

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF DEFENSE,

Defendant.

Civil Action No. 1:26-cv-13447-PBS

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This is a motion for partial summary judgment for an order requiring production of the three records referred by the United States Marine Corps (“USMC”) to the U.S. Department of Defense (“DOD”) for determination (the “Referred Records”). These records are:

- Memorandum of August 27, 2025: “Identification of Judge Advocate General Officers and Civilian Attorneys for Potential Detail to the Department of Justice;”
- Memorandum of August 27, 2025: “Potential Department of Defense Support for Immigration Adjudication;” and
- Memorandum of Agreement Between the Department of Justice Executive Office for Immigration Review and the Department of War for the Detailing of Temporary Immigration Judges.

These records are responsive to both FOIA requests at issue in this case. They have already been identified, collected, and segregated for review. They are in the custody of DOD. DOD has never asserted that any FOIA exemption applies to these documents, and there is no evidence that any exemption applies.

There is an exceptionally high public interest in the immediate release of these three Referred Records. They appear to contain the operational parameters of a joint program between

DOD and the Department of Justice (“DOJ”) to substitute military personnel into the Immigration Court as Temporary Immigration Judges (“TIJs”), at a time when DOJ has been terminating large numbers of civilian Immigration Judges (“IJs”). TIJs hear the cases of people who have been arrested by U.S. Immigration and Customs Enforcement (“ICE”) inside the United States and accused of being noncitizens subject to deportation. TIJs therefore decide questions of exceptional consequence for people arrested inside the United States, including who is a citizen, who will be free or jailed during the Immigration Court proceedings, and who will ultimately be deported.

People appearing before the Immigration Court are entitled to a hearing before an IJ or TIJ who is “impartial” and “independent.” *See* 8 C.F.R. § 1003.10(b); *see also* U.S. Const. Amend. V (Due Process Clause). What is more, our system of government reflects the “deeply rooted and ancient opposition in this country to the extension of military control over civilians.” *See Reid v. Covert*, 354 U.S. 1, 23-24, 33 (1957) (plurality op.); *see also* 18 U.S.C § 1385 (Posse Comitatus Act). Yet there is strong reason to believe that these military TIJs are not merely reservists hired in their civilian capacities, but are in fact active-duty military servicemembers carrying out orders from DOD under the program described in the Referred Records. The program therefore appears to create a situation where active-duty military servicemembers are deciding the rights of civilians arrested inside the United States. Any such arrangement raises profound questions about the legality of the program and the decisions that result. Items that are currently left unanswered include: how exactly are these military personnel being assigned these duties? What exactly are they being ordered to do? What restrictions, pressures, or influences exist that might impair their impartiality and independence? And who is evaluating their performance of these duties and based on what criteria?

In addition to the three Referred Records that are the subject of this motion, DOD is no doubt in possession of additional records responsive to the two FOIA requests at issue. If past experience with FOIA cases is any guide, DOD will likely take the position that it will take time to develop search terms, run internal searches, review the results for responsiveness, and make determinations regarding the applicability of any exemptions or redactions for those additional records. In the meantime, the public should not have to wait months or years for access to the three Referred Records that have already been identified. Military TIJs across the country—including, it appears, at least five in Massachusetts—are deciding people’s rights *today*. Those people and their counsel need to know the basic parameters of the military TIJ program in order to assess whether the program is lawful and, if not, to make and preserve challenges to the legality of those proceedings and the decisions that result. ACLUM is consequently moving for partial summary judgment for an order requiring the release of the three Referred Records now.

BACKGROUND

The second Trump Administration has repeatedly deployed and attempted to deploy the military to exercise control over the civilian population inside the United States. *See generally District of Columbia v. Trump*, 810 F. Supp. 3d 19 (D.D.C. 2025) (Washington D.C.), stay pending appeal granted *District of Columbia v. Trump*, No. 25-5418, 2025 WL 3673674 (D.C. Cir. Dec. 17, 2025) (per curiam); *Newsom v. Trump*, 786 F. Supp. 3d 1235 (N.D. Cal. 2025) (Los Angeles), stay pending appeal granted *Newsom v. Trump*, 141 F.4th 1032 (9th Cir. 2025); *Oregon v. Trump*, 809 F. Supp. 3d 1193 (D. Or. 2025) (Portland), administrative stay vacated *Oregon v. Trump*, 163 F.4th 1309 (9th Cir. Jan. 8, 2026) (Mem.); *Illinois v. Trump*, No. 25-cv-12174, 2025 WL 2886645 (D. Ill. Oct. 10, 2025) (Chicago), stay pending appeal denied *Trump v. Illinois*, 146 S. Ct. 432 (2025). These actions raise profound questions about compliance with the law, the Constitution,

