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

BRIEF FOR DEFENDANTS-APPELLEES–CROSS-APPELLANTS

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(U) TABLE OF CONTENTS

[redacted]

(U) TABLE OF AUTHORITIES

(U) *Page*

(U) *Cases*

[redacted]

PRELIMINARY STATEMENT

(U) This is an appeal, and cross-appeal, from a district court judgment disposing of the remaining aspects of this Court's 2014 mandate in this long-running Freedom of Information Act ("FOIA") action. The FOIA requests at issue seek records from the Department of Justice's Office of Legal Counsel ("OLC"), the Central Intelligence Agency ("CIA"), and the Department of Defense ("DOD") (collectively, the "agencies" or the "government"), concerning the use of targeted lethal force against U.S. citizens associated with al-Qa'ida and other terrorist groups.

[redacted] The Court has issued two prior decisions in this case. In June 2014, the Court held that the government had waived the protection of FOIA's exemptions as to certain legal analysis contained in a July 2010 OLC opinion concerning a contemplated lethal operation against Anwar al-Aulaqi (the "OLC-DOD Memorandum"). *New York Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014) ("*NYT I*"). The Court ruled that the factual portions of the OLC-DOD Memorandum, which contained intelligence information and operational details, remained properly classified and protected by FOIA Exemption 1, 5 U.S.C. § 552(b)(1). The Court also held that information [redacted]

[redacted]

[redacted]

[redacted] remained classified and protected by FOIA Exemption 1.

[redacted] Following a remand, this Court affirmed the district court's ruling that ten other OLC opinions responsive to the plaintiffs' FOIA requests were protected in whole or in part by FOIA Exemptions 1, 3, and 5. *See New York Times v. DOJ*, 806 F.3d 682 (2d Cir. 2015) ("*NYT II*"). This Court held that Exemptions 1 and 3 protected classified intelligence information and operational details in the factual portions of a February 2010 OLC opinion regarding a contemplated operation against Aulaqi. The Court also held that Exemptions 1 and 3 protected OLC opinions [redacted]

(U) In July 2015, while the *NYT II* appeal was pending, the district court issued a 160-page decision addressing the remaining responsive OLC records, as well as responsive records in the possession of CIA and DOD. As this Court had directed, the district court reviewed detailed classified indices submitted by OLC, CIA, and DOD; reviewed many of the responsive documents *in camera*; and made rulings on a document-by-document basis. Special Appendix ("SPA") 1-164; Classified Supplemental Appendix ("CA") 1-160. The district court held that the vast majority of documents were protected by FOIA Exemptions 1, 3, and 5 as

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properly classified, protected from disclosure by the National Security Act, and privileged. The district court ordered disclosure of seven documents in whole or in part, however, reasoning that those documents contain legal analysis similar to the legal analysis that this Court ordered released in *NYT I*.

[redacted] This Court should reject the ACLU's claim to classified, statutorily protected, and privileged documents. The documents that the district court held to be protected under FOIA address highly classified matters that this Court has already held are covered by Exemptions 1 and 3, including [redacted] That information, as well as other classified and statutorily protected information, is exempt under Exemptions 1 and 3. In addition, nearly all of the withheld documents are protected by the deliberative process, attorney-client, and/or presidential communications privileges under Exemption 5. Most if not all of the arguments raised by the ACLU have already been rejected by this Court in the prior appeals, and by the D.C. Circuit in a separate appeal concerning the same or similar documents.

[redacted]

[redacted]

(U) The government brings this limited cross-appeal to challenge certain disclosures ordered by the district court as to seven documents.

(U) The district court reasoned that the government has waived its privileges and lost Exemption 5 protection with regard to any legal analysis in the documents that is similar in content to the OLC-DOD Memorandum. But the seven documents at issue in the cross-appeal remain privileged in their entirety, because they were created in the course of distinct attorney-client communications and/or Executive Branch deliberations. Furthermore, several of the documents are drafts or other attorney work product. Nothing in this Court's prior rulings–which found a waiver as to *final* legal analysis in the OLC-DOD Memorandum–suggests that drafts or other independently privileged deliberations or attorney-client communications are no longer protected. In addition, three of the seven documents contain classified and statutorily protected information that the district court did not redact.

(U) STATEMENT OF JURISDICTION

(U) The district court had jurisdiction over this FOIA action under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The district court entered judgment on July 23, 2015, and the ACLU filed a timely notice of appeal on September 18, 2015. Joint Appendix ("JA") 26, 624. The government filed a timely cross-appeal on October 2, 2015. JA 26. This Court has jurisdiction under 28 U.S.C. § 1291.

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(U) STATEMENT OF ISSUES PRESENTED

1. (U) Whether the district court properly concluded that the documents the ACLU seeks are protected by FOIA Exemptions 1, 3, and 5 because they are classified, protected by the National Security Act, and/or privileged.

2. (U) Whether the district court erred in holding that FOIA Exemptions 1, 3, and 5 did not protect seven documents that contain privileged attorney-client communications and Executive Branch deliberations, three of which also contain classified information and information protected by the National Security Act.

(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)(A). 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, 166-67 (1985).

(U) FOIA Exemption 1 protects information and 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). Under

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Executive Order 13,526, information may be classified if it "pertains to" one of the specified categories—which include "intelligence activities (including covert action), intelligence sources or methods," "foreign relations or foreign activities of the United States," and "military plans, weapons systems or operations"—and an official with original classification authority has determined that its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security." Exec. Order No. 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009).

(U) FOIA Exemption 3 protects information and records that are "specifically exempted from disclosure by statute . . . if that 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). Section 102A(i)(1) of the National Security Act of 1947, as amended, requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1), and qualifies as a withholding statute for purposes of Exemption 3. *See ACLU v. DOJ*, 681 F.3d 61, 72-73 (2d Cir. 2012).

(U) FOIA Exemption 5 protects from public disclosure "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party

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other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). That includes records that are covered by the deliberative process, attorney-client, and presidential communications privileges. *See Brennan Center for Justice v. DOJ*, 697 F.3d 184, 189 (2d Cir. 2012); *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014).

B. (U) FACTUAL AND PROCEDURAL BACKGROUND.

1. (U) The ACLU's FOIA Request and Initial District Court Proceedings

(U) This case arises out of FOIA requests submitted by the ACLU to the Department of Justice (including its component OLC), CIA and DOD, seeking records relating to the "targeted killing" of U.S. citizens. JA 28-39. The ACLU sought records pertaining to (1) the legal basis upon which U.S. citizens can be subjected to targeted killings, (2) the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such decisions and what evidence is needed to support them, and (3) the legal and factual basis for the targeted killing of Anwar al-Aulaqi. JA 32-33.

(U) During the initial district court proceedings, the government acknowledged the existence of classified records responsive to the ACLU's FOIA request, including the OLC-DOD Memorandum, but determined that providing any further details about responsive records could itself disclose classified information protected by Exemption 1 (a "no number, no list" response). The district court

upheld the agencies' responses to the plaintiffs' respective FOIA requests, and granted summary judgment for the government. *New York Times Co. v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).[1]

2. (U) The *NYT I* Decision

(U) This Court affirmed in part, reversed in part, and remanded. *NYT I*, 756 F.3d 100. The Court first considered the OLC-DOD Memorandum, which concerned a contemplated operation against Anwar al-Aulaqi, whom the government had officially acknowledged targeting. *See id.* at 111. The Court ruled that the government had waived the protection of FOIA's exemptions with respect to certain legal analysis in the Memorandum, and that a redacted version of the Memorandum must be disclosed. *Id.* at 112-21.

(U) The Court's waiver ruling was based principally on the release in February 2013 of a Department of Justice White Paper (the "DOJ White Paper") containing legal analysis that the Court concluded "virtually parallels" certain legal analysis in the OLC-DOD Memorandum. *Id.* at 116. The Court also cited statements by certain high-ranking Executive Branch officials, including a statement by the Attorney General publicly acknowledging "the close relationship between the DOJ White Paper and previous OLC advice." *Id.* "Whatever

[1] (U) This case was consolidated with another FOIA case filed by the New York Times and two of its reporters; that case was finally resolved by this Court's decision in *NYT II*.

