17-3399

IN THE

United States Court of Appeals

FOR THE

Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellants,

– v. –

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF JUSTICE, and UNITED STATES DEPARTMENT OF STATE,
Defendants–Appellees.

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

BRIEF FOR PLAINTIFFS–APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation are affiliated non-profit membership corporations. They have no stock and no parent corporations.

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JURISDICTIONAL STATEMENT

Plaintiffs brought claims under the Freedom of Information Act. The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). On March 27, 2017, the district court entered an order granting in part and denying in part Defendants' motion for partial summary judgment, and denying Plaintiffs' motion for partial summary judgment. SPA 1. As to the remaining contested issues, on August 17, 2017, the district court entered a final order granting Defendants' motion for partial summary judgment and denying Plaintiffs' motion for partial summary judgment. SPA 48. The court entered judgment for Defendants on August 22, 2017. SPA 58. Plaintiffs timely filed a notice of appeal on October 20, 2017. JA 488. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether memoranda that provided the legal basis for U.S. government surveillance programs affecting Americans are "working law" or have been adopted, such that the government may not withhold any portion of these memoranda under Exemption 5 of the Freedom of Information Act.
2. Whether the government failed to establish that these memoranda are subject to the deliberative process and attorney-client privileges under Exemption 5 of the Freedom of Information Act.
3. Whether the government's withholding of these memoranda under Exemptions 1 and 3 of the Freedom of Information Act is improper.

STATEMENT OF THE CASE

Over the past two decades, the U.S. government has repeatedly relied on secret legal interpretations to justify mass surveillance programs affecting millions of Americans. In this case, Plaintiffs seek basic information about the legal boundaries of Executive Order 12333 ("EO 12333")—the primary authority under which the National Security Agency ("NSA") conducts electronic surveillance. Plaintiffs filed their FOIA requests to learn how the government construes its authority under EO 12333 and its regulations, and whether the government's surveillance appropriately accounts for the constitutional rights of American citizens and residents. This is precisely the kind of information that Congress intended to be made public under FOIA. Nonetheless, many of the legal interpretations that have supplied the basis for these sweeping surveillance programs remain shrouded in secrecy today.

This lawsuit concerns the public's right to know what law is: in particular, what law the executive branch applies when it conducts surveillance that affects Americans under EO 12333. This is an increasingly vital question for two reasons. First, Americans' communications today are routinely routed around the world as they traverse the Internet, and are therefore more exposed than ever before to the many surveillance programs that operate under EO 12333. Second, the law concerning EO 12333 is made almost entirely within the executive branch. Unlike

other types of surveillance, such as wiretaps under Title III, surveillance under EO 12333 is not supervised by any court, nor is it generally regulated by congressional statute. Thus, to evaluate the protections afforded to Americans who are swept up in this surveillance, the public must understand how the executive branch interprets EO 12333's broad authority.

In response to Plaintiffs' requests for this necessary information, Defendants identified hundreds of records, many of which the government withheld in their entirety. The parties proceeded to litigate the government's withholdings as to a subset of these documents, which included legal memoranda, agency regulations, training manuals, and compliance reports. In two opinions addressing the parties' cross-motions for summary judgment, the district court sustained the government's withholdings. *ACLU v. NSA*, No. 13-cv-09198 (KMW), 2017 WL 1155910 (S.D.N.Y. Mar. 27, 2017) (Wood, J.) (SPA 1); *ACLU v. NSA*, No. 13-cv-09198 (KMW), slip op. (S.D.N.Y. Aug. 17, 2017) (Wood, J.) (SPA 48).

Plaintiffs now appeal the district court's rulings as to eight documents: two memoranda that provided the legal basis for President George W. Bush's warrantless wiretapping program, known as "STELLAR WIND"; and six surveillance "approval packages," which contain memoranda setting out the legal basis for government surveillance activities under EO 12333.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

A. Executive Order 12333

EO 12333 is the foundation of the government's foreign intelligence surveillance regime. Originally issued in 1981 by President Ronald Reagan, EO 12333 governs surveillance activities within the United States, as well as human and electronic surveillance conducted overseas.[1] EO 12333 § 2.4. The collection, retention, and dissemination of information obtained under EO 12333 is governed by directives and regulations promulgated by federal agencies and approved by the Attorney General. Although these regulations do not permit the government to intentionally "target" U.S. persons except in limited circumstances, they permit what is sometimes referred to as "bulk surveillance"—the indiscriminate collection of electronic communications or data. *See, e.g.*, Press Release, White House, Off. of the Press Sec'y, *Presidential Policy Directive 28—Signals Intelligence Activities* at n.5 (Jan. 17, 2014), https://perma.cc/X8FK-8X8J. Americans and foreigners alike may be swept up in this bulk surveillance.

EO 12333's stated objective is to authorize the intelligence community to gather information necessary to protect U.S. interests from "foreign security threats." *See* EO 12333 § 1.1. However, the executive order is used to justify

[1] EO 12333 has been revised three times. *See* 46 Fed. Reg. 59,951 (Dec. 4, 1981), *amended by* EO 13284, 68 Fed. Reg. 4077 (Jan. 28, 2003), EO 13355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), *and by* EO 13470, 73 Fed. Reg. 45,328 (July 30, 2008).

surveillance for a broad range of purposes, resulting in the collection, retention, and use of information from large numbers of Americans with no nexus whatsoever to foreign security threats. *See* John Napier Tye, *Meet Executive Order 12333: The Reagan Rule That Lets the NSA Spy on Americans*, Wash. Post, July 18, 2014, http://wapo.st/2nyKP3l. Despite the breadth of government surveillance conducted under EO 12333, it is not supervised or approved by any court, even when Americans' private information is gathered. The public knows relatively little about how the government construes its authority under EO 12333 to conduct surveillance that affects Americans.

Two of the documents at issue here pertain to one of the government's most controversial surveillance programs: in the fall of 2001, the NSA launched a secret, warrantless surveillance program in violation of both EO 12333 and the Foreign Intelligence Surveillance Act ("FISA"). *See, e.g.*, U.S. Dep't of Justice, Office of the Inspector General, *A Review of the Department of Justice's Involvement with the President's Surveillance Program* 13–14 (July 2009) ("DOJ Report").[2] This program, known as STELLAR WIND, involved several kinds of warrantless surveillance of Americans' communications: the bulk collection of phone records, the bulk collection of Internet metadata, and the interception of phone calls and emails. *Id.* at 15. To legally justify the STELLAR WIND program, the Justice

[2] *Available at* https://nyti.ms/2GBmgL0 (beginning at PDF page 325).

Department prepared memoranda interpreting the limits and protections in EO 12333, as well as those in FISA and the Constitution. These memoranda formed the legal basis for the government's repeated authorization of the STELLAR WIND program. *See, e.g.*, *id.* at 33, 182, 192. When aspects of the program were first disclosed in the *New York Times* in 2005, it led to a torrent of public outcry. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, http://nyti.ms/1THEg5q. Nonetheless, more than a decade later, the public still has not seen the full legal analysis that formed the basis for this surveillance.

