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

United States Court of Appeals
for the
Second Circuit

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

Plaintiffs-Appellants

- v -

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

Defendants-Appellees

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

BRIEF OF *AMICI CURIAE* SENATORS RON WYDEN, RAND PAUL, JEFF MERKLEY, AND MARTIN HEINRICH

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of sitting United States Senators consisting of Senator Ron Wyden (D-Oregon), who has served on the Senate Select Committee on Intelligence since 2001; Rand Paul (R-Kentucky), who has served on the Committee on Foreign Relations since 2013 and the Committee on Homeland Security and Governmental Affairs since 2011; Jeff Merkley (D-Oregon), who has served on the Senate Appropriations Committee since 2013; and Martin Heinrich (D-New Mexico), who has served on the Senate Select Committee on Intelligence since 2013.

As Senators duly elected by the people and responsible for writing the laws that the Executive is constitutionally charged with executing, *amici* are deeply concerned that the Executive Branch's excessive secrecy is frustrating the purposes of the Freedom of Information Act ("FOIA") and impeding a healthy debate on an issue of paramount importance: when the Government may use drone strikes to kill one of its own citizens without charge or trial.

In its fight against terrorism, the Executive has confronted novel situations where Congress has given little direction. As such, it has appropriately relied upon the guidance of the Department of Justice's Office of Legal Counsel ("OLC"), the body charged with issuing interpretations of the law that bind the Executive Branch. That office has now issued an undisclosed number of opinions defining the parameters of when the Government may target U.S. citizens during the course of counterterrorism operations in a nation with which the United States is not presently at war. Few matters could be of greater concern to the public and to lawmakers in a democratic society. *Amici* thus seek the release of any OLC memoranda that

[1] The parties consent to the filing of this brief. In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

contain such legal analysis, both to ensure that lawmakers are better able to monitor and check excesses and abuses by the Executive Branch and to ensure that the public has enough information to hold its Government accountable.

SUMMARY OF THE ARGUMENT

This case concerns whether the Department of Justice ("DOJ") may continue to withhold, in their entirety, approximately ten legal memoranda authored by the Office of Legal Counsel ("OLC Memos") that have been identified as responsive to FOIA requests from the New York Times and the American Civil Liberties Union. SPA 178-179. At least one of these memos specifically addresses the legality and constitutionality of lethal military action against an American citizen. SPA 181-182. The Executive's attempt to conceal these records from public view is contrary to FOIA and is offensive to basic notions of democratic accountability.

Of all the acts that a Government may undertake, none is more serious and deserving of debate than the act of taking one of its own citizens' lives. Yet, despite the overwhelming public interest in these memoranda, which shed light on Executive Branch policy with regard to such action, the Executive has fought for years to keep them shielded from public view. Shrouding in secrecy the limits of the Executive's authority to target a U.S. Citizen for execution without trial runs counter to our democratic principles. As Senators Ron Wyden, Mark Udall, and Martin Heinrich, all members of the Senate Select Committee on Intelligence at the time, wrote in a public letter to Attorney General Eric Holder: "[E]very American has the right to know when their government believes it is allowed to kill them." Letter to The Honorable Eric Holder, Nov 26, 2013 ("Letter to Holder").[2]

[2] *Available at* http://www.wyden.senate.gov/download/?id=C48CD5E5-EF15-4A44-A1BF-2274E5B1929A&download=1 (last visited Feb. 10, 2015).

The Executive Branch's refusal to disclose the legal analysis in the OLC Memos is all the more problematic in light of repeated public pronouncements by senior administration officials defending the use of armed unmanned aerial vehicles ("drones") to target U.S. citizens abroad without judicial process. Having touted the legality of the drone program and offered reassurances to the public that the program operates within the legal parameters set by the OLC, the Executive Branch may no longer legitimately claim an exemption to withhold the OLC Memos. The district court's contrary conclusion is flawed in two respects.

First, the court below read the "official acknowledgment" doctrine to mean that the Executive Branch only waives its right to seek a FOIA exemption where prior disclosures are identical to the information a FOIA claimant seeks. But that doctrine does not require such an exactness; rather, the dissimilarities between new information and the prior disclosures will only defeat waiver where such dissimilarities are "material." Here, there is no indication that the information in the unreleased OLC Memos is materially dissimilar to previous official disclosures.