[redacted]

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." *Id.* at 120-21.

(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." *Id.* at 117 (emphasis added); *see also id.* at 113 ("[N]o waiver of any operational details in th[e] document has occurred."). Holding that the factual portions of the OLC-DOD Memorandum remained classified and exempt from disclosure, the Court redacted "the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities." *Id.* at 119; *see also id.* at 124-25 (redacting Part I, consisting of intelligence reporting concerning Aulaqi and information about how an operation would be carried out). Only two discrete facts were held to "no longer merit secrecy": that Aulaqi was killed in Yemen, and that CIA had an undefined operational role in the Aulaqi strike. *Id.* at 117-19 & 122 n.22.

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

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[redacted]

[redacted] *Id.* at 117; CA 595. At the government's request, the Court also redacted additional passages in the OLC-DOD Memorandum [redacted] [redacted] CA 626-27 (rehearing petition), 641 ("We will make all of the redactions in the OLC-DOD Memorandum requested by the government."). The Court also concluded that "the OLC-DOD Memorandum contains some references to the Yemeni government that are entitled to secrecy." 756 F.3d at 118.

(U) With regard to documents other than the OLC-DOD Memorandum, the Court rejected the agencies' "no number, no list" response to the ACLU's FOIA request, in light of the Court's ruling that the government had publicly acknowledged that CIA "had an operational role in targeted drone killings." *Id.* at 122. The Court did not find any waiver as to the nature of CIA's role, however. *Id.* at 122 n.22 (noting that for purposes of appeal, "it makes no difference whether the drones were maneuvered by CIA or DOD personnel so long as CIA has been disclosed as having some operational role in the drone strikes").

(U) The Court directed the government on remand to submit any other responsive OLC legal 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." *Id.* at 121.

[redacted]

[redacted]

[redacted] The Court also directed OLC to disclose a redacted version of a classified index of records responsive to the ACLU's FOIA request. *Id.* at 122-23. The Court permitted the government to redact [redacted] *Id.* at 122-23 & n.23; CA 632-33 (rehearing petition); *New York Times Co. v. DOJ*, 758 F.3d 436, 441 (2d Cir. 2014) (deeming the "reasons indicated by the Government in a sealed portion of its Petition" "sufficient to preclude disclosure" of certain listings); CA 666-74 (seeking further redactions to index, [redacted] CA 685 (permitting additional redactions). The Court left it to the district court "to determine which of these documents need to be withheld and which portions of these documents need to be redacted as subject to one or more exemptions that have not been waived." *NYT I*, 756 F.3d at 123. The Court recognized that "[s]ome, perhaps all," of the information in the documents listed on the OLC index "might be protected as classified intelligence information or predecisional." *Id.*

(U) Finally, the Court directed DOD and CIA to provide the district court with classified indices listing documents responsive to the ACLU's FOIA request. *Id.* at 122, 123. The Court directed the district court to determine which, if any,

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listings must be disclosed, "after examining whatever further affidavits DOD and CIA care to submit to claim protection of specific listings." *Id.* at 123. Again, the Court noted that this would "not necessarily mean that either the number or the listing of all documents on those indices must be disclosed." *Id.* at 122.

3. (U) The District Court's First Decision on Remand

(U) On remand, the district court ruled as to ten other responsive OLC memoranda, nine of which were withheld in full and one of which was withheld in part. The district court applied this Court's rulings in *NYT I* to hold that the documents were properly protected as classified, statutorily protected, and privileged. CA 687-707. The district court rejected the plaintiffs' contention that the government had waived the protection of applicable FOIA exemptions. *Id.*

[redacted] Specifically, the district court held that Exemptions 1, 3, and 5 protected portions of a February 2010 memorandum concerning a possible operation against Aulaqi, which the government had released with redactions consistent with this Court's redactions to the OLC-DOD Memorandum. The district court held that Exemptions 1, 3, and 5 protected [redacted] CA 690-98. The district court also held that

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[redacted]

Exemptions 1, 3, and 5 protected two classified and privileged OLC opinions [redacted] CA 692-701.

[redacted] The district court also held that the remaining seven OLC legal memoranda [redacted] were classified and privileged documents protected by Exemptions 1, 3, and 5. [redacted] CA 689. Another memorandum, from 2002, provided legal advice on the "assassination ban" in Executive Order 12,333. CA 701-03. [redacted] CA 704-06.

4. (U) The *NYT II* Decision

(U) The plaintiffs appealed, and this Court affirmed the district court's rulings as to all ten OLC memoranda. *NYT II*, 806 F.3d at 685-87.

[redacted] The Court held that the two memoranda [redacted] contained "intelligence information that was properly exempted." *Id.* at 685. The Court also held that redacted portions of the February 2010 Aulaqi memorandum were exempt from compelled disclosure. *Id.* at 685, 687.

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[redacted]

(U) The Court also held protected a 2002 memorandum addressing Executive Order 12,333, agreeing with the district court that "most of it discusses topics exempted from FOIA disclosure and not subject to any waiver." *Id.* at 686. As to one portion of the 2002 memorandum that discussed a topic publicly referred to by senior government officials several years later, the Court found no waiver of privilege, reasoning that the context of the legal reasoning in the memorandum was different from the context of the later public statements. *Id.* at 686-87.

[redacted] Next, the Court agreed with the district court that five legal memoranda [redacted] remain "entitled to protection." *Id.* at 687. The Court explained that "[i]t would be difficult to redact any arguably disclosable lines of legal analysis from these documents without disclosing the content of [redacted] *Id.*

(U) With regard to all of the OLC memoranda, moreover, the Court rejected the ACLU's argument that OLC opinions constitute "working law" that the government is compelled to disclose. *Id.* The Court explained that OLC does not "'have the authority to establish the 'working law' of the agency," and that "[a]t most," OLC opinions provide "legal advice as to what an agency is *permitted* to do." *Id.* (quotation marks and citation omitted).

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5. (U) The District Court's July 2015 Decision

(U) While the *NYT II* appeal was pending, the district court issued a lengthy decision that, as later supplemented and amended, ruled on the remaining documents in the possession of OLC, CIA, and DOD that were responsive to the ACLU's FOIA request. SPA 1-164; JA 620-22; CA 1-160.

(U) Although the district court ruled as to 163 documents, only 59 documents are relevant to these cross-appeals. The ACLU seeks 59 documents that it argues are not protected under FOIA as classified, protected by statute, and/or privileged;[2] the government challenges the district court's order compelling disclosure of part or all of 7 of those documents based on a theory of waiver. The documents at issue on appeal, which are described in more detail below, consist generally of legal opinions, classified intelligence information, draft materials, and attorney-client communications.

(U) The district court conducted a document-by-document review of the listings on the OLC, CIA and DOD classified indices. For many of the OLC documents, and several of the CIA and DOD documents, the district court also reviewed the documents *in camera* and issued rulings based upon that review.

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[2] (U) On appeal, the ACLU has narrowed its challenge to a total of 59 documents: 21 OLC documents, 32 CIA documents, and 6 DOD documents. ACLU Br. 6-7. (Although the ACLU's brief states that 60 documents are at issue, the brief identifies only 59 distinct documents). One of those 59 documents, OLC 50, was actually ordered disclosed in full. SPA 59, 159.

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[redacted]

SPA 16-144, 149-158.[3] The district court held that the vast majority of the documents were protected by Exemptions 1, 3, and/or 5. *See* SPA 16-144, 149-158, 160, 165-66.

[redacted] The district court first considered OLC documents that contained classified and statutorily protected information [redacted] CA 16-29; *see also* CA 276-341 (OLC classified *Vaughn*). Those documents included [redacted] *See* CA 278-80, 286-92.

[redacted] As the district court recognized, this Court in *NYT I* held that information [redacted] was properly classified and protected by Exemption 1. CA 16-17, 28.

