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No. 14-4432(L),

No. 14-4764(Con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 14-4432(L), 14-4764(Con)

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, SCOTT SHANE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs-Appellants,

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.

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

BRIEF FOR DEFENDANTS-APPELLEES

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(U) Preliminary Statement

(U) This Court previously held that the government waived the protections of Freedom of Information Act exemptions for certain legal analysis in a July 2010 Department of Justice Office of Legal Counsel ("OLC") memorandum concerning the use of targeted lethal force against Anwar al-Aulaqi (the "OLC-DOD Memorandum"). The Court ordered disclosure of that legal analysis, while protecting from disclosure classified and privileged information in that memorandum. The Court remanded to the district court to consider, *inter alia*, whether ten other OLC legal memoranda are exempt in whole or in part from disclosure.

(U) On remand, the district court inspected each of the ten OLC legal memoranda *ex parte* for "determination of waiver of privileges and appropriate redaction" in light of this Court's rulings. The district court correctly held that nine of the memoranda were properly withheld in full, and that one opinion was properly withheld in part.

(U) Specifically, the district court upheld the withholding in part of a February 2010 memorandum concerning Aulaqi, which was released publicly with redactions consistent with the redactions approved by this Court in the OLC-DOD Memorandum.

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[redacted] The district court also upheld the withholding in full of [redacted] The information in those memoranda is classified, protected by statute, and privileged, and protected by FOIA Exemptions 1, 3, and 5.

[redacted] The district court also correctly concluded that the remaining [redacted] —remain exempt from disclosure in their entirety. [redacted] Another memorandum provides legal advice on the assassination ban in Executive Order 12,333 that is materially different from the cursory discussion of that subject in the OLC-DOD Memorandum. [redacted]

(U) In sum, the district court faithfully applied this Court's rulings to uphold the challenged withholdings. This Court should affirm.

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(U) Statement of Jurisdiction

(U) The district court had jurisdiction over these actions under 28 U.S.C. § 1331. The district court issued a classified decision on September 30, 2014, and a public, redacted version of its decision on October 31, 2014, upholding the government's challenged withholdings as to the ten OLC legal memoranda. (Special Appendix ("SPA") 178-98). The order was final and appealable as it relates to the New York Times action, which sought only OLC legal memoranda. (Joint Appendix ("JA") 297, 301; SPA 197). The New York Times plaintiffs filed a timely notice of appeal (JA 10), and this Court has jurisdiction under 28 U.S.C. § 1291. Although the ACLU action includes additional claims seeking other documents and information, the district court certified partial final judgment under Fed. R. Civ. P. 54(b). (SPA 197). Following the district court's denial of the ACLU's motion for reconsideration (JA 971-74, SPA 199-200), the ACLU filed a timely notice of appeal on December 24, 2014 (JA 975-76). This Court has jurisdiction over the ACLU's appeal under 28 U.S.C. § 1291.

(U) Statement of Issues Presented

1. (U) Whether the district court properly upheld the government's withholding of one OLC legal memorandum in part and nine OLC legal memoranda in full under FOIA Exemptions 1, 3, and 5, where the withheld documents and

information are properly classified, protected from disclosure by the National Security Act, and privileged, and those protections have not been waived.

2. (U) Whether the district court properly redacted classified and privileged information from its opinion before issuing the opinion publicly.

(U) Statement of the Case

A. (U) Statutory Background

(U) FOIA generally requires an agency to search for and make records promptly available in response to a request that reasonably describes the records sought. 5 U.S.C. § 552(a)(3). But Congress recognized "that public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U.S.C. § 552(b)." *CIA v. Sims*, 471 U.S. 159, 166-167 (1985).

(U) FOIA Exemption 1 exempts from disclosure records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Pursuant to Executive Order 13,526, an agency may withhold information that has been determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security," and it "pertains to" specified categories of information, including "intelligence activities (including

covert action)," "intelligence sources or methods," or "foreign relations or foreign activities of the United States." Exec. Order 13,526, § 1.4(c), (d), 75 Fed. Reg. 707, 709 (Dec. 29, 2009).

(U) FOIA Exemption 3 exempts from disclosure records that are "specifically exempted from disclosure by [another] statute" if the relevant statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The National Security Act of 1947, as amended, specifically directs the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1).

(U) FOIA Exemption 5 exempts from disclosure records that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 encompasses traditional common-law privileges, including the attorney-client and deliberative process privileges. *See Brennan Center for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 189 (2d Cir. 2012).

B. (U) Factual and Procedural Background

1. (U) Plaintiffs' FOIA Requests and OLC's Responses

(U) The New York Times action arises out of two FOIA requests submitted to OLC. The first request (the "Shane request") sought all OLC "opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States government." (JA 297). The second request (the "Savage request") sought OLC "memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist." (JA 301).

(U) OLC acknowledged the existence of one responsive record as it related to the Department of Defense ("DOD")—the OLC-DOD Memorandum—but withheld the document in its entirety under FOIA Exemptions 1, 3, and 5. OLC refused to confirm or deny the existence of any other responsive documents insofar as the New York Times requests pertained to the Central Intelligence Agency ("CIA") or any other federal government agencies. (JA 299).

(U) The ACLU case arises out of FOIA requests submitted to the Department of Justice, CIA, and DOD seeking records relating to the targeted killing of U.S. citizens, including through the use of unmanned aerial vehicles. (JA 305-16, 248-

59, 345-56). During the initial district court proceedings, OLC acknowledged the existence of classified responsive documents, including the OLC-DOD Memorandum. (JA 291-92).[1] The government determined, however, that no further details concerning those classified records could be provided without causing undue harm to national security. (JA 191-97).

(U) The district court upheld OLC's responses to plaintiffs' FOIA requests, as well as the responses provided by CIA and DOD, and granted summary judgment to the government. (SPA 1-73).

2. (U) Proceedings on Prior Appeal

a. (U) The Court's Ruling on Appeal and Issuance of the Court's Initial Public Decision

(U) This Court affirmed in part and reversed in part the district court's judgment. (SPA 79-175, JA 871-922). The Court ruled that the OLC-DOD Memorandum was properly classified. (SPA 113). The Court held, however, that the government had waived the protection of FOIA's exemptions with respect to certain legal analysis in the OLC-DOD Memorandum, and that a redacted version

[1] (U) This Court's prior opinion stated that OLC had withheld an OLC opinion related to DOD under Exemptions 1 and 3 that "is apparently not the OLC-DOD Memorandum," which the Court understood to have been withheld only under Exemptions 1 and 5. (SPA 94). The sole responsive classified OLC opinion related to DOD was the OLC-DOD Memorandum, which was withheld under Exemptions 1, 3, and 5. (JA 286-87, 289, 291-92). The justifications for withholding were provided by OLC for Exemption 5 (JA 289-93), and the Office of the Director of National Intelligence ("ODNI") for Exemptions 1 and 3. (JA 198-99, 291-94).

of the OLC-DOD Memorandum must be disclosed. (SPA 109-34, 142). The Court's waiver ruling was based principally on the release in February 2013 of a draft unclassified Department of Justice White Paper (the "DOJ White Paper") containing legal analysis similar to certain legal analysis in the OLC-DOD Memorandum, and on public statements by high-level government officials acknowledging the identity of the target of the operation contemplated in the OLC-DOD Memorandum, Anwar al-Aulaqi, and the existence of relevant OLC advice.