B. Plaintiffs' Freedom of Information Act Request

Motivated by concerns about the lawfulness of electronic surveillance that implicates Americans and operates with no statutory constraint and little oversight, Plaintiffs filed substantially similar FOIA requests on May 13, 2013, with the Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA"), Federal Bureau of Investigation ("FBI"), NSA, the Justice Department's National Security Division ("NSD") and Office of Legal Counsel ("OLC"), and the State Department. *See* JA 28. The requests sought disclosure of the legal standards governing EO 12333 surveillance; rules and regulations issued under that authority; and procedures designed to limit intrusions into Americans' privacy. *See id.*

C. District Court Proceedings

After exhausting administrative remedies, Plaintiffs filed their complaint on December 30, 2013, and an amended complaint on February 18, 2014. *See* ECF Nos. 1, 17. Plaintiffs subsequently agreed to modify the scope of their requests to expedite the release of information. *See* ECF No. 27. The district court approved a stipulation on May 9, 2014, requiring NSA, CIA, DIA, FBI, and the State Department to search for five categories of records concerning electronic surveillance under EO 12333: certain specific regulations and policies, authorizations for surveillance, formal legal opinions, training materials, and reports relating to surveillance of U.S. persons. *See* JA 17–20. Plaintiffs separately submitted a revised FOIA request to NSD, which NSD then processed. Plaintiffs then filed their Second Amended Complaint, which incorporates the revised NSD request. *See* JA 24.

Defendants determined that there were hundreds of records responsive to Plaintiffs' requests. Following Defendants' productions, the parties agreed to litigate Defendants' withholdings and redactions of a subset of 150 responsive documents, and to apply the resulting ruling to the remaining responsive documents. *See* ECF Nos. 52, 59, 70. The records at issue included two categories of documents that are the subject of this appeal:

- **"STELLAR WIND" memoranda** (OLC 8 and 10): These legal memoranda concern the lawfulness of President George W. Bush's warrantless

wiretapping program, known as STELLAR WIND, *see infra* Section II.A; and

- **Surveillance "approval packages"** (NSA 11 and NSD 12, 13, 14, 33, and 49): Each approval package contains legal analysis recommending a particular course of action concerning surveillance activity under EO 12333, as well as additional documents reflecting agency decisions that occurred after consideration of those recommendations. *See infra* Section II.A.

Defendants then moved for partial summary judgment on their withholdings of the subset of documents, and Plaintiffs cross-moved. *See* ECF Nos. 59, 70.

On March 27, 2017, the district court issued a Memorandum Opinion and Order granting Defendants' motion for partial summary judgment in part and denying it in part, and denying Plaintiffs' cross-motion without prejudice. *See* SPA 1. As relevant here, with respect to Exemption 5, the district court concluded that OLC had justified its withholding of the STELLAR WIND memoranda pursuant to the deliberative process and attorney-client privileges, SPA 21, but that Defendants had failed to establish that the NSA and NSD approval packages were properly withheld in their entirety under those privileges, SPA 25, 29–30. The court directed Defendants to supplement their submissions with detail about what portions of the documents contain legal advice or deliberative and predecisional analysis. *See* SPA 25. With respect to Exemptions 1 and 3, the court upheld Defendants' withholdings, though it did not explicitly rule on the application of these exemptions to OLC 10, and it acknowledged that the NSA had not conducted a segregability review of OLC 8. SPA 36, 46; JA 175. The parties then cross-moved

for partial summary judgment as to several issues, including the applicability of Exemption 5 to the approval packages. *See* ECF Nos. 100, 107.

On August 17, 2017, the district court issued a Memorandum Opinion and Order granting Defendants' motion for partial summary judgment and denying Plaintiffs' motion. *See* SPA 48–57. As relevant here, the court held that Defendants had met their burden to show that the approval packages had been properly withheld in their entirety pursuant to Exemptions 1 and 3, and it declined to rule on the validity of their withholdings under Exemption 5. *See* SPA 55–57. The court entered judgment for Defendants on August 22, 2017. SPA 58.

Plaintiffs now challenge the district court's rulings as to the STELLAR WIND memoranda (OLC 8 and 10) and the legal analysis contained within the approval packages (NSD 12, 13, 14, 33, and 49, and NSA 11).

SUMMARY OF THE ARGUMENT

This case poses a question of critical importance: to what extent can the government keep secret the law that it applies when conducting surveillance of Americans under EO 12333. Despite FOIA's strong presumption in favor of disclosure—and its hostility to "secret law"—the district court upheld the government's withholding of these legal memoranda under FOIA Exemptions 1, 3, and/or 5. The lower court's decision was in error.

Although Exemption 5 shields certain privileged records from disclosure, it does not permit the government to withhold the memoranda here. Because these documents contain the "working law" of the executive branch, and because they have been expressly adopted as agency law and policy, the government's claimed privileges do not apply. Moreover, the government failed to meet its burden to establish that the documents are privileged in the first place, relying on conclusory assertions where FOIA requires it to put forward specific facts.

Nor are the government's withholdings justified under Exemptions 1 or 3. The government failed to segregate and release legal analysis that is not inextricably intertwined with properly classified or otherwise exempt material in the memoranda. The government also improperly asserted these exemptions over information that it has officially acknowledged, both in the course of this litigation and through a 700-page Inspectors General report concerning STELLAR WIND.

Accordingly, Plaintiffs respectfully request that the Court reverse the district court's judgment. The Court should hold that Exemption 5 does not shield these documents from disclosure and, in light of that determination, order the re-processing of the eight documents for disclosure of any information not properly subject to Exemptions 1 and 3. At a minimum, Plaintiffs urge the Court to review the eight documents *in camera* to assess the government's claimed exemptions,

given the controlling effect of these legal memoranda and the deficiencies in the government's declarations.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 193 (2d. Cir. 2012).

ARGUMENT

I. UNDER FOIA, COURTS ENFORCE A STRONG PRESUMPTION IN FAVOR OF DISCLOSURE AND RESOLVE ANY DOUBTS IN FAVOR OF THE PLAINTIFF.

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and 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 (2004). To that end, courts enforce a "strong presumption in favor of disclosure." *Associated Press v. DOD*, 554 F.3d 274, 283 (2d Cir. 2009). 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). Even where an exemption has been properly invoked in support of withholding a particular

document, "[a]ny reasonably segregable portion of a record shall be provided," and the government may withhold only those specific "portions which are exempt." 5 U.S.C. § 552(b); *see EPA v. Mink*, 410 U.S. 73, 93 (1973).

Consistent with FOIA's presumption of public access to agency records, "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been improperly withheld." *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (internal quotation marks omitted). "[A]ll doubts" as to the applicability of an asserted exemption must be "resolved in favor of disclosure." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *see Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

FOIA is particularly hostile to secret law and to agency efforts—as in this case—to withhold documents that constitute the legal rules according to which the government operates. As the Supreme Court has observed, FOIA "represents a strong congressional aversion to 'secret (agency) law,' and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

II. THE GOVERNMENT IMPROPERLY WITHHELD THE DOCUMENTS UNDER EXEMPTION 5.

Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption "incorporate[s] into the FOIA all the normal civil discovery privileges." *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991). Importantly, however, documents that constitute an agency's "working law," or that an agency has adopted as its law or policy, may not be withheld under Exemption 5. *See Sears*, 421 U.S. at 161; *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360 (2d Cir. 2005); *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 198 (2d Cir. 2012).

