14-4432-cv(L), 14-4764-cv(CON)

United States Court of Appeals

for the

Second Circuit

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, SCOTT SHANE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellants,

– v. –

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, Including its component U.S. Special Operations Command, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees.

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

BRIEF FOR PLAINTIFFS-APPELLANTS AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

As required by Rule 26.1, Appellants state that the American Civil Liberties Union and the American Civil Liberties Union Foundation are affiliated non-profit membership corporations. Accordingly, they have no stock and no parent corporations, nor does any corporation own more than 10% of their stock.

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JURISDICTIONAL STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") brought claims under the Freedom of Information Act ("FOIA"). The district court had subject matter and personal jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706. The court (McMahon, J.) originally granted summary judgment to the government in a decision dated January 3, 2013, with a Judgment filed on January 24, 2013. The ACLU appealed to this Court, which had jurisdiction under 28 U.S.C. § 1291. This Court affirmed in part, reversed in part, and remanded to the district court in a revised opinion dated June 23, 2014. An order entering partial summary judgment and a partial mandate issued June 26, 2014 as to paragraph 3 of the "Conclusion" section of this Court's revised opinion. A second mandate was issued August 18, 2014.

On remand, the district court granted in part and denied in part summary judgment to defendant Department of Justice, and granted in part and denied in part partial summary judgment to the ACLU, in a decision dated October 31, 2014. The district court entered final judgment as to certain of the ACLU's claims under Federal Rule of Civil Procedure 54(b), finding that there was no just reason for delaying this appeal. Special Appendix ("SPA") 197. The ACLU filed a timely notice of appeal on December 24, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented in this appeal are:

1. Did the district court err in holding that defendant Department of Justice had not waived its right to withhold legal analysis and certain factual information contained in certain Office of Legal Counsel memoranda relating to the targeted-killing program?

2. Did the district court err in affirming the Department of Justice's withholding of certain Office of Legal Counsel memoranda under Exemptions 1, 3, and 5?

3. Did the district court err in sealing portions of its opinion without demonstrating that the sealing was narrowly tailored and necessary to advance a compelling government interest and without making findings on the record?

STATEMENT OF THE CASE

This litigation concerns a Freedom of Information Act request (the "Request") filed by the ACLU for records relating to the government's targeted-killing program and to the killing, in the fall of 2011, of three United States citizens—Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi. The Request seeks records concerning the purported legal basis for the program, the process by which the government adds U.S. citizens to so-called "kill lists," and the government's legal and factual basis for the killing of those three U.S. citizens. Plaintiffs filed the Request on October 19, 2011 with the Central Intelligence Agency ("CIA"), the Department of Defense ("DOD"), and the Department of Justice ("DOJ")—including with DOJ's Office of Information Policy ("OIP") and Office of Legal Counsel ("OLC").

OLC initially provided a "*Glomar*" response, *see generally Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), refusing to confirm or deny that it possessed responsive records.[1] JA318.[2] After Plaintiffs filed suit, however, OLC substituted

[1] This appeal concerns only the OLC's responses to the Request, and accordingly the procedural history provided here omits developments relating to the DOD and CIA except insofar as those developments are relevant to the lawfulness of OLC's responses.

[2] On January 7, 2015, the ACLU moved this Court, pursuant to Fed. R. App. P. 3(b)(2), to consolidate this appeal with the appeal of The New York Times, Docket No. 14-4432. *See* Dkt. No. 26. The New York Times and the government consented to the ACLU's motion. On February 3, 2015, pursuant to Fed. R. App. P. 30(c) and Local Rule 30.1, the ACLU and the government stipulated to delay

a "no-number no-list" response for its *Glomar* response, acknowledging that it possessed responsive records but contending that FOIA's exemptions excused it from having to enumerate or describe them. Notwithstanding its no-number no-list response, OLC acknowledged the existence of a classified legal opinion "pertaining to the Department of Defense" ("July 2010 OLC Memo") which it withheld in its entirety under Exemptions 1, 3, and 5. JA289; *see also* JA291, 294.[3]

The ACLU challenged the lawfulness of OLC's no-number no-list response, and its withholding of legal memoranda, on the grounds that the government had "officially acknowledged" much of the information it was seeking to withhold, and that in any event at least some of the information the government was seeking to withhold was not covered by any FOIA exemption. After considering the parties' cross-motions for summary judgment, however, the district court entered judgment for the defendants. *N.Y. Times v. Dep't of Justice*, 915 F. Supp. 2d 508, 553 (S.D.N.Y. 2013), SPA1-68, 68. As relevant here, it held that the government's public statements about the program did not preclude OLC from providing a no-

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the filing of the ACLU's appendix. *See* Dkt. No. 56. On February 3, 2015, the date this brief is being submitted, the Court granted the ACLU's motion for consolidation. See Dkt. No. 58. All appendix citations in this brief refer to joint and special appendices filed by The New York Times.

[3] In addition, OLC provided a *Vaughn* index listing sixty non-classified emails. JA290-91, 324-33. The ACLU is not seeking disclosure of those emails. Pls' Mem. In Support/Opp'n at 48 n.44. Dist. Ct. Dkt. 35.

number no-list response, and that the information OLC sought to protect in the July 2010 OLC Memo fell within the scope of FOIA's exemptions. The court specifically rejected the government's argument that legal analysis could be withheld as a source or method under Exemption 3, SPA45-46, but it held that such analysis could be withheld under Exemption 1 "if it pertain[ed] to matters that are themselves properly classified." SPA37.

This Court affirmed in part, reversed in part, and remanded. *N.Y. Times v. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014), SPA79-144. The Court held that by making numerous public statements about the program, the government had waived its right to provide a no-number no-list response to the Request and waived its right to categorically withhold the July 2010 OLC Memo. Because it concluded that portions of that memorandum "no longer merit[ed] secrecy," SPA124, the Court published a redacted version of it with its opinion. 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," SPA143, and ordered OLC to make publicly available a redacted version of the *Vaughn* index it had previously submitted *ex parte*.[4]

[4] 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* indexes to the district court "for *in camera* inspection and determination of appropriate disclosure and appropriate redaction." SPA143.

