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15-2956

15-3122(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 15-2956, 15-3122(XAP)

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs-Appellants–Cross-Appellees,

v.

UNITED STATES DEPARTMENT OF JUSTICE, INCLUDING ITS COMPONENT THE OFFICE OF LEGAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE, INCLUDING ITS COMPONENT U.S. SPECIAL OPERATIONS COMMAND, CENTRAL INTELLIGENCE AGENCY,
Defendants-Appellees–Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLEES–CROSS-APPELLANTS

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(U) TABLE OF CONTENTS

(U) TABLE OF AUTHORITIES

(U) *Cases*

(U) *Statutes*

(U) *Rules*

(U) PRELIMINARY STATEMENT

(U) Defendants-appellees-cross-appellants the United States Department of Justice ("DOJ"), the Central Intelligence Agency ("CIA"), and the Department of Defense (together, the "government") respectfully submit this reply brief in support of their cross-appeal seeking reversal of the district court's order requiring disclosure of all or part of seven documents.[1] As demonstrated in the government's opening brief, all seven documents are privileged and protected in their entirety by Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5). Three documents also contain discrete classified and statutorily privileged information protected by Exemptions 1 and 3, *id.* § 552(b)(1), (3), that the district court failed to protect.

(U) Contrary to the premise of the ACLU's opposition brief ("ACLU Opp."), the government has not waived its ability to protect privileged legal advice and analysis on the subject of the use of targeted lethal force. This Court's decision in *New York Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014) ("*NYT I*"), which found a waiver of privilege as to certain legal analysis in the so-called "OLC-DOD Memorandum," does not mean that other undisclosed and

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[1] (U) The district court upheld the government's determinations as to the vast majority of the responsive documents, as discussed in the government's opening brief ("Gov't Br."). In accordance with Fed. R. App. P. 28.1(c)(4), this reply brief is limited to the issues presented by the government's cross-appeal.

independently privileged documents on the same subject are no longer protected. The ACLU's position misconstrues the Court's prior decisions in this case and is flatly inconsistent with settled law holding that a waiver of privilege as to one attorney-client or deliberative communication does not mean that other, undisclosed communications must be released.

~~(TS//NF) (Privileged)~~ Moreover, the ACLU fails to rebut the government's showing that the seven documents at issue in this cross-appeal remain protected in full by Exemption 5, as they are independently privileged attorney-client communications and/or predecisional deliberations that have not been previously disclosed. OLC 46 is an email communication from a client to attorneys at the Office of Legal Counsel ("OLC"), confirming the client's understanding of predecisional legal advice provided by OLC regarding [redacted]. The privileged legal advice reflected in OLC 46 has never been disclosed, and it remains fully protected by the attorney-client and deliberative process privileges notwithstanding the disclosure (in the OLC-DOD Memorandum) of earlier OLC advice on [redacted] whether the United States could lawfully target Aulaqi [redacted]. Tab C of CIA 59 is also protected in its entirety by the deliberative process privilege; it is a predecisional draft document presented as an option to, and ultimately not selected

by, decisionmakers. The remaining documents (OLC 50, 144 and 145, and CIA 109 and 113) are also predecisional and deliberative drafts. Indeed, the ACLU has effectively abandoned its claim to OLC 50.

(U) Three of the documents also contain discrete information that is classified and statutorily protected that the district court failed to order redacted. None of this information has been officially acknowledged, and thus it remains protected by Exemptions 1 and 3, in addition to Exemption 5.

(U) The ACLU's claim of "procedural unfairness" is also unavailing. The district court followed this Court's mandate in reviewing detailed classified indexes, and in many cases the responsive classified and privileged documents themselves, *in camera*. The district court's classified decision contains its document-by-document rulings, frequently discussing the classified or privileged aspects of the responsive documents. It is hardly surprising that this sort of *in camera* review—precisely the sort of review sought by the ACLU—would result in an opinion discussing exempt aspects of the reviewed material. And this Court has approved the government's filing of redacted briefs to address the classified, statutorily protected and privileged information in the district court's decision.