and the fundamental values of our democracy. *See, e.g.*, 18 U.S.C § 1385 (Posse Comitatus Act); *Reid*, 354 U.S. at 23-24, 33 (1957) (plurality op.) (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.”); *Ex parte Milligan*, 71 U.S. 2, 124-25 (1866) (“Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”); The Declaration of Independence para. 14 (U.S. 1776) (“He has affected to render the Military independent of and superior to the Civil power.”).

One manifestation of this pattern of military intrusion into civilian affairs is currently occurring in the Immigration Courts. As described below, it appears that DOD is operating a program to order active-duty military personnel to work as TIJs. This program is particularly concerning because it appears to place active-duty military servicemembers in a position to directly decide the rights of civilians arrested by the government inside the United States.

The Immigration Courts are, in theory, a check on executive power over the domestic population. ICE and other federal agencies routinely arrest people inside the United States and accuse them of being noncitizens subject to deportation. The job of the Immigration Courts is fundamentally to decide whether such accusations are true or false. *See* 8 C.F.R § 1003.14. The Immigration Courts are staffed by IJs, who are executive branch employees within DOJ. *See* 8 C.F.R. §§ 1003.9, 1003.10. The Immigration Courts are also sometimes staffed with TIJs, a category of temporary IJ position created in 2014. *See* 79 Fed. Reg. 39953, 39956 (July 11, 2014). TIJs perform essentially the same duties as IJs, and both IJs and TIJs are bound by the same requirements to exercise “impartial” and “independent” judgment. *See* 8 C.F.R. §§ 1003.10(b); 1003.10(e); *see also* U.S. Const. Amend. V (Due Process Clause).

IJs and TIJs perform numerous important duties that directly affect the rights and liberty of people arrested inside the United States. For example, IJs and TIJs decide whether a person is a citizen or not, if they can be deported or not, and, if a person can be deported, whether the person should, in fact, be ordered deported or instead be granted various grounds of relief from deportation. *See* 8 U.S.C. §§ 1229a(a), (c)(4). In those cases where a person is ultimately ordered deported, the IJ or TIJ is typically the officer who makes that decision and signs that order. *See* 8 U.S.C. §§ 1101(a)(47); 1220a(a)(1). Additionally, many people are eligible for release from custody during their immigration proceedings. *See* 8 U.S.C. § 1226(a); *Guerrero Orellana v. Moniz*, 813 F. Supp. 3d 185, 198-200 (D. Mass. 2025) (amended class definition and declaratory judgment), affirmed *Guerrero Orellana v. Moniz*, Nos. 25-2152, 26-1094, 2026 WL 2352042 (1st Cir. Aug. 13, 2026). IJs and TIJs determine who is eligible for release and, for those who are, hold detention hearings (often called “bond hearings”) to determine if the person will continue to be jailed or will be released on bail and/or conditions. *See* 8 C.F.R. § 1003.19. The IJ’s decision in the bond hearing is of exceptional consequence to a person’s liberty because deportation proceedings often take months and even years to complete. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 30 (1st Cir. 2021).

In the last year and a half, the Trump Administration has undertaken a series of actions that appear to undermine the fairness of proceedings in Immigration Court. DOJ has fired large numbers of IJs, many of whom had reportedly taken actions disfavored by the Trump

Administration.¹ These terminations continue to occur, including in Massachusetts.² At the same time, DOJ is actively recruiting new IJs to serve in positions it terms “deportation judges.”³ Even more recently, DOJ promulgated a notice of proposed rulemaking which would authorize IJs and TIJs to punish private litigants or their lawyers, *but not the government’s counsel*, for various forms of vaguely defined conduct.⁴ These actions, among others, suggest that the Trump Administration is attempting to chill advocacy and compromise judicial independence in order to secure rulings more favorable to the government and less favorable to people arrested by ICE.

