13-422-cv
The New York Times Company v. United States

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2013

Submitted: October 1, 2013 Decided: June 23, 2014

Docket Nos. 13-422(L), 13-445(Con)

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

v.

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,
Defendants-Appellees.
- -

Before: NEWMAN, CABRANES, and POOLER, Circuit Judges.

Appeal from the [illegible] States District Court for the Southern District of New York (Colleen McMahon, District Judge), dismissing, on motion for summary judgment, a suit under the Freedom of Information Act seeking documents relating to targeted killings of United States citizens carried out by drone aircraft.

We conclude that (1) a redacted version of the OLC-DOD

Memorandum must be disclosed, (2) a redacted version of the

Memorandum must be disclosed, (2) a redacted version of the classified Vaughn index (described below) submitted by OLC must be disclosed, (3) other legal opinions prepared by OLC must be submitted to the District Court for in camera inspection and determination of waiver of privileges and appropriate redaction, (4) the Glomar and "no number, no list" responses are insufficiently justified, (5) DOD and CIA must submit Vaughn indices to the District Court for in camera inspection and determination of appropriate disclosure and appropriate redaction, and (6) the Office of Information Policy ("OIP") search was sufficient. We therefore affirm in part, reverse in part, and remand.

Background

The FOIA requests at issue in this case focus primarily on the drone attacks in Yemen that killed Anwar al-Awlaki[2] and Samir Khan in September 2011 and al-Awlaki's teenage son, Abdulrahman al-Awlaki, in October 2011. All three victims were United States

[2] This spelling, which we adopt (except in quotations), is used by the District Court and in the Government's brief. The briefs of N.Y. Times and ACLU and numerous documents in the record render the name "al-Aulaqi."

expected to cause identifiable and describable damage to the national security." Executive Order No. 13526 § 1.1(a)(3)-(4), 1.4(c)-(d), 75 Fed. Reg. 708, 709 (Dec. 29, 2009).

Exemption 3 exempts records that are "specifically exempted from disclosure by [another] statute" if the relevant statute either "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(i), (ii) (2013). Two such statutes are potentially relevant here. The Central Intelligence Agency Act of 1949, as amended, provides that the Director of National Intelligence "shall be responsible for protecting intelligence sources or methods," and exempts CIA from "any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507 (2013). The National Security Act of 1947, 50 U.S.C. § 3024-1(i)(1) (2013), exempts from disclosure "intelligence sources and methods."

Exemption 5 exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2013). Exemption 5 encompasses traditional common law privileges against disclosure, including the attorney-client and deliberative process privileges. See National Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005).

The N.Y. Times FOIA requests and Government responses. Shane and Savage, New York Times reporters, submitted separate FOIA requests to OLC. Shane's request, submitted in June 2010, sought:

> all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killings, assassination, or killing of people suspected of ties to Al-Qaeda or other terrorist groups by employees or contractors of the United States government.

Joint Appendix ("JA") 296-97.

Savage's request, submitted in October 2010, sought:

> a copy of all Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for United States armed forces or intelligence

> community assets to target for killing a United States citizen who is deemed to be a terrorist.

JA 300-01.

OLC denied Shane's request. With respect to the portion of his request that pertained to DOD, OLC initially submitted a so-called "no number, no list" response[3] instead of submitting the usual Vaughn index,[4] numbering and identifying by title and description documents that are being withheld and specifying the FOIA exemptions asserted. A no number, no list response acknowledges the existence of documents responsive to the request, but neither numbers nor identifies them by title or description. OLC said that the requested documents pertaining to DOD were being withheld pursuant to FOIA exemptions 1, 3, and 5.

As to documents pertaining to agencies other than DOD, OLC

During the course of the litigation, OLC modified its

The ACLU FOIA requests and Government responses. In October

"drones) or by other means.

2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killings, including who is authorized to make such determinations and what evidence is needed to support them.

3. All memoranda,

4. All documents and records pertaining to the factual basis for the targeted killing of Al-Awlaki, including:

A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;

B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;

C. Facts indicating that there was a legal justification for killings persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;

D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and

E. Any other facts relevant to the decision to authorize and execute the targeted killings of al-Awlaki.

5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.