[3] (U) The district court's decision comprises three documents: (1) the 160-page *Memorandum Decision and Order*, dated June 23, 2015, which incorporates the government's classified index listing for each document at issue, the court's original "Ruling" on each document based on its review of the classified indices, and its "Rulings After In Camera Review" as to those documents the district court reviewed *in camera* (SPA 1-160); (2) the *Order With Respect to the Government's Submission of July 1, 2015*, dated July 16, 2015 ("July 16, 2015 Order"), which accepted the segregability determinations contained in supplemental declarations submitted by government, and amended the court's *in camera* review ruling as to OLC document 145 (JA 620-22); and (3) the *Order Amending Decision of June 23, 2015, Directing the Unsealing of Certain Orders Previously Filed, Directing the Entry of Judgment, and Closing Case*, dated July 17, 2015 ("July 17, 2015 Order"), which summarized the various iterations of, and amendments to, the district court's decision over time (SPA 162-64). The unredacted district court decision is reproduced at CA 1-160.

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(U) The court next considered OLC legal advice memoranda, intelligence products, and other factual information provided to OLC in connection with requests for legal advice, and other operational documents. The district court held that the government had properly withheld as exempt from disclosure under FOIA:

- (U) (Privileged) OLC 75 and 84, attorney-client communications requesting legal advice [redacted] *see* CA 39-44;
- [redacted]
- (U) OLC 64, 65, 66, 70, 71, 73, 76, 83, 90, 91, and 95, intelligence products and other factual information provided to OLC in connection with such requests for legal advice, *see* CA 67-75.

(U) Turning to the documents identified on the classified CIA *Vaughn* index, *see* CA 427-66, the district court held that FOIA Exemptions 1, 3, and 5 protected intelligence products, classified correspondence, and internal deliberative materials, including:

- [redacted]
- [redacted]

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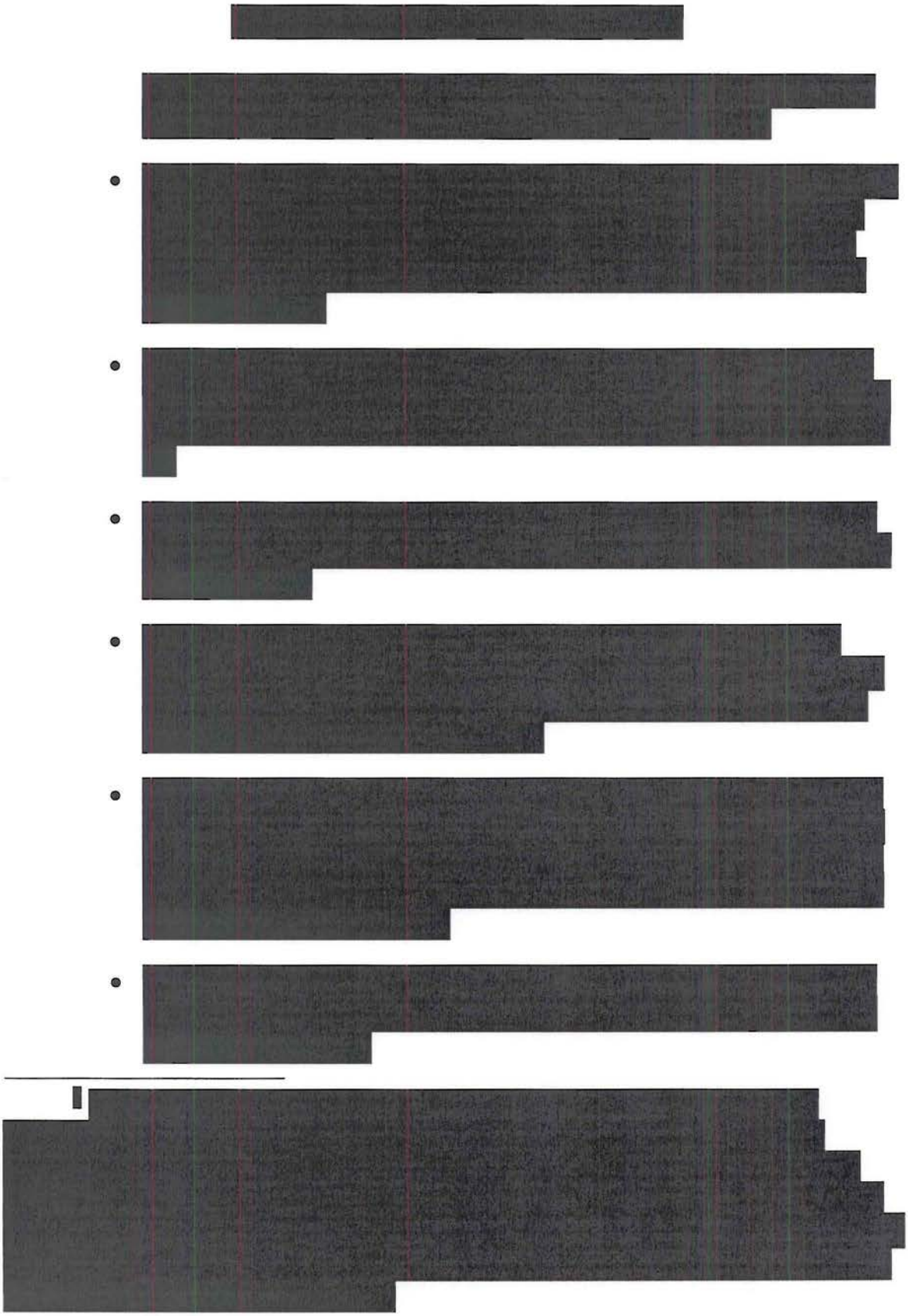

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[redacted] The district court also held that FOIA Exemptions 1 and 5 protected six classified and privileged documents that discuss [redacted] *See* CA 149-56.

(U) Although the district court held that the vast majority of responsive documents were exempt from disclosure, the district court ordered seven documents disclosed in whole or in part. The government had invoked Exemptions 1, 3, and 5 over withheld portions of the documents. The district court upheld the redaction of limited portions of the documents under Exemptions 1 and 3, but rejected the Exemption 5 claim on the basis that the documents contain legal analysis that is similar in content to legal analysis in the OLC-DOD Memorandum. *See* CA 34-38 (OLC 46), 58-59 (OLC 50),[5] 66-67 (OLC 144-145), 108-12 (CIA 59, Tab C), 123-26 (CIA 109), 131-33 (CIA 113).

(U) The district court also ordered the government to undertake a re-review of each of the documents that the district court had not reviewed *in camera*, to determine whether information concerning certain "officially acknowledged facts" could be reasonably segregated from information that is exempt from disclosure.

[5] (U) Although the July 17, 2015 Order (SPA 162-64) and Judgment (SPA 165-66) mistakenly state that OLC is directed to produce Document 150, it is clear from the June 23, 2015 Decision and Order that the court was referring to OLC 50 (SPA 58-59).

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[redacted]

SPA 11-13. Specifically, the district court found that the government had officially acknowledged the following:

1. (U) The fact that the government uses drones to carry out targeted killings overseas.

2. (U) The fact that both DOD and CIA have an intelligence interest in the use of drones to carry out targeted killings.

3. (U) The fact that both DOD and CIA have an operational role in conducting targeted killings.

4. (U) Information about the legal basis (constitutional, statutory, common law, international law and treaty law) for engaging in targeted killings abroad, including specifically the targeted killing of a U.S. national.

5. (U) The fact that the government carried out the targeted killing of Aulaqi.

6. (U) The FBI was investigating Samir Khan's involvement in terrorism/jihad.

SPA 8-11, 158-59. In response, the government submitted supplemental declarations from OLC, CIA and DOD attesting with respect to each document that any "officially acknowledged material" is not reasonably segregable. SPA 159; CA 479-547. The district court found these declarations sufficient, JA 620, and directed entry of judgment, SPA 162-66. These appeals followed.

(U) SUMMARY OF ARGUMENT

I. (U) The district court correctly held that FOIA Exemptions 1, 3, and 5 protect the classified, statutorily protected, and privileged documents sought by the ACLU on appeal. This Court has previously held that similar documents are

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protected by FOIA exemptions, and the district court's ruling on those documents reflects a careful application of this Court's decisions.

[redacted] As this Court has held, such information is protected by Exemptions 1 and 3. Legal analysis that would reveal that same information is similarly protected. The district court correctly concluded that none of the withheld information has been officially acknowledged.

