No. 13-445

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

American Civil Liberties Union and The American Civil Liberties Union Foundation,
Appellants,
v.
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 the Central Intelligence Agency,
Appellees.

On Appeal from the United States District Court
For the Southern District of New York

Brief for the American Civil Liberties Union and The American Civil Liberties Union Foundation

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CORPORATE DISCLOSURE STATEMENT

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

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JURISDICTIONAL STATEMENT

The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") brought claims under the Freedom of Information Act. The District Court had subject matter and personal jurisdiction pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(E)(iii), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706. The District Court granted summary judgment to the Defendant–Appellee government agencies, and judgment was entered on January 24, 2013. The ACLU filed its Notice of Appeal on February 1, 2013, which was timely under Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the defendant–appellee agencies can lawfully provide "no number no list" responses to plaintiffs' Freedom of Information Act ("FOIA") request for information about the targeted-killing program when the President and senior government officials have voluntarily disclosed information about the program's scope, effectiveness, operation in individual instances, and purported legal basis.

2. Whether the defendant–appellee agencies can lawfully provide "no number no list" responses when the provision of a *Vaughn* declaration enumerating and describing responsive documents would disclose no information protected by Exemptions 1 and 3.

3. Whether the Departments of Justice and Defense have waived their right to withhold a memorandum from the Office of Legal Counsel to the Department of Defense (the "OLC–DOD Memo") by voluntarily disclosing its substance.

4. Whether the Departments of Justice and Defense have waived their right to withhold the OLC–DOD Memo by adopting its reasoning.

5. Whether, irrespective of waiver or adoption, the Departments of Justice and Defense properly withheld the OLC–DOD Memo pursuant to FOIA Exemptions 1 and 5.

6. Whether the Department of Defense has waived its ability to withhold the unclassified memoranda listed on its *Vaughn* index (the "Unclassified Memos") pursuant to FOIA Exemption 5.

7. Whether the Department of Justice's Office of Information Policy conducted an adequate search for responsive records.

STATEMENT OF THE CASE

This litigation concerns a Freedom of Information Act request (the "Request") filed by the ACLU for records relating to the government's targeted-killing program and to its killing, in the fall of 2011, of three United States citizens—Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi. The Request seeks records concerning the purported legal basis for the program, the process by which the government adds U.S. citizens to so-called "kill lists," and the government's legal and factual basis for the killing of those three U.S. citizens. Plaintiffs filed the Request on October 19, 2011, with the Central Intelligence Agency ("CIA"), the Department of Defense ("DOD"), and the Department of Justice ("DOJ")—including DOJ's Office of Information Policy ("OIP") and Office of Legal Counsel ("OLC"). After exhausting administrative appeals, the ACLU filed suit in the Southern District of New York on February 1, 2012. The case was consolidated with a related suit filed by The New York Times Company.

After various modifications by the defendant agencies of their original responses to the ACLU's Request, the parties filed cross-motions for summary judgment. In two opinions dated January 3, 2013, and January 22, 2013, U.S. District Judge Colleen McMahon granted the government's motion and denied the ACLU's motion. *See N.Y. Times Co. v. U.S. Dep't of Justice*, Nos. 11 Civ. 9336 & 12 Civ. 794, 2013 WL 238928 (S.D.N.Y. Jan. 22, 2013) (SPA1–68); *N.Y. Times*

Co. v. U.S. Dep't of Justice, Nos. 11 Civ. 9336 & 12 Civ. 794, 2013 WL 50209 (S.D.N.Y. Jan. 3, 2013) (SPA69–71). The ACLU timely appealed on February 1, 2013; the New York Times Company also appealed. This Court consolidated the appeals on March 19, 2013.

STATEMENT OF FACTS & PROCEDURAL HISTORY

I. The Targeted-Killing Program

Over the last twelve years, the CIA and JSOC have used drones to carry out targeted killings in at least half a dozen countries. Some of these killings have been carried out in Iraq and Afghanistan; many others have been carried out in places far removed from areas of armed conflict. *See* JA166. The frequency of drone strikes has increased dramatically in recent years, and public interest in the government's targeted-killing program has increased concomitantly. *See generally id.*; *see also generally* Scott Shane & Thom Shanker, *Yemen Strike Reflects U.S. Shift to Drones in Terror Fight*, N.Y. Times, Oct. 1, 2011, http://nyti.ms/qd0L4Q (cited at JA255–256). Many commentators, including some in public office, have raised concerns about civilian casualties, the program's legal basis, the process by which individuals are added to so-called "kill lists," and the wisdom of permitting Executive Branch officials to deprive individuals of their lives without ever presenting evidence to any court. *See* JA837–843. Within the United States, public concern and debate about the program grew substantially after the CIA and JSOC killed three U.S. citizens in Yemen in the fall of 2011. On September 30, 2011, the CIA and JSOC killed Anwar al-Aulaqi, who had been added to the agencies' "kill lists" months earlier, and Samir Khan, who was traveling with him. JA249–251. Two weeks later, the CIA and JSOC killed Abdulrahman al-Aulaqi, Anwar al-

Aulaqi's sixteen-year-old son, in what anonymous CIA officials told the media was "an outrageous mistake." JA842.

While the government does not release casualty statistics, The Bureau of Investigative Journalism, a London-based group that tracks American drone strikes, estimates that the CIA and JSOC may have killed more than 4,000 people in Pakistan, Yemen, and Somalia alone, including approximately 1,000 civilian bystanders.[1]

II. Plaintiffs' FOIA Request & the Agencies' Responses

To help the public better assess the wisdom and lawfulness of the targeted-killing program the ACLU filed the Request under the Freedom of Information Act ("FOIA") on October 19, 2011, with the CIA, DOD, and DOJ, including its components OIP and OLC. It sought records concerning the purported legal basis for the program, the process by which the government adds U.S. citizens to so-called "kill lists," and the government's legal and factual basis for the killing of Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi. *See* JA248–259.

DOD did not provide any substantive response to the Request. *See* JA373. OLC and the CIA issued so-called "Glomar" responses, refusing to confirm or

[1] *See Covert War on Terror: The Datasets*, Bureau of Investigative Journalism, http://www.thebureauinvestigates.com/category/projects/drone-data/ (last visited Apr. 12, 2013); *see also* Scott Neuman, *Sen. Graham Says 4,700 Killed in U.S. Drone Strikes*, NPR News, Feb. 21, 2013, http://n.pr/157whqC.

deny the existence of responsive records. *See generally Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). JA263–264, 318. After exhausting administrative appeals, the ACLU filed suit on February 1, 2012. The Southern District of New York consolidated the case with a related action filed by The New York Times Company. *See* JA036–048, JA024–035.

In connection with the parties' cross-motions for summary judgment, the defendant agencies modified their original FOIA responses after "senior executive branch officials . . . publicly addressed significant legal and policy issues pertaining to U.S. counterterrorism operations and the potential use of lethal force by the U.S. government against senior operational leaders of al-Qa'ida or associate[d] forces who have U.S. citizenship." SPA7 (quotation marks omitted). The agencies' amended responses to the Request were as follows:

A. DOJ

After searching its own files, OLC provided a *Vaughn* index listing sixty non-classified responsive records, each described as an e-mail concerning "the use of lethal force in a foreign country against U.S. citizens in certain circumstances," withholding them in their entirety under FOIA Exemption 5. JA290–291, JA324–333; *see generally Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). OLC stated that it was also withholding classified records, but that FOIA Exemptions 1 and 3 excused it from having to disclose the number of these documents or supply a

description of them. (OLC termed this a "no number no list" response, as did the other agencies.) OLC did acknowledge the existence of one classified record, an "OLC opinion related to DOD operations" (the "OLC–DOD Memo"), which it withheld in its entirety under Exemptions 1 and 3. JA291–292; *see* SPA9.

OIP's search yielded one set of talking points related to "hypothetical questions" about the death of Anwar al-Aulaqi, a record it released. OIP also issued a *Vaughn* index listing four unclassified records withheld under Exemptions 3 and 5. JA412–413, JA442–443, JA447–450, JA453–454. And it withheld additional classified documents through a "no number no list" response pursuant to Exemptions 1 and 3. JA412.

At issue in this case are (a) DOJ's "no number no list" responses, (b) its withholding of the OLC–DOD Memo, and (c) the adequacy of OIP's search.

B. DOD

DOD released a speech by DOD General Counsel Jeh Johnson at Yale Law School on February 22, 2012, and it provided a *Vaughn* index listing ten unclassified records withheld under FOIA Exemption 5. JA337–338. Seven of those records consisted of e-mail chains regarding drafts of speeches given by Mr. Holder and Mr. Johnson, JA338–339; one was a presentation about international legal principles made by Mr. Johnson, JA339; and DOD described the two others as "unclassified memoranda from the Legal Counsel to the Chairman of the Joint

Chiefs of Staff to the White House's National Security Council Legal Advisor addressing the legal basis for conducting military operations against U.S. citizens in general" (the "Unclassified Memos"). *Id.*; SPA54.

DOD also indicated that it had located responsive documents that were classified. One of these was the OLC–DOD memo, which the agency withheld under FOIA Exemptions 1 and 5. *See* JA339. As to the remainder, DOD issued a "no number no list" response. JA342.