Additionally, the district court's narrow and rigid interpretation of the official acknowledgment doctrine is not only wrong as a matter of law, it also undermines the purposes of FOIA. FOIA was enacted to peel back the layers of official secrecy to ensure that the public is sufficiently informed about the functions of government to hold its elected leaders accountable. In particular, Congress sought through FOIA to prevent the Government from using cherry-picked disclosures casting controversial policies in a favorable light to distort public debate and silence criticism. Requiring an absolute parallel between the information sought and the information previously disclosed would defeat this purpose and enable rather than prevent the misleading, selective disclosure of information.

Second, even if the prior disclosures do not waive the Executive's right to assert Exemption 1, that does not end the inquiry. Courts are obligated under FOIA to assess the "logic" and "plausibility" of the Executive's assertion that releasing certain information will harm national security, and they must do so in light of the entire evidentiary record. Prior similar disclosures—even those that do not meet the "matching" requirement of the official acknowledgment doctrine—may still constitute evidence that undercuts the logic and/or plausibility of an agency's claim that releasing the requested information will cause harm to national security.

There is good reason to doubt the logic and plausibility of the Executive's assertions here, given the past disclosures. The history of FOIA litigation on national security issues is one littered with examples of the Executive routinely and reflexively claiming that a particular disclosure of any information it prefers to keep secret will harm national security. However, it frequently fails to identify any evidence of actual harm, even after a forced or inadvertent disclosure of such information occurs. *Amici* urge the Court to think carefully before sanctioning such behavior, especially in light of the historical excesses that have occurred when the Executive has been allowed to keep certain information secret—including from Members of the House and Senate—based on vague claims that disclosure would harm national security.

For example, the Executive predicted that the release of the July 2010 Memorandum—the disclosure of which this Court ordered in June 2014—would compromise national security. Yet, to this day, the Executive has not identified a single harm of any kind that resulted from the disclosure of that Memorandum. Even if the legal analysis in the OLC Memos is significantly different in some respects from that contained in official statements and in the now-released July 2010 Memorandum, this does not by itself prove that those differences would cause harm to

national security. Rather, the DOJ must offer a logical and plausible account of how the new information contained in these memos could reasonably be expected to cause harm to national security. This showing must be made both in light of the information publicly acknowledged about the drone program and the reality that prior disclosures in similar circumstances do not appear to have harmed our national security.

The district court does not appear to have conducted any analysis of this question; instead, once it established that the prior disclosures did not "match" the information in the new OLC Memos, it not only refused to find that the Executive Branch waived its right to assert Exemption 1, but it accorded the prior disclosures absolutely *no* evidentiary weight. This was an overly narrow interpretation that undermines the effective functioning and integrity of FOIA itself.

Finally, the district court erred insofar as it found that the legal analysis in the OLC Memos was subject to withholding under Exemptions 1, 3, and 5. This Court has already recognized that legal analysis does not constitute "sources and methods," and may only be concealed under Exemptions 1 and 3 where it reveals an undisclosed operation or is inalterably entangled with sensitive facts. *N.Y. Times Co. v. United States DOJ*, 756 F.3d 100, 119 (2d Cir. 2014). Neither applies here. Senior Administration officials have already admitted to relying upon OLC Memos to justify past drone attacks, and *amici* are confident that this Court could disentangle the legal analysis from any protected information, just as it did in its June 23, 2014 opinion where it redacted and released the July 2010 OLC Memorandum.[3] Nor may the Executive avail itself of Exemption 5, which insulates certain privileged materials from

[3] The subject of said memo was "Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi."

disclosure. Senior officials from the Attorney General to the Director of the CIA have admitted that the targeted killing program is constrained by OLC's guidance. There can, thus, be little doubt that at least some of these memos constitute "working law," which cannot lawfully be shielded from the public.

For years, senior administration officials have publicly advanced arguments for the legality, efficacy and necessity of targeted killings, including of U.S. citizens abroad without charge or trial. Having done so, the Executive may not now retreat behind dubious claims of secrecy, particularly on an issue of such public importance. For these reasons, this Court should review, redact, and release the OLC Memos so that Congress and the public may understand the Executive's interpretation about what is allowed under the law.

ARGUMENT

I. There Is Extraordinary Public Interest in the OLC Memos at Issue.

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." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In short, the underlying purpose of FOIA is to peel back the layers of official secrecy in order to guarantee the transparency necessary to foster public debate on the most important issues of our time.