(U) First, the Court found "substantial overlap in the legal analyses in" the OLC-DOD Memorandum and the DOJ White Paper. (SPA 120). The Court found that the DOJ White Paper "virtually parallels the OLC-DOD Memorandum in its analysis of the lawfulness of targeted killings," noting that "[l]ike the Memorandum, the DOJ White Paper explains why targeted killings do not violate 18 U.S.C. §§ 1119 or 2441, or the Fourth and Fifth Amendments to the Constitution, and includes an analysis of why section 1119 encompasses a public authority justification." (SPA 120). The Court further noted that Attorney General Holder had publicly acknowledged "the close relationship between the DOJ White Paper and previous OLC advice." (SPA 120-21).

(U) Second, the Court relied on public statements by Executive Branch officials, including statements by Attorney General Holder and President Obama acknowledging that the United States had targeted Aulaqi, the subject of the OLC-

DOD Memorandum. (SPA 105-07). The Court also noted that John Brennan, the nominee for Director of the CIA and then-Assistant to the President for Homeland Security and Counterterrorism, explained at his confirmation hearing, in response to a question about the U.S. government's use of lethal force against a U.S. citizen, that "[t]he Office of Legal Counsel advice establishes the legal boundaries within which we operate." (SPA 105-06; *see also* SPA 124-26 (noting other public statements regarding Aulaqi strike)). This Court concluded that "[w]hatever protection the legal analysis [in the OLC-DOD Memorandum] might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper." (SPA 133-344).

(U) The Court made clear, however, that "[t]he Government's waiver applies *only* to the portions of the OLC-DOD Memorandum that explain legal reasoning." (SPA 124 (emphasis added)). "The loss of protection for the legal analysis in the OLC-DOD Memorandum does not mean * * * that the entire document must be disclosed." (SPA 123).

(U) The Court further held that the factual portions of the OLC-DOD Memorandum, with two limited exceptions, remain classified and exempt from disclosure. (SPA 113, 124, 130). The Court specifically found that "no waiver of any operational details in th[e] document has occurred." (SPA 113). Recognizing that "in some circumstances legal analysis could be so intertwined with facts

entitled to protection that disclosure of the analysis would disclose such facts," the Court redacted "the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities." (SPA 130). The Court redacted the entirety of Part I, which consisted of certain factual material concerning Aulaqi. (SPA 119). The Court held that only two discrete facts "no longer merit secrecy": that Aulaqi was killed in Yemen, and that the CIA had an undefined operational role in the Aulaqi strike. (SPA 124, 126).

[redacted] Even within the legal reasoning portions of the OLC-DOD Memorandum, moreover, the Court held that certain information remains exempt from disclosure. Specifically, [redacted]

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[redacted]

(U) The other responsive OLC legal memoranda had not been submitted to this Court for *in camera* inspection. (SPA 136). The Court directed the government to submit those memoranda "to the District Court for in camera examination and determination of waiver and appropriate redaction, in light of our rulings with respect to disclosure and redaction of the legal reasoning in the OLC-DOD Memorandum." (SPA 136). The Court also directed OLC to disclose a redacted version of a classified index of records responsive to the ACLU's FOIA request, and ordered further proceedings on remand with regard to those records. (SPA 140).

(U) This Court issued a public opinion on April 21, 2014, after providing the decision to the government for classification review. (JA 871-922). The public opinion redacted certain information contained in the classified opinion also issued on that date, in order to preserve the government's opportunity to seek further review with respect to certain disclosures of information in the decision. (CA 31 n.1). Although the Court provided a court-redacted version of the OLC-DOD Memorandum to the government for review, the Court did not attach that document to its April 21, 2014 public opinion.

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b. (U) The Court's Rulings on the Government's Petition for Rehearing and Issuance of the Redacted OLC-DOD Memorandum

(U) The government sought panel rehearing or, in the alternative, rehearing *en banc*. (CA 121-38). As relevant here, the government urged the Court to make additional redactions to the OLC-DOD Memorandum and the OLC index of classified responsive documents. (CA 128-36).

(U) On June 23, 2014, the Court granted the rehearing petition as it related to the Court's opinion and the OLC-DOD Memorandum, issuing a revised public decision and a public version of the OLC-DOD Memorandum that made the additional redactions and modifications sought by the government. (JA 923-29).

[redacted] (*See* CA 128-29 (identifying relevant passages); JA 927 ("We will make all of the redactions in the OLC-DOD Memorandum requested by the government.")). The Court also redacted several references to other classified and/or privileged OLC memoranda. (CA 130-31; JA 927). The Court entered a partial judgment on June 26, 2014, issuing a partial remand of the matter to the district court to implement the Court's directive to inspect the other OLC opinions in camera and determine any "waiver of privileges and appropriate redaction." (JA 930, SPA 143).

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[redacted] On July 10, 2014, the Court ruled on the remaining issue raised by the government's rehearing petition and not resolved in the earlier decision on rehearing—whether to compel disclosure of the OLC index, as ordered by the Court. The Court refused to allow the government to withhold the OLC index in its entirety (JA 934-47), but permitted the redaction of certain additional classified and privileged information prior to disclosure, [redacted] (CA 411-18; JA 944 (deeming the "reasons indicated by the Government in a sealed portion of its Petition" "sufficient to preclude disclosure" of certain listings)).

3. (U) District Court Proceedings on Remand

a. (U) District Court Decision Upholding Withholding of Ten OLC Legal Memoranda in Whole or in Part

(U) Following issuance of this Court's partial mandate, the district court directed the government to provide it, *ex parte*, with unredacted copies of the other ten OLC legal memoranda, together with an *ex parte* submission addressing the government's withholdings with regard to each memorandum. (JA 932).[2] After reviewing the ten OLC legal memoranda and supporting classified declarations and memorandum, the district court upheld the withholding of nine OLC legal

[2] (U) For this Court's convenience, a complete copy of the government's submission to the district court is reproduced in the Classified Appendix.

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memoranda in their entirety. The court also approved the government's release of a redacted version of the tenth, and refused to compel disclosure of the withheld information in that document. (CA 454-74, SPA 178-98).