(U) ARGUMENT

I. (U) The Government Has Not Waived Its Ability to Obtain Confidential, Privileged Legal Advice and Engage in Privileged Deliberations on the Subject of the Use of Targeted Lethal Force

(U) The ACLU misconstrues this Court's decision in *NYT I*, reading it so broadly as to suggest that the government has "officially acknowledged" any and all legal analysis regarding the legal basis for targeted lethal operations and thus cannot withhold such analysis—even if that analysis is contained in independently privileged attorney-client communications or deliberations. The ACLU's interpretation is wrong, and inconsistent with decades of established law.

(U) First, the ACLU conflates the two distinct doctrines of waiver of privilege and official acknowledgment of classified information. Under the official acknowledgment doctrine, a court examines whether the government can withhold a particular fact as classified under Exemption 1 where that fact has been the subject of an official and authorized disclosure. *See, e.g., Wilson v. CIA*, 586 F.3d 171, 189 (2d Cir. 2009). In contrast, where the government has waived privilege as to a particular attorney-client or deliberative communication, the question is whether the waiver of privilege extends to other communications on the same or similar subjects under traditional standards of waiver applicable to the relevant privilege. Under those standards, a waiver of privilege for legal advice on a given topic does not waive privilege for other communications containing legal advice on

the same topic that have never been discussed publicly, or for similar legal advice on the topic prepared in the context of a different deliberative process or attorney-client communication. *See, e.g., In re Von Bulow*, 828 F.2d 94, 103-04 (2d Cir. 1987); *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997).

(U) The Court held in *NYT I* that the prior disclosure of "virtually parallel[]" legal analysis in the DOJ White Paper, which the Attorney General had publicly acknowledged was closely related to "underlying OLC advice," waived the privileges protecting certain legal analysis in a final OLC opinion concerning a contemplated strike against Anwar al-Aulaqi (the "OLC-DOD Memorandum"). 756 F.3d at 116. The Court also held that two discrete facts contained within that legal analysis no longer merited protection: (1) the fact that the CIA had an undefined "operational role" in the operation that targeted Aulaqi (and in drone strikes generally), although the Court did not find any official acknowledgment of the nature or details of that role, and (2) the fact that Aulaqi was targeted in Yemen, although the Court held that other facts regarding Yemen and all intelligence information concerning Aulaqi remained properly classified. Because the privileges protecting the legal analysis in the OLC-DOD Memorandum had been waived, it was no longer protected by FOIA Exemption 5. *See id.* at 114-19.

(U) In *NYT I*, this Court also applied the doctrine of official disclosure (or official acknowledgment) to consider whether legal analysis in the OLC-DOD

Memorandum could be withheld as classified under Exemption 1. *Id.* at 120. The Court found that the legal analysis in the OLC-DOD Memorandum could no longer be classified, and thus had lost the protection of Exemption 1, because virtually parallel analysis had been officially disclosed in the closely related DOJ White Paper. Thus, the Court concluded, release of the legal analysis in the OLC-DOD Memorandum would not cause harm to national security. That is a very different question from whether legal analysis remains privileged and protected by Exemption 5. The ACLU's assertion that "[t]he government's official acknowledgments waive its right to withhold certain records under Exemption 5," ACLU Opp. 26, confuses these two distinct inquiries.

(U) Second, the Court's finding that the government had both waived privilege and officially acknowledged previously classified legal analysis in the OLC-DOD Memorandum does not mean that the same is true of other legal advice or analysis on the same subject. To the contrary, the Court explicitly recognized in *NYT I* that legal analysis regarding the use of targeted lethal force could very well remain classified in other contexts. *See, e.g.*, 756 F.3d at 119 ("in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation"). And in *New York Times Co. v. DOJ*, 806 F.3d 682 (2d Cir. 2015) ("*NYT II*"), the Court held that several other OLC memoranda providing legal advice on the subject of the use

of lethal force were classified and protected by Exemption 1 in their entirety. *Id.* at 685, 687 (discussing Exhibits A, C, F-K). The Court further held that legal advice in another OLC memorandum from 2002 remained privileged even though it addressed some of the same legal authorities and principles (*e.g.*, Executive Order 12,333) that were later addressed in the publicly released DOJ White Paper and OLC-DOD Memorandum. *See id.* at 685-87 (discussing Exhibit E). The Court recognized that "[e]ven if the content of legal reasoning set forth in one context is somewhat similar to such reasoning that is later explained publicly in another context, such similarity does not necessarily result in waiver." *Id.* at 686.[2]