(U) The district court also properly held that nearly all of the documents are protected by Exemption 5. The documents were prepared to assist in Executive Branch deliberations regarding the use of targeted lethal force, and are thus protected by the deliberative process privilege. Many of them are also attorney-client privileged because they contain legal advice to a client or a confidential client communication to a lawyer seeking legal advice. Some of the documents are also protected by the presidential communications privilege as communications to or from the President's closest advisers.

II. (U) The district court erred, however, in ordering disclosure of seven documents in whole or in part. The district court reasoned that the government has waived Exemption 5 protection for any legal analysis in those documents that is

[redacted]

similar to legal analysis in the OLC-DOD Memorandum. But the government has never waived the applicable privileges that protect the seven documents, nor discussed their contents publicly. The attorney-client privilege is not lost simply because information in a privileged document is otherwise publicly available. Similarly, a waiver of the deliberative process privilege is generally limited to the specific deliberative document that has been disclosed, and does not reach all related material.

(U) Furthermore, even if the seven privileged documents were not protected by Exemption 5, the government should have been permitted to redact additional discrete portions of three documents that are classified and protected by the National Security Act, and hence protected by Exemptions 1 and 3.

(U) STANDARD OF REVIEW

(U) This Court reviews *de novo* the district court's determination of whether the government properly invoked FOIA exemptions over responsive documents. *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009). Although an agency has the burden to establish the applicability of the asserted 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.* (quotation marks and citation omitted). The agency's declarations are entitled to a presumption of good faith, *id.*, and where the claimed exemptions implicate

[redacted]

classified national security information, 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) (quotation marks and citation omitted). "Ultimately, an agency may invoke a FOIA exemption if its justification 'appears logical or plausible.'" *Id.*

(U) ARGUMENT

(U) POINT I

(U) The District Court Correctly Sustained the Government's Invocation of FOIA Exemptions 1, 3, and 5 Over the Documents Sought by the ACLU on Appeal

(U) After a painstaking review of the government's detailed indices, multiple declarations from agency officials, and many of the documents themselves, the district court upheld the vast majority of the government's assertions of FOIA Exemptions 1, 3, and/or 5. Nearly all of the documents at issue on appeal are properly classified and protected by Exemption 1; most are also protected by the National Security Act and Exemption 3.[6] This Court previously applied FOIA Exemptions 1 and 3 to similar documents in *NYT I* and *NYT II*. Nearly all of those documents are also privileged and protected by Exemption 5.

[6] (U) There are only three documents at issue on appeal as to which the government has not invoked Exemptions 1 or 3: OLC 50, OLC 144, and Tab C of CIA 59.

[redacted]

[redacted]

The ACLU's arguments, which largely repeat claims already considered and rejected by this Court in the prior appeals, are unavailing.

A. (U) Exemptions 1 and 3 Protect the Properly Classified and Statutorily Protected Documents and Information

(U) Nearly all of the documents sought by the ACLU on appeal are protected by Exemption 1 because they "pertain to" one or more categories of classified information in section 1.4 of Executive Order 13,526—including "intelligence activities (including covert action), intelligence sources and methods," "foreign relations or foreign activities of the United States," and/or "military plans, weapons systems, or operations"—and the government's declarants have identified and described the harms to national security that could reasonably be expected to result from disclosure. Most of the classified documents are also protected by Exemption 3 because their disclosure would reveal intelligence sources and methods protected by the National Security Act.[7]

1. [redacted]

[7] (U) The ACLU does not challenge CIA's assertion of the CIA Act to protect the names and identifying information of agency personnel. ACLU Br. 22 n.11.

[redacted]

[redacted]

[redacted] This Court has repeatedly held such information to be protected from disclosure under Exemptions 1 and 3.

a. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

b. [redacted]

[redacted] The district court properly held that FOIA Exemptions 1 and 3 protect against compelled disclosure of [redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted] Given this Court's prior rulings that FOIA Exemptions 1 and 3 protect [redacted]

[redacted]

[redacted] are clearly protected. [redacted] They are also properly classified and protected by Exemption 1.

[redacted] Indeed, the D.C. Circuit recently upheld the government's invocation of Exemptions 1 and 3 to protect portions of OLC 9, a classified Department of Justice white paper dated May 2011, in a separate FOIA case brought by the ACLU. *See ACLU v. DOJ*, No. 15-5217, 2016 WL 1657953, *2-*3 (D.C. Cir. Apr. 21, 2016); *see also Leopold v. DOJ*, No. 14-cv-00168(APM), ECF No. 40 (D.D.C. Apr. 25, 2016) (reconsidering its prior ruling in light of the D.C. Circuit's decision "affirming [the government's] redactions to the White Paper in their entirety"). Principles of *res judicata* and collateral estoppel bar the ACLU from relitigating the same issue here.

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(U) The ACLU renews the argument that legal analysis cannot be properly classified or protected by statute because it is not *itself* an "intelligence source or method." ACLU Br. 20-23. But information is eligible for classification under Executive Order 12,356 if it "pertains to" an enumerated category and would cause identifiable harm to national security if released. As the D.C. Circuit recognized in rejecting the same argument, "pertains is not a very demanding verb," and it plainly extends to classified legal analysis. *ACLU v. DOJ*, 2016 WL 1657953, *2 (quotation marks and citation omitted).

(U) Similarly, Exemption 3 protects any information that "relates to" an intelligence source or method protected by the National Security Act. *ACLU*, 681 F.3d at 76. This Court has recognized that legal analysis can be properly classified and protected under the National Security Act. *See NYT II*, 806 F.3d at 685, 687 (OLC memoranda protected by Exemptions 1 and 3); *see also NYT I*, 756 F.3d at 119 (noting that "in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of that operation").

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[redacted] The district court properly held that this information remains properly classified and

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statutorily protected from disclosure. CA 32, 97-99, 102-03, 127-30, 134-36; *see also* CA 75-88, 237-40. [redacted]

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2. (U) Factual Documents Containing Raw Intelligence and Analysis Concerning Aulaqi and AQAP

[redacted] The district court also correctly held that the government properly invoked Exemptions 1 and 3 to protect factual documents containing raw intelligence and analysis about Aulaqi and AQAP, which are properly classified and protected by the National Security Act. This category of documents, as narrowed by the ACLU on appeal, [redacted]

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[redacted] As explained *infra* in Point II, the district court incorrectly concluded that certain legal analysis in OLC 46 is no longer privileged. The court rightly recognized, however, that the portions of OLC 46 [redacted] remain protected by Exemptions 1 and 3. CA 38.

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(U) Such documents clearly "pertain" and "relate" to intelligence sources and methods, and thus are protected by Exemptions 1 and 3. *See ACLU*, 681 F.3d at 70-72, 75-76. They are the intelligence source materials on which OLC relied in drafting the factual sections of its Aulaqi opinions. CA 195-96, 306-08, 373-74. In *NYT I*, the Court redacted the entire factual section of the OLC-DOD Memorandum, including "any mention of intelligence gathering activities." *Id.* at 119. The Court took the same approach in *NYT II*, affirming the government's invocation of Exemptions 1 and 3 over all factual portions of the February 2010 Aulaqi memorandum. 806 F.3d at 687. The district court properly applied these holdings to sustain the invocation of Exemptions 1 and 3 over the underlying factual documents considered by OLC in drafting those portions of the memoranda. CA 73-75.

(U) Seizing on the district court's observation that the government has publicly disclosed some information about its reasons for targeting Aulaqi, SPA 9, the ACLU contends that the district court erred by not ordering that such information be segregated and released. ACLU Br. 18-20. But the intelligence source documents and the information they contain are of a very different character than the generalized information about Aulaqi that has been officially released.

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The President and Attorney General have broadly referred to Aulaqi's "leadership role" as an "operational planner, recruiter and money-raiser" for AQAP, and his "role" in the failed bombing of a jetliner in Detroit in December 2009 and in planning two attacks on U.S.-bound cargo planes that never took place. SPA 8, 9-10. The intelligence products at issue here describe the actual intelligence reporting, data and analysis that these general conclusions were based upon. There is an obvious and material difference between general conclusions drawn from specific intelligence, and the intelligence itself.