[redacted] The district court first upheld the withholding [redacted]

[redacted] The district court reasoned that the government had not waived any privilege or exemption [redacted] "by

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virtue of the Administration's public statements or its disclosure of the Draft White Paper." (CA 456, SPA 180). The district court emphasized that this Court had taken "great pains to redact [redacted] (CA 456).

(U) [redacted] The district court next upheld the government's withholding of portions of a February 2010 OLC Memorandum to the Attorney General providing legal advice concerning a contemplated lethal operation against Aulaqi (the "February 2010 Aulaqi Memorandum"). (CA 457-65; *see* CA 354-60 (Exhibit B, unredacted); CA 354-60 (Exhibit K, redacted)). The February 2010 Aulaqi Memorandum was prepared six months before the OLC-DOD Memorandum, and pertains to the proposed Aulaqi operation that was the subject of the DOJ White Paper and the OLC-DOD Memorandum. (CA 457). It memorialized informal oral advice and provided a more succinct assessment of the legality of a proposed operation against Aulaqi. (CA 256).

[redacted] The government disclosed a version of the February 2010 Aulaqi Memorandum to the plaintiffs, but redacted information of the same type and content as the information that this Court redacted from the publicly-released version of the OLC-DOD Memorandum. The district court upheld withholding of the redacted information, ruling that "[n]o privilege has been waived as to the factual intelligence information or the strategic analysis" [redacted]

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[redacted] (CA 457; *see* CA 464 (noting that this Court "repeatedly rejected any contention that the protections of FOIA Exemptions 1, 3, and 5 had been waived as to operational details")).[3]

[redacted]

[3] (U) The district court rejected the government's alternative argument that the February 2010 Aulaqi Memorandum could be withheld under Exemption 5 because it related to a separate deliberative process from the OLC-DOD Memorandum. However, the district court agreed that the redacted version of the February 2010 Aulaqi Memorandum, which the government released to the plaintiffs on August 15, 2014 (CA 9, 229), disclosed the same information that had been publicly revealed in the Court-redacted version of the OLC-DOD Memorandum. (CA 458-59).

TS//[redacted]//NF

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[redacted]

(U) The district court also upheld the withholding of a March 2002 OLC Memorandum analyzing the assassination ban in Executive Order 12,333 (the "March 2002 Memorandum"). (CA 468-70; *see* CA 315-29). Although the district court noted that the OLC-DOD Memorandum released by this Court contained a "brief mention" of Executive Order 12,333, the district court concluded that the analysis in the March 2002 Memorandum is significantly different from any legal analysis that this Court held has been officially disclosed and for which privilege has been waived. (CA 468, 470).

[redacted] Finally, the district court upheld the withholding of an OLC memorandum that [redacted]

[redacted]

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[redacted]

b. (U) Government's Classification Review and the District Court's Sealing Order

(U) The district court provided its decision to the government for classification review before public release. (SPA 178). The version provided contained provisional classification markings, as well as italicized text, identifying those portions that the district court believed were classified. (SPA 197; CA 454-74).

(U) Following its review, the government provided the district court with a redacted version of the decision suitable for public filing, as well as an unredacted version of the decision containing corrected classification markings. (CA 475). The government explained that it had identified some classified material within the

[redacted]

'(~~S//NF~~) The district court questioned [redacted]

~~TS//~~ [redacted] ~~NF~~

decision that the district court had provisionally marked for public release, and had identified certain unclassified information that had been provisionally marked as classified. (CA 475). The government also identified certain privileged material within the decision for redaction. (CA 475). The district court accepted most of the government's redactions.[6]

[redacted] The only redaction that the district court disagreed with was the government's redaction of classified information on page 9 of the opinion that would tend to reveal [redacted]

[redacted]

And the government redacted privileged information describing a confidential request for legal advice. (CA 477).

[redacted]

(U) In its Sealing Order, the district court directed the Clerk of Court to file publicly the redacted version of its decision that the government had provided, and ordered that the full, unredacted version of the decision remain under seal. (SPA 176-77). The district court noted that it disagreed with redactions made by the government on page 9, but that, "[i]n order to preserve that issue for appellate review," the court was filing on the public docket the opinion with all of the government's proposed redactions. (SPA 176-77).

c. (U) Denial of Reconsideration

(U) The ACLU sought reconsideration, asking the district court to consider whether the government had officially acknowledged factual information relating to its decision to target Aulaqi. The district court "summarily and sua sponte denied" the ACLU's motion as to all documents other than the February 2010 Aulaqi Memorandum. (JA 23.7, Dkt. No. 97, at 5 & n.3). After considering a response filed by the government to the motion, the court denied reconsideration as

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to that document as well, explaining: "I read the Second Circuit's decision in the same way the Government does—that is, the Court of Appeals has concluded that the Government has waive[d] its FOIA exemptions only to the extent of legal analysis." (SPA 199).

(U) Summary of Argument

[redacted] The district court correctly upheld the government's withholding of one OLC memorandum in part and the remaining nine OLC memoranda in full, pursuant to FOIA Exemptions 1, 3 and 5. *See infra* Point I. [redacted]

[redacted] One provides legal advice

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concerning the assassination ban in Executive Order 12,333 that is far more extensive than, and different from, the cursory statements about that subject in the OLC-DOD Memorandum and the DOJ White Paper. [redacted] The district court correctly held that none of the legal advice provided in those memoranda matches the legal analysis in the OLC-DOD Memorandum or DOJ White Paper, and thus the memoranda remain classified, protected from disclosure by statute, and/or privileged in their entirety. *See infra* Point I.C.

(U) Plaintiffs' contrary arguments are unavailing. The district court properly declined to order the release of factual information that this Court held remains properly classified and not waived. *See infra* Point I.D.1. Plaintiffs' argument that the district court applied an overly stringent standard for waiver is without merit. Applying the same standard employed by this Court, the district court correctly found that the withheld documents and information do not match the information that this Court held to have been waived. *See infra* Point I.D.2.

(U) Plaintiffs' contention that legal analysis cannot be classified or protected from disclosure by statute is also erroneous; legal analysis is exempt from disclosure under Exemptions 1 and/or 3 when its disclosure would reveal classified and/or statutorily protected information. *See infra* Point I.D.3. Nor do the OLC

memoranda constitute agency "working law." Rather, they convey legal advice and do not bind Executive Branch decisionmakers to any particular course of action. *See infra* Point I.D.4. And contrary to the plaintiffs' claim, the district court carefully conducted a segregability analysis of each responsive memorandum. *See infra* Point I.D.5.

(U) Finally, the Court should reject plaintiffs' contention that the district court violated the First Amendment by issuing the public opinion prepared by the government, which redacts classified and privileged information. Plaintiffs have no First Amendment right of access to classified or privileged information contained in a judicial opinion. *See infra* Point II.A. Moreover, the redacted information identified by the district court at page 9 of its opinion remains currently and properly classified. *See infra* Point II.B.

