UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

15 Civ. 1954 (CM)

DEPARTMENT OF JUSTICE, including its components the Office of Legal Counsel and Office of Information Policy, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

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CORRECTED REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Government respectfully submits this reply memorandum of law in further support of its motion for partial summary judgment. In its opposition and reply ("Opp."), ACLU fails to rebut the Government's substantial showing—supported by a detailed, document-by-document classified index—that the withheld information is exempt from disclosure under FOIA Exemptions 1, 3 and/or 5, 5 U.S.C. § 552(b)(1), (3) and/or (5).[1] Nor has ACLU shown any official acknowledgment or waiver of privilege as to the withheld information.

I. The Government's Withholding of Classified and Statutorily Protected Information Under Exemptions 1 and 3 Was Proper

In its opposition and reply, ACLU reprises yet again the erroneous argument that legal analysis cannot be classified or protected by statute. *See* Opp. at 4 ("neither Exemption 1 nor Exemption 3 protect legal analysis"). This argument has been repeatedly rejected by the Second Circuit and this Court. *See New York Times Co. v. U.S. DOJ*, 756 F.3d 100, 120 (2d Cir. 2014) ("*NYT I*") (noting that it would be proper to classify legal analysis regarding a planned operation); *New York Times v. DOJ*, 806 F.3d 682, 685, 687 (2d Cir. 2015) ("*NYT II*") (affirming this Court's determination that OLC opinions containing legal analysis were properly withheld under Exemptions 1 and 3); *ACLU v. DOJ*, No. 12 Civ. 794 (S.D.N.Y.), Dkt. No. 128 (decision issued July 16, 2015) ("*Final Remand Decision*") (affirming withholding of dozens of documents containing legal analysis); *New York Times v. DOJ*, 915 F. Supp. 2d 508, 535, 540

[1] ACLU does not contest the Government's withholding of names under Exemptions 3 or 6. Opp. at 6 n.10. In addition, ACLU has narrowed its challenge to 128 documents, including 43 classified records providing confidential OLC advice to Executive Branch policymakers withheld by OLC, one classified memorandum withheld by OIP, 18 classified memoranda withheld by NSD, 13 classified memoranda withheld by CIA, 14 classified memoranda withheld by State, 36 classified memoranda withheld by DOD, portions of two DOD reports to Congress that were withheld in part, and portions of the Presidential Policy Guidance ("PPG"). Opp. at 2-4. For the Court's convenience, the Government has prepared an amended classified index that addresses only the documents remaining at issue in this case. The amended classified index and two supplemental classified declarations have been lodged with the Department of Justice's Classified Information Security Officer for the Court's review *ex parte* and *in camera*.

(S.D.N.Y. 2013) (finding "no reason why legal analysis cannot be classified . . . if it pertains to matters that are themselves classified," and recognizing that legal analysis may be inextricably intertwined with information that is statutorily exempt from disclosure), *rev'd in part on other grounds*, 756 F.3d 100.

Equally meritless is ACLU's claim that "legal and policy standards" cannot properly be withheld under Exemptions 1 or 3. Opp. at 19. By the plain terms of Exemption 1 and Executive Order 13,526, *any* "information"—whether in the form of legal analysis, policy standards, or facts—can be properly classified if it pertains to intelligence sources, methods or activities, military plans or operations, foreign relations, or other protected categories of information under the Executive Order, and its disclosure could reasonably be expected to cause identifiable harm to national security.[2] Contrary to ACLU's suggestion, Opp. at 9 n.12, there is no "working law"-type exception to Exemptions 1 or 3 that would require disclosure of legal analysis or "legal and policy standards" that are otherwise properly classified or protected from disclosure by statute. *See NYT II*, 806 F.3d at 687 (noting that "[w]hether or not 'working law,' the documents [OLC opinions] are classified and thus protected under Exemption 1"); *New York Times v. U.S. DOJ*, 872 F. Supp. 2d 309, 317 (S.D.N.Y. 2012) (rejecting ACLU's argument that classified report must be disclosed under "secret law" doctrine).