(U) Furthermore, and contrary to the ACLU's argument, ACLU Br. 19, the question whether factual information about Aulaqi was protected by FOIA Exemptions 1 and 3 was squarely before this Court in both prior appeals. In *NYT I*, the ACLU argued, as it does here, that the Court should require disclosure of factual information in the OLC-DOD Memorandum that is similar in kind to information in publicly available documents about Aulaqi's role in the failed Detroit bombing.[11] The ACLU renewed that argument in *NYT II*.[12] The Court rejected those arguments, holding that the government's waiver extended "*only* to

[11] (U) *Compare* ACLU Br. at 49 & n.46 (citing information contained in February 2012 sentencing memorandum in *United States v. Abdulmutallab*) *with NYT I*, ECF No. 104, Tr. Oct. 1, 2013, at 42-43 (same).

[12] (U) *Compare* ACLU Br. at 49-50 (table purporting to describe "disclosures relating to the factual-basis for the targeting of . . . Aulaqi") *with NYT II*, ECF No. 45, ACLU Br. at 43-44 (same).

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the portions of the OLC-DOD Memorandum that explain legal reasoning," 756 F.3d at 117 (emphasis added), and redacting "any mention of intelligence gathering activities," *id.* at 119. *See also* 806 F.3d at 687 (approving redactions to February 2010 Aulaqi memorandum). The documents at issue here contain even more specific and detailed information concerning intelligence sources and methods. The district court correctly upheld the government's invocation of Exemptions 1 and 3 over that information.

3. [redacted]

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4. (U) The District Court Properly Held that the Information Protected by Exemptions 1 and 3 Has Not Been Officially Acknowledged

(U) Contrary to the ACLU's contention, ACLU Br. 23-25, the district court satisfied fully its obligation to determine that the documents held to be protected by Exemptions 1 and 3 contain no officially acknowledged information that could

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reasonably be segregated and released. The district court reviewed the materials submitted by the ACLU, identified a number of "officially acknowledged facts,"[13] and then reviewed over 70 documents *in camera* to determine whether any of those documents contained reasonably segregable officially acknowledged facts. SPA 11, 159-60. With regard to documents not reviewed *in camera*, the court required the government to conduct a further document-by-document review and to certify that the documents contain no reasonably segregable, officially acknowledged information. SPA 11-13, 159-60; *see* CA 479-547.

(U) The ACLU's argument that the district court applied an overly rigid standard for official acknowledgment, ACLU Br. 11-16, is also wrong. The district court applied the test set out in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), which this Court previously applied and described as "the law of this Circuit," *NYT I*, 756 F.3d at 120 & n.19. The ACLU reprises its argument that the Court should find official acknowledgment of information that is "closely related" to and "not materially different" from previously released information, claiming that such a test can be derived from *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983). In *Afshar*, however, the Court stated that the plaintiff had the burden to "point[] to specific information in the public domain that appears to

[13] (U) As explained *infra* in Point II, the district court erred to the extent it considered legal analysis generally to be an officially acknowledged "fact." *See* SPA 8-9.

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duplicate that being withheld." 702 F.3d at 1130. This Court in *Wilson* articulated a similar standard, describing a "strict test" for official disclosure that requires that information sought under FOIA must be "as specific as" and "match" the officially disclosed information. 583 F.3d at 186. Moreover, consistent with this Court's observation in *NYT I* that the "'matching' aspect of the *Wilson* test [does not] require absolute identity," 756 F.3d at 120, the district court did not "read *Wilson* as requiring that the information correspond verbatim to information previously released," SPA 6.

[redacted] The ACLU is also incorrect in arguing that the district court erred by "too narrowly construing the scope of the government's official acknowledgments of the CIA's operational role in targeted killing." ACLU Br. 16. [redacted]

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(U) Contrary to the ACLU's claim, ACLU Br. 17-18, although this Court considered public statements by members of Congress in *NYT I*, the Court's finding of official acknowledgement of a CIA operational role in drone strikes was premised on statements by former CIA Director Panetta. 756 F.3d at 118. As the district court observed, "[h]ad there been only comments by members of Congress, *Wilson*'s requirement that disclosures about the CIA must come from the CIA would not have been satisfied." SPA 28.[15]

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[14] (U) The ACLU erroneously asserts that the district court found "that the government had engaged in 'extensive and explicit publicity' regarding the CIA's operational role in drone strikes." ACLU Br. 17. In fact, the district court found no statements by any Executive Branch officials concerning "the nature of the CIA's 'operational role' in these matters." SPA 27 (noting "Executive Branch silence on this subject").

[15] (U) The ACLU's reliance on a book by a former CIA official, ACLU Br. at 36 n.17, is also misplaced. Not only has the ACLU waived this argument by

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(U) Furthermore, as the district court observed, there is a material difference between acknowledgment of a general "operational role" in drone strikes and acknowledgment of the nature of that role. *See* CA 7-8 ("Acknowledgment of operational *involvement*, in other words, does not eviscerate the privilege for operational *details*."). The district court correctly rejected the ACLU's claim that the government has officially disclosed the nature of the CIA's operational role in the Aulaqi strike, or any operational details about any particular drone strike. CA 27-29.

[redacted] As the district court rightly noted, [redacted]—is plainly protected by FOIA Exemptions 1 and 3. CA 29.

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failing to raise it before the district court, but publications by former officials are not attributable to CIA, even if they underwent prepublication review. *See, e.g.*, *Afshar*, 702 F.2d at 1133-34.

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B. (U) The Privileged Documents and Information Sought by the ACLU Are Also Protected by Exemption 5

(U) Nearly all of the documents sought by the ACLU on appeal are also privileged, and therefore protected by Exemption 5, 5 U.S.C. § 552(b)(5).[16] The government's declarations and other submissions to the district court provided ample justification for the assertion of the deliberative process, attorney-client privilege, and presidential communications privileges.

1. (U) Privileged Executive Branch Deliberations and Attorney-Client Communications Concerning Contemplated Counterterrorism Operations

(U) Exemption 5 protects materials covered by the "deliberative process" privilege, which applies to agency records that are "predecisional" and "deliberative." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The government need not "identify a specific decision" made by the agency, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975), so long as the document "was prepared to assist [agency] decisionmaking on a specific issue." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002). "A document is "deliberative' when it is actually related to the process by

[16] (U) The government invoked Exemption 5 over all of the documents sought by the ACLU on appeal *except* CIA 105-07, 119-20, 124, and 140.

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which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (quotation marks, citation, and alteration omitted). In determining whether a document is deliberative, courts ask whether it "formed an important, if not essential, link in [the agency's] consultative process"; reflects the opinions of the author rather than the policy of the agency; or might "reflect inaccurately upon or prematurely disclose the views of [the agency]." *Id.* at 483.

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All of these predecisional, deliberative documents fall squarely within the scope of the deliberative process privilege. *See* CA 406-08, 411-12.

[redacted] The deliberative process privilege also protects memoranda [redacted]

[18] (U) The Deputies Committee and Principals Committee are part of the National Security Council (NSC) system. The Principals Committee is the senior interagency forum for consideration of policy issues affecting national security: regular members include the National Security Advisor; the Secretaries of State, Defense and Homeland Security; the Attorney General; the Director of National Intelligence; the Chief of Staff to the President; and the Counsel to the President. The Deputies Committee, consisting of the deputy heads of these and other executive departments and agencies, is responsible for, among other things, policy implementation and day-to-day crisis management, and ensures that issues are properly prepared for decision by the NSC. CA 552.

[19] (U) CIA 62 is also protected by the attorney-client and attorney work product privileges because it contains communications between DOJ and its client agencies and legal advice related to the potential impact on pending litigation of the declassification options under consideration. CA 114-16, 373-74, 408-09.

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[redacted] CA 32, 127-28; *see In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (privilege "protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance").[21]

(U) The government also properly asserted the deliberative process and attorney-client privileges to protect under Exemption 5 requests to OLC for legal advice concerning a contemplated operation against Aulaqi (OLC 75, 84), and factual material provided to OLC in connection with those requests (OLC 64-66, 70-71, 73, 76, 83, 90-91, 95, CIA 2, 3). CA 38-44, 67-75. As confidential client

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(U) DOD 1, a memorandum from the DOD general counsel to the Secretary of Defense, providing legal advice regarding the analysis contained in the OLC's Aulaqi opinions, is similarly protected by the attorney-client privilege. CA 149-51, 424.