Few issues are more important than the topics discussed in the OLC Memos in question—in particular, the rules under which the Executive believes it is justified in taking the life of an American citizen without charge or trial. As the Supreme Court has recognized, "[f]rom the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action." *Gardner* v. *Florida*, 430 U.S. 349, 357-58 (1977). Thus, "[i]t is of vital importance to [the person facing a death

sentence] and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.*; *cf. Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (the Constitution's demand that the death penalty procedures "aspire to a heightened standard of reliability. . . is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."). Nor do the inherent rights possessed by every American evaporate simply because their government suspects them of planning terrorist attacks from foreign soil. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens").

There is an ongoing controversy in the United States about when our government may use extrajudicial force to kill terrorist suspects in general, and U.S. citizens in particular. The degree of the public's interest in these matters is evidenced by myriad reports issued by human rights groups and others, as well as the swell of media coverage devoted to this topic. *See, e.g.*, Human Rights Watch Report, *'Between a Drone and Al-Qaeda": The Civilian Cost of U.S. Targeted Killings in Yemen* (October 2013);[4] Amnesty International Report, *"Will I be Next?" US Drone Strikes in Pakistan* (October 22, 2013);[5] Columbia Law School & Center for Civilians in Conflict, *The Civilian Impact of Drone Strikes: Unexamined Costs, Unanswered Questions* (2012);[6] *see also* "15 FUNsettling Facts About Drones," VOX.COM, MAY 16, 2014 (discussing the murky rationale for targeting U.S. citizens); Mark Mazzetti *et al.*, "How a U.S. Citizen Came

[4] *Available at* http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf (last visited Feb. 10, 2015).
[5] *Available at* http://www.amnestyusa.org/research/reports/will-i-be-next-us-drone-strikes-in-pakistan (last visited Feb. 10, 2015).
[6] *Available at* http://civiliansinconflict.org/uploads/files/publications/The_Civilian_Impact_of_Drones_w_cover.pdf (last visited Feb. 10, 2015).

to Be in America's Cross Hairs," NEW YORK TIMES, March 9, 2013; Conor Friedersdorf, "How Team Obama Justifies the Killing of a 16-Year-Old American," THE ATLANTIC, Oct. 24, 2012 (criticizing the Obama administration for its vague justifications for targeting U.S. citizens abroad). Indeed, it is no exaggeration to say that not a week goes by without a press report or news analysis regarding the Administration's use of drones to target terrorist suspects.

Recognizing the paramount importance of open public debate on this issue, *amici* and other members of the House and Senate have long taken the position that the Executive should release the portions of the OLC Memos outlining the purported legal justification for targeting U.S. citizens. In November 2013, Senate Select Committee on Intelligence members Senators Wyden, Udall, and Heinrich addressed a joint letter to Attorney General Eric Holder calling for greater transparency:

> [T]he limits and boundaries of the President's power to authorize the deliberate killing of Americans need to be laid out with much greater specificity. It is extremely important for both Congress and the public to have a full understanding of what the Executive Branch thinks the President's authorities are, so that lawmakers and the American people can decide whether these authorities are subject to adequate limits and safeguards.
>
> In particular, we believe that the Executive Branch needs to explain exactly how much evidence it believes the President needs to determine that a particular American is a legitimate target for military action. Additionally, we believe the Executive Branch should explain the requirement that a targeted individual represent an "imminent" threat, and the requirement that targeted individuals should only be killed if their capture is "infeasible," in more detail as well. And while you have clarified that these authorities cannot be used inside the United States, absent extraordinary circumstances such as the Pearl Harbor attack, it is unclear to us what other geographic boundaries, if any, exist for this authority. We also believe the Executive Branch needs to clarify whether all lethal counterterrorism operations to date have been carried out pursuant to the 2001 Authorization to Use Military Force, or whether any have been based solely on the President's own authorities.
>
> . . . .

> Furthermore, there is a critical need for additional clarity as to how the Bill of Rights' due process protections apply in this context.

Holder Letter, Nov 26, 2013 at 2-3. To date, few of these questions have been answered. For that reason, public and Congressional interest in the undisclosed OLC memoranda has only increased.