ACLU is therefore simply wrong in arguing that any "legal and policy standards" contained in the two DOD reports to Congress cannot be properly classified. *See* Opp. at 20. ACLU offers no support for its speculation that such standards contained in these reports could

[2] ACLU's contention that "the crucial question is not whether legal analysis *concerns* (in some broad sense) one of the categories of the Executive Order, but whether it is *inextricably intertwined* with information falling into one of those categories," Opp. at 6, is belied by the plain language of the Executive Order. *See* E.O. 13,526, § 1.1(a) (information may be classified if it "pertains to" one of the categories listed in the order and other criteria are met). In any event, the classified appendix makes clear that classified and statutorily protected information is inextricably intertwined in the documents withheld in full under Exemptions 1 and 3.

not pertain to military plans or operations. *See* Opp. at 21. To the contrary, the very purpose of the reports is to brief Congress about military plans and operations for conducting DOD counterterrorism operations, including the various policy considerations and factors that are involved in developing potential military operations. Declaration of Rear Admiral Andrew L. Lewis (ECF No. 41) ¶¶ 11-12, 16. ACLU's contention that "legal and policy standards" contained in the PPG cannot be classified or statutorily protected, Opp. at 19, fails for the same reason. There is nothing illogical or implausible about the notion that standards pertaining to the use of lethal force against terrorists could meet the requirements for classification and statutory protection, as the Government's detailed submissions establish that they do.

ACLU insists that it must be possible to segregate non-exempt information in the withheld documents, Opp. at 7-8, but the Government's detailed classified index explains, on a document-by-document basis, why this speculation is unfounded. And it makes eminent sense why that would be so. ACLU's FOIA request seeks documents concerning highly classified counterterrorism operations and activities. These documents address concrete legal and procedural questions regarding when, how and against whom lethal counterterrorism operations may be undertaken. It is plainly logical and plausible that such information pertains to classified intelligence sources, methods and activities, military plans and operations and/or foreign relations, and that their disclosure would harm national security, among other things by helping terrorists learn how they might avoid being targeted. To the extent these documents contain legal analysis, or legal or policy standards, such information does not appear in a vacuum, but is presented in a particular factual context, and thus is inextricably intertwined with classified and statutorily protected information.

II. The Documents Withheld Under Exemption 5 Are Privileged

A. The Withheld Legal Advice Memoranda Are Protected in Full by the Attorney-Client and Deliberative Process Privileges

Contrary to ACLU's claim, Opp. at 10-14, the Government has amply justified its withholding of the documents ACLU describes as "final legal memoranda" under the attorney-client and deliberative process privileges. As outlined in the Government's opening brief and unclassified declarations, and explained in substantial detail in the classified index, all requirements of the applicable privileges have been met with regard to each document withheld under Exemption 5. Revelation of the withheld memoranda would reveal privileged attorney-client communications, including in many cases that the client contemplated (and sought advice concerning) whether particular counterterrorism activities would be lawful in the circumstances presented, as well as the content of that legal advice. The deliberative process privilege also protects legal advice memoranda prepared to assist Executive Branch decisionmakers in their deliberations with regard to the use of lethal force. In the prior case brought by ACLU, this Court upheld the withholding in full of many such privileged advice documents under Exemption 5. *See Final Remand Decision*, ECF No. 128 at 48-72.

That a legal advice memorandum is "final"—in that it is no longer tentative or draft but represents the attorney's final advice—does not mean it is not predecisional and deliberative. To the contrary, final legal advice memoranda provided to decisionmakers fall squarely within the scope of the deliberative process privilege. *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (such legal advice "fits exactly within the deliberative process rationale for Exemption 5"); *see also Electronic Frontier Found. v. Dep't of Justice*, 739 F.3d 1, 10 (D.C. Cir. 2014) ("*EFF*").