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communications to legal counsel, made for the purpose of obtaining legal advice, these documents are protected by the attorney-client privilege. CA 188-90; *County of Erie*, 473 F.3d at 418-19. They also formed part of OLC's deliberations in the course of formulating its legal advice, and are therefore protected by the deliberative process privilege as well. CA 188-89; *Brennan Center*, 697 F.3d at 194. Although these documents relate to legal advice in the OLC-DOD Memorandum that has since been disclosed, they remain privileged. This Court took pains to redact those portions of the OLC-DOD Memorandum that described the underlying requests for legal advice and communications between OLC and its Executive Branch clients. *See, e.g.*, NYT I, 756 F.3d at 125.

(U) Draft documents and other preliminary attorney work product are also protected by the deliberative process privilege and Exemption 5. For example, the government properly invoked Exemption 5 over several draft CIA documents reflecting internal deliberations regarding how best to present information to the congressional oversight committees or to respond to specific congressional inquiries. *See* CA 116-18 (CIA 78, a draft background paper for congressional oversight committees); CA 118-20, 138-40 (CIA 94 and 123, draft outlines of hearing statement and proposed "Q&As"). Such drafts and outlines, some of which contain handwritten notations, CA 116, 138-39, 410-11, are quintessentially deliberative. *See Tigue*, 312 F.3d at 80 (privilege protects "recommendations, draft

documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency") (quotation marks and citation omitted).

(U) In addition, CIA properly asserted the deliberative process privilege and Exemption 5 to protect draft inter-agency talking points for use in briefing a foreign government, *see* CA 106-08, 407 (CIA 45), a background paper prepared by an agency attorney to brief a more senior official in advance of an inter-agency meeting, *see* CA 128-30, 412 (CIA 111), and an undated document prepared by an agency attorney for more senior officials and proposing specific courses of action, *see* CA 130-31, 412 (CIA 112). DOD likewise properly invoked Exemption 5 over draft talking points, as well as draft operational documents, relating to a contemplated strike against Aulaqi. *See* CA 151-54; JA 590 (DOD 31, 38, 39, 46). These draft documents and briefing papers show an interim stage in the agencies' respective deliberations, represent the views of their authors and not the agencies, and thus are protected by the deliberative process privilege.

2. (U) Privileged Presidential Communications

(U) The presidential communications privilege is "closely affiliated" with the deliberative process privilege. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). It applies "to communications in performance of a President's responsibilities, . . . made in the process of shaping policies and making decisions."

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Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 449 (1977) (quotation marks and citation omitted). The presidential communications privilege protects not only predecisional advice, but also closely-held presidential directives and decisional documents. *See In re Sealed Case*, 121 F.3d at 745-46.

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(U) All of these documents reflect communications between and among the President's closest advisors and/or information gathering by senior presidential advisors in connection with potential advice to the President, and as such are protected in their entirety by the presidential communications privilege. *See Sealed Case*, 121 F.3d at 745-46.

(U) The ACLU concedes that the privilege protects communications solicited and received by the President's immediate advisers in the Office of the President, but contends that "[o]nly the President himself may invoke the privilege." ACLU Br. at 28. This argument, which was not raised in the district court, is waived. In any event, it is incorrect. The ACLU relies on a 1973 district court case addressing assertion of the privilege in civil discovery, ACLU Br. at 28, but courts have since recognized that the President need not personally invoke the presidential communications privilege in the FOIA context. *See, e.g.*, *Loving v.*

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DOD, 496 F. Supp. 2d 101, 108 (D.D.C. 2007), *aff'd*, 550 F.3d 32 (D.C. Cir. 2008); *Lardner v. DOJ*, No. 03-0180(JDB), 2005 WL 758267, at *6-10 (D.D.C. Mar. 31, 2005).

3. (U) ACLU's Remaining Exemption 5 Arguments Are Unavailing

(U) The ACLU's remaining Exemption 5 arguments also fail. The ACLU claims that "at least some of the withheld records" must "represent the effective law and policy of the targeted-killing program" because "the agencies surely have considered . . . the lawfulness of the strikes." ACLU Br. 32. That argument misunderstands the doctrine of "working law." As the Court recognized in *NYT II*, the doctrine does not require disclosure of legal memoranda providing advice about what an agency "is *permitted* to do." 806 F.3d at 687 (quotation marks and citation omitted). Nor does the doctrine require the disclosure of classified records, *id.*, which includes the vast majority of documents at issue on appeal.

(U) The ACLU fares no better with its contention that the government's public declarations are inadequate to establish a basis for invoking Exemption 5. ACLU Br. 29-30. This Court specifically directed the agencies to submit *classified Vaughn* indices to the district court for review, and recognized, given the highly classified nature of the records at issue, that this would not "necessarily mean that either the number or the listing of all documents on those indices must be disclosed." *NYT I*, 756 F.3d at 122. The government need not justify its

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invocations of FOIA Exemptions in a public declaration if doing so would disclose the sensitive information sought to be protected. *See, e.g., Hayden v. NSA*, 608 F.2d 1381, 1384-85 (D.C. Cir. 1979), cited in CA 684.

(U) The ACLU's related claim of "procedural unfairness," ACLU Br. 33-39, also misses the mark. While it is true that some portions of the district court's opinion are heavily redacted, that is because the district court painstakingly carried out this Court's mandate to review each and every listing on the agencies' classified indices to determine which listings, if any, should be publicly disclosed. SPA 13-144, 149-58. The district court then directed the government to produce over 70 documents for *in camera* inspection, and reviewed and issued rulings on the documents one by one. SPA 13-144, 149-60. The ACLU's claim that the district court should have reviewed *all* of the responsive documents, and that this Court should do the same, ACLU Br. 39-40, contravenes well-settled precedent. Where, as here, the government's affidavits and indices are "sufficiently detailed to place the documents within the claimed exemptions," and there is no showing of bad faith, "the district court should restrain its discretion to order *in camera* review." *Halpern v. FBI*, 181 F.3d 279, 292 (2d Cir. 1999); *accord Wilner*, 592 F.3d at 75-76.

[redacted]

(U) POINT II

(U) The District Court Erred in Ordering Disclosure in Whole or in Part of Seven Privileged Documents, Three of Which Also Contain Classified and Statutorily Protected Information

(U) The district court's rulings were correct as to the vast majority of documents at issue. The government has cross-appealed the district court's order to disclose seven documents in whole or in part, however, because those documents contain privileged information that is protected by Exemption 5.[22] Three of the documents also contain classified and statutorily protected information protected by Exemptions 1 and 3.

A. (U) The District Court Erroneously Treated Legal Analysis on the Subject of Targeting as an Officially Acknowledged "Fact"

(U) The district court made a threshold error in holding that legal analysis—specifically, "information about the legal basis (constitutional, statutory, common law, international law and treaty law) for engaging in the targeted killings abroad, including specifically the targeted killing of a U.S. national"—was an officially acknowledged "fact." SPA 8.

(U) Contrary to the district court's understanding, this Court in *NYT I* did not find a waiver of the protections of Exemptions 1, 3, and 5 as to all legal analysis

[22] (U) For the Court's convenience, and because this brief discusses specific classified, statutorily protected, and privileged information in those documents, all seven documents are reproduced at CA 742-56.

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regarding the targeting of U.S. citizens. The Court found a waiver "as to the legal analysis in the [OLC-DOD] Memorandum," based on the government's official disclosure of the DOJ White Paper, which "virtually parallel[ed] the OLC-DOD Memorandum in its analysis of the lawfulness of targeted killings," and the Attorney General's public acknowledgment of "the close relationship between the DOJ White Paper and previous OLC advice." *NYT I*, 756 F.3d at 116. It does not follow from this ruling that any other legal analysis related to the targeting of U.S. persons is also subject to compelled disclosure. *See NYT II*, 806 F.3d at 686 ("Even 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."). There would be no basis for finding waiver of privilege for legal analysis on the same general topic that has never been discussed publicly, or for similar legal analysis prepared in the context of a different deliberative process or attorney-client communication, which remains protected under Exemption 5.