On remand, the district court directed OLC to submit responsive legal memoranda for *in camera* review and to submit classified declarations explaining why "there has been no waiver of any applicable privilege." June 30, 2014 Order, Dist. Ct. Dkt. 67. In separate letters, both parties responded to this order. By letter dated July 7, the government requested that the court allow it to file a summary judgment motion addressing not only the waiver issue but the application of FOIA's exemptions to the withheld memoranda. Dist. Ct. Dkt. 68. Stating that "the government ha[d] not yet had an opportunity to demonstrate the applicability of FOIA's exemptions to each of the documents at issue," the government argued that it would be "both legally appropriate and in the interests of efficiency and judicial economy to decide all issues relating to the OLC memoranda at one time, in the context of a summary judgment motion." *Id.* In a letter submitted the following day, Plaintiffs urged the court to conduct its waiver analysis before considering the application of exemptions. Dist. Ct. Dkt. 69. They argued that the court's decisions as to waiver would determine which exemption-related issues remained to be resolved. *Id.*

On July 9, the district court issued an order stating that it would not accept summary judgment briefing before conducting its waiver review. The court wrote:

These records are subject to pending cross-motions for summary judgment before the district court and are not at issue in this appeal.

> The Court of Appeals has directed this court to decide whether the Government has waived the right to assert any privileges–not decide whether privileges are applicable. This court will not be entertaining arguments about the applicability of FOIA exemptions to the legal memoranda that the government must produce before complying with the mandate.

Dist. Ct. Dkt. 71. In compliance with the court's order, the OLC submitted a set of legal memoranda for *in camera* review, together with a classified memorandum and declarations.[5]

On September 30, the court provided its opinion to the government for classification review, and on October 31 the court filed a version of its opinion on the public docket. The public version of the opinion is so heavily redacted that Plaintiffs cannot say with certainty why the court reached the conclusions it did. However, the court upheld OLC's withholding of at least eight memoranda in their entirety, finding that nothing in those memos "match[ed]" information that had already been disclosed. SPA193-94 (citing *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009)). In addition, the court upheld the redactions that OLC had made in a version of an OLC memorandum dated February 19, 2010 that the government had

[5] It is not entirely clear to Plaintiffs how many memos the OLC submitted to the court for in camera review. *See* SPA179 ("The court has been provided with a total of ten legal memoranda prepared by attorneys in OLC."); SPA183 (stating that one memo is simply a redacted version of another); SPA195 (stating that the OLC submitted twelve exhibits, one of which was a previously released White Paper that the OLC had provided to allow the court "make a record addressing a question asked by the Second Circuit about the [White Paper's] discretionary release").

provided to the ACLU several weeks earlier. SPA183.[6] The court stated, without elaboration, that "[n]o privilege has been waived as to the factual intelligence information or the strategic analysis" relating to the operation that killed Anwar al-Aulaqi. SPA181. Although the parties had not had an opportunity to brief the application of FOIA's exemptions to the withheld memoranda, the court also stated that "[t]he reader should assume that I have considered all three possible exemptions in making the determinations" set out in the opinion. SPA179.

Plaintiffs moved for reconsideration of the court's ruling insofar as the ruling was predicated on a determination that the ACLU had waived its right to seek release of information relating to the factual basis for the government's targeting of Anwar al-Aulaqi; that the government's withholding of this information was lawful; or that this Court had resolved the question of whether the withholding of this information was lawful. Dist. Ct. Dkt. 96 at 1-2. The court denied the motion, stating:

> The only thing I really need to note before this aspect of the case is handed off to the Second Circuit is that I read the Second Circuit's decision in the same way the Government does—that is, the Court of Appeals has concluded that the Government has waived FOIA

[6] The district court submitted its Remand Opinion to the government for classification review on September 30, 2014, and filed a heavily redacted version of the opinion on the public docket on October 31, 2014. Although the district court stated that it disagreed with certain of the government's redactions, the publicly docketed opinion included all of the redactions that the government had requested. SPA176-177.

> exemptions only to the extent of legal analysis. If I misunderstand the Court of Appeals, I am sure the panel will correct me.

SPA199.

SUMMARY OF ARGUMENT

The question posed by this case is to what extent the government can keep secret the law relating to the government's extrajudicial killing of American terrorism suspects. Seven months ago, this Court rejected the government's categorical withholding of the July 2010 OLC Memorandum, which addressed the scope and limits of the government's authority to carry out "targeted killings" of Americans overseas. This appeal concerns the government's withholding of other memoranda relating to the same topic—memoranda that are crucial to an ongoing public debate about one of the most controversial of the government's national security policies. The district court erred in holding that the government's withholding of these memoranda was justified.

First, the district court misapplied the "official acknowledgement" doctrine. As this Court has already observed, SPA105-106, senior officials, including the Attorney General, the CIA Director, and the President himself, have discussed the government's purported legal authority in numerous public statements. They have also defended and disclosed information about their decision to authorize the extrajudicial killing of Anwar al-Aulaqi, an American citizen, in September 2011. Having chosen to "officially acknowledge" this information, the government

cannot lawfully claim that disclosure of the same information, or closely related information, would compromise national security. The district court appears to have concluded, despite this Court's cautionary language, SPA132 n.20, that the government's waiver extends only to the precise information it has already disclosed. But this misunderstands the relevant case law. Once the government has disclosed particular information, the official acknowledgement doctrine requires it to disclose information that is closely related unless there is a *material* difference between that information and the information that the government has already revealed. Indeed, any other rule would have the effect of licensing the kind of selective and misleading disclosures Congress specifically intended FOIA to prevent.

The district court also erred in concluding that this Court had foreclosed any inquiry into the question of whether the government had waived its right to withhold portions of the memoranda that discuss the government's reasons for targeting Anwar al-Aulaqi. This question was not presented to this Court in the earlier appeal, and the Court did not decide it.