The government's withholdings of the STELLAR WIND memoranda and approval packages under Exemption 5 fail for three distinct reasons: the documents contain working law; the documents were adopted as agency law and policy; and the government failed to establish the privileges it asserts. Accordingly, Plaintiffs respectfully request that the Court hold that the government's invocation of Exemption 5 is improper. At a minimum, Plaintiffs ask that the Court review *in camera* the eight documents at issue to assess whether they contain working law or were adopted by executive branch officials.

A. Exemption 5 Does Not Permit Agencies To Keep Their Working Law or Adopted Legal Memoranda Secret.

Regardless of whether documents would otherwise be subject to the attorney-client or deliberative process privileges, an agency may not withhold them under Exemption 5 if either of two exceptions applies: (1) they contain "an 'opinion or interpretation which embodies the agency's effective law and policy,' in other words, its 'working law,'" or (2) they have been "adopted, formally or informally, as the agency position on an issue." *Brennan Ctr.*, 697 F.3d at 195–96, 199–202 (citations and brackets omitted). Importantly, it is not a plaintiff's burden to show that withheld materials are working law or were adopted as a final agency position; rather, as under FOIA generally, it is the agencies' burden to show that Exemption 5 properly applies. *See id.* at 201–02. Defendants failed to meet their burden here.

Under the "working law" doctrine, agencies cannot rely on Exemption 5 to withhold the opinions, rules, and interpretations that constitute their formal or informal law or policy. *Id.* at 195–96, 199–202. A document is considered "working law" if it contains the agency's "effective law and policy," *Sears*, 421 U.S. at 153; is "routinely used" and "relied on" by the agency, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980); or reflects agency opinions about "what the law is" and "what is not the law and why it is not the law," *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997). An agency's actual

reliance on legal analysis as a basis for its policy or operational decisions transforms that analysis into working law. As the Supreme Court explained in *Sears*, "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted"—and these reasons "constitute the 'working law' of the agency." 421 U.S. at 152–53.

Under the "express adoption" doctrine, courts consider whether a document's reasoning and conclusions have been adopted, formally or informally, as the agency position on an issue. *La Raza*, 411 F.3d at 356–57. "Express" adoption is somewhat of a misnomer: as this Court has explained, an agency need not use "specific, explicit language of adoption or incorporation" for the doctrine to apply, and "courts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred." *Id.* at 357 n.5; *see also N.Y. Times Co. v. DOJ*, 138 F. Supp. 3d 462, 474 (S.D.N.Y. 2015) (an agency need not "have explicitly mentioned any specific document in a public statement, so long as its conduct, considered as a whole, manifests an express adoption of the documents"). To adopt a document, an agency must rely on both the document's conclusion and its reasoning. *Sears*, 421 U.S. at 152. While the adoption and working law doctrines are "separate path[s] towards the loss of Exemption 5's protection," *Brennan Ctr.*, 697 F.3d at 196, they are closely related:

both are ways of demonstrating that a particular agency record contains an agency's controlling law or policy.

These limits on the scope of Exemption 5 are grounded in the text of FOIA itself. As this Court has explained, the working law and adoption analyses are "animated by the affirmative provisions of FOIA," which require agencies to disclose their operative rules to the public. *Brennan Ctr.*, 697 F.3d at 200; 5 U.S.C. § 552(a)(1)–(2) (requiring disclosure of "statements of general policy or interpretations of general applicability formulated and adopted by the agency"). The working law and adoption doctrines serve a vital function: they ensure that an agency does not thwart FOIA's requirements by "develop[ing] a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Am. Immigration Council v. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 218 (D.D.C. 2012) (quoting *Coastal States*, 617 F.2d at 867); *see also Sears*, 421 U.S. at 153 (explaining that any judicial application of Exemption 5 must account for the "strong congressional aversion to 'secret (agency) law'"); *La Raza*, 411 F.3d at 360 (stating that an agency's assertion that "it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA" (internal quotation marks omitted)).

Defendants failed to meet their burden to establish that the withheld documents do not contain working law or were not adopted. The district court did not reach the question of whether Exemption 5 applied to the approval packages, *see* SPA 57, but the court erred in holding that the STELLAR WIND memoranda may be withheld under Exemption 5, *see* SPA 22–23.

1. The STELLAR WIND Memoranda Contain Working Law.

The government improperly withheld portions of two OLC memoranda, OLC 8 and 10, which contain the executive branch's working law concerning the warrantless wiretapping program initiated in 2001 and known as STELLAR WIND. The public record is clear that the Attorney General and the President accepted and relied on OLC's analyses in reauthorizing STELLAR WIND, transforming those analyses into working law. As a result, the government cannot withhold any portion of these documents under Exemption 5.

Although the government withheld nearly all of the content of OLC 8, it is plain that this memo is the first formal STELLAR WIND authorization memorandum. *See* JA 262. Indeed, the government did not dispute this point in the district court. According to a comprehensive report on STELLAR WIND by the Justice Department's Office of the Inspector General, a November 2, 2001 memorandum from then-Deputy Assistant Attorney General John Yoo for Attorney General John Ashcroft was "[t]he first OLC opinion directly supporting

the legality of the Stellar Wind program." DOJ Report at 33 (JA 440). As described in OLC's Vaughn Index, OLC 8 is a November 2, 2001 "[l]egal advice memorandum discussing, among other things, legal issues pertaining to surveillance under E.O. 12333," written by Yoo for Ashcroft. JA 259. The few lines of text that the government released from OLC 8 concern the President's authority to conduct warrantless searches for national security purposes. JA 262–75.[3]

Yoo's legal analysis played a central role in periodic reauthorizations of STELLAR WIND: it was accepted and relied on by the Attorney General and President and became the working law of the Justice Department and the executive branch. STELLAR WIND was initially authorized by President Bush on October 4, 2001, for a period of thirty days. *See* JA 283. After the initial authorization, the program was reauthorized for defined periods, typically every 30 or 45 days. *Id.* As each expiration date approached, the Director of Central Intelligence and the Secretary of Defense would recommend that the program be continued based on information regarding potential threats to the United States. JA 284. OLC would then review that recommendation, "assess[ing] whether there [was] a sufficient

[3] OLC 8 was identified as responsive to a different FOIA request in the consolidated case *Electronic Privacy Information Center v. DOJ*, Nos. 06-096, 06-214 (RCL) (D.D.C.), *see* JA 251, which confirms that OLC 8 concerns STELLAR WIND. The request in that case sought information about domestic surveillance, and DOJ "identified the surveillance activities at issue" as pertaining to the "Terrorist Surveillance Program," otherwise known as STELLAR WIND. *EPIC v. DOJ*, 511 F. Supp. 2d 56, 62 n.3 (D.D.C. 2007).

factual basis demonstrating a threat of terrorist attacks in the United States for it to continue to be reasonable under the standards of the Fourth Amendment for the President to authorize the warrantless searches involved in STELLAR WIND." *Id.* "After reviewing each of the proposed STELLAR WIND reauthorizations, [OLC] advised [the Attorney General] that the proposed reauthorization would satisfy relevant constitutional standards of reasonableness under the Fourth Amendment." *Id.* Of critical significance here: "*Based on that advice*, [the Attorney General] *approved as to form and legality* each reauthorization to date [May 6, 2004], except for the Authorization of March 11, 2004 . . . and forwarded it to the President for his action." *Id.* (emphasis added).