(U) Third, the ACLU's contention that the waiver of privilege as to legal analysis in the OLC-DOD Memorandum extends to other privileged communications and deliberations on the subject of the use of targeted lethal force is inconsistent with well-established precedent applying a narrow concept of privilege waiver. This Court has repeatedly held that disclosure of an attorney-client communication outside the litigation context does not waive privilege over separate, undisclosed communications, even if the undisclosed communications are "related conversations . . . on the same subject." *In re von Bulow*, 828 F.2d at 103-

[2] (U) While the "passage of a significant interval of time" was one factor the Court considered in finding no waiver as to the 2002 OLC memorandum, the Court's ruling was also based on "the differences in contexts" between that memorandum and later public statements. *NYT II*, 806 F.3d at 686.

04 (granting writ of mandamus and reversing disclosure order). The ACLU's argument that parties may be prohibited from "selectively disclosing information for use as a sword while protecting related information behind a shield of privilege," ACLU Opp. 29, is inapposite; this principle does not apply to disclosures outside the context of litigation. *See In re von Bulow*, 828 F.2d at 102 ("the extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary's prejudice—does not waive the privilege as to the undisclosed portions of the communication"); *John Doe Co. v. United States*, 350 F.3d 299, 306 (2d Cir. 2003) (reversing disclosure order and noting that *In re von Bulow* court found no waiver even though the party making the disclosure was "attempting to win over the 'court of public opinion'").

(U) Courts have applied waiver principles even more narrowly in the deliberative process context. Thus, release of a deliberative document does not create a broad subject-matter waiver requiring disclosure of related documents on the same topic; rather, the privilege is waived only as to the specific document disclosed. *In re Sealed Case*, 121 F.3d at 741; *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700-01 (9th Cir. 1989); *see also United States v. Wells Fargo Bank, N.A.*, No. 2015 WL 6395917, at *1 (S.D.N.Y. Oct. 22, 2015) (noting that "courts have overwhelmingly (if not uniformly) held that 'the release of a document only

waives the deliberative process privilege for the document that is specifically released, and not for related materials," and quoting *Sealed Case*, 121 F.3d at 741); Gov't Br. 56. This rule serves "to ensure that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents." *Sealed Case*, 121 F.3d at 741.

(U) In response, the ACLU contends that this Court looked to a number of public disclosures and statements in finding a waiver of privilege as to the legal analysis in the OLC-DOD Memorandum. ACLU Opp. 27-28. But this misses the point. While this Court in *NYT I* cited public statements in the course of its opinion, at no point did it suggest (let alone hold) that those statements established a waiver of privilege. Rather, the Court found them relevant in establishing the "context" for determining whether legal analysis in a withheld document (the OLC-DOD Memorandum) was sufficiently identical to an already released document (the DOJ White Paper) to constitute waiver. 756 F.3d at 114-15. Under the well-settled case law cited above and in the government's opening brief (at 55-56), the limited waiver the Court found in *NYT I* concerning legal analysis in the OLC-DOD Memorandum does not extend to similar legal analysis in other, independently privileged communications or deliberations, as this Court recognized in *NYT II*, 806 F.3d at 686.

(U) The ACLU's expansive theory of waiver and official acknowledgment, if adopted by the Court, would have a dramatic and far-reaching adverse impact on the ability of government officials to obtain candid and frank legal advice regarding targeted lethal operations (and more generally). As this Court has noted, "public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest." *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (granting writ of mandamus and vacating order directing disclosure of communications between government attorney and client).

> It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business. Abrogating the privilege undermines that culture and thereby impairs the public interest.

In re Grand Jury Investigation, 399 F.3d 527, 534 (2d Cir. 2005), *quoted in In re County of Erie*, 473 F.3d at 419.

(U) Nowhere could it be more crucial that government officials have access to candid, fully informed legal advice than in the context of decisions about the use of lethal force. Yet under the ACLU's theory, the government could no longer have confidence that attorney-client communications and deliberations regarding such decisions will remain confidential, as virtually any legal advice and analysis

concerning the authorities and concepts discussed in the DOJ White Paper and OLC-DOD Memorandum could be subject to compelled disclosure unless they were classified. Such a result would be flatly inconsistent with this Court's precedents, which have scrupulously enforced the attorney-client privilege and recognized its unique importance in the government context. *In re County of Erie*, 473 F.3d at 419; *In re Grand Jury Investigation*, 399 F.3d at 534.