(U) Standard of Review

(U) The Court reviews *de novo* a district court's order sustaining an agency's withholdings under FOIA. *See Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009). Although the agency has the burden to establish the applicability of the FOIA exemptions, "[a]ffidavits or declarations * * * giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Id.* (internal quotation marks omitted). The agency's declarations are entitled to a presumption of good faith, *id.*, and where the

claimed exemptions implicate national security, the reviewing court "'must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record.'" *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). "Ultimately, an agency may invoke a FOIA exemption if its justification 'appears logical or plausible.'" *Id.* (quoting *Wilner*, 592 F.3d at 73).

(U) ARGUMENT

I. (U) The District Court Properly Applied this Court's Prior Rulings to Sustain the Government's Withholdings

A. (U) The District Court Correctly Upheld Withholding of the Redacted Portions of the February 2010 Aulaqi Memorandum

(U) The February 2010 Aulaqi Memorandum was released to the plaintiffs in redacted form. The district court correctly held that the withheld portions of the memorandum remain privileged, classified, and/or protected from disclosure by statute, and are not subject to waiver under this Court's prior rulings in this case.

(U) The introductory paragraph of the February 2010 Aulaqi Memorandum cites to a privileged and undisclosed memorandum seeking legal advice. (CA 228, 256). This privileged memorandum was not revealed in the DOJ White Paper, the DOD-OLC Memorandum, or any of the public statements on which this Court relied in finding a waiver of certain legal analysis in the OLC-DOD Memorandum,

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and it was properly redacted from the version of the February 2010 Aulaqi Memorandum released to the plaintiffs.

[redacted] Part I of the February 2010 Aulaqi Memorandum contains classified and privileged facts conveyed to OLC by the client agency. (CA 227, 390). For example, Part I includes a description of [redacted] (CA 257-58).

(U) Part I of the February 2010 Aulaqi Memorandum is redacted in its entirety, just as this Court redacted the entire factual section of the OLC-DOD Memorandum. (SPA 145-46). This Court held in its prior decision that "[t]he government's waiver applies only to the portions of the OLC-DOD Memorandum that explain legal reasoning," not to "any operational details" or information pertaining to "intelligence gathering activities." (SPA 124, 113, 130). The information in Part I likewise remains exempt from disclosure under FOIA Exemption 1 as classified information, and under Exemption 3 by virtue of the National Security Act, which shields "intelligence sources and methods" from disclosure. (CA 392); *see* 50 U.S.C. § 3024(i)(1).

(U) Because the facts in Part I of the February 2010 Aulaqi Memorandum were provided to OLC by its client for the purpose of obtaining predecisional legal advice and were included in that advice, they are also protected by Exemption 5

~~TS//~~ [redacted] ~~/NF~~

under both the deliberative process privilege, insofar as their inclusion reflects OLC's view that they are relevant to its legal analysis, and under the attorney-client privilege, as confidential attorney-client communications. (CA 220, 228); *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007); *Nat'l Security Archive v. CIA*, 752 F.3d 460, 464 (D.C. Cir. 2014). As this Court previously held, neither the DOJ White Paper nor public statements by government officials waived the protection of classified and privileged facts concerning Aulaqi. (SPA 113, 119, 124, 130).

[redacted] The redacted portions of Part II of the February 2010 Aulaqi Memorandum are similarly privileged, classified, and statutorily protected, and those protections have not been waived. Part II analyzes

[redacted]

[redacted]

[redacted] Part III of the February 2010 Aulaqi Memorandum contains legal analysis, the majority of which has been released. (CA 260-62, 358-60). The redacted portions of Part III of the memorandum

[redacted]

[redacted] Each of these redactions is consistent with this Court's treatment of similarly sensitive and unacknowledged information in its opinion and the OLC-DOD Memorandum. (CA 70, 128-29,

[redacted]

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411-18 & JA 927, 944

Finally, the government redacted from Part III of the February 2010 Aulaqi Memorandum . As the district court concluded, and as we explain in greater detail below (at Point I.B, *infra*), this discussion remains exempt from disclosure under Exemptions 1 and 3, (CA 463-65). This information is also protected by Exemption 5 as privileged information, as it would reveal both attorney-client communications and predecisional, deliberative material (CA 224, 231; *see* SPA 114 (recognizing that "the law extends the [attorney-client] privilege to legal advice given by a lawyer to his client")); *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (reasoning that legal advice "fits exactly within the deliberative process rationale for Exemption 5").

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B. The District Court Correctly Upheld the Withholding in Full of

Disclosure of any portion of the memoranda would reveal classified and statutorily protected information about intelligence sources and methods,

The memoranda are therefore protected under Exemptions 1 and 3, in conjunction with the National Security Act. (CA 295-96). The memoranda are also protected from disclosure under Exemption 5, as they provided confidential and predecisional legal advice regarding

(CA 223-27, 230-33; *see* SPA 114).

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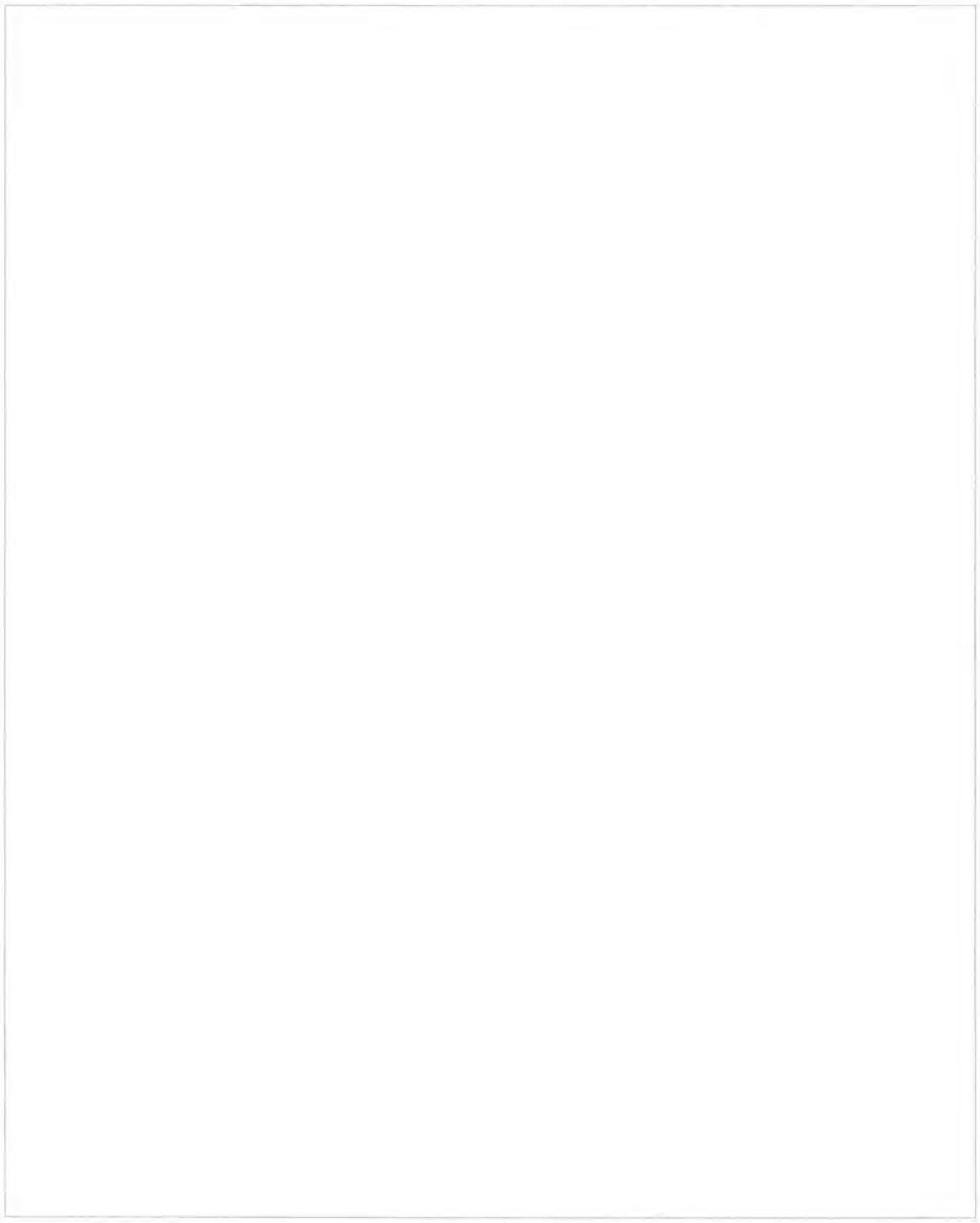

