14-4432-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

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

As required by Rule 26.1, The New York Times Company, a publicly traded company, states that it has no parent company and that no publicly held corporation owns 10 percent or more of its stock.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-706. The court (McMahon, J.) originally granted summary judgment to Defendant United States Department of Justice ("DOJ") and denied partial summary judgment to plaintiffs The New York Times Company, Charlie Savage, and Scott Shane (jointly, "NYT") in a decision dated January 3, 2013 with a Judgment filed on January 24, 2013. Plaintiffs appealed to this Court, which had jurisdiction pursuant to 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 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.

The District Court subsequently granted in part and denied in part summary judgment to DOJ as to the documents subject to remand in a decision dated October 31, 2014. The district court also entered an order sealing in part its October 31, 2014 decision. Plaintiffs timely filed a Notice of Appeal on November 26, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is release of additional documents, in part or in full, required under the Freedom of Information Act ("FOIA") when the Second Circuit has already determined that the Government has waived its right to assert FOIA exemptions as to legal analysis concerning the targeted killing program because of the Government's repeated public disclosures?
2. May purely legal analysis, revealing no classified operational sources or methods, be properly classified as a national security secret and thus withheld under FOIA?
3. Did legal analysis of the targeted killing program become the Government's "working law" and thus must be disclosed under FOIA when that analysis describes the law that agencies must follow in order for their actions to be legal?
4. Was the District Court's decision on remand improperly redacted where the court failed to make specific findings of fact on the record that a compelling government interest justifying the particular redactions existed and was sufficient to overcome the public's First Amendment right of access to court documents and that the sealing was narrowly tailored?

STATEMENT OF THE CASE

Last year, this Court determined that the Government violated the public's rights under FOIA by refusing to grant access to the Government's legal analysis of its targeted killing program as contained in a DOJ legal memorandum. At issue in this second appeal following remand is whether that right can be narrowly cabined to a single document or whether this right logically extends to the related memoranda the Government used to establish the legal framework for extrajudicial attacks on suspected terrorists and militants, including American citizens, away from the field of battle.

NYT originally submitted two FOIA requests to DOJ seeking the Office of Legal Counsel's ("OLC") legal memoranda addressing the legality of the targeted killings of persons deemed to have ties to terrorism.[1]

In response to one request, DOJ acknowledged having one document pertaining to the Department of Defense (the "OLC DOD Memorandum") but claimed that the document was exempt from disclosure under three FOIA exemptions:

- Exemption 1, 5 U.S.C. § 552(b)(1), relating to national defense or foreign policy information properly classified pursuant to Executive Order No. 13526;

[1] OLC is a component of DOJ.

- Exemption 3, § 552(b)(3), relating to information protected from disclosure by statute; and
- Exemption 5, § 552(b)(5), relating to deliberative communications.

With respect to the remainder of both requests, OLC provided a so-called "Glomar response," saying that it could neither confirm nor deny the existence of documents, also pursuant to FOIA Exemptions 1, 3, and 5.

After exhausting its administrative remedies, NYT commenced this action in the Southern District of New York on December 20, 2011. The District Court joined this action for the purposes of briefing and decision with a similar action brought by the American Civil Liberties Union and the American Civil Liberties Union Foundation (jointly, the "ACLU"). DOJ moved for summary judgment, and NYT cross-moved for partial summary judgment. NYT sought release of the OLC DOD Memorandum and for a Vaughn index of any additional responsive memoranda that the Government had refused to acknowledge as a result of its Glomar response.[2] On January 3, 2013, the District Court granted summary judgment to DOJ and denied NYT's cross-motion for partial summary judgment. *N.Y. Times Co. v. U.S. Dep't of Justice* and *American Civil Liberties Union v. U.S. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794 (S.D.N.Y. Jan. 3, 2013) (the

[2] The term "Vaughn Index" originated from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), in which the court rejected an agency's conclusory affidavit stating that requested FOIA documents were subject to exemption. *Id*. at 828.

"Initial District Court Decision"), Special Appendix ("SPA") 1-68. NYT subsequently filed an appeal.

On appeal, this Court reversed in part, holding that DOJ had waived any right to assert FOIA exemptions as to the legal analysis contained in the OLC DOD Memorandum and ordering the immediate release of a redacted version of that document. *N.Y. Times v. U.S. Dep't of Justice*, No.13-422-cv (2d Cir. June 23, 2014) (the "Second Circuit Decision"), SPA79-144. This Court then remanded the case to the District Court, *inter alia*, to determine whether the legal analysis contained in certain additional legal memoranda should be released consistent with the Second Circuit Decision. SPA143.

On remand the District Court held, in a heavily redacted opinion, that of the additional legal memoranda it was ordered to review, portions of only two documents should be disclosed. *N.Y. Times Co. v. U.S. Dep't of Justice* and *American Civil Liberties Union v. U.S. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794 (S.D.N.Y. Oct. 31, 2014) ("Remand District Court Decision"), SPA178-98. The District Court further stated that its order finally disposed of all issues related to the disclosability of OLC legal opinions. SPA197.

STATEMENT OF FACTS

Over the past four years, senior United States Government officials repeatedly and publically affirmed that not only has the United States been involved in the targeted killing of alleged terrorists, but that this targeted killing program is bound by a legal framework established by the OLC. These public statements, coupled with an officially disclosed white paper authored by DOJ, have already led this Court to conclude that the Government had waived its right to assert any FOIA exemptions as to the legal analysis in the OLC DOD Memorandum and further prompted this Court to order the District Court to reconsider whether DOJ had waived its right to assert FOIA exemptions as to additional OLC memoranda also responsive to NYT's FOIA requests. *See* Second Circuit Decision, SPA113-14, 142-43. The District Court held, in an almost entirely redacted opinion, that portions of only two of those additional memoranda should be disclosed.[3] *See* District Court Remand Decision. The District Court also entered a separate order concerning sealing of its decision. *See N.Y. Times Co. v. U.S. Dep't of Justice* and *American Civil Liberties Union v. U.S. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794 (S.D.N.Y. Oct. 31, 2014) ("Sealing Order"), SPA176-77. The majority of the decision is sealed, including certain

[3] It appears that those two memoranda, identified by the District Court on remand as Documents B and K, are actually the same document. *See* District Court Remand Decision, SPA183.

paragraphs that the District Court sealed at the request of the Government even though the court found that those paragraphs did not need to be withheld. SPA176-77. This appeal addresses these two decisions as well as those portions of the Initial District Court Decision not reached by this Court on the original appeal.

Most of the relevant background in this action has already been detailed in the Second Circuit Decision. SPA84-107. NYT will only briefly summarize the background here.