ACLU wrongly speculates that "at least *some*" of the withheld legal advice memoranda must "represent the agencies' effective law and policy," and thus be subject to disclosure as "working law." Opp. at 14. As set forth in the Government's declarations, however, the legal memoranda withheld under Exemption 5 are legal *advice*, not law or policy. They were prepared to assist Executive Branch decisionmakers in their deliberations with regard to the potential use of targeted lethal force, and do not control the policy decisions of those decisionmakers. "At most, they provide, in their specific contexts, legal advice as to what a department or agency 'is *permitted* to do.'" *NYT II*, 806 F.3d at 687 (quoting *EFF*, 739 F.3d at 10). The legal advice memoranda therefore cannot constitute working law, as the Second Circuit recently made clear in rejecting a virtually identical argument by ACLU. *See id.* (holding that final OLC opinions addressing legal basis for use of lethal force "are not 'working law'"). This is true whether the advice memoranda were prepared by OLC, other Department of Justice attorneys, or agency counsel. ACLU urges the Court to adopt a rule that "agency general-counsel memoranda" are necessarily "working law," but they cite no authority whatsoever for such a rule, and there is none.[3] General counsel, just like any other attorneys, can provide privileged and confidential legal advice to their agency clients. Their status as general counsel does not transform that advice, provided as an input to the policy deliberations of senior agency decisionmakers, somehow into agency "law or policy."

[3] ACLU's claim that the Government has "conceded" that memoranda drafted by agency general counsel constitute agency "working law," Opp. at 14, is demonstrably false. In the passage of the appellate brief cited by ACLU, the Government explained that OLC opinions are different in kind from the types of documents that have been held to be "working law," such as "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.'" Declaration of Sarah S. Normand ("Normand Decl."), Exh. A (attaching relevant portions of cited brief) at 50 (quoting *Brennan Center for Justice v. DOJ*, 697 F.3d 184, 201 (2d Cir. 2012) (emphasis omitted)). This sort of guidance to the field is distinctly different from confidential, pre-decisional legal advice provided to senior agency decisionmakers in connection with their deliberations. Nowhere did the Government suggest that such advice memoranda prepared by agency general counsel are "working law."

B. The PPG and Certain Other Withheld Records Are Fully Protected Under Exemption 5's Presidential Communications Privilege

The PPG and certain other documents have been withheld pursuant to the presidential communications privilege. Gov't Br. at 26.[4] As described more fully in the classified index, the PPG (OLC Doc. # 306) constitutes a classified (at the TOP SECRET level), confidential communication from the President to certain Executive Branch agency and department heads, which has been withheld in full under Exemption 5 (and portions of which have also been withheld under Exemptions 1 and 3). The presidential communications privilege is rooted in separation of powers, *United States v. Nixon*, 418 U.S. 683, 708 (1974), and "covers final and post-decisional materials" as well as pre-decisional, deliberative ones, *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). Such final documents "often will be revelatory of the President's deliberations," especially where such documents embody presidential directions as to "a particular course of action." *Id*. "[L]imit[ing] the President's ability to communicate his decisions privately" would "interfer[e] with his ability to exercise control over the executive branch." *Id*. at 745-46.

ACLU incorrectly contends that the presidential communications privilege cannot apply (and therefore justify the withholding of) presidential policy guidance in general, and in particular, the PPG at issue here. First, contrary to ACLU's claim, the President is not required to personally "invoke[] the privilege" in order to rely on Exemption 5's protection. Opp. at 15-16. Indeed, under FOIA, there is no "invocation" of privilege at all, only the assertion of a statutory exemption. *See, e.g., Citizens for Responsibility & Ethics v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 48 n.10 (D.D.C. 2007) ("[T]he President does not need to personally invoke the presidential communications privilege to withhold documents pursuant to FOIA

[4] ACLU does not challenge the assertion of the presidential communications privilege as to any other records besides the PPG, except to argue that the privilege must be invoked personally by the President. Opp. at 14-20.

Exemption 5." (citing cases)); *accord Electronic Privacy Info. Ctr. v. U.S. Dep't of Justice*, 584 F. Supp. 2d 65, 80-81 (D.D.C. 2008).

Although personal invocation of a privilege may be required in civil discovery, courts have made clear that invocation by the President is not required in the FOIA context. *Lardner v. U.S. Dep't of Justice*, 2005 WL 758267, at *7 (D.D.C. 2005) ("For several reasons, this Court concludes that the personal invocation of the presidential communications privilege is also a civil discovery rule that should not be imported into the FOIA analysis."); *accord Loving v. U.S. Dep't of Defense*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007). Whereas a claim of privilege in civil discovery may be subject to a variety of procedural requirements, application of FOIA Exemption 5 turns only on the "*content or nature* of [the] document" and not the "*manner* in which the exemption is raised in a particular request." *Lardner*, 2005 WL 758267 at *7. Because documents covered by Exemption 5 are *per se* "exempt" from FOIA's production requirements by operation of the statute, the only relevant question is whether a document "fall[s] within the ambit" of a privilege, not the procedure employed to reference that privilege. *Id.* at *5 (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001)).