II. (U) The Documents at Issue in the Government's Cross-Appeal Are Privileged and Protected by Exemption 5 in Their Entirety

(U) The government has demonstrated that the seven documents at issue in its cross-appeal are privileged attorney-client communications and/or predecisional, deliberative documents protected by the deliberative process privilege. Gov't Br. 57-70. The documents were created in the course of attorney-client communications or Executive Branch deliberations that have not been previously disclosed, and they therefore remain privileged notwithstanding the Court's finding of waiver as to the legal advice in the OLC-DOD Memorandum. The ACLU's opposition fails to rebut the government's showing that all seven documents are privileged and protected by Exemption 5 in their entirety.

A. (U) OLC 46

(U, ~~Privileged~~) OLC 46 is privileged in full because it is a confidential communication between a government client [redacted]

[redacted] and its attorneys in OLC, made for the purpose of obtaining legal advice. *See In re County of Erie*, 473 F.3d at 418. The district court erred in ordering disclosure of portions of the communication containing legal advice similar to the analysis in the DOJ White Paper or OLC-DOD Memorandum, because OLC 46 is a wholly distinct and independently privileged communication, which has not previously been disclosed. That the communication involved matters [redacted] does not defeat the privilege. Just like the nondisclosed attorney-client communications in *In re von Bulow*, the client's [redacted] remain privileged despite the public disclosure of earlier OLC advice memoranda concerning a contemplated action against Anwar al-Aulaqi. 828 F.2d at 103.[3]

~~(TS//NF) (Privileged)~~ In addition to being protected by the attorney-client privilege, OLC 46 also is protected in full by the deliberative process privilege.

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[3] (U) The ACLU points out that the communication took place "*at most* two years" after the OLC's earlier advice. ACLU Opp. 32. But the ACLU's premise that the privilege is lost merely because a communication is close in time to another legal advice document for which privilege was found to be waived is plainly wrong. The privileged conversations that the Court held remained protected in *In re von Bulow* took place contemporaneously with the disclosed conversations. *See* 828 F.2d at 102-03. The legal advice contained in OLC 46 plainly concerns a distinct question in a materially different deliberation than the legal advice contained in the OLC-DOD Memorandum, and these differences in context would defeat any argument for waiver regardless of when the advice was conveyed.

Again, the document represents a separate and independently privileged Executive Branch deliberative communication. The OLC advice memoranda that have been publicly disclosed addressed whether and under what circumstances a contemplated operation against Aulaqi would be lawful. OLC 46, by contrast, addressed [redacted] is a materially different deliberation and decision than whether to target Aulaqi [redacted]. That deliberation and decision have never been disclosed by the Executive Branch, as the district court correctly found. [redacted]

(U, ~~Privileged~~) The ACLU repeats the district court's patently erroneous suggestion that "final" OLC legal advice cannot be predecisional. ACLU Opp. 13-15. That is not the law. Although OLC's advice to a client may be final in the sense that it represents OLC's final legal advice, it precedes the client's decision regarding whether to take the action in question (here, [redacted], and it was "prepared in order to assist an agency decisionmaker in arriving at [its] decision." *Renegotiation Bd. v. Grumman*

Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (document predecisional if it was "prepared to assist . . . decisionmaking on a specific issue"). Predecisional legal advice, no less than any other type of advice, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *see also Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356–57 (2d Cir. 2005) (final OLC memorandum protected by deliberative process privilege absent express adoption).

(U) The ACLU fares no better with its claim that OLC advice is not protected by the deliberative process privilege because "OLC's *final* opinions . . . *are* the relevant 'government decisions' about the proper view of the law." ACLU Opp. 15; *see also id.* at 13-14 & n.8 (citing *Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002), and arguing that OLC opinions are binding on the Executive Branch). This is the same "working law" argument that the Court definitively rejected in *NYT II*. As the Court recognized in *NYT II*, "OLC documents are not 'working law'"; "[a]t most, they provide, in their specific contexts, legal advice as to what a department or agency is *permitted* to do." 806 F.3d at 687 (quoting *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 10 (D.C. Cir. 2014); internal quotation marks omitted).[4]

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[4] (U) ACLU sought rehearing on this precise question in *NYT II*, which was denied. *See* Dkt. Nos. 14-4432, 14-4764, at ECF Nos. 141, 146 (2d Cir.).