At issue in this case are (a) DOD's "no number no list" response, (b) its withholding of the OLC–DOD Memo, and (c) its withholding of the Unclassified Memos.

C. CIA

The CIA withdrew its initial "Glomar" response and replaced it with a "no number no list" response. In doing so, the CIA acknowledged its "general interest in" two categories of records: those relating to "the legal basis . . . upon which U.S. citizens can be subjected to targeted killing," and those relating to "the process by which U.S. citizens can be designated for targeted killing." JA215–216 (alteration in original). The agency also released the publicly available texts of the speeches given by Mr. Holder and Mr. Brennan. *See* JA216. The CIA issued a "no number no list" based on FOIA Exemptions 1 and 3 as to any other responsive documents in its possession. JA217. It did not provide a *Vaughn* index.

At issue in this case is the CIA's "no number no list" response.

III. The Government's Disclosures About the Program[2]

Senior government officials made a series of on-the-record disclosures about the targeted-killing program before Plaintiffs filed the Request—indeed, it was these disclosures that led Plaintiffs to file the Request in the first place. Since that time, government officials—including the President and some of his closest advisors—have made additional disclosures. Through these disclosures, they have defended the program's legality, effectiveness, and necessity, and have dismissed concerns about civilian casualties. They have described the CIA's role in the program. They have acknowledged that the U.S. government carried out the strike that killed Anwar al-Aulaqi, and they have outlined the government's reasons for having done so. The government's disclosures about the program have been selective and self-serving, and they leave the public record about the targeted-killing program incomplete in crucial respects. Nonetheless, the disclosures have

[2] Most of the government statements cited below were part of the record before the district court. A few were made after July 2012, when briefing before the district court was completed, and most of these were made after January 2013, when the district court entered judgment. Unless they were submitted to the court through post-briefing letters, the sources of such statements are not included in the Joint Appendix. However, this Court may take judicial notice of newspaper articles and other publications in which such statements appear. *See* Fed. R. Evid. 201(d); *see also Hope v. Pelzer*, 536 U.S. 730, 737 n.7 (2002); *Am. Civil Liberties Union v. CIA* ("*Drones FOIA*"), No. 11-5320, — F.3d —, 2013 WL 1003688, at *6 n.10 (D.C. Cir. Mar. 15, 2013).

been sufficiently substantial, detailed, and consistent that they fundamentally undermine the arguments that the government makes in this litigation.

A. The government has acknowledged that the United States carries out targeted killings, including against American citizens.

The President and other senior officials have acknowledged that the government carries out targeted killings of suspected terrorists. An early official acknowledgment came in May 2009 at the Pacific Council on International Policy, where, in response to a question about "remote drone strikes" in Pakistan, then–CIA Director Leon Panetta called such strikes "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership." JA544. Roughly one year later, then–Legal Adviser to the Department of State Harold Koh assured a meeting of the American Society of International Law that "U.S. targeting practices—including lethal operations conducted with the use of unmanned aerial vehicles"—"comply with all applicable law." JA124. On two occasions in 2012, the President acknowledged and discussed the targeted-killing program—first describing it during an online forum as "a targeted, focused effort at people who are on a list of active terrorists who are trying to go in and harm Americans, hit American facilities, American bases, and so on," JA516; and more recently calling it a "tool" used against al-Qaeda in a CNN interview. JA828. In February 2013, Press Secretary Jay Carney stated that "[w]e have acknowledged, the United States, that sometimes we use remotely piloted aircraft to conduct targeted strikes

against specific al Qaeda terrorists in order to prevent attacks on the United States and to save American lives." White House, Press Briefing by Press Secretary Jay Carney (Feb. 5, 2013), http://1.usa.gov/UvbFaS ("Carney Briefing").

Senior officials have also acknowledged that U.S. citizens are and have been among the program's targets. In an April 30, 2012 speech at the Woodrow Wilson International Center for Scholars, John O. Brennan—then the President's chief counterterrorism advisor, and since March 2013 the CIA Director—confirmed that "the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones." JA095. He then disclosed that "[w]hen [the target] is a U.S. citizen, we ask ourselves additional questions" and "engage in additional review." JA102–103. Various government officials, including the President, have acknowledged that the United States was responsible for the targeted killing of Anwar al-Aulaqi. *See infra* FACTS § III(C).

The leaders of the congressional committees that oversee the intelligence community have also made clear that U.S. citizens have been among the program's targets. In her opening statement during Mr. Brennan's confirmation hearing to be CIA Director, Sen. Dianne Feinstein—Chairman of the Senate Select Committee on Intelligence ("SSCI")—discussed the "disclosure . . . of a 16-page unclassified White Paper on the government's legal analysis of the use of targeted force against

a United States citizen[] who was a senior operational leader of al-Qa'ida." *Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence* at 5:18–20, 113th Cong. (Feb. 7, 2013), http://1.usa.gov/15fr1Sx ("Brennan Hearing Tr."). And both Sen. Feinstein and Rep. Mike Rogers, the Chairman of the House Select Committee on Intelligence ("HSCI"), have discussed the CIA's role in the targeted killing of Mr. al-Aulaqi. *See infra* FACTS § III(C).

B. The government has acknowledged the CIA's involvement in the targeted-killing program.

As the D.C. Circuit recently remarked of the CIA, "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes . . . ." *Am. Civil Liberties Union v. CIA* ("*Drones FOIA*"), No. 11-5320, — F.3d —, 2013 WL 1003688, at *5 (D.C. Cir. Mar. 15, 2013). "But," as that court continued, "there is more." *Id.*

On multiple occasions, then–CIA Director Leon Panetta acknowledged that the CIA carries out targeted killings; he also discussed the CIA's role in specific strikes. In a June 2010 interview with ABC News, Mr. Panetta discussed a drone strike in Pakistan that had reportedly killed al Qaeda's third-most-important leader:

> [T]he more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations *in the history of the CIA* in that part of the world, and the result is that we are disrupting their

> leadership. . . . We just took down number three in their leadership a few weeks ago.

JA628 (emphasis added). After his 2009 speech before the Pacific Council, Mr. Panetta responded to a question about "remote drone strikes": "[T]hese operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage." JA544. In March 2010, discussing a drone strike on Hussein al-Yemeni, a suspected "top al Qaeda trainer," Mr. Panetta remarked to the *Wall Street Journal* that "[a]nytime we get a high value target that is in the top leadership of al Qaeda, it seriously disrupts their operations." JA622.

Mr. Panetta continued to discuss the CIA's operational involvement in the targeted-killing program after he became Secretary of Defense.[3] In a speech at the U.S. Navy's 6th Fleet Headquarters in Naples, Italy, Mr. Panetta said: "Having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had at the CIA, although Predators aren't bad." JA577. Later that same day, Panetta noted that a recent military operation in

[3] Mr. Panetta's term as CIA Director stretched from February 13, 2009, to June 30, 2011. He then served in the same administration as Secretary of Defense from July 1, 2011, to February 27, 2013.

Libya had involved "the use of Predators, which is something I was very familiar with in my past job." *Id.*[4]

Mr. Panetta is not the only senior official to have discussed the CIA's operational role in the targeted-killing program. In an October 2012 interview with the *Washington Post*, Mr. Brennan discussed his "efforts to curtail the CIA's primary responsibility for targeted killings" and "described a future in which the CIA is eased out of the clandestine-killing business." JA837, 843. More recently, Ross Newland, who was a senior CIA official when the targeted-killing program was first developed, told the *New York Times* (in the newspaper's paraphrase) that "the agency had grown too comfortable with remote-control killing," "drones ha[d] turned the C.I.A. into the villain in countries like Pakistan," and (in his own words) the CIA's program was "just not an intelligence mission."[5]

Leaders of the congressional committees that oversee the CIA have similarly acknowledged the agency's ongoing operational role. In an interview with CBS, HSCI Chairman Rogers revealed: "Monthly, I have my committee go to the CIA to review [drone strikes]. I as chairman review every single air strike that we use in

[4] In a February 2011 interview with *Newsweek*, the CIA's former General Counsel, John Rizzo, also discussed the CIA's use of Predator drones to carry out targeted killings: "The Predator is the weapon of choice, but it could also be someone putting a bullet in your head." Tara Mckelvey, *Inside the Killing Machine*, Newsweek, (Feb. 13, 2011), http://thebea.st/rfU2eG.

[5] Mark Mazzetti, *A Secret Deal on Drones, Sealed in Blood*, N.Y. Times, Apr. 6, 2013, http://nyti.ms/10FLtIB.

the war on terror, both from the civilian and the military side when it comes to terrorist strikes." Transcript, *Face the Nation*, CBS News (Feb. 10, 2013), http://cbsn.ws/ZgBg9R ("Rogers CBS Tr."). In February 2013, Sen. Feinstein publicized her committee's "robust and ongoing oversight of counterterrorism targeted killings," which included "35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program." Press Release, Sen. Dianne Feinstein, Chairman, U.S. Sen. Select Comm. on Intelligence, Feinstein Statement on Intelligence Committee Oversight of Targeted Killings (Feb. 13, 2013), http://1.usa.gov/14UCBBr ("Feinstein Press Release"). In a more recent radio interview, Sen. Feinstein addressed a proposal to shift responsibility for targeted-killing strikes from the CIA to JSOC by favorably comparing the CIA's drone-strike record to the military's with regard to civilian casualties:

> Here's my concern: We [i.e. the members of the SSCI] watch the intelligence aspect of the drone program, those [i.e. drones] that are used by the Intelligence Agency, very carefully. Literally, dozens of inspections following the intelligence, watching the Agency exercise patience and discretion specifically to prevent collateral damage. The military program has not done that nearly as well. I think that's a fact, I think we even hit our own base once. So, that causes me concern.