Second, ACLU's efforts to characterize the PPG as "law and policy" subject to mandatory disclosure under FOIA, *see* Opp. at 17-19, are wholly unavailing. There is no authority for the notion that, simply because a presidential communication directs Executive Branch activities, it loses its confidential nature. Indeed, it is the President's ability to communicate confidentially with his closest advisors—communications that will naturally and necessarily include directions to subordinate Executive Branch officials—that lies at the core of the privilege.

The "working law" doctrine does not apply here. That doctrine originated in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), which held that a document may not simultaneously be "predecisional" (and thus protected by the deliberative process privilege) and a "final opinion." *Id.* at 152-53. While the Second Circuit has extended this doctrine to the attorney-client privilege context, *see Brennan Center*, 697 F.3d at 207-08; *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360-61 (2d Cir. 2005), the Supreme Court has noted that "[i]t should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and pre-decisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges." *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 n.23 (1979). Regardless, ACLU cites no authority for the proposition that the "working law" doctrine could serve to limit the presidential communications privilege, which applies with full force to post-decisional documents, *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113-14 (D.C. Cir. 2004); *In re Sealed Case*, 121 F.3d at 744-45, and protects the confidentiality of *presidential* decisionmaking. The need to protect a confidential presidential communication remains even if that communication represents a final policy decision. Indeed, the privilege would ring hollow if the President could not confidentially communicate with Executive Branch officials about activities that the President was directing.[5]

Finally, there is no support for ACLU's contention that by releasing a Fact Sheet about the PPG, the President loses his ability to confidentially communicate the details of the PPG's

[5] Moreover, the "secret law" that Congress intended to be made public under FOIA is those agency "rules governing relationships with private parties and its demands on private conduct." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (quoting Frank H. Easterbrook, Privacy and the Optimal Extent of Disclosure under the Freedom of Information Act, 9 J. Legal Stud. 775, 777 (Dec. 1980)); *see also Afshar v. Dep't of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983) (defining "working law" as "those policies or rules, and the interpretations thereof, that either create or determine the extent of the substantive rights and liabilities of a person" (citation and internal quotation marks omitted)). The PPG does not regulate the substantive rights or conduct of private parties, and ACLU does not credibly contend otherwise.

implementation. ACLU Opp. at 20.[6] Nor is the Government required to conduct a segregability review of the document. *See In re Sealed Case*, 121 F.3d at 745 (presidential communications privilege applies to records in their entirety). The Court should therefore uphold the withholding of the PPG in full under Exemption 5.

III. ACLU Fails to Demonstrate That Any of the Withheld Information Has Been Officially Disclosed or That Any Applicable Privilege Has Been Waived

Despite ACLU's claim to the contrary, Opp. at 22-23 & n.25, the test for official disclosure set forth in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), "remains the law of this Circuit," *NYT I*, 756 F.3d at 120 n.19. Indeed, this Court has twice applied the *Wilson* test (including its "matching requirement") on remand from the Second Circuit, rejecting the very arguments that ACLU makes here. *See, e.g.*, *New York Times v. DOJ*, No. 12 Civ. 794(CM), ECF No. 90 ("*First Remand Decision*") at 16-17; *Final Remand Decision*, ECF No. 128 at 5-7.[7] ACLU's suggestion that "the government cannot withhold information unless it is *materially different* from information the government has publicly disclosed in other contexts," Opp. at 22-23, is inconsistent with well-established law that properly classified information is exempt from disclosure *unless* it can be shown that essentially the same information (*i.e.*, information that both "matches" and is "as specific" as the withheld information) has been officially acknowledged. *Wilson*, 586 F.3d at 186; *NYT I*, 756 F.3d at 116, 120 (finding "match" where legal analysis was "virtually parallel[]," if not absolutely identical). As this Court has observed,

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[6] ACLU's argument creates perverse incentives: it would penalize the Government for being transparent in disclosing what information it could with respect to the PPG. According to ACLU, in order to protect the President's confidential communications, the Government must not share any information with the public about the PPG.