A. The Government's Disclosures

As this Court prominently stated, senior Government officials have made numerous statements "discussing the lawfulness of targeted killing of suspected terrorists, which the District Court characterized as 'an extensive public relations campaign to convince the public that [the Administration's] conclusions [about the lawfulness of killing Anwar al Awlaki] are correct.'" Second Circuit Decision, SPA115 (quoting Initial District Court Decision, SPA17). Moreover, these senior officials specifically stated that it is OLC advice – including that contained in the documents now at issue – that establishes the legality of the targeted killings executed by the Government. Indeed, John Brennan, on his nomination to be director of the CIA, testified that "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate." Second Circuit Decision,

SPA117. The Attorney General himself, at the direction of the President, assured Congress in a public letter on May 22, 2013 that certain killings were legal because the Executive Branch had followed the necessary legal standards as determined by "Department of Justice lawyers." Government's Brief, *N.Y. Times v. U.S. Dep't of Justice*, No.13-0422-cv, Docket No. 95 ("Initial Government Appellate Brief"), at 24. The numerous similar Government statements are detailed in the Second Circuit Decision and the declarations submitted to the District Court in 2012. *See* SPA115-21, JA538-814. We respectfully refer the Court to the Second Circuit Decision and the Joint Appendix for a fuller enumeration of the disclosures.

B. The NYT FOIA Requests

On June 11, 2010, *New York Times* reporter Scott Shane submitted a FOIA request (the "Shane Request") to DOJ OLC seeking a copy of "all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing of people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government." JA297. More than a year later, DOJ denied the Shane Request. JA299. It acknowledged having responsive material pertaining to DOD but stated that the material was exempt under Exemptions 1, 3, and 5. As to any materials pertaining to other agencies, it issued a Glomar response. JA299. DOJ cited exemptions applicable to national security (Exemptions 1 and 3) and deliberative materials

(Exemption 5). JA299. NYT timely filed an administrative appeal, and no response was received within the statutorily mandated twenty days. JA482-83.

On October 7, 2011, and in response to the killing in Yemen of Anwar al-Aulaki, a U.S. citizen suspected of terrorist activities, Mr. Savage submitted a FOIA request (the "Savage Request") to DOJ OLC seeking a copy of "all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence community assets to target for killing a United States citizen who is deemed to be a terrorist." JA301. Unlike the response received by Mr. Shane, the response to Mr. Savage's request contained only a Glomar response citing Exemptions 1, 3, and 5 – with no mention of any responsive documents concerning the Department of Defense. JA303. An administrative appeal was filed but not determined within the requisite twenty days. JA485-86.

C. The Initial District Court Decision

Having exhausted its administrative remedies, NYT commenced this action in the District Court challenging both denials and seeking disclosure of all responsive legal memoranda. Complaint, JA24-35. During the pendency of the proceedings in the District Court, DOJ modified its responses to the Shane and Savage Requests by identifying one responsive document that was being withheld: the OLC DOD Memorandum. Second Circuit Decision, SPA90. The Government

moved for summary judgment; NYT cross-moved for partial summary judgment, seeking the release of the OLC DOD Memorandum and a Vaughn index of any materials that had been subject to the Glomar response so that NYT could then challenge the withholding of any other responsive documents that might exist. JA70-71, 457-59. The District Court denied NYT's motion and granted the motion of the Government. SPA72-73.[4]

In its opinion, the District Court expressed deep concern that targeted killings "seem on their face incompatible with our Constitution and laws," but yet felt it was without recourse to order the release of the requested documents. SPA3. "The Alice-in-Wonderland nature of this pronouncement is not lost on me," Judge McMahon wrote, "but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of the contradictory constraints and rules – a veritable Catch-22." SPA3.

As to Exemption 1, the District Court held, as a matter of law, that the kind of pure legal analysis presumably contained in the documents responsive to the Shane and Savage Requests can properly be withheld as classified pursuant to Exemption 1. SPA37. The District Court further held that DOJ could not possibly have waived its right to invoke Exemption 1 as to legal analysis concerning

[4] The District Court's decision included a classified appendix, and certain material was submitted by the Government to the court *ex parte* for *in camera* inspection, all of which remain under seal. SPA3-4.

targeted killings because the type of analysis contained in legal memoranda would be "far more detailed and robust" than that exhibited by the public statements that had been made as of that time. SPA42. Accordingly, the District Court saw no need to undertake *in camera* review. SPA42.

The District Court also held that Exemption 3 does not justify withholding legal analysis because "legal analysis is not an intelligence source or method" within the purview of Section 102A(i)(1) of the National Security Act, 50 U.S.C. § 403-1(i)(1). SPA45. The District Court also examined Exemption 3 as relates to section 6 of the CIA Act, 50 U.S.C. § 403g, and similarly held that the CIA does not apply to "legal analysis." SPA47.

The District Court then discussed the applicability of Exemption 5, but only as to the OLC DOD Memorandum. In its analysis, the District Court catalogued at length the various public disclosures made by administration officials about the targeted killing program, SPA18-29, but found that the disclosures were not sufficient to establish that the OLC DOD Memorandum was disclosable, either under the theory that it served as the "working law" of the administration or on the basis that it was a policy that had been adopted publicly, or incorporated by reference, in the disclosures. SPA47-62.[5] The court likewise held the exemptions

[5] The District Court erroneously stated that NYT's "sole apparent goal at this point is to get a hold of the OLC DOD Memo." SPA52. To the contrary, NYT has always sought disclosure of all legal memoranda responsive to the Shane and

had not been waived by the public statements. SPA37-42, 55-62. Finally, the court said it was constrained to accept the Government's declarations that the Glomar responses given as to any other OLC legal analyses were necessary to protect secret information. SPA62-67.[6]

D. The Second Circuit Decision

On appeal, this Court reversed in part.[7] It found extensive evidence that senior government officials had repeatedly disclosed the legal reasoning

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Savage Requests, but was unaware of the number or content of such memoranda because of DOJ's Glomar and no number, no list responses. NYT sought a Vaughn index of those unacknowledged documents so it could then move for their disclosure. *See* Cross-Motion for Partial Summary Judgment, SPA457-59 (requesting order "directing Defendant to provide a Vaughn index as to any additional documents that were subject to Defendant's Glomar response and permitting further challenge to any withholding that may by brought by NYT in this Court").

[6] The District Court also found that it could not determine whether Exemption 5 applied to two particular non-classified legal memoranda requested only by the ACLU and directed the Government to supplement the record. SPA54-55. The Government subsequently provided an additional declaration as to those two documents, and the District Court entered a separate ruling determining that Exemption 5 did in fact justify withholding those documents. SPA69-71.

[7] This Court issued its initial opinion on April 21, 2014, subject to additional review by the Government for material that should be redacted from both the opinion and the OLC DOD Memorandum. *See* JA871-922. This Court issued a revised opinion on June 23, 2014. *See* SA79-175. On August 28, 2014, this Court issued an Errata Order as to the revised June 23, 2014 opinion. *See* JA966-68. A second revised opinion incorporating the errata has not yet been issued, and NYT will refer to the June 23, 2014 opinion as the operative decision for purposes of this appeal.

underpinning its targeted killing decisions, determined that those statements to be a waiver of the asserted FOIA exemptions, and ordered the disclosure of the legal analysis contained the OLC DOD Memorandum. *See* SPA103-07, 115-21. This Court concluded, "Whatever protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper." SPA133-34.