The DOJ Report explains that, "[i]n reliance on Yoo's advice, the Attorney General certified the program 'as to form and legality' some 20 times before Yoo's analysis was determined to be flawed by his successors." DOJ Report at 193 (JA 446); *id.* at 14–17; *see also* JA 284. Relying on the Attorney General's certifications, President Bush issued "Presidential Authorizations" to implement the surveillance, which were signed by the President, Attorney General, and the Secretary of Defense or other high-ranking Department of Defense officials. DOJ Report at 14–17. In other words, the President, Attorney General, and other executive branch officials accepted and relied upon OLC's reasoning and conclusions as the basis for the periodic reauthorizations of the program.

In 2003, Yoo left OLC, and the office began to reconsider the soundness of the legal reasoning in his November 2, 2001 memorandum.[4] This reconsideration culminated in OLC 10: a May 6, 2004 memorandum from then-Assistant Attorney General Jack Goldsmith to Attorney General Ashcroft, analyzing the lawfulness of STELLAR WIND and supporting its reauthorization. *See* JA 276. As the memorandum explains, it was written in response to the Attorney General's request that OLC "undertake a thorough reexamination of the STELLAR WIND program as it is currently operated to confirm that the actions that the President has directed the Department of Defense to undertake through the National Security Agency (NSA) are lawful." JA 277.

Goldsmith's memo presented a new, more comprehensive analysis of the lawfulness of STELLAR WIND and concluded that the program was lawful. JA 351; DOJ Report at 182–86. The Attorney General and the executive branch subsequently accepted and relied on OLC 10 as the legal basis for the program's continued authorization. *See* Offices of the Inspectors General, *Report on the President's Surveillance Program*, Vol. I, 37–38 (July 2009) (with Vols. II & III, "Joint IG Report") (describing Goldsmith's memo under the header: "A New Legal

[4] Yoo drafted another opinion for Ashcroft concerning STELLAR WIND in 2002, but this later memo "reiterated the same basic analysis in Yoo's November 2, 2001 memorandum in support of the legality of the Stellar Wind program." DOJ Report at 39.

Basis for the Program Is Adopted");[5] DOJ Report at 14–15 (JA 434–35) (listing the dates of 19 subsequent reauthorizations of the program).[6]

That top executive branch officials *repeatedly* relied on the legal analyses in OLC 8 and OLC 10 in authorizing STELLAR WIND confirms that these documents contain working law. *See Coastal States*, 617 F.2d at 869 (legal opinions that are "routinely used" and "relied on" as a basis for agency action are working law). The Attorney General relied on Yoo's memo to certify STELLAR WIND "some 20 times." DOJ Report at 193 (JA 446). Similarly, OLC 10 was the legal basis for 19 additional Attorney General certifications as to the lawfulness of the program. OLC 10 also effectively superseded or rescinded OLC 8—yet another factor confirming that these two memos contain working law and cannot be withheld under Exemption 5. *See* Joint IG Report, Vol. I at 37–38; *Coastal States*, 617 F.2d at 869 (evidence that legal interpretations were at times "amended" or "rescinded" demonstrated their precedential nature and status as working law).

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[5] *Available at* https://nyti.ms/2GBmgL0. The DOJ Report described above is one portion of this 700-page, multi-agency report.

[6] *See also, e.g.*, Ellen Nakashima, *Legal Memos Released on Bush-era Justification for Warrantless Wiretapping*, Wash. Post, Sept. 6, 2014, https://perma.cc/D6Z2-3A6B (describing the Justice Department's release of a version of OLC 10 as "the fullest public airing to date of the Bush administration's legal justification for the warrantless wiretapping of Americans' phone calls and e-mails"); Charlie Savage, *Redactions in U.S. Memo Leave Doubts on Data Surveillance Program*, N.Y. Times, Sept. 6, 2014, http://nyti.ms/2EhpGSl ("[T]he government continued to redact crucial portions of the memo that would answer a primary remaining question about the history of Stellarwind: What prompted the Justice Department to conclude in early 2004 that one aspect of the program, which collected records about Americans' emails in bulk, was illegal[?]").

Contrary to the district court's holding, this Court's decision in *N.Y. Times Co. v. DOJ* (*N.Y. Times II*), 806 F.3d 682 (2d Cir. 2015), does not compel a different result. *See* SPA 21. In that case, the plaintiffs argued that OLC memoranda were working law because OLC legal advice is precedential and binding on the agencies that receive it. *See N.Y. Times II*, 806 F.3d at 687 ("Appellants make the general argument that the legal reasoning in OLC opinions is 'working law.'"). This Court observed in dictum that the OLC documents at issue were not working law because OLC "'did not have the authority to establish the "working law" of the [agency],' and its advice 'is not the law of an agency unless the agency adopts it.'" *Id.* In other words, although OLC memos, standing alone, may not have the force of law, they can become working law if an agency accepts or relies on the memos as a basis for agency action. Here, in contrast to the plaintiffs in *N.Y. Times II*, Plaintiffs have explained precisely how the executive branch relied on and adopted the OLC memos at issue in authorizing the STELLAR WIND surveillance program, and why, as a result, the memos may not be withheld under Exemption 5.

2. The STELLAR WIND Memoranda Were Adopted.

Not only do these memoranda contain working law, but the government's withholdings pursuant to Exemption 5 are improper for a second, independent reason: the memos were expressly adopted by the Attorney General, both publicly

and within the executive branch. By approving the surveillance "as to form and legality" based on the reasoning and conclusions of OLC 8 and 10, the Attorney General adopted the memoranda. *See, e.g.*, *La Raza*, 411 F.3d at 360; *Brennan Ctr.*, 697 F.3d at 198–99, 203–04. Indeed, the executive summary of the Joint IG Report underscores the point: it describes the reasoning of OLC 10 in a section titled "A New Legal Basis for the Program Is Adopted." Joint IG Report, Vol. I at 37–38.

The Attorney General further adopted the reasoning and conclusions of the STELLAR WIND OLC memoranda in his public statements following the disclosure of the program. *See* Press Briefing by Att'y Gen. Alberto Gonzales & Gen. Michael Hayden, Principal Deputy Director for Nat'l Intelligence (Dec. 19, 2005), https://perma.cc/L7ST-YNZ3 (describing the "legal underpinnings for what has been disclosed by the President"); *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* 2006 WL 270364 (testimony of Alberto Gonzales, Attorney General of the United States) (stating that White House Counsel's Office had accepted the "legal analysis performed by the Department of Justice" and, on that basis, had signed off on the program); *see also La Raza*, 411 F.3d at 354–55 (holding that an OLC memorandum was adopted where the Attorney General and high-ranking DOJ officials publicly referred to its

advice). In addition, as the DOJ Report explains, "[m]uch of the legal reasoning in the 6 May 2004 OLC memorandum [OLC 10] was publicly released by DoJ in a 'White Paper'—'Legal Authorities Supporting the Activities of the National Security Agency Described by the President'—issued on 19 January 2006 after the content collection portion of the program was revealed in *The New York Times* and publicly confirmed by the President in December 2005." Joint IG Report, Vol. I at 49–50; *see also* U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), https://perma.cc/5ENC-8QZV.