Second, even if the district court correctly decided the waiver issue, it erred in concluding that the legal analysis in the withheld memoranda is protected by Exemptions 1, 3, and 5. Legal analysis can be withheld under Exemptions 1 and 3 only to the extent it is inextricably intertwined with information that is

independently protected. The district court plainly did not apply this rule; indeed, it appears not to have considered the issue at all. Nor does Exemption 5 provide a basis for withholding the OLC memoranda. Collectively, the withheld memoranda constitute the government's "effective law and policy" relating to the targeted-killing program, because they set out the government's view of the circumstances in which Americans can lawfully be killed by their own government. Neither the attorney-client privilege nor the deliberative-process privilege can justify the government's refusal to disclose its working law.[7]

The ACLU respectfully submits that this Court should review the withheld memoranda *in camera* to determine which portions of them FOIA requires the government to release.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment in FOIA litigation *de novo*. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999); *accord* 5 U.S.C. § 552(a)(4)(B); *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) ("Our task is the same as the task of the district court—reviewing *de novo* the record to determine . . . whether the agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under

[7] The district court also erred in redacting its opinion without making any specific, on-the-record finding that the redactions were narrowly tailored to a compelling government interest. The ACLU adopts the argument of The New York Times with respect to this issue. *See* New York Times Brief, Section III.

FOIA.").

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) (citation omitted). Accordingly, the courts enforce a "strong presumption in favor of disclosure." *Associated Press v. Dep't of Defense*, 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*, 131 S.Ct. 1259, 1265 (2011) (internal citations omitted). Moreover, "the government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged.'" *Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (citing *Afshar v. Dep't of State*, 702 F.2d 1125, 1130-34 (D.C. Cir. 1983)). With the exception of information "inextricably intertwined" with properly withheld material, "[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); *see Inner City*

Press/Cmty. on the Move v. Board of Governors of the Fed. Reserve Sys., 463 F.3d 239, 245 n.10 (2d Cir. 2006) (citing *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 260-61 (D.C. Cir. 1977)).

To ensure that federal judges are able to effectively address agencies' improper withholdings in the national security context, Congress overrode both a Supreme Court decision and a presidential veto to empower federal judges to review national security withholdings *de novo*. *Ray v. Turner*, 587 F.2d 1187, 1190-91 (D.C. Cir. 1978). Congressional lawmakers, in authorizing *de novo* review, "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Id.* at 1194.

I. The district court erred in upholding OLC's withholding of legal memoranda because some parts of the memoranda have been officially acknowledged.

A. The district court erred in requiring Plaintiffs to show a precise "match" between the withheld information and information already disclosed.

Although the public version of the district court's opinion is heavily redacted, the unredacted portions of the opinion make clear that the district court misapplied the "official-acknowledgement" doctrine. The district court's analysis appears to have been predicated on the view that the government waives its right to

withhold information under one of FOIA's exemptions only where there is a precise match between information the government seeks to withhold and information already disclosed on the public record. But this view of the official-acknowledgement doctrine is misguided, and this Court has already suggested as much. SPA132 n. 20 ("a rigid application of [*Wilson*] may not be warranted in view of its questionable provenance"); SPA132 ("[W]e do not understand the 'matching aspect of *Wilson* to require absolute identity.'"). To trigger the official-acknowledgement doctrine, it is enough that the information is *closely related* to the information already disclosed. Once the government has chosen to disclose information, it cannot withhold other information unless it is different in some *material* respect from the information it has already released.

The district court's view that the official-acknowledgement doctrine requires a precise match between the information sought to be withheld and the information already disclosed appears to have been based on the language of *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009). In that case, the Court stated, citing D.C. Circuit decisions, that the official-acknowledgement doctrine applies only 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." *Id.* at 186 (quoting *Wolf v. CIA*,

473 F.3d 370, 378 (D.C. Cir. 2007)).[8] But this Court in *Wilson* did not actually apply the "matching" requirement. Rather, *Wilson* (which was not a FOIA case but a suit in which the plaintiff asserted a First Amendment right to publish portions of her memoir) concluded only that the CIA had not officially acknowledged plaintiff's prior service with the agency by referencing that service in a letter sent to plaintiff privately and later published, without the consent of the agency, in the congressional record. *Id.* at 187-189. The Court's analysis focused overwhelmingly on the last prong of the three-prong test cited in *Wolf*, that is, on whether the CIA's private letter to plaintiff constituted an official disclosure by the agency. It mentioned the specificity and matching prongs only in passing.

This Court's earlier "official acknowledgement" cases did not cite the three-prong test or the "matching" requirement at all, instead stating more generally that the government could not lawfully withhold information that it had officially acknowledged. Nor did the facts of those cases require this Court to consider the degree of specificity necessary to waive the government's withholding of information. In *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421-22 (2d Cir. 1989), which this Court cited in *Wilson*, the Court concluded only that Navy officials' statements concerning certain ships' *capability* to carry

[8] *Wolf* quoted the test directly from *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); and *Fitzgibbon* purported to derive the test from *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir.1983).

nuclear weapons did not officially acknowledge the distinct proposition that the Navy intended to *deploy* nuclear weapons on ships in New York Harbor. The case turned on the fact that the disclosure of the withheld information would have the effect of disclosing properly classified information that had not previously been disclosed. *Id.*

Nor did *Afshar v. Dep't of State*, 702 F.2d 1125, 1131-33 (D.C. Cir. 1983), the case from which *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) and *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) derived the three-part test, suggest that the application of the official-acknowledgement doctrine should be limited to circumstances in which the information sought matched precisely the information already disclosed. 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. Plaintiff challenged certain of the government's redactions and deletions from responsive documents on the basis that this information had already been made public in a book published by a former CIA official. *Id.* at 1131-1133. The D.C. Circuit framed its inquiry as whether the withheld material was "in some material respect different from" information that had been previously disclosed by the government. *Id.* at 1132. As this Court observed in its earlier decision in this litigation,

> *Afshar* rejected the claim of official disclosure for three reasons: (1) none of the books revealed a continuing relationship between CIA and [the Iranian intelligence agency] after 1963, the date of the earliest withheld document; (2) the books provided only a general outline of such a relationship; and (3) none of the books was an official and documented disclosure.

SPA132 n.20 (citing *Afshar*, 702 F.2d at 1131-33).

Thus, the "matching" requirement has a weak foundation in the case law, and, while this Court has cited the requirement on a handful of occasions, it has never applied it rigidly. There is good reason for this. As this Court has observed, an "absolute identity . . . requirement would make little sense [because a] FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed." SPA132.