[7] ACLU's suggestion that the Government's opening brief relied on D.C. Circuit rather than Second Circuit law regarding official acknowledgment, *see* Opp. at 23, is both incorrect and disingenuous. The Government's opening brief cited and applied the Second Circuit's *Wilson* test, as construed by the Court in *New York Times*, and addressed D.C. Circuit law only in response to an argument made by ACLU in (erroneous) reliance on the D.C. Circuit's decision in *Afshar*. *See* Gov't Br. at 29-30 & n.7.

"'similar' is not a synonym for 'matching.'" *Final Remand Decision*, ECF No. 128 at 5-7. *Wilson* also makes crystal clear that members of Congress cannot effect an official disclosure, 586 F.3d at 186, a rule explicitly reaffirmed by the Second Circuit in *NYT I*, 756 F.3d at 119 n.18, and applied by this Court on remand, *Final Remand Decision*, ECF No. 128 at 27 ("Congress has no role to play in 'official acknowledgment'").

Further, as explained in the Government's opening brief, Gov't Br. at 28-33, there is a material distinction between the official acknowledgment doctrine and the distinct doctrines governing waiver of privilege. ACLU continues to conflate these separate doctrines, and its claim that the "official acknowledgment" of legal analysis in one document or context serves as a waiver with respect to all similar or related legal analysis in other factual contexts or privileged communications or deliberations, *see* Opp. at 24, is wholly inconsistent with the Second Circuit's case law on waiver of privilege. Official acknowledgement pertains to the acknowledgement of facts and relates to the assertion of Exemptions 1 and 3. Privileged information loses the protection of Exemption 5 through disclosure only where the requisite standards for waiver have been met. While officially acknowledging a piece of information may impact the Government's ability to withhold that information as properly classified in other contexts, under Second Circuit case law, waiver of the attorney-client privilege over a privileged communication requires disclosure of that particular communication. *See United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982); *accord Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981). This is true even if, as ACLU suggests, the "disclosures in the public arena [are] 'one-sided' or 'misleading[.]'" *In re Von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987). With the deliberative process privilege, too, "[c]ourts have overwhelmingly (if not uniformly) held that the release of a document only waives the deliberative process privilege for the document that is specifically released, and not for related materials." *United States v. Wells Fargo Bank, N.A.*, No. 12 Civ.

7527(JMF), 2015 WL 6395917, at *1 (S.D.N.Y. Oct. 22, 2015) (internal quotation marks omitted). ACLU erroneously attempts to import the law of official acknowledgment into the doctrines of privilege waiver.

Nor does the Second Circuit's *NYT I* decision support the rule urged by ACLU. That decision ordered disclosure of the OLC-DOD Memorandum principally because the Government had released (following a leak), and thus waived any claim of privilege regarding, a draft DOJ white paper that "virtually parallel[ed]" the analysis in the OLC-DOD Memorandum and concerned the same subject: a contemplated operation against a U.S. citizen, Anwar al-Aulaqi. 756 F.3d at 114-18; *id.* at 120 (noting that the DOJ white paper discussed why the targeting of Aulaqi would not violate the law). But that finding of waiver as to legal analysis pertaining to the use of force against Aulaqi (whom the United States has officially acknowledged targeting) did *not* effect a waiver of otherwise privileged and classified legal advice on the same or similar topics arising in other factual contexts and deliberations. *See, e.g.*, *NYT II*, 806 F.3d at 685-86 (sustaining withholding of privileged OLC memorandum even though it addressed topics about which the Government had made official statements). As the Second Circuit observed, "[e]ven if the content of legal reasoning set forth in one context is somewhat similar to such reasoning that is later explained publicly in another context, such similarity does not necessarily result in waiver." *Id.* at 686. The Court cannot simply "ignor[e] . . . the differences in contexts," *id.*, as ACLU would have it do. And such a rule would make little sense, as context matters, and in some cases even the very fact that advice was sought in a different context or deliberation would reveal a privileged and classified fact.