Because the analysis in both memos was adopted or incorporated by reference, Defendants cannot withhold them pursuant to Exemption 5. The district court's holding to the contrary was in error. *See* SPA 22.

3. The Approval Packages Contain Working Law.

The government improperly asserted Exemption 5 over several legal memoranda that are part of "approval packages" for EO 12333 surveillance. As the formal legal underpinning for this surveillance, these memoranda presumably explain why the surveillance is, in the government's view, lawful. Under the working law doctrine, agencies cannot use Exemption 5 to shield from the public "'opinions and interpretations' which embody the agency's effective law and policy." *Sears*, 421 U.S. at 153 (citation omitted). Because the six approval

packages contain the legal reasoning supporting final agency decisions to undertake surveillance activities under EO 12333, they constitute the government's view of what the law is and cannot be withheld under Exemption 5.

The government's descriptions of the approval packages are clear evidence that these documents contain working law. NSA 11 is described as a "Legal Memorandum and Associated Approval Documentation." JA 178. NSD 12, 13, and 14 are "NSD Memo[s] on an NSA Program and Accompanying Documentation." JA 194–95. NSD 33 and 49 are "NSD Memo[s] on an Intelligence Activity and Accompanying Documentation." JA 198, 200. Most importantly, one of NSD's declarations explains that each approval package includes legal analysis "recommending . . . a particular course of action," and contains additional documents "*reflecting the governmental action decisions* [*sic*] *that occurred after consideration of those recommendations*." JA 486 (emphasis added). In other words, the approval packages contain the legal reasoning and conclusions that supported government surveillance activities or programs pursuant to EO 12333.

Moreover, these approval packages, like the STELLAR WIND memos, are the culmination of a formal decision-making process. The packages—which are final agency documents—tie approval of certain agency actions to a particular legal interpretation. Agency approval of the proposed program or action represents

an acceptance of the legal position contained in the approval package. That is the very point of each package: to ensure that the government's surveillance activities have an adequate legal foundation, especially in light of the restrictions imposed by Congress and the Constitution. *See, e.g.*, 50 U.S.C. § 1809 (establishing criminal penalties for unauthorized surveillance). An agency decision-maker who disagreed with the legal justification set forth in an approval package would not approve the package, because the legal analysis is not merely an "informal suggestion[]" "which could be freely disregarded." *Coastal States*, 617 F.2d at 860 & n.8, 869 (evidence that agency auditors would not disregard legal opinions confirmed their status as working law). The decision-maker might instead insist on revisions to the legal rationale, or reject the proposed activity altogether. In short, agency approval of the proposed program is, by design, an acceptance of the legal interpretation contained in the approval package. *See Sears*, 421 U.S. at 141–42, 155 (analyzing working law based on agency decision-making and approval processes). Accordingly, the memoranda constitute working law and cannot be withheld under Exemption 5. *See id.* at 153; *La Raza*, 411 F.3d at 360.

4. The Approval Packages Were Adopted.

For similar reasons, agency officials' acceptance and approval of these packages constitutes adoption of the memoranda. Notably, in the government's multiple rounds of declarations, it has never denied that the packages were in fact

approved. Both the Supreme Court in *Sears* and FOIA itself make clear that an agency may "adopt" a legal opinion or interpretation through formal or informal internal processes, rendering that legal interpretation subject to disclosure. *Sears*, 421 U.S. at 155 (ordering disclosure of memoranda "adopted by the General Counsel" and communicated to the Regional Director); 5 U.S.C. § 552(a)(1)(d); *Afshar v. Dep't of State*, 702 F.2d 1125, 1139–40 (D.C. Cir. 1983) (discussing agency's internal adoption of recommendations). Under FOIA, if agency decision-makers approved and thereby adopted a particular legal opinion as the basis for surveillance affecting Americans, that opinion may not be withheld under Exemption 5. *See, e.g.*, *La Raza*, 411 F.3d at 360 (stating that an agency's assertion that "it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA").

B. The Documents Are Not Privileged and Thus May Not Be Withheld Under Exemption 5.

Separate from the applicability of the working law and adoption doctrines, the government failed to meet its burden of establishing the privileges it asserts under Exemption 5.

1. The Government Failed To Establish That the Deliberative Process Privilege Applies.

To properly invoke the deliberative process privilege, the government must establish that the withheld material is both "predecisional" and "deliberative."

Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999). A document is "predecisional" if it was "prepared in order to assist an agency decisionmaker in arriving at his decision," and "deliberative" if it is "actually . . . related to the process by which policies are formulated." *La Raza*, 411 F.3d at 356 (quotation marks omitted). The privilege is intended to protect "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Grand Cent. P'ship*, 166 F.3d at 482 (citing *Hopkins*, 929 F.2d at 84–85). For a document to be deemed "deliberative," it cannot be "merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002).

Crucially, even if a document was "predecisional" at the time it was created, an agency's subsequent acceptance or reliance on it extinguishes the privilege and requires disclosure under FOIA. *See Brennan Ctr.*, 697 F.3d at 200 n.12; *Am. Soc'y of Pension Actuaries v. IRS*, 746 F. Supp. 188, 190–91 (D.D.C. 1990) ("[D]ocuments that are the basis of an agency's decision or are created afterwards to explain the decision are acknowledged expressions of the agency's position."). Moreover, the deliberative process privilege does not protect descriptions of past or present policy, nor does it "cover 'purely factual' material." *Grand Cent. P'ship*, 166 F.3d at 482; *see also Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d

865, 876 (D.C. Cir. 2009). Agencies have an obligation to segregate purely factual material that is not otherwise exempt and to provide that material to FOIA requesters.

Because the deliberative process privilege is "so dependent upon the individual document and the role it plays in the administrative process," *Coastal States*, 617 F.2d at 867, courts have required the government to describe withheld documents in detail to justify claims of privilege. The privilege turns on how each document was ultimately used, with whom it was shared, whether it was directed at a particular case, and whether portions of it are factual and therefore disclosable. Thus, the government must at least explain: (1) the roles of the author and recipient of each document; (2) the function and significance of the document in a decision-making process; and (3) the subject matter of the document and the nature of the deliberative opinion. *See Senate of P.R. v. DOJ*, 823 F.2d 574, 585 (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); *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011) (requiring agencies to describe documents' "function and significance in the agency's decision-making process" to sustain the privilege).

Here, for at least two reasons, the government failed to establish that the STELLAR WIND memoranda and approval packages are predecisional and deliberative. First, as discussed above, the STELLAR WIND memoranda were accepted as the legal basis for the implementation of President Bush's warrantless wiretapping program, and the legal memoranda within the approval packages were accepted as the legal basis for surveillance activities under EO 12333. *See supra* Section II.A. As a result, even if these documents were at one point predecisional, they are "no longer considered predecisional[,] for they now support and explain the agency's position in the same manner a postdecisional document explains an agency decision." *Brennan Ctr.*, 697 F.3d at 200 n.12 (citation omitted).

