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. 9317 (AKH)

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

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

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PRELIMINARY STATEMENT

The bulk of the ACLU's opposition is devoted to the Government's assertion of the deliberative process privilege, and in some cases also the attorney-client privilege, to protect predecisional deliberations concerning aspects of the CIA's detention and interrogation program. Contrary to the ACLU's claims, the CIA's original declaration and *Vaughn* index are sufficient to support its assertion of these privileges, which protect 21 of the 22 documents remaining at issue in this case.[1] But to avoid any doubt on this question, the CIA has submitted a supplemental declaration, which provides additional information regarding each of the records withheld based on the deliberative process or attorney-client privileges. This supplemental declaration, together with the information previously submitted, logically and plausibly explains why the information withheld from these records is privileged and protected from public disclosure by FOIA Exemption 5. The ACLU fails to rebut the Government's substantial showing of privilege. To the extent the ACLU addresses specific documents at all, its arguments are premised on speculation about the content of withheld material, mischaracterization of selected unredacted passages, and misapplication of case law.

The last document remaining at issue—the September 11, 2001 Memorandum of Notification or "MON" (Doc. No. 1)—is protected in its entirety under Exemptions 1 and 3. The ACLU makes much of the fact that a portion of one sentence of the MON was disclosed by the Senate Select Committee on Intelligence in the publicly released version of its report. But the MON itself has never been disclosed, and it remains a highly classified and extraordinarily sensitive document. The Government's classified and unclassified submissions—which are

[1] In its opposition brief ("Opp."), ACLU has abandoned its challenge to Doc. Nos. 17 and 50. (*See* Opp. at 33 (listing documents still challenged by ACLU)). With the exception of Doc. Nos. 1 and 66, the ACLU does not contest the CIA's withholding of classified or statutorily protected information under Exemptions 1 and 3. (*See* Opp. at 27-28).

entitled to substantial deference from this Court—logically and plausibly establish that the MON is properly withheld in full under Exemptions 1 and 3. The MON is also properly withheld in full under Exemption 5, as it is a privileged and confidential presidential communication that has been closely held within the Executive Branch.

ARGUMENT[2]

I. The CIA Has Logically and Plausibly Established that 21 Documents Are Protected by the Deliberative Process Privilege and, for 14 Documents, Also the Attorney-Client Privilege

A. The ACLU Overstates the Degree of Detail Required to Justify Withholdings Under Exemption 5

As an initial matter, the ACLU overstates the degree of detail with which the Government must discuss each document as to which the deliberative process privilege or attorney-client privilege is asserted in a FOIA case. The ACLU draws from a handful of cases that found a particular governmental showing insufficient to assert the existence of inflexible general rules of how the Government must demonstrate that the privileges apply in every case. (*See* Opp. at 6-7, 16-17). Contrary to the ACLU's assertion, there is no strict rule regarding the format for the Government to justify its Exemption 5 withholdings, nor any requirement that the Government's justifications contain "extensive detail." (Opp. at 6). Rather, an agency's submissions are sufficient where they provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Indeed, the Second Circuit recently described a "so-called 'classical'" *Vaughn* index as "one that lists titles and descriptions of documents with cites to claimed FOIA exemptions." *N.Y. Times*

[2] An amended *Vaughn* index listing the 22 documents remaining in dispute is attached to the Supplemental Declaration of Antoinette B. Shiner, dated January 6, 2017 ("Supp. Shiner Decl"), filed herewith. For the Court's convenience, the Government has also filed a complete set of the documents withheld in part that remain at issue, in the redacted form released to the ACLU. *See* Declaration of Elizabeth Tulis, dated January 6, 2017 ("Tulis Decl."), Exhs. A-T.

Co. v. DOJ, 758 F.3d 436, 439 (2d Cir. 2014). And both the Second and the D.C. Circuits have recognized that agencies do not need to reveal privileged or otherwise protected details in order to justify their withholdings under FOIA exemptions. *See N.Y. Times*, 758 F.3d at 440; *Hayden v. NSA*, 608 F.2d 1381, 1384-85 (D.C. Cir. 1979).[3]

As detailed further below, the declarations and *Vaughn* index submitted by the Government in this case provide more than enough information to justify the Government's withholdings. Indeed, they provide at least as much detail, if not more, as the *Vaughn* indexes and declarations found to be sufficient in other recent Exemption 5 cases. *See, e.g.*, *ACLU v. DOJ*, 12 Civ. 794 (CM), 2015 WL 4470192 (S.D.N.Y. July 16, 2015) (sustaining the vast majority of the Government's withholdings), Dkt. Nos. 100, 100-2 (CIA declaration and index), *affirmed in part and reversed in part*, __ F.3d __, 2016 WL 7367794 (2d Cir. Dec. 20, 2016) (sustaining all of the Government's withholdings); *James Madison Project v. DOJ*, No. 15-cv-1307 (RMC), 2016 WL 5314231 (D.D.C. Sept. 22, 2016) (concluding, *inter alia*, that CIA's withholdings were proper), Dkt. Nos. 9-6 to 9-8 (CIA declaration and index).

[3] In attempting to construct inflexible general rules out of selected district court and appellate opinions, the ACLU takes language out of context and relies on inapposite case law. For example, the ACLU quotes a passage from *Grand Central Partnership v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999), in which the court noted that it was "hard to understand why Exemption 5 would be applicable" because, in part, there was "not the slightest indication that the document formed an 'essential link' in the agency's policy development." (*See* Opp. at 7). But that observation was not describing a *Vaughn* entry that was insufficiently detailed, but rather explaining the Second Circuit's conclusion that the document at issue was entirely non-exempt and had to be released in full based on the content of the document. *See* 166 F.3d at 484. Another of the cases that the ACLU cites is not even a FOIA case, but instead addresses a discovery dispute regarding the sufficiency of a privilege log under Federal Rule of Civil Procedure 26 and Local Civil Rule 26.2. *See Auto Club of N.Y. v. Port Auth. of N.Y. and N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (cited in Opp. at 7). Even so, the court there recognized the permissibility of using a "categorical" log rather than making detailed document-by-document entries in every case. *See id.* at 58-60.

B. The ACLU's Challenges to Withholdings from Specific Documents Are Meritless

Although the ACLU purports to challenge the redactions in 21 documents from which the Government withheld material pursuant to the deliberative process privilege and/or attorney-client privilege, it addresses only 14 documents specifically. The ACLU's challenges are unfounded.