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[redacted]

C. (U) The District Court Properly Upheld the Withholding in Full of the Remaining OLC Legal Memoranda

[redacted]. The district court also correctly determined that the [redacted] OLC legal memoranda, [redacted]

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[redacted] are exempt from disclosure in full under Exemptions 1, 3, and/or 5. (CA 456, 468-73). There has been no loss of protection for those memoranda, [redacted]

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[redacted] memoranda are also exempt in their entirety under Exemption 5 as attorney-client and deliberative process privileged documents, because they provide confidential, predecisional legal advice to Executive Branch decisionmakers [redacted]

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Court's previous decisions, which, as the district court noted, protected [redacted] (CA 70, 456).

2. (U) The March 2002 Memorandum Providing Legal Advice Concerning the Assassination Ban in Executive Order 12,333

(U) The district court also properly sustained the withholding in full under Exemption 5 of the March 2002 OLC Memorandum, which provided legal advice regarding the assassination ban in Executive Order 12,333. (CA 468-70). Although, as the district court noted, the DOJ White Paper and the publicly released version of the OLC-DOD Memorandum assert without elaboration that an operation against a U.S. citizen "would not violate the assassination ban in Executive Order 12333" because "a lawful killing in self-defense is not an assassination," those cursory statements do not waive the protections applicable to the very different and far more extensive legal analysis in the March 2002 Memorandum. (CA 470).

(U) The district court identified fundamental differences between the March 2002 Memorandum and the legal analysis in the DOJ White Paper and the publicly-released OLC-DOD Memorandum—differences that are analyzed in detail in the district court's decision, although they are described in only general terms here so as not to disclose the very privileged information that has been withheld. (CA 469-70).

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(U) Although the March 2002 memorandum discusses a concept that appears in the DOJ White Paper and the two Aulaqi memoranda, the relevant analysis in the March 2002 Memorandum "does not correspond to any legal analysis (or, for that matter factual analysis)" in the DOJ White Paper or the Aulaqi memoranda. (CA 470). The March 2002 Memorandum also discusses other issues that are not analyzed in the DOJ White Paper or the Aulaqi memoranda. (CA 470). In addition, the March 2002 Memorandum addresses legal analysis in an earlier classified and privileged OLC opinion, references to which this Court redacted from the OLC-DOD Memorandum. (CA 470; *see also* CA 130-31 & JA 927).

(U) In sum, the legal analysis in the March 2002 Memorandum is far broader in scope than the references to Executive Order 12,333 in the DOJ White Paper and the Aulaqi OLC opinions and is substantially different from any publicly disclosed legal analysis that this Court relied on to find waiver. Because there is no "match" between the analysis in the March 2002 Memorandum and the previously disclosed legal analysis, the district court correctly held that there has been no waiver of the protections of Exemption 5.[9]

(U) [9] [redacted] Furthermore, although the district court did not address this issue, the March 2002 memorandum is also protected under Exemption 5 because it provides legal advice to a senior Presidential advisor regarding a potential Presidential decision, and hence is subject to the presidential communications privilege. (CA 234-35). *See Amnesty Int'l USA*, 728 F. Supp. 2d at 522.

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D. (U) Plaintiffs' Remaining Contentions Lack Merit

1. (U) This Court Addressed the Status of Factual Material in the OLC-DOD Memorandum and Held That It Was Properly Classified and Not Waived

(U) The ACLU argues that the district court erred in interpreting this Court's decisions as holding that the government had waived protection only for legal analysis in the OLC-DOD Memorandum, not factual material. (ACLU Br. 22, SPA 188, 199-200). But this Court explicitly and repeatedly stated in its earlier decision that, with the exception of two discrete facts, it found waiver *only* as to "the portions of the OLC-DOD Memorandum that explain legal reasoning." (SPA 124 (emphasis added); *see also* SPA 113 (finding waiver only "[w]ith respect to the document's legal analysis")). The Court ruled that the remaining portions of the document, including the underlying facts, remain "properly classified," and that "no waiver of any operational details in th[e] document has occurred." (SPA 113).

(U) Furthermore, the Court redacted Part I of the OLC-DOD Memorandum, consisting of privileged factual information provided to OLC by its Executive Branch clients, agreeing with the government that that information remained exempt from disclosure. (SPA 145-46; *see also* SPA 119, 188, 199). In its decision on rehearing, the Court noted that the redactions to the OLC-Memorandum were made "to maintain the secrecy of those portions of the [document] that appeared to warrant *permanent secrecy* for reasons set forth by the

Government in submissions to the Court filed *ex parte* and *in camera*." (JA 925 (emphasis added)). The district court properly applied this Court's rulings to the ten additional OLC memoranda, holding in relevant part that there had been no waiver or official disclosure of factual information in those documents.