Finally, in its reply, ACLU addresses only five supposed "facts" that ACLU claims to have been officially acknowledged. As explained below, the sources cited by ACLU do not satisfy the standard for official disclosure.[8]

1. **ACLU's assertion that "*the government conducts targeted killings in Pakistan, including through the use of drones.*"**

ACLU cites three sources in support of this assertion, none of which establishes any official acknowledgment that the United States "conducts targeted killings in Pakistan." First, ACLU relies on a *New York Times* article that purports to quote statements by Secretary of State Kerry in an interview on Pakistani television in August 2013. *See* ACLU Exh. 34. A review of the transcript of that interview, however, reveals that the Secretary Kerry did not in fact make the statements that the *New York Times* and ACLU attribute to him. Contrary to the *New York Times*' and ACLU's rendition of Secretary Kerry's comments, he did not say that any "drone-strike program" or "targeted-killing program" was "'on a good track' and 'would end soon.'" Opp. at 30 (quoting Exh. 34; alteration omitted); Waiver Table at 25 (altering quote to "[drone-strike] program"). While the reporter's questions were focused on alleged drone strikes, Secretary Kerry repeatedly made clear that his responses concerned "any kind of counterterrorism activities, whatever they may be," and not any particular types of counterterrorism activities. Normand Decl., Exh. B. ACLU also fails to explain why a statement by Secretary Kerry from more than two years ago that he expected that such counterterrorism activities "w[ould] end" soon could possibly support a finding that the Government conducts drones strikes in Pakistan.

Next, ACLU relies on a statement by former White House Press Secretary Jay Carney that "our intelligence community has intelligence that leads them to believe that al-Qaeda's

[8] The Government is also lodging two supplemental classified declarations that address specific classified matters that cannot be discussed on the public record.

number two leader, al-Libi, is dead," but does not identify where, how or by whom he was killed. ACLU Exh. 20, at 13 ("I don't have anything for you on the circumstances of his death or the location."); Gov't Br. at 37. Mr. Carney's statement does not support the assertion that the United States killed al-Libi, or even that he was killed in Pakistan, much less ACLU's assertion.

Nor is ACLU's assertion supported by the third statement proffered by ACLU—a 2009 statement by then-CIA Director Panetta that unspecified "operations" were "the only game in town." Secretary Panetta went out of his way to say that he could not discuss "the particulars" of "covert and secret operations," and his non-specific reference to "operations," made more than six years ago, hardly supports ACLU's assertion that the United States "conducts targeted killings in Pakistan."

2. ACLU's assertion that "*the CIA in particular conducts targeted killings in Pakistan, including through the use of drones.*"

This assertion is also unsupported by the materials cited by ACLU. ACLU relies on statements from Mr. Panetta from 2009 and 2010, which were before this Court and the Second Circuit in *NYT I*, and yet both courts found an official acknowledgment only that the CIA (along with DOD) had an undefined "operational role" in drone strikes. *NYT I*, 756 F.3d at 122 & n.22; *Final Remand Decision*, ECF No. 128 at 8. Certainly, Mr. Panetta's statements from more than five years ago do not support ACLU's sweeping assertion that the CIA "conducts targeted killings," in Pakistan or anywhere else.

Nor do Mr. Panetta's statements in a recent documentary support this assertion. Pl.'s Opp. at 31 (citing article in *Politico* discussing documentary). For starters, Mr. Panetta made his statements as a private citizen several years after he left the CIA (and the U.S. Government), and thus his comments cannot constitute official disclosures as a matter of law. *See Wilson*, 586 F.3d at 186; *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421-22 (2d Cir.

1989). In any event, Mr. Panetta did not make the factual representations that Plaintiff alleges in its opposition. *See* Normand Decl., Exh. C (transcript of cited portion of documentary). In the cited portion of the documentary, Mr. Panetta does not state that the CIA conducted an operation in Pakistan, let alone a drone strike as Plaintiff purports. *Id*. at 1-2. Although Mr. Panetta recalled a particular counterterrorism strike, he did not say that: (1) the strike took place in Pakistan; (2) the CIA conducted the strike; or (3) a drone was used to carry out the strike. *Id.* Mr. Panetta could have been describing the intelligence community's approval of an operation conducted by U.S. military forces in Afghanistan or another country in which the Department of Defense has acknowledged conducting counterterrorism operations. Or the strike could have been undertaken by U.S. military personnel employing more conventional weapons like fixed-wing aircraft or cruise missiles. The purported "official disclosure" identified by Plaintiff does not "match" Mr. Panetta's statements in any sense of the word, and his statements are certainly not "as specific" as ACLU's claim that "the CIA conducts drones strikes in Pakistan." *See Wilson*, 586 F.3d at 186.