Senator Dianne Feinstein on Drones, Assault Weapons Ban, The Takeaway (Mar. 20, 2013), http://bit.ly/147GbKB ("Feinstein Takeaway Interview").

And equally telling, when the SSCI considered Mr. Brennan's CIA Director nomination, the members spent a substantial portion of the hearing discussing targeted killing, including the future "role" of Mr. Brennan "as CIA director in [the] approval process" for targeted killings. *See, e.g.*, Brennan Hearing Tr. at 31:13–15 (question of Sen. Feinstein).

C. The government has disclosed that it carried out the killing of Anwar al-Aulaqi and has described its reasons.

The President and other senior administration officials have acknowledged the United States' responsibility for the killing of Anwar al-Aulaqi on September 30, 2011. SPA11. That day, DOD's *Armed Forces Press Service* published a story on the DOD website announcing "[a] U.S. air strike that killed Yemeni-based terrorist Anwar al-Awlaki early this morning is a testament to the close cooperation between the United States and Yemen, Defense Secretary Leon E. Panetta said today." JA651. The story referred to remarks given by then–Secretary Panetta in response to a press question about the strike:

> Well, this has been a bad year for terrorists. You know, we—we just have seen a major blow—another major blow to al-Qaida, someone who was truly an operational arm of al-Qaida in this node of Yemen. And, you know, we had always had tremendous concern that after getting bin Laden, that *someone like Awlaki was a primary target* because of his continuing efforts to plan attacks against the United States. . . .
>
> As far as the operational elements here, I'm not going to speak to those except to say that *we've been working with the Yemenis over a long period of time to be able to target Awlaki*, and I want to

> congratulate them on their efforts, their intelligence assistance, their *operational assistance* to get this job done.

JA799 (emphases added).

President Obama echoed Mr. Panetta's remarks on national television nearly one month later. On October 25, 2011, on *The Tonight Show With Jay Leno*, the President said that Mr. al-Aulaqi "was probably the most important al Qaeda threat that was out there after bin Laden was taken out, and it was important that, working with the Yemenis, we were able to remove him from the field." JA556.

In January 2012, Mr. Panetta again discussed Mr. al-Aulaqi's killing and the purported legal basis for it in an interview broadcast on CBS's *60 Minutes*. Reporter Scott Pelley asked Mr. Panetta, "You killed al-Aulaqi?" Mr. Panetta responded by nodding affirmatively. JA514. Mr. Panetta explained his understanding of the government's legal authority to kill U.S. citizens it suspects of terrorism, and disclosed that the use of that authority "required a recommendation the CIA director makes . . . , but in the end when it comes to going after someone like that, the President of the United States has to sign off." *Id.* [6]

The leaders of the congressional committees that oversee the CIA have also acknowledged that agency's role in Mr. al-Aulaqi's killing. At Mr.

[6] Portions of Mr. Pelley's interview with Mr. Panetta were broadcast as a "Web Extra" presentation and are only available as video on the Internet. JA514.

Brennan's February 2013 confirmation hearing before the SSCI, Sen. Feinstein asked the nominee to describe the threat that justified that killing:

> I think one of the problems is now that the drone program is so public, and one American citizen is killed, people don't know much about this one American citizen . . . . And I wonder if you [Mr. Brennan] could tell us a little bit about Mr. al-Awlaki and what he had been doing?

Brennan Hearing Tr. at 125:14–20. Similarly, Rep. Rogers disclosed that his committee has overseen the CIA's targeted-killing strikes since "even before they conducted that first air strike that took Awlaki." *See* Rogers CBS Tr.

Beyond acknowledging the government's responsibility for the al-Aulaqi strike, the government has explained its reasons for carrying it out. Speaking at a White House ceremony the day of the strike, President Obama recited a list of terrorist activities with which the government believed Mr. al-Aulaqi to be associated, including leading "external operations for al Qaeda in the Arabian Peninsula," "planning and directing efforts to murder innocent Americans," "direct[ing] the failed attempt to blow up an airplane on Christmas Day in 2009," "direct[ing] the failed attempt to blow up U.S. cargo planes in 2010," and "repeatedly call[ing] on individuals in the United States and around the globe to kill innocent men, women and children to advance a murderous agenda." JA139. During Mr. Panetta's press conference the same day, he cited the same allegations. JA799.

The government has made allegations against Mr. al-Aulaqi in other contexts as well. In labeling him a Specially Designated Global Terrorist in July 2010, the Department of the Treasury alleged that Mr. al-Aulaqi played "a key role in setting the strategic direction for AQAP"; "recruited individuals to join AQAP"; "facilitated training" at AQAP camps in Yemen; and "helped focus AQAP's attention on planning attacks on U.S. interests." *See* Designation of Anwar al-Aulaqi Pursuant to Executive Order 13,224 and Global Terrorism Sanctions Regulations, 31 C.F.R. 594, 75 Fed. Reg. 43,233–34 (publicly announced July 12, 2010) ("SDGT Designation"). In a February 2012 sentencing memorandum filed in *United States v. Umar Farouk Abdulmutallab*, No. 2:10-cr-20005 (E.D. Mich. filed Dec. 26, 2009), the government alleged that Mr. al-Aulaqi had instructed and enabled the defendant, who had been convicted of plotting to bomb a Northwest Airlines jetliner on December 25, 2009, to carry out the attack. JA592.

D. The government has outlined the purported legal justification for the targeted killing of U.S. citizens and referred to and discussed the OLC memoranda that set out that justification.

The government has outlined the purported legal justification for the targeted killing of U.S. citizens. On February 4, 2013, NBC News published a non-classified DOJ white paper titled, "Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force." *See* Michael Isikoff, *Justice Department Memo Reveals Legal*

Case for Drone Strikes on Americans, NBC News, Feb. 4, 2013, http://nbcnews.to/U1ZII3. The DOJ subsequently officially released the 16-page document—which is dated November 8, 2011—in response to a reporter's previously submitted FOIA request.[7] Jason Leopold, *Targeted Killing White Paper Leaked to NBC News Turned Over to Truthout by DOJ in Response to a Six-Month-Old FOIA Request Four Days Later*, Truthout, Feb. 16, 2013, http://bit.ly/12TT4ra.

The White Paper sets out legal arguments purporting to justify the government's killing of Americans believed to be senior leaders of al-Qaeda. *See Department of Justice White Paper* at 1–2, November 8, 2011, http://bit.ly/YKXeN8 ("White Paper"). It explains the sources of the government's claimed legal authority, *id.* at 2–5, the scope of that authority (and the limits on it), *id.*, the relevance of the Fourth and Fifth Amendments, *id.* at 5–10, the feasibility and appropriateness of judicial review, *id.* at 5–7, 10, and the import of the foreign-murder statute, *id.* at 10–15 (addressing 18 U.S.C. § 1119(b)), and the War Crimes Act, *id.* at 15–16 (addressing 18 U.S.C. § 2441)).

[7] Though the White Paper appears to be responsive to the ACLU's request, DOJ neither released the document nor listed it (or any draft thereof) on its *Vaughn* index. *See infra* ARGUMENT § IV. Despite releasing it to other FOIA requesters, DOJ has not released it to the ACLU.

Even before the release of the White Paper, the government had set out its legal analysis in a series of speeches by senior officials. Harold Koh, then the Department of State's Legal Adviser, addressed the program's legal basis in a March 25, 2010 address to the American Society of International Law. JA124–125 (discussing, among other things, international law of war principles). Mr. Brennan addressed the program's legal basis in a September 16, 2011 speech at Harvard Law School. JA130–131 (contending that the government's legal authority to carry out targeted killings is not "restricted solely to 'hot' battlefields like Afghanistan," and proposing that "the traditional conception of what constitutes an 'imminent' attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations"). Jeh Johnson, then DOD's General Counsel, addressed the program's legal basis in a February 22, 2012 speech at Yale Law School. JA403 (contending that "belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives").[8]

[8] In an April 2012 speech discussing the legal regime applicable to the CIA in a "hypothetical case," then–CIA General Counsel Stephen W. Preston cited the President's authority under Article II of the Constitution, "[a] specific congressional authorization," "national self-defense" authority under Article 51 of the United Nations charter, and the international humanitarian law principles. JA573–574.

Most notably, Attorney General Eric Holder addressed the legal basis for the targeted-killing program in a March 5, 2012 speech at Northwestern University School of Law. Like the White Paper, the Attorney General's speech addressed both the source and the scope of the government's claimed authority. JA083–086. It also endeavored to distinguish targeted killings, which the Attorney General viewed as legitimate, from "assassinations," which are proscribed by Executive Order. JA085. *See infra* ARGUMENT § III(A) (discussing the speech and the White Paper in more detail).

