UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, and SCOTT SHANE,

Plaintiffs,

v. 11 Civ. 9336 (CM)

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

.....x

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

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, including its component the Office of Legal Counsel, U.S. DEPARTMENT OF DEFENSE, including its component U.S. Special Operations Command, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

MEMORANDUM OF LAW IN OPPOSITION TO THE ACLU'S MOTION FOR RECONSIDERATION OF COURT'S DECISION ON REMAND

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Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the "ACLU") move for reconsideration of the Court's decision dated September 30, 2014, a redacted version of which was filed publicly on October 31, 2014 (the "Decision on Remand" or "Decision").[1] Specifically, the ACLU seeks reconsideration of the Decision "insofar as that 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 (the 'Factual Basis Information'); that the government's withholding of the Factual-Basis information was lawful; or that the Second Circuit resolved the question of whether the withholding of the Factual-Basis information was lawful." ACLU Mot. at 1-2. The ACLU requests that the Court re-review the Office of Legal Counsel ("OLC") memoranda that were the subject of the Decision on Remand, as well as the OLC-DOD Memorandum on which the Second Circuit has already ruled, for the purpose of "assessing the extent to which they contain Factual-Basis Information that has been officially acknowledged." ACLU Mot. at 6.

In accordance with the Court's November 14, 2014 Order, defendants the Department of Justice, the Department of Defense and the Central Intelligence Agency (collectively, the "Government") respectfully submit this memorandum, limited to addressing the ACLU's argument as it relates to the February 2010 OLC Memorandum pertaining to Anwar al-Aulaqi (the "February 2010 Memorandum").[2] The Court has denied the ACLU's motion "summarily and *sua sponte* . . . as to all other documents," including the OLC-DOD Memorandum. Nov. 14, 2014

[1] The New York Times plaintiffs have not joined in the ACLU's motion for reconsideration.

[2] The February 2010 Memorandum is described in the Decision on Remand as Bies Exhibit B, in unredacted form, and Bies Exhibit K, in redacted form. In the Decision on Remand, the Court ordered the Government to release the redacted version, Bies Exhibit K, to the extent the Government had not already done so. Decision on Remand at 12. That document was released to plaintiffs on August 15, 2014, prior to the Decision on Remand.

Order. For the reasons set forth below, the Court should deny the ACLU's motion with regard to the February 2010 Memorandum as well.

A. The ACLU Cannot Relitigate the Second Circuit's Rulings as to Factual Information Before This Court on Remand

As a preliminary matter, this Court did not make any finding in the Decision on Remand 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." ACLU Mot. at 1. Rather, as directed by the Second Circuit, the Court simply applied the Circuit's rulings to each of the OLC memoranda submitted for *in camera* review, including the February 2010 Memorandum. *See New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 124 (2d Cir. 2014) ("other legal memoranda prepared by OLC and at issue here must be submitted to the District Court for *in camera* inspection and determination of waiver of privileges and appropriate redaction"); Decision on Remand at 1-2 (noting that Court's *in camera* review of OLC memoranda was "for the purpose of ascertaining whether the Government has waived the protection of asserted FOIA Exemptions for those documents, for the reasons announced in the Circuit's opinion").

The ACLU is, however, barred from relitigating the Second Circuit's rulings before this Court on remand. "'When an appellate court has once decided an issue, the trial court, at a later stage in the litigation, is under a duty to follow the appellate court's ruling on that issue.'" *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991) (quoting *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977)); *see also Am. Hotel Int'l Grp. v. OneBeacon Ins. Co.*, 611 F. Supp. 2d 373, 378 (S.D.N.Y. 2009) (quoting *Uccio*). Contrary to the ACLU's claim, the Second Circuit plainly decided that factual information contained in the OLC-DOD Memorandum, with two limited exceptions, remains properly classified and exempt from disclosure under FOIA. *See New York*

Times, 756 F.3d at 113-14 (holding that "the OLC[-]DOD Memorandum was properly classified and that no waiver of any operational details in that document has occurred," and that the protections of Exemptions 1 and 5 had been waived only as to "the document's legal analysis").[3] Indeed, this Court specifically noted in its Decision that the Court of Appeals "repeatedly rejected any contention that the protections of FOIA Exemptions 1, 3 and 5 had been waived as to operational details [with two limited exceptions] or other intelligence information," Decision on Remand at 11, and has denied the ACLU's motion "summarily and *sua sponte*" as to the OLC-DOD Memorandum, Nov. 14, 2014 Order.