6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any

various documents concerning the targeted killings of United States citizens in general and al-Awlaki, his son, and Khan in particular.

responsive documents, each described as an e-mail chain reflecting internal delib

principles, to officers who had recently obtained the rank of O-7. The remaining two withheld unclassified records were described as “memoranda from the Legal Counsel to the Chairman of the Joint Chiefs of Staff to the White House’s National Sec

of John Bennett, Director, National Clandestine Service, CIA, ¶ 27 (quoting ACLU request). In these two categories, CIA submitted a no number, no list response, relying on Exemptions 1 and 3, with the exception that CIA acknowledged that it possessed copies of speeches given by the Attorney General at Northwestern University Law School on March 5, 2012, and by the Assistant to the President for Homeland Security and Counterterrorism on April 30, 2012. See id.

The pending lawsuit and District Court opinions. In December 2011, N.Y. Times filed a lawsuit challenging the denials of the Shane and Savage requests. ACLU filed its suit in February 2012. After the suits were consolidated, both Plaintiffs and the Government filed cross-motions for summary judgment. In January 2013, the District Court denied both Plaintiffs' motions for summary judgment and granted the Defendants' motion in both cases, with one exception, which required DOD to submit a more detailed justification as to why the deliberative process exemption (asserted through Exemption 5) applied to two unclassified memos listed in its Vaughn index.

citing Wilson v. CIA, 586 F.3d 171, 186 (2d Cir. 2009), first ruled that waiver of Exemption 1 had not occurred with respect to classified documents containing operational details of targeted killing missions. See Dist. Ct. Op., 915 F. Supp. 2d at 535-37. The Court then specifically considered whether waiver of Exemption 1 had occurred with respect to the OLC-DOD Memorandum and rejected the claim. See id. at 538.

As to Exemption 3, which protects records exempted from disclosure by statute, the District Court first noted that section 102A(i)(1) of the National Security Act, now codified at 50 U.S.C. § 3024(i)(1) (2013), is an exempting statute within the meaning of Exemption 3, and that this provision protects from disclosure "intelligence sources and methods." Id. at 539. The Court then reckoned with ACLU's contention that placing individuals on kill lists does not fall within the category of intelligence sources and methods. Agreeing with a decision of a district court in the District of Columbia, ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 290-92 (D.D.C. 2011) ("Drone Strike Case"), which was later reversed on appeal, see ACLU v. CIA, 710

F.3d 422 (D.C. Cir.

As to

and/or attorney-client privileges, see id. at 544, rejected the Plaintiffs' contentions that these privileges had been lost because of one or more of the following principles: waiver, adoption, or working law, see id. at 546-50.

As to documents 9 and 10 on DOD's Vaughn index, the Court initially found DOD's justification for invoking Exemption 5 inadequate, see id. at 545, but ruled that a subsequent submission sufficiently supported the application of the deliberative process privilege and hence Exemption 5 to these documents, see Dist. Ct. Supp. Op., 2013 WL 238928, at *1.

Finally, the District Court considered the Glomar and no number, no list responses that were given by DOJ, DOD, and CIA. Apparently accepting the sufficiency of the affidavits submitted by officials of these agencies to justify the responses under Exemptions 1 and 3, the Court turned its attention to the Plaintiffs' claims that these protections had been waived. Again, following the district court opinion in the Drone Strike Case, before it was reversed, the District Court here concluded that none of the public statements of senior officials waived

entitlement to submit Glomar or no number, no list responses because "[i]n none of these statements is there a reference to any particular records pertaining to the [targeted killing] program, let alone the number or nature of those records." Dist. Ct. Op., 915 F. Supp. 2d at 553 (emphases in original).

Information made public after the District Court opinions.[9]

[9] As a general rule, a FOIA decision is evaluated as of the time it was made and not at the time of a court's review. See, e.g., Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) ("To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing."). On this basis, the Government argues that we cannot consider any official disclosures made after the District Court's opinion.

