[ORAL ARGUMENT NOT YET SCHEDULED]

No. 15-5217

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs–Appellants,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFFS–APPELLANTS

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October 19, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs–Appellants respectfully submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

The American Civil Liberties Union and American Civil Liberties Union Foundation are the Plaintiffs–Appellants in this matter. The Defendant–Appellee is the Central Intelligence Agency. No *amici* appeared below, and none are anticipated in this appeal.

(B) Ruling Under Review

The ruling under review is an order of the district court (Collyer, J.), dated June 18, 2015, granting Defendant's motion for summary judgment and denying Plaintiffs' cross-motion for summary judgment. Order, No. 10-cv-436 (D.D.C. June 18, 2015), ECF No. 75 (JA 233). The district court issued an opinion together with the Order. Opinion, No. 10-cv-436, 2015 WL 3777275 (D.D.C. June 18, 2015), ECF No. 74 (JA 189–222).

(C) Related Cases

This case has previously been before this Court. *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) (No. 11-5320).

Counsel are aware of two related actions. Both actions, like this one, involve Freedom of Information Act requests for records relating to the government's

"targeted killing" program.

In *Leopold v. DOJ*, No. 14-cv-168, 2015 WL 5297254 (D.D.C. Aug. 12, 2015), Judge Mehta ruled that multiple passages in a Department of Justice white paper ("May 2011 White Paper") had been withheld unlawfully. The Justice Department filed a notice of appeal on October 8, 2015. ECF No. 33; *see also* Notice of Appeal, *Leopold v. DOJ*, No. 14-cv-168 (D.D.C. Oct. 8, 2015), ECF No. 33. (As of this filing, the D.C. Circuit had not yet docketed the appeal in *Leopold*.) The withholding of the May 2011 White Paper is also at issue in this appeal.

In the consolidated action of *ACLU v. DOJ*, No. 12 Civ. 794 (S.D.N.Y filed Feb. 1, 2012), and *N.Y. Times Co. v. DOJ*, No. 11 Civ. 9336 (S.D.N.Y. filed Dec. 20, 2011), the Second Circuit heard oral argument in June 2015 relating to the government's withholding of certain Office of Legal Counsel ("OLC") memoranda. *N.Y. Times Co. v. DOJ*, Nos. 14-4432 & 14-4764 (2d Cir. oral argument held June 23, 2015). Once that appeal is resolved, the Second Circuit will consider the lawfulness of the government's withholding of certain other documents relating to the targeted-killing program, including the May 2011 White Paper at issue in *Leopold v. DOJ*. *See ACLU v. DOJ*, No. 15-2956 (2d Cir. appeal docketed Sept. 18, 2015); *see also* Order, *ACLU v. DOJ*, No. 15-2956 (2d Cir. Oct. 15, 2015), ECF No. 46. In an earlier appeal in the same action, the Second Circuit ruled that the government was unlawfully withholding one OLC memorandum,

and the Court published a redacted version of that memorandum with its decision. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014). With the exception of the May 2011 White Paper—which the Second Circuit has yet to consider—the records at issue in the New York action are not at issue in this case, but the two cases raise some of the same legal issues.

Though not "related" to the instant litigation under D.C. Cir. R. 28(A)(1)(C) because it lies in a district court outside the District of Columbia, at least one other case "involve[es] substantially the same parties and the same or similar issues," *id.* That case, *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. filed Mar. 16, 2015), focuses principally on records that are more recent than the ones at issue in this case, but the court has stayed certain aspects of the litigation pending this Court's resolution of this appeal. *See* Order Modifying Apr. 30, 2015 Scheduling Order & Otherwise Issuing Directions for the Further Conduct of This Action ¶ 3, *ACLU v. DOJ*, No. 15 Civ. 1954 (S.D.N.Y. July 9, 2015), ECF No. 25.

/s/ Jameel Jaffer
Jameel Jaffer
Counsel for Plaintiffs–Appellants

Date: October 19, 2015

CORPORATE DISCLOSURE STATEMENT

American Civil Liberties Union, Inc. and American Civil Liberties Union Foundation, Inc. are affiliated non-profit corporations devoted to defending and expanding civil liberties and civil rights in the United States. No publicly held company, or any other party, holds any ownership interest in either organization. American Civil Liberties Union, Inc. is a membership organization with no parent company. The directors of American Civil Liberties Union Foundation, Inc. are selected, indirectly, by American Civil Liberties Union, Inc. No other party controls American Civil Liberties Union Foundation, Inc., directly or indirectly.

/s/ Jameel Jaffer
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Counsel for Plaintiffs–Appellants

Date: October 19, 2015

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GLOSSARY

ACLU	American Civil Liberties Union
CIA	Central Intelligence Agency
DOD	Department of Defense
DOJ	Department of Justice
DOS	Department of State
FOIA	Freedom of Information Act
OLC	Office of Legal Counsel

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706. On remand after this Court's decision in *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), the district court granted summary judgment in favor of Defendant Central Intelligence Agency on June 18, 2015. *ACLU v. CIA*, No. 10-cv-436, 2015 WL 3777275 (D.D.C. June 18, 2015), ECF No. 75 (JA 223). Plaintiffs timely filed a notice of appeal on July 29, 2015. Notice of Appeal, *ACLU v. CIA*, No. 10-cv-436 (D.D.C. July 29, 2015), ECF No. 76 (JA 224). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the records sought by Plaintiffs–Appellants' Freedom of Information Act ("FOIA") request, 5 U.S.C. § 552, are protected from disclosure under FOIA Exemptions 1, 3, and 5.

2. Whether public statements by government officials waived the Central Intelligence Agency's right to invoke FOIA exemptions that might otherwise have been applicable.

STATEMENT OF THE CASE

Since 2001, and with particular frequency since 2009, the United States has used unmanned aerial vehicles—drones—to carry out lethal strikes, or so-called "targeted killings," against suspected terrorists and militants overseas. According to credible, independent studies, the strikes have killed more than three thousand people, including hundreds of civilians. Although many Americans have raised

questions about the effectiveness, lawfulness, and morality of the government's drone campaign, the government has exercised tight control over the information available to the public. The Freedom of Information Act ("FOIA") request at issue in this case (the "Request" (JA 17–32)) was filed by the American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU") to compel the release of information that is crucial to the public's ability to understand government policy and hold policymakers accountable for their decisions.

The ACLU filed the Request on January 13, 2010, with the Department of Defense ("DOD"), the Department of Justice ("DOJ"), the Department of State ("DOS"), and the Central Intelligence Agency ("CIA"). *See* JA 17. None of the agencies timely processed the Request. Three months after the ACLU filed it, the CIA provided a "Glomar" response, "declining either to confirm or deny the existence of any responsive records." *ACLU v. CIA*, 710 F.3d 422, 425–26 (D.C. Cir. 2013).

The ACLU filed suit against DOD, DOJ, and DOS on March 16, 2010, and, after exhausting administrative appeals, added the CIA as a defendant on June 1, 2010. JA 39–40. After DOD, DOJ, and DOS completed processing and released certain documents, the ACLU voluntarily dismissed the complaint against those

agencies. JA 191.[1] The CIA remained as the only defendant.

The CIA moved for summary judgment and the ACLU cross-moved for partial summary judgment on the question whether the CIA's Glomar response was lawful. The district court entered judgment for the defendants. *ACLU v. DOJ*, 808 F. Supp. 2d 280 (D.D.C. 2011).

On appeal, this Court reversed. *ACLU v. CIA*, 710 F.3d at 425.[2] The Court concluded that "[g]iven the extent of official statements" by executive-branch officials unmistakably acknowledging the CIA's "intelligence interest" in drone strikes, *id.* at 429–30, the notion that the agency did not have responsive records "beggar[ed] belief." *Id.* at 430–31. Accordingly, the Court remanded the case with instructions for the "filing of a *Vaughn* index or other description of the kind of documents the Agency possesses, followed by litigation regarding whether the

[1] DOS eventually released 186 records; DOD released 17 records and a multi-volume record relating to an investigation of a drone strike that killed civilians in Afghanistan; and DOJ identified responsive records but withheld them in full.