The ACLU complains that it "has not yet had an opportunity to brief the question of whether and to what extent the OLC memoranda contain Factual-Basis Information that has been officially acknowledged." ACLU Mot. at 3-4. But that is a dilemma of the ACLU's own making. In its June 30, 2014 Order, the Court directed the Government to submit the OLC memoranda for *in camera* review, along with *ex parte* submissions explaining why the material withheld from the OLC memoranda was not within the scope of the waiver found by the Second

[3] The ACLU's argument that the Second Circuit has not ruled on whether there has been a waiver as to factual information in the OLC-DOD Memorandum, *see* ACLU Mot. at 4, 5 n.3, ignores the numerous statements by the Second Circuit that the waiver found by that Court is limited to legal analysis and does not encompass factual information, with two limited exceptions. *See* 756 F.3d at 117 ("The loss of protection for the legal analysis in the OLC-DOD Memorandum does not mean, however, that the entire document must be disclosed. . . . The Government's waiver applies only to the portions of the OLC-DOD Memorandum that explain legal reasoning."); *id.* 117-18, 119 (holding that even within those portions of the document that contain legal reasoning, factual material was properly withheld, with the exception of "the identity of the country in which al-Awlaki was killed" and "the identity of the agency, in addition to DOD, that had an operational role in the drone strike that killed al-Awlaki"; noting that these are the "only . . . facts mentioned in the pure legal analysis portions of the OLC-DOD Memorandum" that the Court had ordered disclosed); *id.* at 119 (recognizing that "in some circumstances, legal analysis could be so intertwined with facts that disclosure of the analysis would disclose such facts," and noting that "[a]ware of that possibility, we have redacted . . . the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities").

Circuit. *See* Dkt. No. 67. In response, the Government proposed that the Court entertain briefing by both parties in the context of a motion for summary judgment with regard to the OLC memoranda. *See* Dkt. No. 68. The ACLU strenuously objected to the Government's proposal, and urged the Court to adhere to its initial Order and decide the waiver issue based on its *in camera* review of the OLC memoranda. *See* Dkt. No. 69. The ACLU thus forfeited the opportunity it now seeks to brief the questions of official acknowledgement and waiver of applicable privileges with respect to any factual or other information in the OLC memoranda.

We note, moreover, that to the extent the ACLU suggests it never had an opportunity to brief the propriety of withholding factual information from the OLC-DOD Memorandum, that suggestion is without merit. The Government's withholding of the OLC-DOD Memorandum was squarely before the Second Circuit, and the ACLU had a full opportunity to make whatever arguments it wished to make with regard to the information, factual or otherwise, in that document. Indeed, at the oral argument before the Second Circuit, the ACLU's counsel specifically argued that factual information contained in the OLC-DOD Memorandum, and any other memoranda pertaining to Aulaqi, should be disclosed. *See* Tr., Oct. 1, 2013, at 42-43 ("[Q:] What facts in your view can be released and which cannot be? [A:] Well, at a minimum, the government's memos about the factual basis for the killing of Anwar al-Awlaki, those should be disclosed in part. I say that for a couple of reasons. One is that the government has introduced some of those facts into the public sphere through the Attorney General's letter, for example. Through an affidavit filed in an appendix with the sentencing report in [the] Abdulmutallab prosecution. There is a long discussion.") (excerpt of transcript attached hereto). These are the same arguments that the ACLU offers now, in urging the Court to order release of factual information. *See* ACLU Mot. at 5 (referring to Dkt. No. 92, at 11-12 (arguing that official acknowledgement

and waiver had occurred based on, among other things, the Attorney General's May 22, 2013 letter to Congress and the sentencing memorandum filed in the Abdulmutallab prosecution)). And as noted, these arguments have been squarely rejected by the Second Circuit, which ruled that with two limited exceptions all factual information in the OLC-DOD Memorandum remains properly classified. *See New York Times*, 756 F.3d at 113-14, 117-19; note 3, *supra*.