We disagree. Although we are not required to consider such evidence, the circumstances of this case support taking judicial notice of the statements here. See Fed. R. Evid. 201(b)(2). The Government's post-request disclosures "go[] to the heart of the contested issue," Powell v. U.S. Bureau of Prisons, 927 F.2d 1239, 1243 (D.C. Cir. 1991) (internal quotation marks omitted), and, as discussed below, are inconsistent with some of its prior claims, including that the Government has never acknowledged CIA's operational involvement. Taking judicial notice of such statements is the same course taken by the Court of Appeals for the D.C. Circuit in its recent ACLU v. C.I.A. decision. 710 F.3d at 431. We conclude that it is the most sensible approach to ongoing disclosures by the Government made in the midst of FOIA litigation.

Moreover, the Government's request for an opportunity to submit new material concerning public disclosures made after the District Court's decision was honored by affording the Government an opportunity, after oral argument, to submit such material ex parte for in camera inspection, which the Government has done.

2013; the official disclosure occurred four days later.

The statements are those of John O. Brennan, Attorney General Eric Holder, and President Obama. Brennan, testifying before the Senate Select Committee on Intelligence on February 7, 2013, on his nomination to be director of CIA, said, among other things, "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate." Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence,

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leaked to Isikoff is not dated and not marked "draft."

ACLU contends that DOJ did not release the DOJ White Paper in response to its FOIA request, nor list it on its Vaughn index. See Br. for ACLU at 21 n.7. The Government responds that ACLU had narrowed its request to exclude "draft legal analyses," Letter from Eric A.O. Ruzicka to Sarah S. Normand (Apr. 3, 2012), and that the DOJ White Paper was "part of document number 60 on the Vaughn index submitted by the Office of Legal Counsel as an attachment to a responsive e-mail. See Br. for Appellees at 25 n.8. The OLC's Vaughn index describes document number 60 as "E-mail circulating draft legal analysis regarding the application of domestic and international law to the use of lethal force in a foreign country against U.S. citizens in certain circumstances, and discussion regarding interagency deliberations concerning the same" and invokes Exemption 5. Apparently, OLC expected ACLU to understand "circulating" to mean "attachment."

The Government offers no explanation as to why the identical text of the DOJ White Paper, not marked "draft," obtained by Isikoff, was not disclosed to ACLU, nor explain the discrepancy between the description of document number 60 and the title of the DOJ White Paper.

113 Cong. 57 (Feb. 7, 2013) ("Brennan Hearing"), available at http://www.intelligence.senate.gov/130207/transcript.pdf. Holder sent a letter to Senator Patrick J. Leahy, Chairman of the Senate Judiciary Committee on May 22, 2013 ("Holder Letter").[11] In that letter Holder stated, "The United States . . . has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi," Holder Letter at unnumbered second page, and acknowledged that United States counterterrorism operations had killed Samir Khan and Abdulrahman al-Awlaki, who, he states, were not targeted by the United States, see id. He also stated, "[T]he Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and is actively engaged in planning to kill Americans." Id. He also stated, "The decision to target Anwar al-Aulaki was lawful . . . ." Id. at fourth unnumbered page. President Obama delivered an address at the National Defense University on May

[11] The Holder Letter is available at http://www.justice.gov/ag/AG-letter-5-22-13.pdf.

23, 2013.[12] In that address, the President listed al-Awlaki's terrorist activities and acknowledged that he had "authorized the strike that took him out."

Discussion

I. FOIA Standards.

FOIA calls for "broad disclosure of Government records." CIA v. Sims, 471 U.S. 159, 166 (1985). The disclosure obligation is subject to several exemptions. However, "consistent with the Act's goal of broad disclosure, these exemptions have consistently been given a narrow compass." Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (internal quotation marks omitted). Exemptions 1 (classified documents), 3 (documents protected by statute), and 5 (privileged documents), outlined above, have been invoked in this litigation. "The agency asserting the exemption bears the burden of proof, and all doubts as to the applicability of the exemption must be resolved in favor of disclosure." Wilner, 592 F.3d at 69. To meet its burden of proof, the agency can submit "[a]ffidavits or

[12] The President's address is available via a link at http://wh.gov/hrTq.

declarations giving reasonably detailed explanations why any withheld documents fall within an exemption." ACLU v. Dep't of Justice, 681 F.3d 61, 69 (2d Cir. 2012) (internal quotation marks omitted).