[2] After the parties completed substantive briefing, but before oral argument, the CIA asked that the Court remand the case in light of limited disclosures the government had made in *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013), a FOIA case that was then pending before the Southern District of New York. (The case in the Southern District of New York consolidated two actions brought respectively by the ACLU and the New York Times Co. *See supra* CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES § C.) The ACLU opposed the CIA's motion on the grounds that a remand would cause unwarranted delay. Pls.–Appellants' Opp'n to the CIA's Motion to Remand for Further Proceedings at 5, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. July 29, 2012), ECF No. 1381308. This Court denied the CIA's motion. *See* Order, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. July 2, 2012), ECF No. 1381688.

exemptions apply to those documents." *Id.* at 432. The Court noted that the CIA had filed a so-called "no number no list" response in the S.D.N.Y. litigation, but it expressed skepticism about the legitimacy of the response. *Id*. It noted that a "no number no list" response "ha[d] not previously been considered by this court" and "would only be justified in unusual circumstances, and only by a particularly persuasive affidavit." *Id.*

Notwithstanding the Court's cautionary language, on remand the CIA proffered a "no number no list" response, acknowledging that it possessed responsive records but maintaining that every fact about the records, "including the number and nature" of the records, "remain[s] currently and properly classified." Def. CIA's Mot. for S.J. at 7 (D.D.C. Aug. 9, 2013), ECF No. 49. The district court subsequently granted the CIA's motion to stay proceedings in this case pending the government's determination whether to seek further review of the Second Circuit's decision in *N.Y. Times Co. v. DOJ*, 756 F.3d 100 (2d Cir. 2014). Minute Order (D.D.C. June 6, 2014).

In *N.Y. Times Co.*, the Second Circuit considered the ACLU's FOIA request, filed with multiple agencies, for records containing factual information and legal analysis concerning targeted-killing strikes on U.S. citizens. In the district court, the CIA proffered a "no number no list" response and the court granted summary judgment for the government. *N.Y. Times Co.*, 915 F. Supp. 2d 508. On appeal, the

Second Circuit affirmed in part, reversed in part, and remanded. *N.Y. Times Co.*, 756 F.3d at 103. The court held that by making numerous public statements about the targeted-killing program, the government had waived any right to provide a "no number no list" response to the Request and any right to categorically withhold a July 2010 Office of Legal Counsel ("OLC") memorandum ("July 2010 OLC Memo") addressing the legality of the targeted killing of Anwar al-Aulaqi. *See id.* at 120–21. The Second Circuit also held that the memorandum could not be withheld under Exemption 5 because it had been adopted as the executive branch's effective law and policy. *Id.* at 116–17. After reviewing the memorandum *in camera*, *see id.* at 115, the court concluded that large portions "no longer merit[ed] secrecy," *id.* at 117, and it published a redacted version of the memorandum with its opinion, *see id.* at 124. It also ordered OLC to submit other legal memoranda to the district court "for in camera inspection and determination of waiver of privileges and appropriate redaction," and it ordered OLC to make publicly available a redacted version of the *Vaughn* index OLC had previously submitted *ex parte*. *Id.* at 121. With respect to certain CIA and DOD records that had previously been the subject of Glomar and "no number no list" responses, the court ordered the agencies to submit *Vaughn* indices to the district court "for *in camera* inspection and determination of appropriate disclosure and appropriate redaction." *Id.* at 122.

After the Second Circuit issued its decision, the CIA withdrew its motion for summary judgment pending in the district court in this case. *See* Decl. of Martha M. Lutz ("Lutz Decl.") ¶ 6 (JA 83). In an effort to speed the release of non-exempt records and narrow the issues before the court, the ACLU agreed to limit its Request to two categories of records:

(1) "Any and all final legal memoranda (as well as the latest version of draft legal memoranda which were never finalized) concerning the U.S. Government's use of armed drones to carry out premeditated killings"; and

(2) "[F]our types of records containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known" (hereinafter "summary strike data").[3]

Lutz Decl. ¶ 6 (JA 83).[4]

In its renewed motion for summary judgment, the CIA for the first time provided a substantive response to the Request. The agency identified as

[3] Below, the ACLU used the phrase "strike metadata" to refer to this information, but the district court found the phrase to be inapt. JA 200. The ACLU disagrees that the term is inapt, but has adopted the phrase "summary strike data" in this brief to avoid a distracting dispute about nomenclature.

[4] The Request at issue in this case, as narrowed, does not overlap with the requests at issue in the ACLU lawsuits pending before the Second Circuit and the Southern District of New York. *See supra* CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES § C. When narrowing the Request, the ACLU expressly excluded OLC memoranda whose withholding was being considered in the ACLU's FOIA litigation in the Southern District of New York. *See* Lutz Decl. ¶ 6 n.2 (JA 83).

responsive:

(1) Twelve legal memoranda maintained in the CIA's Office of General Counsel, including one classified DOJ White Paper ("May 2011 White Paper" (JA 147–69)) that had already been released with redactions in the litigation pending before the Southern District of New York. *See* Lutz Decl. ¶¶ 7–8 (JA 84–85);[5] and

(2) Thousands of records representing "four types of pre-existing intelligence products produced by the Agency" containing summary strike data responsive to the second category of the narrowed Request. Lutz Decl. ¶ 9 (JA 85).

The CIA withheld eleven legal memoranda in their entirety, and the twelfth memorandum in part, under FOIA Exemptions 1, 3, and 5. Lutz Decl. ¶¶ 7, 23–24, 29–30 (JA 83–84, 94–96). It withheld all records responsive to the second prong of the ACLU's narrowed Request pursuant to Exemptions 1 and 3. *Id.* ¶¶ 25–26 (JA 93–94). It did not provide the ACLU with any meaningful description of the responsive records, let alone describe them individually in a *Vaughn* declaration.

The district court granted summary judgment to the CIA on June 18, 2015. *ACLU v. CIA*, No.10-cv-436, 2015 WL 3777275 (D.D.C. June 18, 2015) (JA 189–222). The court concluded that the memoranda were properly withheld under

[5] The May 2011White Paper, titled "Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen," was released to the ACLU in redacted form on September 5, 2014. The CIA states in its declaration: "Although this document . . . has been produced in connection with the [New York] case, the Agency has included this record here because it is not among the OLC memoranda that were remanded to the District Court by the Second Circuit." Lutz Decl. ¶ 7 n.3 (JA 84).

Exemptions 1 and 5, and that the government had not waived its right to withhold any part of the memoranda through public statements. JA 207–22. The court also held that the summary strike data sought by the ACLU was protected by Exemption 1. JA 207–09. The court deferred to the government's assertion that non-exempt material could not be segregated from exempt material, and rejected the ACLU's request for *in camera* review. JA 221–22. [6]

SUMMARY OF ARGUMENT

This case concerns the CIA's withholding of records that would allow the public to better understand and evaluate the effectiveness, lawfulness, and morality of the government's drone campaign. In an earlier appeal, this Court held that the CIA could not lawfully refuse to confirm or deny its interest in the use of drones to carry out targeted killings, and that the Freedom of Information Act required the agency to provide a substantive response to Plaintiffs' Request. Two years later, however, the CIA continues to withhold essentially everything, and public debate about the drone campaign continues to be impoverished and distorted by unwarranted secrecy and selective disclosure. FOIA was enacted to prevent precisely this. It was meant to prevent federal agencies from operating on the basis of laws and policies concealed from the public. And, with narrow and carefully

[6] The district court did not address the CIA's Exemption 3 basis for withholding, resting its conclusion solely on Exemption 1. JA 209.

articulated exceptions, it was meant to compel agencies to disclose information about their conduct—even (indeed especially) when that conduct is undertaken in the name of national security.

The district court erred in concluding that the legal memoranda withheld by the CIA are categorically protected by FOIA's Exemption 1. Legal analysis is not itself an intelligence activity, source, or method; nor does it fall into any of the other categories of classifiable information set out in the relevant executive order. As a result, legal analysis can be withheld under Exemption 1 only to the extent it is inextricably intertwined with properly classified facts or with information that is protected by another FOIA exemption. Here, the CIA has not demonstrated that the legal analysis in the memoranda is inextricably intertwined with independently protected facts, and there is every reason to believe that it is not.

The district court also erred in concluding that the legal memoranda are exempt under Exemption 5. The CIA has not established that the legal memoranda fall within any of the common-law privileges encompassed by that exemption. Moreover, the limited public information available about the withheld memoranda indicates that at least some of the memoranda constitute the type of "effective law and policy" that—as the Supreme Court observed in *NLRB v. Sears*, 421 U.S. 132, 153–54 (1975)—FOIA affirmatively requires federal agencies to disclose.

The district court also erred in concluding that summary strike data is

categorically exempt under Exemption 1. Facts and statistics about drone strikes are not themselves intelligence activities, sources, or methods, or agency functions—and the CIA does not contend they are. The district court reasoned that these limited facts and statistics would "reveal[]" exempt information about the agency's operational involvement in the targeted-killing program, but the government has already officially disclosed at least some of the information that the district court believed the summary strike information would reveal. Moreover, as this Court emphasized in its decision two years ago, Plaintiffs' Request seeks records concerning the *government's* activities, not just the *CIA's*; accordingly, disclosure of the summary strike data would not reveal the distinctive role played by the CIA in drone strikes. And even if some of the summary strike data could not be disclosed without revealing properly classified information, the district court erred in failing seriously to consider whether this concern could be addressed through redactions.