(U) The district court appears to have conflated the distinct doctrines of official acknowledgment and waiver of privilege. Official acknowledgment is relevant to Exemption 1, where courts examine whether the government is precluded from withholding particular information as classified if the same information has been the subject of a prior, official, and authorized disclosure.

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Wilson, 586 F.3d at 186; *NYT I*, 756 F.3d at 120 & n.19. By contrast, to determine whether there has been a waiver of privilege for purposes of Exemption 5, it is necessary to examine the particular document at issue, the nature and context of the alleged disclosure, and the specific privilege asserted.

(U) Attorney-client privilege, for example, is not "lost by the mere fact that the information communicated [between attorney and client] is otherwise available to the public." *United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982). The privilege attaches to *communications*, not information. *Id.*; *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981); *see also* Kenneth W. Graham, Jr., *Federal Practice & Procedure, Federal Rules of Evidence* § 5729 (updated April 2015) (waiver "requires disclosure of a privileged communication; revealing the information communicated is not a waiver regardless of how much such disclosure may sap the value of the privilege"). Public disclosures of attorney-client privileged information outside the context of litigation do not waive privilege as to other, undisclosed attorney-client communications. *See In re von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987); *John Doe Co. v. United States*, 350 F.3d 299, 305-06 (2d Cir. 2003).

(U) In *von Bulow*, for example, the client's publication of a book detailing privileged communications with his attorney in the course of a murder trial was held not to waive attorney-client privilege for communications with his attorney in

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which related matters were discussed. 828 F.2d at 103. The Court reasoned that the particular communications that had been published "lose their privileged status because they obviously are no longer confidential," but that "related matters not so disclosed remain confidential." *Id.* The district court had erred in broadening the scope of the petitioner's privilege waiver "to include related conversations [with his attorney] on the same subject." *Id.*

(U) Similarly, the applicability of the deliberative process privilege does not turn on whether the information communicated to the decisionmaker includes publicly available information. Rather, it is the author's advice and recommendations, and the selection of particular facts or information to be provided to the decisionmaker, that are protected. *See Grand Cent. P'ship*, 166 F.3d at 482; *Nat'l Sec. Archive*, 752 F.3d at 465. Courts have therefore recognized that waiver of the deliberative process privilege is generally limited to the specific deliberative document that has been disclosed, and does not encompass related material. *See, e.g.*, *Sealed Case*, 121 F.3d at 741; *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700-01 (9th Cir. 1989). This limited concept of waiver ensures that government officials do not voluntarily limit public disclosures in order to protect other, more sensitive information. *See Sealed Case*, 121 F.3d at 741.

(U) With regard to the seven documents ordered released in full or in part, the district court erroneously required the government to release legal analysis that

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the court found to be similar to analysis in the OLC-DOD Memorandum, without examining the circumstances of each document. As explained below, each of the documents ordered disclosed was created as part of a separate and independently privileged attorney-client communication or predecisional deliberation for which there has been no waiver of privilege, and thus remains protected by FOIA Exemption 5.

(U) Furthermore, three of the documents ordered disclosed by the district court also contain discrete information that remains classified and statutorily protected, and thus protected by Exemptions 1 and 3. Even if this Court does not agree that those privileged documents are protected in their entirety under Exemption 5, the Court should permit redaction of the specific information that is protected by Exemptions 1 and 3.

B. (U) All Seven Documents Are Privileged in Their Entirety and Thus Protected Under FOIA Exemption 5; Three Also Contain Classified and Statutorily Protected Information That Is Protected by FOIA Exemptions 1 and 3

1. (U) OLC 46

[redacted] The district court erroneously ordered production of a redacted version of OLC 46, in [redacted]

[redacted]

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advice was provided [redacted]

[redacted] CA 742.

(U) (Privileged) This document is protected in its entirety by Exemption 5 because it is attorney-client privileged. It is a confidential communication from the client, [redacted]

[redacted] CA 182-84, 501-02. As a confidential communication by a client to the client's lawyers, the document is privileged, *see County of Erie*, 473 F.3d at 419, and it remains so even if it involves a topic that has been publicly revealed in other contexts, *see Cunningham*, 672 F.2d at 1073 n.8. Prior to this case, the government has never publicly disclosed that this communication took place, much less its content. CA 184; *see also* JA 136 (redacted *Vaughn* entry).

(U) The document is also protected in its entirety under Exemption 5 and the deliberative process privilege, as it was prepared to assist in the decision whether to undertake a contemplated action and provided analysis relevant to making that decision. CA 183, 501-02.

(U) The attorney-client communications and deliberations reflected in OLC 46—which took place long after the OLC provided legal advice in the February 2010 and July 2010 Aulaqi memoranda—are independently privileged, regardless of the disclosure of earlier legal advice. CA 501-02.

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(U) In ordering disclosure of a redacted version of OLC 46, the district court appeared to believe that the document could not be protected by Exemption 5 and the deliberative process privilege because it consists of "final" legal advice. SPA 37-38 (reasoning that the government's Exemption 5 argument is "internally inconsistent" because legal advice "cannot be both 'predecisional' and 'final'"). But final advice documents fall squarely within the scope of the deliberative process privilege because they communicate legal advice to decisionmakers in connection with policy decisions that have not yet been made. If OLC provides advice about a proposed use of targeted lethal force, that advice can be both final (because it is OLC's final advice) and predecisional (because OLC is not a decisionmaker with respect to the targeted use of lethal force). *See Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (applying Exemption 5 to protect OLC advice).

(U) (Privileged) The district court's redactions to the document, CA 38, do not obviate the privilege concerns. The existence of the redactions, and their context, tend to reveal the privileged fact that [redacted] CA 501. The paragraph proposed for release explains that [redacted]

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Release of the redacted document would therefore disclose the privileged fact that [redacted] CA 501-02, 742.

[redacted] Finally, the portion of OLC 46 ordered disclosed states: [redacted] That information is protected by Exemptions 1 and 3, CA 184, 487 n.4, and should be redacted from any portion of OLC 46 that is disclosed. [redacted]

2. (U) OLC Documents 50, 144, and 145

(U) The district court also erred in ordering disclosure of draft legal analysis contained in OLC Documents 50, 144, and 145.

(U) OLC 50 is a one-page email from the Assistant Attorney General for OLC to herself, dated October 24, 2011. CA 503, 743. The email contains a draft two-paragraph proposed insert to an earlier draft of the document that eventually

[redacted]

[redacted]

became the DOJ White Paper (which was dated November 8, 2011). CA 58-59, 503, 743. A comparison of the draft language in OLC 50 to the relevant paragraphs of the DOJ White Paper reveals that the insert was not, in fact, incorporated into the publicly disclosed version of the White Paper.[23] Nevertheless, the district court ordered OLC 50 disclosed because it supposedly contains statements comparable to what later appeared in the DOJ White Paper, the OLC-DOD Memorandum, or both. SPA 59.

(U) OLC 144 consists of undated, draft talking points concerning the legal basis for using lethal force against al Qa'ida. SPA 63, 507, 744. The document is an internal OLC outline prepared in connection with the drafting of legal advice, and represents attorneys' internal views and preliminary thoughts and reactions. *Id.* The district court ordered disclosure of this document in redacted form, concluding that it "touch[es] on matters falling under Listed Fact # 4," *i.e.*, information about the "legal basis" for targeted killings. SPA 8, 66.

(U) OLC 145 is also an undated internal outline of classified facts and legal analysis prepared in connection with the drafting of legal advice, entitled "Outline of Analysis: Possible Lethal Operation Against Anwar Aulaqi." SPA 64, 507, 745-47. Two other copies of this document contain handwritten notations by

[23] (U) The two paragraphs in OLC 50 were to be inserted after the first sentence of the White Paper, but the first two paragraphs of the White Paper are different from the language in OLC 50. *Compare* CA 644-45 *with* CA 743.

[redacted]

attorneys, which the district court found to be privileged. SPA 64, 67. With regard to OLC 145, however, the district court ruled that three sentences of one bullet point, under the heading "Potential Constitutional Issues," "can be disclosed," presumably because they contain legal analysis that the court found similar to the analysis disclosed in the OLC-DOD Memorandum and/or the DOJ White Paper. CA 66-67.