Before the release of the White Paper, the administration treated these speeches as a comprehensive and definitive statement about the legal basis for the government's targeted-killing policy. In his April 2012 Wilson Center speech, Mr. Brennan stated that he considered Mr. Holder's speech to have "already described" the relevant "legal authorities . . . , including all relevant constitutional considerations" that apply to the targeting of U.S. citizens. JA102. The White House press secretary also argued that Mr. Holder and other senior officials had detailed the legal basis for the program. *See* Carney Briefing ("I encourage you to go back to look the speeches by the Attorney General, by John Brennan, remarks by Jeh Johnson and by Harold Koh on these matters, and I think they provide a pretty voluminous accounting of matters that are treated here with great deliberation and seriousness.").

E. The government has acknowledged the existence of OLC memoranda that constitute the targeted-killing program's governing law.

The government has acknowledged in this litigation that the OLC produced at least one legal memorandum relating to the targeted-killing program—the OLC–DOD Memo—but the OLC produced others as well. Earlier this year, the administration provided four memoranda about the targeted killing of U.S. citizens to the SSCI in connection with the nomination of John Brennan to be CIA Director.[9] At Mr. Brennan's confirmation hearing, Mr. Brennan acknowledged that the OLC memoranda were governing law: "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate." Brennan Hearing Tr. at 57:14–15.[10]

The administration has made clear that the White Paper was drawn from one or more of the OLC memoranda. Mr. Carney explicitly tied OLC opinions to the White Paper and to Mr. Holder's speech. White House, Press Gaggle by Press

[9] In February 2013, Sen. Feinstein revealed that the SSCI was seeking access to "all nine OLC opinions" on the "legal authority to strike U.S. citizens," Feinstein Press Release, but later clarified that there were "a total of 11 OLC opinions related to targeted killing," four of which had been released to the SSCI. Ryan Reilly, *Seven Other Targeted Killing Memos Still Undisclosed*, Huffington Post, Feb. 13, 2013, http://huff.to/12gSbZC.

[10] As discussed above, Sen. Feinstein's statement about the White Paper—describing it as a "16-page unclassified White Paper on the government's legal analysis of the use of targeted force against a United States citizen, who *was* a senior operational leader of al-Qa'ida"—suggests that not only was the advice operative, but that it had been relied upon when the government targeted Mr. al-Aulaqi. Brennan Hearing Tr. at 57:14–15 (emphasis added).

Secretary Jay Carney (Feb. 7, 2013), http://1.usa.gov/TQ3MLw ("Carney Gaggle") ("[T]he President directed the Department of Justice to provide the congressional Intelligence Committee's access to classified Office of Legal Counsel advice related to the subject of the Department of Justice white paper that we've been discussing these last several days."). And in testimony before the Senate Judiciary Committee, Attorney General Holder responded to questions about the White Paper's controversial definition of "imminence," which had first been discussed publicly by Mr. Brennan, JA 130–31:

> I think that white paper becomes more clear if it can be read in conjunction with *the underlying OLC advice*. I mean in the three, the speech that I gave at Northwestern I talked about imminent threat and I said that incorporated three factors: a relevant window of opportunity to attack, the possible harm that missing window would cause. . . . I do think and without taking a position one way or another, it is one of the strongest reasons why the sharing of the opinions, the advice, the OLC advice with this committee makes sense.

Oversight of the U.S. Department of Justice Before the S. Comm. on the Judiciary at 1:51:36–1:52:24, 113th Cong. (Mar. 6, 2013), http://1.usa.gov/14pKfSc ("Holder Judiciary Cmte. Testimony").

IV. The District Court's Opinion

In two opinions dated January 3 and January 22, 2013, the district court granted summary judgment to the government. The court's holdings are summarized here.

A. "No Number No List" Responses

The court affirmed the defendant agencies' "no number no list" responses, rejecting Plaintiffs' argument that the government's many disclosures about the targeted-killing program had waived the agencies' right to make a "no number no list" response. SPA66–67. The court did not consider whether the agencies' provision of something other than a "no number no list" response, including a *Vaughn* index, would compromise information protected by a FOIA exemption.

Additionally, without specific reference to the agencies' "no number no list" responses, but perhaps with them in mind, the court addressed generally the applicability of Exemptions 1 and 3 to documents responsive to the Request.

First, it held that it "s[aw] no reason why legal analysis cannot be classified pursuant to the Executive Order on Classified National Security Information, No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) ('E.O. 13,526'), if it pertains to matters that are themselves classified." SPA37. Addressing waiver under Exemption 1, the court rejected the Plaintiffs' arguments that government statements regarding "the factual bas[e]s" for the killings of Anwar Al-Awlaki, Samir Khan, and Abdulrahman Al-Awlaki had waived the government's right to exempt such documents from disclosure under FOIA. SPA39. It also determined that, generally, "none of [the government's] public pronouncements reveals the

necessarily detailed analysis that supports the Administration's conclusion that targeted killing . . . is lawful." SPA41.

Next, the court made general conclusions with respect to Exemption 3. The court held that targeted killing constitutes an "intelligence source or method" under the National Security Act ("NSA"), 50 U.S.C. § 403-1(i)(1), and that information about the CIA's involvement in targeted killing would constitute a CIA "function[]" under the Central Intelligence Agency Act ("CIA Act"), 50 U.S.C. § 403g. SPA45, SPA47.[11] But the court agreed with Plaintiffs' argument that legal analysis cannot be considered an "intelligence source or method" within the meaning of the NSA, or a "function[]" under the CIA Act. SPA45–47.

B. Identified Documents Withheld by the Agencies

1. The OLC–DOD Memo

The court held that the OLC–DOD Memo was properly withheld under Exemption 5. SPA42, SPA51, SPA59–60. It rejected Plaintiffs' argument that senior officials' public speeches about the targeted-killing program's legal basis had waived the agencies' right to withhold the document. SPA59–60. And the court found "no need" to address Plaintiffs' arguments that the withholding of the OLC–DOD Memo was impermissible because the document constituted "working

[11] The NSA and the CIA Act are the two withholding statutes relied upon by the government. *See infra* ARGUMENT § II(C).

law"—as the government's effective law and policy—or impermissibly classified "secret law." SPA55.

The court's general conclusions regarding Exemptions 1 and 3—that it "s[aw] no reason why legal analysis cannot be classified," SPA37, and that legal analysis cannot be considered an "intelligence source or method" within the meaning of the NSA, or a "function[]" under the CIA Act, SPA45–47—would also apply to the OLC–DOD Memo. But because the court found that the OLC–DOD Memo was properly withheld under Exemption 5, it did not adjudicate the application of Exemptions 1 and 3 to that record, and it declined to review the OLC–DOD Memo *in camera*. SPA42.

2. The Unclassified Memos

In its supplemental opinion, the court held that the Unclassified Memos were deliberative and therefore properly withheld under Exemption 5. SPA70. The court did not address Plaintiffs' argument that the agencies had waived their right to withhold the Unclassified Memos by disclosing their substance or adopting them as policy. Nor did it address Plaintiffs' arguments based on governmental "working law" or impermissible "secret law." *See* SPA55, n.35; SPA70.[12]

[12] The court held that the unclassified "CAPSTONE presentation" listed on the DOD *Vaughn* index was protected by Exemption 5. SPA53. Plaintiffs no longer seek that document.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment in FOIA litigation de novo. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999); *accord* 28 U.S.C. § 552(a)(4)(B).

SUMMARY OF THE ARGUMENT

At the heart of this FOIA case is the fundamental question whether the government can lawfully refuse to disclose records about a targeted-killing program—and the killings of three U.S. citizens pursuant to it—that has been acknowledged and discussed by the President, the nation's senior-most military and intelligence officials, and other government officials in scores of public statements. It cannot. When government officials have publicly disclosed and discussed at length both the government's asserted legal authority to lethally target American citizens and the CIA's and Pentagon's roles in carrying out the specific killings at issue here, then the government's continuing claims of secrecy are not only legally untenable, but rationally implausible.

Because of these official acknowledgements, the government cannot properly invoke the "no number no list" response to avoid its statutory obligations. Nor can the government withhold legal analysis justifying the use of lethal force against U.S. citizens when it has publicly adopted that analysis, and the analysis constitutes the working law of the targeted-killing program. And the government's claimed authority to withhold records under FOIA exemptions is also improper because targeted-killing is not an intelligence source or method or a "function" of the CIA for withholding purposes.

Below, the district court felt "constrained" by a "thicket of laws and precedents," SPA3, to conclude that the government had satisfied its statutory duties despite its sweeping secrecy claims. But this Court should not accept what its sister Circuit recently termed "a fiction of deniability," *Drones FOIA*, 2013 WL 1003688 at *6, that every day becomes more and more at odds with plain truths that cannot be ignored either inside or outside this Court.

ARGUMENT

I. FOIA Requires the Court to Scrutinize Closely the Government's Argument that National Security Requires Records to Be Withheld from the Public.