1. The Government Properly Withheld Information from Doc. No. 4 Pursuant to the Deliberative Process and the Attorney-Client Privileges

The Government properly applied the deliberative process privilege and attorney-client privilege to Doc. No. 4, email exchanges between CIA attorneys containing legal advice about questioning detainees who are granted POW status. (*See* Supp. Shiner Decl. ¶ 5).

The ACLU raises no specific challenge to the Government's invocation of the deliberative process privilege with respect to Doc. No. 4. The document is predecisional and deliberative because it contains legal analysis relevant to the client/decisionmaker's ultimate decision as to how to handle interrogations in light of a detainee's status. (*Id.*). Accordingly, the deliberative process privilege protects the withheld information in full.

The ACLU's challenge to the Government's invocation of the attorney-client privilege with respect to Doc. No. 4 is without merit. The ACLU argues that the Government has not justified application of the attorney-client privilege because it has not shown that disclosure of the communication would "encroach upon 'the secrecy of the underlying facts.'" (Opp. at 22 (quoting *Mead Data Center v. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977)). This argument assumes a legal requirement that does not exist.

First, to the extent the ACLU is arguing that the attorney-client privilege only protects legal advice insofar as disclosure would reveal particular facts that were confidentially

communicated to the attorney by the client, the ACLU is simply incorrect, and its position conflicts with the governing Second Circuit case law.[4] Under the standard set forth in *County of Erie*, the attorney-client privilege applies where there is (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice. *See* 473 F.3d at 419. As explained by the Second Circuit, the purpose of the attorney-client privilege is "to encourage attorneys and their clients to communicate fully and frankly and thereby to promote 'broader public interests in the observance of law and administration of justice.'" *Id.* at 418. Thus, the inquiry considers "whether the predominant purpose of the communication is to render or solicit legal advice." *County of Erie*, 473 F.3d at 420. The Second Circuit imposes no requirement that a party demonstrate that disclosure of confidential legal advice would reveal a client's confidential communication of particular facts for the attorney-client privilege to apply. *See generally id.* at 418-20. Here, the emails contain legal advice requested in confidence. (*See* Supp. Shiner Decl. ¶¶ 3, 5). Therefore, the attorney-client privilege applies. *See County of Erie*, 473 F.3d at 419.

Second, to the extent the ACLU is arguing that the attorney-client privilege does not protect legal advice where the advice reflects facts that were not kept "secret" by the client, (Opp. at 22-23), that is plainly wrong. There is no requirement that facts communicated to an attorney be "secret facts" or facts "held confidential by the client" for the attorney-client privilege to apply. (Opp. at 23). The attorney-client privilege protects *communications*, regardless of their content, including communications involving facts that are otherwise publicly known. *See United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) (noting that

[4] Indeed, the ACLU ignores the Second Circuit's decision in *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007), and cites only D.C. Circuit and D.C. district court cases in support of its "secret facts" argument. (*See* Opp. at 22-23).

"[t]he privilege attaches not to the information but to the communication of the information," and that the privilege is not "lost by the mere fact that information communicated is otherwise available to the public"); *see, e.g.*, *GE v. United States*, No. 3:14-cv-190 (JAM), 2015 WL 5443479, at *2 (D. Conn. Sept. 15, 2015) (rejecting argument that "conflate[d] the requirement that an attorney-client *communication* be confidential with a non-existent requirement that the underlying *information* that is transmitted be non-public or confidential").

2. The Government Properly Withheld Information from Doc. Nos. 6, 7, 8, and 9 Pursuant to the Deliberative Process and Attorney-Client Privileges

The withheld information in Doc. Nos. 6, 7, 8, and 9 is protected by both the deliberative process privilege and the attorney-client privilege. All of these documents consist of deliberations and attorney-client communications concerning the contemplated interrogation of detainee Abu Zubaydah. (Supp. Shiner Decl. ¶¶ 6-9).

a. The Government Properly Invoked the Deliberative Process Privilege with Respect to Doc. Nos. 6, 7, 8, and 9

The deliberative process privilege protects all four documents. Doc. Nos. 7-9 are a series of cables between Agency employees in the field and Headquarters personnel. (Supp. Shiner Decl. ¶¶ 7-9). The documents are predecisional and deliberative because they discuss issues regarding how to conduct the next phase of interrogation of Zubaydah. (*Id.*); *see, e.g.*, *Nat'l Whistleblower Ctr. v. HHS*, 849 F. Supp. 2d 13, 39 (D.D.C. 2012) (deliberative process privilege protected internal agency emails containing advice and recommendations regarding pending personnel matters within the agency, prepared before final decisions were made as to how to proceed with respect to those matters).

Doc. No. 6 is an email prepared by a CIA attorney, and sent to clients for comment, providing draft text for a possible letter to the Attorney General seeking an advance declination

of prosecution in connection with the use of certain interrogation methods. (Supp. Shiner Decl. ¶ 6; *see* Tulis Decl., Exh. B). The draft language is contained in an email, not on letterhead, with a cover message from the attorney that states, "This is only a first draft." (Tulis Decl., Exh. B). Such draft documents circulated for comment are plainly protected by the deliberative process privilege. *See ACLU v. DOJ*, __ F.3d __, 2016 WL 7367794, at *5 (2d Cir. Dec. 20, 2016) (privilege protected a variety of informal documents containing preliminary or draft legal analysis, including email summarizing advice at meeting and soliciting feedback); *see also New York Times v. DOJ*, 756 F.3d 100, 121 (2d Cir. 2014) (same for agency counsel's informal memoranda containing preliminary legal analysis). Indeed, as a draft document, it is inherently predecisional. *See ACLU v. DOJ*, __ F.3d __, 2016 WL 7367794, at *5 (draft document not subject to disclosure because "it is a draft and for that reason predecisional"); *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1458 (1st Cir. 1992) (unsigned draft letter "clearly protected from disclosure by the deliberative process privilege").