~~(TS/NS) (Privileged)~~ Like the OLC advice memoranda in *NYT II*, the legal advice reflected in OLC 46 is not "working law," but rather advice to a decisionmaker about what the Executive Branch was lawfully permitted to do. Specifically, in OLC 46, the client memorialized its understanding of OLC's advice that [redacted]. OLC did not opine that [redacted]; it simply opined that [redacted]. This is quintessential predecisional and deliberative advice that is protected by the deliberative process privilege and Exemption 5.

B. **(U) CIA 59, Tab C**

(U) The ACLU also fails to rebut the government's showing that Tab C of CIA 59 is protected in its entirety by the deliberative process privilege. Contrary to the ACLU's claim, ACLU Opp. 15, the government has both "pinpoint[ed] the specific agency decision to which [Tab C] correlates" and "verif[ied] that the document precedes the decision to which it relates." ACLU Opp. 15 (citing *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (alteration and internal quotation marks omitted)).

(U, ~~Privileged)~~ As explained in the government's submissions to the district court, and as is apparent from the document itself, Tab C [redacted]

[redacted]. CA 757-89. At the time these high-level inter-agency deliberations were ongoing, it had been reported that Aulaqi, an American citizen, had been killed in a drone strike in Yemen in September 2010, but the United States had not officially acknowledged that Aulaqi had been targeted by the United States. While this information at that time remained classified (it was not declassified until May 2013), officials at the highest levels of government were engaged in the process of [redacted].

(U, ~~Privileged~~) Tab C is a draft [redacted] a draft White Paper [redacted]. Tab C preceded that decision, and was "prepared in order to assist an agency decisionmaker in arriving

at [its] decision." *Grumman*, 421 U.S. at 184; *Tigue*, 312 F.3d at 80. It therefore easily satisfies the predecisional element of the deliberative process privilege.

(U, ~~Privileged~~) Tab C of Document 59 is also deliberative. It was one of the inputs to the decisionmaking process—specifically, one of several options under consideration by decisionmakers—and "formed an important, if not essential, link in the . . . consultative process." *Grand Cent. P'ship*, 166 F.3d at 483; *Hopkins v. HUD*, 929 F.2d 81, 84-85 (2d Cir. 1991) (privilege applies to "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'" (quoting *NLRB v. Sears*, 421 U.S. 132, 150 (1975))). Tab C does not, as the ACLU suggests, ACLU Opp. 17, simply reflect "decisions already reached." On the contrary, its release would reveal the content of deliberations [redacted]. *See* Gov't Br. 65-66.

(U) The ACLU argues that Tab C is not protected by the deliberative process privilege and Exemption 5 because it is a so-called "messaging" document containing "deliberations concerning how to present government policies to the public." ACLU Opp. 18. The ACLU asserts that only deliberations regarding "substantive policy decisions," and not deliberations about how or what to disclose

publicly about a government policy, can be protected by the deliberative process privilege.

(U) That argument is based on a misinterpretation of *Sears* and has been flatly rejected by both courts of appeals and most district courts to have addressed it. In *Sears*, the Supreme Court held that Exemption 5 protects "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" 421 U.S. at 150. *Sears* did not define or otherwise limit the type of government "decisions" or "policies" for which a document could be predecisional and deliberative, and hence privileged. It merely held that a document comprising the agency's final decision and explaining the basis for that decision was not predecisional or deliberative. *Id.* at 150, 155-59 (explaining that decision not to file a charge and accompanying memorandum constitute a "final disposition" and "opinion" required to be disclosed under the affirmative publication provision of FOIA).