This Court then remanded the case to the District Court to determine whether waiver mandated the release of additional OLC legal memoranda that were responsive to the Shane and Savage Requests. SPA143.[8]

E. The District Court Remand Decision

In a heavily redacted opinion on remand, the District Court found that only two of the memoranda at issue should now be disclosed. *See generally*, District Court Remand Decision, SPA178-98.[9]

[8] The remand for review of the remaining memoranda effectively mooted the second part of NYT's request for relief: that the Government produce a Vaughn index of the documents that had been subject to Glomar so that NYT could then challenge their withholding. The effect of the remand was to skip over the Vaughn stage and go directly to the question of whether the documents could be withheld by DOJ.

[9] While it is somewhat difficult to discern exactly what the District Court decided on remand with respect to each of the memoranda or precisely how many documents were involved, it appears that the District Court took the following action: Document A (withheld); Document B (released with redactions); Document C (withheld); Document E (withheld); Document F (withheld); Document G

Consistent with its initial decision determining that classified legal analysis was properly withheld under FOIA, the District Court certified its decision for immediate appeal, and stated, "this order finally disposes of a discrete and severable issue in this action, to wit: the disclosability of one specific type of legal document (legal opinions from the OLC) sought from one party defendant (the Department of Justice)." SPA198. NYT then filed this appeal. JA969. The ACLU then filed an appeal as to the same documents in its parallel case. *See American Civil Liberties Union v. U.S. Dep't of Justice*, No. 12 Civ. 794, Docket No. 114 (Dec. 24, 2014), JA975. The ACLU moved to consolidate its appeal with NYT, and that motion remains pending. *See American Civil Liberties Union v. U.S. Dep't of Justice*, No. 14-4764-cv, Docket No. 26 (Jan. 7, 2015).

SUMMARY OF ARGUMENT

The core proposition underlying the initial appeal in this case is equally forceful today: Americans should know the legal principles under which their government is operating, particularly when that government is authorizing the

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(withheld); Document H (withheld); Document I (withheld); Document J (withheld); Document K (released with redactions); Document L (ignored as irrelevant). *See* District Court Remand Decision. It is not clear if there is a Document D. Documents B and K were legal memoranda concerning the targeted killing of Anwar al Aulaki prepared six months prior to the OLC DOD Memoranda. Analysis contained in Documents B and K was incorporated into the final OLC DOD Memorandum. *See* District Court Remand Decision, SPA181-82.

death of United States citizens abroad, to assure that the rule of law is being followed and individual liberties are being safeguarded.

Taken together, the District Court's two substantive decisions err in three fundamental ways. First, abstract legal analysis is not properly classified. By its nature, it does not fall into the categories of information that the operative executive order permits to be classified. Just as the District Court found that Exemption 3 is inapplicable to legal analysis, the same result should apply as to Exemption 1. Second, the District Court appears to have given this Court's decision on waiver too narrow a reading. It is inconceivable that the multiple statements made by public officials justifying targeted killings are not reflected in the legal analysis of the withheld memoranda. Third, as reflected in the public statements of officials, the legal analysis provided by OLC set forth the legal standards that the Government was required to use for its targeted killing program. As such, it constituted "working law," and Exemption 5 cannot be used to justify withholding the memoranda. In addition, in sealing nearly its entire decision on remand, the District Court failed to observe the constitutional standards for public access to court documents.

ARGUMENT

This Court undertakes a *de novo* review of a District Court's determination of summary judgment in a FOIA case. Second Circuit Decision, SPA108; *see also Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999) (rejecting Government's argument that a lesser standard should apply); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (*de novo* review required in Glomar case). That review is conducted without deference to the agency's determination or the determination of the District Court. *Id*. ("When an agency claims that a document is exempt from disclosure, we review that determination and justification *de novo*."). Although courts view agency affidavits with a presumption of good faith, *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005), that does not end the inquiry insofar as they must engage in *de novo* review. *Cf. Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 151 (2d Cir. 2010) ("[A] test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine 'the basic policy that disclosure, not secrecy, is the dominant objective of [FOIA].'" (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976))).

"The 'basic purpose [of FOIA] reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Bloomberg*, 601 F.3d at 147 (quoting *Rose*, 425 U.S. at 360-361). In

light of this purpose, FOIA exemptions are to be construed narrowly, and "[a]ll doubts [are] resolved in favor of disclosure." *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *Wood*, 432 F.3d at 82-83); *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *Nat'l Council of La Raza v. U.S. Dep't of Justice*, 411 F.3d 350, 355-56 (2d Cir. 2005); *Lawyers Comm. for Human Rights v. Immigration & Naturalization Serv.*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989) (exemptions are "narrowly construed to ensure that Government agencies do not develop a rubber stamp, 'top secret' mentality behind which they can shield legitimately disclosable documents"). Courts thus recognize that there is a "strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents." *Associated Press*, 554 F.3d at 283 (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)).

I.

NEITHER EXEMPTION 1 NOR EXEMPTION 3 PROVIDES A BASIS FOR WITHHOLDING LEGAL ANALYSIS UNDER FOIA

The remaining legal memoranda at issue on appeal (the "OLC Memoranda") have all been withheld under Exemption 1, which protects from disclosure documents that are "in fact properly classified" pursuant to an Executive Order. 5

U.S.C. § 552(b)(1) (emphasis added). The only information at issue in NYT's appeal is pure legal analysis like the released portions of the OLC DOD Memorandum – the legal propositions advanced and the statutory, treaty, and precedential authorities invoked – which reflects none of the types of operational details or personnel identities that animate and require Exemption 1 protection.

Such analysis, without more, does not meet the legal criteria for classification. This Court recognized as much in its first opinion in this matter when it discussed the exceptional circumstances that would allow withholding of legal analysis – *i.e.*, when disclosure of the advice would also disclose a secret operation or when classified facts were intertwined with the analysis. SPA130-31. To routinely classify legal reasoning would invite the dramatic expansion of government secrecy and virtually mandate the type of "secret law" FOIA is intended to guard against. To the extent that the Government has not already waived Exemption 1, the District Court's decision as to Exemption 1 should be reversed.

A. E.O. 13526 Limits the Authority to Classify and Thus the Government's Use of Exemption 1

Analysis of Exemption 1 begins with E.O. 13526 (75 Fed. Reg. 707 (Dec. 29, 2009)), which circumscribes the scope of the President's power to classify to only those documents the unauthorized disclosure of which "could reasonably be expected to cause identifiable or describable damage to national security" and

"pertains to" one of eight enumerated topics. E.O. 13526 § 1.4.[10] Exemption 1, in turn, applies only to those documents that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552(b)(1).