The ACLU offers no specific challenge to the Government's invocation of the deliberative process privilege with respect to Doc. No. 6 or Doc. No. 9. The ACLU's challenge to the Government's invocation of the deliberative process privilege with respect to Doc. Nos. 7 and 8 is based on the ACLU's mischaracterization of isolated unredacted passages in those documents and speculative assertions regarding the nature of the information withheld. (*See* Opp. at 8 (speculating about the content of Doc. No. 8 based on isolated language that was released); *id.* at 9 (mischaracterizing an unredacted sentence in Doc. No. 7 as describing a decision already made); *id.* (speculating that Doc. Nos. 7 and 8 describe decisions already made based on mischaracterizations of passages that were released)). The Supplemental Shiner Declaration confirms that the ACLU's speculation is simply unfounded. (Supp. Shiner Decl.

¶¶ 7, 9). Accordingly, the ACLU has not countered the Government's showing that the deliberative process privilege was properly invoked with respect to these documents.

b. The Government Properly Invoked the Attorney-Client Privilege with Respect to Doc. Nos. 6, 7, 8, and 9

In addition to the deliberative process privilege, these four documents are also protected by the attorney-client privilege. Doc. Nos. 7 and 9 are protected by the attorney-client privilege because the confidential communications were sent to CIA attorneys for their legal review of the proposed course of action. (Supp. Shiner Decl. ¶¶ 3, 7, 9). The attorney-client privilege protects Doc. No. 8 because the cable contains confidential information exchanged by the client under consideration by CIA attorneys for the purpose of providing legal advice on the proposed course of action. (*Id.* ¶¶ 3, 8). Doc. No. 6, in turn, is protected by the attorney-client privilege because it is a confidential communication from an attorney to his or her clients, which contains information exchanged between the attorney and the clients in furtherance of providing requested legal advice. (Supp. Shiner Decl. ¶¶ 3, 6).

The ACLU challenges the Government's invocation of the attorney-client privilege with respect to Doc. Nos. 6, 7, 8, and 9 on the basis that the documents, in the ACLU's view, "suggest a purpose not of determining the legality of CIA interrogation methods, but of evading accountability for known torture." (Opp. at 20). The ACLU argues that these communications between agency employees and attorneys may not be protected by the attorney-client privilege because they are either "strategic policy communications," rather than communications made for the purpose of obtaining legal advice, or subject to the crime-fraud exception to the privilege. (Opp. at 21; *see also* Opp. at 17-18). Again, however, the ACLU's argument rests on mischaracterizations of passages that were released, unfounded speculation regarding the content of the withheld information, and misapplication of case law. (*See id.* at 17-18, 20-21).

As set forth in the Supplemental Shiner Declaration, and contrary to the ACLU's speculative assertions, the cables consist of confidential communications that were either sent to CIA attorneys for their legal review of the proposed course of action (Doc. Nos. 7, 9) or contain confidential information provided by the client under consideration by CIA attorneys for the purpose of providing legal advice on the proposed course of action (Doc. No. 8). (*See* Supp. Shiner Decl. ¶¶ 3, 7-9). Likewise, Doc. No. 6 contains confidential information exchanged between the CIA attorney and the clients in furtherance of providing requested legal advice. (*Id.* ¶¶ 3, 6; Tulis Decl., Exh. B). With respect to all of these communications, the attorneys were acting in their capacity as legal counsel; they were not policymakers. (*Id.* ¶ 3).

Nor does the crime-fraud exception apply to any of these records—which consist of communications between CIA attorneys and clients in which the attorneys' role was to provide counsel as to the legality of the client's proposed courses of action. (Supp. Shiner Decl. ¶¶ 3, 6-9). In such circumstances, the need to respect the privilege is at its apex, and application of the crime-fraud exception would effectively gut the privilege. *See United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) ("The attorney-client privilege is strongest where a client seeks counsel's advice to determine the legality of conduct before taking action."), *abrogated on other grounds by Loughrin v. United States*, 134 S. Ct. 2384 (2014); *e.g.*, *United States v. White*, 887 F.2d 267, 272 (D.C. Cir. 1989) (rejecting district court's application of the crime-fraud exception on the basis that it would "deny [the client] the privilege where even its sternest critics acknowledge that the justifications for the shield are the strongest – where a client seeks counsel's advice to determine the legality of conduct *before* the client takes any action"); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243, 246 (C.D. Cal. 1993) (concluding that communications in which client "simply sought advice from counsel concerning the legality of his conduct before responding to the SEC"

were "within the attorney client privilege," and observing that allowing discovery of such communications under the crime-fraud exception "would be to virtually deny the existence of any attorney-client privilege" between the attorney and client).

The fallacy of the ACLU's crime-fraud argument is illustrated by Doc. No. 6. The document does not, as the ACLU claims, contain any "acknowledgment" by CIA attorneys that "the torture of Zubaydah and others violated federal criminal law, 18 U.S.C. §§ 2340-2340B." (Opp. at 21). The sentence alluded to by the ACLU—which is draft text for a possible letter—merely states that the contemplated interrogation methods "include activities that normally would appear to be prohibited under the provisions of 18 U.S.C. §§2340-2340B (apart from potential reliance upon the doctrines of necessity or of self-defense)."[5] (Tulis Decl., Exh. B, at 2). It does not represent a legal conclusion or acknowledgment by the attorney, particularly in light of the draft nature of the document. Moreover, the statement in question (if finalized and approved by the client) would have been sent to the Attorney General, the nation's chief law enforcement officer, in an effort to confirm that the conduct in question could be undertaken without subjecting the interrogators to criminal liability. (*See* Supp. Shiner Decl. ¶ 6; Tulis Decl., Exh. B). Not surprisingly, the ACLU fails to cite a single case holding that an attorney's efforts to determine whether prospective conduct is lawful, and to advise and advocate on behalf

[5] OLC subsequently provided legal advice on the subject on August 1, 2002. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General (Aug. 1, 2002), available at https://www.justice.gov/olc/file/886061/download; Letter to Alberto R. Gonzales from John C. Yoo, Deputy Assistant Attorney General (Aug. 1, 2002), available at https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug1.pdf; Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General (Aug. 1, 2002), available at https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf.

of a client to ensure that the client does not engage in a course of conduct that could later be deemed unlawful, could possibly vitiate the attorney-client privilege.