We review de novo a district court's grant of summary judgment in FOIA litigation. See Wilner, 592 F.3d at 69. When an agency claims that a document is exempt from disclosure, we review that determination and justification de novo. See id. When the claimed exemptions involve classified documents in the national security context, the Court must give "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." ACLU, 681 F.3d at 69 (emphasis in original) (internal quotation marks omitted).

II. Appellants' Claims

Narrowing the scope of the Shane request (OLC opinions that address ÖvVæ0‰@×B#@éùvVæ0

Bies Decl. ¶ 30.

OLC withheld the OLC-DOD Memorandum as protected from disclosure by Exemption 5 "because it is protected by the deliberative process and attorney-client privileges." Id. DOD withheld the doc4Dthe8Qe

After pointing out that Exemption 1

Court

relied upon and repeated in public the arguments made specifically in the OLC-DOD Memo," id. at 549 (emphasis in original) (internal quotation marks omitted), and that "it is sheer speculation that this particular OLC memorandum . . . contains the legal analysis that justifies the Executive Branch's conclusion that it is legal in certain circumstances to target suspected terrorists, including United States citizens, for killing away from a 'hot' field of battle," id. The Court saw no need to consider the plaintiffs' claim of waiver in the context of the attorney-client privilege because the deliberative process privilege protected the OLC-DOD Memorandum under Exemption 5. See id.

We agree with the District Court's conclusions that the OLC-DOD Memorandum was properly classified and that no waiver of any operational details in that document has occurred. With respect to the document's legal analysis, we conclude that waiver of Exemptions 1 and 5 has occurred.[14] "Voluntary disclosures of all

[14] We therefore need not consider the Appellants' claim that the legal analysis in the OLC-DOD Memorandum was not subject to classification.

or part of a document may waive an otherwise valid FOIA exemption," Dow Jones & Co. v. U.S. Dep't of Justice, 880 F. Supp. 145, 150-51 (S.D.N.Y. 1995) (citing Mobil Oil Corp. v. E.P.A., 879 F.2d 698, 700 (9th Cir. 1989)), vacated in part on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995), and the attorney-client and deliberative privileges, in the context of Exemption 5, may be lost by disclosure, see Brennan Center for Justice v. U.S. Dep't of Justice, 697 F.3d 184, 208 (2d Cir. 2012).

(a) Loss of Exemption 5. Exemption 5 "'properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law

H. Voth, Waiver of the Attorney-Client Privilege, 64 Oregon L. Rev. 637, 650 (1986).

In considering waiver of the legal analysis in the OLC-DOD Memorandum, we note initially the numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists, which the District Court characterized as "an extensive public relations campaign to convince the public that [the Administration's] conclusions [about the lawfulness of the killing of al-Awlaki] are correct." Dist. Ct. Op., 915 F. Supp. 2d at 524. In a March `'``9ush|0×'e%2

efforts against Al Qaeda and its associated forces," JA 399, and referring explicitly to "targeted killing," said, "In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice," JA 402.

In a March 5, 2012, speech at Northwestern University, Attorney General Holder said, "[I]t is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces." JA 449. He discussed the relevance of the Due Process Clause, id., and maintained that killing a senior al Qaeda leader would be lawful at least in circumstances where

> [f]irst, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.

JA 450. Amplifying this last point, he stated that "use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force: . . . necessity[,] . . . distinction[,] . . . proportionality[,] . . . [and] humanity." Id. As the District Court noted, "The

Northwestern Speech [by the Attorney General] discussed the legal considerations that the Executive Branch takes into consideration before targeting a suspected terrorist for killing" and "the speech constitutes a sort of road map of the decision-making process that the Government goes through before deciding to 'terminate' someone 'with extreme prejudice.'" Dist. Ct. Op., 915 F. Supp. 2d at 537.