Consistent with this pattern, as DOJ has removed large numbers of civilian IJs, DOD and DOJ have apparently undertaken a program to substitute active-duty military personnel into the Immigration Courts as TIJs. For more than a decade, only former IJs, former members of the Board of Immigration Appeals, certain current or former administrative law judges, and Department of Justice attorneys with at least 10 years of immigration law experience were eligible to serve as TIJs. *See* 79 Fed. Reg. 39953, 39956 (July 11, 2014). In August 2025, DOJ abruptly

¹ *See, e.g.,* Nicholas Nehamas et al., *How Trump Purged Immigration Judges to Speed Up Deportations*, N.Y. Times (updated Apr. 13, 2026), <https://www.nytimes.com/2026/04/09/us/politics/trump-miller-immigration-judges-purge.html>; Alan Gionet, *Fired immigration court judge shares concerns about enforcement of nation’s laws*, CBS News (July 16, 2026), <https://www.cbsnews.com/colorado/news/immigration-judge-brea-burgie-fired/>.

² *See* Rachell Sanchez-Smith & Stephanie Brown, *Another longtime immigration judge no longer at Boston court*, WBUR (July 27, 2026), <https://www.wbur.org/news/2026/07/27/boston-immigration-judge-omalley-firings>.

³ *See* Dep’t of Just., <https://join.justice.gov/> (last visited Aug. 14, 2026); Meg Satterthwaite & Sang-Min Kim, *Key Trump Deportation Strategies: Removing, Replacing, and Pressuring Immigration Judges*, Just Sec. (July 17, 2026), <https://www.justsecurity.org/147642/trump-deportation-immigration-judges/>.

⁴ Civil Monetary Penalty for Actions in Contempt of an Immigration Judge’s Proper Exercise of Authority, 91 Fed. Reg. 47979, 47981 (July 30, 2026).

rescinded these experience requirements. The new amended regulations permit the appointment of “any attorney” as a TIJ. *See* Designation of Temporary Immigration Judges, 90 Fed. Reg. 41883, 41886 (Aug. 28, 2025).

Around the same time DOJ eliminated the TIJ eligibility requirements, DOD reportedly authorized the assignment of up to 600 military service members as TIJs.⁵ It appears that these military service members are not merely reservists taking on new positions in their civilian capacities, but rather are being ordered to serve as TIJs in an active-duty status. *See, e.g.*, Declaration of Daniel L. McFadden (“McFadden Decl.”) Exs. K (internal solicitation for USMC personnel to accept Active Duty Operational Support (“ADOS”) orders for service as TIJs⁶), L (internal solicitation for active-duty and other Army personnel to accept assignments as TIJs). DOD reportedly continues to order military personnel on active duty to serve as TIJs in the immigration courts.⁷ It appears there are now five military TIJs assigned to Immigration Courts in Massachusetts.⁸

⁵ Konstantin Toropin, *Pentagon authorizes up to 600 military lawyers to serve as temporary immigration lawyers*, Associated Press (updated Sept. 2, 2025), <https://apnews.com/article/pentagon-immigration-judges-trump-pete-hegseth-b07950833591270b926ad86ede8b961f>.

⁶ ADOS orders are a program for “temporary active-duty opportunities,” during which the servicemember will “receive full active duty pay and benefits.” *See* “Active Duty Operation Support Orders (ADOS Orders),” Marine Corps Forces Reserve, (last accessed Aug. 13, 2026), <https://www.marforres.marines.mil/Staff-Sections/General-Staff/G-1-Administration/Active-Billets/Find/> (under “What is ADOS” tab).

⁷ Celine Castronuovo & Ben Penn, *DOD Moves to Order Military Lawyers to Be Immigration Judges* (3), Bloomberg L. (updated June 30, 2026), <https://news.bloomberglaw.com/us-law-week/hegseth-moves-to-order-military-lawyers-to-be-immigration-judges>.

⁸ See U.S. Dep’t of Just., Exec. Off. for Immigr. Rev., *EOIR Announces Regional Deputy Chief Immigration Judge, Administrative Law Judge, 37 Immigration Judges and 4 Temporary Immigration Judges* Biographical Information (July 29, 2026), <https://www.justice.gov/eoir/media/1454606/dl?inline> (Cmdr. Kai V. Bernal-LeClaire, U.S. Navy

As described by many independent legal commentators, the apparent assignment of active-duty military personnel to adjudicate the physical liberty and potential expulsion of civilians inside the United States raises serious legal questions.⁹ The people being subjected to this program might be able to raise these concerns in their removal proceedings, in Petitions for Review to the U.S. Courts of Appeal, or elsewhere—but doing so generally requires sufficient information to describe what exactly is happening. DOJ and DOD have kept the public largely in dark. ACLUM filed FOIA requests to ensure the public has timely and transparent access to information about the military TIJ program.