Moreover, requiring a precise match between the information sought and the information already disclosed would undermine the interests that FOIA was meant to protect. It bears emphasis that when Congress enacted FOIA in 1966, it was concerned not only about government secrecy but about selective disclosure as well. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974) ("*FOIA Source Book.*") ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly

clear."). Requiring "absolute identity" between the information sought and the information already disclosed would enable rather than prevent selective disclosure. It would permit the government to reveal cherry-picked facts—presumably ones that cast its conduct in the most favorable light—while at the same time suppressing the facts that might fuel public skepticism.

The government's disclosures relating to the targeted-killing program raise precisely this concern. For several years now, government officials have been engaged in a public relations campaign meant to assure the public that the program is effective, lawful, and necessary. *See ACLU v. CIA*, 710 F.3d 422, 429-431 (D.C. Cir. 2013) (describing extensive official statements regarding the targeted killing program). They have said that the program is tightly supervised, and they have dismissed or minimized concerns about civilian casualties. When many Americans questioned whether the government's killing of three American citizens was justified, government officials disclosed facts and legal analysis meant to convey that the killings were lawful. FOIA was meant to be an answer to exactly these kinds of strategic disclosures. It was meant to rein in the practice of selective disclosure and ensure that the American public would have the information it needed to evaluate the government's policies and practices for itself. An "absolute identity" requirement would prevent FOIA from serving this purpose. Indeed, it would render the statute impotent in contexts in which the statute is especially

important. The public's interest in disclosure of legal analysis would be especially great if the legal rationales the government had offered publicly for its actions did not precisely match the legal rationales in the records still withheld.[9]

Accordingly, neither the case law nor the interests underlying FOIA weigh in favor of an "absolute identity" requirement. The better reading of the case law, and the one more consistent with FOIA's underlying purpose, is that once the government has chosen to disclose information, it may not withhold information that is closely related unless that information is "in some *material* respect different from" the information it has already disclosed. *Afshar*, 702 F.2d at 1132 (emphasis added). Disclosure of information that is not materially different from already-disclosed information "adds nothing to the risk," even if there is not "absolute identity." SPA132. This is the rule that this Circuit cited in pre-*Wilson* cases; it is

[9] The concern that agencies will engage in selective disclosure in order to manipulate public opinion and debate is not, unfortunately, fantastical. 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 Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* ("SSCI Report"), (December 13, 2014), http://www.intelligence.senate.gov/study2014.html. Some CIA personnel were troubled by the inconsistency between the agency's contemplated disclosures about the 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* fig leaf 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 rule that the D.C. Circuit cited in *Afshar*; and it is the rule that this Circuit actually applied in *Wilson*.

This is also the rule that this Court has already applied in this case. For example, this Court concluded that the government had waived its right to withhold portions of the July 2010 OLC Memo discussing 18 U.S.C. § 956(a), even though the government's analysis of this statute in the context of targeted killing had not been disclosed publicly. *See, e.g.*, SPA120 ("[e]ven though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLC-DOD Memorandum considers, the substantial overlap in the legal analysis in the two documents fully establishes that the government may no longer validly claim that legal analysis in the Memorandum is a secret."); SPA133 (finding that because the government had already disclosed the legal framework for the program, any discussion of 18 U.S.C. § 956(a) in the OLC-DOD Memorandum added nothing to the risk). This Court's analysis was sound, and the government did not challenge it. Although the portions of the July 2010 OLC Memo addressing section 956(a) did not precisely match analysis that had already been disclosed, the analysis of section 956(a) was not materially different because its disclosure would not (and did not) disclose any properly classified information that had not already been revealed.

The court below did not apply this rule. The unredacted portions of the

court's opinion suggest that the court applied the three-part test rigidly, and that it effectively required "absolute identity" between the information sought and the information already disclosed. *See, e.g.*, SPA193-94; SPA189 (querying whether information in Exhibits B and K was "as specific as" and "matches" information in publically disclosed sources). Indeed, the district court's affirmance of the agency's withholdings confirms that the court applied the official-acknowledgement test too rigidly. Given the extent of the government's disclosures concerning the legal framework of the targeted killing program, it is simply inconceivable that eight of the memos are still properly withheld in their entirety—and that all of the redactions in a ninth memo are lawful as well. Perhaps the still withheld legal memos include legal analysis that does not precisely match the legal analysis that has already been disclosed. But unless the still-withheld legal analysis is *materially* different—that is, unless its disclosure would have the effect of disclosing properly classified information that has not yet been revealed—the analysis should be regarded to have been officially acknowledged.

Plaintiffs respectfully submit that this Court should review the memos *in camera* to determine which aspects of the memos have been officially acknowledged. In the alternative, the court should review a subset of the memos for this purpose and direct the district court to review the remainder of the memos.

Plaintiffs submit that in either case the Court should provide direction to the district court about the proper application of the official-acknowledgement doctrine.

B. The district court erred in concluding that this Court had rejected the argument that the government had officially acknowledged factual information.

The district court declined to consider whether the government had waived its right to withhold factual information concerning the reasons the government had targeted Anwar al-Aulaqi, stating that this Court had concluded that the government had "waived FOIA exemptions *only* to the extent of legal analysis." SPA199 (emphasis in original). The district court was incorrect. Plaintiffs do not understand this Court to have decided that the factual information in the withheld OLC memos was properly withheld. The previous appeal simply did not present this question.

This Court's previous decision addressed only one OLC memo, because at that juncture in the litigation the government had issued a no-number no-list response with respect to the remainder of the memos. Even as to the one memo the Court addressed—that is, even as to the July 2010 OLC Memo—the Court focused almost entirely on the question of whether and to what extent the government had already disclosed the legal analysis it was seeking to withhold. The Court held that the government had acknowledged the fact that the CIA had played a role in the

strike that killed Anwar al-Aulaqi in Yemen, SPA125-126, but it did not purport to conduct a more comprehensive analysis relating to the waiver of factual information. It would not have made sense to do this with respect to the July 2010 OLC Memo, because it was not until this Court issued its ruling in April 2014 that the ACLU first learned that one section of the July 2010 OLC-DOD Memo addressed the factual basis for the targeting of Anwar al-Aulaqi. And it would not even have been *possible* for the Court to conduct a waiver analysis with respect to the *other* withheld OLC memos because, at that juncture in the case, the OLC had not acknowledged those memos' existence. With respect to these other memos, the Court's analysis was focused on whether OLC's no-number no-list response was justified.