In May 2014, after President Obama nominated David Barron—a former OLC lawyer who drafted at least one of the memos at issue in this litigation, *see* SPA 181-82—to the United States Court of Appeals for the First Circuit, *amici* reiterated their demands that the Administration release the OLC Memos. As *amicus* Senator Paul wrote at the time:

> [K]illing an American citizen without a trial is an extraordinary concept and deserves serious debate . . . . I believe that all senators should have access to all of these opinions. Furthermore, the American people deserve to see redacted versions of these memos so that they can understand the Obama administration's legal justification for this extraordinary exercise of executive power. The White House may invoke national security against disclosure, but legal arguments that affect the rights of every American should not have the privilege of secrecy. . . .

Rand Paul, "Show Us the Drone Memos," NEW YORK TIMES, May 11, 2014. Numerous other Senators echoed that sentiment. *See* "White House to Provide Lawmakers Access to Drone Memo Authorizing Killing of American," WASHINGTON POST, May 6, 2014 (quoting Senator Udall as calling on the White House to release the OLC Memos); Prepared Floor Statement of Senator Chuck Grassley, May 20, 2014 ("the Administration should comply with the Second Circuit's order requiring them to make the Barron Office of Legal Counsel opinion public, with redactions.").[7] As *amicus* Senator Wyden stated:

> As a former basketball player, I often say that sections of the playbook for combating terrorism will often need to be secret, but the rulebook that the United States follows should always be available to all of the American people. Our

[7] *Available at* http://www.grassley.senate.gov/news/news-releases/have-senators-seen-all-barron-drone-memos (last visited Feb. 10, 2015).

> military and intelligence agencies will sometimes need to conduct secret operations, but they should never be placed in the position of relying on secret law.

Wyden Floor Statement on Drone Memos and Barron Nomination, May 21, 2014 at 1-2.[8] And, as *amicus* Senator Merkley Stated:

> The debate over these [OLC] memos raises important issues that I believe merit significant additional attention, especially how to define the boundaries of government action in our ongoing fight against terrorists. Applying the legal framework developed for traditional battlefields to the battle against terrorism is not a perfect fit, and we need to grapple with the parallels and differences.
>
> I believe that in a democracy, this debate over how we apply our constitutional principles must be open and public.
>
> . . .
>
> Going forward, the principle of transparency should be applied much more broadly. Citizens should have full access to declassified interpretations of written law that guide the application of that law. Secret law has no place in our democracy.

Merkley Statement on Barron Nomination, May 21, 2014.[9]

The public and Congress's interest in the OLC memos has not diminished over time. For example, in April 2014, twenty organizations that advocate for open government sent a public letter to the Chairmen and the Ranking Members of the House Permanent Select Committee on Intelligence and the House Armed Services Committee demanding an end to the use of "secret law" and calling on Congress to "compel disclosure of Office of Legal Counsel (OLC) memos that describe functional legal limits to the drone program." Open Letter, April 16, 2014.[10] Nor did the release of the July 2010 OLC Memo last summer, by order of this Court, slake the

[8] *Available at* http://www.wyden.senate.gov/news/press-releases/wyden-floor-statement-on-drone-memos-and-barron-nomination- (last visited Feb. 10, 2015).
[9] *Available at* http://www.merkley.senate.gov/news/press-releases/merkley-statement-on-barron-nomination (last visited Feb. 10, 2015).
[10] *Available at* http://www.openthegovernment.org/sites/default/files/hr%204372%20sign%20on%20final.pdf (last visited Feb. 10, 2015).

public's appetite for more transparency on this issue. Instead, it only served to reignite a healthy debate about the lawfulness of extrajudicial executions of U.S. citizens. *See generally* Alice Ross, *Legal Experts Dissect the US Government's Secret Drone Memo: A Round-Up*, The Bureau of Investigative Journalism, June 25, 2014.[11] That release represented a step in the right direction, but much more transparency is needed to ensure that the public is equipped to hold its elected leaders accountable on an issue of such tremendous import.

II. The Executive's Prior Disclosures Foreclose It From Claiming a FOIA Exemption.

As this Court has already noted, senior Government officials—from the CIA Director to the President himself—have made repeated public statements justifying the decision to order the killing of an American citizen through military action. *See N.Y. Times Co.*, 756 F.3d at 111; *see also ACLU v. CIA*, 710 F.3d 422, 429-31 (D.C. Cir. 2013) (describing a litany of official statements regarding the targeted killing program). These public pronouncements have rightly been characterized by both this Court and the district court 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.'" *N.Y. Times Co.*, 756 F.3d at 114 (quoting District Court Op., 915 F. Supp. 2d at 524). Moreover, in order to persuade the public that the targeted-killing program was legally permissible, Executive Branch officials have attempted to reassure the public that they followed the standards set forth by the OLC. *N.Y. Times Co.*, 756 F.3d at 111 (quoting John Brennan's testimony at his nomination hearing for CIA director: "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate."); *see also* Letter from Attorney General Eric Holder, May 22, 2013 at 3-4 (explaining that the decision to