Finally, the district court erred in deferring to the CIA's conclusion that none of the information in the withheld legal memoranda had been officially acknowledged. The parties disagreed about what facts and analysis the government had disclosed to the public, whether those disclosures constituted official acknowledgements under this Court's jurisprudence, and whether the withheld records contained facts and analysis that had been officially acknowledged. In light

of this, the district court should first have determined which of the disclosures relied upon by Plaintiffs were official acknowledgements, and then reviewed the legal memoranda in camera to determine whether officially acknowledged facts or analysis appeared therein.

Plaintiffs respectfully submit that this Court should vacate the decision below and remand for further proceedings. To guide those proceedings, the Court should examine at least a sample of the records—both the legal memoranda and the summary strike data—*in camera.* Plaintiffs recognize that this Court ordinarily leaves review of withheld records to the district court, but Plaintiffs ask the Court to review at least some of the records here—as the Second Circuit did in *N.Y. Times Co.*—in light of the limited number of legal memoranda at issue, the possibility of "sampling" the records containing summary strike data, the extraordinary public interest in these records, the fact that this case has already been remanded once, and the considerable delay that would inevitably result from another remand.

STANDARD OF REVIEW

This Court reviews *de novo* "whether [an] agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under the FOIA." *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (quotation marks omitted); *see* 5 U.S.C. § 552(a)(4)(B).

ARGUMENT

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA is "a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (quotation marks omitted).

In keeping with FOIA's purpose, courts enforce a "strong presumption in favor of disclosure." *DOS v. Ray*, 502 U.S. 164, 173 (1991); *see Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008). The statute requires disclosure of responsive records unless a specific exemption applies, and the exemptions are given "a narrow compass." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) (quotation marks omitted); *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) ("'[The] limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976))). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007). However, "conclusory affidavits that merely recite statutory standards, or are overly vague or

sweeping will not . . . carry the government's burden." *Larson v. DOS*, 565 F.3d 857, 864 (D.C. Cir. 2009). With the exception of information "inextricably intertwined" with properly withheld material, *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977), "[a]ny reasonably segregable portion of a record [must] be provided . . . after deletion of the portions which are exempt," 5 U.S.C. § 552(b).

I. The CIA has not justified withholding the legal memoranda under Exemptions 1, 3, or 5.

A. The CIA has not justified withholding the legal memoranda under Exemptions 1 or 3 because it has not demonstrated that their legal analysis is inextricably intertwined with information that is properly withheld.

Under Exemption 1, the government may withhold information that is "specifically authorized under criteria established by an Executive order . . . and properly classified under that order." 5 U.S.C. § 552(b)(1). Here, the CIA relies on Executive Order 13,526, which (as relevant here) provides that information may be classified if (1) it "pertains to" one of the categories listed in the order, and (2) its unauthorized disclosure "reasonably could be expected to result in damage to the national security" that "the original classification authority is able to identify or describe." Exec. Order 13,526 §§ 1.4, 1.1. The CIA asserts that the responsive legal memoranda "pertain[] to" two enumerated categories in Executive Order 13,526—"intelligence activities (including covert action), intelligence sources or

methods" and "foreign relations or foreign activities of the United States," Exec. Order 13,526 § 1.4(c)–(d)—and that their disclosure would damage national security. *See* Lutz Decl. ¶¶ 14–15, 22–24 (JA 87–88, 90–93).

Under Exemption 3, the government may withhold information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Here, in connection with Exemption 3, the CIA relies on the National Security Act, 50 U.S.C. § 3024, which protects "intelligence sources and methods," and the Central Intelligence Agency Act, 50 U.S.C. § 3507, which protects "functions" of the CIA. *See* Lutz Decl. ¶¶ 19–21 (JA 89–90).

The district court erred in concluding that the CIA may withhold the legal memos in their entirety. Legal analysis cannot be withheld in its own right under either Exemption 1 or 3. While an agency may withhold legal analysis that is inextricably intertwined with exempt information, the CIA has not demonstrated inextricability here.

As an initial matter, legal analysis is not itself an intelligence activity, source, or method. *See N.Y. Times Co.*, 756 F.3d at 119 ("In fact, legal analysis is not an intelligence source or method." (quotation marks removed)); *see also ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (explaining that a "memorandum from DOJ to CIA interpreting the Convention Against Torture does not, by its own terms, implicate 'intelligence sources or methods'"). Nor is it a

"function" of the CIA, *see Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). Exemption 3 does not, therefore, authorize its withholding.

The district court did not address the application of Exemption 3 to legal analysis, but it held that the legal memoranda could be categorically withheld pursuant to Exemption 1 because they "*pertain[] to* an intelligence activity, source, or method" or to the "foreign relations and foreign activities of the United States." JA 206–07 (quotation marks omitted) (citing Exec. Order 13,526 § 1.4(c)–(d)). This reasoning, however, places more weight on "pertains to" than the phrase can bear.

Read as a whole, the Executive Order is plainly meant to carefully limit the kinds of information that can be classified. *See, e.g.*, Exec. Order 13,526 § 1.7(a) ("In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; . . . or (4) prevent or delay the release of information that does not require protection in the interest of the national security."); *id.* § Preamble ("Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are *equally important priorities*." (emphasis added)). Thus, rather than permitting the classification of

any information, the Executive Order authorizes the classification of only eight categories of information, and it describes each of those categories with specificity. *See, e.g.*, Exec. Order 13,526 § 1.4(f) ("United States Government programs for safeguarding nuclear materials or facilities").

Given that specificity, the introductory phrase "pertains to" cannot reasonably be understood to authorize the classification of information merely because it relates in some general way to one of the categories. The more natural and logical construction of the Executive Order is that it authorizes classification only if the information in question falls into—that is, *belongs to*—one of the categories. Notably, the very dictionary cited by the district court in support of its construction of the Executive Order provides as its first numbered definition of the word "pertain": "to belong as a part, member, accessory, or product." *Pertain*, Merriam-Webster's Dictionary (online ed.), http://www.merriam-webster.com/dictionary/pertain. To be sure, the phrase "pertains to" is sometimes used more broadly, but neither the government nor the district court offered any rationale for according the phrase a broader meaning in this particular context.

And it does not make sense to accord the phrase a broader meaning in this context because doing so would render the Executive Order's classification categories—the categories described with specificity in section 1.4—irrelevant. The district court dismissed this argument, reasoning that the requirement that an

agency demonstrate a risk of "identifiable or describable damage to the national security" will place an outside limit on agencies' classification power. JA 208 (citing Exec. Order 13,526 § 1.4). But this misses the point. The Executive Order limits the classification power *both* by placing substantive limits on the kinds of information that can be classified *and* by prohibiting the classification of information whose disclosure would not be harmful. The two limitations operate independently, and in different ways. The district court's construction eviscerates one of these limits, even if it leaves the other limit in place—and in doing so it transforms what was meant to be a narrow and carefully circumscribed authority to withhold certain specific categories of information into a broad and nebulous power to withhold *any* information that (in the government's view) would compromise national security. This construction is not supportable by the text of the Executive Order or by the order's stated purpose.

Indeed, because virtually everything the CIA does relates in some way to one of the classification categories, adopting the district court's reasoning would give the CIA a near-categorical exemption from the FOIA—something Congress considered but rejected. *See* Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 256 (1987) (detailing congressional rejection of the CIA's plea to "exclude totally the CIA . . . from the requirements of FOIA"); *see also* H.R. Rep. No. 98-726(II) (1984),

reprinted in 1984 U.S.C.C.A.N. 3778, 3780 (discussing the creation, by the CIA Information Act, of "a *limited exemption* from the [FOIA] for *selected* CIA records" and underscoring the CIA's broad FOIA obligations through "a reaffirmation by the Congress that the principles of freedom of information are applicable to the CIA" (emphases added)); *cf. Phillippi*, 546 F.2d at 1015 n.14 (refusing to interpret the term "function" so broadly that it would give the CIA license "to refuse to provide any information at all about anything it does"); *Weissman v. CIA*, 565 F.2d 692, 694–96 (D.C. Cir. 1977).

A further reason to reject the district court's construction of the Executive Order is that accepting it would effectively sanction "secret law." On the district court's reasoning, legal analysis is classifiable if it "concern[s]" one of the classification categories. JA 206–07. The drafters of FOIA, however, made clear that one of the law's "principal purposes" was to "eliminate secret law." *Jordan v. DOJ*, 591 F.2d 753, 781 (D.C. Cir. 1978) (Bazelon, J., concurring) (quotation marks omitted); *see also Sears*, 421 U.S. at 153–54 (discussing the "strong congressional aversion to secret agency law" in FOIA); *see also, e.g., Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 872 (D.C. Cir. 2009) ("As we have repeatedly explained, FOIA provides no protection for such 'secret law' developed and implemented by an agency."); *Stokes v. Brennan*, 476 F.2d 699, 702 n.3 (5th Cir. 1973) ("[S]ecret law is an abomination." (quotation marks omitted)). Indeed, FOIA

expressly obliges federal agencies to disclose final legal opinions and adopted statements and interpretations of policy even in the absence of any request for such records. *See* 5 U.S.C. § 552(a)(2); *see infra* § I.B (discussing FOIA's affirmative-disclosure requirements). It does not make sense to interpret Exemption 1 to permit legal analysis to be withheld in its own right when one of Congress's express purposes in enacting the FOIA was to prevent agencies from operating on the basis of laws and policies concealed from the public.