(U) While the ACLU speculates that there must be factual information within the OLC-DOD Memorandum, and the other responsive OLC memoranda, that overlaps with information in the public domain, this Court has already concluded that there is no reasonably segregable non-exempt information in the OLC-DOD Memorandum beyond that already produced. (SPA 123 (noting that FOIA requires production of "reasonably segregable portion[s]" of responsive records), 130 (noting that Court had redacted "the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities" in recognition of the possibility that "in some circumstances legal analysis [can] be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts")). Furthermore, the facts that the Court redacted from the OLC-DOD Memorandum, which were provided in confidence by OLC's clients and reflect OLC's selection of facts relevant to its predecisional legal advice, remain privileged. (JA 909-10); *see In re Cnty. of Erie*, 473 F.3d at 418; *Nat'l Security Archive v. CIA*, 752 F.3d 460, 464 (D.C. Cir. 2014).

(U) To the extent the ACLU urges this Court to revisit its earlier rulings with regard to factual material in the OLC-DOD Memorandum (ACLU Br. 22-25), this Court should decline the invitation. The ACLU makes the same argument now that it previously made to this Court, asserting that factual material contained in the OLC-DOD Memorandum, including "the factual basis for the killing of Anwar al-[Aulaqi]," must be disclosed because it had already been officially acknowledged by the government. (*Compare* JA 23.8, Dkt. No. 104, Tr., Oct. 1, 2013, at 42-43, *with* ACLU Br. 24 & n.11, 44 & n.41).

(U) This Court has already rejected that argument, ruling that, with two limited exceptions, the factual information in the OLC-DOD Memorandum remains properly classified and privileged. (SPA 113, 123-26, 130-31). Given this Court's extensive and exhaustive consideration of these matters in the prior appeal, there are no "cogent and compelling reasons" for the Court to depart from its prior rulings. *Johnson v. Holder*, 564 F.3d 95, 99-100 (2d Cir. 2009).

2. (U) The District Court Applied the Correct Standard for Official Disclosure

(U) The plaintiffs are also mistaken in arguing (ACLU Br. 13-22; NYT Br. 28-29) that the district court applied an improperly strict legal test to conclude that prior official disclosures did not waive protection for the withheld documents and information at issue here. The ACLU quotes *Afshar v. Department of State*, 702

F.2d 1125 (D.C. Cir. 1983), for the proposition that information cannot be withheld unless there is a "material difference" between it and the information previously disclosed.

(U) The district court here carefully examined the withheld information, however, and explained how it is materially different from information that the government has previously disclosed. Furthermore, *Afshar* specifically notes that there must be a showing that the agency's previous disclosure "appears to duplicate" the material sought, *i.e.*, that the disclosure is "as specific as" and "matches" the withheld information. *Afshar*, 702 F.3d at 1130; *accord Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003). That is the same standard applied in *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009), which "remains the law of this Circuit" (SPA 132 n.20), and in other decisions of the D.C. Circuit and other courts of appeals. *See, e.g.*, *ACLU v. CIA*, 710 F.3d 422, 426-27 (D.C. Cir. 2013); *Moore v. CIA*, 666 F.3d 1330, 1333-34 (D.C. Cir. 2011); *ACLU v. DOD*, 628 F.3d 612, 620-21 (D.C. Cir. 2011); *Pickard v DOJ*, 653 F.3d 782, 786-87 (9th Cir. 2011).

(U) While this Court previously observed that the "matching" aspect of *Wilson* does not "require absolute identity," SPA 132, at a minimum, the two pieces of information must be fundamentally the same. Thus, in finding official disclosure, this Court observed that the DOJ White Paper "virtually parallels" the legal

analysis of the OLC-DOD Memorandum. (SPA 120 (noting "the substantial overlap in the legal analyses in the two documents")). Without a fundamental "overlap" or "parallel" between the two pieces of information, it cannot be said that the official disclosure of the first piece of information in fact officially disclosed the second. The district court correctly found that this standard is not met with regard to any withheld information in the ten OLC memoranda at issue here.[10]

3. (U) Legal Analysis Can Be Withheld Under Exemptions 1 and 3 When Its Disclosure Would Reveal Classified and Statutorily Protected Information

(U) Plaintiffs' renewed argument that legal analysis cannot be protected under Exemptions 1 or 3 (NYT Br. 17-23, 26-28; ACLU Br. 25-26) is also mistaken.

(U) Executive Order 13,526 provides for information to be classified if its unauthorized disclosure "could reasonably be expected to cause identifiable or describable damage to the national security" and the information "pertains to"

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[10] (U) For purposes of preserving its argument for potential further review, the government respectfully notes its disagreement with this Court's prior ruling that the government has officially disclosed and waived privilege for certain legal analysis contained in the OLC-DOD Memorandum. As set forth in the government's briefs in the earlier appeal, the public disclosures and statements relied on by the plaintiffs did not meet the standard for official disclosure or waiver of applicable privileges. We further note that the Court's release of the OLC-DOD Memorandum and its order compelling disclosure by the government of additional information would not themselves constitute an independent official disclosure or waiver by the government that would strip protection from otherwise exempt information and material.

specified categories. Exec. Order 13,526, § 1.4, 75 Fed. Reg. at 709. There is no exclusion for legal analysis. This Court previously observed that "in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation." (SPA 130). The Court further "recognize[d] that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." (SPA 130). The Court also agreed with the district court's conclusion that the OLC-DOD Memorandum—which conveyed OLC's legal advice and analysis to the Attorney General—"was properly classified." (SPA 113); *see also, e.g.*, *New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 312-13, 317-18 (S.D.N.Y. 2012) (upholding withholding of classified legal analysis under Exemption 1); *Mobley v. DOJ*, 870 F. Supp. 2d 61, 66-68 (D.D.C. 2012) (same). The plaintiffs' contrary argument is wrong.

(U) Similarly, information that pertains to intelligence sources and methods may also be protected from disclosure under the National Security Act, and thus can be withheld under Exemption 3. (CA 388); *see Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981). While the district court in its earlier decision observed that legal analysis itself "is not an 'intelligence source or method'" (SPA 45), it also noted that "legal analysis in a particular document" may be "inextricably intertwined with information that is statutorily exempt from

disclosure, including information about intelligence sources and methods." (SPA 46, *cited in* SPA 100). This Court should reject plaintiffs' unfounded contention that legal analysis is categorically excluded from protection under Exemptions 1 or 3.

4. (U) The OLC Memoranda Do Not Constitute Agency Working Law

(U) Plaintiffs also argue that legal analysis in the OLC memoranda cannot be withheld under Exemption 5 because it constitutes "working law" under *Brennan Center* and similar cases. Their position, which is largely a repeat of arguments rejected in the prior appeal, is mistaken.