[11] *Available at* http://www.thebureauinvestigates.com/2014/06/25/legal-experts-dissect-the-us-governments-secret-drone-memo-a-round-up/ (last visited Feb. 10, 2015).

target U.S. citizens abroad was consistent with advice provided by "Department of Justice lawyers").[12] Having touted the legality of the targeted killing program, assured the public that it was acting in accordance with OLC guidelines, and released an OLC memorandum in the form of a Department of Justice White Paper on the very same subject, the Executive Branch cannot now invoke an exemption arguing that releasing substantially similar legal analysis will imperil national security or reveal "sources and methods." At the very least, the fact that Executive Branch officials have released similar documents must not be ignored in analyzing the appropriateness of their invocation of the exemptions they cite.

The district court's analysis on this point contains two errors. First, the district court misinterpreted the "official acknowledgment" doctrine, which holds that the Government waives the right to assert an exemption as to previously disclosed information. *See generally Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (providing for waiver where the information sought "(1) [is] as specific as the information previously released, (2) match[es] the information previously disclosed, and (3) was made public through an official and documented disclosure."). Second, by limiting its analysis to the waiver question, the district court failed to fulfill its duty to assess the logic and plausibility of the Executive's Exemption 1 claim in light of the entire evidentiary record, as required by FOIA. *See N.Y. Times Co.*, 756 F.3d at 119. That is, it failed to consider whether the prior disclosures—even if dissimilar from the information contained in the undisclosed memorandum—might still expose as illogical or implausible the Executive's assertion that further releases could compromise national security. Put differently, it is not enough for a court to conclude that the information sought and the information previously

[12] *Available at* http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html?_r=0 (last visited Feb. 10, 2015).

released is different—rather, the Government must explain why those differences matter from a national security standpoint. The failure to do so is reversible error.

A. The District Court Misapplied the "Official Acknowledgment" Waiver Doctrine.

Although the district court's opinion is heavily redacted, the unclassified version clearly indicates that the court rejected Appellants' contention that the Government waived its right to invoke a FOIA exemption because some of the content in the unreleased OLC Memos differs from the information previously revealed by the Government. *See* District Court Opinion, SPA 193 ("The legal analysis in [the unreleased OLC memo] does not 'match' the analysis disclosed in the draft white paper."). However, this Court has clearly stated that "the 'matching' aspect of the *Wilson* test" does not "require absolute identity." *N.Y. Times Co.*, 756 F.3d at 120. Indeed, as noted in the brief of Appellant ACLU, the "official acknowledgment" cases have never required that the information sought be identical to that already in the public domain; instead, courts have rejected waiver arguments only where the newly sought information was "in some *material* respect different from" previously released information. *See e.g., Afshar v. Dep't of State*, 702 F.2d 1125, 1132 (D.C. Cir. 1983) (emphasis added); *see generally* ACLU Br. 14-16.

Indeed, a precise "matching" requirement is not only wrong as a matter of law; it also threatens to undermine the purposes animating FOIA. When Congress enacted FOIA in 1966, it sought to foster transparency so that the people would have enough information to hold their elected officials accountable. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In particular, Congress sought to prevent the Executive Branch from distorting debates on issues of public importance by cherry-picking favorable facts and selectively parceling them out to the public. *See, e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966), *reprinted in* Subcomm. on

Admin. Practice, S. Comm. on the Judiciary, 93d Cong., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, at 59 (1974) ("FOIA Source Book.") ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."). A rigid application of *Wilson* would have the opposite effect: it would enable government officials to build support for controversial programs by revealing favorable facts while concealing anything that may stoke public opposition. The consequences for democratic decision-making are profound:

> [T]he executive's power to classify and declassify information raises the specter of government misinformation, or its weaker and less noxious relative, "spin control." By releasing selected fragments of information while carefully guarding others, an administration can distort public perception of a particular issue or event. By providing the public with unrepresentative pieces of an informational "mosaic," executive branch disclosures may in fact work affirmative harm upon public and congressional deliberations on national security issues . . . . In short, the more government officials declassify or leak information in highly politicized situations, the more one wonders whether the damage originally asserted to justify classification was in fact illegitimate, and whether the government is attempting to fix public discussion of foreign affairs.

Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 Harv. L. Rev. 906, 913-914 (1990); *see also* John J. Mearsheimer, WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS 46-55 (2011) (describing instances in which the executive branch disseminated false or misleading information to advance its goals in World War II, the Vietnam War, and the war in Iraq).

Nor is this concern hypothetical with respect to the targeted killing program. As this Court has recognized, the Government has for years conducted an "extensive public relations campaign" to convince the public that its targeted killing policy is lawful. *N.Y. Times Co.*, 756 F.3d at 114 (internal quotation marks and citation omitted). In attempt to answer criticisms voiced by human rights advocates and media outlets, the Executive Branch has offered

reassurances that those in charge of the program have made every effort to minimize civilian casualties and target only those who pose imminent threats to U.S. security. *See, e.g.*, *ACLU v. CIA*, 710 F.3d at 429-31 (D.C. Cir. 2013). Yet, every time the public, and even members of Congress, have sought more information about the program, the Executive Branch has retreated behind claims of secrecy. In the words of Harvard Professor and former OLC lawyer, Jack Goldsmith, "There's something wrong with [an administration's] aggressive leaking and winking and nodding about the drone program, but saying in response to Freedom of Information requests that they can't comment because the program is covert." Scott Shane, *Renewing a Debate over Secrecy, and its Costs*, N.Y. TIMES, June 6, 2012.[13]

Having launched a public relations campaign to build support for its drones program, the Executive Branch's assertions that it must maintain the confidentiality of the OLC Memos should be carefully scrutinized, lest the courts inadvertently authorize the very type of selective disclosures that FOIA was intended to prevent. To protect against that outcome, this Court should reaffirm that once the Executive Branch chooses to release information, it waives its right to withhold closely related information absent a showing that the new information is materially different from that disclosed. Because the Executive Branch does not appear to have made any showing that the new information in the unreleased memos is materially different, *amici*

[13] For example, as detailed in a recent Select Committee on Intelligence report, the CIA conducted an extensive media campaign—consisting largely of false and misleading claims about the efficacy of torture—to build support for its interrogation and detention practices. Yet, even as it selectively disclosed information to the press about its activities in this regard, it simultaneously asserted the need for absolute secrecy to avoid having to respond to inquiries about these activities. Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Approved December 13, 2012; Declassified December 3, 2014) at 113-288, 401-08.

respectfully urge this Court reverse the opinion below and release redacted versions of the OLC Memos.

B. Even Absent a Finding of Waiver, The District Court Should Have Assessed Whether the Executive's Predictions of Harm Were Logical and Plausible In Light of Prior Disclosures.

It appears to *amici* that the district court did nothing more than conclude that the legal memos at issue differed in some respect from the Executive Branch's prior revelations without determining whether such differences were material or whether further disclosures would, in fact, harm national security. But even if the Executive's prior disclosures are significantly different from the OLC Memos and do not trigger waiver *per se*, they may still constitute evidence that contradicts the DOJ's assertion that further disclosures will harm national security. The district court's failure to address whether the Executive's assertions of harm were still logical and plausible in light of the past disclosures is a concerning error that requires reversal.

FOIA law is clear: to invoke Exemption 1, an agency must provide a "logical" and "plausible" account of how disclosing the responsive records "reasonably could be expected to result in damage to the national security." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009); Exec. Order 13,256 § 1.1(a)(4). Courts must then review such assertions *de novo*. *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999). While "logic" and "plausibility" reflect a deferential standard of review, they are not empty terms. A claim that defies common sense cannot be "logical." *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013) ("There comes a point where . . . court[s] should not be ignorant as judges of what [they] know as men [and women].") (finding that the government's Exemption 1 justification was neither "logical" nor "plausible") (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)). And, as the Supreme Court has explained elsewhere, a claim is not "plausible" if the claimant has only adduced facts that establish a "mere

possibility" of it being true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "Plausible," then, necessarily means something more than merely "conceivable." *Id.* at 1951. Crucially, courts may not credit an agency's Exemption 1 claims as logical or plausible where they are "called into question by contradictory evidence in the record." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (internal quotation marks and citation omitted).