In an April 30, 2012, speech at the Wilson Center in Washington D.C., John O. Brennan, then-Assistant to the President for Homeland Security and Counterterrorism, said, "Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts drone strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones." JA 95. On Feb. 7, 2013, Brennan, testifying on his nomination to be director of CIA, said, "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate." Brennan Hearing at 57.

Even if these statements assuring the public of the

lawfulness of targeted killings are not themselves sufficiently detailed to establish waiver of the secrecy of the legal analysis in the OLC-DOD Memorandum, they establish the context in which the most revealing document, disclosed after the District Court's decision, should be evaluated. That document is the DOJ White Paper, officially released on Feb. 4, 2013. See note 9, above. Before considering be'á†B•3

entitled "War crimes." Part VI explains why the contemplated killing would not violate the Fourth or Fifth Amendments of the Constitution.

The 16-page, single-spaced DOJ White Paper virtually parallels the OLC-DOD Memorandum in its analysis of the lawfulness of targeted killings. Like the Memorandum, the DOJ White Paper explains why targeted killings do not violate 18 U.S.C. §§ 1119 or 2441, or the Fourth and Fifth Amendments to the Constitution, and includes an analysis of why section 1119 encompasses the public authority justification. Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLC-DOD Memorandum considers, the substantial overlap in the legal analyses in the two documents fully establishes that the Government may no longer validly claim that the legal analysis in the Memorandum is a secret. After the District Court's decision, Attorney General Holder publicly acknowledged the close relationship between the DOJ White Paper and previous OLC advice on March 6, 2013, when he said at a hearing of the Senate Committee on the Judiciary that the DOJ White Paper's discussion

whereas in our case, the Government has conceded that the White Paper, with its detailed analysis of legal reasoning, has in fact been officially disclosed, see footnote 10, supra.

In resisting disclosure of the OLC-DOD Memorandum, the Government contends that making public the legal reasoning in the document will inhibit agencies throughout the Government from seeking OLC's legal advice. The argument proves too much. If this contention were upheld, waiver of privileges protecting legal advice could never occur. In La Raza, we explained that "[l]ike the deliberative process privilege, the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's inc

this subsection." 5 U.S.C. § 552b. The Government's waiver applies only to the portions of the OLC-DOD Memorandum that explain legal reasoning. These are Parts II, III, IV, V, and VI of the document, and only these portions will be disclosed. Even within those portions of the document, there are matters that the Government contends should remain secret for reasons set forth in the Government's classified ex parte submission, which we have reviewed in camera.

One of those reasons concerns reF2tfEm the Government

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 the job done." JA 799. On October 25, 2011, President Obama, appearing on a network television program, said, referring to al-Awlaki, "[I]t was important that, working with the [Yemenis,][18] we were able to remove him from the field." Transcript of "The Tonight Show with Jay Leno (Oct. 25, 2011). JA 556. On the day al-Awlaki was killed, September 3, 2011, DOD's Armed Forces Press Service reported, "A U.S. airstrike 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." JA 651. The report continued, "Obama and Panetta congratulated the Yemenis on their intelligence and operational assistance in targeting [al-] Awlaki." Id. It is no secret that al-Awlaki was killed in Yemen. However, the OLC-DOD Memorandum contains some references to the Yemeni government that are entitled to secrecy and will be

[18] The Tonight Show transcript erroneously rendered this word "enemies," an error the Government acknowledged at oral argument.

redacted.

The other fact within the legal reasoning portion of the OLC-DOD Memorandum that the Government contends merits secrecy is the identity of the agency, in addition to DOD, that had an operational role in the drone strike that killed al-Awlaki. Both facts were deleted from the April 21 public opinion, but have been restored in this opinion. Apparently not disputing that this fact has been common knowledge for some time, the Government asserts the importance of concealing any official recognition of the agency's identity. The argument comes too late.