And for good reason. The ACLU's flawed theory of the crime-fraud exception would significantly undermine the ability of government officials to obtain candid and frank legal advice regarding the legality of contemplated actions, particularly in the area of national security. As the Second Circuit has observed:

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

In re Grand Jury Investigation, 399 F.3d 527, 534 (2d Cir. 2005), *quoted in County of Erie*, 473 F.3d at 419. This principle is particularly apt in the context presented here, in which Agency attorneys were consulted concerning the lawfulness of actions that CIA officials deemed necessary to protect the national security. (*See* Supp. Shiner Decl. ¶ 3; *e.g.* Tulis Decl., Exh. B). It is precisely in such circumstances that government personnel must have access to candid and confidential legal advice, without fear that their discussions with counsel will someday be made public. If attorney-client confidences are not protected in circumstances like these, government officials will be less likely to seek legal advice to confirm the lawfulness of contemplated actions—to the detriment of the rule of law. *See County of Erie*, 473 F.3d at 419; *Grand Jury Investigation*, 399 F.3d at 534. Doc. Nos. 6-9 fall squarely within the attorney-client privilege.

3. The Government Properly Withheld Information from Doc. Nos. 13 and 14 Pursuant to the Deliberative Process Privilege

Doc. Nos. 13 and 14 are protected by the deliberative process privilege. These documents consist of emails between agency personnel in the field and Headquarters that are

predecisional and deliberative. (Supp. Shiner Decl. ¶¶ 11-12). Specifically, the emails in Doc. No. 13 contain recommendations and represent interim stages of decision-making regarding certain activities in the field. (*Id.* ¶ 11). Doc. No. 14 provides an employee's assessment of ongoing medical issues related to interrogations for the purpose of future decisionmaking by the head of the Office of Medical Services ("OMS"). (*Id.* ¶ 12). This information falls squarely within the protections of the deliberative process privilege. *See Grand Cent. P'ship*, 166 F.3d at 482 ("The 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 omitted)).

The ACLU's challenge to the Government's invocation of the deliberative process privilege with respect to these documents again rests on speculation about information withheld based on isolated unredacted sentences, and mischaracterizes those sentences as describing agency decisions already undertaken. (*See* Opp. at 8-9). The ACLU's baseless speculation does not defeat the Government's showing that the information was properly withheld as predecisional and deliberative.

4. The Government Properly Withheld Information from Doc. No. 15 Pursuant to the Deliberative Process and Attorney-Client Privileges

The withheld information in Doc. No. 15 is protected by both the deliberative process privilege and the attorney-client privilege. Doc. No. 15 consists of a cable from an agency employee in the field to CIA attorneys and other Headquarters employees containing a summary of Abu Zubaydah's interrogation, an assessment of the situation, and a recommendation for a plan of action based on that information. (Supp. Shiner Decl. ¶ 13). The document is predecisional and deliberative, and therefore protected by the deliberative process privilege,

because it recommends a plan of action and requests a final decision from Headquarters with respect to that proposal. (*Id.*).

Doc. No. 15 also is protected by the attorney-client privilege because it consists of a confidential communication that was sent by Agency employees to CIA attorneys for their legal review of a proposed course of action. (Supp. Shiner Decl. ¶¶ 3, 13). The ACLU's suggestion that this attorney-client communication is merely a "policy discussion[]," and was not sent to the attorneys for the purpose of obtaining legal advice, is baseless, as confirmed by the Supplemental Shiner Declaration. (*See id.*).

Further, the agency's declarant attests, contrary to the ACLU's suggestion (Opp. at 12-13), that the Government has not improperly withheld "factual matter" in Doc. No. 15. (Supp. Shiner Decl. ¶¶ 23-24). Not only is any factual information in the document part of a confidential communication sent to CIA attorneys for the purpose of obtaining legal advice (*see* Supp. Shiner Decl. ¶¶ 3, 13), and thus protected in full under the attorney-client privilege, *see County of Erie*, 473 F.3d at 419, but disclosure of any such factual information would also reveal the deliberations at issue (*see* Supp. Shiner Decl. ¶ 24), and hence such information is also exempt from disclosure under the deliberative process privilege, *see, e.g.*, *Elec. Frontier Found. v. United States*, 739 F.3d 1, 13 (D.C. Cir. 2014) (noting that factual material is covered by the deliberative process privilege where it would expose the deliberative process at issue).

5. The Government Properly Withheld Information from Doc. No. 18 Pursuant to the Deliberative Process Privilege

The withheld information in Doc. No. 18 is protected by the deliberative process privilege. Doc. No. 18 is predecisional and deliberative because it consists of an email from an agency employee to his supervisor transmitting a draft cable, which was submitted to the supervisor for review before finalizing. (Supp. Shiner Decl. ¶ 14). The ACLU does not offer

any specific challenge to the Government's invocation of the deliberative process privilege with respect to this document.

As noted in the Supplemental Shiner Declaration, the *Vaughn* index accompanying the original Shiner Declaration incorrectly stated that the attorney-client privilege applies to this document—only the deliberative process privilege is being invoked. (*See id.* ¶ 14 & n.4). Accordingly, the ACLU's challenge to the Government's invocation of the attorney-client privilege with respect to Doc. No. 18 is moot.

6. The Government Properly Withheld Information from Doc. No. 28 Pursuant to the Deliberative Process Privilege

The withheld information in Doc. No. 28 is protected by the deliberative process privilege. Doc. No. 28 is a memorandum from OMS to the Office of Inspector General (OIG) regarding a draft version of the OIG's Special Review on the Counterterrorism and Detention Program. (Supp. Shiner Decl. ¶ 16). It is predecisional and deliberative because it provides OMS's recommendations, edits, and comments for the OIG's consideration in drafting its next version of the Special Review.[6] (*Id.*); *see, e.g.*, *Nat'l Council of La Raza v. DOJ*, 337 F. Supp. 2d 524, 534 (S.D.N.Y. 2004) ("Drafts and comments on documents are quintessentially predecisional and deliberative."); *accord Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004).

The ACLU's suggestion that the Government "appears to be" improperly withholding factual material in Doc. No. 28 (Opp. at 12-13) is meritless, and unsupported by the relevant case law, which makes clear that disclosure of even "purely factual material" may "reveal an agency's decision-making process," particularly in connection with draft documents. *Russell v. Dep't of*

[6] The final version of the Special Review was released to ACLU in redacted form. (*See* La Morte Decl., Exh. A, ECF. Nos. 53-1 to 53-3).

Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (sustaining agency's withholding of pages of draft manuscript concerning "the history of herbicide use in the Vietnam conflict"). For example, in *Competitive Enterprise Institute v. Office of Science and Technology Policy*, 161 F. Supp. 3d 120 (D.D.C. 2016), *order modified by* 185 F. Supp. 3d 26 (D.D.C. 2016), the agency had withheld 47 pages of drafts of a letter responding to an outside organization's request, including several pages containing draft edits from agency staff. *Id.* at 123, 128. The court rejected the plaintiff's argument that the agency could segregate and disclose portions of the documents that recited "historical facts," explaining that "[t]he deliberative process privilege protects not only the content of drafts, but also the drafting process itself." *Id*. at 131-32. Similarly here, especially because the final version of the Special Report has been released, "[a]ny effort to segregate the 'factual' portions" of the document at issue "would run the risk of revealing 'editorial judgments'—for example, decisions to insert or delete material or to change a draft's focus or emphasis.'" *Id.* at 132 (quoting *Dudman Comms. Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987)).

In addition, regardless of whether any of the OMS edits, recommendations, and comments contained in Doc. No. 28 include material that could be described as "factual," disclosure of such details would necessarily reveal the deliberative process with respect to both the drafting of the IG report at issue, and OMS's own deliberations in commenting on the draft. Revelation of any factual material within the document would reveal information about the nature and content of OMS's predecisional and deliberative views on an interim stage of the report. As such, any factual material in Doc. No. 28 is not segregable. *See, e.g.*, *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014) (rejecting argument portions of draft history that contained factual material were not protected by deliberative process privilege, explaining

that "'the selection of the facts thought to be relevant' is part of the deliberative process"); *see also Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979) ("Disclosing factual segments from the DBA and CPA summaries would reveal the deliberative process of summarization itself by demonstrating which facts in the massive rule-making record were considered significant by the decisionmaker and those assisting her.").

7. The Government Properly Withheld Information from Doc. Nos. 44, 45, and 46 Pursuant to the Deliberative Process and Attorney-Client Privileges

Doc. Nos. 44, 45, and 46 consist of emails between CIA attorneys and from CIA attorneys to agency Office of Public Affairs ("OPA") personnel, providing comments on a draft press proposal prepared by OPA regarding the detention and interrogation program. (Supp. Shiner Decl. ¶ 20). The ACLU offers no specific challenge to the Government's invocation of the deliberative process privilege with respect to these documents, and the information withheld clearly meets the standard. The emails contain the recommendations of CIA attorneys to OPA, and related discussions among attorneys, as to whether and how to present certain information about the detention and interrogation program to the public. (*Id.*). They are quintessentially deliberative. *See, e.g.*, *ACLU v. DOJ*, ___F.3d __, 2016 WL 7367794, at *5 (sustaining Government's withholding, pursuant to the deliberative process privilege, of "a set of suggested talking points concerning the legal basis for drone strikes," as well as "a draft of a proposed op-ed article that suggested some ways of explaining the Government's legal reasoning").

Contrary to the ACLU's argument (*see* Opp. at 19-20), the emails also fall squarely within the protection of the attorney-client privilege. As the Supplemental Shiner Declaration explains, OPA requested the legal advice of CIA attorneys with respect to its draft press plan, and CIA's attorneys responded by providing legal advice and highlighting specific legal concerns and considerations presented by the draft proposal. (Supp. Shiner Decl. ¶ 20).

ACLU's speculation that the emails reflect an "attempt to direct public relations strategy" or a conversation about "the message the agency wants to convey" purely as a matter of policy (*see* Opp. at 20) is simply wrong. The CIA attorneys on these emails were not acting as "lobbyists"; rather, the publicly released portions of these emails show that agency attorneys were doing exactly what they should be doing as *legal* advisors to agency personnel: deliberating on the potential legal ramifications of OPA's draft press plan on various pending litigations involving the detention and interrogation program, and providing legal advice and recommendations accordingly. (*See* Doc. Nos. 44-46, Exhs. 2-4 to Ladin Decl.). Thus, the cases cited by the ACLU regarding communications between clients and lawyers acting in their capacity as lobbyists, not lawyers, are inapposite. *Compare* Opp. at 20 *with, e.g.*, *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 285 (S.D.N.Y. 2001) ("The fact that a lawyer occasionally acts as a lobbyist does not preclude the lawyer from acting as a lawyer and having privileged communications with a client who is seeking legal advice."); *Weissman v. Fruchtman,* No. 83 Civ. 8958, 1986 WL 15669 (PKL), at *15 (S.D.N.Y. Oct. 31, 1986) (attorney-client privilege properly invoked to protect legal advice sought on pending legislation).

Further, for the reasons explained above, *see supra* at 4-6, the ACLU's contention that the attorney-client privilege cannot apply to legal advice unless the Government demonstrates that disclosure of the communication would "encroach upon 'the secrecy of the underlying facts'" (Opp. at 22-23) is meritless. The attorney-client privilege protects communications, regardless of whether any facts communicated would be "secret" in other contexts. *See County of Erie*, 473 F.3d at 418-20; *Cunningham*, 672 F.2d at 1073 n.8.

8. The Government Properly Withheld Information from Doc. No. 66 Pursuant to the Deliberative Process Privilege

Doc. No. 66 is a draft memorandum, expressly marked "draft," entitled "Summary and

Reflections of Chief Medical Services on OMS Participation in the RDI Program." (Supp. Shiner Decl. ¶ 22). It is an unsigned, undated document that does not appear on Agency letterhead. (*See* Tulis Decl., Exh. T). As Ms. Shiner explains, Doc. No. 66 is predecisional and deliberative because "it is a selective, draft account of one Agency officer's impressions of the detention and interrogation program. This document remained a working draft and was never finalized. It is not the Agency's or OMS's final or official history, or assessment, of the program." (Supp. Shiner Decl. ¶ 22). Draft documents of this sort fall squarely within the scope of the deliberative process privilege. *See ACLU v. DOJ*, __ F.3d __, 2016 WL 7367794, at *5 (a draft is "for that reason predecisional"); *Grand Cent. P'ship*, 166 F.3d at 482 (privilege protects "draft documents . . . and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"); *accord Nat'l Sec. Archive*, 752 F.3d at 461-65 (draft volume of CIA staff historian's account and assessment of Bay of Pigs invasion did not constitute agency official history, and was therefore protected by the deliberative process privilege).