The Executive Branch's prior disclosures about the drone program constitute just such contradictory evidence, even if they do not precisely "match" the information contained in the unreleased memos. Indeed, it is entirely possible for a prior disclosure by the Government to definitively contradict an Exemption 1 claim even though it stops short of meeting the criteria for waiver under the "official acknowledgment" doctrine. Whether this occurs depends on how specifically tailored the Government's articulation of harm is to the requested information. For example, if the Department of Defense regularly released pictures of detainees without incident, and then a FOIA requester asked for pictures of a particular detainee, the Department of Defense could not withhold the requested pictures by broadly asserting that releasing *any* image of *any* detainee would endanger national security. To be clear, such an Exemption 1 assertion would fail not because it effected a waiver under the "official acknowledgment" doctrine (the pictures sought do not "match" the pictures previously released). Rather, it would fail because the harmless, prior releases of detainee images would facially contradict and expose the implausibility of the Government's overbroad assertion that disclosing any detainee's image would cause harm. In such circumstances, absent a more specific articulation as to why

releasing the *precise* images sought would endanger national security when previous images did not, a court could not credit the Government's assertion of Exemption 1.[14]

The same principles apply here: it is not enough to say merely that the legal analysis here at issue "differs" from the analysis contained in the previously disclosed memo. The Executive must explain why those differences are meaningful and why the new revelations in the unreleased memos would plausibly cause harm to national security given what has already been safely revealed to the public about the targeted killing program. Unfortunately, the district court appears to have bypassed this essential analysis. By stopping at the waiver issue, the court erroneously acted as though prior disclosures that fall short of triggering waiver are entitled to no evidentiary consideration whatsoever for purposes of Exemption 1. In so doing, the court did not fulfill its duty under FOIA to fully assess the logic and plausibility of the Executive's claims in light of the full record of past disclosures. This Court should reverse the judgment below to correct that error.

[14] Indeed, this Court implicitly embraced this position *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161 (2d Cir. 2014). There, the plaintiff sought pictures of Guantánamo detainee Muhammed al-Qahtani; the Government sought to withhold those images based in part upon the claim that the very "'subject of U.S. detainee operations'" was so inflammatory that releasing any detainee images would incite anti-American hostility. *Id.* at 165 (quoting Government declarant). The plaintiff argued that the previous, uneventful release of other detainee images disproved the Government's contention that any such releases would trigger violence. This Court credited that stance, rejecting the view that "every image of a specifically identifiable detainee is exempt from disclosure pursuant to FOIA." *Id.* at 169. To be sure, the Court ultimately upheld the Government's Exemption 1 assertion, but only because it found that the record demonstrated that the particular images of al-Qahtani "would be singularly susceptible to use by extremist groups to incite anti-American hostility." *Id.* at 169 (finding that al-Qahtani's torture and his status as the alleged 20th hijacker made his images unique). Here, by contrast, there is no indication that the record contains anything suggesting that the legal analysis in the undisclosed memoranda is in fact likely to cause harm to national security, given the prior disclosures.

III. The District Court Erred to the Extent it Permitted the Executive to Withhold The Legal Analysis Contained in the OLC Memos Under Exemptions 1, 3, and 5.

A. Exemptions 1 and 3.

The unclassified version of the district court's opinion does not clearly state which exemptions the court ultimately found persuasive. Indeed, the opinion's sole unredacted commentary on the Executive's invocation of Exemptions 1 and 3 is the following strikingly conclusory sentence: "The reader should assume that I have considered all three possible exemptions in making the determinations outlined below." SPA 179. The court's unredacted treatment of Exemption 5 is no more comprehensive.

This Court has made clear, however, that the Government may only invoke Exemptions 1 and 3 to conceal legal analysis in two extremely limited circumstances: (1) where "the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation;" or (2) where the "legal analysis [is] so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." *N.Y. Times Co.*, 756 F.3d 100 at 119 (favorably quoting the district court's observation that "legal analysis is not an 'intelligence source or method'"). The first circumstance is manifestly absent here given that the use of drones to target U.S. citizens has, for years, been widely discussed by senior administration officials. *Id.* As to the second, there is no indication in the record that the court made any effort to determine whether the legal analysis at issue could be segregated from any sensitive factual information, as required by FOIA. *See Lykins v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984) (FOIA requires that courts order the release of "any reasonably segregable, nonexempt portions" of otherwise exempt documents); *see also Hopkins v. Dep't of Housing and Urban Dev.*, 929 F.2d 81, 85–86 (2d Cir. 1991) (vacating order where there was "nothing in the district court's opinion suggest[ing] that it ever considered" whether privileged

data was segregable). Of course, there is ample reason to suspect that had the court properly conducted such an analysis, it would have found that the legal discussions in the OLC Memos were segregable. Indeed, in reviewing, redacting and releasing the July 2010 OLC Memo, this Court proved perfectly capable of disentangling the "pure legal analysis" from protected information. SPA 131. Equally so, the release of the November 2011 White Paper, which discusses the legal framework for drone strikes, and senior officials' repeated public pronouncements outlining the legal justifications for targeted killings demonstrate that the legal analysis can be separated out from protected factual information.