Reserve; Lt. Col. Terry M. Meinecke, U.S. Army Reserve); U.S. Dep't of Just., Exec. Off. for Immigr. Rev., *EOIR Announces 11 Immigration Judges and 25 Temporary Immigration Judges* (Oct. 24, 2025), <https://www.justice.gov/eoir/media/1415981/dl?inline=> (Sujata Rodgers, U.S. Army Judge Advocate General's Corps; Lt. Col. Jason David Thomas, U.S. Army Reserve Judge Advocate General's Corps); Dep't of Just., Exec. Off. for Immigr. Rev., *EOIR Announces 77 Immigration Judges and 5 Temporary Immigration Judges* Biographical Information (May 21, 2026), <https://www.justice.gov/eoir/media/1441406/dl?inline> (Capt. Jared J. Monaco, U.S. Army Reserve Judge Advocate General's Corps); *see also* 170 Cong. Rec. S6499, 6533 (daily ed. Nov. 12, 2024) (nomination of Sujata M. Rodgers to rank of colonel in the Army).

⁹ *See* Steven J. Lepper, *Hypothetical Legal Review on Judge Advocates Serving as Immigration Judges*, Just Sec. (Dec. 16, 2025), <https://www.justsecurity.org/126460/olc-memo-judge-advocates-immigration-judges/>; Suzanne Monyak & Celine Castronuovo, *DOJ Memo Draws Doubts on Military Lawyers as Immigration Judges*, Bloomberg L. (Nov. 18, 2025), <https://news.bloomberglaw.com/us-law-week/doj-memo-draws-doubts-on-military-lawyers-as-immigration-judges>; Margy O'Herron, *Using Military Lawyers as Immigration Judges Is Ill-Advised and Potentially Illegal*, Brennan Ctr. for Just. (Sept. 29, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/using-military-lawyers-immigration-judges-ill-advised-and-potentially>; Adriel Orozco, *Trump Administration Appoints Hundreds of Unqualified Military Lawyers to Serve as Immigration Judges*, Am. Immigr. Council (Sept. 5, 2025), <https://www.americanimmigrationcouncil.org/blog/trump-appoints-military-lawyers-to-serve-as-immigration-judges/>; Andrew Turley & John Ewers, *Why It's Wrong to Involuntarily Mobilize Reserve JAGs for Immigration Cases*, Just Sec. (July 16, 2026), <https://www.justsecurity.org/146560/involuntarily-mobilize-military-lawyers-wrong/>.

MATERIAL FACTS

Last October, ACLUM submitted identical FOIA requests regarding the military TIJ program to DOD (via the Office of the Secretary of Defense/Joint Staff FOIA office) and to the Department of the Navy. *See* ACLUM Statement of Facts (“SOF”) ¶¶6, 12; *see also* McFadden Decl. Ex. A (FOIA request).

DOD assigned its request case number 26-F-0130 (the “OSD/JS Request”). SOF ¶8. DOD has not provided any final response to the OSD/JS Request, has not provided any responsive records, and has not asserted any FOIA exemptions for any responsive records that may exist. *Id.* ¶10. DOD’s tracking website lists the OSD/JS Request simply as “In Process.” *Id.* ¶11.

DON has been more active. In early March, DON referred ACLUM’s request (the “DON Request”) to the USMC. *Id.* ¶15. On or about June 11, 2026, USMC referred three records to OSD/JS to make a release determination and respond directly to ACLUM. *Id.* ¶17; *see also* McFadden Decl. Ex. G. (USMC referral memorandum). These three Referred Records are:

- Memorandum of August 27, 2025: “Identification of Judge Advocate General Officers and Civilian Attorneys for Potential Detail to the Department of Justice;”
- Memorandum of August 27, 2025: “Potential Department of Defense Support for Immigration Adjudication;” and
- Memorandum of Agreement Between the Department of Justice Executive Office for Immigration Review and the Department of War for the Detailing of Temporary Immigration Judges.

See SOF ¶17; McFadden Decl. Ex. G. OSD/JS assigned the Referred Records case number 26-F-2511, but has not made any determination about them, has not released them, and has not asserted that any FOIA exemption applies to them. *See* SOF ¶¶18-19.