For all these reasons, the district court erred in holding that legal analysis can be withheld in its own right under Exemption 1. The question the district court should have asked was not whether the withheld legal analysis *concerned* (in some broad sense) one of the classification categories in the Executive Order, but whether (or to what extent) the legal analysis was *inextricably intertwined with* information falling into one of those categories. *See, e.g.*, *N.Y. Times Co.*, 756 F.3d at 119 (reasoning that legal analysis could be withheld under Exemption 1 to the extent it was inextricably intertwined with properly classified facts); *see also Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) ("Even if Exemption 1 is found to justify withholding the documents, [the government] may not automatically withhold the full document as categorically exempt without disclosing any segregable portions.").

Here, it is simply not plausible that all of the legal analysis is inextricably

intertwined with properly withheld information. The government itself has shown that it is possible to extricate legal analysis from sensitive facts about the drone program. Senior government officials have managed to speak publicly about the legal analysis underlying the drone program without disclosing properly classified facts. *See N.Y. Times Co.*, 756 F.3d at 114–15. They have managed to draft white papers without disclosing properly classified facts. *See, e.g.*, JA 170–86. They have released OLC memos without disclosing properly classified facts. *See, e.g.*, *N.Y. Times Co.*, 756 F.3d at 124. The publicly available white papers and OLC memoranda are redacted, but that is precisely the point: Through careful redaction, it is possible to release legal analysis in a way that protects properly classified facts.

In this case, the CIA has made no effort at all—at least in its public declaration—to meet its burden to explain why legal analysis cannot be segregated, *see Mead*, 566 F.2d at 261 (observing that it is the agency's burden to supply "a detailed justification for [its] decision that non-exempt material is not segregable"); *see also* 5 U.S.C. § 552(b). The agency states that it has "determined that there is no reasonably segregable, non-exempt portions of documents that can be released," Lutz Decl. ¶ 31 (JA 96), but the agency provides no explanation for this statement. Presumably the CIA says more in its classified declarations, but this Court has previously made clear that an agency cannot satisfy its burden under FOIA merely

by citing summarily to an exemption and then providing other material *ex parte*. *See Mead*, 566 F.2d at 251. In these circumstances, the district court should have at the very least examined the memoranda *in camera* to determine whether the CIA's assertion that no legal analysis could be segregated was correct.[7]

As a general matter, of course, a district court has broad discretion to decide whether *in camera* review of materials withheld under FOIA is appropriate. In this case, however, the agency had provided no meaningful public explanation for its withholdings. Senior government officials had spoken publicly about the very things that the CIA sought to withhold.[8] In an earlier appeal in this case—involving

[7] Notably, the government has backtracked from similar assertions in the recent past. In June 2013, the ACLU filed a motion asking the Foreign Intelligence Surveillance Court to unseal its opinion interpreting a statute to allow the government to collect metadata about hundreds of millions of domestic telephone calls. *See In re Orders Interpreting Section 215 of the PATRIOT Act*, No. Misc. 13-02, 2014 WL 5442058 (F.I.S.C. Aug. 7, 2014). The government initially responded that "[a]fter careful review of the Opinion by senior intelligence officials and the [DOJ], the Executive Branch has determined that the Opinion should be withheld in full and a public version of the Opinion cannot be provided." *Id.* at *2 (quotation marks omitted). However, after the court ordered the government to submit "a detailed explanation of its conclusion," the government retracted its "object[ion]" to the release of "those portions of the Opinion that are not classified and the release of which would not jeopardize the ongoing investigation." *Id.* (quotation marks omitted). Later, the government told the court that even more of the opinion could be released, and the court published a public, largely unredacted version of the order on its website. *See* Opinion, *In re Application of the FBI for an Order Requiring the Production of Tangible Things From [Redacted]*, No. BR 13-25 (F.I.S.C. Feb. 19, 2013), http://1.usa.gov/1js1r8Q.

[8] *See* Tr. of Oral Argument at 12:19–21 (question of Griffith, J.), *ACLU v. CIA*, No. 11-5320 (D.C. Cir. Sept. 20, 2012), characterizing the government's public,

the same records at issue now—this Court had concluded that the CIA's response to the ACLU's Request was "indefensib[le]," and that the CIA was inappropriately asking the courts to "give their imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *ACLU v. CIA*, 710 F.3d at 431. In a related case involving other legal memoranda about the targeted-killing program, the Second Circuit had reached a similar conclusion. *See N.Y. Times Co.*, 756 F.3d at 116. And the question of segregability—which is, again, the question on which the district court should have been focused—is a question especially suitable to resolution through *in camera* review. *See Carter v. Dep't of Commerce*, 830 F.2d 388, 392–93 (D.C. Cir. 1987) (explaining that *in camera* review is justified when an agency submits conclusory affidavits, an agency manifests bad faith, the withheld documents are limited in number, or disputes turn on the content of withheld documents). In this context, the district court's refusal to examine the withheld records *in camera* was an abuse of discretion.

Even if the district court did not abuse its discretion, this Court should now conduct the review that the district court did not. The ACLU recognizes that this

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often anonymous, statements as "a pattern of strategic and selective leaks at very high levels of the Government"); Jack Goldsmith, *Drone Stories, the Secrecy System, and Public Accountability*, Lawfare (May 31, 2012, 8:03 AM), https://www.lawfareblog.com/drone-stories-secrecy-system-and-public-accountability (discussing *ACLU v. CIA* and remarking that "none of the previous Glomar cases involved such extensive and concerted and long-term government leaking and winking").

Court does not often conduct this kind of review, but given the limited number of legal memoranda at issue, the extraordinary public interest in them, and the considerable delay that would inevitably result from any remand, the ACLU respectfully urges the Court to review at least a subset of the legal memoranda to guide the district court's review of the remainder of them.[9]

B. The CIA has not justified withholding the legal memoranda under Exemption 5.

The CIA has not justified withholding the legal memoranda under Exemption 5 because it has not demonstrated that any of the privileges it invokes—the attorney–client privilege, the deliberative process privilege, and the presidential communications privilege—actually applies. Moreover, even if the withheld memoranda (or some of them) would otherwise be protected by these privileges, the CIA cannot withhold the records to the extent they represent the agency's effective law or policy—and there is good reason to believe that at least some of the records do.

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[9] Even if the district court was correct to hold that legal analysis can be withheld under Exemption 1 whenever it "concerns" information that falls into one of the classification categories, the legal analysis at issue here is not withholdable under Exemption 1 because its disclosure would not "cause identifiable or describable damage to the national security," Exec. Order 13,526 § 1.4; *see N.Y. Times Co.*, 756 F.3d at 120 ("With the redactions and public disclosures discussed above, it is no longer either logical or plausible to maintain that disclosure of the legal analysis in the [July 2010 OLC Memorandum] risks disclosing any aspect of military plans, intelligence activities, sources and methods, and foreign relations." (quotation marks omitted)).

Exemption 5 protects information that would be shielded in litigation by traditionally recognized evidentiary or discovery privileges. As this Court has explained, the privileges encompassed by Exemption 5 are to be "narrowly construed" and are "limited to those situations in which [their] purposes will be served." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). "[I]t is the government's burden to prove that the privilege applies, and not the plaintiff's to demonstrate the documents sought fall within one the enumerated section 552(a)(2) categories." *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 202 (2d Cir. 2012). Here, the CIA asserts the deliberative process, attorney–client, and presidential communications privileges for "certain of the legal memoranda"—although in its public declaration it does not specify which privilege it claims for which record. Lutz Decl. ¶ 27 (JA 94).

The deliberative process privilege protects records that are "predecisional" and "deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). A document is "predecisional if 'it was generated before the adoption of an agency policy' and deliberative if 'it reflects the give-and-take of the consultative process." *Id.* at 151 (quoting *Coastal States*, 617 F.2d at 866); *see Mead*, 566 F.2d at 256 n.40 ("There may also be circumstances in which what might easily be labeled 'deliberative' rather than 'factual' material must be disclosed because it would not reveal the deliberative process within the agency."). The deliberative

process privilege is intended to "prevent injury to the quality of agency decisions" by shielding non-final analysis from disclosure. *Sears*, 421 U.S. at 151. Accordingly, the deliberative process privilege does not shield an agency's final legal analysis or statements of policy; nor does it allow withholding of post-decisional documents explaining an agency's legal position, policy, or action. As the Supreme Court explained in *Sears*:

> This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of post-decisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.

Id. at 152; *see also Brinton v. DOS*, 636 F.2d 600, 605 (D.C. Cir. 1980).