3. ACLU's assertion that "*the government conducts targeted killings in Yemen, including through the use of drones*."

The Government has acknowledged that the U.S. military has worked closely with the Yemeni government to operationally dismantle and eliminate the terrorist threat posed by core al Qaeda and al Qaeda in the Arabian Peninsula ("AQAP"), and that our joint efforts have resulted in direct action against a limited number of senior AQAP members in Yemen who posed a terrorist threat to the United States. *See* ACLU Exh. 21 at 4, Exh. 40 at 5. Aside from the operations that killed Anwar and Abdulrahman al-Aulaqi, however, the sources proffered by ACLU do not establish the United States' involvement in any particular operation in Yemen.

4. ACLU's assertion that "*the CIA in particular conducts targeted killings in Yemen, including through the use of drones*."

ACLU's cited sources for this statement (the Second Circuit's opinion in *NYT I*, the draft DOJ white paper, and a 2010 statement by Mr. Panetta) do no more than reiterate the statements underlying the Second Circuit's conclusion that the United States has officially acknowledged that the CIA had an undefined "operational role" in the strike that killed Aulaqi. That the CIA had a role in a single operation in Yemen provides no support for ACLU's far broader supposition that the CIA "conducts targeted killings in Yemen."

5. ACLU's assertion that "*a September 17, 2001 Memorandum of Notification signed by President Bush authorizes the CIA to take lethal action against suspected terrorists.*"

ACLU fails to establish any official acknowledgment that this document authorizes lethal action by the CIA. ACLU relies principally on statements in a book by the CIA's former general counsel, Opp. at 28-29, 32-33, but under the clear law of this Circuit, statements by former agency officials "cannot effect an official disclosure," "however credible" they may be. *Hudson River Sloop*, 891 F.2d at 421-22; *accord Wilson*, 586 F.3d at 186. This is true regardless of whether the former employee's statements underwent "pre-publication" review. *See Afshar*, 702 F.2d at 1133. Indeed, the D.C. Circuit has rejected the very argument made by ACLU here, that "the CIA's screening and approval" of a book was "tantamount" to an official disclosure. *See id.* at 1133-34. As that court explained, materials published by former agency officials "are received as the private product of their authors," and "are not generally treated as official disclosures by foreign governments or by the public in the same way that a CIA cable [or other official agency document or statement] would be." *Id.* at 1134.[9]

[9] ACLU's reliance on a declaration filed in another FOIA action in 2007, acknowledging the existence of a memorandum of notification regarding capture and detention operations, Opp. at 32, has no bearing on the question whether any such document authorizes lethal action against suspected terrorists.

Finally, apart from ACLU's failure to satisfy the test for official acknowledgment, its focus on a handful of purportedly "officially acknowledged facts" is misguided. In its ruling on the final group of documents in the prior case brought by ACLU, this Court found a number of "officially acknowledged facts," and yet upheld the vast majority of the Government's withholdings of documents, finding that even if the documents contained officially acknowledged facts (and many of them did), such facts were not reasonably segregable from other exempt information. *Final Remand Decision*, ECF Nos. 128 & 29. That is because even though the Government has officially acknowledged that it uses lethal force against certain terrorists, the particular documents sought by ACLU were nevertheless exempt from disclosure because those facts were inextricably intertwined with classified and/or statutorily protected information (such as the use of force against a particular target) and/or arose in a privileged context (such as in a document requesting or providing legal advice about a contemplated operation). The same holds true in this case. The relevant question is not whether the Government has officially acknowledged facts in the abstract, but whether there has been any official acknowledgment or waiver of privilege as to the particular documents and information withheld. There has not.

CONCLUSION

For the foregoing reasons, and those set forth in the Government's opening memorandum of law and supporting submissions, the Court should grant partial summary judgment to the Government, and deny ACLU's motion for partial summary judgment.

Dated: December 22, 2015

Respectfully submitted,

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