B. This Court Correctly Held That the Factual Material in the February 2010 Memorandum Remains Properly Classified and Exempt from Disclosure Under the Second Circuit's Rulings

In its Decision on Remand, this Court properly applied the Second Circuit's rulings to the February 2010 Memorandum. The version of that memorandum released to plaintiffs on August 15, 2014 (and approved by this Court in the Decision on Remand) contains redactions that are the same as or substantially similar to the redactions that the Second Circuit applied to the OLC-DOD Memorandum, including "operational details" and "intelligence information." *New York Times*, 756 F.3d at 113, 119. As this Court correctly concluded in the Decision on Remand, the February 2010 Memorandum "contains certain intelligence information relating to Aulaqi and includes both strategic and legal analysis relating to the proposed operation. No privilege has been waived as to the factual intelligence information or the strategic analysis." Decision on Remand at 4. Given the similarity of the material redacted from the February 2010 Memorandum to the material that the Second Circuit held remains properly classified and redacted from the OLC-DOD Memorandum, this Court correctly declined to order the release of any further information. Furthermore, to the extent "additional information" was redacted from the February 2010

Memorandum, the Court correctly ruled, in the classified portion of its decision, that this information is properly classified and exempt from disclosure. *See* Decision on Remand at 6-12.[4]

CONCLUSION

For the foregoing reasons, the Court should deny the remainder of the ACLU's motion for reconsideration.

Dated: November 21, 2014

Respectfully submitted,

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Assistant United States Attorney

[4] The redacted factual material is also properly withheld as privileged pursuant to Exemption 5. Neither the Second Circuit nor the ACLU has identified any reason that waiver has occurred of the privileges applicable to the fact that the withheld material was determined to be relevant to OLC's legal analysis. The decisions by OLC's Executive Branch clients to provide certain classified factual information to OLC, and OLC's decision to rely upon those facts in providing confidential legal advice to its clients, themselves remain privileged under the attorney-client and deliberative process privileges, and disclosure of such factual material would necessarily reveal the nature of these sensitive internal deliberations and client confidences. *See Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980) (holding that factual material is privileged and exempt from disclosure "if the manner of selecting or presenting those facts would reveal the deliberat[iv]e process, or if the facts are 'inextricably intertwined' with the policy-making process"); *see also Envt'l Protection Agency v. Mink*, 410 U.S. 73, 91-92 (1973) (documents that "contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily inextricably intertwined with policymaking processes may be withheld under Exemption 5) (internal quotation marks omitted); *cf.* Second Unclassified Declaration of John E. Bies (Oct. 3, 2014) ¶¶ 53-54 ("Disclosing these [factual documents in OLC's possession] would reveal privileged and confidential information about the nature and subject of those decisions, and that OLC and its Executive Branch clients considered the information contained in the documents potentially relevant to that determination.").

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v. 13-422(L), 13-445(Con)

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees,

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New York, N.Y.
OCTOBER 1 , 2013
2 :20 p.m.

Before:

HON. JOSE A. CABRANES,
HON. ROSEMARY S. POOLER,
HON. JON O. NEWMAN,

Circuit Judges

APPEARANCES

JAMEEL JAFFER
BRETT MAX KAUFMAN
HINA SHAMSI
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DAVID McCRAW
VICTORIA D. BARANETSKY
Attorneys for Plaintiff-Appellant New York Times

themselves.

JUDGE CABRANES: There is an important speech to the American Society of International Law by Dean Koh on the matter which obviously is rooted in law.

Why isn't that adequate to give you a sense of what the legal concerns are regarding this whole area?

MR. JAFFER: Well, the analysis that's public now and the facts that are public now may be incomplete, they may be misleading, they may be selectively disclosed. When Congress enacted --

JUDGE CABRANES: You want to know, not just the legal theory, you want to know all the facts that are being considered by the writers of these memorandum.

MR. JAFFER: Consistent with the government's legitimate interest in protecting intelligence sources and methods. We don't want everything to be released.

JUDGE CABRANES: Give us an idea of what, in your view, you would deem appropriate not to be released. Or, on the other hand, what in your view can be released?

What facts in your view can be released and which cannot be?

MR. JAFFER: Well, at a minimum, the government's memos about the factual basis for the killing of Anwar al-Awlaki, those should be disclosed in part. I say that for a couple of reasons. One is that the government has introduced

some of those facts into the public sphere through the Attorney General's letter, for example. Through an affidavit filed in an appendix with the sentencing report in Abdulmutallab prosecution. There is a long discussion.