"The attorney–client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C.Cir.1984)). It "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976); *accord Coastal States*, 617 F.2d at 862. "The privilege also protects communications from

attorneys to their clients," *Tax Analysts*, 117 F.3d at 618, but only insofar as necessary to "protect the secrecy of the underlying facts" obtained from the client, *Mead*, 566 F.2d at 254 n.28.

The presidential communications privilege protects the narrow category of documents that are authored or "solicited and received by the President or his immediate advisers in the Office of the President." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1123 (D.C. Cir. 2004) (quotation marks omitted); *see In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) ("[T]he presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected."). It covers documents authored or received by "immediate White House staff in the Office of the President with significant responsibility for advising the President." *Judicial Watch*, 365 F.3d at 1117; *see In re Sealed Case*, 121 F.3d at 752 ("[T]he privilege should apply only to communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate."). The privilege does not extend "to staff outside the White House in executive branch agencies," and it must not be used "as a means of shielding information regarding governmental operations that do not call ultimately

for direct decisionmaking by the President." *In re Sealed Case*, 121 F.3d at 752.

Here, the CIA has failed to provide *any* public description of the responsive legal memoranda or *any* public justification for its claim of privilege. The agency gives no information about how the documents were produced and at whose request, how they were used, who they were shared with—let alone what they address. With the exception of the May 2011 White Paper, the legal memoranda are simply described as "responsive" to the ACLU's narrowed Request for "legal memoranda on the U.S. government's use of armed drones to carry out premeditated killings" and as being located in the agency's Office of General Counsel. Lutz Decl. ¶ 8 (JA 84). The agency's conclusory declaration lacks anything approaching the justification courts have required in other cases. *See Senate of P.R. on Behalf of Judiciary Comm. v. DOJ*, 823 F.2d 574, 584 (D.C. Cir. 1987) (finding cursory description of "each document's issue date, its author and intended recipient, and the briefest of references to subject matter" inadequate to sustain withholding under Exemption 5). The agency has not supplied the ACLU (or the public) with any basis on which to conclude that the documents are in fact covered by the privileges the government invokes.

Moreover, the CIA's *categorical* withholding of the legal memoranda is almost certainly unlawful even if all of the records fall within the presumptive scope of Exemption 5. This is because Exemption 5 does not allow the withholding

of "opinions and interpretations which embody the agency's effective law and policy." *Brennan Ctr.*, 697 F.3d at 202 (citing *Sears*, 421 U.S. at 153); *id*. at 194–95 ("[D]ocument[s] claimed to be exempt will be found outside of Exemption 5 if [they] closely resemble[] that which FOIA affirmatively requires to be disclosed," including "'statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.'" (quoting 5 U.S.C. § 552(a)(2)(A)–(C))); *Pub. Citizen*, 598 F.3d at 875 (quoting *Jordan*, 591 F.2d at 774). To the contrary, FOIA mandates the disclosure of such opinions to the public. *See* 5 U.S.C. 552(a)(2)(A)–(B); *Sears*, 421 U.S. at 153; *Jordan*, 591 F.2d at 774. As the Supreme Court explained in *Sears*, any judicial application of Exemption 5 must account for the "strong congressional aversion to secret agency law" and the "affirmative congressional purpose to require disclosure of documents which have the force and effect of law." 421 U.S. at 153 (quotation marks omitted).

Although the ACLU has only limited information about the withheld memoranda, there is good reason to believe that at least some of them comprise the CIA's effective law and policy. The agency has played operational and intelligence roles in drone strikes in multiple countries for over a decade. *See infra* § III.B. It is simply not credible that the CIA has done so without its Office of General Counsel having considered the lawfulness of the strikes or having established standards that

govern agency conduct. The agency has surely considered, for example, the lawfulness of the strikes under domestic law (including applicable Executive Orders and congressional authorizations) and international law. It has surely considered the scope of the authority provided by President Bush's September 17, 2001 Memorandum of Notification, a document the CIA has relied on to justify its involvement in targeted killings.[10] Indeed, senior government officials—including the CIA's General Counsel—have repeatedly answered questions about the targeted-killing program by assuring the public that the agencies involved in the program are subject to clear legal standards and protocols.[11]

Because the ACLU's Request focuses principally on "final" legal memoranda, JA 83, it is especially likely that some of the withheld memoranda constitute the agency's effective law. A final memorandum addressing the scope of the agency's authority would be quintessential "effective law." *Sears*, 421 U.S. at 153; *Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002) ("[I]t is not necessary

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[10] In a book cleared by the CIA in a prepublication review, the agency's former General Counsel explained that the September 17, 2001 Memorandum of Notification "authorized lethal action against" suspected al-Qaeda terrorists and formed a legal basis for the CIA's drone program. John Rizzo, *Company Man: Thirty Years of Controversy and Crisis in the CIA* 174 (2014); *see id.* at 177–78.

[11] *See, e.g.*, Stephen W. Preston, General Counsel, CIA, Remarks at Harvard Law School (Apr. 10, 2012), http://1.usa.gov/1JT5zUf; *N.Y. Times Co.*, 756 F.3d at 111 ("[John] Brennan, testifying before the Senate Select Committee on Intelligence on February 7, 2013 on his nomination to be director of the CIA said, among other things, 'The Office of Legal Counsel advice establishes the legal boundaries within which we can operate.'").

that the [memoranda] reflect the final programmatic decisions of the program officers . . .[so long as they] represent the [Office of Chief Counsel's] final legal position . . . ." (emphasis in original)). Even if some of the responsive memoranda are labeled "draft," an agency's label does not itself control the status of that record under FOIA. *Coastal States*, 617 F.2d at 869 (stating that FOIA does not permit an agency to "promulgate[] a body of secret law which it is actually applying . . . but which it is attempting to protect behind a label"). Notably, in *N.Y. Times Co.*, the Second Circuit admonished the government for inconsistently labeling a responsive legal memorandum a "draft" and failing to disclose it in response to a request that excluded "draft legal analysis." *See N.Y. Times Co.*, 756 F.3d at 110 n.9 ("The Government offers no explanation as to why the identical text of the DOJ White Paper, not marked 'draft,' . . . was not disclosed to ACLU, nor explain the discrepancy between the description of document number 60 and the title of the DOJ White Paper.").

Further, the government itself has argued, in related litigation, that the kind of agency memoranda at issue here would constitute agency law. In *N.Y. Times Co.*, the government sought to withhold OLC memoranda related to the targeted-killing program by distinguishing those memoranda from the kinds of agency general-counsel memoranda at issue here. OLC memoranda about the targeted-killing program, the government argued in that litigation, are not binding in the

way that agency general-counsel memoranda would be. Br. for Defs.–Appellees at 50–51, *N.Y. Times Co. v. DOJ*, No. 14-4432 (2d. Cir. Apr. 4, 2015), ECF No. 89. Having made that argument in another court, the government should not be permitted to pretend here that agency memos are something other than the agency's working law.[12]

Accordingly, the CIA's claim that *all* of the legal analysis found in the responsive legal memoranda is covered by Exemption 5, "narrowly construed," *Coastal States*, 617 F.2d at 862—and its claim that *none* of the legal analysis found in the responsive legal memoranda contain "positive rules that create definite standards" for the agency, *Jordan*, 591 F.2d at 774—is neither logical nor plausible. Plaintiffs respectfully request that the Court review the memoranda *in camera* to assess whether the CIA's declarations fairly characterize all of the records the agency seeks to withhold.

II. The CIA has not justified the withholding of summary strike data under Exemptions 1 and 3.

The CIA also invokes Exemptions 1 and 3 to withhold "thousands of classified intelligence products," JA 189, containing segregated "summary strike data," or facts and statistics sufficient to show "the identity of the intended targets,

[12] To be clear, the ACLU believes that certain OLC memoranda are *also* the effective law of the CIA—and that the government has acknowledged as much. *See, e.g.*, *N.Y. Times Co.*, 756 F.3d at 115.

assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known," Lutz Decl. ¶ 6 (JA 83). *See* Lutz Decl. ¶ 26 (JA 93–94).[13] In holding that all summary strike data contained in the responsive intelligence products is protected under Exemption 1, JA 207–09, the district court erred.

As an initial matter, the withheld facts and statistics are not themselves intelligence activities, sources, methods, or agency functions protected by Exemptions 1 or 3. Further, the ACLU's narrowed Request is limited to facts and statistics *in* intelligence products; it does not seek information about the activities, sources, or methods used to *gather* these facts and statistics.

The district court accepted the government's blanket assertion that summary strike data "would *reveal* intelligence activities, sources, and methods and is properly protected under Exemption 1." JA 209 (emphasis added). It reasoned that summary strike data "could reveal the scope of the drone program, its successes and limitations, the 'methodology behind the assessments and the priorities of the Agency' and more." *Id.* (quoting Lutz Decl. ¶ 25 (JA 93)); *see* JA 209 (crediting CIA's argument that "intelligence products containing charts and compilations . . . relat[e] to the 'foreign relations and foreign activities of the United States'"

[13] Again, the narrowed Request seeks the records insofar as they include these facts and statistics. The ACLU does not seek the records in their entirety.