NYT does not dispute that the Government has followed the correct technical procedures for designating the OLC Memoranda as classified. But that technical compliance by the Government does not end the courts' analysis. "Properly classified" necessarily includes compliance with the substantive requirements of E.O. 13526 as well. Most important are the two threshold requirements that a classifying authority must meet and a court must review: First, has the agency established that the information "could reasonably be expected to cause identifiable or describable damage to the national security," and, second, has it also shown that the information "pertains to" the specified categories in the order?

[10] Section 1.4 sets forth the following categories of information that is properly subject to classification: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; (h) the development, production, or use of weapons of mass destruction.

There are other requirements as well. The Government is required to show that the agency was "able to identify or describe the damage" that would likely result from disclosure. E.O. 13526 § 1.1(4). The Executive Order then adds a further dimension to what constitutes "properly classified." It acknowledges that the classifying authority (and ultimately a reviewing court) must consider the motive behind the classification. In particular, classification is prohibited if the purpose of that classification is to: "(1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security." E.O. 13526 § 1.7(a).

In its original opinion, the District Court simply skips over the indispensable first step in the analysis, never undertaking any review of whether disclosure of the abstract legal analysis sought by NYT "could reasonably be expected to cause identifiable or describable damage to the national security." *See* SPA37. That was plain error. Instead, the court focused solely on the second threshold prong – whether the legal analysis was "pertaining to" one of the identified categories. SPA37 ("The Government counters that E.O. 13526 does not contain a specific carve-out for legal analysis; rather, E.O. 13526 applies to any information that 'pertains to' the various items listed in Section 1.4. Therefore, legal analysis that

'pertains to' military plans or intelligence activities (including covert action), sources or methods – all of which are classified matters – can indeed be classified.").

In its first opinion in this case, this Court implicitly rejected the idea that legal analysis, without more, could be classified: "We recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation. But that is not the situation here . . . . We also 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." SPA130. Were legal analysis standing alone properly classified, there would be no need to delineate the exceptional circumstances that could justify classification.

Moreover, the District Court's truncated reading of E.O. 13526 – looking only at the "pertains to" clause – not only creates legal error in this case but would provide the basis for an alarming expansion of the Government's authority to classify. Consider the broad sweep of the categories contained in Section 1.4 to which classified information might "pertain" – everything from "foreign relations . . . of the United States" and "foreign government information" to "scientific, technological, or economic matters relating to the national security." By ignoring the first prong of the classification test and focusing solely on the second, the

District Court's holding leaves little in the realm of foreign policy and national defense that could not be subject to classification at the Executive's whim.

The Government has not met, and cannot meet, the harm standard contained in the Executive Order necessary to properly invoke Exemption 1 to deny the NYT FOIA requests. Legal analysis is in important part an exercise in identifying, delineating, and evaluating publicly available legal precedent – information that is invaluable to the public in understanding whether the administration is acting within the bounds of the law, but utterly irrelevant to enemies seeking to avoid capture or death. The proffered declaration from the Government is little more than a description of the legal standards for classification and a threadbare assurance that the law has been followed. *See* Declaration of Robert R. Neller, dated June 20, 2012 ("Neller Dec."), ¶¶ 17-22, JA339-41. That sort of conclusory declaration has been regularly rejected as inadequate to support Exemptions 1 and 3. *See*, *e.g.*, *Halpern*, 181 F.3d at 293 (declining to credit a declaration that "barely pretend[ed] to apply the terms of [the Executive Order governing classification] to the specific facts of the documents at hand"); *ACLU v. Office of Dir. of Nat'l Intelligence* ("*ACLU II*"), No. 10 Civ. 4419, 2011 U.S. Dist. LEXIS 132503 at *20 (S.D.N.Y. Nov. 15, 2011) ("By proffering conclusory and nearly identical justifications for various withholdings, the government appears to assume that *de novo* FOIA review requires little more than a judicial spell check"); *El Badrawi v.*

Dep't of Homeland Sec., 583 F. Supp. 2d 285, 314 (D. Conn. 2008) (rejecting summary judgment based on a declaration that "merely restates the standards promulgated in [the Executive Order]"). [11]

The District Court correctly held in reference to Exemption 3, legal analysis is not an "intelligence source or method" that must be kept secret. In its briefing on the first appeal in this action, the Government effectively conceded the point as well, stating that that Exemption 3 applies only "to the extent [legal analysis] incorporates information that would tend to reveal intelligence sources and methods." Initial Government Appellate Brief at 32. In light of that conclusion, it is illogical and implausible to think that legal standards by which the targeted killing program operates could conceivably harm national security and require withholding under Exemption 1. In fact, the history of this case now proves as much. Senior government officials repeatedly discussed – openly, for the entire

[11] None of the three cases cited by the District Court in support of its Exemption 1 holding in fact addresses whether abstract legal analysis can be kept secret. *See* Initial District Court Decision, SPA37. *N.Y. Times v. Dep't of Justice ("Patriot Act Case")*, 872 F. Supp. 2d 309, 318 (S.D.N.Y. 2012), held that any legal analysis in a DOJ memorandum could not be segregated from secret operational details. It did not reach the question of whether the legal analysis itself could be classified. In *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007), the court addressed whether a bargaining position being taken in international trade negotiations could be withheld. And in in *ACLU II*, No. 10 Civ. 4419, 2011 U.S. Dist. LEXIS 132503, the court found in relevant part that the Government's submissions were insufficient to grant summary judgment as to Exemptions 1 and 3.

world, friends and enemies alike – the contours of the legal analysis at issue here (the very reason why waiver was found by this Court). Subsequently, this Circuit ordered the release of a large portion of that actual analysis. There was no damage to national security, either from the officials' statements or from the release of the OLC DOD Memorandum. Drone strikes continue just as before.[12]

Indisputably, for certain documents, legal analysis may be "inextricably intertwined" with properly classifiable information, making redaction of the classified information impossible. But segregability is subject to court review. *See American Civil Liberties Union v. FBI*, 2014 U.S. Dist. LEXIS 141933, at *7 (S.D.N.Y. Oct. 6, 2014) ("'[N]on-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.'" (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007)). Undertaking *in camera* review, this Court successfully segregated the non-exempt portions of the OLC DOD Memorandum, and there is no reason to doubt that a similar result is possible with the OLC Memoranda. To the extent that the District Court has determined on remand that classified material in any of the OLC Memoranda is inextricably intertwined with properly classified information and

[12] *See* Ismail Khan, "U.S. Drone Strike in Pakistan Is Said to Have Killed 6 Militants," N.Y. TIMES (Jan. 4, 2015), *available at* http://www.nytimes.com/2015/01/05/world/asia/us-drone-strike-pakistan.html.

therefore not releasable, that determination must be reviewed *de novo*. *See* Second Circuit Decision, SPA108.