Accordingly, *amici* respectfully urge that this Court conduct its own assessment—as it did with the July 2010 OLC Memo—to determine whether any portions of the unreleased memos can be released.

B. Exemption 5.

Few things are more offensive to principles of democratic accountability than the Government concealing the laws that govern its interactions with its citizens. *See Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997) ("[T]he public can only be enlightened by knowing what the [agency] believes the law to be"). Indeed, when Congress enacted FOIA, its "primary objective [was] the elimination of secret law." *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772 n.20 (1989) (quotation marks and citation omitted); *see also Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360 (2d Cir. 2005) (the "view that [an agency] may adopt a legal position while shielding from public view the analysis that yielded that position is offensive to FOIA.") (internal quotations and citation omitted). For that reason, it is well established that agencies may not invoke Exemption 5's attorney-client or deliberative process privileges to shield so-called "working law" from the public. *Brennan Ctr. for Justice at*

N.Y. Univ. Sch. of Law v. United States DOJ, 697 F.3d 184, 196, 208 (2d Cir. 2012). Here, the district court violated that rule when it permitted the Government to conceal the OLC Memos in their entirety under Exemption 5.

There can be little doubt that at least some of the OLC Memos at issue constitute working law. A document qualifies as working law if it has "the force and effect of law," *NLRB v. Sears, Rebuck, & Co.*, 421 U.S. 132, 153 (1975), provides "guidance . . in [the agency's] dealings with the public," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980), or is "routinely used" and "relied on" by an agency, *id.*; *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997). Nor does it matter whether such a document is formally adopted: "[A]n agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

Here, one need not speculate whether the OLC Memos fit into one of the aforementioned categories of "working law"—rather, one need only look to the public pronouncements by senior administration officials. In the words of CIA Director John Brennan: "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate.'" *N.Y. Times Co.*, 756 F.3d at 111 (2d Cir. 2014).[15] This is the very definition of "working law." *Brennan Ctr.*, 697 F.3d at 194-95.

[15] Moreover, as one scholar has observed, "OLC memos are generally viewed as authoritative guidance to the rest of the Executive Branch when it comes to the scope of the government's legal authorities—whether or not they are "adopted" as such." Steve Vladeck, "OLC Memos and FOIA: Why the (b)(5) Exemption Matters," JUSTSECURITY.COM, Jan. 4, 2014, *available at justsecurity.org/5277/olc-memos-foia-b5-exception-matters/* (last visited Feb. 10, 2015).

Accordingly, *amici* support Appellants' position that this Court should review the memo *in camera* to determine which aspects of the OLC Memos constitute working law. To the extent they do, they should be released to the public.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court rule in favor of Appellants and reverse the decision of the district court.

Respectfully submitted,

/s/

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Dated: February 11, 2015

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE NEW YORK TIMES COMPANY, *et al.*, *Plaintiffs-Appellants* *v.* UNITED STATES DEP'T OF JUSTICE, *et al.*, *Defendants-Appellees*	No. 14-4432-cv(L), 14-4764-cv(CON)

CONSENT MOTION FOR EXTENSION OF TIME TO FILE *AMICUS* BRIEF

Undersigned counsel, with the consent of all parties, request a one day extension to file an *amicus* brief on behalf of Senators Ron Wyden, Rand Paul, Jeff Merkley, and Martin Heinrich, and in support of Appellants. Undersigned counsel attempted to electronically file the brief on February 10, 2015, but were unable to use our ECF credentials due to a system upgrade requiring that all PACER accounts be linked to ECF accounts. Undersigned counsel were not able to obtain the necessary information to link those accounts until the morning of February 11, 2015. The *amicus* brief was served on all parties by email on February 10, 2015, and has now been filed via ECF.

Respectfully submitted,

/s/

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