(U) That does not mean, however, that a deliberative document relating to an agency decision about how best to explain an agency policy to the public is outside the scope of the deliberative process privilege. As the First Circuit has held, an agency's decision about "how and what to communicate to the public . . . is a decision in and of itself," and internal agency deliberations leading up to that

decision are thus protected by the deliberative process privilege. *N.H. Right to Life v. HHS*, 778 F.3d 43, 54 (1st Cir. 2015), *cert denied*, 136 S. Ct. 383 (2015).

(U) The D.C. Circuit has similarly recognized that an agency's internal deliberations about how to "respond to the reaction of some members of the public" to the agency's publication of an article, including "draft letters proposing two options for replies," are "advisory opinions" protected by the deliberative process privilege and Exemption 5. *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993). Numerous district courts have reached similar conclusions. *See, e.g., ACLU v. DHS*, 738 F. Supp. 2d 93, 112 (D.D.C. 2010) (draft "talking points" making recommendations about what to state publicly about an issue are protected by the deliberative process privilege); *Competitive Enterprise Inst. v. EPA*, 12 F. Supp. 3d 100, 118-19 (D.D.C. 2014) (internal deliberations about how to respond to media inquiries and how to describe agency activities to the public are protected by the deliberative process privilege); *Edelman v. SEC*, 2016 WL 1170927, *18-*19 (D.D.C. Mar. 24, 2016) (draft talking points responding to complaints about an agency's recent filings are protected by deliberative process privilege); *Keeper of the Mountains Found. v. DOJ*, 514 F. Supp. 2d 837, 852-55 (S.D.W.V. 2007) (internal materials addressing how to respond to a newspaper article and congressional inquiry, including draft response letters, are protected by the deliberative process privilege).

(U) In *Sierra Club v. Department of Interior*, 384 F. Supp. 2d 1 (D.D.C. 2004), the court specifically rejected as "misplaced" the plaintiffs' reliance on *Sears* for their argument that the deliberative process privilege does not apply to draft letters to Members of Congress regarding an agency policy that had already been adopted. *Id.* at 20. The court distinguished the final agency action memoranda at issue in *Sears* from the internal agency drafts that were properly protected by the deliberative process privilege and Exemption 5. *Id.*

(U) The ACLU does not address any of these authorities, but instead relies on a handful of district court and magistrate judge decisions. At bottom, those decisions are predicated on an erroneous distinction between agency decisions about substantive policy matters and other types of agency decisions. Neither *Sears* nor subsequent Supreme Court decisions support that distinction. The deliberative process privilege is intended to protect "open and frank discussion" among government officials about "agency decisions." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001). Decisions about whether and how the agency should explain a largely classified national security program to the public fall well within the scope of the privilege. *See* Gov't Br. 66.

(U) The distinction the ACLU advocates between agency decisions on substantive policies and other types of agency decisions would be unworkable in practice, and would require courts to enmesh themselves in agency decisionmaking

to an unprecedented degree. Agency decisions about how to explain a policy decision often involve sensitive policy discussions about how the policy should be interpreted, with reference to previous deliberations and related ongoing policies. Agencies also often reconsider or amend policies on an ongoing basis, and agency deliberations about "messaging" can be part of that process. Those deliberations should be afforded the protections of the deliberative process privilege and Exemption 5.

(U, ~~Privileged~~) Tab C of Document 59 is also independently protected by the deliberative process privilege because, in addition to [redacted], it is a draft document (and marked as such). CA 785-89; *Grand Cent. P'ship*, 166 F.3d at 482 (privilege protects "draft documents"). As a draft, the document represents an iterative stage of the government's process of creating a final document—in this case, [redacted]. Draft documents are routinely held to be protected by the deliberative process privilege and Exemption 5. *See, e.g.*, *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 206-07 (2d Cir. 2012) (draft OLC memoranda); *Lahr v. NTSB*, 569 F.3d 964, 982-84 (9th Cir. 2009) (draft reports and analysis); *Abdelfattah v. DHS*, 488 F.3d 178, 183-84 (3d Cir. 2007) (draft report); *Krikorian*, 984 F.2d at 466 (draft letters proposing alternatives for replies

to public inquiries); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1458 (1st Cir. 1992) (draft letter).

