THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL. Defendants.	Case Number: 17-cv-07572

DECLARATION OF ERIC F. STEIN

Pursuant to 28 U.S.C. § 1746, I, Eric F. Stein, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services ("IPS") of the United States Department of State (the "Department") and have served in this capacity since January 22, 2017. Previously, I was the Acting Director since October 16, 2016, and Acting Co-Director since March 21, 2016. I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other applicable records access provisions. As the IPS Director, I have original classification authority and am authorized to classify and declassify national security information. Prior to serving in this capacity, from April 2013, I worked directly for the Department's Deputy Assistant Secretary ("DAS") for Global Information Services ("GIS") and served as a senior advisor and deputy to the DAS on all issues

related to GIS' offices and programs, which includes IPS. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of the Executive Order governing classified national security information), by members of Congress, by other government agencies, and those made pursuant to judicial process such as subpoenas, court orders, and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of the Department's library; and (8) technology applications that support these activities.

2. I am familiar with the efforts of Department personnel to process the subject request, and I am in charge of coordinating the agency's search and recovery efforts with respect to that request. I make the following statements based upon my personal knowledge, which in turn is based upon information furnished to me in the course of my official duties.

3. This declaration further describes the justification for the Exemption 5 and Exemption 7(E) withholdings that Plaintiff is still challenging.

FOIA Exemption 5

4. Plaintiff continues to challenge the Department's Exemption 5 withholdings in six documents. These documents were used to assist in the coordination between the President and other members of the Executive Branch in carrying out their responsibilities regarding immigration enforcement. These documents contain information covered by various privileges encompassed in Exemption 5: deliberative process privilege, attorney client privilege, presidential communications privilege, and attorney work product privilege.

5. **Document C06534021** is a memorandum entitled "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns." This memorandum was solicited for a meeting of the National Security Council (NSC) Lawyer's Group headed by a Deputy Legal Advisor to the National Security Council. The Deputy Legal Advisor was acting at the direction of John Eisenberg, the Assistant to the President, Deputy Counsel to the President for National Security Affairs, and Legal Advisor to the National Security Council, a senior presidential advisor with broad and significant responsibility for gathering information in the course of preparing advice for potential presentation to the President. This document is deliberative and predecisional with respect to visa policies considered by the President regarding the "endorse or espouse" provisions of the Immigration and Nationality Act. To the best of my knowledge, the analysis has not been publicly adopted formally or informally. The document offers legal analysis of a range of possible policy options, and this analysis was not binding on the Department or the President, and therefore is not working law. The document was kept confidential and was not widely disseminated; it was disseminated only to the attendees of the NSC Lawyer's Group, a select group of senior agency counsel, including the acting Assistant Legal Adviser of the Office of Consular Affairs at the State Department who retrieved the memorandum for this search. For these purposes, the members of the NSC Lawyer's Group are government officials and employees, and therefore their communications fall within the scope of governmental privileges. The document was prepared by U.S. Immigration and Customs Enforcement attorneys with input from the members of the Lawyers Group in order to provide legal advice for possible presentation to the President through Mr. Eisenberg. Finally, civil litigation has frequently challenged aspects of this administration's immigration policy (*see, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018);

Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018)), and this memorandum explicitly assesses the litigation risk of policy decisions in this area of immigration law. Because the entire memorandum consists of deliberative, legal analysis that is subject to the above-mentioned privileges, no part of the memorandum is segregable for release. Any limited factual material is inextricably intertwined with the deliberative and legal privileges. Therefore, this document was withheld in full under FOIA Exemption 5.

6. **Document C06569352** is an approved Action Memorandum entitled "Travel Sanctions Against Persons Who Participate in Serious Human Rights Violations and Other Abuses" that was withheld in part under FOIA Exemptions 5 and 7(E). **Document C06569347** is Tab 2 to the memorandum. The subject of the Action Memorandum is "Proposed Implementation Procedures," and the record bears the title "Procedures for Implementation of the 212(f) Proclamation Barring Entry of Aliens Involved in Various Human Rights and Humanitarian Law Abuses." This document was withheld in full under FOIA Exemption 5, with portions also withheld under FOIA Exemption 7(E). **Document C06569349** is Tab 3 to the memo, entitled "Background on Sanctions Authority" that was withheld in full under FOIA Exemption 5. This action memorandum was drafted in response to the request of the National Security Council Staff for "legal options for barring entry into the United States to aliens who participate in serious human rights and humanitarian law violations and related abuses" so that they could present those options to the President. The analysis in the memorandum and the two attachments to the memorandum is predecisional with respect to the President's final decision on whether to exercise his authority to bar entry in the United States of aliens who participate in serious human rights violations, which resulted in Presidential Proclamation 8697. To the best of my knowledge, the analysis in this memorandum and its attachments has not been publicly