(quoting Exec. Order 13,526 § 1.4(d))).[14]

While it may be that the *records containing* summary strike data would both reveal such information and cause harm to national security, it is not logical or plausible that the *data itself*, properly segregated, would do so.

In considering why, two points warrant emphasis.

First, while the government has not disclosed the summary strike data (hence this litigation), it has already disclosed much of the information the CIA appears to be concerned about "reveal[ing]" through the release of the data. *See infra* § III.B.

Second, insofar as the Request was addressed to the CIA, it sought records in the agency's *possession*, not just records relating to the CIA's own activities. *See* JA 21–24. Contrary to what the district court appears to have assumed, JA 212, the fact that the CIA has *records* about certain drone strikes does not necessarily mean that the CIA itself was operationally involved in a particular strike, or in strikes in a particular country. As this Court has recognized, the CIA has an

[14] The district court erroneously stated that the CIA "designated" the summary strike data "as relating to the foreign relations and foreign activities of the United States," JA 209 (quotation marks omitted). At least in its public declaration, the CIA's assertions with respect to summary strike data focus solely on whether disclosure of this information would reveal "sources or methods of underlying intelligence collection" under Exec. Order 13,526 § 1.4(c), and *not* on whether disclosure would reveal information relating to "foreign relations or foreign activities" under § 1.4(d). *See* Lutz Decl. ¶ 25 (JA 93).

intelligence interest in *all* U.S. government drone strikes. *ACLU v. CIA*, 710 F.3d at 428 ("Nor was the CIA's *Glomar* response limited to documents about drones operated by the Agency. Rather, the CIA asserted and the district court upheld a sweeping *Glomar* response that ended the plaintiffs' lawsuit by permitting the Agency to refuse to say whether it had *any documents at all* about drone strikes."); *id.* at 430 ("The defendant is, after all, the Central *Intelligence* Agency. And it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself.").

Particularly against this background, the CIA's arguments are not logical or plausible.

The agency contends that the information sought by the Request "would tend to show . . . the types of information tracked by CIA analysts." Lutz Decl. ¶ 25 (JA 93). That the CIA tracks this kind of information, however, is hardly a secret. Indeed, the CIA effectively acknowledged that it tracks this kind of information when it acknowledged that it has records responsive to the ACLU's Request. Lutz Decl. ¶ 6 (JA 83) (acknowledging CIA's possession of four categories of records sufficient to show "the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known").

The CIA's argument that disclosure would reveal the scope of its knowledge (or ignorance) about the targeted-killing program, *see* Lutz Decl. ¶ 25 (JA 93), is also defective. The agency asserts that disclosing summary strike data "would reflect the information available to the CIA at a certain point in time, which could show the breadth, capabilities, and limitations of the Agency's intelligence collection." *Id.* The problem with this argument is that it would support withholding virtually all CIA records. If information could be withheld merely because it would contribute to a more complete picture of the agency's knowledge or activities, the CIA would have carved out for itself the very categorical exemption from the FOIA that Congress has repeatedly rejected. *See supra* § I.A. Plaintiffs filed the Request precisely because disclosure of the requested information would provide the public with a more complete picture of the government's activities, and the FOIA was enacted specifically to require agencies to respond substantively to such requests. If information requested by the ACLU falls into one of FOIA's exemptions, the CIA is entitled to withhold it. But the agency cannot lawfully reject FOIA requests on the grounds that responding would provide the public with a better sense of the government's conduct and policies.

The CIA's arguments become even less persuasive when they are applied to the specific kinds of facts and statistics sought by the ACLU here. Consider a drone strike reportedly conducted by the U.S. military's Joint Special Operations

Command in Yemen, on December 12, 2013, that killed twelve individuals, all civilians.[15] The government has already acknowledged that it uses drones to carry out targeted killings in Yemen;[16] that the CIA has an intelligence interest in the use of drones to carry out targeted killings;[17] that the CIA is operationally involved in drone strikes in Yemen;[18] that drone strikes kill civilians;[19] that the government conducts after-the-fact analyses of drone strikes, especially where civilian deaths are alleged;[20] and that the government uses advanced surveillance capabilities, among other things, to assess the aftermath of strikes.[21] The release of summary

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[15] *Cf.* Greg Miller, *Yemeni Victims of U.S. Military Drone Strike Get More Than $1 Million in Compensation*, Wash. Post, Aug. 18, 2014, http://wapo.st/1jIV80b; Michael Isikoff, *Yemenis: Drone Strike "Turned Wedding Into Funeral"*, NBC News, Jan. 8, 2014, http://nbcnews.to/1VDRHnz.

[16] *See, e.g.*, *N.Y. Times Co.*, 756 F.3d at 118.

[17] *See, e.g.*, *ACLU v. CIA*, 710 F.3d at 430.

[18] *See, e.g.*, *N.Y. Times Co.*, 756 F.3d at 122.

[19] *See, e.g.*, President Barack Obama, Remarks at the National Defense University (May 23, 2013), http://1.usa.gov/1MByTEZ ("May 2013 Obama Speech") ("There's a wide gap between U.S. assessments of [civilian] casualties and nongovernmental reports. Nevertheless, it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war.").

[20] *See, e.g.*, White House, Press Briefing by Press Secretary Josh Earnest (Apr. 23, 2015) http://1.usa.gov/1jAHwnC ("Apr. 2015 White House Briefing") ("When a counterterrorism operation is carried out, it is followed by a battle damage assessment where our intelligence professionals evaluate the region or the area where the operation was carried out to determine the results of the operation and whether or not, if any, civilian casualties occurred. And in the process of carrying out that battle damage assessment, that draws on multiple sources of intel.").

[21] *See, e.g.*, *Nomination of John O. Brennan to be Director of the Central Intelligence Agency: Questions for the Record Submitted to the S. Select Comm. on*

strike data associated with this reported strike would not logically or plausibly cause harm any more than the government's own disclosures have.

And even if the CIA could show—and has shown, in its classified declarations—that releasing *all* of the summary strike data associated with this hypothetical strike would cause harm, nothing precludes the agency from redacting the specific information that requires continued secrecy. Indeed, segregating releasable information from responsive records is the agency's duty under FOIA. *See* 5 U.S.C. § 552(b). If disclosing the precise date of the reported strike (assuming it occurred) would reveal classified information that has not been acknowledged (and whose disclosure would compromise national security), the CIA could redact the day, or the month, or, in certain cases, perhaps even the year. If disclosing the precise area of Yemen in which the reported strike occurred would reveal classified information that has not been acknowledged, the CIA could redact the name of the province. If disclosing that the Joint Special Operations Command was responsible for the strike would reveal properly classified information that has

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Intelligence, 113th Cong. (Feb. 14, 2013), http://1.usa.gov/1jAmJAr ("Feb. 2013 Brennan QFR") at 2 ("When civilian deaths are alleged, analysts draw on a large body of information—human intelligence, signals intelligence, media reports, and surveillance footage—to help us make an informed determination about whether civilians were in fact killed or injured. In those rare instances in which civilians have been killed, after-action reviews have been conducted to identify corrective actions and to minimize the risk of innocents being killed or injured in the future. Where possible, we also work with local governments to gather facts and, if appropriate, provide condolence payments to families of those killed.").

not already been acknowledged, the CIA could redact the name of the agency responsible.

Because the government has acknowledged that it conducts targeted-killing strikes using drones in Somalia,[22] the same analysis would hold for data concerning drone strikes in that country. And because the government has acknowledged that the CIA *itself* conducts drone strikes in Pakistan,[23] it is even less likely that the CIA could justify the withholding of summary strike data concerning strikes in that country. The effect of keeping this information secret, against a background of broad official disclosure, is not to keep the nation's enemies from learning about the drone program—they are surely well aware of it, and the government surely wants them to be—but to keep this nation's citizens from learning of their government's actions.

Accordingly, the ACLU respectfully requests that this Court review a sample of the records containing summary strike data *in camera* to assess whether

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[22] *See, e.g.*, DOD, Press Briefing by Rear Adm. John Kirby (Feb. 3, 2015), http://1.usa.gov/1ZDJ4ye ("Feb. 2015 Pentagon Statement").

[23] *See, e.g.*, *This Week* (ABC News television broadcast June 27, 2010), http://abcn.ws/1ZDK2dF ("June 2010 Panetta Interview") ("[Osama bin Laden is] in an area of the—the tribal areas in Pakistan that is very difficult. The terrain is probably the most difficult in the world. . . . But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of the Al Qaida leadership. We just took down number three in their leadership a few weeks ago. We continue to disrupt them.").

the data, or a subset of it, can be released without compromising an agency interest protected by FOIA.

III. The CIA should be compelled to disclose information in the legal memoranda it has officially acknowledged.

A. The district court erred in deferring to the CIA's assertion that none of the analysis in the legal memoranda had been officially acknowledged.