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). By design, FOIA "create[s] a 'strong presumption in favor of disclosure.'" *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). "Although Congress enumerated nine exemptions from the disclosure requirement, these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)) (quotation marks omitted); *accord Am. Civil Liberties Union v. Dep't of Def.*, 543 F.3d 59, 66 (2d Cir. 2008), *vacated on other grounds and remanded*, 130 S. Ct. 777 (2009) (mem.). The Supreme Court recently reaffirmed that the courts are to give FOIA's exemptions "a narrow compass." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1265 (2011) (quotation marks omitted).

The courts' obligation to enforce the public's right of access to government records is especially important where, as here, the information in question concerns

the government's response to national-security threats. The Congress that enacted FOIA in 1966 voiced particular concern about selective and misleading government statements on national-security policies, and it gave the public access to information so that the public could evaluate those policies, and the government's assertions about them, for itself. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, at 59 (1974) ("*FOIA Source Book*").[13]

Eight years after enacting FOIA, Congress amended it to clarify that the courts must independently review any government claim that national security requires records to be withheld from the public. *See* S. Rep. No. 93-1200 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6723; *accord CIA v. Sims*, 471 U.S. 159,

[13] *See also* 112 Cong. Rec. 13031 (1966) (statement of Rep. Rumsfeld), *reprinted in FOIA Source Book* at 70 ("Certainly it has been the nature of Government to play down mistakes and to promote successes. . . . [This] bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government . . . .").

189 (1985).[14] Since then, the Judiciary has frequently emphasized that, while the Executive Branch is entitled to a degree of deference in its factual claims about the harms that might result from disclosure, courts cannot "relinquish[] their independent responsibility" to review an agency's withholdings. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).

II. The Agencies' "No Number No List" Responses to the ACLU's FOIA Request Are Unlawful.

The defendant–appellee agencies seek to justify their "no number no list" responses on the ground that any enumeration or description of responsive records would reveal classified information about the "nature, breadth, and depth" of their interests in the subjects of the Request. JA217 (CIA); JA342 (DOD); JA192 (DOJ).[15] In accepting this argument, the district court erred.

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[14] *See also* 120 Cong. Rec. 9314 (1974) (statement of Sen. Kennedy) ("We have seen too much secrecy in the past few years, and the American people are tired of it."); 120 Cong. Rec. 9334 (1974) (statement of Sen. Muskie) ("It should not have required the deceptions practiced on the American public under the banner of national security in the course of the Vietnam war or since to prove to us that Government classifiers must be subject to some impartial review.").

[15] OLC and OIP made "no number no list" responses at the request of the Office of the Director of National Intelligence ("ODNI"). *See* JA291 (OLC); JA441 (OIP). The ODNI's justification for the response is set out in the Declaration of John F. Hackett. JA192–193.

A. A "no number no list" response to a FOIA request is a novel judicial accommodation that is justified only in the most unusual circumstances.

Typically, in response to a FOIA request, an agency searches for responsive records, releases those that are not exempt, and "provide[s] the court with 'a reasonable basis to evaluate the claim of privilege'" by submitting a detailed justification of any withholdings in a "*Vaughn* index." *Boggs v. United States*, 987 F. Supp. 11, 21 (D.D.C. 1997) (quoting *Gallant v. NLRB*, 26 F.3d 168, 173 (D.C. Cir. 1994)); *see Vaughn*, 484 F.2d at 826–28. In limited circumstances, however, courts have permitted the government to refuse to confirm or deny the existence of responsive records when such acknowledgment would itself implicate one of FOIA's exemptions. *See Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009); *accord Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011).

That response, known as "Glomar," is a judicial innovation. *See Phillippi*, 546 F.2d 1009. The "no number no list" response is a recent variation of Glomar. Rather than refuse to confirm or deny the existence of responsive records, an agency invoking "no number no list" refuses to enumerate or describe responsive records that it acknowledges it does possess. SPA67.

While there may be circumstances in which an agency could justify a "no number no list" response, those circumstances will be exceedingly rare. Earlier this year, the D.C. Circuit rejected the CIA's Glomar response to another ACLU

FOIA request for information about that agency's use of drones to carry out targeted killings. *See Drones FOIA*, 2013 WL 1003688, at *8–*9. To guide the district court on remand, the circuit court discussed the circumstances in which a "no number no list" response might be justified. *Id.* at *8–*9.[16] An agency's "no number no list" response will be lawful, the court wrote, only if the agency demonstrates that enumerating or describing any responsive documents would itself disclose information protected by one of FOIA's exemptions. *Id.* at *8; *accord* SPA67.

Thus, to justify a "no number no list" response, it is not sufficient for an agency to show that identifying or describing some subset of the records it refuses to enumerate or describe would reveal information protected by a FOIA exemption. The agency must show that identifying or describing *any* of those records would implicate an exemption. If the agency cannot make that showing, FOIA requires it to identify and describe those records to the extent it can do so without implicating the exemptions. That is why the D.C. Circuit in *Drones FOIA* observed that legitimate "no number no list" responses would be "unusual" and would require "particularly persuasive" affidavits, 2013 WL 1003688, at *8:

[16] The court noted that the government's filings in *this* litigation "speak as if the notion of a 'no number, no list' response is well-established," but that, in fact, those filings constituted the *third* "reported instance[] of such a response." 2013 WL 1003688, at *8.

because their justification requires *the very same kind of accounting* normally associated with the *Vaughn* index. *See Vaughn*, 484 F.2d at 826 (requiring "a relatively detailed analysis in manageable segments" of documents withheld under FOIA exemptions).

B. The agencies' "no number no list" responses are unlawful because the government has already disclosed the information that it purports to protect.

It is well settled that the government cannot withhold information that it has already officially acknowledged. *See, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007).[17] Applying that rule, courts have held Glomar responses to be unlawful where the government has already acknowledged "the existence of [responsive] agency records *vel non*." *Id.* at 374; *accord Wilner*, 592 F.3d at 70; *Drones FOIA*, 2013 WL 1003688, at *2. As the district court correctly noted, a "no number no list" response will be similarly unlawful where the agency has already acknowledged the information that its response seeks to protect. *See* SPA66–67; *accord Drones FOIA*, 2013 WL 1003688, at *8.

[17] A FOIA requester challenging a withholding on the basis of official acknowledgment must satisfy three criteria: "First, the information requested must be as specific as the information previously released. Second, the information requested must match the information previously disclosed . . . . Third, . . . the information requested must already have been made public through an official and documented disclosure." *Wolf*, 473 F.3d at 378 (ellipses in original) (quotation marks omitted); *accord Wilner*, 592 F.3d at 70.

Here, the agencies contend that enumerating or describing any additional records would disclose the "nature, depth, or breadth" of their respective interests in the subject matter of the ACLU's FOIA request, JA334; JA217; JA192–193,[18] but the government has already disclosed the information it says its various "no number no list" responses protect.

CIA

Senior government officials have acknowledged that:

• **the CIA has an operational role in the targeted-killing program**, *see supra* FACTS § III(B); JA628; JA544; JA622; JA577; JA837; Rogers CBS Tr.; Feinstein Press Release; Brennan Hearing Tr. at 31:13–15;[19]

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[18] The agencies use slightly different phrasing, but their arguments are the same.

[19] The government might argue that members of Congress may not "officially acknowledge" facts about Executive Branch agencies, but that argument lacks legal support and is logically absurd.

In *Hoch v. CIA*, No. 88-5422, 1990 WL 102740 (D.C. Cir. July 20, 1990) (per curium), the D.C. Circuit specifically declined to reach the question of whether a congressional committee can officially acknowledge classified information while noting earlier precedent indicating that it could. *See id.* at *1 ("We cannot so easily disregard the disclosures by congressional committees. As [the plaintiff–appellant] notes, in *Fitzgibbon v. CIA*, the district court held that such disclosures are official because the CIA cannot have 'greater official status as an arm of the United States government than the United States Senate.' This circuit has never squarely ruled on this issue, but we need not do so to decide this case." (footnotes omitted)).

Moreover, the committees chaired by Sen. Feinstein and Rep. Rogers are *charged by statute* with overseeing covert actions taken by the CIA. *See* 50 U.S.C. § 413b. Their unequivocal public statements carry both the weight of those responsibilities and the authority of their offices. To ignore clear confirmations of

• **at least in some geographic areas, the CIA has primary responsibility for carrying out such killings**, *see supra* FACTS § III(B); JA628; JA544; JA622;

• **the CIA has in fact carried out many such killings, including the strike that killed Anwar al-Aulaqi**, *see supra* FACTS §§ III(B)–(C); JA544; JA622; JA628; JA514; Rogers CBS Tr.; **and**

• **the CIA's role in the program is ongoing**, *see supra* FACTS § III(B); JA847, JA843; Rogers CBS Tr.; Feinstein Press Release; Feinstein Takeaway Interview; Brennan Hearing Tr. at 31:13–15.