Finally, we underscore the critical role that the judiciary plays in policing the executive branch's use, and misuse, of secrecy. Under FOIA, the courts are not rendered mere bystanders whenever the executive branch declares something classified. *See, e.g.*, *Halpern*, 181 F.3d at 295 (declining to accept a "conclusory 'catch-all' assertion" that information is properly classified where Government did not provide "sufficiently specific explanation"); *ACLU II* at *15 (finding that Government has "failed to make the required showing that the information withheld 'logically falls' within Exemption 1" (quoting *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009))).

Judicial review of the Government's claimed need for secrecy is an essential bulwark to safeguard openness in government at a time when unprecedented amounts of information are being withheld from public inspection, undermining the public oversight that is central to accountability. According to the Information Security Oversight Office, more than 80 million documents were classified in FY2013, and over 95 million in FY2012, compared to around 6 million in 1996.[13] In the words of one congressman: "[W]e are at a moment in our history where

[13] INFORMATION OVERSIGHT OFFICE, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, REPORT TO THE PRESIDENT (2014), *available at* http://www.archives.gov/isoo/reports/2013-annual-report.pdf.

there is an overwhelming overclassification of material . . . . And the process itself is arcane, and there is no accountability."[14] Experts estimate that anywhere between 50% and 90% of documents are misclassified.[15] The judiciary is positioned to provide a meaningful check on this pervasive power of the Executive. As Senator Daniel Patrick Moynihan once observed, "secrecy is the ultimate form of regulation because people don't even know they are being regulated."[16]

B. The District Court Properly Found that Legal Analysis Could Not Be Withheld under Exemption 3

The District Court specifically rejected DOJ's attempt, pursuant to FOIA Exemption 3, to withhold legal analysis under Section 102A(i)(1) of the National Security Act ("NSA Act"), 50 U.S.C. § 403, and Section 6 of the CIA Act, 50 U.S.C. § 403g: "[A]s with the NSA, the CIA Act's prohibition on the disclosure of intelligence sources or methods would apply to the targeted killing program itself,

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[14] Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 2 (2010) at 4 (remarks of Rep. William D. Delahunt), *available at* http://judiciary.house.gov/_files/hearings/printers/111th/111-160_63081.PDF.

[15] *Id*. at 84 (prepared statement of Thomas S. Blanton, Director, Nat'l Sec. Archive, George Washington University). *See also* Brief of *Amicus Curiae* Reporters Committee for Freedom of the Press in Support of Appellants and Urging Reversal (April 22, 2013), *N.Y. Times v. U.S. Dep't of Justice*, No.13-0422-cv, Docket No. 84.

[16] John Podesta, "Need to Know: Governing in Secret," *in* THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 220, 227 (Richard C. Leone and Greg Anrig Jr., eds, 2003).

but not to the withheld legal analysis." SPA47. Further, the court said, "[I]t is entirely logical and plausible that [protected information about intelligence sources and methods] could be redacted from the legal analysis." SPA46. The Government has effectively abandoned the argument that legal analysis falls under the two acts and Exemption 3. In its briefing on the first appeal in this action, the Government said Exemption 3 applies only "to the extent [legal analysis] incorporates information that would tend to reveal intelligence sources and methods." Initial Government Appellate Brief at 32.

The District Court's conclusion is fully supported by the law. Exemption 3 permits the withholding of materials that are "specifically exempted from disclosure by [another] statute." 5 U.S.C. § 552(b)(3). The two statutes relevant here permit the Government to keep secret "intelligence sources and methods." *See* National Security Act, 50 § U.S.C. 403-1(i)(1); CIA Act, 50 U.S.C. § 403g. Under established law, the Government has burden of showing that the materials at issue "logically fall[] within the claimed exemptions." *Wilner*, 592 F.3d at 69 (internal quotation marks and citations omitted); *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) (finding that materials must "fall into the categories of 'intelligence sources and methods'"). Nothing about legal analysis "logically falls" within any definition of "intelligence sources or methods," and the

Government's boilerplate declaration fails to establish otherwise. *See* Neller Dec. ¶¶ 17-22, JA339-41.

As with Exemption 1, the proper next step is *in camera* review to determine whether the disclosable information can be segregated from information that is classified under the two relevant statutes. *See N.Y. Times v. Dep't of Justice ("Patriot Act Case")*, 872 F.Supp.2d 309, 318 (S.D.N.Y. 2012) (reviewing *in camera* whether legal analysis could be released with redaction).

C. The Government Has Waived Its Right To Invoke Exemptions 1 and 3

Even if this Court determines that Exemptions 1 and 3 were properly invoked by DOJ at the time the memoranda were drafted, the right to assert those exemptions (as well as Exemption 5) has been waived by the repeated public disclosures by senior Government officials and the release of the DOJ White Paper, just as was the case with the OLC DOD Memorandum. *See* Second Circuit Decision, SPA113-14 ("With respect to the [OLC DOD Memorandum's] legal analysis, we conclude that waiver of Exemptions 1 and 5 has occurred. 'Voluntary disclosures of all or part of a document may waive an otherwise valid FOIA exemption.'" (quoting *Dow Jones & Co. v. U.S. Dep't of Justice*, 880 F.Supp. 145, 150-51 (S.D.N.Y. 1995))). While this Court continued to embrace the "official acknowledgement" test of *Wilson v. CIA*, 586 F.3d 171, 186 (2d. Cir. 2009) in its earlier decision in this case, it cautioned against a narrow literal reading of

Wilson's requirement that the information sought had to "match" the information publicly disclosed. SPA131-32. This Court said that a "rigid application" of the test "may not be warranted" and questioned the wisdom of requiring the waived information to be a near facsimile of the publicly disclosed. SPA132. ("Indeed, such a requirement would make little sense. A FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed."). Yet, in the decision on remand, the District Court appears to have formalistically applied the same rigid interpretation of *Wilson* to the OLC Memoranda that this Court previously discouraged. *See* SPA189, 193.

As more fully outlined by the ACLU in its brief in the related case of *ACLU v. U.S. Dep't of Justice*, No. 14-4764, what matters for *Wilson* analysis is that the information sought is closely related to the information that has already been publically disclosed; here, such information encompasses all the legal analysis establishing the framework for engaging in targeted killings. In the interest of judicial economy, NYT will not further address the waiver issue and instead adopts and incorporates the argument contained in the ACLU's brief on appeal. *See* Plaintiff's Brief, *American Civil Liberties Union v. U.S. Dep't of Justice*, No. 14-4764, filed February 3, 2015, at Sections II-A, B.

II.