adopted formally or informally. The documents offer legal and policy analysis of a range of possible policy options, including discussion of how to implement those options and potential interagency coordination. This analysis of proposals was not binding on the Department or the President, and therefore is not working law. As the released portion of the memorandum makes clear, the memorandum was provided at the request of the National Security Council Staff in order to advise the President in his creation of the policy announced in Presidential Proclamation 8697. The document was kept confidential and was not widely disseminated; it was created by the relevant equity holders at the Department and used by the Secretary to brief the National Security Council Staff. Portions of the Memorandum and the entirety of "Background on Sanctions Authority" contain legal advice given by the Legal Adviser, Harold Koh, to the Secretary of State and the President. Because the entirety of the two tabs consists of deliberative analysis that is subject to the above-mentioned privileges, no part of the tabs is segregable for release. The Action Memorandum has already been segregated to release all non-privileged information, and no further segregation is possible without harm to the privileges and law enforcement sensitive information contained in the redacted portions. Any limited factual material under the redactions is inextricably intertwined with the deliberative and legal privileges. Therefore, the two tabs were withheld in full under FOIA Exemption 5, as were portions of the Action Memorandum.

7. **Document C06568577** is a two-page memorandum from the Department of Justice's Office of the Legal Counsel entitled "Informal Legal Opinion on Section 212(d)(3)(B)(i) of the Immigration and Nationality Act." This informal opinion, distributed to the National Security Council, evaluates conflicting legal views among agencies on an interpretation of INA § 212(d)(3)(B)(i). The President and National Security Council used this

informal opinion to inform decisions on a policy related to a specific geographical region, the details of which are classified. To the best of my knowledge, the analysis in this memorandum and its attachments has not been publicly adopted formally or informally. The analysis specifically acknowledged different viable legal interpretations and was not binding on the agencies, and therefore is not working law. The document was kept confidential and was not widely disseminated; it was created by attorneys in the Office of the Legal Counsel and used to brief the National Security Council Staff. Because the entire memorandum consists of deliberative, legal analysis that is subject to the above-mentioned privileges, no part of the memorandum is segregable for release. Any limited factual material is inextricably intertwined with the deliberative and legal privileges. Therefore, this document was withheld in full under FOIA Exemption 5.

8. **Document C06570336** is a one-paragraph inter-agency Executive Branch memorandum from the Deputy Assistant Attorney General of the Department of Justice's National Security Division ("NSD") entitled "Memorandum for Michele T. Bond Acting Assistant Secretary Department of State." The analysis in this memorandum offers the National Security Division's legal views on a proposed exemption under INA § 212(d)(3)(B) for material support provided to a terrorist organization under duress. To the best of my knowledge, the analysis in this memorandum and its attachments have not been publicly adopted formally or informally and was provided prior to any exemption from INA § 212(d)(3)(B) being enacted. Accordingly, this memorandum is a pre-decisional record. Furthermore, NSD's views did not bind the Department of State to take an action, and so are not working law. Because the entire memorandum reflects NSD's deliberative, legal analysis and evaluation of a proposed exemption from an existing law, this record is subject to the deliberative process privilege. There is no non-

exempt information in the memorandum that could be segregated for release. Any limited factual material is inextricably intertwined with NSD's deliberative process and the Department of State's attorney client privilege, and would provide no informational value if disclosed. Thus, this memorandum is protected in full by the deliberative process privilege and attorney client privilege of Exemption 5 of the FOIA.

FOIA Exemption 7(E) – Law Enforcement Information

9. The Department withheld certain information under FOIA Exemption 7, which protects from disclosure all "records or information compiled for law enforcement purposes" that could reasonably be expected to cause one of the six harms outlined under 5 U.S.C. § 552(b)(7). The Department is a mixed-function agency and enforcement of the Immigration and Nationality Act falls squarely within the Department's law enforcement functions. The withheld information details investigation techniques used to assess the core national security concerns that arise in processing visa applications, such as triggers for further security investigations or checking for terrorism ineligibilities. These sections describe the proactive steps consular officers take to prevent criminals, terrorists, and other bad actors from entering the United States.

10. The Department reviewed the documents line by line, and released information wherever possible. The information that is redacted, including in 9 FAM 302.6-2(B)(3), does not appear unredacted elsewhere, and is more specific and technical than information that was released. Withheld section headings contain specific law-enforcement-sensitive information that must not be released.

V. CONCLUSION

11. In summary, the Department has carefully reviewed all of the documents addressed herein for reasonable segregation of non-exempt information and has implemented

segregation when possible. Otherwise, the Department determined that no segregation of meaningful information in the documents could be made without disclosing information warranting protection under the law.

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

Executed this 3rd day of May 2019, Washington, D.C.



Eric F. Stein