Executive Order. Completing that review presents significant challenges. The diversion of Task Force time and resources for litigation purposes would have a detrimental effect on the Task Force's ability to conduct its mission. In particular, requiring the Task Force to conduct searches for exculpatory or otherwise discoverable information for purposes of the *habeas* litigation, relying on the Task Force to identify such information in its recommendations anymore than it would in its ordinary course of business, or requiring the Task Force to organize its review pursuant to litigation-driven deadlines, would significantly undermine the Task Force's ability to complete its review in the time required by the President. The Task Force was not designed to be an arm of the Department of Justice *habeas* litigation team, and it cannot be pressed into service for such a role without compromising its ability to carry out the prompt and comprehensive interagency review of the status of all Guantanamo detainees that is required by the Executive Order.

33. I hereby declare that the foregoing is true and accurate to the best of my knowledge.

Dated: May 12, 2009
Washington, D.C.



MATTHEW G. OLSEN