JUDGE CABRANES: Why isn't that adequate for your purposes? You want to be able to contest the facts on which a particular opinion rested, is that it?

MR. JAFFER: It is not adequate for the same reasons that Congress thought it wasn't adequate when it enacted the FOIA in the first place.

Congress's concern was not just with transparency. It was with -- Congress wanted to end the practice of selective disclosure. It saw selective disclosure as a particular evil. And in many contexts, selective disclosure is worse than no disclosure at all, because it can be misleading.

JUDGE CABRANES: Doesn't this lead inevitably to a disclosure of the entire memorandum? Can you give us an idea what sort of things would exist in an OLC memorandum which you think the government can legitimate withhold?

MR. JAFFER: Sure. Information about human intelligence sources, for example. If there is a paragraph about here's how we know this particular fact, I think it is quite legitimate for the government to protect that. Also --

JUDGE NEWMAN: Not just how we know it, if they say we know it.

MR. JAFFER: Right. Depending on the context, I think you're right. There may be situations -- I'm sure there are situations in which the government's disclosing that it knew a particular thing would have the effect of disclosing its source. And in that instance, the government could protect it. But not everything could be protected on that argument.

JUDGE NEWMAN: I just have trouble seeing once you get past pure legal reasoning and you get into facts --

MR. JAFFER: Judge Newman, I guess my only request is you give us the opportunity to get to that point in the case. If you're right, the District Court will throw us out and say you get nothing more than the Vaughn. We should be given the opportunity to contest the government's withholding of those documents, at least in part.

JUDGE NEWMAN: You've got affidavits from very senior people who say doing that very thing will compromise security.

MR. JAFFER: They do say that. In one instance, for example, they say -- this is in the CIA's affidavit, it will compromise security because it will lead people to think that the U.S. government was involved -- that we were involved in the killing of these four U.S. citizens. And of course the government has now disclosed that. Or the ODNI declaration says it will lead people to think that the CIA has an intelligence interest in the program. And that too has been disclosed.

JUDGE NEWMAN: You've picked out, fair argument, perhaps the vulnerable paragraphs of the affidavit.

MR. JAFFER: In my view, they're all vulnerable.

JUDGE NEWMAN: There are other allegations there that I don't think are as vulnerable.

MR. JAFFER: Another one they relied on quite extensively is the argument that even if the CIA's intelligence interest in the program has been disclosed, the extent of that interest will be disclosed if we provide a list.

First, I think the D.C. Circuit's reasoning in the Drones FOIA case was exactly right, that disclosing a list of documents possessed by the CIA about targeted killing tells you nothing at all about what the CIA is doing on targeted killing. It may be that the CIA has a lot of documents.

JUDGE CABRANES: The Seventh Circuit wouldn't agree with the D.C. Circuit on that. I quote the language: That the government might fear that inferences from Vaughn indices or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence.

Is that utterly implausible?

MR. JAFFER: I think that Bassiouni might have been rightly decided on those facts. I think that analysis goes too far. It proves too much. If you accept that any agency can withhold innocuous details because of the possibility that somebody else might find a way to make them other than

innocuous, you've effectively given the agency a categorical exemption from the FOIA. That's something Congress explicitly considered and rejected the idea. It considered it later on, about 15 years later, rejected the idea again.

The CIA is supposed to comply with the FOIA, which means the CIA is supposed to provide Vaughn indices in response to requests like ours.

JUDGE CABRANES: Let me ask you a question, the question I asked your colleague representing The New York Times about the character of these opinions. What exactly you're seeking. You're seeking for certain so-called formal opinions. Right? The so-called binding opinions of the OLC.

MR. JAFFER: That's right. We've actually carved out drafts from our request.

JUDGE CABRANES: And oral comments or interactions are beyond your interest?

MR. JAFFER: Beyond our interest, and I think beyond the reach of the FOIA.

We are asking for the OLC memos because senior officials have said that the OLC memos set binding parameters for the government's activities in this particular context. That's a paraphrase, but that's essentially what Mr. Brennan said in his confirmation hearing. That's essentially what the Attorney General told Congress in testimony.

Given that they reference the OLC memos in that way,