ACLU's arguments for disclosure of Doc. No. 66 are without merit. ACLU first suggests that the document cannot be protected by the deliberative process privilege because it "appears to consist largely of a retrospective account of actions taken by the agency over the course of the" detention and interrogation program. (Opp. at 8). But as the D.C. Circuit has repeatedly held, although it may recount past events, "a *draft* of an agency's official history is pre-decisional and deliberative, and thus protected under the deliberative process privilege." *Nat'l Sec. Archive*, 752 F.3d at 463 (citing *Dudman*, 815 F.2d at 1567, and *Russell*, 682 F.2d at 1048). For purposes of applying the deliberative process privilege, it is the "agency's official history" that constitutes the relevant "final agency decision." *Id.* Only the official

history "constitutes the agency's 'official statement' concerning the agency's prior actions, and it helps educate future decisionmakers." *Id.* Doc. No. 66 is a draft, and does not constitute the final or official OMS account (Supp. Shiner Decl. ¶ 22); accordingly, it is predecisional.

That Doc. No. 66 was "never finalized" (Opp. at 8 n.1) is immaterial. Whether or not a draft resulted in a final agency document has no bearing on its privileged status: "There may be no final agency document because a draft died on the vine. But the draft is still a draft and thus still pre-decisional and deliberative." *Nat'l Sec. Archive*, 752 F.3d at 463. Indeed, the Second Circuit recently rejected this exact argument by the ACLU, and upheld the government's assertion of the deliberative process privilege and Exemption 5 to protect a draft op-ed that had never been published. *ACLU v. DOJ*, __ F.3d __, 2016 WL 7367794, at *5; *see also Leopold v. CIA*, 89 F. Supp. 3d 12, 24 (D.D.C. 2015) (rejecting argument that predecisional documents that were never finalized and approved could not be privileged, and noting that "agency personnel must know from the get-go that their work will not turn into front-page news regardless of whether a project is ultimately scrapped; were it otherwise, they might temper everything they write for fear that it will not be protected").

Equally unavailing is the ACLU's argument that the Government has failed to "segregate non-deliberative, factual material" in Doc. No. 66. (Opp. at 10; *see also id.* at 10-11 (arguing that pages of Doc. No. 66 discretionarily released in separate litigation brought against two CIA contractors contain segregable factual material)). ACLU fails to recognize that because it is a draft, the entirety of the document is privileged. *Nat'l Sec. Archive*, 752 F.3d at 465 (rejecting argument that CIA was required to disclose reasonably segregable factual portions of draft history, because draft was "exempt in its entirety under Exemption

5").

And even apart from the draft status of Doc. No. 66, the ACLU is incorrect to suggest that "purely factual material" is necessarily segregable in the context of the deliberative process privilege. (Opp. at 9-10, 11 (citing *EPA v. Mink*, 410 U.S. 73, 87-88 (1973))). As the Second Circuit has recognized, "[d]isclosure of 'purely factual material' in otherwise exempt documents may be ordered only if the material 'is severable without compromising the private remainder of the document[].'" *Lead Indus.*, 610 F.2d at 85 (quoting *Mink*, 410 U.S. at 91). To make this determination, "[m]ore is required than merely plucking factual segments from the report[ ]," *id.*, as ACLU urges the Court to do here. Rather, "there must be a sensitive reference to the relation of the factual segments to the report as a whole." *Id.*

The ACLU ignores this requirement altogether. The title of the document makes clear that it purports to be a "summary and reflections" on OMS's participation in the detention and interrogation program. (Supp. Shiner Decl. ¶ 22; *see* Tulis Decl., Exh. T). In addition to the explicitly evaluative purpose of the document, as the D.C. Circuit has recognized, "[i]n producing a draft agency history, the writer necessarily must 'cull the relevant documents, extract pertinent facts, organize them to suit a specific purpose,' and 'identify the significant issues.'" *Nat'l Sec. Archive*, 752 F.3d at 465 (quoting *Mapother v. DOJ*, 3 F.3d 1533, 1538 (D.C. Cir. 1993)). The writer's "'selection of the facts thought to be relevant' is part of the deliberative process" and "necessarily involves 'policy-oriented *judgment*.'" *Id.* (quoting *Mapother*, 3 F.3d at 1539).[7] Accordingly, both because it is a draft, and because any factual

[7] The government does not contend that "*any* factual narration necessarily reflects a deliberative process of selecting *which* facts to include in a document" (Opp. at 11 n.3 (first emphasis added)). But where, as here, disclosing factual material in a document "would reveal the deliberative process of summarization itself," *Lead Indus.*, 610 F.2d at 85, the factual material is protected.

material is bound up with deliberative nature of the document, all of the information withheld from Doc. No. 66 is exempt from disclosure under Exemption 5.[8]

C. The Government Has Adequately Justified Its Exemption 5 Withholdings in the Remaining 7 Documents

The ACLU has not specifically challenged the applicability of Exemption 5 with respect to Doc. Nos. 2, 10, 19, 29, 37, 43, and 55, and the information withheld from these documents is protected by the deliberative process privilege and/or attorney-client privilege. (*See* Supp. Shiner Decl. ¶¶ 4, 10, 15, 17-20). The Supplemental Shiner Declaration describes, in substantive detail, the nature of each document, explains why the withheld information is predecisional and deliberative, and, where applicable, establishes that the communications were made for the purpose of obtaining or providing legal advice. (*See id.*). The Declaration also confirms, for all documents for which the attorney-client privilege has been asserted, that the confidentiality of those communications has been maintained. (*Id*. ¶ 3). The Government has amply satisfied its burden to establish the privileged status of these records. *See Carney*, 19 F.3d at 812; *County of Erie*, 473 F.3d at 419.

D. All Reasonably Segregable Information Has Been Released

An agency is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quotation marks omitted). The ACLU identifies no reason why that presumption should be disturbed in this case. While the ACLU relies on *Mead Data*, 566 F.2d at 261, to argue that agencies must provide a "detailed justification for non-segregability" (Opp. at 12), "more recent decisions form

[8] ACLU also challenges the withholding of classified and statutorily protected information within Doc. No. 66 to the extent it consists of "medical details" of the CIA's detention and interrogation of detainees, Opp. at 31, but Ms. Shiner confirms that no such medical details have been withheld under Exemptions 1 or 3. (Supp. Shiner Decl. ¶ 22).

the D.C. Circuit have indicated that the standard first articulated in *Mead Data* has been relaxed." *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 207 (D.D.C. 2013) (discussing *Loving v. DOD*, 550 F.3d 32, 41 (D.C. Cir. 2008), and *Johnson v. Exec. Office for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002)). Specifically, the D.C. Circuit has held that a *Vaughn* index that adequately describes the information withheld and the applicable exemptions, in conjunction with a declaration that the agency "released all segregable material," is sufficient for the court's segregability determination. *Loving*, 550 F.3d at 41; *accord Johnson*, 310 F.3d at 776. Here, the agency's declarant, Antoinette Shiner, completed a document-by-document and line-by-line segregability review and determined that all reasonably segregable non-exempt information has been released. (Supp. Shiner Decl. ¶ 23). Further, the agency has provided a detailed *Vaughn* and two declarations explaining its privilege withholdings.