(U) First, it is unnecessary for this Court even to consider the "working law" issue as to the vast majority of the withheld material because, putting to the side the question whether legal analysis in the withheld OLC memoranda could constitute working law that would not be protected under Exemption 5, the government nonetheless would be justified in withholding the same documents and information on alternate grounds, as explained above. The government invoked not only Exemption 5 over the withheld documents and information, but also Exemptions 1 and 3. The district court upheld withholding on the ground that, *inter alia*, disclosure would reveal classified information. (CA 455-57, 463-65, 468-70, 472-73). Plaintiffs do not argue that their "working law" arguments would

justify disregarding the protections afforded to classified and statutorily protected information.[11]

(U) Furthermore, plaintiffs are wrong to argue that an OLC opinion constitutes "working law" that loses the protections of Exemption 5. This Court held in *Brennan Center* that "'working law' analysis is animated by the affirmative provisions of FOIA," 697 F.3d at 200, which require disclosure of "those policies or rules, and the interpretations thereof, that either create or determine the extent of the substantive rights and liabilities of a person." *Afshar*, 702 F.2d at 1141 (quotation marks and citation omitted). Examples given by this Court in *Brennan Center* include Department of Energy interpretations of regulations given precedential effect within the agency, and IRS documents setting out the agency's "final *legal* position concerning the Internal Revenue Code, tax exemptions, and proper procedures." 697 F.3d at 200-01.

(U) This Court recognized in *Brennan Center* that OLC opinions are of an entirely different character. In *Brennan Center*, OLC provided advice to two agencies about "the constitutional and legal propriety" of implementing a federal

[11] (U) Only two documents at issue in this appeal contain discrete portions that, although privileged, are not also classified and statutorily protected. The first—the February 2010 Aulaqi Memorandum—contains privileged portions that are similar to portions of the OLC-DOD Memorandum that this Court redacted from the publicly-released version. (CA 229, 160-61; SPA 165-66). The second is a document that has no connection to the public statements that plaintiffs rely on in arguing "working law." (CA 315-329).

statute, but "[n]o one at the OLC made the decision" that the statute would not be implemented. 697 F.3d at 202-03. This Court emphasized that, as an OLC official explained in a declaration in that case, "OLC's legal advice and analysis informs the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted." *Id.* at 203 (quoting declaration of Paul Colborn, OLC Special Counsel).

(U) It was precisely on this basis that the Court concluded in *Brennan Center* that the OLC advice was not working law. 697 F.3d at 203. The D.C. Circuit has reached the same conclusion, noting that OLC provides legal advice to an agency that may define "the legal parameters of what the FBI is *permitted* to do," but that "OLC [does] not have the authority to establish the 'working law' of the FBI" and its advice "is not the law of the agency unless the agency adopts it." *Electronic Frontier Foundation v. DOJ*, 739 F.3d 1, 8-10 (D.C. Cir. 2014).

(U) The same principles control here. OLC provided legal advice that "inform[ed] the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice [was] not itself dispositive as to any policy adopted." 697 F.3d at 203. Plaintiffs rely heavily on John Brennan's general statement at his confirmation hearing that "Office of Legal Counsel advice establishes the legal boundaries within which we can operate," ACLU Br. 32-33, but that statement does not transform confidential legal advice into "working law." As in *Electronic*

Frontier Foundation, the Executive Branch was "free to decline" to undertake the actions "deemed legally permissible in the OLC Opinion." 739 F.3d at 10.

(U) Under plaintiffs' proposed approach, any OLC legal advice to an agency about a contemplated course of action would lose Exemption 5 protection if the agency decides to undertake that action. That dramatic expansion of "working law" is contrary to binding precedent, and should be rejected. Privileged, predecisional legal advice from OLC to Executive Branch decisionmakers is fundamentally and wholly different from the "working law" required to be disclosed under FOIA.

5. (U) The District Court Properly Performed a Segregability Analysis of Each Responsive Memorandum

(U) Finally, plaintiffs wrongly contend that the district court failed to consider whether the documents contain any reasonably segregable, non-exempt material. In fact, the district court ordered the government to provide an *ex parte* filing specifically addressing each memorandum withheld in full, and each redaction in the memorandum withheld in part. (JA 931-32). The district court then conducted a painstaking examination of each of the responsive memoranda, in many instances reviewing individual sections or even lines of the documents to determine whether any additional portion could be disclosed. (CA 454-74). Although it may not be

apparent to plaintiffs because of the classified nature of much of the analysis, the district court carefully evaluated whether it could segregate protected information.

(U) Plaintiffs insist that legal analysis in OLC memoranda must necessarily be segregable (ACLU Br. 26-28; NYT Br. 24-25), but as this Court recognized, there are circumstances in which the mere existence of legal advice would reveal classified and statutorily protected information, and other circumstances in which legal analysis is "so intertwined with facts entitled to protection" that it cannot be segregated. (SPA 130). The district court properly concluded that the nine memoranda withheld in full contain no reasonably segregable non-exempt information, and the government has released all reasonably segregable portions of the February 2010 Aulaqi Memorandum.

II. (U) The District Court Properly Filed the Public Opinion Prepared by the Government, Which Redacts Classified and Privileged Information

(U) The plaintiffs erroneously assert that the district court violated the First Amendment by filing the redacted version of its opinion provided by the government after classification review, which identifies and removes classified and privileged information from the public opinion. "As a general rule," there is no constitutional right "to traditionally nonpublic government information." *McGehee v. Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality op.) (no First Amendment or due

process "right of access to government information"); *id.* at 16 (Stewart, J., concurring). This rule necessarily applies with respect to classified and privileged information, to which litigants have never had a right of public access. To the extent the district court expressed disagreement with one portion of the government's redactions, we explain below why the information in question is classified.

A. (U) Plaintiffs Have No First Amendment Right of Access to Classified or Privileged Information in a Judicial Opinion

(U) Relying on *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), and its progeny, the plaintiffs invoke the First Amendment right of public access to judicial documents to challenge the redactions in the district court's opinion and the process used to identify those redactions. (NYT Br. 41-45; ACLU Br. 35). But those cases hold only that the judiciary must, before sealing certain unclassified judicial proceedings or records, make specific findings demonstrating the need to deny public access. Here, the Executive Branch has already determined that disclosure of the redacted classified information could reasonably be expected to harm national security. The Executive Branch also identified a limited amount of privileged information, the redaction of which the district court approved.

(U) Where classified information is at stake, the general rule is that its protection "must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it."

Department of the Navy v. Egan, 484 U.S. 518, 529 (1988). The Executive Branch's "authority to classify and control access to information bearing on national security" stems from the President's constitutional role as the head of the Executive Branch and as Commander-in-Chief. *Id.* at 527.

(U) The deference that courts give to the Executive regarding access to classified information is not only rooted in the constitutional role of the President, it also rests on practical concerns. "Recognizing the relative competencies of the executive and judiciary," this Court has cautioned that it is "bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding whether disclosure of the [classified] information * * * would pose a threat to national security." *ACLU v. DOJ*, 681 F.3d at 70-71 (citation and internal quotation marks omitted); *see also McGehee*, 718 F.2d at 1149 ("judiciary lacks the requisite expertise" to "second-guess" agency classification decisions).