Second, the government's public declarations lack the factual content and specificity required to establish the privilege.[7] Rather than describe the actual decision-making process with respect to any of the documents, the OLC and NSD declarations simply restate the legal standard for invoking the privilege. *See, e.g.*, JA 251, 254 (stating that the memos "were prepared in advance of Executive Branch decisionmaking" and "consist of advice to Executive Branch officials in connection with that decisionmaking"); JA 190–91 (characterizing the approval

[7] Although the government may seek to rely on information provided in the Classified NSA Declaration, *see* JA 189 (stating that the classified declaration discusses these documents), FOIA strongly disfavors reliance upon *in camera*, *ex parte* submissions and permits such reliance only after the government has submitted as detailed a public explanation of its withholdings as possible. *See John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 110 (2d Cir. 1988); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006).

packages as predecisional "because they related to and preceded a final decision regarding one or more NSA programs or other intelligence activities" and deliberative because "they reflect ongoing deliberations by Government attorneys on DOD procedures and one or more NSA programs"). In addition, with respect to the approval packages, NSD provided virtually no information about the roles of the recipients of the documents. *See* JA 189, JA 486 (legal memoranda in approval packages were written by NSD attorneys and received by Justice Department officials). These fundamental deficiencies in Defendants' declarations are fatal to their assertion of the privilege. *See, e.g.*, *Senate of P.R.*, 823 F.2d at 585.

The district court erred in holding that "Plaintiffs overstate the burden of specificity required of Defendants in asserting the deliberative process privilege." *See* SPA 16. In reaching this conclusion, the court suggested that, under *Tigue*, the government need not identify any relevant decision to which the withheld documents relate. *See* SPA at 17. But that is incorrect. *Tigue* explained that an agency need not show that a decision was *in fact* ultimately made; however, an agency "must be able to demonstrate that, *ex ante,* the document for which executive privilege is claimed *related to a specific decision facing the agency*." 312 F.3d at 80 (emphasis added); *see also* SPA 17, 27 (acknowledging *Tigue*'s holding). Here, the government did not identify any specific decision to which the documents related, even *ex ante*. As a result of this flawed reasoning, the district

court effectively eliminated the government's burden to justify its claim of privilege, based on little more than the government's say-so.[8]

2. The Government Failed To Establish That the Attorney-Client Privilege Applies.

The attorney-client privilege protects "most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Brennan Ctr.*, 697 F.3d at 207 (internal citation omitted). To properly invoke the privilege, the government must show that a document was "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). As with all withholdings under FOIA, the government bears the burden of establishing the privilege applies. *Id.* at 418.

With respect to the approval packages, the government's vague and incomplete descriptions of the withheld documents cannot support the attorney-client privilege. Because NSD failed to provide sufficient information about the

[8] The district court also erred in finding that "Plaintiffs do not mention OLC's invocation of these privileges in their opening memorandum." SPA 21. In that memorandum, Plaintiffs argued that "none of the agencies have satisfied their burden to provide the information necessary to justify the [deliberative process] privilege." Pls.' Mem. in Supp. of S.J. 29, ECF No. 70.

Moreover, Plaintiffs have challenged OLC's claims of privilege—in the proceedings below and in this appeal—based on the government's official acknowledgments, which have waived any privilege over the STELLAR WIND memoranda. *See infra* Section IV.

roles of the authors and those who received copies of the withheld documents, the Court cannot assess whether the documents were in fact confidential communications between client and counsel, or whether they were, for example, distributed widely to government personnel as official guidance—thus defeating the privilege. *See id.* at 419. The attorney-client privilege does not apply to everyone within an organization, *Upjohn Co. v. United States*, 449 U.S. 383, 396–97 (1981), and merely labeling the recipient a member of the Justice Department is insufficient to establish that the privilege is properly invoked. *See, e.g.*, *Coastal States*, 617 F.2d at 863; *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 519 (S.D.N.Y. 2010). Under well-established precedent, the government's declarations and Vaughn indices are simply insufficient to justify the privilege. *See, e.g.*, *Mead Data Cent., Inc. v Dep't of Air Force*, 566 F.2d 242, 253–54 (D.C. Cir. 1977); *Adamowicz v. IRS*, 552 F. Supp. 2d 355, 366 (S.D.N.Y. 2008).

With respect to the STELLAR WIND memoranda, the government has waived any privilege through its official acknowledgments and public statements. As described in greater detail below, the government has made numerous official acknowledgments concerning both the scope of the STELLAR WIND program and its purported legal basis, and it has publicly disclosed documents that describe in detail the contents of these memoranda. *See infra* Section IV (discussing application of the official acknowledgment doctrine). These acknowledgments

waive the confidentiality required to maintain the attorney-client privilege. *N.Y. Times Co. v. DOJ* (*N.Y. Times I*), 756 F.3d 100, 114–17 (2d Cir. 2014) (discussing waiver through official acknowledgment). In addition, the Attorney General's statements, in describing the "legal underpinnings" of the program, publicly relied on the analysis in the OLC memoranda in order to justify the surveillance, thereby waiving any privilege. *See supra* Section II.A.2 (discussing executive branch statements adopting the reasoning and conclusions of the OLC memoranda); *La Raza*, 411 F.3d at 360–61 (discussing waiver through public reliance).

III. THE GOVERNMENT IMPROPERLY WITHHELD DOCUMENTS UNDER EXEMPTIONS 1 AND 3.

A. Exemptions 1 and 3 Must Be Narrowly Construed.

The government may invoke Exemption 1 only over records that have been "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order." *See* 5 U.S.C. § 552(b)(1). For a record to be "properly classified," it must be (1) classified by an "original classification authority," (2) owned, produced, or under the control of the federal government, and (3) fall into one of eight "protected categories" listed in Section 1.4 of EO 13526. In addition, an "original classification authority" must determine that disclosure "could be expected to result in damage to the national security," and must be "able to identify or describe the damage." EO 13526 § 1.1(a)(1)–(4).

Importantly, records cannot be classified to "conceal violations of law, inefficiency, or administrative error" or to "prevent embarrassment." *Id.* § 1.7(a)(1)–(2)

The government may invoke Exemption 3 only over records that are "specifically exempted from disclosure by [a] statute" other than FOIA. *See* 5 U.S.C. § 552(b)(3). The government relies primarily on the National Security Act, which exempts "intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). It also invokes the NSA Act, 50 U.S.C. § 3605, which exempts "the disclosure of the organization or any function of the National Security Agency," as well as 18 U.S.C. § 798, which exempts "communication intelligence activities of the United States." JA 152, 153. Each of these statutes must be construed narrowly. *See, e.g.*, *Milner*, 562 U.S. at 571 (FOIA's exemptions must be "given a narrow compass"); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (the reference to "functions" in the analogous CIA Act does not allow the agency "to refuse to provide any information at all about anything it does," but instead "exempts the CIA from providing information regarding its internal structure").