To the extent records protected by the deliberative process privilege contained factual information, Ms. Shiner determined that those facts are not segregable from the underlying deliberations. (Supp. Shiner Decl. ¶ 24). As explained by Ms. Shiner, during the course of the former interrogation program at issue in the documents, there was considerable back-and-forth among CIA personnel, in various roles, about handling different aspects of the interrogations. (*Id.*). These discussions necessarily required employees to convey facts and situational assessments to decisionmakers for the purpose of receiving a final decision on outstanding matters. (*Id.*). These facts formed an integral part of the decisionmaking process, and their disclosure would reveal the deliberations at issue. (*Id.*). In addition, as explained above, facts contained in draft documents or comments on drafts are typically not segregable, as their disclosure would be revelatory of the deliberative process. *See supra* at 14-16 and 19-21.

Moreover, in several of the documents at issue, the information was also withheld pursuant to the attorney-client privilege. (Supp. Shiner Decl. ¶ 24). With respect to attorney-client privileged material, factual information was communicated to attorneys for the purpose receiving legal advice on a particular subject or conveyed to attorneys for their legal review to ensure that proposed conduct complied with appropriate legal standards. (*Id.*). There is no obligation to segregate factual material from attorney-client communications, as the privilege protects the communications themselves. *See supra* at 5-6.

II. The MON Is Protected in Full by Exemptions 1, 3 and 5

The September 17, 2001 Memorandum of Notification (Doc. No. 1) is exempt from disclosure in full. It is classified and protected from disclosure by statute, and thus exempt under Exemptions 1 and 3, and also a privileged presidential communication, and thus exempt under Exemption 5.

A. The MON Is Protected in Full by Exemptions 1 and 3

The MON is properly withheld in its entirety under Exemptions 1 and 3. The document contains information pertaining to intelligence sources and methods that is currently and properly classified under Section 1.4(c) of Executive Order 13526, and protected from disclosure under the National Security Act, as amended, 50 U.S.C. § 3024. First Shiner Decl. ¶ 29 & Index No. 1. The ACLU contends that the Government has not adequately justified its withholding of the MON under Exemptions 1 and 3 (Opp. at 28-31), but detailed information supporting the Government's justification for withholding the MON in full under Exemptions 1 and 3 is set forth in the classified declaration submitted for the Court's review *ex parte* and *in camera*. *See* ECF No. 51. Where, as here, the Government's justification for withholding a document itself would disclose classified or otherwise exempt information, that justification may be provided *ex*

parte. *New York Times*, 758 F.3d at 440 ("[w]hen the itemization and justification are themselves sensitive, . . . to place them on public record could damage security in precisely the way that FOIA Exemption 1 is intended to prevent" (quoting *Hayden*, 608 F.2d at 1384 (alteration in *New York Times*)).

The ACLU argues that limited additional information about the MON was provided in a declaration submitted in 2007 in a separate FOIA litigation before this Court. (Opp. at 29-30). Regardless of whether the document identified in the 2007 declaration is the MON, however, that hardly undermines the Government's justifications for withholding the MON in full pursuant to Exemptions 1 and 3 (or Exemption 5, discussed below). The declaration cited by the ACLU describes a "notification memorandum" "from the President to the members of the NSC regarding a clandestine intelligence activity," which "pertains to the CIA's authorization to detain terrorists," and "discusses the approval of the clandestine intelligence activity and related analysis and description." (Opp. at 29-30). Whether or not it refers to the MON, as the ACLU contends, this description confirms that the document contains information pertaining to intelligence activities, sources and methods within the meaning of Section 1.4(c) of Executive Order 13526, which are protected from disclosure under Exemption 1 as well as Exemption 3 and the National Security Act.

Nor is the Government's justification for withholding the MON rendered insufficient simply because the existence of the MON has been officially acknowledged and an excerpt of one sentence of the document declassified and quoted by the SSCI in its report. (*See* Opp. at 30).[9] For the reasons explained in the classified declaration, the MON is properly withheld in its

[9] A portion of the same excerpt was later released in the redacted report of the Department of Justice's Office of Professional Responsibility ("OPR Report"). *See* La Morte Decl., Exh. L-1, ECF No. 53-22, at 36, cited in Opp. at 30. Plaintiffs did not challenge the redaction of other information describing the MON on the same page of the OPR report.

entirety under Exemptions 1 and 3, notwithstanding the disclosure of the existence of the MON and a portion of one sentence of the document.

B. The MON Is Privileged and Protected in Full by Exemption 5

In addition to being classified and protected from disclosure by statute, the MON is also protected in full by Exemption 5 and the presidential communications privilege. First Shiner Decl. ¶ 29. 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 predecisional, deliberative ones, *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). Indeed, 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. The presidential communications privilege protects records in their entirety. *See id.* at 745.

The Government has logically and plausibly established that the MON is protected in full by the presidential communications privilege. As Ms. Shiner explains, the MON is a direct, confidential communication from the President to Agency officials on sensitive topics, and it has been closely held within the Executive Branch. (First Shiner Decl. ¶ 29). Although Congress was notified of the MON, given its extraordinary sensitivity, the notification was strictly limited to certain members of Congress as provided in the National Security Act, 50 U.S.C. § 3093(c)(2). (First Shiner Decl. ¶ 29). Ms. Shiner also confirms that public disclosure of the MON would inhibit the President's ability to engage in effective communications and decisionmaking. (*Id.*)

The ACLU fails to overcome this showing that the MON is privileged and protected from disclosure in its entirety under Exemption 5. 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 23). 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. DHS*, 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 Exemption 5." (citing cases)); *accord Electronic Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 80-81 (D.D.C. 2008).