(U) There is no basis for the ACLU's apparent claim that only drafts for which there is an "associated final record" are "true drafts" entitled to the protections of the deliberative process privilege. ACLU Opp. 17 n.11. Simply because a draft document was never finalized does not mean it loses its status as a predecisional and deliberative draft. *See, e.g.*, *Elec. Privacy Info. Ctr. v. DHS*, 928 F. Supp. 2d 139, 152 (D.D.C. 2013) ("to protect a 'draft' document, an agency need not necessarily identify a corresponding final document," but need only "provide adequate description of the document to demonstrate that it was genuinely part of the agency's deliberative process"). Indeed, the very fact that a draft was never finalized oftentimes serves to corroborate its deliberative nature. *See, e.g.*, *Pies v. IRS*, 668 F.2d 1350, 1353-54 (D.C. Cir. 1981); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996). That is the case here: the fact that Tab C was never finalized underscores its status as a deliberative alternative presented to, but ultimately not selected by, the decisionmakers.

C. (U) OLC 50

(U) The ACLU has effectively conceded its claim to OLC Document 50, based on the government's showing that the document is "a one-page email from

the Assistant Attorney General for OLC to herself" containing "a draft two-paragraph proposed insert to an earlier draft of the document that eventually became the November 2011 White Paper." ACLU Opp. 17 n.11 (alteration omitted) (stating that Plaintiffs no longer seek this document if the Court determines this description is accurate).[5] The Court can readily confirm that OLC 50, which is reproduced at CA 743, is a privileged draft.

D. (U) OLC 144/145 and CIA 109/113

(U) The only argument the ACLU advances with regard to the remaining four documents is that the district court rejected the government's assertion that they are predecisional drafts. *See* ACLU Opp. 17 & n.12. But, as the government explained in its opening brief, and as is apparent from the face of the documents themselves, the district court was simply wrong. OLC 144 and 145 are quintessential draft documents: both are unsigned, undated, internal outlines reflecting preliminary legal analysis. Gov't Br. 61-63; CA 63-65, 507-09; *see* CA 744 (OLC 144), 745-47 (OLC 145). They represent interim stages of OLC's deliberations concerning the proper legal analysis applicable to a contemplated targeting operation against a U.S. citizen, which preceded OLC's final advice on

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[5] (U) The same is true for the following draft documents sought by the ACLU as part of its appeal: CIA 45, 78, 94, 111, 112, and 123 and DOD 31, 38, 39, and 46. *See* ACLU Opp. 17 n.11 (referring to draft documents identified at pages 47-48 of the government's opening brief).

that question, and as such are both predecisional and deliberative. Likewise, both CIA 109 and 113 are unsigned, undated, rough outlines prepared by CIA attorneys concerning legal issues relating to the Aulaqi strike, created for use in ongoing intra- and inter-agency deliberations on that subject. Gov't Br. 67-68; CA 123-24, 131-32, 752-54 (CIA 109), 755-56 (CIA 113).

(U) This Court held in *NYT I* that similar informal, predecisional memoranda prepared by a Department of Defense attorney remained protected by the deliberative process privilege, even though they addressed the same or similar legal authorities as the DOJ White Paper and OLC-DOD Memorandum. *See* 756 F.3d at 121 (noting that DOD memoranda "mention legal authorities, but in no way resemble the detailed, polished legal analysis in the disclosed DOJ White Paper"). The same is true of OLC 144 and 145 and CIA 109 and 113, which "[a]t most . . . are part of the process by which governmental decisions and policies are formulated, or the personal opinions of the writer prior to the agency's adoption of a policy." *Id.* (citation, internal quotation marks and alteration omitted).

III. (U) Portions of Three Documents at Issue in the Government's Cross-Appeal Are Also Protected by Exemptions 1 and 3

(U) As the government explained in its opening brief, three of these documents (OLC 46 and CIA 109 and 113) also contain discrete classified and statutorily protected information that the district court failed to order redacted.

Gov't Br. 60, 68-70. Even if this Court were to reject the government's Exemption 5 arguments, this information should still be protected from compelled disclosure. None of this information has been officially acknowledged or disclosed, and thus it remains protected by Exemptions 1 and 3.