Consistent with FOIA's "general, firm philosophy of full agency disclosure," it is the government's burden to prove that Exemption 1 or 3 applies. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999). Because these exemptions are

"narrowly construed," the government's justifications must meet "an exacting standard." *ACLU v. DOD*, 389 F. Supp. 2d 547, 551 (S.D.N.Y. 2005) (alterations omitted). As this Court has explained, the government must justify its withholdings with "reasonable specificity" and "without resort to 'conclusory and generalized allegations of exemptions.'" *Halpern*, 181 F.3d at 290–91; *see also ACLU v. Office of the Dir. of Nat'l Intelligence*, No. 10-cv-4419 (RJS), 2011 WL 5563520, at *10 (S.D.N.Y. Nov. 15, 2011) (refusing "to credit a pro forma recitation of the exemption statutes as the basis for the NSA withholdings"). As with all FOIA exemptions, the government's justification for invoking Exemptions 1 and 3 must be both "logical" and "plausible." *N.Y. Times I*, 756 F.3d at 119; *see also ACLU v. CIA*, 710 F.3d 422, 429–30 (D.C. Cir. 2013) (holding that the CIA's assertion of harm to national security was neither logical nor plausible).

Critically, under FOIA, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Nonexempt portions of a document must be disclosed unless they are "inextricably intertwined" with exempt portions. *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.10 (2d. Cir. 2006); *N.Y. Times I*, 756 F.3d at 119. Accordingly, Defendants bear the burden of establishing that they have segregated and released non-exempt portions of individual records. *See, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991);

Amnesty Int'l USA, 728 F. Supp. 2d at 496. To allow the Court to make the required "specific findings of segregability," *Sussman v. U.S. Marshals Serv*., 494 F.3d 1106, 1116 (D.C. Cir. 2007), agencies must provide a detailed justification for non-segregability, and a description of "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead*, 566 F.2d at 261.

B. The Government Must Segregate and Release Legal Analysis That Is Not "Inextricably Intertwined" with Exempt Information.

The government may not withhold legal analysis under Exemption 1 or 3 unless that legal analysis is inextricably intertwined with properly classified information. *See N.Y. Times I*, 756 F.3d at 119–20 (holding that legal analysis may be withheld under Exemption 1 only to the extent it is inextricably intertwined with properly classified facts); *ACLU v. FBI*, No. 11-cv-7562 (WHP), 2015 WL 1566775, at *2 (S.D.N.Y. Mar. 31, 2015). Here, the government made only bare and insufficient assertions that it has segregated and released non-exempt legal analysis, *see Mead*, 566 F.2d at 261, and the public record strongly suggests that the government is improperly withholding this non-exempt material.

Under Exemption 1, "pure" legal analysis—*i.e.*, constitutional and statutory interpretation, discussions of precedent, and legal conclusions that can be segregated from properly classified or otherwise exempt facts—cannot be withheld. Pure legal analysis is "not an intelligence source or method," *N.Y. Times*

I, 756 F.3d at 119–20, and its disclosure cannot "reasonably . . . be expected to result in damage to the national security," as required by EO 13526. Importantly, the mere fact that legal analysis *relates* to secret intelligence activity does not establish that disclosing the legal analysis would reveal the protected activity itself. *See N.Y. Times I*, 756 F.3d at 119–20 (segregating "pure legal analysis" in an OLC memorandum from facts describing "intelligence gathering activities").

Indeed, given the volume and breadth of public information about STELLAR WIND, and the fact that the program is no longer in operation, it strains credulity to claim that disclosure of pure legal analysis related to the program could damage national security today. As discussed *infra*, the existence of the STELLAR WIND program—and facts related to its operation—have been public knowledge for over a decade. *See, e.g.*, U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), https://perma.cc/5ENC-8QZV; Press Briefing by Att'y Gen. Alberto Gonzales & Gen. Michael Hayden (Dec. 19, 2005), https://perma.cc/L7ST-YNZ3. And in 2015, the government released the Joint IG Report, a 700-page, multi-agency Inspectors General report on the warrantless wiretapping program. In light of the voluminous public record on this topic, the government cannot plausibly withhold pure legal analysis in the STELLAR WIND

memoranda based on conclusory assertions that disclosure would cause harm to the national interest.

Nor does Exemption 3 protect pure legal analysis. None of the statutes that Defendants cite in invoking Exemption 3 specifically exempt pure legal analysis from disclosure. *See* 18 U.S.C. § 798 (criminalizing disseminating classified information about the "communication intelligence activities of the United States or any foreign government"); 50 U.S.C. § 3024(i)(1) (directing the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure"); 50 U.S.C. § 3605 (protecting from mandatory disclosure any "information with respect to the activities" of the NSA).

Thus, the critical question is whether the legal analysis in the withheld memos is inextricably intertwined with properly classified or otherwise exempt information. *Sussman*, 494 F.3d at 1116. For the reasons discussed below, the government failed to meet its burden to justify its withholdings and segregation decisions.

1. The Government Improperly Withheld Pure Legal Analysis in OLC 8.

The government's own disclosures and the public record strongly suggest that at least some of the information withheld in OLC 8 constitutes pure legal analysis.

Most significantly, the NSA conceded that it did not conduct a segregability review of the document for information that would fall outside Exemptions 1 and 3. *See* JA 174–75. Because this document may not be withheld under Exemption 5, *see supra* Section II, the Court should order the government to conduct a proper segregability review and to release all non-exempt material.

Other disclosures make clear that OLC 8 contains pure legal analysis. As discussed *supra*, OLC 8 is a 24-page, November 2, 2001 memo from John Yoo to the Attorney General that addresses the lawfulness of STELLAR WIND. The government redacted all but eight lines of text from this memo. *See* JA 262–75. But the withheld portions of the memo closely track legal analysis that the government disclosed at length in the DOJ Report. *See, e.g.*, DOJ Report 33–38 (JA 440–45) (describing a series of legal arguments set forth in a November 2, 2001 memorandum from Yoo to the Attorney General).

In addition, the subject matter, text, and length of OLC 8 all correspond to that of OLC 9—a 22-page memorandum and two-page appendix from Yoo to Judge Colleen Kollar-Kotelly of the Foreign Intelligence Surveillance Court, dated May 17, 2002, which also addresses the lawfulness of STELLAR WIND, and which the government disclosed to Plaintiffs with few redactions.[9] *Compare* OLC

[9] In OLC 9, Yoo analyzed whether STELLAR WIND's warrantless electronic surveillance for national security purposes would violate EO 12333, which limits the ability of

8 (JA 262), *with* OLC 9 (JA 393). Indeed, given the similarities between the heavily redacted OLC 8 and mostly unredacted OLC 9—as discussed in greater detail below—it is clear that OLC 8 contains pure legal analysis and that the government improperly withheld this analysis under Exemptions 1 and 3.

2. The Government Improperly Withheld Pure Legal Analysis in the Approval Packages.

Given the nature of the approval packages and Defendants' description of them, their withholdings of the packages in full are almost certainly inappropriate. Because each approval package includes a legal memo concerning surveillance activities, it is highly likely that the packages contain legal analysis that is segregable from properly exempt material. Moreover, the legal memoranda within the packages are quite lengthy, making it even more probable that they contain pure legal analysis devoid of operation details. The memo in NSD 13, for example, spans 46 pages. *See* JA 486–87. In light of the length of these legal memos, it is neither "logical" nor "plausible" to assert that withholding them in full is necessary to "protect[] our intelligence sources and methods from foreign discovery." *N.Y. Times I*, 756 F.3d at 119.