DOD

Senior government officials have acknowledged that:

• **the military's involvement in the targeted-killing program is active (and perhaps growing)**, *see* JA339 (acknowledging the existence of the OLC–DOD Memo); JA289 (same); *see supra* FACTS §§ III(A)–(C); JA516; Carney Briefing; JA095; JA841–843; Feinstein Takeaway Interview; JA651; JA799; **and**

• **the military played a role in the killing of Anwar al-Aulaqi**, *see supra* FACTS §§ III(C); JA651; JA799.

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facts by congressional leaders speaking about matters within their statutory purviews in the context of an official-acknowledgment analysis would defy both law and logic. It would be especially perverse in this case, where the government repeatedly insists on the adequacy of congressional oversight of the targeted-killing program while rejecting the need to explain even parts of it to the public. *See, e.g.*, JA083–84, JA086; JA102.

DOJ[20]

Senior government officials have acknowledged that:

• **DOJ has established rules governing the targeted-killing program**, *see supra* FACTS § III(D)–(E); Carney Briefing; Carney Gaggle; Holder Judiciary Cmte. Testimony; Feinstein Press Release;

• **the OLC–DOD Memo is a document responsive to the Request, i.e. it relates to the targeted killing of U.S. citizens,** JA339;

• **the White Paper and statements by the Attorney General mirror, or were drawn from, OLC memoranda**, *see supra* FACTS § III(E); Carney Gaggle; Holder Judiciary Cmte. Testimony; Feinstein Press Release; **and**

• **DOJ possesses other responsive documents, including up to 11 OLC opinions**, *see supra* FACTS § III(E) & note 9; Carney Gaggle; Holder Judiciary Cmte. Testimony.

C. The agencies' "no number no list" responses cannot be justified under Exemptions 1 and 3.

The agencies' "no number no list" responses would be unlawful even if the agencies had not already disclosed the "nature, depth, [and] breadth" of their

[20] While the CIA and DOD declarations focus on the "nature, depth, and breadth" of their respective agencies' interests, both OLC and OIP (through ODNI) assert "no number no list" responses on the basis that any information about the "volume and nature of the classified documents located by DOJ would reveal classified information about the *nature and extent* of the *U.S. Government's* classified counterterrorism activities." JA192 (emphases added).

interests in the subject matter of the Request. To justify a "no number no list" response, an agency must explain why the enumeration and description of responsive documents would necessarily disclose information protected by a FOIA exemption. The agencies have failed to do this—and it is not a close question.

The agencies justify their "no number no list" responses by reference to FOIA Exemptions 1 and 3.[21] Exemption 1 excludes from disclosure matters that are both "(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). Under the relevant executive order, information may be classified if: (1) it is classified by an original classification authority; (2) it is under the control of the government; (3) it "pertains to" a "[c]lassification [c]ategor[y]" defined in section 1.4 of the order; and (4) its disclosure could be reasonably expected to result in identifiable or describable damage to the national security. E.O. 13,526 §§ 1.1, 1.4. The classification categories relevant here are "intelligence activities (including covert action)" and "intelligence sources or methods," and "military plans, weapons systems, and operations." *Id.* § 1.4.

[21] With respect to their "no number no list" responses, the CIA and DOJ rely on both exemptions, JA217, JA192–193, and DOD relies on Exemption 1 only, JA336, JA342.

FOIA Exemption 3 applies to documents withheld pursuant to qualifying withholding statutes. *See* 5 U.S.C. § 552(b)(3). To support an Exemption 3 withholding under a qualifying statute, the government bears the burden of showing that its withholdings fall within the statute's scope. *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 559 (S.D.N.Y. 2005) ("*Torture Memo FOIA*"). The CIA and DOJ cite the NSA as a relevant withholding statute, and the CIA additionally cites the CIA Act. JA213–214; JA190–191.[22] The NSA prohibits the "unauthorized disclosure" of "intelligence sources and methods," 50 U.S.C. § 403-1(1), and section 6 of the CIA Act protects against disclosures that would reveal "intelligence sources and methods" or would reveal the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g.

The phrases "intelligence sources and methods" and "functions . . . of . . . the Agency" have sometimes been given broad scope, but neither phrase affords the CIA a categorical exemption from the FOIA. *See, e.g.*, *Weissman v. CIA*, 565 F.2d 692, 694–96 (D.C. Cir. 1977) (holding that the CIA's authority to protect "intelligence sources and methods" did not extend to domestic law-enforcement functions); *Phillippi*, 546 F2d at 1015, n.14 (The reference in the CIA Act to

[22] Plaintiffs do not contest that the NSA and the CIA Act are withholding statutes within the meaning of Exemption 3.

"functions" does not give the CIA license "to refuse to provide any information at all about anything it does; rather, it exempts the CIA from providing information regarding its 'internal structure.'"); *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) (holding that the CIA's book-publishing propaganda was not an "intelligence source or method" that had been "contemplated by Congress").

Indeed, when the CIA sought a categorical exemption from the FOIA, Congress refused to supply it. *See* Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 256 (1987) (detailing congressional rejection of the CIA's plea to "exclude totally the CIA . . . from the requirements of FOIA"). And in 1984, when Congress enacted the CIA Information Act to streamline processing of FOIA requests by creating "a *limited exemption* from the [FOIA] for selected CIA records," it underscored the CIA's broad FOIA obligations and explained that its amendment "represent[ed] a reaffirmation by the Congress that the principles of freedom of information are applicable to the CIA." H.R. Rep. No. 276(II) (1984), *reprinted in* 1984 U.S.C.C.A.N. 3778, 3780.

The agencies have not justified their "no number no list" responses under either Exemption 1 or 3. An agency may only "invoke a FOIA exemption if its justification 'appears logical or plausible.'" *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) (quoting *Wilner*, 592 F.3d at 73).

Even assuming for the sake of argument that the agencies' declarations establish that there are *some* responsive documents that cannot be identified or described without disclosing information protected by Exemptions 1 or 3, the declarations do not logically or plausibly establish that this is true of *every* responsive document. Indeed, the declarations do not even *try* to establish it. But this is the agencies' burden.

Moreover, whereas the legitimacy of a Glomar response does not turn on the *nature* of the underlying documents (because the government seeks to protect whether or not it even possesses responsive records), the legitimacy of a "no number no list" response depends on the *specific information* that would be disclosed if an agency were to provide a *Vaughn* index. If an agency establishes that its identification and description of *some* records would inevitably disclose information protected by Exemptions 1 and 3, then the agency has justified the non-provision of a *Vaughn* index—for *those* records. But the agency cannot justify its failure to provide a *Vaughn* declaration for a set of records by contending that its identification and description of a *subset* of those records would disclose protected information. *See Vaughn*, 484 F.2d at 827, n.21 (quoting *EPA v. Mink*, 410 U.S. 73, 93 (1973)) (stating that an agency may "not discuss only the representative example while ignoring the bulk of the documents which may be disclosable"). But—at most—that is all the government's declarations do.

A "no number no list" response also frustrates FOIA by making a meaningful judicial evaluation of agency withholding claims less possible. The *Vaughn* index was a judicial innovation—but, consistent with FOIA, it aimed to make more information public, not less. *See Vaughn*, 484 F.2d at 823–26. The very purpose of requiring the government to meaningfully justify withholdings of information responsive to FOIA requests is to "transform a potentially ineffective, inquisitorial proceeding against an agency that controls information into a meaningful adversarial process" by giving the court a "reasonable basis to evaluate . . . claim[s] of privilege." *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 183 n.3 (3d Cir. 2007) (quotation marks omitted); *accord Delaney Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987) (requiring detailed government submissions to "overcome the applicant's natural handicap—an inability to argue intelligibly over the applicability of exemptions when he or she lacks access to the documents"). That is why, as the district court acknowledged, government submissions that merely "parrot the relevant statutory language" are "never enough to avoid disclosure under FOIA." SPA54; *accord Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[T]he burden which FOIA specifically places on the Government . . . cannot be

satisfied by the sweeping and conclusory citation of an exemption plus submission of disputed material for in camera inspection.").[23]

The Court should be particularly skeptical of the defendant–appellee agencies' "no number no list" responses here because the agencies have already identified and described some responsive records. The CIA has acknowledged that it possesses copies of certain speeches, and the OLC has acknowledged the OLC–DOD Memo. *See supra* FACTS § II. Outside the context of this litigation, the government has acknowledged the existence of other OLC memoranda about targeted killing. *See supra* FACTS § III(D)–(E). That the agencies were able to identify and/or describe these responsive records undermines considerably their contention that a *Vaughn* declaration would inevitably disclose protected information. It also undermines their claim that the provision of a *Vaughn* declaration would reveal the "nature, breadth, and depth" of their respective interests in the subject matter of the Request. By identifying and describing *some*

[23] The second half of the quotation from *Mead* additionally explains, consistent with FOIA, why whatever justifications the government might have presented in its classified declarations below—and whatever conclusions the district court might have drawn from those submissions in the classified appendix to its opinion, *see* SPA3–4—should not be the lone basis for any affirmance of the district court's grant of summary judgment. *See Wilner*, 592 F.3d at 68 ("The court should attempt to create as complete a public record as is possible." (quotation marks omitted)); *Roth*, 642 F.3d at 1185 ("Reviewing documents *in camera* is no substitute for the government's obligation to provide detailed public indexes and justifications whenever possible." (quotation marks omitted)).

responsive documents, the agencies have disclosed that they have an interest in the subject of Plaintiffs' request. Even assuming that the "nature, breadth, and depth" of the agencies' respective interests in the subject matter of the Request is protected under Exemptions 1 or 3, if an agency can release *some* information without implicating an exemption, it must supply a "particularly persuasive" reason to explain why the same is not true as to *any* other information. But the agencies' declarations are devoid of any such reason, and they have failed to meet their FOIA burden.