The district court erred in concluding that this Court had already decided an issue that had never been presented to it. Plaintiffs understand this Court's previous decision to have contemplated that the district court would examine all of the withheld OLC memos to assess the extent to which they contained information—legal analysis *or* factual information—that the government had already acknowledged. SPA134 n.21; SPA143. Plaintiffs had already submitted to the district court a list of factual information that they believed the government to have disclosed, and they anticipated that on remand the district court would provide them an opportunity to supplement this list. Instead, the district court

denied the ACLU an opportunity to brief the issue and deemed the issue to have been decided already by this Court. This was error, and it was a consequential one. There can be no question that the government has officially acknowledged at least *some* factual information relating to al-Aulaqi's killing. Indeed, President Obama himself did so on the day after al-Aulaqi was killed:

> The death of Awlaki is a major blow to al Qaeda's most active operational affiliate. Awlaki was the leader of external operations for al Qaeda in the Arabian Peninsula. In that role, he took the lead in planning and directing efforts to murder innocent Americans. He directed the failed attempt to blow up an airplane on Christmas Day in 2009. He directed the failed attempt to blow up U.S. cargo planes in 2010. And he repeatedly called on individuals in the United States and around the globe to kill innocent men, women and children to advance a murderous agenda.[10]

JA139. Attorney General Holder's May 22, 2013 letter to Congress repeats these allegations.[11] Plaintiffs will not burden the Court with a comprehensive log of the government's repeated disclosures, over several years, about the nature of the threat that al-Aulaqi was said to present and the reasons why the government believed itself to be justified in carrying out his extrajudicial killing, but they

[10] The district court's first summary judgment opinion cited this statement, SPA11, but it erroneously excluded official-disclosures of factual information from the scope of its review on remand.

[11] Letter from Eric H. Holder, Jr., Attorney General, to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013), http://www.justice.gov/ag/AG-letter-5-22-13.pdf.

respectfully refer the Court to Table 1, which indicates what information the government has disclosed and in which contexts.[12]

II. OLC has not justified its withholdings under Exemptions 1, 3, and/or 5.

A. Neither Exemption 1 nor Exemption 3 permits the government to withhold legal analysis describing the legal justification for killing American citizens.

Even if the district court was correct that the government has not waived its right to withhold the legal analysis in the OLC memos, the court erred in holding that this legal analysis was protected by Exemptions 1 and 3.

As this Court has already recognized, and as the district court recognized in its pre-remand opinion, "legal analysis is not an 'intelligence source or method.'" SPA130 (quoting SPA45). This does not mean that legal analysis can never be withheld under Exemptions 1 and 3, but, as this Court has indicated, it can be withheld only if its disclosure would have the effect of disclosing information that is independently protected. SPA130 ("We . . . recognize that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts."). Legal analysis could be withheld, for example, if disclosing "the very fact that legal

[12] To be clear, Plaintiffs do not take issue with the district court's observation that the government has not disclosed "operational details" relating to the strike that killed Anwar al-Aulaqi. SPA38-39. There is an important difference, however, between operational details (*e.g.*, details relating to the technology used, the tactics employed, etc.), and the reasons why the government concluded that al-Aulaqi was a lawful target. Plaintiffs do not seek the former; they seek only the latter.

analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation." SPA130.[13]

The district court appears to have applied a different rule, if it applied one at all. The court does not appear to have considered whether analysis in the OLC memos could be segregated from information that was independently protected. The unredacted portions of its remand opinion focus on the issue of waiver. The only sentence that addresses the government's invocation of exemptions 1 and 3 is an entirely conclusory one: "The reader should assume that I have considered all three possible exemptions [exemptions 1, 3, and 5] in making the determinations outlined below." SPA179.

The question the district court should have addressed, but apparently did not, is whether any of the legal analysis in the withheld OLC memos could be disentangled from information that was independently protected. There is every reason to believe that it could be. In its review of the July 2010 OLC Memo, this Court carefully disentangled "pure legal analysis" from information that was

[13] The parties are in agreement that legal analysis cannot be withheld under Exemptions 1 and 3 in its own right, but that it can be withheld when it is inextricably intertwined with "sources or methods" or with information that falls within one of the other categories set out in Section 1.4 of Executive Order 13,526. *See, e,g.*, OLC Reply, Dist. Ct. Dkt. 105, at 7-8 (contending that legal analysis can be withheld under Exemptions 1 and 3 when its disclosure would reveal classified or statutorily privileged information); CIA & DOD Reply, Dist. Ct. Dkt. 113, at 5-6 (same); ACLU Reply to OLC, Dist. Ct. Dkt. 112, at 4 ("The ACLU does not take issue with the [government's] statement of the law").

independently protected. SPA131. Government officials did essentially the same thing when they drafted the November 2011 White Paper, spoke publicly about the legal framework governing the targeted-killing program, and issued statements and letters about it. *See, e.g.* Letter from Attorney General Eric H. Holder, to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013);[14] JA447-450 (Speech by Attorney General Eric Holder at Northwestern School of Law (March 5, 2012)); JA113-126 (Remarks of Harold H. Koh to the American Society of International Law (March 25, 2010)). When this Court remanded this case to the district court in June, it expressly contemplated that the district court might order the government to release redacted versions of the withheld memos. SPA143. There is every reason to believe that at least some of the legal analysis in the withheld memos could be segregated from information that is independently protected.

The district court erred in failing to conduct a segregability analysis. *Cf. Hopkins v. Dep't of Housing and Urban Dev.*, 929 F.2d 81, 85–86 (2d Cir. 1991) (vacating order where there was "nothing in the district court's opinion suggest[ing] that it ever considered" whether privileged data was segregable). In the context presented here, this error was especially significant. As discussed at

[14] Available at http://www.justice.gov/sites/default/files/ag/legacy/2013/05/28/AG-letter-5-22-13.pdf.

greater length below, *see* Section II. B *infra*, one of FOIA's core purposes was to end the phenomenon of "secret law." The district court's failure to consider segregability deprived the public of precisely the kind of information that FOIA's drafters were most concerned with. Moreover, this Court has already recognized the extraordinary public interest in the memos the OLC is withholding here, and the extraordinary public significance of the issues the memos address. SPA82 ("The issues assume added importance because the information sought concerns targeted killings of United States citizens carried out by drone aircraft"); *see also* SPA3 ("The Alice-in-Wonderland nature" of a ruling "… effectively allowed the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret"). Against this background, the district court should have considered segregability especially carefully.