A March 18, 2010, Wall Street Journal article quotes Panetta, then CIA Director:

> "Anytime we get a high value target that is in the top leadership of al Qaeda, it seriously disrupts their operations," Mr. Panetta said. "It sent two important signals," Mr. Panetta said. "No. 1 that we are not going to hesitate to go after them wherever they try to hide, and No. 2 that we are continuing to target their leadership."

"Drone Kills Suspect in CIA Suicide Bombing," The Wall Street Journal (Mar. 18, 2010). Although the reference to "we" is not unequivocally to CIA and might arguably be taken as a reference to the Government generally, any doubt on this score was eliminated three months later.

In a June 27, 2010, interview with Jake Tapper of ABC News, Panetta said:

> [W]e 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 dis

television program "60 Minutes":

Asked, "You killed al-Awlaki?" Panetta "nodded affirmatively," as described by the District Court, see Dist. Ct. Op., 915 F. Supp. 2d at 530. Then, when asked about identifying for killing a person who has been identified as an enemy combatant, Panetta says, "It's a recommendation we make, it's a recommendation the CIA director makes in my prior role . . . the President of the United States has to sign off." Web Extra presentation, available at http://www.cbsnews.com/video/watch/?id=7396830n, at 0:01, 2:30. CIA's former director has publicly acknowledged CIA's role in the killing of al-Awlaki.

On February 7, 2014, Rep. Mike Rogers, chairman of the House Select Committee on Intelligence, disclosed that his committee has overseen the CIA's targeted-killing strikes since "even before they conducted that first air strike that took Awlaki." Transcript, *Face the Nation*, CBS News (Feb. 10, 2013), http://cbsn.ws/ZgB9R.

On February 11, 2014, the following exchange occurred between Senator Bill Nelson and James R. Clapper, Director of National Intelligence, at a hearing of the Senate Armed Services Committee:

The District Court noted the Government's contention that "'[i]t is entirely logical and plausible that the legal opinion contains information pertaining to military plans, intelligence activities, sources and methods, and foreign relations.' (Gov't Memo. in Opp'n/Reply 6)." Dist. Ct. Op., 915 F. Supp. 2d at 540. But the Court then astutely observed, "[T]hat begs the question. In fact, legal analysis is not an 'intelligence source or method.'" Id.

We recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation, but that is not the situation here where drone strikes and targeted killings have been publicly acknowledged at the highest levels of the Government. We also recognize that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts. Aware of that possibility, we have redacted, as explained above, the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities. The only other

DOD
Facts mentioned in the pure legal analysis portions of the OLC-DOD Memorandum – the identification of

With the redactions and public disclosures discussed above, it is no longer either "logical" or "plausible" to maintain that disclosure of the legal analysis in the OLC-DOD Memorandum risks disclosing any aspect of "military plans, intelligence activities, sources and methods, and foreign relations." The release of the DOJ White Paper, discussing why the targeted killing of al-Awlaki would not violate several statutes, makes this clear. The additional discussion of 18 U.S.C. § 956(a) in the OLC-DOD Memorandum adds nothing to the risk. Whatever

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of the books was an official and documented disclosure. The second reason was supported by a citation to Lamont v. Dep't of Justice, 475 F. Supp. 761, 772 (S.D.N.Y. 1979), with a parenthetical stating that the withheld information must have "already been specifically revealed to the public" (emphasis in Afshar). Lamont did not assert specific revelation as a requirement for disclosure; it observed that the plaintiff had raised a factual issue as to whether the information sought had been specifically revealed. More important, Afshar, the ultimate source of the three-part test, does not mention a requirement that the information sought "match[es] the information previously disclosed."

Wilson also cited Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414 (2d Cir. 1989). Clearwater also cited Fitzgibbon and Afshar and drew from those opinions more rigidity than was warranted. The issue in Clearwater was simply whether the Navy had previously disclosed, as the plaintiff claimed, that it was planning to deploy nuclear weapons at the New York Harbor Homeport. The Court rejected the claim, pointing out that the Navy had said only that the ships to be stationed at the Homeport were capable of carrying nuclear weapons. See id. at 421.

protection the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper.