EXEMPTION 5 DOES NOT PROVIDE A BASIS FOR WITHHOLDING THE OLC MEMORANDA

The OLC Memoranda are also withheld under Exemption 5. As set forth above, *supra* Section I-C, the Government has waived its right to invoke this exemption as well because of its extensive public statements. But even if this Court determines that no waiver occurred, that exemption still does not justify withholding the memoranda at issue. Exemption 5 permits an agency to keep secret only "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" and has been construed to include both the "deliberative process" and "attorney-client" privileges. 5 U.S.C. § 552(b)(5); *La Raza*, 411 F.3d at 356.[17] But this Court has also made clear that legal analysis loses Exemption 5 protection when it has become the Government's "working law." *See Brennan Ctr. v. U.S. Dep't of Justice*, 697 F.3d 184, 194-95 (2d Cir. 2012).[18] Here, as the statements by senior

[17] It is unclear from the Government's redacted Vaughn Index, produced following the Second Circuit Decision, precisely which privileges the Government believes apply to each of the OLC Memoranda.

[18] *Brennan* clarified the working law doctrine by distinguishing working law from express adoption (incorporation by reference), both of which provide a legal basis for setting aside Exemption 5. The working law doctrine is applicable when a legal position is adopted as the operating law of the government, whether the

government officials showed, the legal analysis promulgated by the OLC became the legal framework under which targeted killings were undertaken. As such, whether it is contained in the OLC DOD Memorandum or the remaining undisclosed memoranda, the legal analysis is the "working law" of the Government and must be disclosed.[19]

The District Court did not consider "working law" as to the OLC DOD Memorandum in its initial decision, based on the court's erroneous conclusion that because it found that statements by public officials did not amount to waiver or express adoption under Exemption 5, it did not need to go further. *See* SPA55

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government discloses the adoption publicly or not. *Brennan*, 697 F.3d at 199-202. Express adoption or incorporation by reference occurs when an agency uses a legal analysis to publicly justify a position it is taking. *Brennan*, 697 F.3d at 198-99. Because analysis of express adoption or incorporation by reference largely tracks the analysis this Court undertook in its original decision concerning waiver, *see* SPA114-29, NYT will not repeat those arguments here, other than to reiterate that, in reference to Exemption 5 waivers, this Court has explicitly stated that "courts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred." *La Raza*, 411 F.3d at 357 n.5 (emphasis in original).

[19] The District Court mistakenly said that the NYT had conceded that the OLC DOD Memorandum was initially exempt from disclosure under Exemption 5 at the time it was written. *See* SPA52. In fact, NYT specifically raised that issue in a court-ordered supplemental briefing to the District Court after *Brennan* clarified what Exemption 5 required. *See* NYT Letter Brief, October 10, 2012. In any event, there is no basis for finding any such concession as to the OLC Memoranda. The burden of proof for showing factually that Exemption 5 applied in the first instance remains with DOJ. *See Brennan*, 697 F.3d at 201-2 ("[I]t is the government's burden to prove that the privilege applies, and not the plaintiff's to demonstrate the documents sought" must be disclosed as "working law.").

("Because waiver and adoption merge, at least in the context of the 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 privilege."). The Second Circuit, however, has explicitly stated that working law is a separate doctrine from express adoption and constitutes a "distinct path [ ] through which Exemption 5's protections can be lost." *Brennan*, 697 F.3d at 198. While the redactions in the District Court Remand Decision makes it impossible to know whether or how the court addressed working law as to the OLC Memoranda, the court ultimately stated that its decision was final as to all issues pertaining to legal opinions. *See* SPA197.

In *Brennan* and *La Raza*, this Court laid out a fundamental principle of FOIA: If a document, even one that was originally deliberative, sets forth what has become an agency's "effective law and policy," it must be disclosed as "working law." *Brennan*, 697 F.3d at 199; *La Raza*, 411 F.3d at 356-57; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The public does not have to be subjected to "trust me" government in which officials know the law they are applying but are immune from having to reveal it. *See Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 548 (2d Cir. 1978) (FOIA requires release of a document that "sets forth or clarifies an agency's substantive or procedural law," lest it render that working law "secret law"). FOIA was passed in

part to prevent the public from being subjected to secret law by governmental agencies. *Jordan v. U.S. 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." (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975))). Because final agency policy is *per se* disclosable under Exemption 5, the working law analysis does not turn on whether a document has been publicly acknowledged or not.

The working law doctrine extends to executive branch policies and practices that do not meet the strict definition of "law." *See NLRB*, 421 U.S. at 153 (recognizing the "affirmative congressional purpose [of FOIA] to require disclosure of documents that have 'the force and effect of law'"); *Coastal States*, 617 F.2d at 869 (working law consists of agency guidance or precedent applied by agency staff in their dealings with the public); *PHE, Inc. v. U.S. Dep't of Justice*, 983 F.2d 248, 252 (D.C. Cir. 1993) (working law is "materials that define standards for determining whether the law has been violated"). Nor is it necessary that the requested document be "absolutely binding" on an agency or government employee as long as it expresses a "settled and established policy" – in other words, there is simply no requirement that a policy, to be considered "working law," must ultimately have an actual effect on a particular private party. *See Public Citizen, Inc. v. Office of Mgmt. and Budget*, 598 F.3d 865, 875 (D.C. Cir.

2009); *see also Tax Analysts v. IRS ("Tax Analysts I")*, 117 F.3d 607, 617 (D.C. Cir. 1997); *Coastal States*, 617 F.2d at 859-60 (policy at issue must be disclosed as an agency's working law even though it was not formally binding). If the documents are "routinely used" and "relied on" by agencies, they fall within the definition of working law. *Coastal States*, 617 F.2d at 869; *Tax Analysts I*, 117 F.3d at 617.

Viewed under that body of law, the record makes clear that the legal analysis provided by OLC constitutes the government's "working law" in its implementation of the targeted killing program. That conclusion flows both from the statements made by senior officials and from the unique nature of OLC advice in the particular context of targeted killings. John Brennan, then the President's national security aide, testified that "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate." Second Circuit Decision, SPA117. The Attorney General, at the direction of the President, also assured Congress and the public that certain killings were legal because the Executive Branch had followed the necessary legal standards as determined by "Department of Justice lawyers." Initial Government Appellate Brief at 24. Government officials, including Attorney General Holder, have repeatedly stressed that targeted killing decisions are legal because of the procedures the Government follows. *See* Initial District Court Decision, SPA18-26. Among those assuring

that an established legal protocol was followed was Harold Koh, the State Department Legal Adviser (the Government's "procedures and practices for identifying lawful targets are extremely robust" and legal principles are "implemented rigorously . . . to ensure that [targeted killings] are conducted in accordance with all applicable law"). SPA19. Likewise, DOD General Counsel Jeh Johnson discussed "the basic legal principles that form the basis for [targeted killings]" and noted that we "must consistently apply conventional legal principles." SPA20. It is circular (and Kafkaesque) for the Government 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 standards set forth by OLC are not binding on them. If the OLC legal advice is *not* working law, it casts serious doubt on the Government's claims of legality.