Although personal invocation of a privilege may be required in discovery,[10] courts have made clear that invocation by the President is not required in the FOIA context. *See 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

[10] None of the cases cited by the ACLU on this point arose in the FOIA context. (*See* Opp. at 23-24). Rather, they involved privileges asserted in civil discovery, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) (discovery in tort actions); *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977) (subpoena issued in class action lawsuit); *Ctr. on Corp. Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 872-73 (D.D.C. 1973) (discovery in tax refund case), or in criminal proceedings, *United States v. Burr*, 25 F. Cas. 187 (1807) (subpoena issued in misdemeanor criminal prosecution); *Sealed Case*, 121 F.3d at 744 n.16 (grand jury subpoena).

"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)).

Aside from its flawed procedural argument, the ACLU's challenge to the Government's assertion of the presidential communications privilege to protect the MON is based on a fundamentally erroneous premise: that the privilege cannot apply to (and therefore justify the withholding of) presidential "directives that have the legal effect of limiting or regulating agency conduct." (Opp. at 26). There is no authority for the notion that a presidential communication loses its confidential nature simply because it directs Executive Branch activities. To the contrary, the law is clear that the privilege protects presidential directives and decisional documents. *See Sealed Case*, 121 F.3d at 745 ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents."); *see also Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010). 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 privilege would ring hollow if the President could not confidentially communicate with Executive Branch officials about activities that the President was directing.[11]

[11] None of the cases cited by the ACLU, *see* Opp. at 26, supports the proposition that a presidential directive like the MON cannot be protected by the presidential communications privilege. The courts in *Sealed Case*, 121 F.3d at 745, and *Amnesty International USA*, 728 F. Supp. 2d at 522, explicitly recognized that the privilege applies to decisional as well as predecisional documents. And in *Center for Effective Government v. Department of State*, 7 F. Supp. 3d 16, 27 (D.D.C. 2013), the court did not hold that the privilege can never apply to presidential policy directives, as the ACLU suggests. Rather, the court found the privilege inapplicable because—unlike the MON—the (unclassified) presidential directive in question had been "widely distributed within the Executive Branch" and "publicly touted." *See id.* at 23-29. The court's ruling was also informed by its finding that there was no evidence that the directive

The ACLU is also wrong in contending that portions of the MON must be released simply because an excerpt of one sentence of the MON was quoted in the SSCI Report. (Opp. at 26-27 (citing the SSCI Report, which quotes part of one sentence of the MON, *see* Ladin Decl., Exh. 14, and the OPR Report released to Plaintiffs in this case, which quotes the same language, *see* La Morte Decl., Exh. L-1, ECF No. 53-22, at 36)).[12] As explained in the Shiner Declaration—and nowhere disputed by the ACLU—the MON itself remains an extraordinarily sensitive document that has been closely held within the Executive Branch. (Shiner Decl. ¶ 29). And while the privilege may be waived when "specific documents" are "voluntarily released to third parties outside the White House," (Opp. at 26 (quoting *Sealed Case*, 121 F.3d at 741-42)), that is not what happened here.

To begin with, the MON was not shared with "third parties" as that term was used in *Sealed Case*. *See* 121 F.3d at 741-42 (finding privilege waived where documents disclosed to counsel representing subject of grand jury investigation). Rather, as Ms. Shiner explains, consistent with the requirements of the National Security Act, 50 U.S.C. § 3093, Congress was notified of the MON, but "given the extraordinary sensitivity of the MON, the notification to Congress was strictly limited to certain Members of Congress, in accordance with 50 U.S.C.

"was intended to be, or has been treated as, a confidential presidential communication"; rather, the directive was an unclassified document lacking any "inherent (or claimed) basis for secrecy" or "need to protect military, diplomatic, or sensitive national security secrets." *Id.* at 25. The MON, in contrast, is and has always been a highly classified and extraordinarily sensitive document the disclosure of which would harm national security for the reasons set forth in the Government's classified and unclassified declarations.

[12] The ACLU also claims that the title and length of the MON have been publicly released. Opp. at 27. In fact, the complete title of the MON has not been released, and was redacted from the publicly released version of the SSCI Report. *See* Ladin Decl., Exh. 14, at n.7. But even if the ACLU were correct that the title and length of the document had been disclosed, that is the sort of general information that is frequently included in a *Vaughn* index justifying the withholding of privileged documents, and does not result in any waiver of privilege.

§ 3093(c)(2)." (Shiner Decl. ¶ 29). This "strictly limited" disclosure to certain Members of Congress, for the purpose of facilitating Congress's oversight responsibilities and pursuant to the requirements of the National Security Act, did not effect any waiver of privilege. *See Murphy v. Dep't of Army*, 613 F.2d 1151, 1155 (D.C. Cir. 1979) (where Congress receives information from agencies that is not available to the general public, "no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large"); *see, e.g., Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 604 (D.C. Cir. 2001) (providing memoranda and correspondence created as part of DOJ's deliberative process to Congressional committee did not waive protections of Exemption 5). Indeed, the ACLU does not argue otherwise.

Nor is there any basis to find that the MON is no longer privileged simply because certain Members of Congress published an excerpt of one sentence of the MON in the SSCI Report. Indeed, the law is to the contrary. In *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002), an excerpt of a privileged memorandum was quoted in a public report prepared by the Webster Commission, a task force established by the IRS to conduct an independent review, gather information and make recommendations on how to reform the IRS's Criminal Investigations Department. *Id*. at 73. The FOIA requestor argued that the public disclosure of this excerpt waived the protection of Exemption 5 and the deliberative process privilege. *Id.* at 73, 81. The Second Circuit rejected this argument, holding that the memorandum remained privileged and protected from disclosure *in its entirety*. *Id.* at 81 ("for purposes of the deliberative process privilege, the incorporation of one sentence from the Neiman Memorandum in the published Report is not inconsistent with the IRS's or the Southern District's 'desire to keep the rest secret'" (quoting *Rockwell Int'l Corp.*,

235 F.3d at 603-04)); *id.* at 82 (holding, after *in camera* review, that redacted version of memorandum need not be produced).

The same is true here—the presidential communications privilege protecting the MON is not vitiated by the decision of certain members of Congress to quote a portion of one sentence of that document in the SSCI Report. Just as the Department of Justice properly withheld the privileged memorandum in full in *Tigue*, the Government has properly withheld the MON in full here.

CONCLUSION

For the reasons set forth above, and in the Government's opening memorandum, the Court should grant the Government's motion for summary judgment in full.

Dated: New York, New York
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