(U) Contrary to the district court's ruling, OLC 50, 144 and 145 are protected by Exemption 5 and the deliberative process privilege, because they are non-final, draft documents that represent interim stages of OLC's thinking regarding how best to present the legal advice and analysis at issue. Draft inserts to documents that were then in the process of being drafted and refined, like OLC 50, and outlines of preliminary legal analysis, like OLC Documents 144 and 145, are integral parts of the deliberative process of drafting and editing written OLC legal advice. CA 503, 507-09. While they may contain snippets (or even paragraphs) of legal analysis that make their way into the final document, they are nothing more than preliminary drafts. Moreover, the differences between the preliminary draft and the final advice document reveal protected aspects of the deliberative process for finalizing the document. The documents, which contain information concerning the deliberative process of formulating OLC advice, are privileged in their entirety under the established law of this Circuit. *See Tigue*, 312

[redacted]

F.3d at 80. Disclosure of a later version of the DOJ White Paper did not effect a waiver of privilege as to earlier drafts or deliberations. *See Nat'l Sec. Archive*, 752 F.3d at 465.

(U) Indeed, the district court recognized as much, in other portions of its decision not challenged by the ACLU on appeal. SPA 55 ("Drafts of the OLC-DOD Memorandum are not comprehended in the Second Circuit's ruling, which applies to final legal advice that was disclosed publicly by virtue of the Draft White Paper."); *see, e.g.*, SPA 52-56 (upholding withholding of OLC 11 and 13, which provided comments on excerpt of draft OLC-DOD Memorandum). The result should be the same for OLC Documents 50, 144, and 145.

3. (U) Tab C of CIA 59

(U) (Privileged) The district court also erred in ordering disclosure of Tab C of CIA 59, which is [redacted] CA 757-59, 760-61, 784-89. [redacted] CA 108, 760-61.

[redacted]

[redacted]

(U) (Privileged) Document 59 contains [redacted] attachments: Tab A provides a detailed recommendation from [redacted] CA 110, 762-65. Tab B is the DOJ White Paper, dated November 8, 2011, the substance of which was officially disclosed after an apparent unauthorized disclosure to the news media. CA 110, 766-83. Tab C is [redacted] CA 110, 748-51, 784-89. [redacted] CA 110.

(U) (Privileged) The district court ordered disclosure only of Tab C, [redacted] finding "absolutely no FOIA privilege appurtenant to it that has not been waived." CA 111. Yet the district court appeared to recognize that Tab C was part of a privileged deliberation, and ordered it released "without any reference to the fact that it is an attachment to anything else." CA 112. In the district court's view, Tab C is segregable from the rest of the document, and "[r]eleasing the document in this way will not reveal anything about any deliberations in which it may have been used." CA 112. The court concluded that

[redacted]

[redacted]

the document "should be produced simply as what it is – [redacted] CA 110-12.

(U) (Privileged) But CIA 59 (including Tab C) remains protected in its entirety by Exemption 5 and the deliberative process privilege. Regardless of the specific attachments, [redacted] CA 757-59; *see, e.g., Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979) (disclosing "factual segments" of larger documents "would reveal the deliberative process of summarization" by disclosing which facts in the record "were considered significant by the decisionmaker and those assisting her").

(U) (Privileged) Even considered on its own, furthermore, Tab C is protected by Exemption 5 and the deliberative process privilege. First, the document was provided to [redacted] CA 108-12, 757-59; *see N.H. Right to Life v. HHS*, 778 F.3d 43, 54 (1st Cir. 2015) (a "decision of how and what to communicate to the public . . . is a decision in and of itself"). [redacted]

[redacted]

[redacted]

[redacted] This harm cannot not be avoided simply by producing Tab C independent of the other attachments. Even divorced from the other documents, it will be readily apparent that [redacted]

[redacted]

(U) While some district courts have suggested that the deliberative process privilege does not apply to "messaging" deliberations about how to present an existing policy to the public, *see, e.g.*, *Fox News Network, LLC v. Dep't of Treasury*, 911 F. Supp. 2d 261, 281 (S.D.N.Y. 2012), there is no basis to categorically exclude such deliberations from the scope of the privilege. *N.H. Right to Life*, 778 F.3d at 54; *see, e.g., Judicial Watch, Inc. v. DHS*, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012) (collecting cases). The rationales for protecting predecisional deliberations—to assure that subordinates will feel free to provide decisionmakers with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies; and to protect against confusing or misleading the public—apply with equal force to predecisional deliberations about how best to present information to the public about government policies.

(U) (Privileged) Second, Tab C is independently privileged because it was a draft [redacted], which was never finalized and has never been publicly released. *See* CA 112 (describing Tab C as [redacted]

[redacted]

[redacted]

[redacted]); CA 758. The draft is by its very nature deliberative and privileged. *See Tigue*, 312 F.3d at 80.

(U) Contrary to the district court's conclusion, SPA 111, there has been no waiver of the deliberative process privilege with respect to Tab C. The NSC deliberations at issue have not been publicly disclosed, and the mere fact that similar legal analysis was contained in other documents prepared in connection with separate deliberations, does not waive privilege. *See supra* at 56.

4. **(U) CIA Documents 109 and 113**

(U) Finally, the district court erred in ordering disclosure of portions of two undated draft outlines prepared by CIA attorneys for purposes of intra- and inter-agency discussions concerning legal issues relating to the use of lethal force against U.S. persons, including Aulaqi. CA 123-26, 752-54 (CIA 109), 131-33, 755-56 (CIA 113). Examination of these documents reveals that they are clearly protected by Exemption 5 and the deliberative process privilege: they are unsigned, rough outlines, with analysis presented in bullet-point format. CA 752-56. CIA 109 was prepared for use in connection with an internal CIA presentation or briefing about the legal issues surrounding the Aulaqi strike; it is not a finished product, and there is no indication the presentation or briefing was ever delivered. CA 534-35. CIA 113 was prepared in connection with discussions between CIA and OLC regarding the lawfulness of targeting Aulaqi. CA 537-38.

[redacted]

[redacted]

(U) The district court erroneously concluded that there is "no indication" that CIA 109 or 113 are predecisional or draft documents protected by Exemption 5 and the deliberative process privilege. CA 121, 132. It is clear from the face of both documents that they are informal, rough outlines addressing legal issues relating to the Aulaqi strike. Like the informal, predecisional DOD memoranda that this Court held remained privileged in *NYT I*, 756 F.3d at 121, CIA 109 and 113 "mention legal authorities, but in no way resemble the detailed, polished legal analysis in the disclosed DOJ White Paper," or the OLC-DOD Memorandum. "At most, they are part of the process by which governmental decision 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). Even if, as the district court believed, CA 123, 132, the documents were prepared after the Aulaqi strike, *but see* CA 537-38, they should still be protected as privileged. The documents themselves, and CIA's declarations and classified index, make clear that intra- and inter-agency deliberations were ongoing regarding how best to address the legal issues raised by a strike against Aulaqi. CA 447-48, 451-52, 534-35, 537-38, 752-56.

[redacted] In addition, while the district court applied redactions to CIA 109 and 113 in an effort to remove classified information, CA 125-26, 133, the redacted documents still contain information that

[redacted]

[redacted]

is classified and protected by the National Security Act (identified in bold type), and accordingly protected by Exemptions 1 and 3. In CIA 109, the district court failed to redact the following:

- [redacted]
- [redacted]
- [redacted]

(U) The district court also failed to redact the following information in CIA 113:

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

(U) The district court erred in ordering disclosure of this information because it is protected by Exemptions 1 and 3, as well as Exemption 5.

[redacted]

[redacted]

(U) CONCLUSION

(U) The district court's disclosure order should be reversed, and the judgment of the district court should otherwise be affirmed.

Respectfully submitted,

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

I hereby certify that this brief 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.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 16,462 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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[redacted]

(U) CERTIFICATE OF SERVICE

(U) I hereby certify that the foregoing Brief for Appellee-Cross-Appellant was filed with the Court on June 6, 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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