It is important to understand the role advice from OLC plays in a program like the targeted killing where individual actors may face criminal liability. By statute, executive order, and longstanding practice, OLC opinions, far more so than other kinds of government lawyering, will often function as the executive branch's controlling view of the law.[20] The District Court, in its first decision, discussed at

[20] *See, e.g.*, Randolph D. Moss, "The Department of Justice Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 ADMIN. L. REV. 1303, 1305 (2000) ("When the views of the Office of Legal Counsel are sought on the question of the legality of a proposed executive branch action, those views are typically treated as conclusive and binding within the

length the concern that targeted killings were criminal acts or otherwise violated U.S. law. *See* SPA13-17. But it is well established that individual government agents enjoy immunity when they act within a legal framework established by OLC and that framework is followed.[21] In such circumstances, OLC opinions are not mere advice, but rather establish the binding parameters within which officials may operate without fear of prosecution in areas that are not ordinarily subject to judicial review – such as in the realm of national security.[22] The special role of

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executive branch. The legal advice of the Office, often embodied in formal, written opinions, constitutes the legal position of the executive branch, unless overruled by the President or the Attorney General.").

[21] *See also* Brief of *Amici Curiae* Electronic Privacy Information Center and Seven Open Government Organizations in Support of Appellants and Urging Reversal (April 22, 2013), *N.Y. Times v. U.S. Dep't of Justice*, No. 13-0422-cv, Docket No. 85.

[22] *See, e.g.*, "Developments in the Law – Presidential Authority," 125 HARV. L. REV. 2090, 2092-93 (2012) ("OLC's most important function is to exercise the authority (delegated to it by the Attorney General) to issue legal opinions for the executive branch, especially on issues of constitutional law. Attorney-advisers within OLC produce written opinions that become binding on the executive branch until and unless overruled by the President or the Attorney General. These opinions are not only followed by the entire executive branch, but arguably also confer nearly complete civil and criminal immunity for officials that act in accordance with OLC's view of the law. As a result, the attorneys at OLC exercise great influence over the actions of the executive branch, particularly in areas, such as national security, where secret programs carried out by the President may not be challenged in court for years, if ever. In such areas, OLC assumes a quasi-judicial role as the only 'independent' actor to review proposed policies, making the objectivity of its opinions extremely important for keeping executive power within its proper bounds."); *see also* Plaintiff's Brief, *American Civil Liberties Union v. U.S. Dep't of Justice*, No. 14-4764, filed February 3, 2015, at Section III- B.

OLC opinions has been repeatedly acknowledged. For instance, when Attorney General Holder decided not to re-open torture investigations involving U.S. personnel unless they had acted outside the legal limits set by OLC, he stated: "That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals."[23]

Concededly, there are times when the memoranda of government lawyers, including those in OLC, have fallen short of qualifying as working law. For instance, in *Brennan*, this Court found that the working law exception did not apply to certain OLC memoranda analyzing whether a USAID requirement of contractors was constitutional. The Court concluded that OLC was not empowered to be the decision-maker as to whether the agency should enforce the requirement. *Brennan*, 697 F.3d at 203. But that sort of advice to an agency – counseling on a thumbs up/thumbs down decision as to whether keep a policy or abandon it – should be distinguished from procedures and guidelines that an agency must follow

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[23] Speech of Attorney General Eric Holder, "Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees," (Aug. 24, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html.

to ensure legality. In instances where government lawyers are laying out procedures and guidelines that are to have iterative application going forward, as they presumably did here, the working law doctrine applies with full force.[24] It is the difference between being asked to render a legal opinion for a client as to the legality of a certain policy and setting a policy that will be followed to assure legality.

That distinction emerges in contrasting *Brennan* to those cases in which memoranda were found to be working law, such as *Coastal States*, *Public Citizen*, and *Tax Analysts v. IRS ("Tax Analysts II")*, 294 F.3d 71 (D.C. Cir. 2002), all of which were cited favorably by this Court in *Brennan*. *See Brennan*, 697 F.3d at 200-01. *Coastal States*, 617 F.2d at 857, dealt with legal memoranda that

[24] Similarly, an additional case cited by the Government in the initial appeal, *Electronic Frontier Foundation v. U.S. Dep't of Justice*, 739 F.3d 1 (D.C. Cir. 2014), is not to the contrary. In that case, the court determined that an OLC memorandum supplied to the FBI did not constitute the agency's "working law" because "Even if the OLC Opinion describes the legal parameters of what the FBI is permitted to do, it does not state or determine the FBI's policy." *Id.* at 10 (emphasis omitted). But in that case, the FBI had actually *declined* to adopt the analysis in the OLC memorandum, the opposite situation as the one presented here, where public officials explicitly *embraced* the OLC's analysis. *Id.* ("The FBI was free to decline to adopt the investigative tactics deemed legally permissible in the OLC Opinion. Indeed, the [Office of the Inspector General]'s report acknowledged that the FBI had 'declined, for the time being, to rely on the authority discussed in the OLC Opinion.' The OLC opinion does not provide an authoritative statement of the FBI's policy. It merely examines policy options available to the FBI."). The OLC Memoranda at issue here are hardly mere "policy options;" they supply the adopted working law that has underpinned targeted killings of actual people, including American citizens. For the Government to claim otherwise is, at the least, disingenuous.

interpreted Department of Energy regulations and were provided to auditors in field offices to guide their work. The memoranda were designed to help regional auditors assure that companies were in compliance with a program regulating petroleum pricing and allocation. *Id.* at 858. While auditors were technically free to reject the interpretations provided by counsel, the staff "failed to follow a regional counsel opinion only if it could be distinguished on the facts, or if the matter were referred to a higher authority within the agency." *Id.* at 860. The memoranda were indexed and used as precedent. *Id.* Those factors, among others, led to the conclusion that they constituted working law.

Similarly, in *Tax Analysts II*, at issue was legal advice from the Office of Chief Counsel setting forth the Internal Revenue Service's legal position on the tax code and procedures. 294 F.3d at 81. The court distinguished between exempt documents reflecting "internal give-and-take" and those that were disclosable because they contained the "considered legal conclusions" of the Chief Counsel. *Id.* at 73. Specifically, the court declined to release legal opinions providing advice to "equally-positioned decisionmakers," comments on a draft form, or reactions to a legislative proposal. *Id.* at 81. But the court deemed to be working law those memoranda that were addressed to resolution of taxpayer disputes as well as a final legal opinion concerning general procedures. *Id.* at 80. Even though the program officers who received the memoranda had final programmatic

decision-making authority in a particular case, the court found that it is "enough that [the opinions] represent OCC's final *legal* position concerning the Internal Revenue Code, tax exemptions, and proper procedures." *Id.* at 81 (emphasis in original).