(U) This Court has not decided whether a district court has any power to review security classifications made regarding judicial documents. *See United States v. Aref*, 533 F.3d 72, 82 (2d Cir. 2008) (reserving the question). To the extent any limited review is available in this context, however—an issue the Court need not decide in this case—such review would properly account for, and give the utmost deference to, the national security judgments of the Executive Branch. *See ACLU v. DOJ*, 681 F.3d at 69-70 (recognizing that classified information remains

protected if the Government provides a "logical or plausible" explanation that its disclosure reasonably could be expected to damage national security).

(U) Even assuming arguendo that *Press-Enterprise* applies in this very different context, furthermore, the First Amendment right of access attaches only where (1) there is a history of public access to the particular judicial proceeding, and (2) public access plays a significant positive role in its functioning. 478 U.S. at 8-9. A court must examine not only the type and stage of the judicial proceeding, but also the particular materials at issue. *See, e.g., In re Appl. of New York Times Co. to Unseal Wiretap*, 577 F.3d 401, 410-11 (2d Cir. 2009).

(U) History and tradition refute any claim that experience supports public access to classified or privileged information in a judicial opinion. The Government is not aware of any case, in any type of proceeding, in which a court has recognized a First Amendment right of access to classified information in judicial records. On the contrary, classified information is regularly provided to courts in a non-public manner. *See, e.g., ACLU v. DOJ*, 681 F.3d at 70; *Wilson*, 586 F.3d at 176 n.4. Courts also regularly incorporate and discuss classified information in portions of their opinions that are withheld from public view. *See, e.g., Obaydullah v. Obama*, 688 F.3d 784, 786 n.* (D.C. Cir. 2012); *In re Sealed Case*, 310 F.3d 717, 720 n.3 (For. Intel. Surv. Ct. Rev. 2002). Indeed, classified

information was discussed in this Court's prior opinion, and redacted from the version publicly filed. (*See* SPA 124).

(U) Similarly, courts have recognized that the interest in protecting the confidentiality of privileged information is "precisely the kind of countervailing concern" that can "overrid[e] the general preference for public access to judicial records." *Siedle v. Putnam Invs.*, 147 F.3d 7, 11 (1st Cir. 1998); *see also Diversified Group, Inc. v. Daugerdas*, 217 F.R.D. 152, 160-161 (S.D.N.Y. 2003) (collecting cases). Indeed, at the government's request in the prior appeal, this Court redacted privileged information from the version of the OLC-DOD Memorandum appended to its decision, on the ground that it was privileged and thus protected by FOIA Exemption 5. (*Compare* CA 160-61 *with* SPA 165-66; *see also* CA 131, JA 927).

(U) It would be particularly odd to find a First Amendment right of access to classified and privileged information in a FOIA action, given Congress' judgment that a district court may review documents and information *in camera* and *ex parte* to determine whether they have been properly withheld as classified or privileged. 5 U.S.C. § 552(a)(4)(B); *see also ACLU v. DOJ*, 681 F.3d at 70 (undertaking such review). The government should not lose the ability to protect classified and privileged information simply because the district court has, for the sake of facilitating judicial review, incorporated such information from its *ex parte* review

into its explanation of why documents are exempt from disclosure. *See In re Grand Jury Subpoena*, 493 F.3d 152, 154 (D.C. Cir. 2007) ("[T]here is no First Amendment right to grand jury proceedings, nor do First Amendment protections extend to ancillary materials dealing with grand jury matters, such as Judge Tatel's concurring opinion." (internal quotation marks omitted)).

(U) The plaintiffs have also not shown that public access to classified or privileged information "plays a significant positive role in the functioning of the particular process in question." *United States v. Erie County*, 763 F.3d 235, 239 (2d Cir. 2014) (internal quotation marks omitted). The Supreme Court has repeatedly emphasized the government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp v. U.S.*, 444 U.S. 507, 509 n.3 (1980); *see also Egan*, 484 U.S. at 527; *Haig v. Agee*, 453 U.S. 280, 307 (1981). And, as noted, courts have recognized the strong public interest in protecting the confidentiality of privileged communications. Granting the public access to classified and privileged information discussed in judicial opinions would frustrate that interest.[12]

[12] (U) Even if this Court were to find a "qualified First Amendment right of public access" to classified or privileged information in a judicial opinion, the appropriate disposition would not be to order specific disclosures. "[E]ven when a right of access attaches, it is not absolute." *Press-Enterprise*, 478 U.S. at 9. Here, the government's redaction of only information determined to be classified or

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B. (U) The Redacted Material Identified by the District Court Was Properly Classified

(U) The district court was mistaken to suggest in its October 31, 2014 order that redacted information at page 9 of its opinion would not "tend to reveal any classified information." (SPA 176).

[redacted] The redacted portions of the district court's opinion address the [redacted]

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privileged already satisfies *Press-Enterprise*'s requirement that closure be "essential to preserve higher values" and "narrowly tailored to serve that interest." *Id.* at 9 (internal quotation marks omitted). Should this Court disagree, however, it should give the district court the opportunity to consider the government's submissions in this regard and to engage in any "additional fact-finding" necessary, *Erie County*, 763 F.3d at 243, taking into account the deference to be afforded to the Executive Branch's predictive judgment as to the harm that could result from disclosure of classified information. *See ACLU v. DOJ*, 681 F.3d at 70-71.

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[redacted] (CA 464-68). Because the discussion in the redacted paragraphs at page 9 of the district court's opinion tends to disclose that classified information, these paragraphs are also properly classified.

(U) The United States explained the reasons for these redactions in a classified, *ex parte* submission to the district court. (CA 476-77). The district court's basis for questioning the redactions was that it disagreed with the government's assessment that these paragraphs "would tend to reveal any classified information." (SPA 176). But this is precisely the type of matter on which a court should accord substantial deference to the views of the Executive Branch. *See ACLU v. DOJ*, 681 F.3d at 70-71; *El-Masri v. United States*, 479 F.3d

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296, 305 (4th Cir. 2007). This Court should maintain the disputed redactions to the district court's opinion.

(U) CONCLUSION

The district court's order dated September 30, 2014, should be affirmed, and the redacted portions of that Order should remain under seal.

Respectfully submitted,

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(U) CERTIFICATE OF COMPLIANCE

(U) Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,733 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in Times New Roman, 14-point font.

(U) /s/ Sharon Swingle
(U) Counsel for Defendants-Appellees

(U) CERTIFICATE OF SERVICE

(U) I hereby certify that the foregoing Brief for Defendants-Appellees was filed and served on April 2, 2015. The classified version of the brief was filed with the Court by being delivered to the Court Security Officer on this date. The public, redacted version of the brief was filed with the Court and served on opposing counsel through the CM/ECF system.

/s/ Sharon Swingle
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