"[W]hen information has been 'officially acknowledged' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *ACLU v. CIA*, 710 F.3d at 426–27 (quoting *Wolf*, 473 F.3d at 378). An official acknowledgment waives otherwise-applicable FOIA exemptions where the information sought is (1) "'as specific as the information previously released,'" (2) "'match[es] the information previously disclosed,'" and (3) was "'made public through an official and documented disclosure.'" *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)).

Importantly, the doctrine is not limited to instances in which the government has disclosed information *identical* to the information sought by the requester. *See N.Y. Times Co.*, 756 F.3d at 120 n.19 (rejecting "rigid application" of official-acknowledgment doctrine). In *Afshar v. DOS*, 702 F.2d 1125, 1131–33 (D.C. Cir. 1983)—the case from which *Fitzgibbon*, 911 F.2d at 765, and *Wolf*, 473 F.3d at 378, derived the three-part test—this Court framed its inquiry as whether the

withheld material was "in some *material* respect different from" information that had been previously disclosed by the government.[24] Put another way, the relevant question is whether, in light of all the information the government has already released, "additional" disclosure of responsive information "adds [anything] to the risk" of harm. *N.Y. Times Co.*, 756 F.3d at 120; *ACLU v. CIA*, 710 F.3d at 426, 430; *Fitzgibbon*, 911 F.2d at 766 ("[T]he central issue here is . . . a determination of possible harm."); *Afshar*, 702 F.2d at 1130 (characterizing the logic of official acknowledgment: "[R]elease of information cannot be expected to cause damage to the national security or disclose intelligence sources and methods if the information is already publicly known.").

Indeed, a more formalistic application of the official-acknowledgement doctrine would have the effect of licensing the very kind of selective disclosure that FOIA was meant to end. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in*

[24] In *Afshar*, the plaintiff sought records pertaining to his activities as a prominent critic of the former government of Iran, including information concerning the relationship between the CIA and the former Iranian intelligence agency. The Court rejected the plaintiff's claim that the CIA had waived its claimed exemptions because the public disclosures did not cover the period sought by the request, provided only a general outline of the relationship, and moreover, were not from an official source. *Afshar*, 702 F.2d at 1131–33.

Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974).

The government's disclosures relating to the targeted-killing program present exactly the kind of pattern that FOIA was intended to prevent. For several years, government officials have been engaged in a "relentless public relations campaign" meant to assure the public that the program is effective, lawful, and necessary. *N.Y. Times Co.*, 915 F. Supp. 2d at 535, *rev'd on other grounds*, 756 F.3d 100; *see also ACLU v. CIA*, 710 F.3d at 429–31. They have said that the program is tightly supervised, and they have dismissed or minimized concerns about civilian casualties. FOIA was meant to be the antidote to these kinds of strategic disclosures, and to ensure that the American public would have the information it needs to evaluate the government's policies and practices for itself.[25]

[25] The concern that agencies will engage in selective disclosure in order to manipulate public opinion is well founded. A recently released report of the Senate Select Committee on Intelligence discusses an episode in which the CIA prepared a "media campaign" that contemplated "off the record disclosures" about issues that the agency was claiming in court could not be addressed publicly without grave danger to national security. *See* Senate Select Comm. on Intelligence, Committee Study of the CIA's Detention and Interrogation Program: Executive Summary (Dec. 3, 2014), http://1.usa.gov/1hfYcQa. Some CIA personnel were troubled by the inconsistency between the agency's contemplated disclosures about its interrogation program and the representations the agency was making in court. The SSCI Report cites an internal agency communication in which one agency attorney expressed concern that "[o]ur Glomar figleaf is getting pretty thin." *Id.* at 405. It also points to another communication in which "another CIA attorney noted . . . 'the [legal] declaration I just wrote about the secrecy of the interrogation program [is] a work of fiction.'" *Id.*

The district court erred in holding that "none of the requested information is available through an official disclosure and, accordingly, [the] CIA has not waived its validly invoked FOIA exemptions with respect to [any of] the withheld records," JA 214.

First, the district court erred in reasoning that many of the acknowledgments produced by the ACLU were "not relevant to the immediate FOIA request." JA 215; *see, e.g.*, JA 218 (stating that an official acknowledgment that the government was involved in a drone strike in Somalia was irrelevant because it "did not reference the CIA"). Again, the ACLU's Request sought information "concerning the U.S. Government's use of armed drones," not just records concerning the CIA's operational involvement. Lutz Decl. ¶ 6 (JA 83). As this Court has noted, the CIA surely has records concerning drone strikes conducted by other government agencies. *ACLU v. CIA*, 710 F.3d at 428. The mere fact that an official acknowledgement does not reference the CIA does not mean that it does not implicate responsive records in the CIA's possession.

Second, the district court erred in deferring to the CIA's assertion that there had been no official acknowledgement of the analysis in the withheld legal memoranda. JA 220 (citing Lutz Decl. ¶ 24 (JA 92)); *see* Lutz Decl. ¶ 25 (JA 93) ("I further note that there has been no official disclosure of any [strike-metadata] information."). The declaration to which the court deferred was written before the

ACLU had proffered a list of the facts that it believed the government had officially acknowledged, and accordingly it is highly unlikely that it was written with those specific facts in mind. (The Lutz Declaration was filed on November 25, 2014, *see* Lutz Decl. at 17 (JA 96)—a month before the ACLU filed its list of acknowledged facts, *see* Pl.'s Opp'n & Cross-Mot. for S.J. at 20–24 (D.D.C. Dec. 19, 2014), ECF No. 69.) More fundamentally, the question of whether the withheld records contained officially acknowledged facts or analysis was a question the district court could reasonably have answered only by examining the withheld records *in camera*—something it declined to do. It bears emphasis that the parties disagreed about what facts and analysis the government had disclosed, whether those disclosures were official acknowledgements under this Court's jurisprudence, and whether officially acknowledged facts and analysis appeared in the withheld records. The district court's deference to the agency's legal conclusion was inappropriate because it was not at all clear that the agency was considering the relevant facts, and because it was even less clear that the agency was drawing the correct conclusions from those facts.

B. The government has officially acknowledged at least some of the analysis in the legal memoranda.

As detailed below, the government has disclosed both legal analysis and factual information relating to the targeted-killing program. To the extent that the withheld records contain the same or similar information, the CIA must disclose

them. *See ACLU v. CIA*, 710 F.3d at 431 ("'There comes a point where . . . Court[s] should not be ignorant as judges of what [they] know as men' and women. We are at that point with respect to the question of whether the CIA has any documents regarding the subject of drone strikes." (first alteration added) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (opinion of Frankfurter, J.))).

The chart below lists the categories of facts and analysis that have been officially acknowledged (the "Waiver" column) and identifies the source (or a selection of the sources) in which the waiver was made (the "Source of Disclosure" column).

1. The government has officially acknowledged legal analysis relating to the targeted-killing program.

Waiver	Source of Disclosure
Analysis of the Fourth and Fifth Amendments to the U.S. Constitution and their application to the targeted killing of U.S. citizens	July 2010 OLC Memo (JA 135–38) Feb. 2010 OLC Memo (JA 145–46) May 2011 White Paper (JA 167–69) Nov. 2011 White Paper (JA 175)
Analysis of the 2001 AUMF	July 2010 OLC Memo (JA 118–24) May 2011 White Paper (JA 159–61)

Waiver	Source of Disclosure
Analysis of the definition of "associated force" under the 2001 AUMF	May 2014 Preston Statement[26] at 2
Analysis of 18 U.S.C. § 1119, which prohibits the killing or attempted killing of a U.S. national outside the United States	July 2010 OLC Memo (JA 109–16) May 2011 White Paper (JA 152–64) Nov. 2011 White Paper (JA 180–84)
Analysis of 18 U.S.C. § 956(a), which criminalizes conspiracy to commit murder abroad	July 2010 OLC Memo (JA 132–34) May 2011 White Paper (JA 164–65) Nov. 2011 White Paper (JA 183)
Analysis of the War Crimes Act, 18 U.S.C. § 2441(a), including discussion of Common Article 3 of the Geneva Convention	July 2010 OLC Memo (JA 134–35) May 2011 White Paper (JA 165–67) Nov. 2011 White Paper (JA 185–86)
Analysis of the "public authority" doctrine	July 2010 OLC Memo (JA 111–34) May 2011 White Paper (JA 154–61)

[26] Stephen W. Preston, General Counsel, DOD, The Framework Under U.S. Law for Current Military Operations, Prepared Statement for the Senate Committee on Foreign Relations (May 21, 2014), https://www.aclu.org/sites/default/files/field_document/preston_statement.pdf.