Plaintiffs respectfully suggest that this Court should review the withheld memos to determine the extent to which legal analysis can be segregated from information that is independently protected. In the alternative, the Court should instruct the district court to conduct that analysis.

B. The memoranda are not protected from disclosure by Exemption 5 because they constitute the government's working law.

The district court also erred in holding that the withheld memoranda are protected by Exemption 5. Even assuming that Exemption 5 would otherwise

protect these documents—i.e., even assuming that the documents are subject to the attorney-client or deliberative-process privilege—FOIA does not permit the government to withhold "working law."[15]

If an agency's document has become its "effective law and policy," it will be subject to disclosure as the "working law" of that agency. *Brennan Ctr. v. Dep't of Justice*, 697 F.3d 184, 199 (2d Cir. 2012) (citing *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153 (1975)); *Coastal State Gas Co. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). FOIA's affirmative disclosure provisions expressly require "indexing of final opinions, statements of policy and interpretations which have been adopted by the agency, and instructions to staff that affect a member of

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[15] As noted above, the district court declined to afford the parties an opportunity to brief the applicability or non-applicability of Exemption 5, and the government did not submit public declarations justifying its reliance on this exemption. The government has not informed Plaintiffs which of the memos it regards to be protected by the deliberative-process privilege and which by the attorney-client privilege. The working law doctrine, however, vitiates both privileges. *Brennan Ctr.*, 697 F.3d at 208 (citing *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360-61 (2d Cir. 2005)).

One passage in the district court's pre-remand opinion suggests that the court considered and rejected the argument that the government had "adopted" the July 2010 OLC Memo. SPA55 ("Because waiver and adoption merge, at least in the context of deliberative process, I will discuss them together. And because they bar disclosure of the OLC DOD Memo, there is no need to discuss the concept of secret or working law, and only a limited basis on which to mention attorney-client."). There is no reason to conclude that the court reached the same conclusion (or even considered the issue) with respect to the still-withheld OLC memos, and in any event the working law and adoption doctrines are distinct. *See, e.g.*, *Brennan Ctr.*, 697 F.3d at 198 (stating that working law constitutes a "distinct path [] through which Exemption 5's protections can be lost").

the public." *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153 (1975) (quoting 5 U.S.C. § 552(a)(2)). Those affirmative provisions, the Supreme Court reasoned in *Sears*, "represent [ ] a strong congressional aversion to secret agency law, and represent[ ] an affirmative congressional purpose to require disclosure of documents which have the force and effect of law." *Id.* (internal quotation marks, alterations, and citations omitted). One of FOIA's core purposes was to afford the public access to "the reasons for [] polic[ies] actually adopted by an agency." *Id.* at 161; *see also Jordan v. Dep't of Justice*, 591 F.2d 753, 781 (D.C. Cir. 1978) (Bazelon, J., concurring) ("One of the principal purposes of the Freedom of Information Act is to eliminate secret law."). Exemption 5 must be construed against that background.

A document constitutes working law if it has "the force and effect of law," *Sears*, 421 U.S. at 153; guides agency staff in their dealings with the public, *Coastal States*, 617 F.2d at 869; or is "routinely used" and "relied on" by the agency, *id.*; *Tax Analysts v. IRS* (*"Tax Analysts I"*), 117 F.3d 607, 617 (D.C. Cir. 1997). It is immaterial that a document is not "absolutely binding" on the agency if it expresses a "settled and established policy." *Public Citizen, Inc. v. Office of Mgmt. and Budget*, 598 F.3d 865, 875 (D.C. Cir. 2009); *Tax Analysts I*, 117 F.3d at 617; *Jordan*, 591 F.2d at 774 (stating that guidance documents need not be "absolutely binding" on the agency to qualify as working law if they contain

"positive rules that create definite standards" for agency action). Where the reasons which "supply the basis for an agency policy [are] actually adopted[,] . . . [t]hese reasons constitute the working law." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 360 (2d Cir. 2005) (quoting *Sears*, 421 U.S. at 152-53) (internal quotation marks omitted). Indeed, even documents that do not reflect the agency's "final *programmatic* decisions" may nevertheless qualify as working law, so long as they represent the agency's "final *legal* position" concerning its responsibilities and constraints. *Brennan Ctr.*, 697 F.3d at 201 (emphasis in original) (quoting *Tax Analysts v. IRS* (*"Tax Analysts II"*), 294 F.3d 71, 81 (D.C. Cir. 2002)).

Thus in *Coastal States*, the D.C. Circuit held that legal memoranda interpreting Department of Energy regulations provided to auditors in field offices constituted agency working law because the "opinions were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent." 617 F.2d at 869. The D.C. Circuit noted that while "the agency insists that the interpretations were not 'binding'" auditors used the opinions as precedent, and followed them unless the facts of a particular case were distinguishable. *Id.* at 859-60.

Similarly, in *Public Citizen*, plaintiffs sought Office of Management and Budget ("OMB") documents describing the circumstances under which executive

branch agencies could "bypass" OMB to submit their budgets directly to Congress. 598 F.3d at 867. The documents summarized OMB's understanding of which agencies had that authority, as well as its own authority. *Id.* at 868. The D.C. Circuit concluded that "[d]ocuments reflecting OMB's formal or informal policy on how it carries out its responsibilities fit comfortably within the working law framework." *Id.* at 875.

And in *Tax Analysts II*, the D.C. Circuit concluded that memoranda setting forth the Internal Revenue Service Office of Chief Counsel's position on the tax code and procedures as applied to specific taxpayers constituted "working law" because "they 'simply explain and apply established policy.'" 294 F.3d at 80-81 (quoting *Coastal States*, 617 F.2d at 869). The court held that although the memoranda left agency program officers with discretion in individual cases, "it [was] enough that [the memoranda] represent[ed] the [Chief Counsel's] final *legal* position." *Id.* at 81.