The Referred Records are currently in the custody of OSD/JS, a FOIA office for DOD. *Id.* ¶¶5, 20. The Referred Records are responsive to both the DOD Request and the DON Request.

Id. ¶¶21-22. The Referred Records are not subject to any exemption from release under FOIA. *Id.* ¶¶10, 19, 23.

ARGUMENT

A party may move for summary judgment in whole or in part “at any time until 30 days after the close of all discovery.” *See* Fed. R. Civ. P. 56(b). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Friedman v. Cent. Me. Power Co.*, 174 F.4th 233, 240 (1st Cir. 2026). “As to issues on which the summary judgment target bears the ultimate burden of proof, she cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute.” *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 315 (1995).

Under FOIA, the relevant agency bears the burden to prove that any withholding is justified, and the Court must review any such assertion *de novo*. *See* 5 U.S.C. § 552(a)(4)(B); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 137 (1975) (explaining that FOIA “seeks to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language” (citation modified)). Consequently, an agency withholding records bears the burden of proving that withheld materials fall within one of FOIA’s statutory exemptions. *See Church of Scientology Int’l v. DOJ*, 30 F.3d 224, 228 (1st Cir. 1994) (explaining that “[t]he government bears the burden of demonstrating the applicability of a claimed exemption . . . and the district court must determine *de novo* whether the queried agency has met this burden”). And even if the government proves that a document contains *some* exempt information, “all reasonably segregable, non-exempt portions of any agency records must, after deletion of the exempt material, be disclosed to a requester.” *Id.* (citation modified).

Here, DOD has not shown that any of three Referred Records is exempt from release either in whole or in part. *See* SOF ¶23. Indeed, DOD has never claimed that any exemption applies to these records. *See id.* ¶¶10, 19. One of the Referred Records appears to be DOD’s final agreement with DOJ for the military TIJ program, and the other two appear to be statements of DOD’s policies and decisions—all examples of records releasable under FOIA. *See, e.g., ACLU of Mass. v. ICE*, 686 F. Supp. 3d 11, 21-23 (D. Mass. 2023) (Saris, J.) (ordering disclosure of “a description of a publicly disclosed agreement and operational guidance for meeting the terms of the agreement,” a “policy statement,” “administrative guidance,” and “administrative and operational instructions and procedures”); *Block & Leviton LLP v. Fed. Trade Comm’n*, No. 19-12539, 2020 WL 6082657, at *2, 8 (D. Mass. Oct. 15, 2020) (Saris, J.) (ordering disclosure of draft settlement agreements to the extent they do not disclose certain commercial information about non-governmental entity, and ordering *Vaughn* index and potential *in camera* review for any withheld records); *ACLU of Mass. v. ICE*, 448 F. Supp. 3d 27, 38-41 (D. Mass. 2020) (Sorokin, J.) (ordering disclosure of draft talking points about “an already-decided policy decision”). It has now been more than two months since USMC sent the Referred Records to OSD/JS. DOD has not met its burden to justify withholding these three Referred Records, and they should therefore be released.

CONCLUSION

For the foregoing reasons, ACLUM respectfully requests that the Court:

- (a) Order DOD to produce the Referred Records to ACLUM in their entirety within three (3) business days after the Court’s order;
- (b) Enter a corresponding declaration that the Referred Records are public records under FOIA, and that DOD violated FOIA by failing to produce them in response to ACLUM’s request.

A proposed order is filed herewith.

Dated: August 14, 2026

Respectfully submitted,

/s/ Julian Bava

Jessie J. Rossman (BBO #670685)

Daniel L. McFadden (BBO #676612)

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L.R. 7.1 CERTIFICATION

I hereby certify that counsel for Plaintiff conferred with counsel for the government in a good faith effort to narrow or resolve the relief requested in this motion. No counsel has yet appeared in this case for the government. Counsel for Plaintiff conferred with a representative for the U.S. Attorney's Office for the District of Massachusetts. That attorney indicated that the government will likely oppose this motion.

Date: August 14, 2026

/s/ Julian Bava

Julian Bava

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2026, a copy of the foregoing document will be served on all registered participants through the Court's CM / ECF system. No counsel has yet appeared for the government. A copy of the foregoing document will therefore also be served on the U.S. Attorney's Office for the District of Massachusetts by electronic mail.

Date: August 14, 2026

/s/ Julian Bava

Julian Bava