The agencies' argument is made weaker still by the flexibility that the courts have always given to the *Vaughn* requirement. A *Vaughn* index "may take any form so long as" it "permits the court to critically evaluate the merit of [an] agency's claim of privilege." *Delaney*, 826 F.2d at 128; *accord Drones FOIA*, 2013 WL 1003688, at *8 ("[O]nce an agency acknowledges that it has some responsive documents, there are a variety of forms that subsequent filings in the district court may take."). If describing a given document in a particular way would disclose protected information, the agency can describe the document more generically. If even a generic description would disclose protected information, the agency can omit the description altogether from its public declaration and provide a description *ex parte*. Plaintiffs do not concede that the responsive records cannot be described with reasonable specificity in a public declaration. But the point is

that if a detailed public declaration would inevitably disclose protected information, the agencies have many options short of simply refusing to provide a *Vaughn* index at all, *Drones FOIA*, 2013 WL 1003688, at *8, and the FOIA requires the agencies to employ one of those options, *see Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection."). Though a *Vaughn* index "usually detail[s] the author, date, number of pages, subject matter of each contested document, and a short explanation of why the document should not be disclosed," *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 107 n.1 (2d Cir. 1988), *rev'd on other grounds*, 493 U.S. 146 (1989), the *Vaughn* requirement is flexible enough to accommodate the demands of particular litigation. *See Vaughn*, 484 F.2d at 826–27.

The consequences of the government's argument here go beyond the records at issue in this case. Because it will almost always be true that enumerating and describing records responsive to FOIA requests will reveal information about the depth or breadth of the CIA's interest in the subject of the request, the CIA could effectively do unilaterally what Congress explicitly rejected nearly thirty years ago, and exempt itself from FOIA altogether. *See supra* ARGUMENT § II(C). To shield from the public documents about *any* topic, it would simply have to seek

classification of the "nature, depth, and breadth" of its interest in that topic. The CIA's secrets would no longer include just legitimately protected programs, operations, sources, and methods. Rather, the CIA would be able to shield any document without regard to whether, by the letter and spirit of FOIA, a public demand for that record should lead to a public release. *See Torture Memo FOIA*, 389 F. Supp. 2d at 561 (identifying the "danger of Glomar" as over-classification that "frequently keep[s] secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods").

Likewise, judicial acceptance of blanket "no number no list" responses would lead to an increase of withholdings of *non-exempt* records by fundamentally diminishing the government's withholding burden under FOIA. As this case clearly demonstrates, a "no number no list" response relieves responding agencies of having to provide the court with any justification regarding the withholding of *particular* documents. And in doing so, it raises the specter of "no number no list" responses being invoked by the government to shield documents based on withholdable "nature, depth, and breadth" information even where the responding agency ordinarily would have to release the underlying documents themselves. That is manifestly not an outcome consistent with the text of or policy behind FOIA, a statute whose "dominant objective" is disclosure, *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

III. The Agencies' Withholding of the OLC–DOD Memo and the Unclassified Memos (and Any Other Responsive OLC Memoranda) is Unlawful.

While each of the agencies has offered a "no number no list" response with respect to some subset of responsive records, each (except the CIA) has also provided plaintiffs with a *Vaughn* index and declaration describing other responsive records withheld under Exemptions 1, 3, and 5.[24] Plaintiffs do not contest the bulk of those withholdings. They do challenge, however, the government's withholding of legal analysis and conclusions in the OLC–DOD Memo, the Unclassified Memos, and certain OLC memoranda that the agencies have not addressed in this litigation but whose existence they have officially acknowledged in public statements.[25]

The government's withholding of these records fails for three reasons: (1) the government has officially acknowledged or adopted as policy the legal conclusions and rationale of the memoranda relating to targeted killing; (2) legal analysis is not an "intelligence source or method" and must, therefore, be segregated for release; and (3) targeted killing is not an "intelligence source or

[24] If any responsive records contain personal information subject to FOIA Exemption 6, *see* JA199, the government should redact that information and produce the non-exempt portions. *See* 5 U.S.C. § 552(b).

[25] There are at least eleven OLC memoranda regarding targeted killing, *see supra* FACTS § III(E), any of which—if related to U.S. citizens—would be responsive to the Request.

method" or "function" within the meaning of the government's withholding authorities.[26]

A. The agencies have waived their right to withhold responsive legal memoranda under Exemptions 1 and 5.

The government has waived its right to withhold the OLC–DOD Memo, the Unclassified Memos, and any other responsive legal memoranda under Exemptions 1 and 5, and the district court erred in concluding otherwise.

Under both Exemptions 1 and 5, the government's "official acknowledgment" of requested information waives its ability to withhold it. *See supra* ARGUMENT § II(B). Under Exemption 5—which incorporates both the attorney–client and deliberative-process privileges, *see* 5 U.S.C. § 552(b)(5)—the "working law" doctrine constitutes an additional basis to find waiver. That doctrine requires disclosure of "all opinions and interpretations" that constitute an agency's "effective law and policy" or "working law." *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153, 161 (1975). Under either standard, the government's public acknowledgments defeat its claims of privilege with respect to legal memoranda

[26] The New York Times Company's brief in its related case further explains in the sections addressing Exemptions 1, 3, and 5 why legal analysis is not properly classified and release of it would cause no national-security harm, and why the government has adopted the legal analysis at issue here as "working law." The ACLU adopts the Times' additional arguments.

responsive to the Request, including those withheld pursuant to "no number no list" responses.

As the district court remarked, the government has "mount[ed] an extensive public relations campaign" in order to persuade the public of the targeted-killing program's lawfulness, SPA17, culminating in Attorney General Holder's March 2012 Northwestern speech. Mr. Holder discussed the purported sources of the government's authority to carry out targeted killings of American citizens and the conditions under which it could exercise that authority. JA085. He discussed the relevance and import of the Due Process Clause. *Id.* He addressed the laws of war and their applicability to the targeted-killing program, specifically describing the significance of the principles of necessity, distinction, proportionality, and humanity. JA086. He also distinguished targeted killings from "assassinations." JA085. As the district court observed, the Attorney General's speech "constitute[d] a sort of road map of the decision-making process that the Government goes through before deciding to 'terminate' someone 'with extreme prejudice.'" SPA39–40.

Nonetheless, the district court rejected Plaintiffs' waiver arguments as to both Exemptions 1 and 5. The court held that the public statements relating to the targeted-killing program were not of "sufficient exactitude" to waive the government's Exemption 1 privilege. SPA38, SPA40. And it rejected "waiver and

adoption" under Exemption 5 based on its determination that the Attorney General's speech (and any other statements) did not constitute an "express adoption" of the OLC–DOD Memo: "[T]here is no evidence that the Government continually relied upon and repeated in public the arguments made *specifically* in the OLC–DOD Memo." SPA60 (quotation marks omitted).

The court's Exemption 1 holding was clear error. As the above discussion shows, Mr. Holder's speech detailed almost every aspect of the relevant law. To turn the Exemption 1 waiver inquiry into one focused on whether an executive official includes footnotes in a public speech, as the district court essentially did, SPA40, is a formalistic approach that cannot be squared with FOIA's presumption in favor of disclosure. *See Pub. Citizen*, 533 F.3d at 813. Moreover, Mr. Holder's analysis tracks substantially the officially released DOJ White Paper's analysis (which itself was based on OLC opinions), and its content was cited by the White House Press Secretary as an authoritative representation of the administration's position. Mr. Holder himself referred to his speech in explaining to Congress why he agreed it should be permitted to see "the underlying OLC advice." *See supra* FACTS § III(E). The government has waived its Exemption 1 privilege as to the OLC–DOD Memo (a responsive record, and thus related to targeted killing) as well as to other responsive legal memoranda.