Under the framework that this Court and the D.C. Circuit have applied in other contexts, at least some of the memos withheld by OLC here are working law. Government officials have repeatedly underscored that OLC sets the legal boundaries for the targeted killing program. Discussing the government's targeted killing of American citizens, John Brennan, who was then the president's counterterrorism advisor, stated that "[t]he Office of Legal Counsel advice

establishes the legal boundaries within which we can operate."[16] Brennan further explained that the legal framework established by the OLC addressed the "thresholds for action; . . . the procedures, [and] the practices, the processes, the approvals, the reviews." *Id.* In a letter to the Chairman of the Senate Judiciary Committee, Attorney General Holder indicated that the memos set out "the circumstances in which [the government] could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans."[17] Other senior government officials have similarly defended the lawfulness of the targeted-killing program by stating that the program is subject to clear legal standards and protocols. *See, e.g.*, JA113-126 (State Department Legal Advisor Harold Koh); JA395-406 (DOD General Counsel Jeh Johnson); JA571-575 (CIA General Counsel Stephen Preston). As The New York Times argues in its brief, the government should not be permitted "to argue, on the one hand, that the legal standards established by OLC and followed by these agencies make their actions legal and, on the other, that the standard set forth by OLC is not binding on

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[16] Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence, at 57:11-28, 113th Cong. (Feb. 7, 2013), http://www.intelligence.senate.gov/130207/transcript.pdf.

[17] Letter from Attorney General Eric H. Holder to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013), http://www.justice.gov/sites/default/files/ag/legacy/2013/05/28/AG-letter-5-22-13.pdf .

them." New York Times Brief, at 35.

The government's public statements make clear that the OLC memos supply the legal framework for the targeted killing program. The memos plainly guide government agencies, including the CIA and DOD, in their dealings with the public—they set out the circumstances in which the agencies can target citizens with lethal force. The agencies rely on the memos. The memos set out Americans' substantive rights—indeed, they set out the scope of the most significant right. *See* November 2011 White Paper at 2 ("there is no interest more weighty than a person's interest in his life").[18] They contain positive rules that govern agency action. In other words, they are the government's "effective law and policy."

The district court erred in holding, without analysis, that the memos were protected by Exemption 5. *Cf. La Raza*, 411 F.3d at 360 ("[A]s the district court cogently concluded, 'The Department's view that it may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA.'"). Indeed, disclosure of the memoranda is especially crucial here because the targeted-killing policy is unlikely to be reviewed in individual cases. *Cf. Jordan*, 591 F.2d at 781–782 (explaining that disclosure of secret law is

[18] *Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (Nov. 8, 2011), http://fas.org/irp/eprint/doj-lethal.pdf.

especially important when that law is "all but unreviewable in individual cases") (Bazelon, J., concurring). Plaintiffs respectfully submit that the Court should review the memos *in camera* to determine which of them contains the government's working law.

III. The district court erred in sealing major portions of its decision on remand.

Following the government's classification review, the district court sealed its full opinion and released a largely redacted version of the opinion on the public docket. SPA176. The district court did not make any findings on the record in support of its redactions, and the court's order provided no reasoning regarding whether the redactions were narrowly tailored as required by the First Amendment. *United States v. Erie County*, 763 F.3d 235, 239 (2d. Cir. 2014). The district court's extensive redactions, and its failure to justify those redactions on the public record, violate the public's constitutional right of access to judicial opinions. Plaintiffs adopt the arguments made by The New York Times with respect to this issue. *See* New York Times Brief, Section III.

CONCLUSION

For the reasons stated above, the Court should vacate the district court's judgment and review the withheld memoranda in camera to determine which portions FOIA requires the government to release. The ACLU recognizes that this Court would not ordinarily conduct this kind of review in a FOIA case, but given

the limited number of documents and the extraordinary public interest in them, the considerable delay that would inevitably result from any remand, and the fact that the Court has reviewed a related *in camera* already, the ACLU respectfully urges the Court to review at least a subset of the records itself to guide the district court's analysis.

Dated: February 3, 2015

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TABLE OF OFFICIAL ACKNOWLEDGMENTS

1. DISCLOSURES RELATING TO THE LEGAL BASIS FOR THE KILLING OF U.S. CITIZENS

Subject of disclosure	Source of disclosure
18 U.S.C. § 1119, which prohibits the attempted killing or killing of a U.S. national while such national is outside the United States but within the jurisdiction of another country	July 2010 OLC Memo, at 12-35[19] May 2011 White Paper, at 1-17[20] November 2011 White Paper, at 10-15[21]
18 U.S.C. § 956(a), which criminalizes conspiracy to commit murder abroad	July 2010 OLC Memo, at 35-36 May 2011 White Paper, at 17-18
18 U.S.C. § 2441(a), the War Crimes Act, including discussion of Common Article 3 of the Geneva Convention	July 2010 OLC Memo, at 37-38 May 2011 White Paper, at 18-20 November 2011 White Paper, at 15-16

[19] *Memorandum for the Attorney General: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010) ("July 2010 OLC Memo"), https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf. Also available at *New York Times v. Dep't of Justice*, 756 F.3d 100, 124 (2d. Cir. 2014).

[20] *Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen* . . . (May 25, 2011) ("May 2011 White Paper"), https://news.vice.com/article/a-justice-department-memo-provides-the-cias-legal-justification-to-kill-a-us-citizen.

[21] *Department of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (Nov. 8, 2011) ("November 2011 White Paper"), http://fas.org/irp/eprint/doj-lethal.pdf.

The "public authority" doctrine, as applied to 18 U.S.C. § 1119 and 18 U.S.C. § 956(a)	July 2010 OLC Memo, at 14-37 May 2011 White Paper, 11-13 November 2011 White Paper, at 10-13.
Executive Order 12333, which bans assassinations	February 2010 OLC Memo, at 1-4[22] Harold H. Koh's March 25, 2010 speech[23] May 2011 White Paper, at 15 November 2011 White Paper, at 15 Attorney General Holder's March 5, 2012 speech[24]
The Fourth and Fifth Amendments to the U.S. Constitution and their application to the killing of U.S. citizens	February 2010 OLC Memo, at 6 July 2010 OLC Memo, at 38-41 May 2011 White Paper, at 20-22 November 2011 White Paper, at 5-9
The definition of imminence	February 2010 OLC Memo, at 6-7 July 2010 OLC Memo, at 21 May 2011 White Paper, at 20-21

[22] *Memorandum for the Attorney General: Lethal Operation Against Shaykh Anwar Aulaqi . . .* (Feb. 19, 2010) ("February 2010 OLC Memo"), https://www.aclu.org/sites/default/files/assets/olc_opinion_feb_2010.pdf.
[23] JA112 ("Koh Speech").
[24] JA446 ("Holder Speech").