The district court erred in concluding otherwise. Rather than require the government to disclose legal analysis that is not inextricably intertwined with

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the NSA and other intelligence agencies to use electronic surveillance within the United States or directed against U.S. persons. *See* JA 395–97.

exempt material, the court essentially concluded that no such category exists. *See* SPA 54. Although the court did not review any of the approval packages *in camera*, it nevertheless held that "case citations and quotations standing in a vacuum would be meaningless," and that "[i]f sufficient context was disclosed to make the non-exempt material meaningful, the circumstances warranting the classification of the document would be revealed." *Id.* (citation omitted). However, as this Court recognized in *N.Y. Times I*, legal analysis is not an intelligence source or method, and it is only sometimes intertwined with properly classified facts. 756 F.3d at 119–20. Rather than make "specific findings of segregability," *Sussman*, 494 F.3d at 1116, the district court erred in simply accepting the government's blanket classification of the legal memoranda within the approval packages. *See* SPA 54, 56–57.

IV. THE GOVERNMENT'S OFFICIAL ACKNOWLEDGMENTS DEFEAT EXEMPTIONS 1 AND 3, AND WAIVE ITS RIGHT TO WITHHOLD RECORDS UNDER EXEMPTION 5.

Under the well-established "official acknowledgment" doctrine, the government cannot withhold information that it has already disclosed to the public. *N.Y. Times I*, 756 F.3d at 114, 119–20; *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) ("[T]he CIA cannot prevent a former employee from publishing even properly classified information once the Agency itself has officially disclosed it."); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("[W]hen information has been

'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." (internal citation omitted)).

Even if the information that agencies seek to withhold was once protected by Exemptions 1 and 3, the agencies may not withhold it unless it differs materially from information that the government has already revealed. *N.Y. Times I*, 756 F.3d at 120 (explaining that the official acknowledgment doctrine does not "require absolute identity" between the withheld and disclosed information to overcome claimed exemptions); *Afshar v. Dep't of State*, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (once the government has chosen to disclose information, it may not withhold closely related information unless it is "in some *material* respect different from" information it has already disclosed (emphasis added)).

This Court's precedent is clear that the government's official acknowledgments overcome Exemption 5 privileges as well. In the proceedings below, the government attempted to insulate its Exemption 5 withholdings from disclosure by arguing that the court should engage in a separate "waiver" analysis rather than an "official acknowledgment" analysis—and by urging the court to take an unduly narrow view of the scope of the waiver doctrine. *See* Gov. Opp. 42–47, ECF No. 75. But regardless of whether the Court characterizes its analysis as involving "waiver" or "official acknowledgment," the result is the same: the government failed to meet its burden to show that it has not waived confidentiality

over the withheld portions of the STELLAR WIND memoranda. This conclusion follows directly from the Second Circuit's opinion in *N.Y. Times I*. In that case, the Court held that an OLC memorandum on targeted killing could not be withheld under Exemption 5 because a series of official acknowledgments by senior government officials, as well as the government's release of a DOJ white paper, resulted in the "waiver of secrecy and privilege as to the legal analysis" in the OLC memorandum. 756 F.3d at 114–17.

The government is almost certainly withholding information in OLC 8 that it has officially acknowledged elsewhere. As discussed *supra*, it is clear that the withheld portions of OLC 8 contain legal analysis that the government disclosed in the DOJ Report. *Compare, e.g.*, OLC 8 at 7 (JA 264) ("FISA only provides a safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security."), *with* DOJ Report at 34 (JA 441) ("Yoo characterized FISA as merely providing a 'safe harbor for electronic surveillance,' adding that it 'cannot restrict the President's ability to engage in warrantless searches that protect the national security.'"); *see generally id.* at 33–38 (JA 440–45) (describing the legal arguments in Yoo's memorandum).

Moreover, as discussed *supra*, the subject matter, text, and length of OLC 8 all correspond to that of OLC 9. Notably, the eight lines of text that the

government released from OLC 8 are identical to text in OLC 9. *Compare, e.g.*, OLC 8 at 7 (JA 264) ("FISA only provides a safe harbor for electronic surveillance, and cannot restrict the President's ability to engage in warrantless searches that protect the national security."), *with* OLC 9 at 5 (JA 397) (same).

Because the DOJ Report and OLC 9 are official acknowledgments of Yoo's legal analysis of STELLAR WIND—including Yoo's determination that the executive branch can engage in warrantless electronic surveillance within the United States, notwithstanding EO 12333 and statutory prohibitions—the government must disclose any closely related material, such as the analysis in OLC 8. *See N.Y. Times I*, 756 F.3d at 120.

Similarly, the government is almost certainly withholding information from OLC 10 that it has officially acknowledged in the DOJ Report and other portions of the Joint IG Report. Indeed, OLC's declaration concedes that it is "possible" that material officially disclosed in the Joint IG Report appears in portions of OLC 10 that were redacted. JA 254–55. In fact, it is a virtual certainty that the Joint IG Report discloses information that is withheld in OLC 10. For example, in OLC 10, the government withholds Goldsmith's description of March 2004 modifications to the STELLAR WIND program. *See* JA 284–89. But the Joint IG Report provides detailed information about these modifications, which concerned both the

President's own legal authority and the NSA's legal authority for its operations under the program. *See* DOJ Report at 44–46.

In sum, given the government's disclosures of OLC 9 and the Joint IG Report, it is plain that it is improperly withholding non-exempt information from OLC 8 and 10.

V. THIS COURT SHOULD REVIEW THE EIGHT DOCUMENTS *IN CAMERA*.

For the reasons explained above, Plaintiffs respectfully ask the Court to hold that Defendants failed to establish the exemptions they assert over the STELLAR WIND memoranda and surveillance approval packages; to order the re-processing of the documents; and to order the release of any information not properly subject to Exemptions 1 and 3. In the alternative, Plaintiffs request that the Court conduct an *in camera* review of the documents (or a representative sample) to assess the government's claimed exemptions.

FOIA grants judges broad discretion to "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions." 5 U.S.C. § 552(a)(4)(B). Courts "often . . . examine the document *in camera*" "in an effort to compensate" for the informational imbalances inherent in FOIA litigation. *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973). In cases such as this one that "involve a strong public interest in disclosure," there is "a greater call for in camera inspection." *Allen v.*

CIA, 636 F.2d 1287, 1299 (D.C. Cir. 1980), *overruled on other grounds*, *Founding Church of Scientology of D.C. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983).

It is a standard practice for this Court to review contested documents in a FOIA dispute *in camera*. *See Grand Cent. P'ship*, 166 F.3d at 478 n.2 ("[I]t is the well settled practice of this Court to conduct *in camera* review of contested documents in a FOIA dispute."); *see also, e.g.*, *Tigue*, 312 F.3d at 82 (conducting *in camera* review of contested documents in a FOIA case). Finally, *in camera* review is particularly appropriate where, as here, "the number of records involved is relatively small," *ACLU v. DOJ*, No. 12-cv-7412 (WHP), 2014 WL 956303 (S.D.N.Y. Mar. 11, 2014), and "agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims." *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment.

Dated: February 2, 2018

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 10,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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.

Dated: February 2, 2018

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CERTIFICATE OF SERVICE

On February 2, 2018, I filed and served the foregoing BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system.

Dated: February 2, 2018

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