The same principles abided in *Public Citizen*. The FOIA requester there sought legal memoranda that were used to "guide further decision-making" on whether proposed legislation needed to be cleared by the Office of Management and Budget. 598 F.3d at 875. The D.C. Circuit found that documents "reflecting OMB's formal and informal policy on how it carries out its responsibilities fit comfortably within the working law framework." *Id.* The court continued: "[A]n agency's application of a policy to guide further decision-making does not render the policy itself predecisional." *Id.* The touchstone was not whether the memoranda were absolutely binding but whether they expressed a "settled and established policy." *Id.*

Those cases stand for the proposition that legal opinions are disclosable as working law when they are "'routinely used by agency staff as guidance,'" *Brennan*, 697 F.3d at 200 (quoting *Coastal States*, 617 F.2d at 869), or "'reflect[ ] [an agency's] formal or informal policy on how it carries out its responsibilities.'" *Brennan*, 697 F.3d at 201 (quoting *Public Citizen*, 598 F.3d at 875). In each of

those cases, unlike in *Brennan*, the government lawyers were setting policy to apply to future events and guide decision-making going forward.

In those circumstances, as here, such an opinion is not advice entitled to confidentiality. It is the rule of law.

III.

THE DISTRICT COURT VIOLATED THE FIRST AMENDMENT RIGHT OF ACCESS TO JUDICIAL OPINIONS BY SEALING NEARLY ITS ENTIRE DECISION ON REMAND

On remand, the District Court issued its full opinion under seal and released a separate opinion on the public docket that was redacted almost in its entirety following a consultation process with the Government. *See generally* District Court Remand Decision, SPA178-98. The District Court also entered a separate order concerning that sealing, in which the court acknowledged that it did not think certain paragraphs in its decision needed to be redacted but was redacting them all the same at the Government's request. *See* Sealing Order, SPA176-77. The public's First Amendment right of access was plainly violated, both by the District Court's denial of meaningful access to its reasoning and by the process it used in redacting its decision on remand.

"The notion that the public should have access to the proceedings and documents of courts is integral to our system of government. To ensure that ours is indeed a government of the people, by the people, and for the people, it is

essential that the people themselves have the ability to learn of, monitor, and respond to the actions of their representatives and their representative institutions." *United States v. Erie Cnty*, 763 F.3d 235, 238-9 (2d Cir. 2014). This essential value is protected by both the First Amendment and by a common law right of access to judicial documents. *Id*. at 239 ("[O]ur Constitution, and specifically the First Amendment to the Constitution … protects the public's right to have access to judicial documents.").

Where the First Amendment right of access is implicated, issues of law related to sealing or closure are reviewed *de novo*. *In re N.Y. Times Co.*, 577 F.3d 401, 405 (2d Cir. 2009); *In re Grand Jury Subpoena*, 103 F.3d 234, 236 (2d Cir. 1996). Even when factual questions are involved, this Court has made clear that a district court decision is not only given "close appellate scrutiny," but that "we have traditionally undertaken an independent review of sealed documents, despite the fact that such a review may raise factual rather than legal issues." *Newsday LLC v. Cnty of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013).

In order to determine whether a particular type of document or proceeding is subject to the First Amendment right of access, courts apply the "experience and logic" test. As framed recently by this Court, "we consider (a) whether the documents 'have historically been open to the press and general public' (experience) and (b) whether 'public access plays a significant positive role in the

functioning of the particular process in question' (logic)." *Erie Cnty*, 763 F.3d at 239 (quoting *Lugosch v. Pyramid Co.*, 435 F.3d 110, 120 (2d Cir. 2006)). The First Amendment right of access to judicial opinions is well settled and beyond dispute. *See Prod. Res. Grp. v. Martin Prof'l*, 907 F.Supp.2d 401, 417 (S.D.N.Y. 2012) ("The qualified First Amendment right attaches to judicial opinions such as this one."); *see also Lugosch*, 435 F.3d at 121.

"Once a First Amendment right of access to judicial documents is found, the documents 'may be sealed [only] if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' And, '[b]road and general findings by the trial court … are not sufficient to justify closure.'" *Erie Cnty*, 763 F.3d at 239 (quoting *Lugosch*, 435 F.3d at 120).

Here, far from providing a factual rationale and narrowly tailoring the redaction, the District Court offered no reasoning at all in support of its decision to seal the full opinion or redact substantial portions of the opinion released on the public docket. *See* Sealing Order, SPA177 ("The full opinion will remain under seal."). Moreover, the District Court sealed even those portions of the docket it explicitly stated should be *released* to the public. SPA176-77 ("I disagree with the Government's redaction of the bulk of the first full paragraph and the second and third paragraphs on page 9, which as drafted by this court contain not a whit of

classified material (the Government does not suggest otherwise), and which I do not believe would tend to reveal any classified information. In order to preserve that issue for appellate review, I will release on the public docket the opinion with all the Government's proposed redactions today, along with this cover note indicating my conclusion about this material. Should the Second Circuit agree with the Government that the material was properly redacted, nothing will be lost; should it agree with my view that nothing the Government has redacted on page 9 should be redacted, it will so indicate."). This rationale turns the First Amendment on its head, restricting from public view information the District Court finds no reason to seal. What is "lost" by such an action, of course, is the full protection of the First Amendment itself.

It appears that the District Court engaged in the bulk of its redactions in order to preserve classified information (although it did not make findings to that effect). NYT does not dispute that such a rationale could in some circumstances justify sealing provided that the court makes specific, on the record findings stating as much. Here, however, even if that necessary finding of fact had been made, the breadth of the District Court's sealing is far from "narrowly tailored"; indeed, entire sections are redacted, including headings and even the anonymized name of the documents under consideration. Because of the unwarranted scope of the redaction, NYT has no ability to respond in detail to the decision on remand. That

stands in marked contrast to what has happened previously in this very case. In the Initial District Court Decision, the District Court managed to discuss, at great length and on the public record, its analysis of FOIA exemptions related to the OLD DOD Memorandum. This Court did likewise in its opinion. Why similar discussion in the decision on remand is unfit for public disclosure is baffling.

What limited information was made public frustrates the public's right to understand the basic thread of the District Court's decision, sometimes in ways that border on the absurd. The public version of the opinion states on one page, "The issue raised by the Government's objection to disclosure is potentially fascinating and incredibly complicated." The preceding and subsequent sections are redacted in their entirety. *See* SPA186. At times, it is not even clear what document is being discussed.

Such wholesale, unexplained redaction clearly constituted a violation of the constitutional right, and the opinion should be released in full except as to that information that is duly sealed in accordance with the constitutional standards and processes.

CONCLUSION

For each of these reasons, NYT respectfully asks this Court to (i) reverse the judgment below granting DOJ summary judgment and denying partial summary judgment to Appellants; (ii) declare that the legal analysis contained in the OLC Memoranda is public under 5 U.S.C. § 552 and order DOJ to provide the memoranda, in full or in part, to NYT within 20 business days; (iii) unseal the Remand District Court Decision to the full extent required by the First Amendment; (iv) award NYT the costs of these proceedings, including reasonable attorney's fees, as expressly permitted by 5 U.S.C. § 552(a)(4)(E); and (iv) grant such other and further relief as the Court deems just and proper.

Dated: New York, NY
February 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 11,191 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 3, 2015

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