Likewise, the court erred in its Exemption 5 "adoption" analysis. The relevant question is not, as the district court analyzed it, whether the government's public statements evidence the "specific[]" adoption of a withheld *document*; rather, it is whether those statements demonstrate that the government has adopted the *legal reasoning* in that document as "effective law and policy." *See Brennan Ctr. for Justice at N.Y. Univ. Law Sch. of Law v. Dep't of Justice, Cv.* , 697 F.3d 184, 195 (2d Cir. 2012). The government's public statements about the legal analysis that governs its targeted-killing program leave no doubt that the withheld memoranda embody the government's "effective law and policy." This Court recently reaffirmed that "a party cannot invoke [a] relied-upon authority and then shield it from public view." *Id.* at 208. But "invoke" and "shield" is exactly what the government has done here. *See* FACTS § III(D)-(E). Considering "all the[se] relevant facts and circumstances," the district court erred in concluding that the government's "repeated references" to "assure third parties" as to the legality of its actions, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 357 (2d Cir. 2005), as well as its other public representations, did not constitute adoption of the OLC–DOD Memo's legal reasoning (as well as that of other responsive legal memoranda). The district court's error has only been made clearer by recent events. The official release of the White Paper, statements by Press Secretary Carney and the Attorney General himself explicitly linking the White Paper to the

Northwestern speech, and Mr. Brennan's assurance that "[t]he Office of Legal Counsel advice establishes the legal boundaries within which we can operate," make the government's claim that it has not adopted the legal reasoning and conclusions of the withheld memoranda simply incredible. *See supra* FACTS §§ III(D)–(E).[27]

B. The legal memoranda are not protected by Exemptions 1 and 3.

1. Legal reasoning cannot be withheld under Exemptions 1 or 3.

The district court properly acknowledged that legal analysis cannot be protected under the National Security Act because "legal analysis is not an intelligence source or method." SPA45 (quotation marks omitted). Nevertheless, the court "saw no reason why legal analysis cannot be classified" under E.O. 13,526. SPA37. This was error. While legal analysis may be withheld if it is inextricably intertwined with *other* properly classified information, legal analysis cannot itself be classified. For good reason, no court has ever held otherwise.

Under the Executive Order, information can be classified only if it falls within one of eight enumerated categories of classifiable information, E.O. 13,526 § 1.4(c); if the original classification authority determines that "disclosure of the information reasonably could be expected to result in damage to the national

[27] The waiver of the government's Exemption 1 and 5 privileges extends to any responsive legal memoranda, even those not enumerated in response to the Request. *See supra* FACTS §§ III(D)–(E).

security," *id.* § 1.1(4); and if the authority is "able to identify or describe the damage," *id*. Here, the government contends that its legal analysis falls within section 1.4(c), *see* SPA37, which includes "intelligence activities (including covert action), intelligence sources or methods, or cryptology." The government's declarations, however, fail to explain how legal analysis can possibly fall within this category. Plainly, legal analysis is not an "activity," a "source," or a "method." The government's declarations resort simply to reciting the Executive Order's standards and asserting they have been met. But as the district court itself recognized, government assurances that "parrot the relevant statutory language" are "never enough to avoid disclosure under FOIA." SPA54; *see Halpern*, 181 F.3d at 295 (requiring "sufficiently specific explanation[s]" in agency affidavits); *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

In reaching its erroneous conclusion, the district court cited to language that appears at the beginning of E.O. § 1.4(c) ("Information shall not be considered for classification unless . . . it pertains to one of the following . . . ."), and reasoned that even information that does not itself describe or disclose intelligence sources or methods can be classified as long as it "pertains to" them. SPA37. If this reading of the Executive Order prevailed, however, it would expand exponentially the universe of information that has until now been regarded as properly classifiable. Indeed, it would permit the government to classify *every* record responsive to

plaintiffs' Request because, by definition, all of them "pertain to" targeted killing, which the government regards to be an intelligence method. (For that matter, even the government's legal briefs in this litigation "pertain to" targeted killing.) The phrase "pertains to" simply cannot bear the weight the district court placed on it.

To Plaintiffs' knowledge, no other court has so sweepingly interpreted the phrase.[28] To the contrary, the courts have uniformly held that the category of information classifiable under section 1.4(c) is co-extensive with the category withholdable under the "intelligence sources and methods" provision of the NSA. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981); *Phillippi*, 546 F.2d at 1015 n.14. That consistent interpretation of both withholding authorities limits them to their intended purpose: to prevent the disclosure of information that, beyond merely *pertaining* to "intelligence sources and methods," would in fact *reveal* them.

Nor would the release of the government's legal analysis jeopardize national security. If public discussion of the legal analysis related to targeted killing caused

[28] And none of the three cases cited by the district court yields any support for the court's position, *see N.Y. Times Co. v. Dep't of Justice*, 872 F. Supp. 2d 309, 318 (2012) (discussing segregability, not classification, of legal analysis); *Am. Civil Liberties Union v. Office of the Dir. of Nat'l Intelligence*, 2011 WL 5563520, at *5, *8 (S.D.N.Y. Nov. 15, 2011) (denying summary judgment to the government on Exemption 1), and one is blatantly contrary to it, *see Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 157 (D.D.C. 2007) (rejecting the responding agency's withholding of documents containing legal analysis under Exemption 1).

harm to the national security, it would be news to Mr. Koh, Mr. Brennan, Mr. Johnson, and Mr. Holder, who all spoke at length about the administration's legal justification for targeted killing—not to mention Press Secretary Carney, who, when asked whether the release of the White Paper was a threat to national security, answered: "No. No." Carney Briefing; *see supra* FACTS § II(D).

This sensible understanding of the government's withholding authority under Executive Order 13,526, and of the type of national-security harm Congress sought to prevent in Exemption 1, also accords with one of the overarching purposes of FOIA: to eliminate "secret law." *See, e.g.*, *Sears*, 421 U.S. at 154; *see also, e.g.*, *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 872–873 (D.C. Cir. 2010). Were the government authorized to conceal its legal authorities, the balance Congress chose to strike through FOIA—one that protects classified *facts* but requires the disclosure of previously secret *law*—would be fatally undermined.

Of course, that legal analysis cannot be withheld as an "intelligence source or method" under the Executive Order does not mean that legal analysis can never be withheld. It is conceivable that in some circumstances legal analysis will be "inextricably intertwined" with properly classifiable information. *See, e.g.*, *N.Y. Times Co.*, 872 F. Supp. 2d at 318. Here, however, there is every reason to believe that the government's legal analysis *can* be segregated from classified facts. The

speeches of senior officials and, most recently, the White Paper prove that the legal underpinnings of the targeted-killing program can be segregated from protectable "intelligence sources and methods." FOIA requires the government to disclose the former even if it must redact the latter. *See, e.g.*, *Hopkins v. Dep't of Housing and Urban Dev.*, 929 F.2d 81, 85–86 (2d Cir. 1991).

2. Targeted killing is not a "source or method" of intelligence or a statutory "function" of the CIA.

As laid out above, *see supra* ARGUMENT § II(C), the government's withholding authorities under FOIA Exemption 3 protect "intelligence sources and methods." Though that phrase is broad, it is not limitless. The Supreme Court has tethered it to the Agency's mandate of "securing all possible data pertaining to foreign governments or the national defense and security of the United States." *Sims*, 471 U.S. at 170 (quotation marks omitted). The district court correctly concluded that "legal analysis is not an 'intelligence source or method.'" SPA45. Neither is killing: though intelligence sources and methods inform the government's decisions to kill, killing itself does not "logically fall[] within," *Wilner*, 592 F.3d at 68 (quotation marks omitted), the bounds of the statutory term. The district court erred in holding otherwise.

For the same reason, the district court erred in concluding that targeted killing is a "function" under the CIA Act. SPA47. Far from being a catchall that would effectively "accord the Agency a complete exemption from the FOIA," that

term exempts only information about the Agency's '"internal structure." *Phillippi*, 546 F2d at 1015, n.14.

IV. The DOJ's OIP Did Not Conduct an Adequate Search.

While even a rigorous search for documents might miss one or a few responsive records, OIP's search of four DOJ offices failed to locate *thirty* responsive e-mail chains (dated before OIP's self-determined cutoff date) with other DOJ offices that were, in fact, found by OLC. That discrepancy alone makes clear that the search terms and methods used by OIP were inadequate. *See* JA324–333; JA453–454. An agency must revise its assessment of what constitutes a reasonable search "to account for leads that emerge during its inquiry," and the search's reasonableness depends on "what the agency knew at its conclusion rather than what the agency speculated at its inception." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998). When it realized its search had missed documents found by its sister sub-agency, the OIP should have widened its search and used a more comprehensive set of key words, or at least explained the its original failure—something it has never done in this litigation.

In addition, OIP indicated that the cutoff date for its search was November 3, 2011. JA418. None of the other responding agencies provided cutoff dates, and the date chosen by OIP has no obvious relation to the Request. However, the White Paper, which was prepared by DOJ, is dated November 8, 2011. *See* White Paper;

see also Daniel Klaidman, *Obama's Drone Debacle*, Daily Beast, Mar. 10, 2013, http://thebea.st/Zys6Af. Presumably, the White Paper—or, at least drafts of it—would have been within one of the offices searched by OIP. As such, OIP's failure to list the document (or drafts) demonstrates the inadequacy of its search.

For those reasons, the district court erred in summarily concluding that OIP's search was adequate under FOIA. SPA33.

CONCLUSION

For the reasons stated above, the Court should reverse the district court and remand this case with instructions that the district court: (1) order the defendant–appellee agencies to forfeit their "no number no list" responses and to provide sufficiently detailed justifications for any responsive documents they seek to withhold; (2) order DOJ and DOD to disclose the OLC–DOD Memo; (3) order DOD to disclose the Unclassified Memos; (4) determine whether additional responsive legal memoranda exist that can no longer be withheld; and (5) order OIP to renew its search for responsive documents.

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I hereby certify that this brief complies with Rule 32(a)(7)(B) because it contains 13,887 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii), and that it complies with typeface and type style requirements of Rule 32(a)(5)-(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.

_____

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