	November 2011 White Paper, at 7-8 Holder speech Fact sheet on US Policy Standards and Procedures for Use of Force in Counter-terrorism[25]
International Humanitarian Law and law of war principles	Koh Speech Holder speech Attorney General Holder's May 22, 2013 letter [26] July 2010 OLC Memorandum, at 24-34 May 2011 White Paper, at 13-15 Nov. 2011 White Paper, at 8-9 Fact sheet
Feasibility of capture	July 2010 OLC Memo, at 40-41 May 2011 White Paper, at 2 November 2011 White Paper, at 6-8

[25] Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operation Outside the United States and Areas of Active Hostilities, (May 23, 2013) ("Fact Sheet"), http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism.

[26] Letter from Attorney General Eric H. Holder to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013) ("Holder letter"), http://www.justice.gov/sites/default/files/ag/legacy/2013/05/28/AG-letter-5-22-13.pdf.

	Holder speech Holder letter Fact sheet
Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)	July 2010 OLC Memo, at 21-25 May 2011 White Paper, at 12-13 November 2011 White Paper, at 6
Government conducts legal analysis before lethal drone strikes	Holder speech Fact sheet
OLC provides legal advice establishing boundaries of the targeted killing program	Brennan SSCI Hearing[27] Senator Dianne Feinstein Press Release, February 13, 2013[28]

2. DISCLOSURES REGARDING THE KILLING OF ANWAR AL-AULAQI, ABDULRAHMAN AL-AULAQI, AND SAMIR KHAN

Subject of disclosure	Source of disclosure
The government uses drones to carry out targeted killings	Secretary of Defense Robert M. Gates' March 4, 2011 speech[29]

[27] Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the Senate Select Comm. on Intelligence, at 57:11-18, 113th Cong. (Feb. 7, 2013), http://www.intelligence.senate.gov/130207/transcript.pdf.

[28] Senator Dianne Feinstein, Statement on Intelligence Committee Oversight of Targeted Killings (Feb. 13, 2013), http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8.

	President Obama's January 30, 2012 remarks[30] Assistant to the President for Homeland Security John Brennan's April 30, 2012 speech[31] Holder letter President Obama's May 23, 2013 speech at the National Defense University[32] Fact sheet
The CIA and DOD had operational roles in the killing of Anwar al-Aulaqi	May 18, 2010 Panetta interview[33] June 27, 2010 Panetta interview[34] September 30, 2011 Panetta remarks[35]

[29] Robert M. Gates, Remarks by Secretary Gates at the United States Air Force Academy, U.S. Dep't of Def. (Mar. 4, 2011), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4779.

[30] *President Obama Hangs out with America*, White House Blog (Jan. 30, 2012), http://www.whitehouse.gov/blog/2012/01/30/president-obama-hangs-out-america; The White House, *Your Interview with the President—2012*, YouTube, at 28:37–29:23 (Jan. 30, 2012), http://www.youtube.com/watch?v=eeTj5qMGTAI; *see id.* at 26:20–30:18.

[31] JA88.

[32] President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) ("Obama NDU Speech"), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

[33] Leon E. Panetta, Director's Remarks at the Pacific Council on International Policy (May 18, 2009), https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html.

[34] JA626.

	October 7, 2011 Panetta interview[36] January 29, 2012 Panetta interview[37] February 10, 2013 Rep. Mike Rogers interview[38]
The government specifically targeted Anwar al-Aulaqi for killing, and it also killed Abdulrahman al-Aulaqi and Samir Khan	Holder letter
Abdulrahman al-Aulaqi and Samir Khan were not specifically targeted	Holder letter

3. DISCLOSURES REGARDING THE FACTUAL BASIS FOR THE KILLING OF ANWAR AL-AULAQI, ABDULRAHMAN AL-AULAQI, AND SAMIR KHAN

Subject of disclosure	Source of disclosure
Anwar al-Aulaqi was someone the U.S. government was "focusing on" and was on a list of terrorists	March 26, 2010 Panetta Interview[39] June 27, 2010 Panetta Interview July 16, 2010 Press Release from the U.S. Department of Treasury[40]

[35] JA799.
[36] JA576.
[37] JA640.
[38] *Face the Nation*, CBS News (Feb. 10, 2013), http://www.cbsnews.com/news/face-the-nation-transcripts-february-10-2013-graham-reed-and-rogers/.
[39] JA794.

The government believes Anwar al-Aulaqi directed the failed attempt to bomb a Northwest Airlines jetliner on Christmas 2009, and that failed bomber Umar Farouk Addulmutallab met Samir Khan in Yemen	Abdulmutallab Sentencing Memorandum[41] President Obama's September 30, 2011 Remarks[42] Obama NDU Speech
The government believes Anwar al-Aulaqi had a leadership role in al-Qaeda in the Arabian Peninsula	February 2011 Testimony of Michael Leiter[43] President Obama's September 30, 2011 Remarks Obama NDU Speech
The government believes Samir Khan was involved in "jihad"	Samir Khan's FBI File[44]

[40] *Treasury Designates Anwar al-Aulaqi, Key Leader of Al-Qa'ida in the Arabian Peninsula* (July 16, 2010), http://www.treasury.gov/press-center/press-releases/Pages/tg779.aspx.

[41] JA580.

[42] JA139.

[43] *Understanding the Homeland Threat Landscape – Considerations for the 112th Congress, Hearing Before the Committee on Homeland Security, House of Representatives*, at 26 (Feb. 9, 2011), http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72212/pdf/CHRG-112hhrg72212.pdf.

[44] Jason Leopold, *An Exclusive Look Inside the FBI's Files on the US Citizen Who Edited Al Qaeda's Official Magazine*, Vice News (Sept. 22, 2014), https://news.vice.com/article/an-exclusive-look-inside-the-fbis-files-on-the-us-citizen-who-edited-al-qaedas-official-magazine.

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Dated: February 3, 2015

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