Waiver	Source of Disclosure
	Nov. 2011 White Paper (JA 180–84)
Analysis of the assassination ban in Executive Order 12333	Feb. 2010 OLC Memo (JA 140, 143, 146) Mar. 2010 Koh Speech[27] Nov. 2011 White Paper (JA 185) Mar. 2012 Holder Speech[28] Dec. 1989 Parks Memo[29] at 8
Analysis of the definition and requirements for the existence of non-international armed conflicts	July 2010 OLC Memo (JA 121–22) Nov. 2011White Paper (JA 172–75)
Analysis of the use of force in self-defense under international law	Nov. 2011 White Paper (JA 172–73) Mar. 2012 Holder Speech Mar. 2010 Koh Speech

[27] Harold H. Koh, Legal Advisor, DOS, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), http://1.usa.gov/1ZDNDIQ.

[28] Eric Holder, Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012), http://1.usa.gov/1ZDO1aj.

[29] W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Lawyer (Dep't of Army Pamphlet 27-50-204) (Dec. 1989).

Waiver	Source of Disclosure
Analysis of international humanitarian law principles. including the requirements of: • necessity • distinction • proportionality • humanity	July 2010 OLC Memo (JA 125–27, 131) May 2011 White Paper (JA 160–62) Nov. 2011 White Paper (JA 178–79) Mar. 2010 Koh Speech Mar. 2012 Holder Speech May 2013 Fact Sheet[30]
Analysis of the term "imminence"	Nov. 2011 White Paper (JA 177–78) Feb. 2010 OLC Memo (JA 145–46) July 2010 OLC Memo (JA 118, 124–25, 136) May 2011 White Paper (JA 167–68) May 2013 Fact Sheet
Analysis of the term "feasibility of capture"	July 2010 OLC Memo (JA 137–38) May 2011 White Paper (JA 149) Nov. 2011 White Paper (JA 176–78)

[30] White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), http://1.usa.gov/1ZDOBEU.

Waiver	Source of Disclosure
	Mar. 2012 Holder Speech May 2013 Fact Sheet
Analysis of international legal principles governing respect for other countries' national sovereignty	Mar. 2012 Holder Speech Mar. 2010 Koh Speech May 2013 Fact Sheet

2. The government has officially acknowledged many facts about the targeted-killing program.

Waiver	Source of Disclosure
The government uses drones to carry out targeted killings.	May 2013 Obama Speech Apr. 2012 Brennan Speech[31]
The CIA and DOD have operational roles in targeted killings.	*N.Y. Times Co.*, 756 F.3d at 118–19

[31] John Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy, Speech at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

Waiver	Source of Disclosure
	Feb. 2014 Clapper Testimony,[32] quoted in *N.Y. Times Co.*, 756 F.3d at 119 Oct. 2011 Panetta Speech,[33] quoted in *N.Y. Times Co. v. DOJ*, 756 F.3d at 118 Mar. 2013 Feinstein Statement,[34] cited in *N.Y. Times Co.*, 756 F.3d at 119 n.18 Feb. 2013 Rogers Interview,[35] cited in *N.Y. Times Co. v. DOJ*, 756 F.3d at 119 n.18 Apr. 2015 Feinstein Statement[36] Apr. 2015 McCain Interview[37]

[32] Siobhan Gorman, *CIA's Drones, Barely Secret, Receive Rare Public Nod*, Wall St. J. Wash. Wire Blog (Feb. 11, 2014), http://on.wsj.com/1MQ7sY3.

[33] Leon Panetta, Sec'y of Def., Remarks to Service Members in Naples, Italy (Oct. 7, 2011), http://1.usa.gov/1OFj3ux.

[34] John T. Bennett, *McCain, Feinstein Split Over Shifting Strike UAV Program to Military*, Defense News, Mar. 15, 2013, http://archive.defensenews.com/article/20130319/DEFREG02/303190025/McCain-Feinstein-Split-Over-Shifting-Strike-UAV-Program-Military.

[35] *Face the Nation* (CBS News television broadcast Feb. 10, 2013), http://cbsn.ws/1MQ8gwj.

[36] Press Release, Sen. Dianne Feinstein, Statement on Death of U.S., Italian Hostages (Apr. 23, 2015), http://1.usa.gov/1jAq4j5.

[37] *State of the Union* (CNN television broadcast Apr. 26, 2015), http://cnn.it/1jAquWD.

Waiver	Source of Disclosure
	May 2015 NSC Statement[38]
The government conducts targeted killings in Pakistan, including through the use of drones.	Jan. 2012 Obama Hangout[39] at 28:38–29:30 May 2009 Panetta Speech[40]
The CIA conducts targeted killing in Pakistan, including through the use of drones.	June 2010 Panetta Interview May 2009 Panetta Speech
The government conducts targeted killings in Yemen, including through the use of drones.	*N.Y. Times Co.*, 756 F.3d at 118
The CIA conducts targeted killings in Yemen, including through the use of drones.	*N.Y. Times Co.*, 756 F.3d at 119, 122 May 2011 White Paper (JA 149)

[38] Karen DeYoung, *Debate Is Renewed on Control of Lethal Drones Operations*, Wash. Post, May 5, 2015, http://wapo.st/1Fi9h94.

[39] Matt Compton, *President Obama Hangs out with America*, White House Blog (Jan. 30, 2012), http://1.usa.gov/1jAr7iS.

[40] Leon Panetta, Dir., CIA, Remarks at the Pacific Council on International Policy (May 18, 2009), http://1.usa.gov/1jAHNqA.

Waiver	Source of Disclosure
The government conducts targeted killings in Somalia, including through the use of drones.	Sept. 2014 Pentagon Statement (JA 218) Feb. 2015 Pentagon Statement Mar. 2015 Pentagon Statement[41]
A September 17, 2001 Memorandum of Notification signed by President Bush authorizes the CIA to take lethal action against suspected terrorists.	June 2007 Dorn Decl.[42] ¶¶ 66–68
The OLC provides advice establishing the legal boundaries of the targeted-killing program.	Feb. 2013 Brennan Testimony,[43] quoted *N.Y. Times Co.*, 756 F.3d at 111 Mar. 2013 Holder Testimony,[44] quoted in *N.Y. Times Co.*, 756 F.3d at 116

[41] DOD, Statement on March 12 Airstrike in Somalia (Mar. 18, 2015), http://1.usa.gov/1ZDJ4ye.

[42] Eighth Decl. of Marilyn Dorn, CIA Info. Review Officer, *ACLU v. DOD*, No. 04 Civ. 4151 (S.D.N.Y. June 8, 2007), ECF No. 226, https://www.aclu.org/files/pdfs/natsec/20070105_Dorn_Declaration_8.pdf.

[43] *Nomination of John O. Brennan to be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 113th Cong. (Feb. 7, 2013).

[44] *Oversight of the U.S. Department of Justice: Hearing Before the Senate Committee on the Judiciary*, 113th Cong. (Mar. 6, 2013).

Waiver	Source of Disclosure
	Feb. 2013 Feinstein Statement,[45] cited in *N.Y. Times Co. v. DOJ*, 756 F.3d at 121
The government conducts before- and after-the-fact legal and factual analysis of lethal strikes.	Apr. 2015 White House Briefing May 2013 Fact Sheet Feb. 2013 Brennan QFR at 2
Innocent bystanders have died or been injured as a result of U.S. drone or other targeted-killing strikes	May 2013 Obama Speech Sept. 2015 Rhodes Interview[46] at 13:10–14:10

CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that this Court should vacate the decision below and remand for further proceedings. To guide those proceedings, the Court should examine at least a sample of the records—both the legal memoranda and the summary strike data—*in camera.* Plaintiffs recognize that this Court ordinarily leaves review of withheld records to the district court, but

[45] Press Release, Sen. Dianne Feinstein, Statement on Intelligence Committee Oversight of Targeted Killings (Feb. 13, 2013), http://1.usa.gov/1MQ9Eil.

[46] *Upfront* (Al-Jazeera television broadcast Sept. 25, 2015), http://www.aljazeera.com/programmes/upfront/2015/09/obama-failed-syria-150925142816322.html.

Plaintiffs ask the Court to review at least some of the records here—as the Second Circuit did in *N.Y. Times Co.*—in light of the limited number of legal memoranda at issue, the possibility of "sampling" the records containing summary strike data, the extraordinary public interest in these records, the fact that this case has already been remanded once, and the considerable delay that would inevitably result from another remand.

Date: October 19, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,447 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

On October 19, 2015, I served upon the following counsel for Defendant–Appellee one copy of Plaintiffs–Appellants' BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system:

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ADDENDUM

5 U.S.C. § 552 Public information; agency rules, opinions, orders, records, and proceedings

[Selected subsections provided; omissions denoted by "***"]

(a) Each agency shall make available to the public information as follows:

***

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

***

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports

prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

***

Executive Order 13,526

December 29, 2009

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1—ORIGINAL CLASSIFICATION

Section 1.1. Classification Standards.

(a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which

includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(d) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

***

Section 1.4. Classification Categories. Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or

(h) the development, production, or use of weapons of mass destruction.

***

Section 1.7. Classification Prohibitions and Limitations.

(a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of the national security.

***