(U) Most of the ACLU's arguments with regard to Exemptions 1 and 3 are addressed in the government's opening brief. *See, e.g.*, Gov't Br. 31, 34-37, 38-42. The ACLU newly argues in its opposition brief that the government has officially disclosed the nature of the CIA's role in drone strikes in statements by the President at the University of Chicago in April 2016. ACLU Opp. at 6-8. But the President made no mention of the CIA in his remarks, referring only to "intelligence agencies" and "intelligence." *Cf.* *https://www.dni.gov/index.php/intelligence-community/members-of-the-ic* (listing sixteen agencies that are part of the federal intelligence community). Indeed, the President's comments highlighted that the nature and details of the intelligence community's role in U.S. government drone strikes remain highly sensitive and classified.

(U) The D.C. Circuit recently upheld the government's assertion of Exemptions 1 and 3 to protect CIA documents concerning drone strikes despite an identical argument by the ACLU that the President's April 2016 remarks had officially disclosed the CIA's role in such strikes. *See ACLU v. DOJ*, 640 F.

App'x 9 (Mem.) (D.C. Cir. Apr. 21, 2016) (per curiam) (upholding challenged withholdings following the ACLU's submission of a Fed. R. App. P. 28(j) letter regarding President Obama's April 2016 statements). This Court should do the same.

IV. (U) The District Court Did Not Create Any "Procedural Unfairness" in Following This Court's Mandate

(U) The Court should also reject the ACLU's contention that the district court's actions in carrying out the mandate of this Court in *NYT I* resulted in "procedural unfairness." Following this Court's mandate, the district court reviewed detailed classified indices and issued rulings on a document-by-document basis, in many cases following *in camera* review of the responsive records. This review produced a voluminous decision containing significant classified and privileged passages – which is hardly surprising given the subject matter of records concerning the legal basis for lethal targeting of terrorists.

(U) The ACLU complains that substantial portions of the government's brief in this case are redacted, ACLU Opp. at 1-3, but such redactions were necessary to address the district court's reasoning, much of which is classified or privileged. The redactions to the government's brief in this appeal are no different from those in the government's brief in *NYT II*; in both instances, redactions were authorized by this Court to allow the government to address the classified and privileged

portions of the decisions under review. Nor is it surprising that the district court's opinion discussing the privileged and classified indices and records it reviewed *in camera*, and consequently the government's brief addressing that opinion on appeal, contain privileged and classified information that needs to be redacted to protect precisely the exempt information at issue in this appeal.

(U) The ACLU also complains that the government did not submit sufficiently detailed *Vaughn* indices to the district court. That assertion is belied by the government's detailed classified indexes, CA 276-341, 427-66, large portions of which are reproduced in the district court's opinion. Much of the detail contained in the classified indices could not be filed publicly without revealing the classified, statutorily protected and privileged information that the government seeks to protect. For example, contrary to the ACLU's speculation, ACLU Opp. 1 n.2, the government could not describe documents as "'related to an unacknowledged specific targeted-killing strike' without revealing *any* of the information the government believes is protected by FOIA's exemptions." ACLU Opp. at 1 n.2. Such a description would reveal the existence of an unacknowledged strike—information that this Court has recognized could be properly classified. *See* 756 F.3d at 119 ("in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation").

(U) Finally, the ACLU notes that the district court "had to spend 'literally hundreds of hours'" examining classified indices and documents, ACLU Opp. at 2 (quoting JA 621), suggesting that this was an unreasonable burden on the district court. This underscores that, contrary to the ACLU's contention in its opening brief, ACLU Br. 39-40, the district court did not err in declining to review *all* of the classified documents *in camera*, and there is no need for this Court to do so. *See* Gov't Br. 52.

(U) CONCLUSION

For the foregoing reasons, and the reasons set forth in the government's opening brief, the district court's order compelling disclosure of seven documents in whole or in part should be reversed.

Respectfully submitted,

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AUGUST 2016

(U) CERTIFICATE OF SERVICE

(U) I hereby certify that the foregoing Reply Brief for Defendants-Appellees-Cross-Appellants was filed with the Court on August 5, 2016, by being lodged with the Court Security Officer. A redacted, public version of the brief was filed with the Court and served on opposing counsel through the CM/ECF system.

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(U) CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

(U) I hereby certify that the foregoing Reply Brief for Defendants-Appellees-Cross-Appellants complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

(U) I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. (a)(7)(B) because it contains 6,544 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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