IV. Legal Analysis in Other Withheld Documents[21]

In addition to seeking at least the legal analysis in the OLC-DOD Memorandum, ACLU also seeks disclosure of

The other OLC legal memoranda have not been submi

number of responsive documents and a description of their contents if those facts are protected from disclosure by a FOIA exemption. See Wilner, 592 F.3d at 67-69; Hayden v. National Security Agency, 608 F.2d 1381, 1384 (D.C. Cir. 1979). However, we agree with the D.C. Circuit that "[s]uch a response would only be justified in unusual circumstances, and only by a particularly persuasive affidavit." ACLU, 710 F.3d at 433.

The Government's core argument to justify the Glomar and no number, no list responses, as it was with the effort to withhold the OLC-DOD Memorandum, is that identification of any document that provides legal advice to one or more agencies on the legality of targeted killings "would tend to disclose the identity of the agency or agencies that use targeted lethal force against certain terrorists who are U.S. citizens . . . ." Br. for Appellees at 37. If one of those agencies is CIA, the Government's argument continues, disclosure of any information

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Glomar to NYTimes; no number, no list to ACLU as to classified documents, except OLC-DOD Memorandum	no number, no list to Shane, Glomar to Savage, except OLC-DOD Memorandum; noept	OLC-

Shane, Glomar to

in a Vaughn index that "would tend to disclose the identity" of that agency must be protected because, the Government claims, "[T]he government has never disclosed (with the exception of the Bin Laden operation) whether the CIA has an operational role in the use of targeted lethal force or is authorized to use such force." Id. at 38.

As was true of waiver of privileges that might originally have protected the legal reasoning in the OLC-DOD Memorandum, the statements of Panetta when he was Director of CIA and later Secretary of Defense, set forth above, have already publicly identified CIA as an agency that had an operational role in targeted drone killings.[23] With CIA identified, the Appellees' main argument for the use of Glomar and no number, no list responses evaporates. The Vaughn index submitted by OLC in camera must be disclosed, and DOD and CIA must submit classified Vaughn indices to the District Court on remand for in camera inspection and determination of appropriate disclosure and appropriate redaction.

As was also true of the OLC-DOD Memorandum, however, the requirement of disclosing the agencies' Vaughn indices does not

[23] For purposes of the issues on this appeal, it makes no difference whether the drones were maneuvered by CIA or DOD personnel so long as CIA has been disclosed as having some operational role in the drone strikes.

necessarily mean that either the number or the listing of all documents on those indices must be disclosed. The Appellees argue persuasively that with respect to docume

103-04, 244-49; 10-49, 51-56, 84-86, 94, 101, 106-09, 111-12, 114-15, 251, 252-54, 255-61, 266-67, 268; and all listings after listing number 271.

Unlike OLC, DOD and CIA did not provide this Court with classified Vaughn indices, and we are unable to distinguish among listed document numbers, which titles or descriptions merit secrecy. We will therefore direct that, upon remand, DOD and CIA will provide the District Court with classified Vaughn indices listing documents responsive to the Plaintiffs' requests. From these indices, the District Court, with the guidance provided by this opinion, should have little difficulty, after examining whatever further affidavits DOD and CIA care to submit to claim protection of specific listings, to determine which listings on these indices may be disclosed. See ACLU, 710 F.3d at 432 (prescribing a similar procedure after rejecting a Glomar response).

VI. Adequacy of OIP's Search

Finally, ACLU argues that OIP did not make an adequate search because it did not disclose thirty e-mail chains with other DOJ [illegible] se it did not dequa

it does not identify all responsive records. See Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999). The adequacy of a search is not measured by its results, but

the number, title, and description of all documents, with the exception of listing numbers 1-4, 6, 10-49, 51-56, 69, 72, 80-82, 84-87, 92, 94, 101, 103-04, 106-09, 111-12, 114-15, 244-49, 251, 252-54, 255-61, 266-67, 268; and all listings after listing number

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271;

(3) other legal other

[illegible] other

OLC-DOD Memorandum after appropriate redactions and deletion of classification codes (redactions in the OLC-DOD Memorandum are indicated by white spaces)